

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck, Commissioner

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SC Court of Appeals

W.C.C. File No. 1112328
Appellate Case No. 2019-001357

Samuel Rose, Claimant.....Respondent,

v.

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

RECORD ON APPEAL
VOLUME 1 OF 2

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DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO: 1112328

SAMUEL ROSE, EMPLOYEE/CLAIMANT

vs.

JJS TRUCKING, LLC, AND CHRIS THOMPSON SERVICES, LLC, EMPLOYERS,

and

**BRIDGEFIELD CASUALTY INSURANCE COMPANY AND TRAVELERS
INSURANCE COMPANY, CARRIERS,**

and

SOUTH CAROLINA UNINSURED EMPLOYERS FUND/ DEFENDANT.

Hearing: Held in Summerville, South Carolina on May 15, 2012

Appearances: Employee/Claimant represented by Joseph B. Fisher, George Sink
Law Firm, N. Charleston, South Carolina

Employer, Chris Thompson Services and Bridgefield Casualty
Company represented by Kirsten L. Barr, Trask & Howell, LLC,
Mt. Pleasant, South Carolina

Employer, JJS Trucking, LLC appeared pro se.

Carrier, Travelers Insurance Company represented by F. Reid
Warder, Jr., Esquire, Wood & Warder, LLC, Charleston, SC

South Carolina Uninsured Employers' Fund, Defendant was
represented by Amy V. Cofield, Cofield Law Firm, Lexington,
South Carolina

Purpose of Hearing: To determine issues as set forth on Form 50 and Form 51

Decision and Order: By Commissioner Gene McCaskill

Date: August 23, 2012

STIPULATIONS

The parties stipulated to the following matters at the hearing:

1. The purpose of the hearing was to determine issues pursuant to Form 50 and 51.
2. Notice of the hearing was timely and properly served upon all parties of interest.
3. The Claimant's average weekly wage is \$650.00 and compensation rate is \$433.34 respectively.
4. Venue, set in Dorchester County, is proper.
5. The Employee/Claimant was injured while working for Chris Thompson Services, LLC and workers' compensation was filed, therefore, the South Carolina Workers' Compensation Commission has jurisdiction of the case.

APA SUBMISSIONS:

ON BEHALF OF THE EMPLOYER:

<u>EXHIBIT NO.</u>	<u>NAME OF REPORT/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORTS</u>	<u>NO. OF PAGES</u>
1	SLED Report	04/30/12-04/26/12	1-9
2	Petition to Transfer Liability	04/30/12-01/24/12	10-14
3	SCWCC Form 18	04/10/12	15
4	Deposition of Samuel Rose	11/14/11	16-26
5	Deposition of Sedrick Smalls	11/14/11	27-38
6	JJS Trucking Certificate of Insurance	10/08/11-10/08/10	39

ON BEHALF OF THE CLAIMANT

<u>EXHIBIT NO.</u>	<u>NAME OF REPORT/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORTS</u>	<u>NO. OF PAGES</u>
1	Stuart M. Leon, MD MUSC Medical Center	08/10/11	1-2
2	Andrew B. Conrad, MD MUSC Medical Center	08/10/11	3-5
3	Christopher J. Erikson, MD		

4	MUSC Medical Center Peter H. White, MD MUSC Medical Center	08/10/11 08/11/11	6-7 8-9
5	Alan N. Abel, MD	08/16/11-01/25/12	10-22
6	Michael S. Rissing, MD MUSC Medical Center	08/23/11	23-24
7	Cameron Wills, DC Tri-County Spinal Care	09/02/11	25-26
8	Richard Kellett, MD Tri-County Spinal Care	09/06/11-10/11/11	27-40
9	Troy Marlow, MD TriCounty Radiology Associates	11/09/11	41-42
10	Michael Wildstein, MD Wildstein Spine Center, PA	11/23/11	43-44
11	Donald E. Olofsson, DO TriCounty Radiology Associates	11/30/11	45-46
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ON BEHALF OF TRAVELERS INDEMNITY COMPANY

<u>EXHIBIT NO.</u>	<u>NAME OF REPORT/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORTS</u>	<u>NO. OF PAGES</u>
1	Correspondence from Garry Smith, Compliance Division, to F. Reid Warder, Jr.	03/30/12	14
2	Premium Finance Agreement for JJS Trucking, LLC	10/13/10	1
3	Travelers Invoice to JJS Trucking, LLC	11/08/10	2
4	Notice of Cancellation	01/04/11	2
5	SC Department of Employment And Workforce	02/21/12	15

ON BEHALF OF SC UNINSURED EMPLOYERS' FUND

<u>EXHIBIT NO.</u>	<u>NAME OF REPORT/PHYSICIAN OR OTHER EVIDENCE</u>	<u>DATE OF REPORTS</u>	<u>NO. OF PAGES</u>
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NONE

STATEMENT OF THE CASE

This claim is before the South Carolina Workers' Compensation Commission pursuant to a Form 50 filed by the Claimant on November 18, 2011, and Form 51 filed by Defendant, Chris Thompson Services on December 15, 2011, and Form 51 filed by Defendant, SC Uninsured Employers' Fund on January 4, 2012. The Claimant alleged that on August 10, 2011 he sustained an alleged injury to his right knee, back, neck and head. Defendants denied the claim.

It was the Claimant's position that he was injured on August 10, 2011 while employed by JJS Trucking. Claimant asserted that JJS Trucking was a subcontractor to Chris Thompson Services. JJS Trucking is uninsured and Chris Thompson is insured by Bridgefield Casualty Insurance Company. The Claimant seeks a finding of compensability that includes medical treatment, payment of temporary total benefits less any amounts paid by the carrier of Chris Thompson Services.

It was the position of Chris Thompson Services that the Claimant sustained an admitted injury by accident as alleged on August 10, 2011. However, the severity of permanency of injuries and need for future treatment was specifically denied. Chris Thompson Services also made a Motion to Transfer Liability to the South Carolina Uninsured Employers' Fund pursuant to §42-1-415 because Mr. Cedric Smalls, a principal of JJS Trucking, had represented to Chris Thompson Services that it had workers' compensation coverage. Chris Thompson Services had obtained an ACORD Form 25 Certificate of Insurance indicating coverage. Chris Thompson Services also stated to the Commissioner that it had, through its insurance carrier, Bridgefield, paid temporary total disability payments since the date of the accident in the amount of \$75.00 per week and requested that the South Carolina Uninsured Employers' Fund reimburse Bridgefield for those benefits paid. Chris Thompson Services argued that JJS Trucking never provided notice that his coverage had changed or lapsed. Chris Thompson Services argued that a

certificate of insurance presented distinguished this case from the Hopper case, (Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (2009).)

Because the case at had a description of the policy terms. The distinction was also offered that the Hopper case dealt with an out of state employer or multi-state employers and regulations and that this case did not.

It was further argued that the signature of David Hayes as the authorized agent for the insurance company satisfactory the face of the certificate of insurance rose no red flags regarding the authority of the signature. It was also argued that a copy of the certificate of insurance was filed with the South Carolina Workers' Compensation Commission on November 4, 2011, which was believed to be a timely filing.

The SC Uninsured Employers' Fund argued that liability could not be transferred to the UEF. It was argued that the certificate of insurance presented was sufficient pursuant to the law set forth in the Barton v. Higgs case (Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145 (2009)) as well as the Hopper v. Terry Hunt Construction case. The SC Uninsured Employers' Fund argued that the description of operations box was blank and that the cases of Barton and Hopper stood for the proposition that incomplete certificates were not sufficient to transfer liability. It was also argued that the certificate of insurance only stated it was a "binder" and never conveyed any information that there was ever a policy written.

The Uninsured Employers' Fund argued that the timing of the presentation of the certificate was contrary to §42-1-415. That statute provides that documentation must be turned over to the Commission "at the time a claim is filed". This certificate was not turned over for several months. The UEF argued that §42-1-415(A) stated that the upstream contractor must first pay all benefits due before requesting liability to be transferred and at the time of the

hearing. However, only a few benefits had been paid, certainly not all. Therefore, the UEF argued that the case was premature as far as the motion to transfer liability.

EVIDENCE OF THE CASE

The Claimant testified that he was working on August 10, 2011 for JJS Trucking in Summerville, SC at the Keystone Lumber Mill. He stated that JJS Trucking was owned by Cedric Smalls and that he had been working there for about 4 ½ to 5 months prior to his accident. Claimant testified that during his time at JJS Trucking, his job was to haul loads from Summerville, SC to North Charleston, SC, specifically from Keystone Lumber Mill to Westvaco. He explained that he was injured when he was rear-ended by a truck that was following him causing his truck to jackknife and hit the median wall. Following the accident, Claimant testified that he suffered a fractured knee, low back and neck injury as well as dizziness and problems with his left hand. He testified that following the accident, he went to MUSC where he was to receive further treatment from a neurologist and orthopedist but never got those because of having no insurance. Instead he went to a general practitioner by the name of Dr. Abel and from there, he was referred to Tri County Spinal Care for pain management and then to Dr. Wildstein, an orthopaedic surgeon.

Claimant testified that he has been unable to work since August 10, 2011, because of the nerve damage he sustained in his neck and back. He further testified that he still has headaches, numbness in his left arm and fingers and his back. He is currently on several medications such as Flexeril, Neurontin, Elavil and Viracept as well as Ibuprofen. He testified that it is his understanding that he needs to see a neurologist and needs to have surgery.

On cross-examination, the Claimant stated that he had to reschedule his last hearing because he had been incarcerated, accused of stealing a 32" television, some barstools and a laptop. Claimant stated, "the police said a witness observed me running across the parking lot

running from an apartment across the street to my mom's car and putting it in the car". Claimant testified that he was using a cane recommended by Dr. Avery because he had fallen down the stairs once. He said he had fallen down the stairs in January when at his mother's house but after that fall, his pain became worse.

On cross-examination by Mr. Smalls, the Claimant testified that he was hired by JJS Trucking as a contractor. He testified that he worked his own schedule but that Cedric Smalls told him to work 12 hours from the time he started. On further cross-examination by Mrs. Cofield, the Claimant clarified that he was a sub-contractor for Chris Thompson Services, but was an employee of JJS. He also stated that when he was arrested last month, he was not using his cane, but he was on Oxycodone and other medications.

On cross-examination by Mrs. Barr, it was stated that it was his responsibility to keep his truck clean and would be responsible for any fines due to his own negligence. He also stated that he is responsible for any state and federal taxes and any workers' compensation insurance.

Christopher Thompson testified that his business was Chris Thompson Services, LLC, and in August of 2011 JJS Trucking was a subcontractor for Chris Thompson Services. He indicated he had been using JJS Trucking since approximately 2008. He explained that when he first hired JJS Trucking he was given a certificate of insurance showing that they had workers' compensation coverage. He said that he requested updated documentation once a year.

Mr. Thompson was shown a certificate of insurance that he identified to be dated October 18, 2011, and issued by Swamp Fox Agency. He stated that he was familiar with Swamp Fox Agency and knew David Hayes who signed the certificate of insurance as being the owner of Swamp Fox Insurance Agency. He stated that his view of the certificate of insurance gave him no reason to question whether or not JJS Trucking had insurance. He conveyed that it was not

until about September or beginning of October before he was positively told that he did not have insurance. After that information was received, he severed his relationship with JJS Trucking.

On cross-examination by Mrs. Cofield, Mr. Thompson acknowledged that there was no description in the Description of Operations box on the certificate of insurance. Mr. Thompson also acknowledged that it did not have a policy number, but in fact, stated that it was a "binder". Mr. Thompson testified that he did not believe that Mr. Smalls purposely defrauded him or purposely gave a false certificate of insurance.

FINDINGS OF FACT

1. Samuel Rose was an employee of JJS Trucking on August 10, 2011.
2. On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg back and neck arising out of and in the course of his employment with JJS Trucking.
3. Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.
4. Claimant is not at maximum medical improvement.
5. As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.
6. As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier.
7. On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.
8. On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.

9. On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC, is an "upstream employer" pursuant to §42-1-415.

10. Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.

CONCLUSIONS OF LAW

1. On August 10, 2011 Samuel Rose was an "employee" of JJS Trucking as defined in S.C. Code Ann. § 42-1-130 (1976).

2. At the time of the Claimant's accident, JJS Trucking possessed over the Claimant the actual right and authority to control and direct his particular work or undertaking and the manner or means of its accomplishment, consistent with the definition of an employee provided in Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

3. The testimony of the Claimant, his immediate employer, Cedric Smalls, and the upstream contractor, Chris Thompson, combined with the evidence available in the record, when evaluated using the factors outlined in Nelson v. Yellow Cab Co., 564 SE 2d 110 (S.C. 2002), weigh towards finding Claimant is an employee and not an independent contractor. This finding is consistent with South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. See South Carolina Workers' Compensation Comm'r v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).

4. Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 pursuant to § 42-9-10 until such time as he is able to return to work.

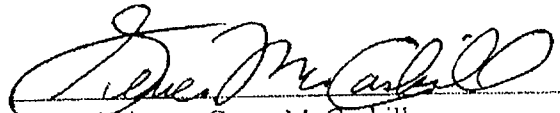
5. Claimant is entitled to medical treatment causally related to his injury pursuant to §42-15-60. Claimant is entitled to reimbursement for all out of pocket medical expenses incurred to date. Carrier shall select an authorized treating physician.
6. Claimant was an employee of JJS Trucking which, at the time of his accident, was an uninsured subcontractor. Pursuant to § 42-1-415(A) Chris Thompson Services, LLC, as the higher tier contractor, shall pay all benefits due the Claimant under the Workers' Compensation Act.
7. Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1-415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.
8. Chris Thompson Services, LLC is entitled to credit for any compensation paid to the Claimant prior to the date of this Order.
9. Traveler's Indemnity was not the carrier for JJS Trucking, LLC on the date of Claimant's injury and therefore is dismissed as a party to this claim.

ORDER

IT IS THEREFORE ORDERED that the statutory employer, Chris Thompson Services, LLC, through its carrier, Bridgefield Casualty Insurance Company, is liable for this claim and shall pay Claimant's medical treatment and temporary total disability benefits beginning August 10, 2011 and continuing through such time Claimant is able to return to work.

All other issues are held in abeyance.

Any party wishing to appeal this Decision and Order may, within fourteen (14) days of the date this Decision and Order is received, file an application for review by the Full Commission, along with the appropriate filing fee.


Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
August 23, 2012

By: Kellie Lindler, Administrative Assistant to Commissioner McCaskill

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSIONS'
APPELLATE PANEL**

SAMUEL A. ROSE,
Claimant/Respondent,

v.

JJS TRUCKING, LLC
Uninsured Employer/Respondent,
and
CHRIS THOMPSON SERVICES, LLC,
Upstream Contractor, and
BRIDGEFIELD CASUALTY INS. CO.,
Carrier, Appellants,
and
S.C. UNINSURED EMPLOYERS' FUND,
Respondent.

W.C.C. FILE NO. 1112328

DECISION & ORDER

Statement of the Case

This matter is before the Commission's Appellate Panel pursuant to the Form 30 filed by Chris Thompson Services and Bridgefield Casualty, seeking review and reversal of the August 23, 2012 Decision and Order of Hearing Commissioner McCaskill. The Appellants respectfully contend that Commissioner McCaskill erred as a matter of law in failing to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415, erred as a matter of law in ordering the Appellants to reimburse "all out of pocket medical expenses," and erred as a matter of law in awarding the Claimant future medical treatment pursuant to S.C. Code Ann. § 42-1-415.

The Hearing Commissioner's Decision and Order contained the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *Samuel Rose was an employee of JJS Trucking on August 10, 2011.*
2. *On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg back and neck arising out of and in the course of his employment with JJS Trucking.*
3. *Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.*
4. *Claimant is not at maximum medical improvement.*
5. *As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.*
6. *As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier.*
7. *On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.*
8. *On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.*
9. *On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC, is an "upstream employer" pursuant to §42-1415.*
10. *Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.*

CONCLUSIONS OF LAW

1. *On August 10, 2011 Samuel Rose was an "employee" of JJS Trucking as defined in S.C. Code Ann. § 42-1-130 (1976).*
2. *At the time of the Claimant's accident, JJS Trucking possessed over the Claimant the actual right and authority to control and direct his particular work or undertaking and the manner or means of its accomplishment, consistent with the definition of an employee provided in Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).*
3. *The testimony of the Claimant, his immediate employer, Cedric Smalls, and the upstream contractor, Chris Thompson, combined with the evidence available in the record, when evaluated using the factors outlined in Nelson v. Yellow Cab Co., 564 SE 2d 110 (S.C. 2002), weigh towards finding Claimant is an employee and not an independent contractor. This finding is consistent with South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. See South Carolina Workers' Compensation Comm'r v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).*
4. *Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 pursuant to § 42-9-10 until such time as he is able to return to work.*
5. *Claimant is entitled to medical treatment causally related to his injury pursuant to §42-15-60. Claimant is entitled to reimbursement for all out of pocket medical expenses incurred to date. Carrier shall select an authorized treating physician.*
6. *Claimant was an employee of JJS Trucking which, at the time of his accident, was an uninsured subcontractor. Pursuant to § 42-1-415(A) Chris*

Thompson Services, LLC, as the higher tier contractor, shall pay all benefits due the Claimant under the Workers' Compensation Act.

5. *Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.*
6. *Chris Thompson Services, LLC is entitled to credit for any compensation paid to the Claimant prior to the date of this Order.*
7. *Traveler's Indemnity was not the carrier for JJS Trucking, LLC on the date of Claimant's injury and therefore is dismissed as a party to this claim.*

Furthermore, the Form 30 filed by the Appellants alleges the followings errors and exceptions:

1. *The Hearing Commissioner erred in finding that Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act, as this "finding" is arbitrary, capricious, impermissibly vague, and contrary to the greater weight of the evidence and the applicable law.*

2. *The Hearing Commissioner erred in finding that the Claimant sustained an injury to his head, knee, leg, back, and neck, as this finding is arbitrary, capricious, impermissibly vague, and otherwise contrary to the greater weight of the evidence and the applicable law.*
3. *The Hearing Commissioner erred in "finding" that the Claimant is entitled to temporary total disability benefits from August 10, 2011 and continuing until, as this finding is arbitrary, capricious, impermissibly vague, and otherwise contrary to the greater weight of the evidence and the applicable law.*
4. *The Hearing Commissioner erred in "finding" that the Claimant is entitled to an evaluation to determine the extent of his injuries, as this finding is arbitrary, capricious, impermissibly vague, and otherwise contrary to the greater weight of the evidence and the applicable law.*
5. *The Hearing Commissioner erred in "finding" that the Claimant is entitled to ongoing medical treatment, as this finding is arbitrary, capricious, impermissibly vague, and otherwise contrary to the greater weight of the evidence and the applicable law.*
6. *The Hearing Commissioner erred as a matter of law in concluding that the Claimant is entitled to reimbursement for all out of pocket medical expenses incurred to date, as this conclusion is arbitrary, capricious, and otherwise contrary to the greater weight of the evidence and the applicable law.*

7. *The Hearing Commissioner erred as a matter of law in concluding that the Claimant has not received all benefits due under the Act, as this "conclusion" is arbitrary, capricious, and otherwise contrary to the greater weight of the evidence in the record and the applicable law.*
8. *The Hearing Commissioner erred as a matter of law in concluding that the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time, as this conclusion is arbitrary, capricious, and otherwise contrary to the greater weight of the evidence in the record and the applicable law.*

Evidence Summary

The Claimant testified that he was employed as a driver for JJS Trucking on August 10, 2011 when he was injured in a motor vehicle accident. Since the accident, the Claimant has received medical treatment from MUSC, Dr. Abel, and Dr. Wildstein for alleged injuries to his back, knee, and left hand. Although the Claimant testified that he has been unable to work since the accident, the originally hearing in this case had to be rescheduled due to the Claimant's incarceration. According to the Claimant, he was accused of stealing a 32" television, some barstools, and a computer. The Claimant testified that, "the police said a witness observed me running across the parking lot running from an apartment across the street to my mom's car and putting it in the car." In addition, the Claimant testified that he fell down the stairs in January 2012 at his mother's house, which increased his pain and resulted in him using a cane.

Chris Thompson testified that JJS Trucking was operating as a subcontractor Chris Thompson Services, LLC, at the time in question. Mr. Thompson testified that he obtained a

Certificate of Insurance from JJS Trucking at the time his relationship with the company began in 2008 and that he has requested and obtained updated Certificates of Insurance from JJS Trucking on a yearly basis since that time. Mr. Thompson identified the October 18, 2010 Certificate of Insurance contained in the Record (Appellants' APA #6, p.39). This Certificate shows that JJS Trucking had workers' compensation coverage through Travelers Insurance for the period from October 8, 2010 through October 8, 2011. This Certificate shows Chris Thompson Services as the Certificate Holder and is signed by David W. Hayes, whom Mr. Thompson identified as the owner of the Producer, the Swamp Fox Agency. Mr. Thompson testified that after receiving this Certificate of Insurance, he had no reason to believe that JJS Trucking did not have workers' compensation insurance until after the Claimant's accident.

The record reveals that Travelers Insurance did, in fact, insure JJS Trucking for a period after the Certificate of Insurance was issued, but the policy lapsed without notice to Chris Thompson Services by any person or entity. Cedric Smalls, the owner of JJS Trucking, confirmed that he did not ever inform Chris Thompson Services that his workers' compensation insurance had lapsed and further testified that Chris Thompson would not allow him to work as a subcontractor if his workers' compensation insurance ever lapsed.

At the time of the hearing, the Claimant was receiving weekly temporary total disability compensation from the Chris Thompson's carrier, as reflected on the Form 18.

Conclusion

After reviewing the record and considering the briefs and oral arguments, we AFFIRM with AMEND in part, as follows:

FINDINGS OF FACT

1. Samuel Rose was an employee of JJS Trucking on August 10, 2011.

2. On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg
back and neck arising out of and in the course of his employment with JJS Trucking.
3. Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.
4. Claimant is not at maximum medical improvement.
5. As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.
6. As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier.
7. On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.
8. On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.
9. On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC, is an "upstream employer" pursuant to §42-1415.
9. Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.

CONCLUSIONS OF LAW

1. On August 10, 2011 Samuel Rose was an "employee" of JJS Trucking as defined in S.C. Code Ann. § 42-1-130 (1976).
2. At the time of the Claimant's accident, JJS Trucking possessed over the Claimant the actual right and authority to control and direct his particular work or undertaking and the manner or means of its accomplishment, consistent with the definition of an employee provided in Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).
3. The testimony of the Claimant, his immediate employer, Cedric Smalls, and the upstream contractor, Chris Thompson, combined with the evidence available in the record, when evaluated using the factors outlined in Nelson v. Yellow Cab Co., 564 SE 2d 110 (S.C. 2002), weigh towards finding Claimant is an employee and not an independent contractor. This finding is consistent with South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. See South Carolina Workers' Compensation Comm'r v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).
4. Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 pursuant to § 42-9-10 until such time as he is able to return to work.
5. Claimant is entitled to medical treatment causally related to his injury pursuant to §42-15-60. Claimant's past causally-related medical treatment should be paid directly to the providers pursuant to the Fee Schedule. Carrier shall select an authorized treating physician for any future medical treatment.

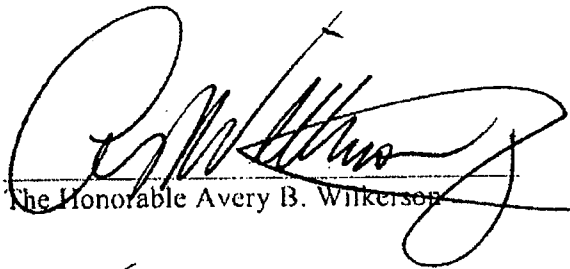
5. Claimant was an employee of JJS Trucking which, at the time of his accident, was an uninsured subcontractor. Pursuant to § 42-1-415(A) Chris Thompson Services, LLC, as the higher tier contractor, shall pay all benefits due the Claimant under the Workers' Compensation Act.
6. Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.
7. Chris Thompson Services, LLC is entitled to credit for any compensation paid to the Claimant prior to the date of this Order.
8. Traveler's Indemnity was not the carrier for JJS Trucking, LLC on the date of Claimant's injury and therefore is dismissed as a party to this claim.

ORDER

IT IS THEREFORE ORDERED that the statutory employer, Chris Thompson Services, LLC, through its carrier, Bridgefield Casualty Insurance Company, is liable for this claim and shall pay Claimant's medical treatment and temporary total disability benefits beginning August 10, 2011 and continuing through such time Claimant is able to return to work.

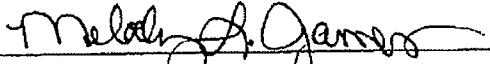
All other issues are held in abeyance.

IT IS SO ORDERED!


The Honorable Avery B. Wilkerson

WE CONCUR:


The Honorable T. Scott Beck


The Honorable Melody James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 15 day of May, 2013
By Valerie D. Deller

Administrative Assistant to the Commissioner

Amy V. Cofield
Kirsten L. Barr
Joseph B. Fisher
Chris Thompson Services (Reg & cert)
JTS Trucking LLC (Reg & cert)

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. 1112328

Samuel A. Rose,)
Employee/Claimant,)
VS.)
JJS Trucking, LLC, Employer, and)
The South Carolina Uninsured Employer's Fund,)
AND)
Chris Thompson Services, LLC, Statutory)
Employer, and Bridgefield Casualty Insurance Co.,)
Carrier/Defendants.)

ADMINISTRATIVE ORDER

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

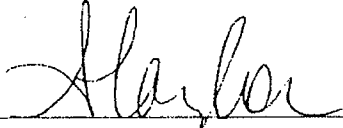
X Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company's Motion to Introduce Newly Discovered Evidence filed November 12, 2013

The following dispositions have been made:

Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company's Motion to Introduce Newly Discovered Evidence is hereby granted. Claimant's third-party claim (by way of Answer and Counterclaim) filed in the Charleston County Court of Common Pleas on February 20, 2013 is hereby admitted into evidence in the above-referenced workers' compensation claim.

Columbia, SC

January 3, 2014



Commissioner Aisha Taylor

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).
January 3, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. 1112328

Samuel A. Rose,)
Employee/Claimant,)
VS.)
JJS Trucking, LLC, Employer, and)
The South Carolina Uninsured Employer's Fund,)
AND)
Chris Thompson Services, LLC, Statutory)
Employer, and Bridgefield Casualty Insurance Co.,)
Carrier/Defendants.)

ADMINISTRATIVE ORDER

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

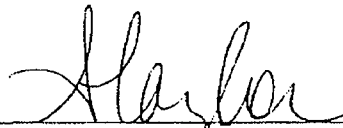
X Claimant's Motion in Opposition to Introduce After Discovered Evidence filed on November 21, 2013

The following dispositions have been made:

Claimant's Motion in Opposition to Introduce After Discovered Evidence is denied.

Columbia, SC

January 3, 2014



Commissioner Aisha Taylor

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).
January 3, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. 1112328

Samuel A. Rose,)
Employee/Claimant,)
VS.)
JJS Trucking, LLC, Employer, and)
The South Carolina Uninsured Employer's Fund,)
AND)
Chris Thompson Services, LLC, Statutory)
Employer, and Bridgefield Casualty Insurance Co.,)
Carrier/Defendants.)
_____)

ADMINISTRATIVE ORDER

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

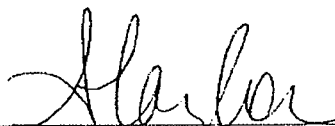
X Claimant's Motion to Introduce After Discovered Evidence filed on December 20, 2013

The following dispositions have been made:

Claimant's Motion to Introduce After Discovered Evidence is denied. The evidence sought to be introduced (the Voluntary Dismissal) does not fit the meaning of "newly discovered evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013.

Columbia, SC

January 3, 2014



Commissioner Aisha Taylor

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).
January 3, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Samuel A. Rose v JJS Trucking, LLC and Chris Thompson Services, LLC

SCWCC: 1112328

Commissioner: Taylor

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 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.


T. Scott Beck, Chair

Columbia, South Carolina

1/21/2014

CONCURRING:

NOT PARTICIPATING:

DISSENTING:

Commissioner Susan S. Barden

Commissioner Melody James

Commissioner Aisha Taylor

Commissioner Avery Wilkerson

Commissioner Andrea C. Roche

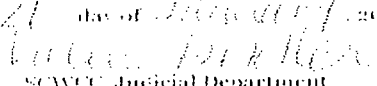
Commissioner Gene McCaskill

X

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 21 day of January, 2014.

By: 
SCWCC Judicial Department

**DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1112328**

Samuel Rose,
Employee/Claimant,

-vs-

JJS Trucking, LLC, and Chris Thompson
Services, LLC,
Employers, and
Bridgefield Casualty Insurance Company
and Travelers Insurance Company,
Carriers, and
South Carolina Uninsured Employers Fund,
Defendants.

HEARING:

Held on September 23, 2013, in St.
Matthews, South Carolina, per notices
timely and properly served upon all parties
of interest.

APPEARANCES:

Benjamin W. Akery, Esq., The Steinberg
Law Firm, L.L.P., appearing on behalf of the
Claimant

Kirsten L. Barr, Trask & Howell, L.L.C.,
appearing on behalf of Chris Thompson
Services, LLC, and Bridgefield Casualty
Insurance Company

Amy V. Cofield, Esq., The Cofield Law
Firm, appearing on behalf of the South
Carolina Uninsured Employers' Fund

John Eric Kaufmann, Esq., appearing on
behalf of J.J.S. Trucking, LLC

PURPOSE OF HEARING:

To determine issues pursuant to Form 21

DECISION & ORDER:

By Aisha Taylor, Commissioner

FILED:

September 2, 2014

EVIDENCE SUBMITTED

In addition to the Commission's file, which is part of the record of the case, the following items were timely and properly submitted into evidence by the Defendants pursuant to the Administrative Procedures Act:

DEFENDANT'S APA SUBMISSIONS

APA # DESCRIPTION DATES PAGES

1	Gregory M. Jones, M.D. Charleston Spine & Physical Medicine	3/20/13 – 4/16/13	1-4
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EXHIBITS # DESCRIPTION DATES PAGES

2	JJS Trucking Certificate of Insurance	10/2/10 – 10/2/11	5
3	Deposition of Sedrick Smalls	11/14/11	6-17
4	Deposition of Samuel Rose	11/14/11	18-28
5	Petition to Transfer Liability	1/24/12 - 4/30/12	29-33
6	SCWCC Form 18	4/10/12	34
7	SLED	4/30/12	35-42

The following items were timely and properly submitted into evidence by the Claimant pursuant to the Administrative Procedures Act:

CLAIMANT'S APA SUBMISSIONS

APA #	DESCRIPTION	DATES	PAGES
8	Stuart M. Leon, M.D.	8/10/11	43 - 44
9	Andrew B. Conrad, M.D.	8/10/11	45 - 47
10	Christopher J. Erikson, M.D.	8/10/11	48 - 49
11	Peter H. White, M.D.	8/11/11	50 - 51
12	Alan N. Abel, M.D.	8/16/11 - 6/6/13	52 - 72
13	Michael S. Rissing, M.D.	8/23/11	73 - 74
14	Cameron Wills, D.C.	9/2/11	75 - 76
15	Richard Kellett, M.D.	9/6/11 - 10/11/11	77 - 90
16	Troy Marlow, M.D.	11/9/11	91 - 92
17	Michael Wildstein, M.D.	11/23/11 - 12/14/11	93 - 96
18	Donald E. Olofsson, D.O.	11/30/11	97 - 98
19	Steven C. Poletti, M.D.	7/15/13	99 - 100

EXHIBITS #	DESCRIPTION	DATES	PAGES
20	Traffic Collision Report S.C. Highway Patrol	8/10/11	101 - 104
21	Statement of Account Dr. Alan N. Abel, M.D.	8/16/11 - 6/6/13	105 - 107
22	Statement of Account Tricounty Spinal Care Centers	9/2/11 - 10/11/11	108 - 111
23	Statement of Account Southeastern Medical Solutions	11/9/11 - 12/14/11	112

24	Decision & Order Commissioner Gene McCaskill	8/23/12	113 – 123
25	Decision & Order Appellate Panel	5/15/13	124 - 134

STIPULATIONS

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Notice of the hearing was properly and timely served upon all parties of interest.
3. Venue, set in Dorchester County, is proper as agreed by the parties.
4. The Claimant's average weekly wage is \$650.00 resulting in a compensation rate of \$433.34.

STATEMENT OF THE CASE

This matter was before the undersigned Commissioner on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Defendants' Form 21 requesting permission to terminate compensation, following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. The Claimant argues that he has not reached maximum medical improvement and is entitled to ongoing compensation or, in the alternative; the Claimant argues he is permanently and totally disabled.

Following the hearing, on November 8, 2013, the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, by and through their attorney, learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011

accident pending in the Charleston County Court of Common Pleas. On November 12, 2013, the Defendants filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas on February 20, 2013. The Defendants argued that this newly discovered evidence was relevant to the determination of the issues pending before the undersigned Commissioner, because the record reveals that the Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days after filing his third-party claim and, to date, has never filed a Form S-2. As a result, the Defendants argue that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. The Claimant did not file a return¹ to the Defendant's Motion to Introduce Newly Discovered Evidence. The Defendants' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case.

EVIDENCE SUMMARY

The Claimant testified on his own behalf. At the time of the hearing, the Claimant, Samuel Rose, was 43 years old. He is a high school graduate and worked for J.J.S. Trucking for approximately six months. (Hrg. Transcript p. 17, ll. 18-25). The Claimant was rear ended on

¹ The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's motion was denied by Administrative Order dated January 3, 2014.

August 10, 2011 while traveling on I-26, allegedly injuring his head, neck, back, and legs. (Hrg. Transcript p. 19, l. 17- p. 20, l. 23).

The Claimant testified that he is currently experiencing stiffness and throbbing pain in his neck that radiates to his shoulders, arms, and head. (Hrg. Transcript p. 28, ll. 1-10). He is also experiencing numbness in his arm and fingers and he claims that he can only lift about 25 pounds with his right arm. (Hrg. Transcript p. 28, ll. 14-25). He stated his left arm is worse than his right. (Hrg. Transcript p. 29, l. 1- p. 30, l. 4).

Regarding the Claimant's lower back, he testified that he currently experiences throbbing, radiating pain in his lower back near his spine. (Hrg. Transcript p. 30, ll. 10-18). He testified that his back is fine when he is moving, but hurts when he stops. (Hrg. Transcript p. 31, ll. 2-10).

The Claimant also testified that his right leg occasionally gives out and swells. (Hrg. Transcript p. 31, ll. 15-18). His knee sometimes hurts, but not always. (Hrg. Transcript p. 31, ll. 17-24). He was previously diagnosed with Osgood-Schlatter's Disease, but he claims he was not experiencing any pain in his right knee at the time of the accident. (Hrg. Transcript p. 32, ll. 4-10).

The Claimant also testified that the back of his head swells up, and he constantly has headaches, dizziness, and blurred vision. (Hrg. Transcript p. 32, ll. 11-17). The Claimant further testified that he did not believe he could go back to work in his current condition because he believes he cannot take the vibrations of driving the truck or doing the pre-trip inspection. (Hrg. Transcript p. 33, ll. 3-10).

On cross-examination, the Claimant testified that he fell down a flight of stairs at his mother's house in November of 2011 and again in January of 2012 and re-injured his back and neck on both occasions. (Hrg. Transcript p. 35, ll. 2-7). The Claimant admitted he went to Tri-County Spinal Care, but he initially stated it was only for pain management. (Hrg. Transcript p. 35, ll. 14-23). After further questioning, the Claimant denied receiving treatment, but later he admitted that he had received injections and MRI's and x-rays had been taken. (Hrg. Transcript p. 35, ll. 6-19).

The Claimant also admitted that he currently carries his cane in the wrong hand, his right hand, even though the doctors advised him that he needs to carry the cane in his *left* hand if he is actually having *right* knee pain. (Hrg. Transcript p. 38, l. 16 – p. 39, l. 7). He also testified that he did not remember Dr. Wildstein telling him that his complaints were out of proportion with what the physical exam showed. (Hrg. Transcript p. 39, ll. 21-25).

The Claimant admitted that he has not applied for any jobs or even looked for work anywhere. (Hrg. Transcript p. 42, ll. 9-14). He also testified that he has not been incarcerated again since the last hearing. (Hrg. Transcript p. 42, l. 23 – p. 43, l. 5). He admits that he was incarcerated after the August 10, 2011 accident.

Upon further cross-examination, the Claimant testified that he believes he needs the cane for dizziness, which he relates to his headaches. (Hrg. Transcript p. 44, l. 14 – p. 45, l. 14). The Claimant was also forced to admit that, despite his testimony that "nothing's been done" for him, Dr. Abel's records indicate the Claimant saw him 42 times. (Hrg. Transcript p. 45, l. 24 – p. 46,

l. 4). He was also forced to admit that he has been treated and evaluated Dr. Kellett, Dr. Wildstein, Dr. Wills, Dr. Poletti, and Dr. Jones and he has received both injections and pain medicine. (Hrg. Transcript p. 46, ll. 8-20).

On re-direct examination, the Claimant testified that Dr. Wildstein said he might potentially benefit from a one level anterior cervical discectomy and fusion. (Hrg. Transcript p. 50, ll. 2-24). The Claimant also testified he was feeling depressed even though depression was never raised in his Form 50 or his response to the Form 21 submitted by the Defendants. (Hrg. Transcript p. 51, l. 10 – p. 52, l. 10).

On November 8, 2013, the Claimant's attorney contacted the Defendants' counsel to discuss an upcoming mediation in the Claimant's previously undisclosed third-party claim. On November 12, 2013, Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Motion to Introduce Newly Discovered Evidence. The newly discovered evidence was the Claimant's third-party claim filed in the Charleston County Court of Common Pleas on February 20, 2013. The Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days and still has not filed a Form S-2.

On November 21, 2013, the Claimant filed a Motion in Opposition to Introduce After Discovered Evidence. The Claimant also filed on December 20, 2013 a Motion to Introduce After Discovered Evidence. On December 23, 2013, the Defendants filed a Return to the Claimant's Motion to Introduce Newly Discovered Evidence.

On January 3, 2014, Commissioner Taylor issued three orders that granted the Defendants' Motion to Introduce Newly Discovered Evidence and denied the Claimant's Motion in Opposition to Introduce After Discovered Evidence and the Claimant's Motion to Introduce After Discovered Evidence.

Based upon the newly discovered evidence admitted into the record, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560(b) by not filing a Form S-2 with the Workers' Compensation Commission, the employer, and the carrier within thirty days. As a result, the Claimant is not entitled to additional benefits under the Act, and the Defendants may terminate payment of temporary total disability benefits.

FINDINGS OF FACT

1. The parties to this proceeding were sent directives for a proposed order on January 13, 2014.
2. The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence).
3. The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the

commission that this third-party action had been commenced. To date, no Form S2 has been filed or served by the Claimant.

CONCLUSIONS OF LAW

1. S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
2. Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra.

3. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, *supra*. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.
4. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
5. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
6. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.
7. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.

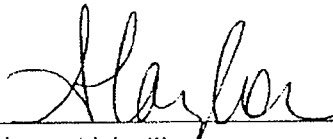
8. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Claimant is not entitled to pursue, and the Defendants shall have no liability for, any additional benefits under the Workers' Compensation Act following the commencement of the third-party action on February 20, 2013.

IT IS, FURTHER ORDERED that the Defendants shall have a lien on the proceeds of any recovery from any third-party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

IT IS SO ORDERED!



Commissioner Aisha Taylor

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).
September 2, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Samuel Rose v Chris Thompson Services, LLC
SCWCC: 1112328
Commissioner: Taylor

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Strike Appellant's Brief**. 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 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

_____ Campbell

_____ Wilkerson

_____ McCaskill

_____ Remand for Order consistent with the Order of the Court.

_____ Remand to the Hearing Commissioner.

_____ Remand to the Jurisdictional Commissioner.

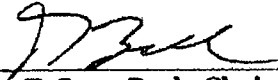
_____ Other: _____

_____ Remand:

_____ Panel Oral Argument.

_____ En Banc Oral Argument.

AND IT IS SO ORDERED.


T. Scott Beck, Chair

Columbia, South Carolina

12/15/2014

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 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 Kim Falls on December 16, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel A. Rose, Claimant, Respondent,

v.

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

Of whom Chris Thompson Services, LLC and
Bridgefield Casualty Ins. Co. are Appellants,

and

JJS Trucking, LLC and South Carolina Uninsured
Employers' Fund are Respondents.

Appellate Case No. 2013-001322

Appeal From The Workers' Compensation Commission

Opinion No. 5291

Submitted November 1, 2014 – Filed January 28, 2015

APPEAL DISMISSED

Kirsten Leslie Barr, Trask & Howell, LLC, of Mt.
Pleasant, for Appellants.

Joseph Brooks Fisher, George Sink, PA Injury Lawyers,
of North Charleston, and Benjamin William Akery, The
Steinberg Law Firm, LLP, of Goose Creek,

for Respondent Samuel A. Rose; John Eric Kaufmann, of Columbia, for Respondent JJS Trucking, LLC; and Amy V. Cofield, Cofield Law Firm, of Lexington, for Respondent South Carolina Uninsured Employers' Fund.

FEW, C.J.: Chris Thompson Services, LLC and its carrier appeal the workers' compensation commission's refusal to order a transfer of responsibility pursuant to subsection 42-1-415(A) of the South Carolina Code (2015). Because the commission has not yet ruled on the merits of Samuel Rose's entire claim for benefits, however, the order is not a final decision, and thus not immediately appealable. We dismiss.

Rose filed this workers' compensation action alleging he sustained accidental injuries to his right knee, back, neck, and head while working for JJS Trucking, LLC. At the time of Rose's injury, JJS Trucking was a subcontractor for Chris Thompson Services and was uninsured. The commission ordered Chris Thompson Services to pay for Rose's medical treatment and temporary total disability benefits.

Chris Thompson Services petitioned the commission "to transfer responsibility for continuing compensation and benefits" to the South Carolina Uninsured Employers' Fund pursuant to subsection 42-1-415(A). The commission refused to order the transfer, finding the issue of transfer was "not ripe for adjudication at this time." The commission also determined Rose had not reached maximum medical improvement, and thus did not rule on his claim for permanent disability.

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). Section 1-23-380 of the Act limits appeals to those from a "final decision" of the commission. An order of the commission is not a final decision unless it resolves the entire action. *See Price v. Peachtree Elec. Servs., Inc.*, 405 S.C. 455, 457, 748 S.E.2d 229, 230 (2013) ("An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review."); *Bone*, 404 S.C. at 73, 744 S.E.2d at 556 (same); *see also* 404 S.C. at 75, 744 S.E.2d at 557 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010))). The

commission's order leaves the merits of Rose's claim for permanent disability unresolved. Therefore, the order is not a final decision and not immediately appealable.

Appellants argue, however, the commission's refusal to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund under subsection 42-1-415(A) is immediately appealable under the following provision of section 1-23-380: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Appellants contend they "are required under the [commission's] order to make ongoing payments to [Rose], in addition to adjusting the claim and providing medical benefits, all despite the fact that . . . Appellants properly petitioned the commission to transfer continuing liability to the [Uninsured Employers' Fund]." Appellants further contend that reimbursement from the Fund after final judgment is not an adequate remedy and this court's "failure to address the appeal at this time would deprive . . . Appellants of any meaningful remedy and would vitiate the statutory scheme envisioned by the General Assembly with the enactment of [section] 42-1-415."

We do not agree that dismissing this appeal deprives Appellants of an adequate remedy. Appellants make no specific argument as to how the commission's refusal to address transfer at this time affects Appellants in any way other than to delay the payment of money. *See Bone*, 404 S.C. at 74, 744 S.E.2d at 556 (stating an employer and its insurance carrier "have an adequate remedy in that they may raise the issue of compensability" after a final award by the commission). The Uninsured Employers' Fund appears to acknowledge that it would be required to reimburse Appellants if the commission later orders a transfer. Therefore, if the commission eventually determines the transfer was adequately documented and thus should have been ordered, Appellants will recover their payments through reimbursement. If the commission does not later order a transfer, Appellants have an adequate remedy in an appeal after the commission's final decision in the case.

Because we dismiss the appeal on the ground that the order is not immediately appealable, we decline to address Appellants' argument that the denial of transfer to the Uninsured Employers' Fund before final judgment is contrary to the legislative intent of section 42-1-415.

APPEAL DISMISSED.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THOMAS and LOCKEMY, JJ., concur.

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL**

SAMUEL ROSE,

Claimant/Appellant,

v.

JJS TRUCKING,

Uninsured Employer, and

CHRIS THOMPSON SERVICES,

Upstream Employer, and

BRIDGEFIELD CASUALTY INS. CO.,

Carrier for Chris Thompson

Services, and

THE STATE ACCIDENT FUND,

Respondents.

W.C.C. File No. 1112328

DECISION & ORDER

STATEMENT OF THE CASE

This matter came before the Commission's Appellate Panel for a review hearing on April 21, 2015. The case was previously tried before Commissioner Taylor on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21 filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. Following the hearing, on November 8, 2013, the Respondents learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas.

On November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in

the Charleston County Court of Common Pleas on February 20, 2013. The Respondents argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. As a result, the Respondents argued that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. The Claimant did not file a return¹ to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case.

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *The parties to this proceeding were sent directives for a proposed order on January 13, 2014.*
2. *The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence).*
3. *The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the*

¹ The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's motion was denied by Administrative Order dated January 3, 2014.

commission that this third-party action had been commenced. To date, no Form S2 has been filed or served by the Claimant.

CONCLUSIONS OF LAW

1. S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
2. Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec. 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, *supra*.
3. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, *supra*. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.
4. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on

which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

5. *Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.*
6. *Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.*
7. *Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.*
8. *Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.*

Thereafter, the Claimant filed a Form 30 requesting review of Commissioner Taylor's September 2, 2014 Order on the following grounds:

FIRST: The Hearing Commissioner erred in granting Defendant's [sic] Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies November 12, 2013 Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim filed in Charleston County Court of Common Pleas on February 20, 2013), the error being that the defense of exclusive remedy was not pled by any of the Defendant's [sic]. nor was the issue raised at the September 23, 2013 hearing before the single Commissioner, further the Answer and Counterclaim could have been secured by the Defendant's before the September 23, 2013 hearing had they exercised reasonable diligence

SECOND: The Hearing Commissioner erred in denying the Claimant's November 21, 2013 Motion in Opposition to Introduce After Discovered Evidence summarily without any legal reasoning, findings of fact or conclusions of law to support this denial.

THIRD: The Hearing Commissioner erred in denying Claimant's December 20, 2013 Motion to Introduce newly Discovered Evidence (voluntary dismissal of the Claimant's third-party suit), holding the voluntary dismissal did not fit the meaning of "Newly Discovered Evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned [sic] on August 5, 2013, the error being there is no requirement under South Carolina Statutory Law, South Carolina Workers' Compensation Regulations or South Carolina Common Law Jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence.

FOURTH: The Hearing Commissioner erred in granting Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntarily [sic] dismissal Claimant's third-party suit) the error being that South Carolina case law holds that when a Claimant voluntarily dismissed his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).

FIFTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), the error being this is a gross miscarriage of justice as the single Commissioner entertained new defenses that were not pled or argued at the September 23, 2013 hearing by the Defendant's [sic], however the single Commissioner did not allow the Claimant to introduce newly discovered evidence or to

be heard to argue their position in response to Defendant's newly discovered evidence which would render the Defendant's [sic] exclusive remedy argument moot.

SIXTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third party-suit) without holding a hearing on the issue to allow both sides to argue their respective positions or to reconvene the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulation 67-707(C)(2)(d).

SEVENTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (Voluntary Dismissal of Claimant's third-party suit) without holding a hearing on the issue or reconvening the September 23, 2013 hearing, the error being it is well-settled law of South Carolina that if the Commission undertakes to receive such additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings. Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, [sic] S.E.2d 318 (1967). In the case at bar, there were no proceedings whatsoever, simply a Commissioner allowing newly discovered evidence to come in from one party and not allowing newly discovered evidence in rebuttal from the opposing party without holding a hearing on the issue or reconvening the original hearing.

EIGHTH: The Hearing Commissioner erred in finding of fact #3 and Conclusion of Law #1 in holding that the Claimant failed to file a Form S2 when the Claimant did indeed file a voluntary dismissal of the Claimant's underlying 3rd party lawsuit as newly discovered evidence on December 19, 2013, which the Commissioner denied, then subsequently filed the appropriate S2 on February 10, 2014 after re-filing the underlying 3rd party lawsuit.

NINTH: The Hearing Commissioner erred in Conclusion of Laws #1, #2, #3, #4, #5, #6, #7, and #8 in holding that the Claimant did not provide notice of the 3rd party action by way of filing a Form S2 and therefore was not entitled to additional medical treatment.

disability benefits or permanent disability when the Claimant voluntarily dismissed his underlying 3rd party claim on December 5, 2013 before settling it and submitted the dismissal to the Commission as newly discovered evidence and then after re-filing the 3rd party lawsuit timely filed a Form S2 on December 19, 2013, the error being that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).

CONCLUSION

The Appellate Panel AFFIRMS the September 2, 2014 Decision and Order of Hearing Commissioner Taylor in its entirety and enters the following:

FINDINGS OF FACT

1. The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013.
2. The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced.

CONCLUSIONS OF LAW

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

that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

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

against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.

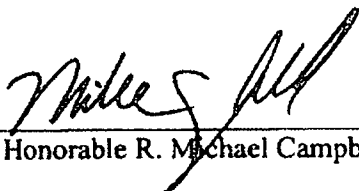
11. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
12. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
13. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the Workers' Compensation Act.
14. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
15. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the Claimant is not entitled to, and the Defendants/Respondents shall have no liability for, any additional benefits under the Workers' Compensation Act.

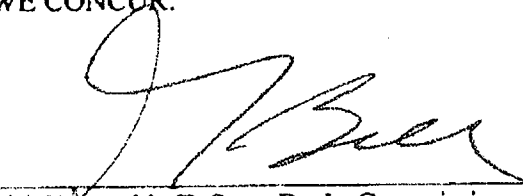
IT IS, FURTHER ORDERED that the Defendants/Respondents shall have a lien on the proceeds of any recovery by the Claimant from any third-party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

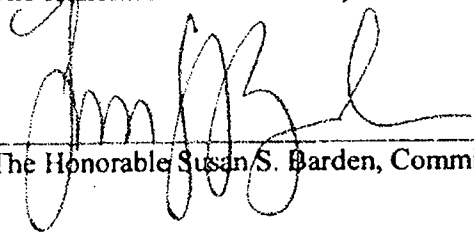
IT IS SO ORDERED!


The Honorable R. Michael Campbell, II, Commissioner

Date: February 8th, 2014

WE CONCUR:


The Honorable T. Scott Beck, Commissioner


The Honorable Susan S. Barden, 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 Kim Falls on February 8, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Samuel Rose, Claimant, Appellant,

v.

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

Appellate Case No. 2016-000497

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2018-UP-155
Submitted March 1, 2018 – Filed April 18, 2018

REVERSED AND REMANDED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC,
of Columbia, for Appellant.

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mount
Pleasant, for Respondents JJS Trucking, Chris Thompson
Services, and Bridgefield Casualty Ins. Co.

Amy V. Cofield, of Cofield Law Firm, of Lexington, for
Respondent State Accident Fund.

PER CURIAM: Samuel Rose appeals an order of the Appellate Panel of the Workers' Compensation Commission (the Appellate Panel) ruling (1) he was not entitled to additional benefits under the Workers' Compensation Act (the Act) and (2) Chris Thompson Services and Bridgefield Casualty Insurance Company (collectively, Respondents) were entitled to a lien on the proceeds of any third-party recovery Rose obtained. On appeal, Rose argues (1) the single commissioner erred by granting Respondents' motion to introduce newly-discovered evidence while denying his similar motion and (2) the single commissioner and Appellate Panel erred by barring him from further benefits due to a violation of section 42-1-560(b) of the South Carolina Code (2015).

After the single commissioner held a hearing to determine whether Respondents could stop temporary compensation payments and whether Rose was entitled to further compensation, but prior to entry of a resulting order, Respondents filed a motion to introduce newly-discovered evidence. In the motion, Respondents asserted Rose initiated a third-party civil action arising out of the accident that also gave rise to his workers' compensation claim, but he failed to give timely notice of the action. *See* § 42-1-560(b) ("Notice of the commencement of the action shall be given within thirty days thereafter to the Workers' Compensation Commission, the employer[,], and carrier upon a form prescribed by the Workers' Compensation Commission."). Rose filed a similar motion in response, informing the single commissioner that the third-party action had been voluntarily dismissed and seeking to introduce the stipulation of dismissal into evidence. The single commissioner granted Respondents' motion but denied Rose's.

In its order denying Rose's motion, the single commissioner found, "The evidence sought to be introduced (the Voluntary Dismissal) does not fit the meaning of 'newly[-]discovered evidence' under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013." However, regulation 67-707 does not include such a requirement, and the single commissioner's finding is contrary to this court's precedent. *See* S.C. Code Ann. Regs. 67-707(C) (2012) ("The moving party must establish the new evidence is of the same nature and character required for granting a new trial and show: (1) [t]he 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) [t]he 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."); *Wise v. Wise*, 394 S.C. 591, 602, 716 S.E.2d 117, 123 (Ct. App. 2011) (explaining "[n]othing requires that the facts be in existence at the time of the first hearing by the single commissioner" to be admitted under regulation 67-707). Accordingly, the denial of Rose's motion was controlled by an error of law, and we reverse it. See S.C. Code Ann. § 1-23-380(5) (Supp. 2017) (providing this court may reverse a decision by the Commission "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . affected by [an] error of law").

Having determined Rose's stipulation of dismissal should have been allowed into evidence and considered by the single commissioner, we further find the single commissioner and Appellate Panel erred by concluding Rose's purported violation of section 42-1-560(b) barred his workers' compensation claim from proceeding. See *Callahan v. Beaufort Cty. Sch. Dist.*, 375 S.C. 92, 97, 651 S.E.2d 311, 314 (2007) ("A voluntary dismissal leaves the situation as though no suit had ever been filed."); *id.* ("Following this rule, [a voluntarily-dismissed] third-party suit . . . [becomes] a nullity, and [section] 42-1-560 is not applicable. As a result, there is no violation of [section] 42-1-560 when the third-party suit is treated as never being filed.").

We reverse the Appellate Panel's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.¹

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

Samuel Rose, Claimant, Appellant,

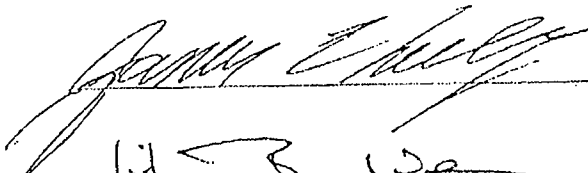
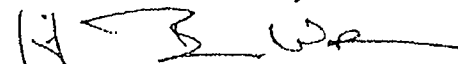
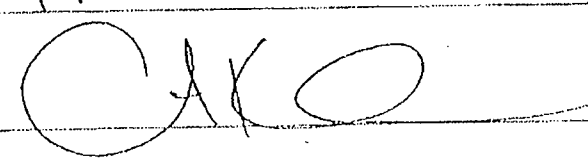
v.

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

Appellate Case No. 2016-000497

ORDER

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

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Stephen Benjamin Samuels, Esquire
Amy V. Cofield, Esquire
Kirsten Leslie Barr, Esquire

FILED

May 29, 2018



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 05, 2018

The Honorable Amy Bracy
Worker's Compensation Commission
Post Office Box 1715
Columbia SC 29202

REMITTITUR

Re: Samuel Rose v. JJS Trucking
Lower Court Case No. 1112328
Appellate Case No. 2016-000497

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny Abbott Kitchings".

CLERK

Enclosure

cc: Stephen Benjamin Samuels, Esquire
Amy V. Cofield, Esquire
Kirsten Leslie Barr, Esquire

SCWCC JUDICIAL DEPARTMENT
REMITTITUR ROUTING SHEET

Samuel Rose v Chris Thompson Services, LLC
SCWCC: 1112328
Commissioners: Campbell, Beck, Barden

Claimant: Andrew W. Creech Defendant: Clarke McCants

This is a remittitur from a higher court

SINGLE COMMISSIONER: Taylor

ORIGINAL APPELLATE PANEL: Campbell, Beck, Barden

ASSIGN TO: Single Commissioner OR Reconstituted Panel

____ Beck _____ McCaskill

____ Barden _____ James

____ Campbell _____ Taylor

____ Wilkerson

Chair: [Signature] Date: 7/19/17

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 HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 10 day of July, 2018.

By: Valerie D. Deller
SCWCC Judicial Department

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

**COMMISSION PANEL: THE HONORABLE T. SCOTT BECK; THE HONORABLE
MICHAEL CAMPBELL; THE HONORABLE SUSAN BARDEN**

SCWCC FILE NO.: 1112328

Samuel Rose,

Employee,
Appellant

v.

JJS Trucking, Uninsured Employer, and
Chris Thompson Services, Upstream Employer,

Employers, and

Bridgefield Casualty Insurance Company and
South Carolina Uninsured Employers' Fund,

Carrier, Defendants.

UPON REMITTITUR FROM THE SOUTH CAROLINA COURT OF APPEALS

Filed:

June 17, 2019

STATEMENT OF THE CASE

This matter was before the Single Commissioner on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Defendants' Form 21 requesting permission to terminate compensation, following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. The Claimant argued that he had not reached maximum medical improvement and was entitled to ongoing compensation or, in the alternative; the Claimant argued he was permanently and totally disabled.

Following the hearing, on November 8, 2013, the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, by and through their attorney, learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. On November 12, 2013, the Defendants filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas on February 20, 2013. The Defendants argued that this newly discovered evidence was relevant to the determination of the issues pending before the undersigned Commissioner, because the record reveals that the Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days after filing his third-party claim and, to date, has never filed a Form S-2. As a result, the Defendants argue that the Claimant was not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements

of S.C. Code Ann. § 42-1-560. The Claimant filed a Motion in Opposition on November 21, 2013 and Motion to Introduce Newly Discovered Evidence on December 20, 2013, which sought to introduce evidence of a voluntary dismissal of Claimant's third-party claim. The Defendants' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. Claimant's Motion in Opposition and Motion to introduce the voluntary dismissal were denied.

On September 2, 2014, the Hearing Commissioner issued a Decision and Order that held Defendant had no liability for any additional benefits under the SC Workers' Compensation Act following the commencement of the third-party action on February 20, 2013. The Appellate Panel affirmed the Hearing Commissioner by way of Decision and Order dated February 8, 2016. Claimant appealed the Decision and Order of the Appellate Panel to the South Carolina Court of Appeals, and on April 18, 2018, the Court of Appeals found that Claimant's stipulation of dismissal should have been allowed into evidence and as such, the Hearing Commissioner's finding that Claimant's claim was barred was in error. The SC Court of Appeals reversed the Order of the Commission and remanded the matter back to the Commission for proceedings consistent with the opinion.

Upon Remittitur to the Commission, the matter was assigned back to the Single Commissioner on July 16, 2018 for further proceedings consistent with the opinion of the Court of Appeals. The parties appeared via telephone conference with the Single Commissioner on April 25, 2019 wherein Claimant's counsel requested the Single Commissioner be recused on the basis that the Single Commissioner had previously heard the matter and ruled against the Claimant. The Motion for Recusal was granted on April 29, 2019 via email correspondence to the parties. Jurisdiction of

this matter now rests with the Appellate Panel of the Full Commission pursuant to the original Remittitur from the SC Court of Appeals.

EVIDENCE SUMMARY

The Claimant testified on his own behalf. At the time of the hearing, the Claimant, Samuel Rose, was 43 years old. He is a high school graduate and worked for J.J.S. Trucking for approximately six months. (Hrg. Transcript p. 17, ll. 18-25). The Claimant was rear ended on August 10, 2011 while traveling on I-26, allegedly injuring his head, neck, back, and legs. (Hrg. Transcript p. 19, l. 17- p. 20, l. 23).

The Claimant testified that he is currently experiencing stiffness and throbbing pain in his neck that radiates to his shoulders, arms, and head. (Hrg. Transcript p. 28, ll. 1-10). He is also experiencing numbness in his arm and fingers and he claims that he can only lift about 25 pounds with his right arm. (Hrg. Transcript p. 28, ll. 14-25). He stated his left arm is worse than his right. (Hrg. Transcript p. 29, l. 1- p. 30, l. 4).

Regarding the Claimant's lower back, he testified that he currently experiences throbbing, radiating pain in his lower back near his spine. (Hrg. Transcript p. 30, ll. 10-18). He testified that his back is fine when he is moving, but hurts when he stops. (Hrg. Transcript p. 31, ll. 2-10).

The Claimant also testified that his right leg occasionally gives out and swells. (Hrg. Transcript p. 31, ll. 15-18). His knee sometimes hurts, but not always. (Hrg. Transcript p. 31, ll. 17-24). He was previously diagnosed with Osgood-Schlatter's Disease, but he claims he was not experiencing any pain in his right knee at the time of the accident. (Hrg. Transcript p. 32, ll. 4-10).

The Claimant also testified that the back of his head swells up, and he constantly has headaches, dizziness, and blurred vision. (Hrg. Transcript p. 32, ll. 11-17). The Claimant further testified that he did not believe he could go back to work in his current condition because he believes he cannot take the vibrations of driving the truck or doing the pre-trip inspection. (Hrg. Transcript p. 33, ll. 3-10).

On cross-examination, the Claimant testified that he fell down a flight of stairs at his mother's house in November of 2011 and again in January of 2012 and re-injured his back and neck on both occasions. (Hrg. Transcript p. 35, ll. 2-7). The Claimant admitted he went to Tri-County Spinal Care, but he initially stated it was only for pain management. (Hrg. Transcript p. 35, ll. 14-23). After further questioning, the Claimant denied receiving treatment, but later he admitted that he had received injections and MRI's and x-rays had been taken. (Hrg. Transcript p. 35, ll. 6-19).

The Claimant also admitted that he currently carries his cane in the wrong hand, his right hand, even though the doctors advised him that he needs to carry the cane in his *left* hand if he is actually having *right* knee pain. (Hrg. Transcript p. 38, l. 16 – p. 39, l. 7). He also testified that he did not remember Dr. Wildstein telling him that his complaints were out of proportion with what the physical exam showed. (Hrg. Transcript p. 39, ll. 21-25).

The Claimant admitted that he has not applied for any jobs or even looked for work anywhere. (Hrg. Transcript p. 42, ll. 9-14). He also testified that he has not been incarcerated again since the last hearing. (Hrg. Transcript p. 42, l. 23 – p. 43, l. 5). He admits that he was incarcerated after the August 10, 2011 accident.

Upon further cross-examination, the Claimant testified that he believes he needs the cane for dizziness, which he relates to his headaches. (Hrg. Transcript p. 44, l. 14 – p. 45, l. 14). The Claimant was also forced to admit that, despite his testimony that “nothing’s been done” for him, Dr. Abel’s records indicate the Claimant saw him 42 times. (Hrg. Transcript p. 45, l. 24 – p. 46, l. 4). He was also forced to admit that he has been treated and evaluated Dr. Kellett, Dr. Wildstein, Dr. Wills, Dr. Poletti, and Dr. Jones and he has received both injections and pain medicine. (Hrg. Transcript p. 46, ll. 8-20).

On re-direct examination, the Claimant testified that Dr. Wildstein said he might potentially benefit from a one level anterior cervical discectomy and fusion. (Hrg. Transcript p. 50, ll. 2-24). The Claimant also testified he was feeling depressed even though depression was never raised in his Form 50 or his response to the Form 21 submitted by the Defendants. (Hrg. Transcript p. 51, l. 10 – p. 52, l. 10).

Defendants submitted the following APA submissions as evidence: Medical records from Gregory M. Jones, M.D. (APA pp. 1-4); JJS Trucking Certificate of Insurance (APA p. 5); Deposition of Sedrick Smalls (APA pp. 6-17); Deposition of Samuel Rose (APA pp. 18-28); Petition to Transfer Liability (APA pp. 29-33); SCWCC Form 18 (APA pp. 34); SLED (APA pp. 35-42); and Third-Party Complaint – Charleston Common Pleas (Exhibit A to 11/12/13 Motion to Introduce Newly Discovered Evidence).

The Claimant submitted the following APA submissions as evidence: Medical records from Stuart M. Leon, M.D. (APA pp. 43-44); Dr. Andrew Conrad, M.D. (APA pp. 45-47); Christopher Erikson, M.D. (APA pp. 48-49); Peter White, M.D. (APA pp. 50-51); Alan Abel,

M.D. (APA pp. 52-72); Michael Rissing, M.D. (APA pp. 73-74); Cameron Willis, D.C. (APA pp. 75-76); Richard Kellett, M.D. (APA pp. 77-90); Troy Marlow, M.D. (APA pp. 91-92); Michael Wildstein, M.D. (APA pp. 93-96); Donald Olofsson, D.O. (APA pp. 97-98); Steven Polletti, M.D. (APA pp. 99-100); Traffic Collision Report SCHP (APA pp. 101-104); Statement of Account - Dr. Abel (APA pp. 105-107); Statement of Account - Tricounty Spinal Care (APA pp. 108-111); Statement of Account - Southeastern Medical Solutions (APA p. 112); and Stipulation of Dismissal (Exhibit 2 to 12/20/13 Motion to Introduce Newly Discovered Evidence).

DISCUSSION

Upon remittitur from the Court of Appeals, the undersigned Appellate Panel reviewed this matter as a whole including all of the testimony, medical records and other evidence presented at the Single Commissioner's September 23, 2013 hearing on the merits of Defendants' Form 21 Request for Hearing as well as all exhibits to post-hearing motions filed with the Hearing Commissioner. Based on the preponderance of the evidence WE, THE APPELLATE PANEL, HEREBY MAKE THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT OF THE APPELLATE PANEL

1. By Order of the South Carolina Court of Appeals, Claimant filed a voluntary dismissal on December 5, 2013, after the date of the Single Commission Hearing, and as such, the voluntary dismissal leaves the situation as though no suit had ever been filed. As a result, there is no violation of S.C. Code Ann. § 42-1-560.
2. As to the merits of the claim, the parties originally appeared for a hearing before Commissioner McCaskill on May 15, 2012, which resulted in a Decision and Order of the Single Commissioner on August 23, 2012. The August 23, 2012 Decision and Order was appealed to the Full Commission and on May 15, 2013, the Appellate Panel

entered a Decision and Order, which was ultimately unappealed and is now the law of the case.¹

3. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Samuel Rose was an employee of JJS Trucking on August 10, 2011.
4. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant sustained compensable injuries to his head, [right] knee, [right] leg, back, and neck arising out of and in the course of his employment with JJS Trucking.
5. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.
6. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.
7. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, On August 10, 2011, JJS Trucking, LLC was operating without proper insurance as required by the Workers' Compensation Act.
8. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on August 10, 2011, JJS Trucking, LLC was operating as a subcontractor for Chris Thompson Services, LLC, and is an "upstream employer" pursuant to §42-1-415.

¹ The issue of whether the Commission erred as a matter of law in failing to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 was preserved for appeal by Defendants Christ Thompson, LLC and Bridgefield Casualty's subsequent Motion and resulting appeals to the Full Commission and the S.C. Court of Appeals. By Order of the Court of Appeals dated January 28, 2015, Defendants' appeal was dismissed as not immediately appealable and preserved for further adjudication or appeal after a final decision of the Commission.

9. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.
10. As a result of the May 15, 2013 Appellate Panel Decision and Order, Claimant was found to not be at maximum medical improvement and Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company were ordered to provide Claimant with "an evaluation to determine the extent of his injuries" and further ordered that Claimant was "entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier." The Full Commission also found that Claimant was entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reached maximum medical improvement.
11. After a review of the evidence as a whole, we find Defendants Thompson Services, LLC and Bridgefield Casualty Insurance Company provided Claimant with the medical evaluation pursuant to the original Single Commissioner Order dated August 23, 2012 and affirmed with amendments by the May 15, 2013 Decision and Order of the Appellate Panel. This evaluation with Dr. Greg Jones of Charleston Spine & Physical Medicine dated March 20, 2013 and updated on April 16, 2013, address Claimant's neck, back and right knee complaints. Dr. Jones reviewed Claimant's history of treatment modalities including epidural blocks to the lumbar spine, physical therapy, epidural injections and right-sided cervical facet injections to the cervical spine, and medications. Dr. Jones opined Claimant would likely not benefit significantly from single level fusion C5-6 as there was no evidence of definitive cervical radiculopathy.

(Defendants' APA p. 4). Dr. Jones placed Claimant at maximum medical improvement as of March 20, 2013.

12. During the same time as his evaluation with Dr. Jones, Claimant continued treating on his own with his family physician, Dr. Alan N. Abel. While Dr. Abel had initially referred Claimant to a neurosurgeon for evaluation of surgery on his neck back in October of 2012, after reviewing Dr. Jones' records, Dr. Abel opined that he was "essentially in agreement with this interpretation." Dr. Abel also placed Claimant at maximum medical improvement and noted he was "not optimistic that [Claimant] will improve to any significant degree in the future." Dr. Abel noted that "perhaps" Claimant could benefit from physical therapy and also referenced a EMG to see if there is nerve decompression in his neck requiring cervical intervention. (Claimant's APA p. 70).

13. On July 15, 2013, Claimant obtained his own Independent Medical Evaluation with Dr. Steven C. Poletti who reviewed Claimant's MRI scans of the cervical spine that showed two-level disc herniations at C5-6 and C6-7 as well as bilateral C6 nerve root compression. Dr. Poletti diagnosed Claimant with cervical disc herniation with spondylosis, cervical radiculopathy, low back pain of indeterminate etiology, and history of right knee contusion/impaction fracture. Dr. Poletti opined Claimant required an evaluation by a knee specialist and that surgery was indicated for Claimant's two-level cervical disc disease with pain radiating into his arm. Dr. Poletti also opined Claimant needed an MRI scan of his lumbar spine.

14. Upon review of the preponderance of the evidence as a whole, we find Claimant is not at maximum medical improvement for his August 10, 2011 work injury. We give

greater weight to the medical opinions of Dr. Poletti than we do the medical opinions of Dr. Jones. Specifically, Dr. Poletti agreed with Claimant's prior treating physician, Dr. Wildstein, who had previously recommended a cervical fusion. In addition, it is important to note Dr. Jones is a physical medicine and rehabilitation doctor, as opposed to Dr. Wildstein and Dr. Poletti, both of whom are orthopaedic surgeons specializing in the spine. We give great weight to Dr. Poletti's assessment of Dr. Jones's medical opinion wherein Dr. Poletti stated, "a non-surgical recommendation from a non-surgeon doesn't really mean all that much to me." (Claimant's APA pp. 99-100).

15. With regards to Claimant's cervical spine, we find the opinions of the two orthopaedic spine surgeons, Drs. Wildstein and Poletti, outweigh the medical opinion of Dr. Jones. As such, we find Claimant is entitled to additional medical treatment to include the recommended cervical fusion as recommended as it has been shown by a preponderance of the evidence that it would tend to lessen his period of disability.
16. We find Defendants had the surgical recommendations of Dr. Wildstein and Dr. Poletti at time of the September 23, 2013 hearing before the Hearing Commissioner and elected to deny the surgery, which was their right, and rely on the medical opinion of Dr. Jones. As such, we find the Claimant has shown good cause to direct his own medical care and hereby appoint Dr. Steven C. Poletti, or other referral from Dr. Poletti, as the authorized provider for Claimant's cervical and lumbar spine treatment.
17. We find Claimant is entitled to an evaluation with an orthopaedic surgeon who specializes in the knee/lower extremity to obtain updated MRI scans and an assessment of Claimant's continued complaints of pain in his right knee. This finding is based upon the preponderance of the evidence including the recommendation of Dr. Poletti,

4. Claimant is not at maximum medical improvement for his injuries to his neck (cervical spine), back (lumbar spine), and right leg (knee).
5. Pursuant to S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Section 42-15-80, Claimant is entitled to treatment for his neck, back, and right knee. Defendants are liable for Claimant's future treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck and back injuries. Defendants are to direct Claimant's medical treatment for his right knee.
6. Claimant is entitled to temporary total disability benefits from August 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment of any back-owed TTD accrued during litigation.

ORDER AND AWARD

Based upon the above Findings of Fact and Conclusions of Law set forth herein,

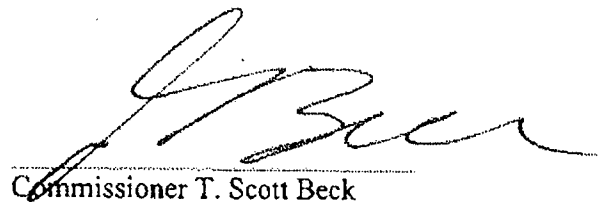
IT IS HEREBY ORDERED Claimant is not at maximum medical improvement for his injuries to his neck, back, and right knee.

IT IS HEREBY ORDERED Claimant is entitled to additional medical treatment to the neck and back, to include a cervical fusion and follow-up treatment with Dr. Steven C. Poletti or other referral made by Dr. Poletti.

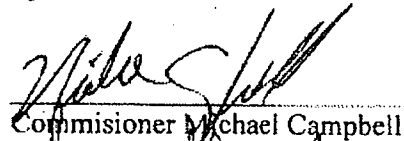
IT IS HEREBY ORDERED Claimant is entitled to an evaluation of his right knee, including an updated MRI, with an orthopaedic surgeon who specializes in the knee/lower extremity at the direction of Defendants.

IT IS HEREBY ORDERED Claimant is entitled to temporary total disability benefits from September 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment for all back-owed TTD benefits as of the date of this Decision and Order

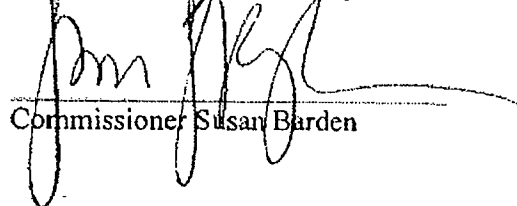
AND IT IS SO ORDERED.



Commissioner T. Scott Beck



Commissioner Michael Campbell



Commissioner Susan Barden

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 June 17, 2019

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COMMISSION PANEL: THE HONORABLE T. SCOTT BECK; THE HONORABLE
MICHAEL CAMPBELL; THE HONORABLE SUSAN BARDEN

SCWCC FILE NO.: 1112328

Samuel Rose,

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v.

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Employers, and

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Filed:

June 24, 2019

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Following the hearing, on November 8, 2013, the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, by and through their attorney, learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. On November 12, 2013, the Defendants filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas on February 20, 2013. The Defendants argued that this newly discovered evidence was relevant to the determination of the issues pending before the undersigned Commissioner, because the record reveals that the Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days after filing his third-party claim and, to date, has never filed a Form S-2. As a result, the Defendants argue that the Claimant was not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements

of S.C. Code Ann. § 42-1-560. The Claimant filed a Motion in Opposition on November 21, 2013 and Motion to Introduce Newly Discovered Evidence on December 20, 2013, which sought to introduce evidence of a voluntary dismissal of Claimant's third-party claim. The Defendants' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. Claimant's Motion in Opposition and Motion to introduce the voluntary dismissal were denied.

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Defendants submitted the following APA submissions as evidence: Medical records from Gregory M. Jones, M.D. (APA pp. 1-4); JJS Trucking Certificate of Insurance (APA p. 5); Deposition of Sedrick Smalls (APA pp. 6-17); Deposition of Samuel Rose (APA pp.18-28); Petition to Transfer Liability (APA pp. 29-33); SCWCC Form 18 (APA pp. 34); SLED (APA pp. 35-42); and Third-Party Complaint – Charleston Common Pleas (Exhibit A to 11/12/13 Motion to Introduce Newly Discovered Evidence).

The Claimant submitted the following APA submissions as evidence: Medical records from Stuart M. Leon, M.D. (APA pp. 43-44); Dr. Andrew Conrad, M.D. (APA pp. 45-47); Christopher Erikson, M.D. (APA pp. 48-49); Peter White, M.D. (APA pp. 50-51); Alan Abel,

M.D. (APA pp. 52-72); Michael Rissing, M.D. (APA pp. 73-74); Cameron Willis, D.C. (APA pp. 75-76); Richard Kellett, M.D. (APA pp. 77-90); Troy Marlow, M.D. (APA pp. 91-92); Michael Wildstein, M.D. (APA pp. 93-96); Donald Olofsson, D.O. (APA pp. 97-98); Steven Poletti, M.D. (APA pp. 99-100); Traffic Collision Report SCHP (APA pp. 101-104); Statement of Account - Dr. Abel (APA pp. 105-107); Statement of Account - Tricounty Spinal Care (APA pp. 108-111); Statement of Account - Southeastern Medical Solutions (APA p. 112); and Stipulation of Dismissal (Exhibit 2 to 12/20/13 Motion to Introduce Newly Discovered Evidence).

DISCUSSION

Upon remittitur from the Court of Appeals, the undersigned Appellate Panel reviewed this matter as a whole including all of the testimony, medical records and other evidence presented at the Single Commissioner's September 23, 2013 hearing on the merits of Defendants' Form 21 Request for Hearing as well as all exhibits to post-hearing motions filed with the Hearing Commissioner. Based on the preponderance of the evidence WE, THE APPELLATE PANEL, HEREBY MAKE THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT OF THE APPELLATE PANEL

1. By Order of the South Carolina Court of Appeals, Claimant filed a voluntary dismissal on December 5, 2013, after the date of the Single Commission Hearing, and as such, the voluntary dismissal leaves the situation as though no suit had ever been filed. As a result, there is no violation of S.C. Code Ann. § 42-1-560.
2. As to the merits of the claim, the parties originally appeared for a hearing before Commissioner McCaskill on May 15, 2012, which resulted in a Decision and Order of the Single Commissioner on August 23, 2012. The August 23, 2012 Decision and Order was appealed to the Full Commission and on May 15, 2013, the Appellate Panel

entered a Decision and Order, which was ultimately unappealed and is now the law of the case.¹

3. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Samuel Rose was an employee of JJS Trucking on August 10, 2011.
4. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant sustained compensable injuries to his head, [right] knee, [right] leg, back, and neck arising out of and in the course of his employment with JJS Trucking.
5. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.
6. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.
7. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, On August 10, 2011, JJS Trucking, LLC was operating without proper insurance as required by the Workers' Compensation Act.
8. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on August 10, 2011, JJS Trucking, LLC was operating as a subcontractor for Chris Thompson Services, LLC, and is an "upstream employer" pursuant to §42-1-415.

¹ The issue of whether the Commission erred as a matter of law in failing to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 was preserved for appeal by Defendants Christ Thompson, LLC and Bridgefield Casualty's subsequent Motion and resulting appeals to the Full Commission and the S.C. Court of Appeals. By Order of the Court of Appeals dated January 28, 2015, Defendants' appeal was dismissed as not immediately appealable and preserved for further adjudication or appeal after a final decision of the Commission.

9. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.
10. As a result of the May 15, 2013 Appellate Panel Decision and Order, Claimant was found to not be at maximum medical improvement and Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company were ordered to provide Claimant with "an evaluation to determine the extent of his injuries" and further ordered that Claimant was "entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier." The Full Commission also found that Claimant was entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reached maximum medical improvement.
11. After a review of the evidence as a whole, we find Defendants Thompson Services, LLC and Bridgefield Casualty Insurance Company provided Claimant with the medical evaluation pursuant to the original Single Commissioner Order dated August 23, 2012 and affirmed with amendments by the May 15, 2013 Decision and Order of the Appellate Panel. This evaluation with Dr. Greg Jones of Charleston Spine & Physical Medicine dated March 20, 2013 and updated on April 16, 2013, address Claimant's neck, back and right knee complaints. Dr. Jones reviewed Claimant's history of treatment modalities including epidural blocks to the lumbar spine, physical therapy, epidural injections and right-sided cervical facet injections to the cervical spine, and medications. Dr. Jones opined Claimant would likely not benefit significantly from single level fusion C5-6 as there was no evidence of definitive cervical radiculopathy.

(Defendants' APA p. 4). Dr. Jones placed Claimant at maximum medical improvement as of March 20, 2013.

12. During the same time as his evaluation with Dr. Jones, Claimant continued treating on his own with his family physician, Dr. Alan N. Abel. While Dr. Abel had initially referred Claimant to a neurosurgeon for evaluation of surgery on his neck back in October of 2012, after reviewing Dr. Jones' records, Dr. Abel opined that he was "essentially in agreement with this interpretation." Dr. Abel also placed Claimant at maximum medical improvement and noted he was "not optimistic that [Claimant] will improve to any significant degree in the future." Dr. Abel noted that "perhaps" Claimant could benefit from physical therapy and also referenced a EMG to see if there is nerve decompression in his neck requiring cervical intervention. (Claimant's APA p. 70).
13. On July 15, 2013, Claimant obtained his own Independent Medical Evaluation with Dr. Steven C. Poletti who reviewed Claimant's MRI scans of the cervical spine that showed two-level disc herniations at C5-6 and C6-7 as well as bilateral C6 nerve root compression. Dr. Poletti diagnosed Claimant with cervical disc herniation with spondylosis, cervical radiculopathy, low back pain of indeterminate etiology, and history of right knee contusion/impaction fracture. Dr. Poletti opined Claimant required an evaluation by a knee specialist and that surgery was indicated for Claimant's two-level cervical disc disease with pain radiating into his arm. Dr. Poletti also opined Claimant needed an MRI scan of his lumbar spine.
14. Upon review of the preponderance of the evidence as a whole, we find Claimant is not at maximum medical improvement for his August 10, 2011 work injury. We give

greater weight to the medical opinions of Dr. Poletti than we do the medical opinions of Dr. Jones. Specifically, Dr. Poletti agreed with Claimant's prior treating physician, Dr. Wildstein, who had previously recommended a cervical fusion. In addition, it is important to note Dr. Jones is a physical medicine and rehabilitation doctor, as opposed to Dr. Wildstein and Dr. Poletti, both of whom are orthopaedic surgeons specializing in the spine. We give great weight to Dr. Poletti's assessment of Dr. Jones's medical opinion wherein Dr. Poletti stated, "a non-surgical recommendation from a non-surgeon doesn't really mean all that much to me." (Claimant's APA pp. 99-100).

15. With regards to Claimant's cervical spine, we find the opinions of the two orthopaedic spine surgeons, Drs. Wildstein and Poletti, outweigh the medical opinion of Dr. Jones. As such, we find Claimant is entitled to additional medical treatment to include the recommended cervical fusion as recommended as it has been shown by a preponderance of the evidence that it would tend to lessen his period of disability.
16. We find Defendants had the surgical recommendations of Dr. Wildstein and Dr. Poletti at time of the September 23, 2013 hearing before the Hearing Commissioner and elected to deny the surgery, which was their right, and rely on the medical opinion of Dr. Jones. As such, we find the Claimant has shown good cause to direct his own medical care and hereby appoint Dr. Steven C. Poletti, or other referral from Dr. Poletti, as the authorized provider for Claimant's cervical and lumbar spine treatment.
17. We find Claimant is entitled to an evaluation with an orthopaedic surgeon who specializes in the knee/lower extremity to obtain updated MRI scans and an assessment of Claimant's continued complaints of pain in his right knee. This finding is based upon the preponderance of the evidence including the recommendation of Dr. Poletti,

of which we give great weight, as well as the testimony of the Claimant. Defendants retain the right to direct Claimant's medical treatment as it relates to his right knee injury.

18. Claimant is entitled to temporary total disability benefits from August 11, 2011 to the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum award of any back payment of temporary total disability benefits due.

19. All other issues are held in abeyance and preserved for future adjudication or appeal.

CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. A voluntary dismissal leaves the situation as though no suit had ever been filed. Following this rule, Claimant's voluntary dismissal of his of his third party claim made the claim a nullity and S.C. Code Ann. Sec. 42-1-560 is not applicable. As a result, there is no violation of S.C. Code Ann. Sec. 42-1-560 when Claimant's third-party claim is treated as never being filed. *See Callahan v. Beaufort Cty. Sch. Dist.*, 375 S.C. 92, 97, 651 S.E.2d 311, 314 (2007).
3. "... [O]ur courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable." *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 458 S.E. 2d 76, 79 (Ct. App. 1995); *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E. 2d, 200, 206 (Ct. App. 2012).

4. Claimant is not at maximum medical improvement for his injuries to his neck (cervical spine), back (lumbar spine), and right leg (knee).
5. Pursuant to S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Section 42-15-80, Claimant is entitled to treatment for his neck, back, and right knee. Defendants are liable for Claimant's future treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck and back injuries. Defendants are to direct Claimant's medical treatment for his right knee.
6. Claimant is entitled to temporary total disability benefits from August 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment of any back-owed TTD accrued during litigation.

ORDER AND AWARD

Based upon the above Findings of Fact and Conclusions of Law set forth herein,

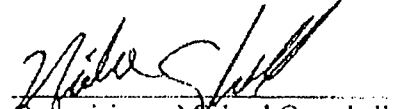
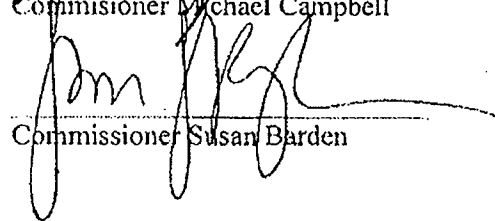
IT IS HEREBY ORDERED Claimant is not at maximum medical improvement for his injuries to his neck, back, and right knee.

IT IS HEREBY ORDERED Claimant is entitled to additional medical treatment to the neck and back, to include a cervical fusion and follow-up treatment with Dr. Steven C. Poletti or other referral made by Dr. Poletti.

IT IS HEREBY ORDERED Claimant is entitled to an evaluation of his right knee, including an updated MRI, with an orthopaedic surgeon who specializes in the knee/lower extremity at the direction of Defendants.

IT IS HEREBY ORDERED Claimant is entitled to temporary total disability benefits from September 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment for all back-owed TTD benefits as of the date of this Decision and Order

AND IT IS SO ORDERED.


Commissioner T. Scott Beck
Commissioner Michael Campbell
Commissioner Susan Barden

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 Valerie D. Deller on June 24, 2019

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Samuel Rose v Chris Thompson

SCWCC: 1112328

Commissioner: Taylor

Panel : Beck, Campbell, Barden

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Reconsider**. 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 is hereby;
_____ Dismissed as Interlocutory. _____ Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;
_____ Granted. Denied. _____ Dismissed _____ Preserved for hearing

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

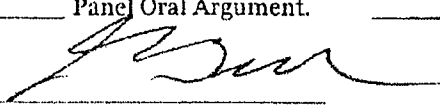
IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

_____ Remand to Panel as indicated below.
_____ Barden _____ James _____ Taylor
_____ Beck _____ Campbell _____ 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.


T. Scott Beck, Chair
For the Commission

Columbia, South Carolina

7/15 2019

CONCURRING:

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

NOT PARTICIPATING:

 x

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 HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 15 day of July, 2019.

By: Valerie D. Deller
SCWCC Judicial Department

9/23/2011 4:08:28 PM Batch: 17515461

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: Unassigned
Carrier File #: 943450
Carrier Code #: 1067
Employer FEIN #: 1112328

Claimant's Name: Samuel Rose SSN: [REDACTED]
Address: [REDACTED]
City: [REDACTED] State: SC Zip: [REDACTED]
Home Phone: [REDACTED] Work Phone: ()

Employer's Name: JJS Trucking, LLC (uninsured employer)
Chris Thompson Services, LLC (upstream employer)
Address: 137-A Gordon Street
City: Charleston State: SC Zip: 29403
Insurance Carrier: SCUEF
Bridgefield Casualty Insurance Company (Chris Thompson)

Preparer's Name: Joseph Fisher, Esquire Law Firm: George Sink, P.A. Preparer's Phone #: (843) 569-1700

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: on or about 8/10/2011

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to right knee, back, neck, and head on or about 08/10/2011 in Charleston County, State of South Carolina.
1b. Body part(s) affected are: right knee, back, neck, and head.

Briefly describe how the accident occurred: Claimant was involved in a traffic collision during course and scope of employment.

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 or about 08/10/2011 in the following manner:

Verbally to owner of company.

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

☐ (a) medical examination and treatment for: all above-referenced injuries

☐ (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:
from date of injury to MMI.

☒ 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 \$To Be Determined, 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:

N/A

11a. Further grounds or unusual aspects of claim:

Any and all allowable; Claimant reserves the right to amend.

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:

MUSC, 171 Ashley Avenue, Charleston, SC 29403; Dr. Alan Abel, 7741-C Dorchester Road, N. Charleston, SC 29418; Tri-County Spinal Care Center, 8626 Dorchester Road, Suite 101, N. Charleston, SC 29420.

11c. To the best of your knowledge, did you have any prior permanent disability? No.

If yes, describe: N/A

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: 60 minutes

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

SCWCC

SEP 14 2011

INSURANCE &
MEDICAL SERVICES

Joseph B. Fisher, Esq.
Preparer's Signature

Attorney for Claimant

jfisher@sinklaw.com

09/08/2011
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

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

50

9/23/2011 4:08:29 PM Batch: 17515461

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER UNASSIGNED

Samuel Rose,)
Claimant,)
v.)
JJS Trucking, LLC, and Chris Thompson)
Services, LLC,)
Employers,)
and)
SCUEF, and Bridgefield Casualty)
Insurance Company,)
Carriers.)

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 8, 2011, I mailed a copy of the attached Form 50 (request for hearing) by depositing copies of same with the United States Postal Service, first-class, postage pre-paid, to the below-listed counsel/parties/entities addressed as follows:

Ms. Virginia Crocker, Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
1333 Main Street; Suite 500
Columbia, South Carolina 29202-1715

Samuel Rose
17 Ashton Street
Charleston, SC 29403

JJS Trucking, LLC
137-A Gordon Street
Charleston, SC 29403

S.C. Uninsured Employers' Fund
100 Executive Center Drive, Ste 101
Columbia, SC 29210

Chris Thompson Services, LLC
Post Office Box 3377
Summerville, South Carolina 29484

Bridgefield Casualty Insurance Company
Post Office Box 600
Gainesville, Georgia 30503


Isaac Garcia - Legal Assistant
George Sink, P.A.

North Charleston, SC
September 8, 2011

11:01:00
034

SCWCC

SEP 14 2011

INSURANCE &
MEDICAL SERVICES

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Samuel A. Rose,	)	W.C.C. FILE NO. 1112328
	)	
Employee/Claimant,	)	
	)	
-vs-	)	PETITION TO TRANSFER LIABILITY
	)	TO S.C. UNINSURED EMPLOYERS' FUND
JJS Trucking, LLC and Chris Thompson	)	PURSUANT TO S.C. CODE ANN. § 42-1-415
Services, LLC,	)	
	)	
Employers,	)	
	)	
and	)	
	)	
Bridgefield Casualty Insurance Co. and	)	
The S.C. Uninsured Employers' Fund,	)	
	)	
Carriers,	)	
	)	
Defendants.	)	
	)	

TO: The South Carolina Workers' Compensation Commission; Joseph B. Fisher, Esq., attorney for the Claimant; JJS Trucking, LLC; Timothy B. Killen, Esq., attorney for The South Carolina Uninsured Employers' Fund; and F. Reid Warder, Esq., attorney for Travelers Insurance Company;

PLEASE TAKE NOTICE that Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company hereby Petition the South Carolina Workers' Compensation Commission pursuant to S.C. Code Ann. § 42-1-415 to transfer liability for this claim to the S.C. Uninsured Employers' Fund based upon the following:

1. In his December 6, 2011 Form 50, the Claimant named JJS Trucking, LLC and Chris Thompson Services, LLC (upstream contractor) as employers at the time of

his August 10, 2011 work-related accident. The Claimant alleges injuries to the right knee, back, neck, and head as a result of an August 10, 2011 motor vehicle accident.

2. JJS Trucking, LLC was the Claimant's direct employer at the time of the August 10, 2011 accident. (See attached depositions of Samuel Rose and Sedrick Smalls).
3. JJS Trucking, LLC was a subcontractor for Chris Thompson Services, LLC at the time of the Claimant's alleged injuries.
4. JJS Trucking, LLC provided Chris Thompson Services, LLC with a Certificate of Liability Insurance, with effective date of October 8, 2010 and expiration date of October 8, 2011 for its workers' compensation policy, at the time it commenced work for Chris Thompson Services, LLC. (Exhibit A).
5. Travelers Insurance Company is listed as the workers' compensation insurer on the Certificate of Insurance provided by JJS Trucking, LLC to Chris Thompson Services, LLC.
6. JJS Trucking's workers' compensation policy with Travelers apparently lapsed, without notice to or the knowledge of Chris Thompson Services, LLC, prior to the August 10, 2011 accident.
7. Pursuant to S.C. Code Ann. § 42-1-415(A), "[n]otwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this

title...In the event that employer is uninsured...the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employer's Fund."

8. Pursuant to S.C. Code Ann. § 42-1-415(B), "[t]o qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee."
9. Under S.C. Code Ann. § 42-1-415, it is clear that when a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance, and the higher tier subcontractor, contractor, or project owner collects documentation of said insurance, the higher tier party must be relieved of any and all liability under this title.
10. JJS Trucking, LLC represented itself to Chris Thompson Services as having workers' compensation insurance coverage as evidenced by the attached Accord Form 25, Certificate of Insurance, which is a standard form acceptable to the Commission. (Exhibit A).
11. Furthermore, S.C. Code Ann. § 42-1-415(C) requires that the lower tier subcontractor notify, by certified mail, the higher tier contractor, subcontractor, or project owner of a lapse in coverage within five days of such a lapse in coverage.

12. JJS Trucking, LLC never provided Chris Thompson Services, LLC with notice, by certified mail or otherwise, that its workers' compensation coverage had lapsed, as required by S.C. Code Ann. § 42-1-415(C).
13. Based on all of the above, Chris Thompson Services, LLC is informed and believes it must be relieved of any and all liability under this title.

WHEREFORE, Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company respectfully request that the South Carolina Workers' Compensation Commission issue an Order relieving Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company from any liability under the Act for WCC Claim Number 1112328 in accordance with S.C. Code Ann. § 42-1-415 and transfer liability, if any, to the S.C. Uninsured Employers' Fund.

Respectfully submitted,

TRASK & HOWELL, L.L.C.
P. O. Box 2167
Mt. Pleasant, SC 29465

By Kirsten L. Barr
Kirsten L. Barr
Attorney for Chris Thompson Services, LLC
and Bridgefield Casualty Insurance Company

January 24, 2012
Refilled April 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2012 I have caused a true and correct copy of the Petition to Transfer Liability to be mailed postage prepaid to the Claimant's attorney and parties to be added addressed as follows:

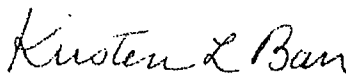
Joseph B. Fisher, Esq.
PO Box 63506
North Charleston, SC 29419

Sedrick Smalls
JJS Trucking, LLC
137-A Gordon St.
Charleston, SC 29403

Amy V. Cofield, Esq.
The Cofield Law Firm
809 South Lake Drive
Lexington, SC 29072

F. Reid Warder, Esq.
P.O. Box 20550
Charleston, SC 29413

Ms. Virginia Crocker
Judicial Director
S. C. Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715



Kirsten L. Barr

118/133\petition to transfer liability

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



WCC File #: 1112328
Carrier File #: 943450
Carrier Code #:
Employer FEIN #:

Claimant's Name: Samuel A. Rose SSN: [REDACTED]

Address: [REDACTED]

City, State, Zip: [REDACTED]

Home Phone: [REDACTED] Work Phone: [REDACTED]

Preparer's Name: Kirsten L. Barr Law Firm: Trask & Howell LLC

Employer's Name: JJS Trucking, LLC/SCUEF and Chris Thompson Services, LLC/Bridgefield Casualty Insurance Company

Address: 106 New Hope Dr.

City, State, Zip: Summerville, SC 29483

Insurance Carrier: Bridgefield Casualty Insurance Co.

Preparer's Phone #: (843) 881-1027

The date of injury reported on Form 12A is: August 10, 2011 (m/d/yyyy)

Check appropriate section(s). The employer's representative requests a hearing to:

- I. ☒ **Stop payment of compensation.** Claimant has reached maximum medical improvement and Claimant continues to receive temporary compensation payments. The employer's representative requests a hearing pursuant to § 42-9-260(D) to stop payment of temporary compensation. A hearing requested pursuant to this section must be held within sixty days of the date of the request.

Claimant reached maximum medical improvement on March 20, 2013 (copy of medical report must be attached).

Compensation payments are current as of June 13, 2013 and shall continue until otherwise ordered or until Form 17 is signed by the claimant.

A Form 17 was offered and refused on June 13, 2013.

- II. ☐ **Address suspension, termination, or reduction of temporary disability payments for any cause.**

☐ a. At any time pursuant to § 42-9-260(E).

☐ b. After the one-hundred-fifty day period has expired pursuant to § 42-9-260(F), R.67-505 and R.67-506.

The basis for the termination/ suspension is _____

- III. ☒ **Determine if compensation is due** pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount, based on the following grounds:

The Claimant has reached maximum medical improvement and impairment ratings have been assigned.

Claimant reached maximum medical improvement on March 20, 2013 (m/d/yyyy) (copy of medical report must be attached).

- IV. ☒ **Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.**

- V. ☐ **Determine amount of compensation for claims involving a fatality.** (Dependency investigation must be attached).

☐ a. Payment of unpaid balance of compensation when employee dies pursuant to § 42-9-280.

☐ b. Amount of compensation for death of employee due to accident pursuant to § 42-9-290.

A hearing requested pursuant to this section will be set on an expedited basis.

- A \$ 25.00 filing fee and updated Form 18 must be included with an employer's request for a hearing.
- An employer requesting a hearing must include certification that the request has been served on all parties in compliance with R.67-211.

Kirsten L. Barr

Preparer's Signature

Attorney for the Defendants

June 13, 2013

Title

Date

P.O. Box 2167, Mt. Pleasant, SC 29465

Address

Questions about the use of this form should be directed to the Judicial Department at 803-737-5675, or visit us online at www.wcc.sc.gov.

WCC Form # 21 Revised 04/18/2011

21

Employer's Request for Hearing



Claimant's Name: Samuel Rose
Address: [REDACTED]
City: [REDACTED] State: SC Zip: [REDACTED]
Home Phone: [REDACTED] Work Phone: ()
Preparer's Name: Joseph B. Fisher, Esq.

Employer's Name: JJS Trucking, LLC (uninsured employer)
Chris Thompson Services, LLC (upstream employer)
Address: 137-A Gordon Street
City: Charleston State: SC Zip: 29403
Carrier: SCUEF
Bridgefield Casualty Insurance Company
Preparer's Phone #: (843) 569-1700

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$433.34 2. AWW: \$650.00 Date of Injury: 8/10/2011
3. Type of injury and body part(s): Truck collision; right knee, back, shoulders, neck, and head.
4. Facts in controversy: The claimant maintains he is not at MMI and needs treatment per Dr. Wildstein and Dr. Poletti. However if the commission finds claimant to be at MMI what is his permanent disability pursuant to 42-9-10 and 42-9-30? Entitlement to future medical treatment pursuant to the Dodge case and 42-15-60; Utica Mohawk language in the order of the case along with lump sum payment; The claimant further requests payment of all causally related medical bills pursuant to previous Orders of the Commission; any and all other issues of compensability and/or benefits due under the Act.
5. Legal issues involved: as above
6. Unusual aspects: as above
7. Witnesses (designate if expert):* Claimant; family members of Claimant; medical providers of Claimant (expert)
Depositions of Claimant, Dr. Abel (expert) and employers' representatives to be provided at the hearing.
8. Exhibits: See APA Submissions
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See APA Submissions
10. Name, address, and specialty, if any, of the treating physician: See Attached.
11. Impairment rating(s); body part(s); physician and date of opinion: See Attached
12. I am amending my Form 50/51 in the following manner: _____

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

Signature: [Signature]
Joseph B. Fisher, Attorney for Claimant
Date of hearing: August 5, 2013 at 11:00AM

Email: jfisher@sinklaw.com

Time needed for hearing: 60 minutes

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.

* Commissioners reserve the right to admit expert witnesses at hearings.

South Carolina Workers' Compensation Commission
1333 Marion Street, Suite 500
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739



PRE-HEARING BRIEF
WCC FILE NO: 1112328

Samuel A. Rose
Claimant's Name

Address

City

State

Zip

Home Phone

Work Phone

Kirsten L. Barr

Preparer's Name

JJS Trucking, LLC/SCUEF and Chris Thompson Services,
LLC/Bridgefield Casualty Insurance Company

Employer's Name

106 New Hope Dr.

Address

Summerville, SC 29483

City

State

Zip

Bridgefield Casualty Insurance Co.

Carrier

(843) 881-4228

Phone #

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$433.34 2. AWW: \$650.00 Date of Injury: August 10, 2011

3. Type of injury and body part(s): Alleged head, neck and right knee injury

4. Facts in controversy:

Claimant is an employee of JJS Trucking, which is a subcontractor of Chris Thompson Services. At the time JJS Trucking was engaged to perform work for Chris Thompson Services, Chris Thompson Services obtained a Certificate of Workers Compensation Insurance. In October 2010, Chris Thompson Services obtained an updated Accord Form 25 Certificate of Liability Insurance showing that JJS Trucking was insured for workers' compensation by Travelers Insurance Co. for the period from October 8, 2010 until October 8, 2011. Chris Thompson Services is the named certificate holder and Travelers Insurance Company's authorized agent, David W. Hayes swore that should the policy be "cancelled before the expiration date thereof, the issuing insurer will endeavor to mail 10 days written notice to the certificate holder," Chris Thompson Services. Apparently, coverage for JJS Trucking lapsed prior to the August 10, 2011 accident; however, neither JJS Trucking, nor Travelers Insurance Company, nor its agents notified Chris Thompson Services of the lapse in coverage, as expressly required by S.C. Code Ann. § 42-1-415. By Order dated May 15, 2013, the Commission has already

conclusively determined that "JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance."

The Claimant has now received all necessary and causally-related medical care and treatment and has been placed at maximum medical improvement by Dr. Gregory M. Jones as of March 20, 2013, with impairment ratings of 5% of the cervicothoracic spine and 5% of the lumbar spine and "no specific restrictions regarding vocational and/or avocational pursuits."

5. Legal issues involved:

Defendants Chris Thompson Services, LLC, and Bridgefield Casualty seek to transfer liability for continuing compensation to the Uninsured Employers Fund pursuant to S.C. Code Ann. § 42-1-415, in addition to reimbursement for all benefits paid to date. Defendants seek to terminate temporary total disability compensation based upon a finding of maximum medical improvement pursuant to S.C. Code Ann. § 42-9-260, with a credit for all benefits paid after March 20, 2013. Defendants also seek a determination of the Claimant's entitlement to benefits for loss of use of the back related to the August 10, 2011 accident, commensurate with the impairment ratings in the record, pursuant to S.C. Code Ann. § 42-9-30(21).

6. Unusual aspects: None known or anticipated.

7. Witnesses (designate if expert*): Chris Thompson; Sedrick Smalls

8. Exhibits: See attached Notice of Submissions; Depositions of Claimant and Sedrick Smalls, WCC File

9. Medical evidence: See attached Notice of Submissions

10. Name, address, and specialty, if any, of the treating physician:

Dr. Gregory M. Jones, Charleston Spine and Physical Medicine

11. Impairment rating(s); body part(s); physician and date of opinion:

5% cervicothoracic file; 5% lumbar spine per Dr. Jones on April 16, 2013

12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation *** Note that the hearing in this case was scheduled prior to the effective date of the mediation regulation.******

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to: Joseph B. Fisher, Esq. PO Box 63506, North Charleston, SC 29419; Benjamin W. Akery, Esq., P.O. Box 1028, Goose Creek, SC 29445; Amy V. Cofield, Esq., The Cofield Law Firm, 809 South Lake Drive, Lexington, SC 29072; and Sedrick Smalls, JJS Trucking, LLC, 765 McDaniel Town Road, Ridgeville, SC 29472 on the 9th of September, 2013
by ☒ first class postage ☐ certified mail ☐ personal service.

Signature: Kristen L. Barr

Email: kbarr@trask-howell.com

Date of hearing: September 23, 2013

Time needed for hearing: One hour

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.

* Commissioners reserve the right to admit expert witnesses at hearings.

* Commissioners reserve the right to admit expert witnesses at hearings.

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

Samuel A. Rose,	)	W.C.C. FILE NO. 1112328
Employee/Claimant,	)	
	)	
v.	)	MOTION TO INTRODUCE
	)	NEWLY DISCOVERED EVIDENCE
JJS Trucking, LLC, Employer, and	)	
the South Carolina Uninsured	)	
Employers' Fund,	)	
	)	
and	)	
	)	
Chris Thompson Services, LLC,	)	
Statutory Employer, and	)	
Bridgefield Casualty Insurance	)	
Company, Carrier,	)	
Defendants.	)	

TO: Commissioner Aisha Taylor, South Carolina Workers' Compensation Commissioner,
Joseph B. Fisher, Esq., attorney for the Claimant, Amy B. Coefield,, Esq., attorney for the
Uninsured Employer's Fund, and J. Eric Kauffmann, attorney for JJS Trucking, LLC:

PLEASE TAKE NOTICE that the above-named Defendants hereby move, pursuant to
Regulation 67-215 and Regulation 67-707 to introduce newly discovered evidence into the record
and the Commission's file. This Motion is based upon the following:

1. This matter is currently pending before Commissioner Taylor for a determination of whether
the Claimant is entitled to any additional medical or compensation benefits under the
Workers' Compensation Act.
2. On November 8, 2013, which was following the hearing but prior to a determination of the
issues, the Defendants learned for the first time that the Claimant commenced a third party

claim against Robbie Clark and his insurance carrier in the Charleston County Court of Common Pleas on February 20, 2013. (See Attached Exhibit "A").

3. The Claimant's third party action arises out of the same alleged accident on August 10, 2011 for which the Claimant seeks workers' compensation benefits. (See Attached Exhibit "B").
4. South Carolina Code § 42-1-560 sets for the requirements for simultaneously pursuing third-party action and a workers' compensation claim. The statute provides:

"Notice of the commencement of the [third party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]."

5. The Claimant did not provide any notice of the commencement of the third party action until November 5, 2013, when counsel for the Claimant notified the undersigned counsel for the Defendants that his third party action was scheduled for mediation. The Claimant's "notice" was clearly beyond the thirty day requirement (it was actually 258 days after the commencement of his third party action) and, to date, no Form S2 (the form prescribed by the Commission) has ever been filed or served.
6. Because the Workers' Compensation Act is in derogation of common law rights, the requirements of § 42-1-560 must be strictly construed. Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even if the Defendants have "not lost [their] right of subrogation against the potentially responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra.

7. According to the South Carolina Supreme Court, "§ 42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, supra.

WHEREFORE, the Defendants respectfully contend that newly discovered evidence (*i.e.*, the third-party claim filed in the Circuit Court on February 20, 2013), when considered with the Commission's file that does not include a Form S2 dated on or before March 22, 2013 and the undersigned's averment that no Form S2 has been served upon the Defendants, compels a conclusion that the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560(b) and; therefore, he is not entitled to any additional workers' compensation benefits as a matter of law. The Defendants request that the Hearing Commissioner receive this newly discovered evidence (Exhibits "A" and "B") or otherwise take judicial notice of the fact that the Claimant commenced a third party action on February 20, 2013 but failed to File a Form S2 within the requisite 30 days and render her decision accordingly..

WE HEREBY SO MOVE.

TRASK & HOWELL, L.L.C.
P. O. Box 2167
Mt. Pleasant, SC 29465

By Kirsten L. Barr
Kirsten L. Barr
Attorney for the Defendants

November 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2013, I have caused a true and correct copy of the Motion to Introduce Newly Discovered Evidence to be mailed postage prepaid to the parties of record addressed as follows:

Benjamin W. Akery, Esq.
PO Box 1028
Goose Creek, SC 29445

Joseph B. Fisher, Esq.
PO Box 63506
North Charleston, SC 29419

J. Eric Kaufmann, Esq.
P.O. Box 6461
Columbia, SC 29260

Amy V. Cofield, Esq.
The Cofield Law Firm
809 South Lake Drive
Lexington, SC 29072

Kirsten L. Barr

Kirsten L. Barr

118/133\motion

EXHIBIT "A"

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robbie Clark,

Plaintiff,

vs.

Samuel A. Rose,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-10-2996

AMENDED ANSWER
AND COUNTERCLAIM
(Jury Trial Demand)

FILED
2013 FEB 20 PM 1:25
JAMES ARMSTRONG
CLERK OF COURT

pub

The defendant, above named, answering the Complaint of the plaintiff, above named, alleges and says as follows:

1. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 1 of the Complaint.
2. That the defendant admits the allegations contained in paragraph 2 of the Complaint.
3. That the defendant admits the allegations contained in paragraph 3 of the Complaint.
4. In response to paragraph 4 of the Complaint, defendant lacks sufficient information as to the particulars, but admits plaintiff was traveling east on I-26 and struck defendant in the rear.
5. In response to paragraph 5 of the Complaint, defendant admits he was traveling east on I-26, but denies that his lights were malfunctioning.
6. In response to paragraph 6 of the Complaint, defendant admits he was hit from behind but denies his lights were malfunctioning.
7. In response to the allegations of paragraph 7, the defendant hereby realleges and incorporates by reference paragraphs 1 through 6 as fully and effectively as if set forth herein verbatim.

8. That the defendant denies the allegations contained in paragraph 8 of the Complaint.
9. In response to paragraph 9 of the Complaint, defendant denies the allegations as to negligence and admits the plaintiff sustained injury.
10. That the defendant denies each and every allegation not specifically admitted.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Comparative Negligence)

11. That plaintiff's comparative negligence is a bar to recovery or reduces plaintiff's recovery as provided by law.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Worker's Compensation Exclusivity/Fellow Employee)

12. That defendant was the statutory employee of Chris Thompson Trucking, plaintiff's employer. This plaintiff and defendant were co-employees and this action may be barred by the doctrines of worker's compensation exclusivity and/or the fellow employee doctrine.

FURTHER ANSWERING AND AS A COUNTERCLAIM

13. The allegations of paragraphs 1 through 12 of the Answer are hereby realleged and incorporated by reference as fully and effectively as if set forth herein verbatim.
14. That Plaintiff Robbie Clark is a citizen and resident of the County of Dorchester, State of South Carolina.
15. That Defendant Samuel A. Rose is a citizen and resident of County of Charleston, State of South Carolina.

16. That the alleged acts and omissions contained herein occurred in the County of Charleston, State of South Carolina.

17. That Defendant Samuel A. Rose, at all times alleged in the Complaint, was acting in the course and scope of his employment with JJS Trucking and was operating a JJS trucking vehicle.

18. Plaintiff Robbie Clark was at all times alleged in the Complaint acting as an independent contractor working as a subcontractor to the owner of the vehicle he was operating.

19. Defendant Samuel A. Rose hereby brings his cause of action in tort against Robbie Clark for Robbie Clark's negligent, grossly negligent, careless, reckless, negligent *per se*, willful and wanton in one or more of the following particulars, to wit:

- (a) In then and there operating said trucking vehicle at a rate of speed that was excessive under the circumstances then prevailing;
- (b) In then and there following too closely;
- (c) In then and there failing to keep a proper lookout;
- (d) In then and there failing to maintain proper control over his aforesaid trucking vehicle;
- (e) In then and there failing to equip his trucking vehicle with adequate brakes or braking system; and if so properly equipped, in failing to properly utilize them;
- (f) In then and there failing to equip his trucking vehicle with adequate and safe steering mechanisms; and if so properly equipped, in failing to properly utilize them;
- (g) In then and there failing to equip his trucking vehicle with an adequate signaling device or horn; and if so properly equipped, in failing to properly utilize it;

- (h) In then and there failing to take advantage of any last clear chance to avoid striking Defendant Samuel A. Rose;
- (i) In then and there colliding with Defendant Samuel A. Rose's truck vehicle;
- (j) In then and there failing to properly observe the road and traffic conditions;
- (k) In then and there failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances;
- (l) In failing to yield the right-of-way to Defendant Samuel A. Rose;
- (m) In then and there operating a trucking vehicle with a reckless disregard for the rights and safety of others;
- (n) All of which were the direct and proximate cause of the injuries and damages Defendant Samuel A. Rose suffered, as are more fully set forth below, said acts being in violation of the laws of the State of South Carolina.

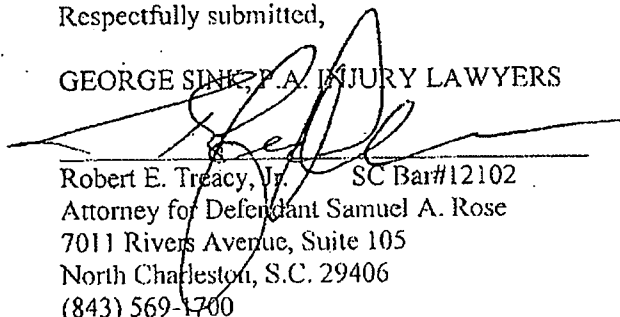
20. As the direct and proximate result of the aforesaid negligence, grossly negligent, careless, reckless, negligent *per se*, willful and wonton acts or omissions of Plaintiff Robbic Clark, Defendant Samuel A. Rose suffered great and permanent physical harm and severe injury from being thrown about within his trucking vehicle, all of which has and will, upon information and belief, in the future cause Defendant Samuel A. Rose to undergo much physical pain, suffering, and mental anguish, and has and will, upon information and belief, in the future cause Defendant Samuel A. Rose to have to spend money for medicine and medical services and has caused Defendant Samuel A. Rose to suffer economic losses including economic losses from the loss of his ability to earn wages.

21. Defendant Samuel A. Rose is informed and believes that he is entitled to judgment for actual and punitive damages against Plaintiff Robbie Clark that a trier of fact may determine, together with the costs of this action and for such other relief as this Court may deem just and proper.

WHEREFORE, Defendant Samuel A. Rose prays for judgment against Plaintiff Robbie Clark, on claims of negligence, gross negligence, carelessness, recklessness, negligence *per se*, and willfulness in such sum of actual and punitive damages that a trier of fact may determine together with such other relief this Court may deem just and proper.

Respectfully submitted,

GEORGE SINE, P.A. INJURY LAWYERS



Robert E. Treacy, Jr. SC Bar#12102
Attorney for Defendant Samuel A. Rose
7011 Rivers Avenue, Suite 105
North Charleston, S.C. 29406
(843) 569-1700

And

CLAWSON and STAUBES, LLC
Timothy A. Domin
Attorney for Defendant Samuel A. Rose
126 Seven Farms Drive, Ste. 200
Charleston, SC 29492
(843) 557-2026

North Charleston, SC

January 2, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROBBIE CLARK,

Plaintiff,

vs.

SAMUEL A. ROSE,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-10-2996

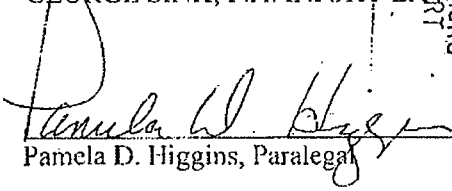
CERTIFICATE OF SERVICE

I, the undersigned employee of George Sink, P.A. Injury Lawyers, do hereby certify that on this day, February 19th 2013, I served a copy of *Amended Answer and Counterclaim* on the below listed parties via first class mail:

Jonathan F. Krell, Esq.
Uricchio Howe Krell Jacobson Toporek and Keith, PA
PO Box 399
Charleston, SC 29402

Robert Daniel Moseley, Jr., Esq.
Smith Moore Letherwood, LLP
300 East McBee Ave., Ste. 500
Greenville, SC 29601

GEORGE SINK, P.A. INJURY LAWYERS


Pamela D. Higgins, Paralegal

2013 FEB 20 PM 1:25
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

EXHIBIT "B"

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ROBBIE CLARK,)

Plaintiff,)

v.)

SAMUEL A. ROSE,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10- 2996

COMPLAINT
Jury Trial Requested

FILED
2012 MAY -7 PM 3:03
JULIE J. ARMS / RONG
CLERK OF COURT

Plaintiff, complaining of Defendant, alleges and says:

PARTIES

1. Plaintiff is and was at all times mentioned herein a citizen and resident of Dorchester County, South Carolina.

2. Defendant is and was at all times mentioned herein a citizen and resident of Charleston County, South Carolina.

JURISDICTION and VENUE

3. This Court has subject-matter jurisdiction over the claims in this lawsuit, personal jurisdiction over Defendant and venue is proper in Charleston County, South Carolina.

FACTS

4. On or about August 10, 2011, at approximately 3:40 a.m., Plaintiff was the operator of a 1999 tractor-trailer bearing South Carolina license plate number P434865 for the year 2012 and was traveling in an easterly direction along I-26.

5. At the time and place aforementioned, Defendant was the operator of a 1995 tractor-trailer bearing South Carolina license plate number PS91257 for the year 2011 and was traveling in an easterly direction along I-26 with malfunctioning tail lights.

6. That suddenly and without any warning, due to Defendant's malfunctioning tail lights, Plaintiff struck the rear of Defendant's tractor-trailer, thereby causing a collision and injuring Plaintiff.

FOR A FIRST CAUSE OF ACTION
(Negligence, Gross Negligence)

7. Plaintiff incorporates all allegations of Paragraphs above into this cause of action as if set forth verbatim.

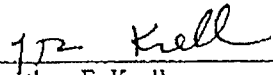
8. That the injuries and damages complained of herein were directly and proximately caused by the following negligent, careless, reckless, willful, and grossly negligent acts of Defendant all in violation of the statutes and common laws of the State of South Carolina, combining and concurring:

- (a) In failing to insure his vehicle was safe for travel on the roads and highways;
- (b) In failing to inspect his vehicle properly before travel;
- (c) In failing to have functioning tail lights;
- (d) In failing to comply with the Federal Motor Carrier Safety Regulations;
- (e) In operating the tractor-trailer without adequate rest or sleep;
- (f) In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there prevailing;
- (g) In otherwise being negligent, reckless, and careless; and
- (h) For such other acts and omissions that may become more apparent through the discovery and/or trial of this matter.

9. That as a result of the aforesaid negligent, grossly negligent, careless, willful, and reckless acts, Plaintiff has been injured and damaged. Plaintiff has, is and will in the future suffer from the following, including but not limited to: pain and suffering; a permanent injury; medical expenses; trauma; loss of enjoyment of life; lost wages; annoyance and inconvenience and travel - all to his injury and damage in an amount of actual and punitive damages to be determined at the trial of this action.

WHEREFORE, Plaintiff requests that judgment be entered against Defendant on all causes of action and that Plaintiff be awarded: actual damages; punitive damages; a trial by jury as to all causes of action properly triable; the costs of this action; and such other and further relief as the Court may deem just and proper.

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.


Jonathan F. Krell
17 1/2 Broad Street - Post Office Box 399
Charleston, South Carolina 29402
Tel: (843) 723-7491; Fax: (843) 577-4179
ATTORNEYS FOR PLAINTIFF

April 30, 2012
Charleston, South Carolina



Claimant's Name: Samuel A. Rose SSN: [REDACTED]
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
Home Phone: _____ Work Phone: _____
Preparer's Name: Benjamin W. Akery Law Firm: The Steinberg Law Firm

Employer's Name: JJS Trucking, LLC (Uninsured Employer); Chris Thompson Services, LLC (upstream employer)
Address: 137-A Gordon's Street
City: Charleston State: SC Zip: 29403
Insurance Carrier: SC Uninsured Employers Fund and/or Bridgefield Casualty Insurance Co.
Preparer's Phone #: (843) 720-2800

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ claimant ☐ employer Date of injury: August 10, 2011

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).

SEE ATTACHED ADDENDUM

(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 that I have served this document pursuant to R.67-211 by delivering a copy to Kirsten L. Barr, Esquire,
Name

Trask & Howell, LLC, P. O. Box 2167, Mt. Pleasant, 29465-2167; Amy V. Cofield, Esquire, Cofield Law Firm, LLC, 809 South Lake Drive, Lexington, SC 29072; J. Eric Kauffman, Esquire, P.O. Box 6461, Columbia, SC 29260
Address

on the 14 day of January, 2014 by ☐ first class mail ☐ personal service ☒ certified mail.

Preparer's Signature

Attorney for the Claimant
Title

January 14, 2014
Date

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

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the losing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

GROUND'S FOR REVIEW

Claimant: Samuel A. Rose

Employer/Carrier: JJS Trucking, LLC (SCUEF); Chris Thompson Services, LLC
(Bridgefield Casualty Ins. Co.)

WCC No.: 1112328

- FIRST: The Hearing Commissioner erred in granting Defendant's Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies November 12, 2013 Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim filed in Charleston County Court of Common Pleas on February 20, 2013), the error being the defense of exclusive remedy was not pled by any of the Defendant's, nor was the issue raised at the September 23, 2013 hearing before the single Commissioner, further the Answer and Counterclaim could have been secured by the Defendant's before the September 23, 2013 hearing had they exercised reasonable diligence.
- SECOND: The Hearing Commissioner erred in denying the Claimant's November 21, 2013 Motion in Opposition to Introduce After Discovered Evidence summarily without any legal reasoning, findings of fact or conclusions of law to support this denial.
- THIRD: The Hearing Commissioner erred in denying Claimant's December 20, 2013 Motion to Introduce newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), holding the voluntary dismissal did not fit the meaning of "Newly Discovered Evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013, the error being there is no requirement under South Carolina Statutory Law, South Carolina Workers' Compensation Regulations or South Carolina Common Law Jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence.
- FOURTH: The Hearing Commissioner erred in granting Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntarily dismissal Claimant's third-party suit) the error being South Carolina case law holds that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed

and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, S.E.2d 311 (2007).

- FIFTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), the error being this is a gross miscarriage of justice as the single Commissioner is entertaining new defenses that were not pled nor argued at the September 23, 2013 hearing by the Defendant's, however the single Commissioner is not allowing the Claimant to introduce newly discovered evidence or to be heard to argue their position in response to Defendant's newly discovered evidence which would render the Defendant's exclusive remedy argument moot.
- SIXTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit) without holding a hearing on the issue to allow both sides to argue their respective positions or to reconvene the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulation 67-707(C)(2)(d).
- SEVENTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (Voluntary Dismissal of Claimant's third-party suit) without holding a hearing on the issue or reconvening the September 23, 2013 hearing, the error being it is the well-settled law of South Carolina that if the Commission undertakes to receive additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings. Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, S.E.2d 318 (1967). In the case at bar, there were no proceedings whatsoever, simply a Commissioner allowing newly discovered evidence to come in from one party and not allowing newly discovered evidence in rebuttal from the opposing party without holding a hearing on the issue or reconvening the original hearing.

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2014, I served the Defendant in the foregoing matter with a copy of the attached WCC Form No. 30 (Request for Commission Review) by mailing a copy of same via certified mail, postage pre-paid and addressed as follows:

S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202

Kirsten L. Barr, Esquire
Trask & Howell, LLC
P. O. Box 2167
Mt. Pleasant, SC 29465-2167

Amy V. Cofield, Esquire
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J. Eric Kauffman, Esquire
P.O. Box 6461
Columbia, SC 29260

By:


Laura L. Clarke

Paralegal to Benjamin W. Akery
Attorney for the Claimant

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1112328

SAMUEL A. ROSE, Employee,
Claimant/Appellant,

vs.

CHRIS THOMPSON SERVICES, LLC
AND J.J.S. TRUCKING, LLC, Employers,
and

BRIDGEFIELD CASUALTY
INSURANCE, SC UNINSURED
EMPLOYERS FUND, Carriers,

Defendants/Respondents.

BRIEF ON BEHALF OF
CLAIMANT/APPELLANT

STATEMENT OF CASE

This case was heard before the Honorable Commissioner Aisha Taylor on September 23, 2013 in St. Matthews, South Carolina to determine all issues set forth in the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies Form No. 21.

The Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company requested to stop/terminate payment of temporary total disability benefits and determine whether the Claimant was entitled to an award of permanency pursuant to the opinion of Dr. Greg Jones who placed the Claimant at maximum medical improvement on March 20, 2013 with impairment ratings of five percent (5%) to the cervico-thoracic spine and five percent (5%) to the lumbar spine. They further sought a

credit for temporary total disability benefits paid following March 20, 2013 and requested a finding commiserate with the impairment ratings given by Dr. Jones. Defendants JJS Trucking took the same position as the Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company. Additionally, Defendant South Carolina Uninsured Employer Fund took the same position as Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company.

The Claimant maintained he had suffered injuries to his head, knee, leg, back and neck and was not at maximum medical improvement. The Claimant relied upon an August 23, 2011 right knee MRI which showed a femoral condyle impaction fracture (Claimant's APA p. 73) and a November 9, 2011 cervical spine MRI which showed C5-6 and C6-7 disc herniations (Claimant's APA p. 91). The Claimant further relied on the opinion of Michael Wildstein, M.D. who recommended a C5-6 fusion surgery on December 14, 2011 (Claimant's APA p. 96) and Dr. Steven C. Poletti, M.D. who agreed with Dr. Wildstein and felt that surgical intervention was indicated in his July 15, 2013 report (Claimant's APA p. 100). The Claimant also maintained that if he was found to be at maximum medical improvement, he is permanently and totally disabled based upon Alan Abel, M.D. deposition testimony and Dr. Poletti's July 15, 2013 IME which stated he is to be on off duty status.

Subsequent to the hearing and before any proposed Order directives were provided by the Commissioner, the Defendant's Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Motion to Introduce Newly Discovered Evidence which was an Amended Answer and Counter Claim filed by the Claimant's

separate third-party counsel dated February 20, 2013. Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company alleged that because the Claimant did not file a Form S2 within thirty (30) days of filing their answer and counter claim, he was not entitled to any additional workers' compensation benefits.

On November 21, 2013, the Claimant timely filed a Motion in Opposition to Introduce After Discovered Evidence. The Claimant maintained the underlying third-party lawsuit did not settle therefore the employer and the workers' compensation insurance carrier did not lose their right of subrogation against the potential responsible third-party. Therefore the Motion to Introduce Newly Discovered Evidence should be denied. Alternatively, the Claimant requested that should the Defendants Motion to Introduce Newly Discovered Evidence be granted, that they be afforded the same opportunity to Introduce Newly Discovered Evidence, namely the Claimant's underlying third-party stipulation of dismissal.

On November 25, 2013 the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a return to Claimant's Motion in Opposition to Introduce After Discovered Evidence.

On December 20, 2013, the Claimant filed a Motion to Introduce Newly Discovered Evidence, namely the Claimant's underlying third-party lawsuit stipulation of dismissal without prejudice filed by Claimant's separate third-party counsel filed with the Charleston County Court of Common Pleas on December 5, 2013. The Claimant respectfully requested that the Newly Discovered Evidence be admitted rendering the Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies S2 and

exclusive remedy arguments moot pursuant to the Decision in Callahan v. Beaufort County School District, 375 S.C. 92, 651 S.E.2d 311 (S.C. 2007).

On December 23, 2013 the Defendant's Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Return to Claimant's Motion to Introduce Newly Discovered Evidence.

On January 3, 2014 the Honorable Commissioner Aisha Taylor issued three (3) Administrative Orders. The first Administrative Order granted the Defendant's Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies Motion to Introduce Newly Discovered Evidence (Claimant's third-party answer and counter-claim). The second Administrative Order summarily denied Claimant's Motion in Opposition to Introduce Newly Discovered Evidence. The third Administrative Order denied Claimant's Motion to Introduce Newly Discovered Evidence stating "the evidence sought to be introduced (a voluntary dismissal) does not fit the meaning of 'newly discovered evidence' under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013."

On January 14, 2014 out of an abundance of caution the Claimant timely filed a Form 30, Request for Commission Review, alleging seven (7) different grounds for review of Commissioner Taylor's January 3, 2014 Administrative Orders.

On January 21, 2014 the Honorable T. Scott Beck issued a Judicial Conference Decision and Order dismissing the Claimant's appeal as it was interlocutory.

On February 10, 2014 Claimant's separate third-party counsel filed Claimant's new Summons and Complaint dated February 3, 2014 with the Charleston County Court of

Common Pleas along with a Form S2 dated February 11, 2014 with the South Carolina Workers' Compensation Commission and served the employer and carrier through their attorney of record. On September 2, 2014, Commissioner Aisha Taylor rendered a Decision and Order which included the following findings of fact pertinent to this appeal:

1. The parties to this proceeding were sent directives for a proposed order on January 13, 2014.
2. The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants Motion to Introduce Newly Discovered Evidence).
3. The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the Commission that this third-party action had been commenced. To date, no Form S2 has been filed or served by the Claimant.

The Single Commissioner also made the following conclusions of law pertinent to this appeal:

1. S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
2. Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise

and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra.

3. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, supra. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.
4. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
5. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
6. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.
7. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
8. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

On September 11, 2014 the Claimant timely filed a Form 30, Request for Commission review alleging the following nine (9) grounds for review:

FIRST: The Hearing Commissioner erred in granting Defendant's Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies November 12, 2013 Motion to Introduce Newly

Discovered Evidence (Claimant's Answer and Counterclaim filed in Charleston County Court of Common Pleas on February 20, 2013), the error being the defense of exclusive remedy was not pled by any of the Defendant's, nor was the issue raised at the September 23, 2013 hearing before the single Commissioner, further the Answer and Counterclaim could have been secured by the Defendant's before the September 23, 2013 hearing had they exercised reasonable diligence.

- SECOND: The Hearing Commissioner erred in denying the Claimant's November 21, 2013 Motion in Opposition to Introduce After Discovered Evidence summarily without any legal reasoning, findings of fact or conclusions of law to support this denial.
- THIRD: The Hearing Commissioner erred in denying Claimant's December 20, 2013 Motion to Introduce newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), holding the voluntary dismissal did not fit the meaning of "Newly Discovered Evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013, the error being there is no requirement under South Carolina Statutory Law, South Carolina Workers' Compensation Regulations or South Carolina Common Law Jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence.
- FOURTH: The Hearing Commissioner erred in granting Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal Claimant's third-party suit) the error being South Carolina case law holds that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, S.E.2d 311 (2007).
- FIFTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), the error being this is a gross miscarriage of justice as the single Commissioner entertained new defenses that were not pled nor argued at the September 23, 2013 hearing by the Defendant's,

however the single Commissioner did not allow the Claimant to introduce newly discovered evidence or to be heard to argue their position in response to Defendant's newly discovered evidence which would render the Defendant's exclusive remedy argument moot.

SIXTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit) without holding a hearing on the issue to allow both sides to argue their respective positions or to reconvene the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulation 67-707(C)(2)(d).

SEVENTH: The Hearing Commissioner erred in granting the Defendant's Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (Voluntary Dismissal of Claimant's third-party suit) without holding a hearing on the issue or reconvening the September 23, 2013 hearing, the error being it is the well-settled law of South Carolina that if the Commission undertakes to receive additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings. Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, S.E.2d 318 (1967). In the case at bar, there were no proceedings whatsoever, simply a Commissioner allowing newly discovered evidence to come in from one party and not allowing newly discovered evidence in rebuttal from the opposing party without holding a hearing on the issue or reconvening the original hearing.

EIGHTH: The Hearing Commissioner erred in finding of fact #3 and Conclusion of Law #1 in holding that the Claimant failed to file a Form S2 when the Claimant did indeed file a voluntary dismissal of the Claimant's underlying 3rd party lawsuit as newly discovered evidence on December 19, 2013, which the Commissioner denied, then subsequently filed the appropriate S2 on February 10, 2014 after re-filing the underlying 3rd party lawsuit.

NINTH: The Hearing Commissioner erred in Conclusion of Laws #1, #2, #3, #4, #5, #6, #7, and #8 in holding that the Claimant did not provide notice of the 3rd party action by way of filing a Form S2 and therefore was not entitled to additional medical treatment, disability benefits or permanent disability when the Claimant voluntarily dismissed his underlying 3rd party claim on December 5, 2013 before settling it and

submitted the dismissal to the Commission as newly discovered evidence and then after re-filing the 3rd party lawsuit timely filed a Form S2 on [February 10, 2014], the error being that Claimant complied South Carolina case law which holds that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, S.E.2d 311 (2007).

The above referenced grounds for review can be summarized into the following issues on appeal.

ISSUES ON APPEAL

- I. **WHETHER THE SINGLE COMMISSIONER COMMITTED AN ERROR OF LAW IN HOLDING THAT THE CLAIMANT DID NOT PROVIDE NOTICE OF THE THIRD PARTY ACTION BY WAY OF FILING A FORM S2 AND THEREFORE WAS NOT ENTITLED TO ADDITIONAL MEDICAL TREATMENT, DISABILITY BENEFITS OR PERMANENT DISABILITY WHEN THE OVERWHELMING UNCONTRADICTED EVIDENCE SHOWS THE CLAIMANT VOLUNTARILY DISMISSED HIS UNDERLYING THIRD-PARTY CLAIM ON DECEMBER 5, 2013, SUBMITTED A DISMISSAL TO THE COMMISSION AS NEWLY DISCOVERED EVIDENCE, RE-FILED A THIRD-PARTY LAWSUIT ON FEBRUARY 3, 2014 AND TIMELY AND PROPERLY FILED A NEW FORM S2 ON FEBRUARY 11, 2014, ALL WITHOUT AFFECTING THE RIGHTS OF THE WORKERS' COMPENSATION INSURANCE CARRIER TO SUBROGATION AGAINST THE POTENTIAL THIRD PARTY DEFENDANT, THEREFORE LEAVING THE SITUATION AS THOUGH THE INITIAL THIRD-PARTY SUIT HAD NEVER BEEN FILED AND RENDERING ANY ALLEDGED VIOLATION OF SECTION 42-1-560, NOT APPLICABLE PURSUANT TO CALLAHAN V. BEAUFORT COUNTY SHCHOOL DISTRICT, 375 S.C. 92, 651, S.E.2d. 311 (2007).**
- II. **WHETHER THE SINGLE COMMISSIONER COMMITTED AN ERROR OF LAW IN GRANTING DEFENDANTS MOTION TO INTRODUCE NEWLY DISCOVERED EVIDENCE (CLAIMANT'S ANSWER AND COUNTER CLAIM) AND DENYING CLAIMANT'S MOTION TO INTRODUCE NEWLY DISCOVERED EVIDENCE (VOLUNTARY DISMISSAL OF CLAIMANT'S THIRD-PARTY SUIT) AS THERE IS NO REQUIREMENT IN SOUTH CAROLINA STATUTORY LAW, WORKERS' COMPENSATION REGULATIONS OR COMMON LAW JURISPURDENCE THAT EVIDENCE MUST EXIST AT THE TIME OF THE**

HEARING IN ORDER FOR IT TO BE CONSIDERED AS NEWLY DISCOVERED EVIDENCE THUS RESULTING IN THE SINGLE COMMISSIONER ENTERTAINING NEW DEFENSES THAT WERE NOT PLEAD NOR ARGUED AT THE SEPTEMBER 23, 2013 HEARING BY THE DEFENDANTS WITHOUT ALLOWING CLAIMANT TO INTRODUCE NEWLY DISCOVERED EVIDENCE OR BE HEARD TO ARGUE THEIR POSITION IN RESPONSE TO DEFENDANT'S NEWLY DISCOVERED EVIDENCE IN VIOLATION OF SOUTH CAROLINA WORKERS' COMPENSATION REGULATION 67-707(C)(2)(D).

STANDARD OF REVIEW

In a workers' compensation case, the Full Commission is the ultimate fact finder. DeBruht v. Kershaw County Sheriff's Dept., 397 S.E.2d 782 (Ct. App. 1990); Rogers v. Kunia Knitting Mills, 440 S.E.2d 401 (Ct. App. 1994). The Full Commission, sitting as a finder of fact, can consider all of the evidence and reach its own findings of fact and conclusions of law. The scope of review of the Full commission is not limited. Lowe v. Am-Can Transport Services, 324 S.E.2d 87 (Ct. App. 1984); Green v. Raybestos-Manhattan, Inc., 156 S.E.2d 318 (S.C. 1967). The Commission must consider all the evidence in the record when developing its findings of fact. Hendricks v. Pickens County, 517 S.E.2d 698 (Ct. App. 1999). An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures. Broughton v. South Carolina Game and Fish Dept., 64 S.E.2d 152 (1951).

ARGUMENT

I. THE SINGLE COMMISSIONER'S RULING THAT THE CLAIMANT DID NOT PROVIDE NOTICE OF THE THIRD-PARTY ACTION BY WAY OF FILING A FORM S2 AND THEREFORE WAS NOT ENTITLED TO ADDITIONAL MEDICAL TREATMENT, DISABILITY BENEFITS OR PERMANENT DISABILITY SHOULD BE REVERSED AS IT IS BASED ON AN ERROR OF LAW AND UNSUPPORTED BY THE EVIDENCE.

On August 10, 2011, the Claimant suffered injuries to his head, knee, leg, back

and neck in a severe motor vehicle collision involving two tractor trailers. He suffered loss of consciousness and had to be removed from his vehicle. The claimant did not commence a third-party action on his own but rather was actually sued by the third-party Plaintiff in the motor vehicle collision. The Claimant, through the help of separate legal counsel, filed an Answer and Counter Claim to not only protect his own legal rights but the rights of the Workers' Compensation Insurance carrier as well. This answer and counter claim was filed on February 20, 2013. The third-party counter claim was never settled and Claimant's separate third-party counsel notified counsel for the workers' compensation insurance carrier on or around November 5, 2013 of the underlying third-party counter claim to insure that the workers' compensation insurance carriers rights were protected in an upcoming mediation in the underlying third-party counter claim.

The workers' compensation insurance carrier then filed a copy of the underlying third-party answer and counter claim with the South Carolina Workers' Compensation Commission as newly discovered evidence on November 12, 2013. Subsequently, separate third-party counsel for the Claimant filed a stipulation of dismissal without prejudice in the underlying third-party counter claim on December 5, 2013 and the Claimant's workers' compensation counsel filed a motion to introduce newly discovered evidence (stipulation of dismissal without prejudice) with the South Carolina Workers' Compensation Commission on December 20, 2013.

The Single Commissioner granted the Defendants motion to introduce newly discovered evidence but denied the Claimant's motion to introduce newly discovered evidence. Claimant's separate third-party counsel then filed a new Summons and Complaint in the underlying third-party claim on February 3, 2014 and timely filed a new Form S2 on February 11, 2014 serving the Workers' Compensation Commission, the employer and carrier.

The facts in the case at bar are identical to those found in Callahan v. Beaufort County School District, 651, S.E.2d. 311 (2007). In Callahan, the Claimant filed a civil action against the third-party Defendant on January 24, 2013 but failed to file a Form S2 with the South Carolina Workers' Compensation Commission within thirty (30) days. The Claimant did not file a Form S2 until July 16, 2013. The Defendants then raised the exclusive remedy defense that the Claimant did not file an S2 within thirty (30) days. Subsequently the Claimant voluntarily dismissed the third-party action without prejudice in November 2003. The court in Callahan held "despite the Claimant's failure to comply with South Carolina Code Annotated § 42-1-560, we nonetheless affirm the circuit courts finding that her workers' compensation claim may proceed. In this case, Claimant voluntarily dismissed her third-party suit pursuant to rule 41, FRCP. A voluntary dismissal leaves the situation as though no suit had ever been filed (Citations omitted). Following this rule, the third-party suit originally filed in January 2003 became a nullity and § 42-1-560 is not applicable. As a result, there is no violation of S.C. Ann. § 42-1-560 when the third-party suit is treated as never being filed." Callahan, 651, S.E.2d. 311, 314 (2007).

Accordingly, the overwhelming evidence in the record shows the Claimant complied with South Carolina case law which holds that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply S.C. Ann. § 42-1-560 by not filing a Form S2 is fully remedied and moot. Consequently, this Appellant Panel acting as the ultimate fact finder should review the record as a whole and reverse the Single Commissioners ruling that the Claimant did not provide notice of the third-party action by way of filing a Form S2 and was not entitled to additional medical treatment, disability benefits or permanent disability. In the alternative, the Claimant respectfully requests that appellant panel remand the case to the Single Commissioner with orders

that the Claimant's voluntary dismissal without prejudice be admitted as newly discovered evidence and have the Single Commissioner reconvene the hearing with proper evidence from both sides pursuant to South Carolina Workers' Compensation Regulation 67-707(c)(2)(d).

II. THE SINGLE COMMISSIONER COMMITTED AN ERROR OF LAW IN GRANTING THE DEFENDANT'S MOTION TO INTRODUCE NEWLY DISCOVERED EVIDENCE (CLAIMANT'S ANSWER AND COUNTERCLAIM) AND DENYING CLAIMANT'S MOTION TO INTRODUCE NEWLY DISCOVERED EVIDENCE (VOLUNTARY DISMISSAL OF CLAIMANT'S SUIT).

South Carolina Workers' Compensation Commission Regulation 67-707 deals specifically with additional and newly discovered evidence. That Regulation states in pertinent part:

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 accumulative 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.

(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 depositions of a witness into the record.

The Single Commissioner denied the Claimant's motion to introduce newly discovered evidence, (December 5, 2013 voluntary dismissal of Claimant's third-party suit) holding the "voluntary dismissal did not fit the meaning of 'newly discovered

evidence' under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013." There is no requirement under South Carolina Statutory law, South Carolina Worker' Compensation Regulations or South Carolina Common Law jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence. This is not a requirement of South Carolina Workers' Compensation Regulation 67-707 or South Carolina Rule of Civil Procedure 59 which governs new trials and amendment of judgments. Therefore, the Single Commissioner's holding was an error of law.

"If the Commission undertakes to receive additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings." Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, S.E.2d. 318, 320 (1967). By the Single Commissioner granting the Defendant's motion to introduce newly discovered evidence (Claimant's answer and counterclaim) and denying Claimant's motion to introduce newly discovered evidence (voluntary dismissal of Claimant's third-party suit) there was a violation of due process. The Single Commissioner simply entertained new defenses that were not pled nor argued at the September 23, 2013 hearing by the Defendant's, without allowing the Claimant to introduce newly discovered evidence or to be heard to argue their position in response to the Defendant's newly discovered evidence which ultimately renders the Defendants exclusive remedy argument moot.

Accordingly, under South Carolina Statutory, Regulatory and Case Law, the Single Commissioner should have granted the Claimant's motion for newly discovered evidence (voluntary dismissal of Claimant's third-party suit) and reconvened the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulations 67-707(c)(2)(d) and rendered a decision in line with the holding in Callahan based upon the proper record as a whole. Consequently, the Claimant respectfully

requests this Appellant Panel acting as the ultimate fact finder remand this case to the Single Commissioner with instructions to admit the Claimant's newly discovered evidence (voluntary dismissal of Claimant's third-party suit) and reconvene the September 23, 2013 hearing pursuant to South Carolina Worker' Compensation Regulation 67-707(c)(2)(d) and make a decision based upon the full record as a whole.

CONCLUSION

For the foregoing reasons the Appellate Panel, acting as the ultimate fact finder, should make its own findings of facts and conclusions of law based on the evidence as a whole and reverse the Decision and order of the Single Commissioner. The Appellate Panel should find the Claimant properly voluntarily dismissed his underlying third-party lawsuit, re-filed the third-party lawsuit and timely filed a Form S2 with the Workers' Compensation Commission, employer and insurance carrier, therefore there was no violation of § 42-1-560 as the initial third-party suit is treated as never being filed and the Claimant's Workers' Compensation case may proceed pursuant to Callahan. In the alternative, the Appellate Panel should remand the case to the Single Commissioner with instructions to receive Claimant's newly discovered evidence (voluntary dismissal of Claimant's third-party suit) and render a Decision based upon the record as a whole in line with the Callahan decision.

Respectfully Submitted,

By:


Joseph Fisher, Esquire
Attorney for the Claimant/Appellant

By:


Benjamin W. Akery
Attorney for the Claimant/Appellant

November 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2014, I served the South Carolina Workers' Compensation Commission and the Defendants in the forgoing matter with a copy of the attached *Brief of Claimant/Appellant* by mailing a copy of same via certified return receipt requested, postage pre-paid and addressed as follows:

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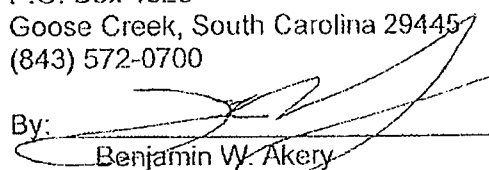
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By: 
Benjamin W. Akery
Attorney for Claimant/Appellant

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL**

SAMUEL ROSE,	)	W.C.C. File No. 1112328
	)	
Claimant/Appellant,	)	
	)	
v.	)	BRIEF OF THE RESPONDENTS
	)	CHRIS THOMPSON SERVICES &
JJS TRUCKING,	)	BRIDGEFIELD CASUALTY INS. CO.
Uninsured Employer, and	)	
CHRIS THOMPSON SERVICES,	)	
Upstream Employer, and	)	
BRIDGEFIELD CASUALTY INS. CO.,	)	
Carrier for Chris Thompson	)	
Services, and	)	
THE STATE ACCIDENT FUND,	)	
	)	
Respondents.	)	
	)	

STATEMENT OF THE CASE

This matter came before Commissioner Taylor for a hearing on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21 filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. Following the hearing, on November 8, 2013, the Respondents learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas.

On November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas on February 20, 2013. The Respondents argued

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

The Claimant did not file a return¹ to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case.

The Claimant then filed a Motion to Introduce New Evidence into the record. After completing discovery in his third-party claim and participating in a 5.8 hour mediation with the third-party defendants, the Claimant entered into an agreement – without the knowledge or consent of the Respondents – to dismiss his third party claim. Commissioner Taylor denied the Claimant's Motion on the basis that the evidence the Claimant sought to introduce was not “of the same nature and character required for granting a new trial” as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.

EVIDENCE SUMMARY

The Claimant testified on his own behalf. At the time of the hearing, the Claimant, Samuel Rose, was 43 years old. He is a high school graduate and worked for J.J.S. Trucking for

¹ The Claimant did file a “Motion in Opposition to Introduce After Discovered Evidence.” The Claimant's motion was denied by Administrative Order dated January 3, 2014.

approximately six months. (Hrg. Transcript p. 17, ll. 18-25). The Claimant was rear ended on August 10, 2011 while traveling on I-26, allegedly injuring his head, neck, back, and legs. (Hrg. Transcript p. 19, l. 17- p. 20, l. 23).

The Claimant testified that he is currently experiencing stiffness and throbbing pain in his neck that radiates to his shoulders, arms, and head. (Hrg. Transcript p. 28, ll. 1-10). He is also experiencing numbness in his arm and fingers and he claims that he can only lift about 25 pounds with his right arm. (Hrg. Transcript p. 28, ll. 14-25). He stated his left arm is worse than his right. (Hrg. Transcript p. 29, l. 1- p. 30, l. 4).

Regarding the Claimant's lower back, he testified that he currently experiences throbbing, radiating pain in his lower back near his spine. (Hrg. Transcript p. 30, ll. 10-18). He testified that his back is fine when he is moving, but hurts when he stops. (Hrg. Transcript p. 31, ll. 2-10).

The Claimant also testified that his right leg occasionally gives out and swells. (Hrg. Transcript p. 31, ll. 15-18). His knee sometimes hurts, but not always. (Hrg. Transcript p. 31, ll. 17-24). He was previously diagnosed with Osgood-Schlatter's Disease, but he claims he was not experiencing any pain in his right knee at the time of the accident. (Hrg. Transcript p. 32, ll. 4-10).

The Claimant also testified that the back of his head swells up, and he constantly has headaches, dizziness, and blurred vision. (Hrg. Transcript p. 32, ll. 11-17). The Claimant further testified that he did not believe he could go back to work in his current condition because he believes he cannot take the vibrations of driving the truck or doing the pre-trip inspection. (Hrg. Transcript p. 33, ll. 3-10).

On cross-examination, the Claimant testified that he fell down a flight of stairs at his mother's house in November of 2011 and again in January of 2012 and re-injured his back and neck on both occasions. (Hrg. Transcript p. 35, ll. 2-7). The Claimant admitted he went to Tri-County Spinal Care, but he initially stated it was only for pain management. (Hrg. Transcript p. 35, ll. 14-23). After further questioning, the Claimant denied receiving treatment, but later he admitted that he had received injections and MRI's and x-rays had been taken. (Hrg. Transcript p. 35, ll. 6-19).

The Claimant also admitted that he currently carries his cane in the wrong hand, his right hand, even though the doctors advised him that he needs to carry the cane in his *left* hand if he is actually having *right* knee pain. (Hrg. Transcript p. 38, l. 16 – p. 39, l. 7). He also testified that he did not remember Dr. Wildstein telling him that his complaints were out of proportion with what the physical exam showed. (Hrg. Transcript p. 39, ll. 21-25).

The Claimant admitted that he has not applied for any jobs or even looked for work anywhere. (Hrg. Transcript p. 42, ll. 9-14). He also testified that he has not been incarcerated again since the last hearing. (Hrg. Transcript p. 42, l. 23 – p. 43, l. 5). He admits that he was incarcerated after the August 10, 2011 accident.

Upon further cross-examination, the Claimant testified that he believes he needs the cane for dizziness, which he relates to his headaches. (Hrg. Transcript p. 44, l. 14 – p. 45, l. 14). The Claimant was also forced to admit that, despite his testimony that "nothing's been done" for him, Dr. Abel's records indicate the Claimant saw him 42 times. (Hrg. Transcript p. 45, l. 24 – p. 46, l. 4). He was also forced to admit that he has been treated and evaluated Dr. Kellett, Dr. Wildstein, Dr. Wills, Dr. Poletti, and Dr. Jones and he has received both injections and pain medicine. (Hrg. Transcript p. 46, ll. 8-20).

On re-direct examination, the Claimant testified that Dr. Wildstein said he might potentially benefit from a one level anterior cervical discectomy and fusion. (Hrg. Transcript p. 50, ll. 2-24). The Claimant also testified he was feeling depressed even though depression was never raised in his Form 50 or his response to the Form 21 submitted by the Defendants. (Hrg Transcript p. 51, l. 10 – p. 52, l. 10).

On November 8, 2013, the Claimant's attorney contacted the Respondents' counsel to discuss an upcoming mediation in the Claimant's previously undisclosed third-party claim. On November 12, 2013, Respondents Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Motion to Introduce Newly Discovered Evidence. The newly discovered evidence was the Claimant's third-party claim filed in the Charleston County Court of Common Pleas on February 20, 2013. The Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days.

ARGUMENTS

- I. The Hearing Commissioner properly concluded that the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560 based upon the greater weight of the evidence in the record and the applicable law.**

The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence). The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been

commenced. As a result, the Hearing Commissioner concluded that the Claimant was not entitled to any additional benefits under the Workers' Compensation Act for failure to comply with the mandatory requirements of S.C. Code Ann. § 42-1-560. The Respondents respectfully request that the Appellate Panel affirm this conclusion based upon the greater weight of the evidence in the record and the applicable law.

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

"Notice of the commencement of the [third-party] action **shall**² be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." (emphasis added)

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

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

the Employer, or the Carrier within thirty days, the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

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

The Claimant would argue that his admitted failure to comply with S.C. Code Ann. § 42-1-560 could somehow be "cured" by voluntarily dismissing this third-party lawsuit and then simply re-filing. The Respondents respectfully contend that the Claimant should not be permitted to grossly circumvent the clear statutory requirements in this manner. To date, there is no case law on this issue and the Supreme Court has previously declined to address the "efficacy" of a re-filing. See Callahan, supra, at footnote #1. Should the Claimant voluntarily dismiss his third-party suit and then re-file, then the third-party suit filed on February 20, 2013

could no longer be considered a “nullity” and to suggest that the Commission should pretend that the February 20, 2013 suit was never filed under such circumstances would entail a grossly prejudicial legal fiction. Therefore, the Respondents respectfully contend that that the Hearing Commissioner’s Decision and Order should not be reversed based on facts not in evidence, hypothetical scenarios, or newly-manufactured events.

II. The Hearing Commissioner’s conclusions of law numbered 4, 5, 6, 7, and 8 are the law of the case.

The Claimant did not appeal Conclusions of Law numbers 4, 5, 6, 7, or 8 of the Hearing Commissioner’s Decision and Order in his Form 30, nor did he raise any exception to these Conclusions in his brief to the Appellate Panel. These Conclusions deal with the Claimant’s entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30, yet none of these statutes are ever mentioned in the Claimant’s Form 30 or his brief, nor does he argue that he is entitled to any benefits under these sections.

Therefore, the following conclusions are the law of the case:

4. *Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.*

5. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
6. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.
7. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
8. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission." Creech v. Ducane Co., 320 S.C. 559, 476 S.E.2d 114, *reh'g denied, cert. denied* (Ct. App. 1995). Furthermore, all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940). Here, the Claimant did not raise any exception to Conclusions numbered 4, 5, 6, 7, or 8 and he cannot now raise any exception to these Conclusions, as the Commission lacks the authority or jurisdiction to extend the fourteen days

permitted for the perfecting of an appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011).³

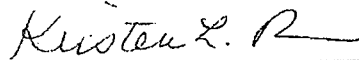
Therefore, regardless of any argument the Claimant makes under S.C. Code Ann. § 42-1-560, the issue is moot because the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law. According to the South Carolina Supreme Court, "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)). In addition, mere "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005) (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993 (holding that failure to provide arguement or supporting authority for an issue renders it abandoned))). Due to his failure to raise any exception to Conclusions 4, 5, 6, 7, or 8 in his Form 30 and his failure to raise any argument regarding Conclusions 4, 5, 6, 7, or 8 in his brief to the Appellate Panel, the Respondents respectfully contend that the Claimant's appeal is moot and otherwise without merit and further respectfully contend that the Hearing Commissioner's Decision and Order should be affirmed in its entirety.

³ Note that the Claimant also failed to raise any exception or make any argument regarding Conclusions numbered 4, 5, 6, 7, or 8 in his brief to the Appellate Panel and therefore, any future exception would be deemed abandoned. Blakely v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976); Beach Co. v. Charleston Co. Sch. Dist., 263 S.C. 7, 207 S.E.2d 406 (1974).

CONCLUSION

Therefore, based upon the argumetns set forth above, the Respondents respectfully request that the Decison and Order of Commissioner Tayhor date September 2, 2014 be affirmed in its entirety.

Respectfully submitted,



Kirsten L. Barr
Trask & Howell, LLC
Attorneys for the Respondents

Dated: December 8, 2014

160/48\dec-ord

CERTIFICATE OF SERVICE

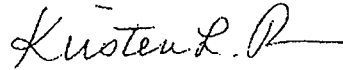
I hereby certify that on this 8th day of December 2014, I have caused a true and correct copy of Brief of the Respondents Chris Thompson Services and Bridgefield Casualty Insurance Co. to be mailed postage prepaid to the parties addressed as follows:

Benjamin W. Akery
PO Box 1028
Goose Creek, SC 29445

Joseph B. Fisher, Esq.
PO Box 63506
North Charleston, SC 29419

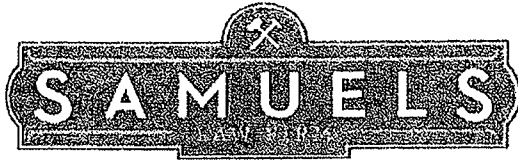
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J. Eric Kaufmann, Esq.
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Columbia, SC 29260



Kirsten L. Barr

118/133\FC Brief



STEPHEN B. SAMUELS
ATTORNEY AT LAW

March 8, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Samuel Rose v. JJS Trucking, et. al.
WCC File No.: 1112328

Dear Ms. Kitchings:

Enclosed for filing is a **Notice of Appeal** in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the Respondent;
2. A copy of the order which is to be challenged on appeal;
3. A filing fee of \$100.00; and
4. A copy of our letters to the Court Reporters requesting the transcripts and confirming that we agree to pay the per page charge as provided by Rule 607, SCACR.

Please have your staff clock in the copy of the Notice of Appeal and return the clocked copy with our courier.

Respectfully,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc: Robert Treacy, Esquire
Amy Bracy, SCWCC
Kirsten L. Barr, Esquire
Amy Cofield, Esquire

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners R. Michael Campbell, II, T. Scott Beck, and Susan S. Barden

WCC File No. 1112328

Samuel Rose, Claimant, ... Appellant,

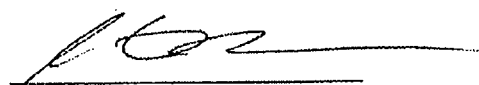
v.

JJS TRUCKING, Uninsured Employer, and CHRIS THOMPSON SERVICES,
Upstream Employer, and BRIDGEFIELD CASUALTY INS. CO., Carrier for
Chris Thompson Services, and THE STATE ACCIDENT FUND, ... Respondents.

NOTICE OF APPEAL

Samuel Rose appeals the Decision and Order of the Appellate Panel of the South Carolina
Workers' Compensation Commission dated February 8, 2016. Appellant received written notice of
the order on February 8, 2016.

March 8, 2016


Stephen B. Samuels
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Counsel for the Appellant

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Counsel for the Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners R. Michael Campbell, II, T. Scott Beck, and Susan S. Barden

WCC File No. 1112328

Samuel Rose, Claimant, ... Appellant,

v.

JJS TRUCKING, Uninsured Employer, and CHRIS THOMPSON SERVICES,
Upstream Employer, and BRIDGEFIELD CASUALTY INS. CO., Carrier for
Chris Thompson Services, and THE STATE ACCIDENT FUND, ... Respondents.

PROOF OF SERVICE

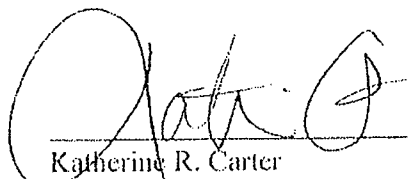
I certify that I, Katherine R. Carter, paralegal to Stephen B. Samuels, have served the **Notice of Appeal** upon counsel for the Respondents and the South Carolina Workers' Compensation Commission by depositing a copy of it in the United States Mail, postage prepaid, on March 8, 2016, addressed as follows:

Amy Cofield
809 South Lake Drive
Lexington, SC 29072

Kirsten L. Barr
P.O. Box 2167
Mount Pleasant, SC 29464

March 8, 2016

Amy Bracy, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715


Katherine R. Carter
SAMUELS LAW FIRM, LLC
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(803) 779-4000

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL**

SAMUEL ROSE,	)	W.C.C. File No. 1112328
	)	
Claimant/Appellant,	)	
	)	
v.	)	DECISION & ORDER
	)	
JJS TRUCKING,	)	
Uninsured Employer, and	)	
CHRIS THOMPSON SERVICES,	)	
Upstream Employer, and	)	
BRIDGEFIELD CASUALTY INS. CO.,	)	
Carrier for Chris Thompson	)	
Services, and	)	
THE STATE ACCIDENT FUND,	)	
	)	
Respondents.	)	

STATEMENT OF THE CASE

This matter came before the Commission's Appellate Panel for a review hearing on April 21, 2015. The case was previously tried before Commissioner Taylor on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21 filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. Following the hearing, on November 8, 2013, the Respondents learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas.

On November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in

the Charleston County Court of Common Pleas on February 20, 2013. The Respondents argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. As a result, the Respondents argued that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. The Claimant did not file a return¹ to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case.

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *The parties to this proceeding were sent directives for a proposed order on January 13, 2014.*
2. *The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence).*
3. *The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the*

¹ The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's motion was denied by Administrative Order dated January 3, 2014.

commission that this third-party action had been commenced. To date, no Form S2 has been filed or served by the Claimant.

CONCLUSIONS OF LAW

1. S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
2. Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec. 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra.
3. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, supra. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.
4. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on

which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

5. *Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.*
6. *Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.*
7. *Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.*
8. *Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.*

Thereafter, the Claimant filed a Form 30 requesting review of Commissioner Taylor's September 2, 2014 Order on the following grounds:

FIRST: The Hearing Commissioner erred in granting Defendant's [sic] Chris Thompson Services, LLC and Bridgesfield Casualty Insurance Companies November 12, 2013 Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim filed in Charleston County Court of Common Pleas on February 20, 2013), the error being that the defense of exclusive remedy was not pled by any of the Defendant's [sic], nor was the issue raised at the September 23, 2013 hearing before the single Commissioner, further the Answer and Counterclaim could have been secured by the Defendant's before the September 23, 2013 hearing had they exercised reasonable diligence.

SECOND: The Hearing Commissioner erred in denying the Claimant's November 21, 2013 Motion in Opposition to Introduce After Discovered Evidence summarily without any legal reasoning, findings of fact or conclusions of law to support this denial.

THIRD: The Hearing Commissioner erred in denying Claimant's December 20, 2013 Motion to Introduce newly Discovered Evidence (voluntary dismissal of the Claimant's third-party suit), holding the voluntary dismissal did not fit the meaning of "Newly Discovered Evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned [sic] on August 5, 2013, the error being there is no requirement under South Carolina Statutory Law, South Carolina Workers' Compensation Regulations or South Carolina Common Law Jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence.

FOURTH: The Hearing Commissioner erred in granting Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntarily [sic] dismissal Claimant's third-party suit) the error being that South Carolina case law holds that when a Claimant voluntarily dismissed his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).

FIFTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), the error being this is a gross miscarriage of justice as the single Commissioner entertained new defenses that were not pled or argued at the September 23, 2013 hearing by the Defendant's [sic], however the single Commissioner did not allow the Claimant to introduce newly discovered evidence or to

be heard to argue their position in response to Defendant's newly discovered evidence which would render the Defendant's [sic] exclusive remedy argument moot.

SIXTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third party-suit) without holding a hearing on the issue to allow both sides to argue their respective positions or to reconvene the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulation 67-707(C)(2)(d).

SEVENTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (Voluntary Dismissal of Claimant's third-party suit) without holding a hearing on the issue or reconvening the September 23, 2013 hearing, the error being it is well-settled law of South Carolina that if the Commission undertakes to receive such additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings. Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, [sic] S.E.2d 318 (1967). In the case at bar, there were no proceedings whatsoever, simply a Commissioner allowing newly discovered evidence to come in from one party and not allowing newly discovered evidence in rebuttal from the opposing party without holding a hearing on the issue or reconvening the original hearing.

EIGHTH: The Hearing Commissioner erred in finding of fact #3 and Conclusion of Law #1 in holding that the Claimant failed to file a Form S2 when the Claimant did indeed file a voluntary dismissal of the Claimant's underlying 3rd party lawsuit as newly discovered evidence on December 19, 2013, which the Commissioner denied, then subsequently filed the appropriate S2 on February 10, 2014 after re-filing the underlying 3rd party lawsuit.

NINTH: The Hearing Commissioner erred in Conclusion of Laws #1, #2, #3, #4, #5, #6, #7, and #8 in holding that the Claimant did not provide notice of the 3rd party action by way of filing a Form S2 and therefore was not entitled to additional medical treatment,

disability benefits or permanent disability when the Claimant voluntarily dismissed his underlying 3rd party claim on December 5, 2013 before settling it and submitted the dismissal to the Commission as newly discovered evidence and then after re-filing the 3rd party lawsuit timely filed a Form S2 on December 19, 2013, the error being that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).

CONCLUSION

The Appellate Panel AFFIRMS the September 2, 2014 Decision and Order of Hearing Commissioner Taylor in its entirety and enters the following:

FINDINGS OF FACT

1. The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013.
2. The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced.

CONCLUSIONS OF LAW

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

that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

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

against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.

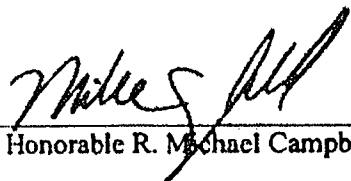
11. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
12. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
13. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the Workers' Compensation Act.
14. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
15. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the Claimant is not entitled to, and the Defendants/Respondents shall have no liability for, any additional benefits under the Workers' Compensation Act.

IT IS, FURTHER ORDERED that the Defendants/Respondents shall have a lien on the proceeds of any recovery by the Claimant from any third-party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

IT IS SO ORDERED!



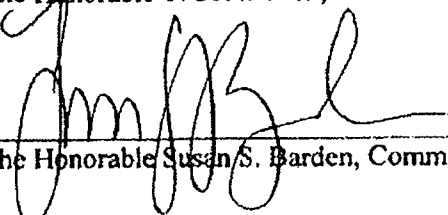
The Honorable R. Michael Campbell, II, Commissioner

Date: February 8th, 2014

WE CONCUR:



The Honorable T. Scott Beck, Commissioner



The Honorable Susan S. Barden, 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 Kim Falls on February 8, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000497

Samuel Rose, Claimant, ... Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission erred in holding Appellant Samuel Rose was barred from receiving workers' compensation benefits by violating § 42-1-560(b) when Rose entered a voluntary dismissal of his third-party claim rendering the civil suit a nullity and curing any violation of § 42-1-560 pursuant to Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007).
2. Whether the Workers' Compensation Commission erred in refusing to admit the stipulation of dismissal into evidence, thus denying Rose due process of law pursuant to Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007).

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Appellant, Samuel Rose, on August 10, 2011. Rose was a tractor-trailer driver. His truck was rear-ended by another motorist, Robbie Clark, while driving on I-26. Rose injured his head, knee, leg, back and neck in the accident. [May 23, 2012 order].

Past Procedural History:

Rose filed a claim for workers' compensation benefits. [Form 50, 12/6/11]. As his direct Employer, JJS Trucking, LLC, was uninsured, Rose sought benefits from the upstream statutory employer, Respondent Chris Thompson Services, LLC (hereafter "Chris Thompson Services"). Rose's Form 50 named JJS Trucking and Chris Thompson Services as Defendants in the claim.

On January 24, 2012, Chris Thompson Services and its insurance carrier, Bridgefield Casualty, filed a Form 51 denying the claim. [Form 51]. Chris Thompson Services also filed a Petition to Transfer Liability to the South Carolina Uninsured Employers' Fund (UEF). [Petition to Transfer Liability]. The UEF was added as a party.

On May 15, 2012, a hearing was held before Commission Gene McCaskill. Commissioner McCaskill issued a Decision and Order dated August 23, 2012, wherein he found:

1. Samuel Rose was an employee of JJS Trucking on August 10, 2011.
2. On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg, back and neck arising out of and in the course of his employment with JJS Trucking.

5. As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.
6. As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical

treatment as prescribed by an authorized treating physician to be selected by the carrier.

8. On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.
9. On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC is an "upstream employer" pursuant to § 42-1-415.
10. Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.

Commissioner McCaskill made the following Conclusion of Law:

7. Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1-415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.

Respondents timely filed a Form 30 (Notice of Appeal) to the Full Commission. [form 30]. On May 15, 2013, the Appellate Panel issued an Order summarily affirming Commissioner McCaskill's conclusion that the Petition for Transfer of Liability was "not ripe for adjudication."

Respondent Chris Thompson Services then appealed to this Court. The UEF appeared as Respondents in the initial appeal. After Final Briefs were filed, the Court directed the parties (Chris Thompson Services and the UEF) to file memoranda addressing whether Chris Thompson Services' Appeal should be dismissed under Bone v. U.S. Food Serv., 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013) ("An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review.").

The Court issued a published Opinion dismissing the appeal on February 27, 2015. Rose v. JJS Trucking, LLC, 768 S.E.2d 412, 411 S.C. 366 (Ct. App. 2015). The case was remitted to the Commission for further proceedings.

During the pendency of this first appeal, Chris Thompson Services paid temporary total disability benefits to Rose, but refused to provide medical treatment. See S. C. Code Ann. § 42-17-60 (2007)(“In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title.”).

Current Procedural History.

As the workers’ compensation case was pending, Robbie Clark filed a lawsuit against Rose in the Charleston County Court of Common Pleas on August 30, 2012. The lawsuit was styled Robbie Clark v. Samuel A. Rose, Case No. 2012-CP-10-2996. Clark was a driver for Chris Thompson Services. He was driving a truck following Rose on I-26, when he rear ended Rose’s truck causing Rose’s injuries. In his complaint, Clark alleged “due to Defendant’s [Rose] malfunctioning tail lights, Plaintiff struck the rear of Defendant’s tractor-trailer, thereby causing an collision and injuring Plaintiff.” [Complaint].

Rose, through his insurance defense counsel, filed an Answer denying liability. On January 2, 2013, Rose had filed an Amended Answer and Counterclaim adding a claim for personal injury due to Clark’s negligence. [Amended Answer] Rose did not, at that time nor within 30 days of the February 20, 2013 compulsory counterclaim, file a Form S2.

Respondents filed a Form 21 seeking to terminate Rose's compensation alleging that he had reached MMI and required no further treatment (Rose disputed this allegation). A hearing was held before Commissioner Aisha Taylor on September 23, 2013.

On November 12, 2013 – prior to Commissioner Taylor making a ruling on the merits – Respondents filed a Motion to Introduce Newly Discovered Evidence. The additional evidence consisted of pleadings in the civil lawsuit filed by Clark against Rose. The documents were a (1) Summons and Complaint filed May 7, 2012, and (1) an Amended Answer and Counterclaim filed February 20, 2013. [motion].

On November 21, 2013, Appellant Rose timely filed a Motion in Opposition to Introduce After Discovered Evidence. [motion in opposition].

On November 25, 2013, Respondent Chris Thompson Services filed a Return to Motion in Opposition to Introduce After Discovered Evidence. [return].

On December 20, 2013, Appellant Rose filed Claimant's Motion to Introduce newly Discovered Evidence. The evidence sought to be introduced was a Stipulation of Dismissal without prejudice filed December 5, 2013 in Robbie Clark v. Samuel A. Rose, Case No. 2012-CP-10-2996.

On January 3, 2014, Commissioner Taylor issued three Administrative Orders addressing the motions. The commissioner granted Respondents' Motion to Introduce Newly Discovered Evidence. [Order 1/3/14]. She also denied Claimant's Motion in opposition to Introduce After Discovered Evidence and denying Claimant's Motion to Introduce After Discovered Evidence. [Order 2 and 3 1/3/14].

On January 14, 2013, Appellant Rose filed a Form 30 appealing Commissioner Taylor's rulings on the motions. [Form 30 dated 1/14/14].

On January 21, 2014, the Full Commission issued an order dismissing the appeal as interlocutory. [FC order 1/21/14].

On February 10, 2014, Rose's separate third-party counsel filed a new Summons and Complaint in the Charleston County Court of Common Pleas. With the new Summons and Complaint, Rose filed and served a Form S2 dated February 11, 2014. [S&C with S2].

On September 2, 2014, Commissioner Taylor issued a Decision and Order. The single commissioner ruled that by failing to file a Form S2, the "Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560." She further ruled "Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013." As a result of these rulings, Commissioner Taylor held Respondents could terminate compensation as of the September 20, 2013 hearing and would have no further liability.

On September 11, 2014, Rose timely filed a Form 30 (Notice of Appeal) with the Commission. The Appellate Panel heard oral arguments on April 21, 2015.

On February 8, 2016, the Appellate Panel issued a Decision and Order affirming the single commissioner's Decision and Order.

This appeal followed.

STATEMENT OF THE FACTS

Appellant Samuel Rose was employed as a truck driver by JJS Trucking, LLC. JJS was a subcontractor for Chris Thompson Services, LLC.

On August 10, 2011, Rose was driving his 18-wheeler eastbound on I-26. Another 18-wheeler, driven by Robbie Clark, was traveling behind Rose's truck. Clark was employed by Chris Thompson Services. The truck Clark was driving was owned by Chris Thompson Services. [APA page 101].

Rose slowed down for a construction zone ahead. Clark then rearended Rose, pushing Rose's truck into the concrete median wall. [APA page 101].

Rose suffered serious injuries in the accident. His injuries included a traumatic brain injury with loss consciousness; lacerations to both shins; fractured medial femoral condyle (femur); and injuries to his back and neck. [APA pages Dr. Wildstein recommended surgery to his neck – specifically a one-level C5-6 ACDF. [APA page 96].

Rose filed a claim for workers' compensation benefits against his direct employer, JJS Trucking. JJS had allowed its workers' compensation insurance to lapse, so was operating as an uninsured employer in violation of the Workers' Compensation Act. Rose then proceeded against Chris Thompson Services (as his statutory employer) and the South Carolina Uninsured Employers' Fund (UEF).

The initial hearing was held before Commissioner Gene McCaskill. On August 23, 2012, Commissioner McCaskill ruled that Chris Thompson Services was the liable employer for Rose's claim. The commissioner ordered Chris Thompson Services to pay temporary compensation and to provide evaluation and treatment for Rose's injuries.

Chris Thompson Services appealed the order, seeking to have liability transferred to

the UEF on the grounds that the subcontractor and direct employer, JJS Trucking, had provided a fraudulent certificate of insurance. The appeal was dismissed an interlocutory.

While the appeal was pending, several events occurred. Robbie Clark filed a lawsuit against Rose in the Charleston County Court of Common Pleas on August 30, 2012. The lawsuit was styled Robbie Clark v. Samuel A. Rose, Case No. 2012-CP-10-2996. Clark was a driver for Chris Thompson Services. He was driving a truck following Rose on I-26, when he rear ended Rose's truck causing Rose's injuries. In his complaint, Clark alleged "due to Defendant's [Rose] malfunctioning tail lights, Plaintiff struck the rear of Defendant's tractor-trailer, thereby causing an collision and injuring Plaintiff." [Complaint].

Rose, through his insurance defense counsel, filed an Answer denying liability. On January 2, 2013, Rose filed an Amended Answer and Counterclaim adding a claim for personal injury due to Clark's negligence. Rose did not, at that time nor within 30 days of the February 20, 2013 compulsory counterclaim, file a Form S2.

In the meantime, Rose had been seen for his injuries by an orthopaedic surgeon, Dr. Michael Wildstein, on November 23, 2011 and December 14, 2011. [APA pages 93-96]. Dr. Wildstein recommended surgery to Rose's cervical spine.

Rose also obtained a second opinion from another orthopaedic surgeon. Dr. Steven Poletti, on July 15, 2013. Dr. Poletti agreed with Dr. Wildstein's recommendation for a surgical fusion. [Apa pages 99-100].

On August 23, 2012, the Single Commissioner ordered "Chris Thompson Services, LLC, through its carrier, Bridgefield Casualty Insurance Company, is liable for this claim and shall pay Claimant's medical treatment and temporary total disability benefits beginning August 10, 2011 and continuing through such time Claimant is able to return to work."

[Order page 11]. The Appellate Panel affirmed. Despite the Commission's Order. Respondents provided no medical treatment.

On March 20, 2013, Respondents arranged a medical evaluation with a physical medicine doctor (not a spine surgeon), Dr. Gregory Jones. Dr. Jones opined Rose required no additional medical treatment and had reached maximum medical improvement.

Relying on the report from Dr. Jones, Respondents filed a Form 21 seeking to terminate Rose's compensation alleging that he had reached MMI and required no further treatment (Rose disputed this allegation). A hearing was held before Commissioner Aisha Taylor on September 23, 2013 *solely on these issues*.

On November 12, 2013 – before Commissioner Taylor issued a ruling on the merits – Respondents filed their Motion to Introduce Newly Discovered Evidence. In their Motion, Respondents moved the Commission to reach the “conclusion that the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560(b) and; therefore, he is not entitled to any additional workers' compensation benefits as a matter of law.” [Motion page 3].

In response, Rose entered into a “Stipulation of Dismissal without Prejudice” of the lawsuit on December 5, 2013. [stipulation]. Rose filed motions to oppose Respondents' motion and to introduce the stipulation of dismissal into the record. [motions].

Commissioner Taylor denied Rose's motions. She granted Respondents motion and then issued an order holding Respondents could terminate compensation as of the September 20, 2013 hearing and would have no further liability. The Order was based on the purported violation of § 42-1-560(b).

ARGUMENT

1. The Commission erred in barring Rose from further workers' compensation benefits because the voluntary dismissal without prejudice of the underlying lawsuit cured any procedural defect.

In general, workers' compensation benefits are the exclusive remedy for an employee who suffers injuries on the job. S.C. Code Ann. § 42-1-540 (2007). The exception is if the employee's injuries result from the negligence of a third-party unconnected to the liable employer. In that case, the employee may also proceed in tort against the negligent third-party.

Should the employee pursue a civil case against a third-party tortfeasor, he must comply with the requirements of § 42-1-560. The statute states "Notice of the commencement of the action shall be given within thirty days thereafter to the Workers' Compensation Commission, the employer and carrier upon a form prescribed by the Workers' Compensation Commission." S.C. Code Ann. § 42-1-560(b) (2007). The Commission requires the use of Form S-2. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007).

In the instant case, Rose did not commence the action. He was sued by an employee of Thompson Services, the liable statutory employer. Rose initially answered and then amended his Answer to include a counter-claim. The irony here is that Rose's counterclaim was effectively *void ab initio* as he had no third-part suit against his statutory employer or its employee. Furthermore, as its employee had sued and been sued, Thompson Services was on notice of the lawsuit from the very beginning.

Regardless of the lack of merit of the underlying suit, the fact remains that Rose did not file and serve a Form S-2 within 30 days of the counterclaim. In Callahan, the South

Carolina Supreme Court held a lack of prejudice to the employer's subrogation rights is immaterial. The court reasoned "Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of § 42-1-560 and leave it to the legislature to amend and define its ambiguities. Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2. Id. (internal citation omitted).

Even though the court held filing of the S-2 was mandatory, the court also affirmed the circuit court's finding that Callahan's workers' compensation claim should not be dismissed. The court quite properly recognized that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party." Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). *Cf. Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRPC (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Callahan was allowed to proceed on the merits of her workers' compensation claim.

The court held:

In this case, Claimant voluntarily dismissed her third-party suit pursuant to Rule 41, FRCP. A voluntary dismissal leaves the situation as though no suit had ever been filed. 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure 2d § 2367, at 321 (1995); Allen v. S. Ry. Co., 218 S.C. 291, 297-298, 62 S.E.2d 507, 511 (1950). Following this rule, the third-party suit originally filed in January 2003 became a nullity, and § 42-1-560 is not applicable. As a result, there is no violation of § 42-1-560 when the third-party suit is treated as never being filed. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007).

The facts in Callahan are identical to the instant case. Here, Rose entered into a voluntary dismissal of the underlying lawsuit. Upon doing so, the third-party suit became a nullity. By following the procedure set forth in Callahan, Rose cured the procedural defect and eliminated any violation of § 42-1-560.

The Commission erred in failing to apply Callahan. This was a straightforward error of law which should be reversed by this Court. As he dismissed the third-party suit, Rose is entitled to proceed on the merits of his workers' compensation claim. The decision below should be reversed and remanded to the Appellate Panel with instructions to proceed on the merits of the underlying workers' compensation claim.

2. The Single Commissioner and Appellate Panel committed an error of law in granting the Respondents' Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Appellant's Motion to Introduce Newly Discovered (Voluntary Dismissal of the lawsuit).

In admitting Respondents' new evidence and denying Rose the opportunity to rebut the new evidence (or even to be heard), the Commission committed an error of law, thus depriving Rose of due process. The Court can correct this error either by reversing the Commission's evidentiary ruling or by taking judicial notice of the fact Rose entered a stipulation of dismissal of the third-party lawsuit.

The hearing was set on a Form 21 filed by Chris Thompson Services. The issue raised on the pleadings was a "request to stop or terminate payment of temporary total disability benefits and determine whether he claimant is entitled to an award of permanency pursuant to statements of maximum medical improvement." [Tr. Page 4, lines 16-21]. At no point during that hearing did Respondents raise an issue over election of remedies. The issue tried was a straightforward dispute over whether Rose had reached MMI with no need

for further treatment (per Dr. Jones) or required surgery (per Drs. Wildstein and Poletti).

On November 12, 2013, Chris Thompson Services filed the Motion to Introduce Newly Discovered Evidence. Rose responded by dismissing the underlying tort suit and filing his own Motion to introduce newly discovered evidence.

Respondents' motion had *nothing* to do with the issues tried at the Form 21 hearing. The motion sought to dismiss Rose's workers' compensation claim via collateral attack. Collateral attack is generally disfavored. "Where subject matter jurisdiction depends upon a factual finding, a judicial decree determining such a fact does or does not exist cannot be challenged on collateral attack." McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E.2d 130 (1990)(where "the factual issue of liability under the Act is finally adjudicated [it] cannot be retried on collateral attack.").

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. See Roper Hosp. v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App.1997). A party is entitled to notice of the issues to be tried so that he can present evidence and legal arguments on the issues. Had Respondents raised the election of remedies issue in their Form 21, then it would have been properly before the Commission. See Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009)(allowing employer to raise lack of subject matter jurisdiction as grounds to terminate benefits by voiding employment relationship due to fraud in the employment application).

Here though, Respondents introduced the issue via a motion to submit after-discovered evidence. While the courts have approved the general concept of raising an election of remedies issue before the Commission via a motion, addressing the issue via a motion without an opportunity to respond violated Appellant's due process rights. Appellant

had no notice that the issue would be raised until the motion was filed. Even more concerning – because the issue was raised on a motion – is the fact Appellant had no opportunity to respond to the evidence presented by Respondents. His only recourse was to dismiss the lawsuit and file his own motion to introduce the proof of the dismissal. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)(upon voluntary dismissal, a third-party suit becomes “a nullity, and § 42-1-560 is not applicable.”). However, because the Commission denied his motion to admit the stipulation of dismissal, he was denied the ability to present the critical evidence that would have solved the problem.

When a party introduces new evidence on a new issue, the commission or court must determine whether the opposing party is prejudiced by the new evidence. “If the Commission undertakes to receive additional evidence, due process requires that counsel should be alerted beforehand so that they may be prepared to participate in the proceedings.” Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318, 320 (1967). “In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised.” Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (2005), *citing* Soil & Material Eng’rs, Inc. v. Folly Assoc., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App.1987); *see also* Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 823 (1998)(citing Folly Assoc. for the premise that the prejudice contemplated by Rule 15, SCRCP, is the lack of opportunity to refute any new evidence connected with the amended complaint).

As to the specific motion itself, the Single Commissioner summarily denied Rose’s Motion to Introduce Newly Discovered Evidence. She ruled “The evidence sought to be introduced (the Voluntary Dismissal) does not fit the meaning of ‘newly discovered

evidence' under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned on August 5, 2013." [Order 3].

The Single Commissioner's rationale for denying Rose's motion is inapplicable to this case. *After discovered evidence* is used to show that the result of a trial was erroneous because critical factual evidence (unknown to the aggrieved party) was not presented to the trier of fact. The after-discovered evidence must be presented *after* judgment is rendered. Additionally, the new evidence must go to the merits of the case -- not a collateral issue. For example, assume the single commissioner ruled on the merits that Rose was entitled to surgery per Dr. Widestein or Dr. Poletti. If, after judgment were rendered, Respondents learned of an intervening accident sufficient to break the chain of causation between the examinations by Dr. Jones and Dr. Poletti, they could introduce such evidence under regulation 67-707.

In the case *sub judice*, while the parties inartfully captioned their motions as seeking to introduce after-discovered evidence, the motions substantively were motions to reopen the record. As such, the single commissioner and Appellate Panel were required to consider the prejudice inherent in admitting Respondents' evidence while denying Appellant's rebuttal evidence. See Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318, 320 (1967)("If the Commission undertakes to receive additional evidence, due process requires that counsel should be alerted beforehand so that they may be prepared to participate in the proceedings."). Cf. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014)(error of commission to refuse to hear testimony of rebuttal witness when claimant promptly amended her pre-hearing brief to respond to new evidence presented by employer). As the Commission's refusal to admit the stipulation of dismissal into the record prevented

Rose from curing the § 42-1-560 violation as expressly permitted by Callahan, the prejudice to Rose is manifest.

Furthermore, the Commission did not have to admit the stipulation of dismissal for this Court to apply Callahan. The parties agree on both key points: (1) Rose did not timely file a Form S-2; and (2) Rose entered a stipulation of dismissal upon being alerted to the violation of § 42-1-560. It is well established that “an appellate court can take judicial notice of something that was not before the trial court if it is indisputable.” Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011).

Therefore, the Court should hold the Commission erred in refusing to allow Rose to respond to the additional evidence submitted by Respondents. The Court should take judicial notice that Rose filed a stipulation of dismissal, thus curing the violation and allowing his workers’ compensation case to proceed on the merits. The decision below should be reversed and remanded to the Appellate Panel with instructions to proceed on the merits of the underlying workers’ compensation claim.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Appellant's claim for workers' compensation benefits should be reinstated. The case should be remanded for a decision on the merits of the issues raised in the September 23, 2013, Form 21 hearing.



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May 31, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000497

Samuel Rose, Claimant, ... Appellant,

v.

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

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Transcript of Hearing, dated September 23, 2013.
2. Form 21.
3. Claimant's APA submissions, pages 43-104..
4. Defendants Form 58.
5. Order dated August 23, 2012.
6. Motion to introduce newly discovered evidence, dated November 12, 2013.
7. Motion in Opposition to Introduce After Discovered Evidence, dated November 21, 2013.
8. Return to Motion in Opposition to Introduce After Discovered Evidence, dated November 25, 2013.
9. Claimant's Motion to Introduce Newly Discovered Evidence, dated December 20, 2013.
10. Administrative Order (3 orders), dated January 3, 2014.
11. Form 30, dated January 14, 2014.
12. Administrative order, dated January 21, 2014.
13. Order, dated September 2, 2014.
14. Form 30, dated September 11, 2014.
15. Brief on Behalf of Claimant/Appellant, dated November 14, 2014.
16. Motion to Strike Claimant's Brief, dated December 1, 2014.

17. Order denying Motion to Strike, dated December 16, 2014.
18. Decision and Order, dated February 8, 2016.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Samuel Rose, Claimant, ... Appellant,

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JJS Trucking, Uninsured Employer, and Chris Thompson Services,
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PROOF OF SERVICE

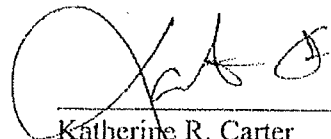
I certify that I, Katherine R. Carter, paralegal to Stephen B. Samuels, have served the **Initial Brief of Appellant and Designation of Matter** upon counsel for the Respondents and the South Carolina Workers' Compensation Commission by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2016, addressed as follows:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION
COMMISSION

The Honorable R. Michael Campbell, II, Commissioner

Appellate Case No. 2016-0006497
W.C.C. 1112328

Samuel Rose, Claimant, v. JJS Trading, LLC, Uninsured Employer, and Chris Thompson
Services, Upstream Employer, and Budgetfield Casualty Ins. Co.
Carrier for Chris Thompson Services, and The State Accident
Fund, Respondents.

FINAL BRIEF OF THE RESPONDENTS

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Statement of the Issues on Appeal

- I. Are the Workers' Compensation Commission's conclusions of law with respect to the Claimant's entitlement to additional medical and compensation benefits the law of the case?
- II. Are the Claimant's arguments impermissibly based upon facts not in evidence and, therefore, not properly before the Court of Appeals?
- III. Did the Workers' Compensation Commission properly conclude that the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560 based upon substantial evidence in the record and the applicable law?
- IV. Was the Respondents' argument under S.C. Code Ann. § 42-1-560 timely and properly raised?

Statement of the Case

This matter came before Workers' Compensation Commissioner Aisha Taylor for a hearing on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21, Stop Payment Application, filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation on the basis that the Claimant had been released at maximum medical improvement and no work restrictions.¹

¹ After extensive evaluation and treatment, the Claimant was ultimately diagnosed with "myofascial pain and/or fibromyalgia." (R. pp. 116-19). According to Dr. Greg Jones, the Claimant reached maximum medical

(R. p. 43, pp. 235-91). A previous Commission Order found that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. (R. pp. 9-11). Only after the hearing before Hearing Commissioner Taylor, but before a decision was rendered, the Respondents learned for the first time on November 8, 2013 that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. (R. p. 109).

Immediately thereafter, on November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas some eight months earlier, on February 20, 2013. (R. pp. 158-169). The Respondents argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. (R. pp. 158-160). As a result, the Respondents argued that the Claimant is not entitled to additional benefits under the Workers' Compensation

improvement by March 20, 2013 and "[i]t does not appear that any future treatment would be warranted." (R. p. 119). Dr. Jones further opined that the Claimant "is capable of working without restrictions." (R. p. 119).

Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. (R. pp. 159-160).

The Claimant did not file a return² to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014, and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. (R. pp. 12-13). The Claimant then filed a Motion to Introduce New Evidence into the record. (R. pp. 177-79). Hearing Commissioner Taylor denied the Claimant's Motion by Administrative Order dated January 3, 2014 on the basis that the evidence the Claimant sought to introduce was not "of the same nature and character required for granting a new trial" as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.³ (R. pp. 16-17).

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she concluded that the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560. (R. pp. 19-31). Commissioner Taylor further granted the Respondents Stop Payment Application, concluding that the Respondents were entitled to terminate temporary disability pursuant to S.C.

² The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." (R. pp. 170-2). The Claimant's Motion was denied by Administrative Order dated January 3, 2014. (R. pp. 14-15).

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

Code Ann. § 42-9-210 and § 42-9-260. (R. pp. 29-30). In addition, Commissioner Taylor concluded that the Claimant is not entitled to any additional medical care or treatment under S.C. Code Ann. § 42-15-60, or benefits for permanent disability or loss of use under S.C. Code Ann. § 42-9-10, § 42-9-20, or § 42-9-30. (R. pp. 29-30).

Thereafter, the Claimant filed a Form 30 requesting the Commission's Appellate Panel review Commissioner Taylor's September 2, 2014 Order; however, the only exceptions raised related to "newly discovered evidence" and the application of S.C. Code Ann. § 42-1-560. (R. pp. 189-92). The Claimant raised no exception to the remainder of the Hearing Commissioner's Conclusions of Law. (R. pp. 189-92). Similarly, the Claimant raised no argument with regard to Commissioner Taylor's denial of benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief to the Appellate Panel. (R. pp. 193-207). In fact, the Claimant did not even mention these statutes in his Form 30 or in his brief to the Appellate Panel. (R. pp. 189-92, pp. 193-207). Therefore, the Respondents argued that the Commissioner's conclusions of law with regard to the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case and is not subject to review by the Appellate Panel or the Courts.⁴ (R. pp. 208-210, pp. 218-220).

After oral arguments in Columbia on April 21, 2015, the Appellate Panel issued the Commission's final Decision and Order dated February 8, 2016, affirming the Decision and Order of Commissioner Taylor in its entirety. (R. pp. 33-42). The Claimant timely filed the present appeal to the South Carolina Court of Appeals. (R. p. 223). In his brief to the Court of Appeals, the Claimant again failed to raise any argument with respect to (or even mention) the Commission's conclusion of law pursuant to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30.

Arguments

I. The Workers' Compensation Commission's conclusions of law with respect to the Claimant's entitlement to additional medical and compensation benefits are the law of the case.

The Claimant did not appeal conclusions of law numbers 4, 5, 6, 7, or 8 of the Hearing Commissioner's Decision and Order in his Form 30, nor did he raise any exception to these conclusions in his brief to the Appellate Panel. (R. pp. 189-92, pp. 193-207). Similarly, the Claimant raises no argument with respect to these conclusions of law in his brief to the Court of Appeals. These conclusions deal with the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30; yet none of these statutes are ever mentioned in the Claimant's Form 30, his brief to the Appellate Panel, or his brief to the Court of Appeals. (R. pp. 189-92, pp. 193-207). Quite simply, the Claimant makes no argument with regard to the proper application of these statutes and; therefore, the following conclusions are the law of the case:

- Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
- Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
- Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.
- Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
- Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission." Creech v. Ducane Co., 320 S.C. 559, 476, S.E.2d 114, *reh'g denied, cert. denied* (Ct. App. 1995). Furthermore, all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940). Here, the Claimant did not raise any exception to the above-reference conclusions of law and the Commission's Appellate Panel lacked the authority or jurisdiction to extend the fourteen days permitted for the perfecting of an appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011).³

Therefore, regardless of any argument the Claimant makes under S.C. Code Ann. § 42-1-560, the issue is moot because the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law. According to the South Carolina Supreme Court, "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)). In addition, mere "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005) (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that failure to provide argument or supporting authority for

an issue renders it abandoned)). Due to his failure to raise any exception to Conclusions 4, 5, 6, 7, or 8 in his Form 30 and his failure to raise any argument regarding Conclusions 4, 5, 6, 7, or 8 in his brief to the Appellate Panel or the Court of Appeals,⁵ the Respondents respectfully contend that the Claimant's appeal is moot and otherwise without merit and further respectfully contend that the Workers' Compensation Commission's final Decision and Order should be affirmed in its entirety as a matter of law.⁶

⁵ Note that due to an obvious typographical error, the Appellate Panel's Decision and Order refers to these same conclusions of law as numbers 11, 12, 13, 14, and 15.

⁶ It is well settled that issues for which no legal authority is cited are abandoned on appeal. See, e.g., Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). Indeed, our courts have often reiterated that even "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496-97 (Ct. App. 2006); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993); Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992). South Carolina law is also well settled that a trial court's or hearing officer's unappealed ruling, right or wrong, is the law of the case. See, e.g., Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d

II. The Claimant's arguments are impermissibly based upon facts not in evidence and are not properly before the Court of Appeals.

The Claimant makes repeated, specific references to facts not in evidence and to documents that were excluded from the record below in support of his arguments on appeal.⁷ Specifically, the Claimant sought to introduce newly-manufactured evidence by motion dated December 20, 2014. (R. pp. 177-79). This motion was denied by Order dated January 3, 2014. (R. pp. 16-17). The Claimant did not appeal the Commission's January 3, 2014 Order to the Court of Appeals. The Claimant's March 8, 2016 Notice of Appeal filed with the Court of Appeals makes no mention of the Commission's January 3, 2014 Order and that Order was not otherwise attached to the Notice, as specifically required by Rule 203(d)(2)(B)ii and Rule 203(e)(2)(C), S.C.A.C.R. (R. pp. 222-24). Therefore, the Claimant cannot now be heard to complain about the propriety of the Commission's January 3, 2014 decision to deny the Claimant's motion to introduce additional evidence, because "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C.

869, 871 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmation); Mid-South Mgmt. Co. v. Sherwood Devel. Corp., 374 S.C. 588, 596 n.3, 649 S.E.2d 135, 139 n.3 (Ct. App. 2007); Fickling v. City of Charleston, 372 S.C. 597, 599, 643 S.E.2d 110, 112 n.1 (Ct. App. 2007).

⁷ The Claimant refers to this document, which was specifically excluded from evidence by the Commission, as a "stipulation."

323, 329, 730 S.E.2d 282, 285 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)).

Furthermore, the Court of Appeals lacks appellate jurisdiction to consider arguments regarding the admissibility of additional evidence because the Claimant did not comply with Rule 203, S.C.A.C.R. See State v. Brown, 358 S.C. 382, 596 S.E.2e 39 (2004) (holding that an appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction). The Court of Appeals also lacks subject matter jurisdiction over the Claimant's evidentiary arguments because S.C. Code Ann. § 42-17-60 and S.C. Code Ann. § 1-23-380(A)(1) make the unappealed Order of January 3, 2014 conclusive and binding. Therefore, it would be improper for the Court of Appeals to either reverse the Commission's decision on the admissibility of the Claimant's new evidence, or to take judicial notice thereof as the Claimant now requests.

However, the entirety of the Claimant's arguments on appeal concern these facts and documents which were not admitted into evidence by the Commission and which are not properly before the Court of Appeals. The Respondents respectfully contend that such arguments based on facts not in evidence are improper. Rule 208(b)(4), S.C.A.C.R., specifically requires that a party's "brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." Because facts and documents not admitted into evidence by the Commission are not properly included in the Record on Appeal pursuant to Rule 210(c), S.C.A.C.R., the Respondents request that arguments made in reliance on such improper references be rejected by the Court of Appeals. See Altichiler v. Dept. of Prof.

Reg., 442 S.2d 349, 350 (Fla. Dist. App. 1st 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for an attorney to attempt to bring such matters before the court.").

III. The Workers' Compensation Commission properly concluded that the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560 based upon substantial evidence in the record and the applicable law.

The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (R. pp. 161-69). The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced. As a result, the Commission concluded that the Claimant had failed to comply with the mandatory requirements of S.C. Code Ann. § 42-1-560. (R. pp. 19-31). The Respondents respectfully request that the Court of Appeals affirm this conclusion based upon substantial evidence in the record and the applicable law.

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

"Notice of the commencement of the [third-party] action shall⁸ be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." (emphasis added)

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

⁸ "The use of the term 'shall' in a statute means that the action is mandatory." Johnston v. S.C. Dept. of Labor, Licensing, and Reg., 365 S.C. 293, 296-97, 617 S.E.2d 363, 364 (2005) (citing Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)).

the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560.

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

The Claimant would argue that his admitted failure to comply with S.C. Code Ann. § 42-1-560 could somehow be "cured" by voluntarily dismissing this third-party lawsuit and then simply re-filing. The Respondents respectfully contend that the Claimant should not be permitted to grossly circumvent the clear statutory requirements in this manner. To date, there is no case law on this

issue and the Supreme Court has previously declined to address the "efficacy" of a re-filing. See Callahan, supra, at n.1. Should the Claimant voluntarily dismiss his third-party suit and then re-file, then the third-party suit filed on February 20, 2013 could no longer be considered a "nullity" and to suggest that the Commission should pretend that the February 20, 2013 suit was never filed under such circumstances would entail a grossly prejudicial legal fiction. Therefore, the Respondents respectfully contend that that the Hearing Commissioner's Decision and Order should not be reversed based on facts not in evidence, hypothetical scenarios, or newly-manufactured events.

IV. The Claimant's argument regarding the timeliness or propriety of the Respondents' argument under S.C. Code Ann. § 42-1-560 is untenable.

The Claimant admits that he filed a third-party suit against Robbie Clark and his insurance carrier in the Charleston County Court of Common Pleas on February 20, 2013 and concealed this fact from the Respondents and the Workers' Compensation Commission for over eight (8) months while he completed discovery and sought to settle that claim. (R. pp. 170-72). Because the Claimant concealed the fact of his third-party suit from the Respondents, in clear violation of S.C. Code Ann. § 42-1-560, the Respondents were unable to raise S.C. Code Ann. § 42-1-560 as a defense to the claim for benefits under the Workers' Compensation Act until the Claimant's illegal and improper concealment was revealed. Yet, the Claimant now argues that it was somehow

untimely or prejudicial for the Respondents to raise these material facts upon discovery. The Respondents respectfully contend that the Claimant's argument in this regard is untenable.

Specifically, the Claimant now contends that his due process rights were somehow infringed upon when the Commission granted the Respondents' Motion to introduce the Claimant's third-party pleadings into evidence. However, the Commission did not prevent the Claimant from responding to this Motion or the arguments contained therein. "Due process is flexible and calls for such procedural protections as the particular situation demands." Stono River Env'tl. Protection Ass'n v. South Carolina Dep't of Health and Env'tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991) (citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)). To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process. Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984) (citing Ka Fung Chan v. Immigration and Naturalization Serv., 634 F.2d 248 (5th Cir. 1981)).

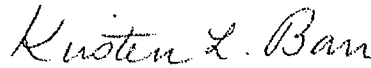
Here, the Commission's regulations specifically guaranteed the Claimant the opportunity to be heard, which he could have exercised by simply filing a Return to the Respondent's Motion or a Memorandum in Reply. See S.C. Code Reg. 67-215(F). In fact, the Commission's Regulations require that the jurisdictional commissioner not consider a motion until "after the opposing party has had ten days notice." S.C. Code Reg. 67-215(G). Nevertheless, the Claimant

simply chose not to file a return or reply memorandum in response to the Respondent's Motion to Introduce Newly Discovered Evidence. The Claimant cannot now be heard to allege prejudice of his own making. Therefore, the Commission neither committed legal error, nor infringed upon the Claimant's right to due process, in granting the Respondents' Motion and considering the legal arguments contained therein, despite the fact that the Claimant failed to avail himself of his right to be heard on this issue. As such, the Commission's decision to admit and consider evidence regarding the third-party suit filed by the Claimant some eight (8) months prior to the workers' compensation hearing, should be affirmed.

Conclusion

Therefore, based upon the arguments set forth above, the Respondents respectfully request that the Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,



November 28, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

The Honorable R. Michael Campbell, II, Commissioner

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

Samuel A. Rose, Claimant..... Appellant,

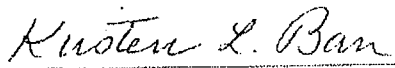
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Respondents complies
with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated
August 13, 2007, requiring redaction of personal data identifiers.

November 28, 2016


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000497

Samuel Rose, Claimant, ... Appellant,

v.

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

REPLY BRIEF

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ARGUMENT

The entire thrust of Respondents' Brief—indeed their entire defense of this case—has been reliance on technicalities, rather than dealing directly with the merits of their obligation to care for their injured employees. Two essential principles overshadow the issues raised in this appeal. The first is that it is not the place of the courts (nor litigants) “to play a ‘gotcha’ game with attorneys by showcasing their alleged mistakes, at the expense of their clients.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012)(Toal, C.J., dissenting); see, also McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011)(“Although prolonging settlement negotiations in hopes of surpassing the statute of limitations is a disdainful practice some insurance companies keep, this in no way justifies the type of ‘gotcha’ game played by McClurgs’ counsel in this case.”)(Toal, C.J., dissenting). The second is that our State has a strong preference for deciding cases on the merits, rather than on procedural technicalities. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc., 274 S.E.2d 287, 275 S.C. 556 (1981). These sentiments are particularly relevant where, as here, the technicalities are not real and cause no impediment to this claim's viability.

1. The Commission's Conclusions of Law in regard to additional medical and compensation benefits are encompassed in the original appeal because they derive from the erroneous procedural dismissal under Section 42-1-560 [in Reply to Respondents' arguments at pages 5-8].

In its Decision and Order, the Appellate Panel made no findings of fact on the merits raised in the pleadings and listed on the Notice of Hearing [R. pp. 43, 113].

The dismissal of the case was based entirely on the procedural issues associated with the Form S-2. [R. pp. 39, lines 13-20; 41, lines 3-7].

As Respondents point out, the Appellate Panel did make additional Conclusions of Law, citing various statutes governing medical and compensation benefits. However, each of these followed the legal conclusion that:

Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec 42-15-560. [R. p. 41, lines 3-7].

The additional conclusions held no further benefits were due under section 42-9-260 (weekly temporary total disability compensation); section 42-15-60 (medical treatment); and section 42-9-10, 42-9-20, and 42-9-30 (permanent disability compensation). The fact each legal conclusion follows conclusion 11 and summarily states Respondents shall have no liability for these benefits confirms that the conclusions derive from the procedural dismissal; not the merits. Cf. Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990)(the definition of prevailing party "clearly envisions a victory to some degree on the merits."). As Appellant unquestionably appealed the rulings on the S-2, so must these derivative conclusions of law been necessarily appealed. When the appellate courts can fairly infer the issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296

S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”).

Respondents have repeatedly tried to backdoor this preservation issue into the case. The Appellate Panel tasked Respondents with drafting a proposed Order. The original draft included the sentence:

Regardless of these arguments, the fact remains that the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law, having failed to perfect an appeal of the Hearing Commissioner Taylor's Conclusions of Law regarding the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30.

Appellant objected to inclusion of this language in the order. [R. pp. 293-295]. The Appellate Panel agreed, deleting this proposed conclusion of law in the final order. In so doing, they effectively ruled against Respondents on the issue (leaving one to observe that Respondents did not appeal, thus failing to preserve their own argument on preservation).

The Court should find that the listed conclusions of law are derivative of the dismissal over the S-2 issue, such that Respondents' preservation argument should be disregarded and denied.

2. The documentation of Appellant's voluntary stipulation of dismissal of the counterclaim in the civil case was presented to the Commission and is properly part of the Record on Appeal [in Reply to Respondents' arguments at pages 5-8].

The Claimant, upon learning that Respondents had moved to dismiss his workers' compensation case based on the Form S-2, filed a voluntary Stipulation of Dismissal of his counterclaim in Robbie Clark v. Samuel A. Rose, Case No. 2012-

CP-10-2996. The Claimant then submitted the Stipulation of Dismissal in support of his Claimant's Motion to Introduce newly Discovered Evidence. [R. pp. 177-185].

Respondents argue that the stipulation of dismissal is not part of the record because (1) the Single Commissioner's order denying the motion was not attached to the Notice of Appeal; and (2) the Single Commissioner denied the motion to introduce newly discovered evidence (a ruling affirmed by the Appellate Panel).

A. Intermediate orders affecting the final judgment on appeal are reviewable by the Court.

Respondents argue that because the Single Commissioner's January 3, 2014 Order denying the December 20, 2013 motion was not attached to the Notice of Appeal, that particular order is unappealable. This argument fails on several grounds.

This case is an appeal from the Appellate Panel; not the Single Commissioner. The multiple rulings from the Single Commissioner were appealed to the Appellate Panel -- which affirmed. [R. pp. 37, 189-192]. There is no requirement -- nor even the possibility -- of directly appealing an order from a single commissioner and bypassing the Appellate Panel. See Janbrette v. Union Camp Paper Corp., 293 S.C. 59, 358 S.E.2d 704 (1987) (decision of a hearing commissioner cannot be taken directly to the circuit court on appeal, without first being reviewed by the Full Commission); S.C. Code Ann. § 42-17-50, 42-17-60 (2007).

The January 3, 2014 order is an intermediate order. The Single Commissioner denied Appellant's motion to submit additional evidence which would have cured the S-2 defect and restored his case. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007) (when claimant voluntarily dismisses third-

party case, “there is no violation of § 42-1-560 [because] the third-party suit is treated as never being filed.”) The denial of the motion prevented the Claimant from availing himself of the cure for his attorney’s error set out by the Supreme Court in Callahan. Appellant appealed the January 3, 2014 order to the Appellate Panel. [R. pp. 186-188]. The appeal was administratively dismissed as interlocutory under Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). The administrative dismissal confirms that the order denying the motion was an intermediate order.

The statute governing appeals explicitly allows the reviewing court to address intermediate rulings which, as here, affect the merits. The statute states: “Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment.” S.C. Code Ann. § 18-1-130 (supp. 2016).

The statute was designed to avoid the hyertechnical arguments raised by Respondents. See, e.g., Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) (“civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party”). Once the Notice of Appeal confers jurisdiction on the appellate court, the court has authority to decide all issues fairly before it – including intermediate rulings and orders which affect the judgment on appeal. The purpose of the Notice of Appeal is to confer jurisdiction; not to frame the issues. Rule 203(c)(2), SCACR. The process of framing issues occurs later – in the briefing stage. Appellant followed the proper procedure by including the Statement of Issues on Appeal in his brief. Rule 208(b)(1)(B), SCACR.

This Court plainly has jurisdiction and authority over the entire S-2 issue. Therefore, Respondents argument should be rejected.

B. Evidence properly submitted to the Commission is part of the Record on Appeal.

Respondents are correct that the Single Commissioner denied Appellant's Motion to Introduce newly Discovered Evidence. Respondents argue -- incorrectly -- that "facts and documents not admitted into evidence by the Commission are not properly included in the Record on Appeal pursuant to Rule 210(c), S.C.A.C.R." The rule states no such thing. It states "The Record shall not, however, include matter which was not *presented* to the lower court or tribunal." Rule 210(c), SCACR. The issue is not whether the single commissioner admitted the evidence; the issue is whether the Appellant presented the evidence to the tribunal. Respondents argument that only admitted evidence can be included in the Record on Appeal is simply wrong. If that were so, the appellate courts would never be able to review a trial judge's decision to exclude evidence.

The general rule on reviewing evidentiary rulings is whether there is a sufficient record made for the court to review. As this Court has stated, "[t]he threshold issue is whether [appellant] attempted to proffer the evidence, rather than whether his attempt succeeded. The rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists." Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct.App. 2007). In such instances, the appellate court will address the merits if it can be determined what the testimony was

intended to show. Rule 103(a)(2), SCRE; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

The above applies to testimony excluded at trial. The attorney must make a proffer of the excluded testimony to create a record for the appellate court. See, e.g. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Cl. App. 2014)(remanding to consider proffered testimony of witness improperly excluded by commission). The “reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.” State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979).

More importantly, it is undisputed that Rose filed the stipulation of dismissal. Respondents understandably seek to prevent the Court from taking judicial notice of this indisputable fact, as it is dispositive of the case and commands reversal. This Court has authority to take judicial notice of adjudicative facts which are indisputable. Masters v. Rodgers Dev., 283 S.C. 251, 321 S.E.2d 194 (Cl. App. 1984). Cf. Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Cl. App. 1984)(“A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records. . . . It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case.”).

The rule on proffering excluded evidence exists to allow meaningful appellate review as does the rule on judicial notice of undisputed facts. As the Stipulation of Dismissal was presented to the Commission and the fact the third-party case was dismissed without prejudice is indisputable, this Court has the ability and authority to review the exclusion of the evidence and reverse the Commission.

3. The Workers' Compensation Commission erred in dismissing Appellant's case when he cured any violation of §42-1-560 by voluntarily dismissing his counterclaim in the civil lawsuit [in Reply to Respondents' arguments at pages 11-14].

No one disputes that the Claimant did not timely file and serve the Form S-2 on Respondents within 30 days of filing the Answer and Counterclaim in the civil case. The issue here is whether the defect was cured by his voluntary dismissal of the counterclaim without prejudice. Callahan created a safety net whereby claimants who inadvertently fail to timely file the S-2 can cure the defect so long as they have not irrevocably prejudiced the subrogation rights of the employer. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)(when claimant voluntarily dismisses third-party case, "there is no violation of § 42-1-560 [because] the third-party suit is treated as never being filed.").

The rule implicated here serves important purposes in the workers' compensation system. Section 42-1-560 created a subrogation interest for the employer wherein it can recover a portion of what it paid in workers' compensation benefits from a third-party tortfeasor. The statute serves multiple public policy interests. The subrogation interest reimburses employers for the costs of a workplace injury, thus lowering insurance premiums for employers. The true cost of the claim is largely borne by the third-party tortfeasor, thus retaining some measure of our fault-based tort system while accommodating our no-fault workers' compensation system. And the injured party is still able to make a recovery both from his employer and from the tortfeasor — yet is prevented from making a double recovery, thus ensuring fairness for all parties.

The statute and case law recognize that the employee is the master of his claim — such that he can elect to proceed under workers' compensation, waive his rights under the act and elect to proceed in tort, or recover both subject to the subrogation lien (which is the wisest path). Section 42-1-560 spells this out, including the requirements that he file a suit within one year and serve the S-2 within 30 days of filing suit.

The difficult aspect of how these case have evolved is in the strict — perhaps even draconian — construction of the statute. No one disputes that a claimant who settles with a third-party tortfeasor without protecting the employer's subrogation interest has elected a remedy and waived his right to workers' compensation benefits. Once a settlement has been disbursed (and perhaps spent), there is no real way for the employer to recover its lien.

The courts have determined there are two critical events: (1) commencement of a lawsuit; and (2) the filing of the S-2. Filing a lawsuit without filing an S-2 does not *in fact* prejudice the employer. So long as the third-party case has not been settled or tried, the employer's subrogation interest has not been compromised. A review of the case law shows *prejudice in fact* is the real issue.

The issue first arose in Taylor v. Mount Vernon-wood-berry Mills Inc, 211 S.C. 414, 45 S.E.2d 809 (1947). The court framed the "question for determination [as] whether an employee who is injured in the course of his employment, and, without the knowledge and consent of his employer, a self-insurer, makes a binding settlement with a third party against whom he has a claim for damages for his injury, and executes a full and complete release to the latter, is thereby debarred from

compensation under the [predecessor to § 42-1-560]. Id. The court held such a settlement – with a signed release – “operated as a bar to the alternate remedy against the employer.” Id.

Three years later the identical situation arose in Gardner v. City of Columbia Police Dept., 57 S.E.2d 308, 216 S.C. 219 (1950). Following Taylor, the court held claimant nullified his workers’ compensation award by “the execution of the release which exonerated the third party tort-feasor from all damages arising out of the accidental injury; and as a direct legal consequence, destroyed the [employer’s] right of subrogation as provided in the Workmen’s Compensation Act.” Id. Notably, Justice Stukes dissented (as he had in Taylor), stating “The record indicates that this is a harder case upon the unwary and uninformed employee and, to me, accentuates the injustice of the rule.” Id. (Stukes, J., dissenting).

The issue arose again in 1959 in Stroy v. Millwood Drug Store, Inc., 109 S.E.2d 706, 235 S.C. 52 (1959). The employee was seriously injured in a motor vehicle accident while in the course of his employment. He filed suit against the other driver. The case was tried resulting in a defense verdict – thus, there was no recovery in the third party case. The employee then sought workers’ compensation benefits. His claim was denied on the grounds that he had elected his remedy – notwithstanding there had been no recovery in the third party case. The Supreme Court added a critical additional fact, to wit: “it appears that prior to the trial of the action against the Checker Cab Company, appellant refused an offer of \$500 in settlement. It was clearly prejudicial to the right of subrogation to decline this offer without the consent of respondents.” Id.

In the 1982 Fisher case, the employee was injured in a fall at a retail store while shopping for her employer. She settled the personal injury case against the retail store without consent of the employer. The Commission held by her settlement with the store, she had elected a remedy against a third party without compliance with section 42-1-560. The Court interpreted the statute to state "the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under § 42-1-550 and still maintain a workmen's compensation claim." Fisher v. South Carolina Dept. of Mental Retardation-Coastal Center, 291 S.E.2d 200, 277 S.C. 573 (1982). The court summarized by stating: "Appellant's noncompliance with the statutory procedure and disregard for the rights and remedies of the carrier violates the spirit of the act. It is clear Mrs. Fisher made an election and has waived any rights she may have had under the South Carolina Workmen's Compensation Law." Id.

More recently in Wise, the Court of Appeals held the rule applied to bar a workers' compensation claim where the claimant had both settled against the third-party tortfeasor and obtained a default judgment against the employer. The Court found it "clear that an employee cannot recover against an employer under both a workers' compensation action and a civil action. Here, Claimant recovered \$900,000 from Employer in the form of a default judgment. Further, because Claimant did not strictly comply with the notice provisions in filing suit against a third party, he is barred from recovering under the Act." Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (2011).

The interesting part of Wise is not the underlying ruling -- which followed the established line of cases. Rather it is the fact that the employee filed the civil suit *after* trying and losing the workers' compensation case on jurisdictional grounds. The issue was whether the employer could introduce the post-hearing civil suit as after-discovered evidence when it was not in existence at the time of the workers' compensation hearing. The Court held the fact of the civil suit was properly before the court on two grounds: (1) the court could take judicial notice of indisputable facts; and (2) the evidence of the civil claim met the criteria for the admission of new evidence because "Noting requires that facts be in existence at the time of the first hearing by the single commissioner." Id. The second point is important here because the single commissioner denied Appellant's motion to submit the Stipulation of Dismissal because it was "after-created evidence." [R. pp. 16-17].

The cases holding there was an election of remedies all have one consistent element: prejudice in fact. In every one of these cases, the employee had settled, tried or obtained a default judgment in the civil case. There was no means for the employer to resurrect its subrogation interest. The subrogation interest had been extinguished.

That brings us to Callahan. Callahan emphatically reemphasizes "that § 42-1-560(b) must be strictly followed in order for a claimant to preserve her right to proceed against both an employer and a third-party." Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007). Once making that statement, the Callahan court then diverges from all previous decisions by concluding that "Claimant's voluntary dismissal without prejudice of her third-party suit allows her

to proceed with her workers' compensation claim." Id. Thus, while acknowledging the general rule of strict compliance, the Court looked to whether the employer had suffered prejudice in fact. On the facts before it, the Court found there was no prejudice because the employer's right of subrogation had not been irrevocably extinguished. An employee is allowed to dismiss the original lawsuit and comply with § 42-1-560(b) when refiling suit against the third-party tortfeasor. The Callahan holding thus preserves the employee's right to full recovery; preserves the employer's right to subrogation; and puts the ultimate burden on the at-fault tortfeasor.

This is not, as argued by Respondents, a "grossly prejudicial legal fiction." [Brief of Respondents, page 14]. This is simply a refusal to elevate form over substance. The fact is that the Claimant took steps to preserve his employer's subrogation rights. That he did so upon learning of his attorney's error is immaterial — as the real issue is that he had not irrevocably extinguished Respondents' subrogation interest (illusory though it may have been).

There is simply no prejudice to the Respondents in reversing the Commission. Respondents retain all statutory subrogation rights. Conversely, the prejudice to Rose is manifest. Not only would he lose his workers' compensation benefits, there is no viable remedy in tort for him to elect. He counterclaimed when sued by his coworker. Both the underlying suit and the counterclaim are barred by the exclusive remedy provision. The civil case was void *ab initio*.

The Court should reverse the decision below and find that the Claimant has not elected his remedy.

4. Appellant was denied due process when the Commission refused to consider the Stipulation of Dismissal [in Reply to Respondents' arguments at pages 14-16].

Respondents argue that "The Claimant cannot now to be heard to allege prejudice of his own making." [Brief of Respondents, page 16]. Specifically, Respondents seem to allege that the Commission should be affirmed because "Claimants simply chose not to file a return or reply memorandum in response to the Respondent's Motion to Introduce Newly Discovered Evidence." [Brief of Respondents, page 16].

This argument makes no sense. The Claimant did file a response to the motion — two in fact. He first filed a Motion in Opposition to Introduce After Discovered Evidence on November 21, 2013. [R. pp. 170-172]. The response was inartfully captioned as a "Motion in Opposition," yet it was undeniably a written response to the motion filed by Respondents.

The Claimant's second response was to file Claimant's Motion to Introduce newly Discovered Evidence on December 20, 2013. The evidence sought to be introduced was the Stipulation of Dismissal without prejudice filed December 5, 2013 in Robbie Clark v. Samuel A. Rose, Case No. 2012-CP-10-2996.

The Claimant exercised due diligence in curing the S-2 defect. He timely filed his initial response to Respondents' motion. Within less than a month, he filed the Stipulation of Dismissal, which was then attached to his own December 20, 2013 motion. All these steps were taken before Commissioner Taylor issued a ruling on any of the motions. Commissioner Taylor issued her rulings on January 3, 2014 — addressing all issues on the same day.

There is nothing inherently wrong in Commissioner Taylor addressing the S-2 issue raised in Respondents' motion. The error lies in refusing to allow the Claimant notice and opportunity to respond, thus denying him due process.

The Single Commissioner's rationale for refusing to consider the Stipulation of Dismissal was an error of law. Simply as a matter of practicality, the Claimant could not obtain a filed Stipulation of Dismissal within 10 days of Respondents' motion. Indeed, even if he had, it would have made no difference, as the refusal to consider the Stipulation of Dismissal was based on its characterization as "after-created evidence" rather than on timeliness. It was plainly before the Single Commissioner when she issued her rulings.

The controlling case on the evidentiary issue is Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (2011). In Wise, the employee filed the civil suit *after* trying and losing the workers' compensation case on jurisdictional grounds. The issue was whether the employer could introduce the post-hearing civil suit when it was not in existence at the time of the workers' compensation hearing. The Court held the evidence of the civil claim met the criteria for the admission of new evidence because "Nothing requires that facts be in existence at the time of the first hearing by the single commissioner." Id. The same rule applies here. The single commissioner denied Appellant's motion to submit the Stipulation of Dismissal because she viewed it as "after-created evidence" which was somehow different than after-discovered evidence. [R. pp. 16-17]. Wise confirms this was an error of law.

The Court should reverse the denial of Appellant's motion to introduce the Stipulation of Dismissal. The Court should find as a matter of law that the Claimant

complied with Callahan by dismissing the tort suit and should reinstate his claim for workers' compensation benefits.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Appellant's claim for workers' compensation benefits should be reinstated. The case should be remanded for a decision on the merits of the issues raised in the September 23, 2013, Form 21 hearing.

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December 2, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000497

Samuel Rose, Claimant, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule
211(b), SCACR.

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December 2, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

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

v.

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

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

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

PETITION FOR REHEARING

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Statement of the Case

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

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

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

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

The Claimant did not file a return² to the Petitioners' Motion to Introduce Newly Discovered Evidence. The Petitioners' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. The Claimant then filed a Motion to Introduce New Evidence into the record. Hearing Commissioner Taylor denied the Claimant's Motion by Administrative Order dated January 3, 2014 on the basis that the evidence the Claimant sought to introduce was not "of the same nature and character required for granting a new trial" as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.³

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

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

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

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

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

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

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

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

Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Notice of the commencement of the [third-party] action shall⁵ be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." (emphasis added)

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

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

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

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

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

Conclusion

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

The Honorable R. Michael Campbell, II, Commissioner

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

Samuel Rose, Claimant.....Appellant,

v.

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

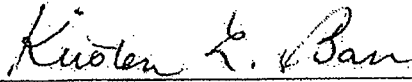
PROOF OF SERVICE

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

Stephen Benjamin Samuels, Esq.
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Columbia, SC 29201

Amy V. Cofield, Esq.
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809 South Lake Drive
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May 3, 2018

A handwritten signature in cursive script that reads "Kirsten L. Barr". The signature is written in dark ink and is positioned above a horizontal line.

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P.O. Box 1715 • 1612 Marion Street
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(803)737-5700

WCC File # 1112328
Carrier File # 943450
Carrier Code # 01067
Employer FEIN 36-4500154

SAMUEL A ROSE

Claimant's Name

SSN

Chris Thompson Services, LLC

Employer's Name

Address

City

State

Zip

PO BOX 3377 SUMMERVILLE, SC 29484-3377

Address

City

State

Zip

Home Phone #

Work Phone #

Bridgefield Casualty Insurance Company

Insurance Carrier

Kiema Lewis

Preparer's Name

1-800-863-2181

Phone #

1. Date of injury: 08/10/11
month day year

2. Total Weeks of Compensation Paid: 125

3. Type of Compensation Paid (TP or TT)/Periods of Payment:

Type: TT From: 08/11/11 To: 01/09/14

Type: _____ From: _____ To: _____

Type: _____ From: _____ To: _____

4. Date of First Payment: 12/22/11
month day year

5. Total Amount Paid (a) Compensation: 54,600.84

(b) Medical (Include Nursing, Hospital Drugs, Etc.): 18,643.22

6. Informal Conference is Requested: ☐ yes ☒ no
(check one)

7. Use these lines to send a memo to the Commission:

Kiema Lewis

Employer's Representative

1-800-863-2181

Phone #

02/08/19

Date

Sent to Commission on

02/08/19

Type or print all information. File this form 6 months after the alleged injury date and each 6 months until the Commission's File is closed. Form 18 must be filed whether or not compensation is ongoing. Check "yes" after number 6 to request an informal conference. Refer to R.67-413, R.67-507, and R.67-804 for further information.

WCC FORM # 18 REV. DATE 3/96
53 A25 943450

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PERIODIC REPORT

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 1112328
Carrier File #: 943450
April 16, 2019

NOTICE OF HEARING

SAMUEL ROSE v. CHRIS THOMPSON SERVICES, LLC, et al

Subject: Remand on issues as set forth by Full Commission Order.
Date: May 8, 2019 at 10:00 AM
Location: SC Workers' Compensation Commission, 1333 Main Street, Suite 500, Hearing Room A
Columbia, SC 29202

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Aisha Taylor
803-737-5692, rgsmith@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Renee G Smith, SC Workers' Compensation, April 16, 2019

Party

Employee: SAMUEL ROSE

Employee: SAMUEL ROSE

Employee: SAMUEL ROSE

Carrier: SC Workers Compensation Uninsured Employers Fund

Attorney

Stephen B. Samuels
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803-779-4000

Joseph B. Fisher
jfisher@sinklaw.com
843-315-1848

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843-572-0700

Amy V. Cofield
amy@cofieldlaw.com
803-951-0389

Party

Carrier: SC Workers Compensation Uninsured Employers
Fund

Employer: CHRIS THOMPSON SERVICES, LLC
Carrier: Bridgefield Casualty Insurance Company

Employer: JJS TRUCKING, LLC
137-A GORDON STREET
CHARLESTON, SC 29403

Attorney

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