THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

WCC 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

BRIEF OF RESPONDENT

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Respondent

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STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Respondent, 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. [R.p. 19].

Rose I:

Rose filed a claim for workers' compensation benefits. [R.p. 92]. 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. Chris Thompson Services also filed a Petition to Transfer Liability to the South Carolina Uninsured Employers' Fund (UEF). [R.p. . 94-98]. 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.

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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. Christ 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.

[R.p. 1-11].

Appellants timely filed a Form 30 (Notice of Appeal) to the Full Commission. 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." [R.p. . 12-22].

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.").

Rose II.

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."

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. [R.p. 108-112]. Rose did not, at that time nor within 30 days of the February 20, 2013 compulsory counterclaim, file a Form S2.

Appellants 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. [R.p. 328-385].

On November 12, 2013 – prior to Commissioner Taylor making a ruling on the merits – Appellants 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. [R.p. 104-117].

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

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

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 Appellants' Motion to Introduce Newly Discovered Evidence. She also denied Claimant's Motion in opposition to Introduce After Discovered Evidence and denying Claimant's Motion to Introduce After Discovered Evidence.

On January 14, 2014, Appellant Rose filed a Form 30 appealing Commissioner Taylor's rulings on the motions. [R.p. 117-120].

On January 21, 2014, the Full Commission issued an order dismissing the appeal as interlocutory. [R.p. 29].

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..

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 Appellants could terminate compensation as of the September 20, 2013 hearing and would have no further liability. [R.p. 30-42].

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.

Rose timely appealed to the Court of Appeals. In an unpublished Decision the Court reversed and remanded for a decision on the merits by the Full Commission. Rose v. JJS Trucking, Op. No. 2018-UP-155 (S.C. Ct. App. filed April 18, 2018). [R.p. 58-60]. Appellants filed a Motion for Reconsideration, which was denied by the Court. [R.p. 61-62, 230-243].

On June 24, 2019, the Full Commission issued an Order on Remand finding for Rose. The Commission found he was not at MMI; that he was entitled to treatment for his lumbar and cervical spine (specifically including surgery) as directed by Dr. Poletti; that he was to receive an evaluation and treatment of his right knee by an orthopaedic surgeon chosen by Appellants; and that he was to be paid the arrearage of temporary total disability compensation (TTD) owed since the Appellants had terminated compensation on January 7, 2014 and continuing until he reached MMI. [R.p. 77-90].

Appellants timely filed a Motion for Reconsideration. [R.p. 257-309]. The Commission denied the Motion. [R.p. 91]. 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. [R.p. 504].

Rose slowed down for a construction zone ahead. Clark then rear-ended Rose, pushing Rose's truck into the concrete median wall. [R.p. 504].

Rose suffered serious injuries in the accident. His injuries included a traumatic brain injury with loss of consciousness; lacerations to both shins; fractured medial femoral condyle (femur); and injuries to his back and neck. [R.p. 434-435, 495-496]. Dr. Wildstein recommended surgery to his neck – specifically a one-level C5-6 ACDF. [R.p. 496].

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. [R.p. 1-11].

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. [R.p. 44-47].

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." [R.p. 114-116].

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. [R.p. 493-496]. 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. [R.p. 199-501].

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." [R.p. 11]. The Appellate Panel

affirmed. Despite the Commission's Order, Appellants provided no medical treatment.

On March 20, 2013, Appellants 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. [R.p. 389-392].

Relying on the report from Dr. Jones, Appellants 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 – Appellants filed their Motion to Introduce Newly Discovered Evidence. In their Motion, Appellants 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." [R.p. 106].

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

Commissioner Taylor denied Rose's motions. She granted Appellants motion and then issued an order holding Appellants 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).

Rose appealed to the Court of Appeals which reversed and remanded. Appellants filed a Petition for Rehearing arguing, *inter alia*, that the Court failed to address an issue raised by Appellants, specifically that a particular conclusion of law barred Rose's claim on the merits. [R.p.

230-244]. The Court denied the Motion for Rehearing. [R.p. 61].

On June 24, 2019, the Full Commission issued an Order on Remand finding for Rose. The Commission found he was not at MMI; that he was entitled to treatment for his lumbar and cervical spine (specifically including surgery) as directed by Dr. Poletti; that he was to receive an evaluation and treatment of his right knee by an orthopaedic surgeon chosen by Appellants; and that he was to be paid the arrearage of temporary total disability compensation (TTD) owed since the Appellants had terminated compensation on January 7, 2014 and continuing until he reached MMI. [R.p. 77-90].

STANDARD OF REVIEW

In reviewing Workers' Compensation Commission's decision, an appellate court must affirm the Commission's factual findings if they are supported by substantial evidence and not controlled by legal error. Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). "An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Tiller, 334 S.C. at 339, 513 S.E.2d at 845.

The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Miller v. State Roofing Co., 312 S.C. 452, 441 S.E.2d 323 (1994); Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991).

ARGUMENT

1. As this Court has previously rejected Appellants' argument on the Commission's derivative Conclusions of Law, this issue is barred by the Law of the Case doctrine [in Response to Appellants' argument at pages 12-18].

Appellants argue – for the second time before this Court – that the case must be dismissed because "Claimant's Form 30 dated September 14, 2014 raised no argument with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 and elucidated no questions as to the Hearing Commissioner's application of these statutes." [Brief of Appellants, page 12]. Appellants raised the *identical* issue before this Court in the previous appeal, both in their Brief and in their Petition for Rehearing (as well as previously raising it before the Appellate Panel).[1] [R.p. 144-146; 195-198; 234-236]. The issue was frivolous from the outset and is no less frivolous for being raised a second time.

In Rose II, the Single Commissioner and Appellate Panel dismissed the underlying workers' compensation case finding that Rose had elected his remedy by filing a counterclaim in a lawsuit arising out of the same accident without filing a Form S2. Rose's insurance defense attorney had indeed filed a counterclaim. However, upon realizing the problem, the counterclaim was dismissed pursuant to Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)("A voluntary dismissal leaves the situation as though no suit had ever been filed. . . . As a result, there is no violation of § 42-1-560 when the third-party suit is treated as never being filed. "). This Court reversed, holding the Commission erred in denying Roses's motion to submit the stipulation of

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[1]In the Statement of the Case, Appellants confirm they made the identical argument to the Appellate Panel in Rose II. They write: Therefore, the Appellants 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." [Brief of Appellants, page 5],

dismissal showing that the violation of § 42-1-560 had been cured.

In Rose II, the Appellate Panel made no findings of fact on the merits raised in the pleadings and listed on the Notice of Hearing. [R.p. 99-103]. The dismissal of the case was based entirely on the procedural issues associated with the Form S-2. [R.p. 54, Findings of Fact 1 and 2; p. 56, Conclusion of Law 11].

As Appellants 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. 56, Conclusion of Law 11].

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 Appellants 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 Respondent unquestionably appealed the rulings on the S-2 in Rose II, so too 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"). Not only was the issue raised by Appellants, the court ruled against them.

Appellants have repeatedly tried to backdoor this preservation issue into the case – first in Rose II and now in this appeal. In Rose II, the Appellate Panel tasked Appellants 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.

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

Appellants raised the issue again in their Brief in Rose II, [R.p. 195-198]. The Court reversed the single commissioner and Appellate Panel holding they "erred by concluding Roses's purported violations of section 42-1-560(b) barred his workers' compensation claim from proceeding." Rose v. JJS Trucking, Op. No. 2018-UP-155 (S.C. Ct. App. filed April 18, 2018). Although the Court did not separately address Appellants' preservation issue, the reversal of both the single commissioner and Appellate Panel establishes that the issue was considered and rejected.

In any case, Appellants removed all doubt by raising the preservation issue in their Petition for Rehearing. [R.p. 234-236]. The Court denied the Petition, holding "the Court is unable to discover that any material fact or principle of law has been overlooked or disregarded, and hence, there is no basis for granting a rehearing." [R.p. 61].

Despite the multiple rulings rejecting their argument, Appellants persist in raising it yet

again. In fact, it is the centerpiece of this third appeal. Although dogged persistence can be laudable, successive appeals of the same issue are not.[2] Once an issue has been decided in a final order, it becomes the law of the case.

Furthermore, Appellants are barred by *res judicata.* The elements of *res judicata* are: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit. Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006). The purpose of *res judicata* is to prevent a party from relitigating a case it has already tried and lost. Appellants lost this issue before this Court. Not only did they lose, the Conclusions of Law on which they rely are a nullity and have been stripped of any effect. See Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995)("When the award of the Commission was reversed . . . it became of no effect and was no longer in existence.").

For these reasons, the Court should deny Appellants attempt to relitigate this issue and affirm the Decision and Order of the Appellate Panel.

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[2] This case is entering its second decade with no end in sight. As this Court has observed in a previous case involving successive appeals, "Odysseus' voyage home took just 10 years." Builders Mut. Ins. Co. v. Bob Wire Elec., Inc., 424 S.C. 161, 817 S.E.2d 807 (Ct. App. 2018). Our Supreme Court cited Rose I for the proposition that "an interlocutory order is not immediately appealable under the 'adequate remedy' provision when the only prejudice was 'to delay the payment of money' between insurance providers." Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019), *quoting* Rose v. JJS Trucking, LLC, 411 S.C. 366, 369, 768 S.E.2d 412, 413 (Ct. App. 2015). Noting that the Legislature enacted the Workers' Compensation Act to "provide a system focusing on quick recovery, relatively ascertainable awards, and limited litigation," the Russell court added "If Russell is entitled to additional benefits, she was entitled to receive them many years ago. If she is not entitled to additional benefits, Wal-Mart was entitled to have her claim denied many years ago." Id.

2. As the Appellate Panel properly followed the instructions on remand from this Court, Appellants were not denied due process and equal protection[in Response to Appellants' argument at pages 18–21].

Appellants repeat their previously rejected arguments regarding Rose's claim for benefits being barred by the Decision and Order reversed by this Court in Rose II, albeit with the additional spin of framing it as a violation of their Constitutional rights. Appellants contend they "were not given any notice that the Commission intended to address the merits of long-abandoned claims under S.C. Code Ann. §§ 42-9-10, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 *sua moto*, in June 2019." [Brief of Appellants, page 19 (emphasis in original)].

It is unfathomable that Appellants would argue to this Court that they had no notice the Commission would decide Rose's case on the merits, let alone to suggest the Commission *sua moto* exceeded its authority on remand. Did Appellants truly expect that the Commission would dismiss Rose's case when this Court reversed and remanded for further proceedings – explicitly rejecting the very argument Appellants now claim is a violation of due process? The Commission *had no authority* to readdress the issue. The issue had been decided by a higher court. "Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." Bobo v. Marshane Corp., 394 S.E.2d 2, 302 S.C. 86 (Ct. App. 1990); see, also Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995)("When the award of the Commission was reversed . . . it became of no effect and was no longer in existence."). Cf. Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019)("given the clear description of the error committed by the appellate panel in reversing the original commissioner, the only task for the commission after the court of appeals' decision was to complete a renewed review of the original commissioner's order under proper principles of law.").

Appellants correctly state that due process affords "persons the right to notice and an opportunity to be heard by an administrative agency." Ross v. Med. Univ. Of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997). However, due process does not extend to allowing a party to relitigate an issued it has already litigated and lost. To allow the losing party a second bite of the apple on an issue ruled on by an appellate court would turn due process on its head. "[A] party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2016).

There is no constitutional infirmity here. Appellants knew full well that this argument had been raised, ruled upon and rejected by the Court of Appeals. Appellants knew full well that the Commission was required to comply with the Court's instructions. They merely need to reread their Petition for Rehearing in Rose I. Only willful blindness would prevent actual knowledge of the issues on remand. The Court should reject this argument and affirm the Appellate Panel's Decision and Order on Remand.

3. The Appellate Panel's § 42-15-60 award is supported by substantial evidence [in Response to Appellants' argument at pages 21-31].

Appellants contend the award of additional medical treatment and the designation of Dr. Steven Poletti as Rose's attending physician is unsupported by substantial evidence. This is a purely factual issue exclusively within the authority of the Commission. This Court does not have the ability to make its own findings of fact nor to weigh the evidence. Appellants may be disappointed that their attempts to deny treatment to a severely injured man have been unavailing, but there is no legal error on which the Court can reverse.

In a previous hearing on May 15, 2012, the Commission found Rose was not at MMI. The Commission ordered Appellants "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.'" [R.p. 19, Finding of Fact 6]. Procedurally this is important, because it meant that at the September 23, 2013 hearing which is the subject of this appeal, the Commission was bound by its previous findings and award. The Commission's ultimate task was to weigh the evidence and determine if Rose had reached MMI without treatment (as urged by Appellants despite the previous Order) or whether he still required cervical spine surgery along with evaluation and treatment of his knee and lumbar spine (as requested by Rose).

After the 2012 hearing, Appellants declined to provide treatment – as they have done throughout this case. Instead, they provided an independent medical evaluation by Dr. Greg Jones, a physical medicine doctor. Dr. Jones opined Rose reached MMI on March 20, 2013 (the date of Dr. Jones' evaluation) with a 5% impairments to his cervicothoracic and lumbar spine; required no treatment; and was able to work without restrictions. [R.p. 389-392.

In the meantime – before seeing Dr. Jones – Rose had been treating (at his own expense) with various doctors. His primary care physician, Dr. Alan Abel, started treatment on August 16, 2011. On December 15, 2011, Dr. Abel noted Rose had seen an "orthopaedist who recommended that he have neck surgery based on an MR scan." [R.p. 463]. On October 8, 2012, Dr. Abel wrote "This patient continues to be frustrated by the lack of recommended treatment. He does need to see a neurosurgeon for evaluation of surgery on his neck. [R.p. 460]. Dr. Abel did later note that he was "essentially in agreement" with Dr. Jones that Rose had developed a "fibromyalgia-type syndrome" and that he was at MMI. He was "not optimistic that he will improve to any significant degree in the future. . . . He would benefit from an EMG nerve conduction study to see if there is, indeed, nerve compression in his neck requiring surgical intervention." [R.p. 465].

Rose also treated with Dr. Richard Kellett at Tri-County Spinal Care Center from September

2, 2011 through October 11, 2011. Dr. Kellett referred Rose for orthopaedic evaluation of his knee and spine. [R.p. 487-488].

Dr. Michael Wildstein, an orthopaedic surgeon, saw Rose on referral from Dr. Kellett on November 23, 2011. His first impression was "I do not think that he is currently a reasonable surgical candidate as most of his complaints are rather nonspecific and are out of proportion to his physical exam findings. I will see him back once I have had chance to review these records and get imaging." [R.p. 93-94]. On the next visit – after reviewing the imaging – Dr. Wildstein opined "I feel that he could potentially benefit from a one-level C5-6 ACDF which I feel would reliably take care of the periscapular pain and neck pain." [R.p. 496]. Appellants refused to authorize Dr. Wildstein's surgical recommendation.

On July 15, 2013, Rose obtained his own independent medical evaluation from Dr. Steven Poletti, an orthopaedic spine surgeon at Southeastern Spine Institute. Dr. Poletti opined "to a reasonable degree of medical certainty" that "I do agree with Dr. Wildstein that surgical intervention is indicated. . . . Although surgery may not be a magic wand answer, it is clearly indicated and clearly related to his pain." Dr. Poletti added that he requires further MRI imaging of his lumbar spine and should be evaluated by an orthopedic surgeon for his ongoing problems with his knee." Dr. Poletti added "He is on off-duty status pending recommendations as mentioned." [R.p. 501-502].

This was the medical evidence before the Commission at the September 23, 2013 hearing. The Commission could have relied on Dr. Jones' opinion and essentially ended Rose's case without him ever receiving the treatment previously ordered. Or, it could have relied on Drs. Abel, Wildstein and Poletti to provide the treatment. The Commission ultimately made the right decision, giving greater weight to the opinions of the two orthopedic surgeons, and awarding additional treatment. This was well within their authority and amply supported by substantial evidence.

A. Cervical Surgery.

Appellants contend the Appellate Panel erred in ordering them to provide surgery to Rose's neck (cervical spine) recommended by two orthopaedic surgeons, Drs. Wildstein and Poletti. Appellants argue "The Commission failed to elucidate what 'expert medical evidence stated to a reasonable degree of medical certainty" showed that any treatment would 'lessen the period of disability,' likely because no such evidence exists." [Brief of Appellants, page 23].

Not only does the evidence exist, it was referenced in detail in the Commission's findings. The Commission wrote:

> 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. 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."
>
> 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.

[R.p. 86-87, Findings of Fact 14-15].

Dr. Wildstein opined surgery would "potentially benefit" Rose and "reliably take care of" his pain. [R.p. 496]. Dr. Poletti agreed with Dr. Wildstein "that surgery could reasonably be expected to decrease his disability" and "is clearly indicated and clearly related to his pain." [R.p. 502]. These opinions are more than sufficient medical evidence for the Commission to find that surgery would tend to lessen Rose's period of disability.

Nonetheless, Appellants insist – somewhat histrionically – that "the Commission utterly failed to note [§ 42-15-60's] requirements or elucidate how they were possibly met in the instant case." [Brief of Appellants, page 22]. Appellants take an artificially constraining view of the statute, apparently basing this argument on Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016).[3] However, the Act is to be construed liberally. "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 689 S.E.2d 615, 386 S.C. 534 (2010).

To make sense of Hartzell, one must look at the radically different record compared to the instant case. Hartzell injured his back on February 25, 2009. He never requested treatment from his employer nor did he seek treatment on his own until after leaving his employment on March 20, 2009. On April 1, 2009 (five weeks and one day after the accident) Hartzell visited a chiropractor.[4] There was no evidence the chiropractor recommended additional medical treatment nor that he gave any opinions that additional treatment was warranted, would be beneficial to Hartzell, or would lessen his period of disability. In short, the proof failed in Hartzell. Indeed, the Commission recognized this deficiency, for it did not order specific treatment. Instead, it merely "ordered a *medical evaluation* to determine whether he (1) was at maximum medical improvement (MMI), and (2) required any additional medical treatment or benefits." Id. Under the previous version of § 42-15-60, the Commission had the authority to order additional treatment without medical evidence – even purely on lay testimony. The 2007 amendment merely added a requirement that the authority

[3]Appellants' counsel represented the employer and carrier in Hartzell.

[4]The opinion mentions only the initial visit with the chiropractor. Per the Record on Appeal found on C-Trak, Hartzell saw the chiropractor four times from April 1-April 13, 2009. There is no other medical evidence in the Hartzell record.

must be predicated on medical evidence stated to a reasonable degree of medical certainty.

Conversely, in the instant case, there is ample medical proof that Rose is not at MMI and would benefit from cervical surgery. [R.p. 496, 502]. The Act defines medical evidence as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code Ann. § 42-1-160(G)(2007). In Michau, our Supreme Court explained:

> The plain reading of the statute requires that "opinion or testimony" must be "stated to a reasonable degree of medical certainty." . . . Because the statute does not require that "documents, records, or other material" be "stated to a reasonable degree of medical certainty," we will not expand its plain meaning or interpolate this requirement.

Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(internal citations omitted).

Dr. Poletti explicitly states his opinion to a reasonable degree of medical certainty, even going so far as to use those exact words.[5] Thus, even under the most restrictive reading of the statute, Dr. Poletti's opinion is competent evidence.

Although Dr. Wildstein does not use the words "reasonable degree of medical certainty" in his records, the term was not required because his treatment recommendation came in a treatment record. Only "opinion or testimony" obtained for purposes of litigation must be stated to a reasonable degree of medical certainty. Id.

The recommendations for surgery from Drs. Wildstein and Poletti are substantial medical evidence on which the Appellate Panel could reasonably rely to conclude additional treatment would lessen Rose's period of disability. An expert must:

> testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged. In determining whether particular evidence meets this test it is not necessary that the expert actually

[5]The acute observer might note that Appellants' IME doctor, Dr. Jones, did *not* explicitly state his opinions to a reasonable degree of medical certainty. [R.p. 389-392].

> use the words "most probably." It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes."

Baughman v. Am. Tel. & Tel., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991); see also Gamble v. Price, 289 S.C. 538, 541, 347 S.E.2d 131, 132-33 (Ct.App.1986) (holding when the meaning is clear the exact words "most probably" need not be used by the expert).

The Commission's award of surgery to Rose's cervical spine is supported by substantial evidence. The Commission properly weighed the competent medical evidence in concluding surgery would tend to lessen Rose's period of disability. The decision below should be affirmed.

B. Appointment of Dr. Poletti.

The Commission found *good cause* to allow Rose to direct his own medical care for his spine and, accordingly, designated Dr. Poletti as the authorized provider. [R.p. 87, Finding of Fact 16]. Appellants argue that the Commission exceeded its authority by designating Dr. Poletti as the authorized treating physician. To the contrary, the Commission acted appropriately and correctly as there was good cause to designate Dr. Poletti.

The controlling statute states:

> The employer shall provide medical, surgical, hospital, and other treatment . . . During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, *unless otherwise ordered by the commission for good cause shown.*

S.C. Code Ann. § 42-15-60 (A)(2007)(emphasis added).

In practice, this means under the default rule the employer selects the "attending physician" and provides any medical treatment "considered necessary by the attending physician." So long as the employer provides the treatment ordered by their selected doctor and the employee accepts it, there is no need for the Commission to be involved. This arrangement reflects the Legislature's intent that workers' compensation claims should be essentially self-administered by the employer

and carrier unless a controversy arises.

Appellants contend the "only circumstance in which the Commission can override an employer's right to choose an authorized treating physician" is when the employee justifiably refuses treatment provided by the employer. [Brief of Appellants, page 25]. Although that circumstance is another area where the Commission has such authority, the Commission also has authority when "good cause is shown" for overriding the employer's choice of physician, or such as the instant case, when the employer fails to provide treatment. See Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006)(affirming Commission's designation of treating surgeon chosen by employee because "This is not a case where an employee is refusing treatment offered by an employer. Rather, this is a situation where the employee feels he still needs treatment and the employer fails to provide it.").[6]

The Commission made a specific finding of fact regarding its decision to designate Dr. Poletti as the attending physician:

> 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.

[R.p. 87, Finding of Fact 16 (emphasis added].

The Commission's reasoning tracks that of Martin. Rose never refused medical treatment – willingly attending the IME with Dr. Jones. The IME with Dr. Jones is the sole medical evaluation provided by Appellants. And the doctor makes it quite clear he was neither authorized nor asked to

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[6]Martin involved the earlier version of the statute where the Commission had discretion to order a change in medical treatment. The 2007 amendment required a finding of *good cause* before ordering the change.

provide treatment.[7] Despite the Commission's previous orders instructing them to "provide ongoing medical treatment as prescribed by an authorized treating physician to be *selected by the carrier*," Appellants never designated an attending physician nor provide any treatment whatsoever. [R.p. 8, Finding of Fact 6].

It would create an absurd result to allow an employer to retain the authority to designate an attending physician when it has displayed such appalling bad faith for the better part of a decade. Appellants' intransigence is ample good cause for them to forfeit their right to name the attending physician. As good cause for the designation of Dr. Poletti is supported by substantial evidence, the Court should affirm.

C. Knee Evaluation.

The Commission found "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." [R.p. 87, Finding of Fact 17]. Appellants object to this finding, contending it is unsupported by medical evidence. The Commission primarily relied on the recommendation of Dr. Poletti and Rose's testimony.

First off, contrary to Appellants' characterization, the injury to the knee is much more than a "superficial laceration."[8] [Brief of Appellants, page 27]. The injury is an "impaction fracture of his medial femoral condyle." [R.p. . 496, 501].

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[7]Dr. Jones' report includes the disclaimer: "*This examination above carried out for purposes of IME only, and did not constitute forming doctor/patient relationship. No treatments were accomplished and no medications prescribed.*" [R.p. 391 (italics in original)].

[8]Appellants also suggest Rose has knee pain from Osgood-Schlatter Disease. Osgood-Schlatter is a common source of knee pain in growing adolescents which usually goes away when the child stops growing. Rose testified "As a child, I was diagnosed with Osgood-Schlatter's disease, but I – Osgood-Schlatter's disease, and I grew out of it." [R.p. 359, lines 4-10].

Dr. Poletti added "He obviously has some significant pain in and around his knee. He requires evaluation by a knee specialist. I suspect that he may require additional MRI scanning of his knee and perhaps even knee surgery." [R.p. 501].

The difficulty for Rose is that he has had minimal treatment for his knee. Dr. Wilds (who diagnosed the fracture) and Dr. Poletti (who agreed with Dr. Wilds' diagnosis) are both spine surgeons. As such, while Dr. Poletti's opinions regarding the specific treatment to be rendered by the knee specialist are cautiously phrased, he is definitive that Rose "*requires* evaluation by a knee specialist." [R.p. 501 (emphasis added)]. It is perfectly reasonable for Dr. Poletti to be cautious in the specifics because even though he is an orthopaedic surgeon, his specialty is treating the spine; not the knee.

As to lay testimony, Rose testified "my leg gives out on me. It swells up, and sometimes it hurts; sometimes it doesn't." He testified he would like to undergo further evaluation for his right knee. [R.p. 358, lines 15-24].

This is substantial evidence to support the Commission's order – particularly since the same relief was ordered previously and not provided.[9] Moreover, in the more recent order, the Commission was much more specific in requiring updated MRI scans and assessments of continued complaints in the right knee.

As a final point, it is disturbing and offensive that Appellants would characterize the request for treatment for the right knee as "a claim for medical treatment long-abandoned."[10] [Brief of

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[9]To the extent Appellants' contend the IME with Dr. Jones complied with the 2012 Order, the report shows Dr. Jones gave no opinions or recommendations regarding treatment for the right knee.

[10]Rose requested treatment for the right knee in his opening statement at the September 23, 2013 hearing. [R.P. 244, line 2-page 245, line 11].

Appellants, page 28]. Appellants are appealing an order from a case tried on September 23, 2013. Evaluation and treatment for the right knee was originally ordered by Commissioner McCaskill following a hearing on May 23, 2012. [R.p. 8, Finding of Facts 2 and 6]. Appellants ignored that order and elected to appeal a peripheral issue rather than providing treatment and mitigating their damages. Following the September 23, 2013 hearing, they filed a motion to dismiss the case on another peripheral issue, necessitating an appeal from Rose and reversal by this Court. The record may be old – not because Rose abandoned any issue, but because Appellants have pulled out the stops to delay and deny accepting any responsibility for Rose's welfare.

The Court should affirm.

D. Low Back.

The Commission found Dr. Poletti should be the authorized provider for Rose's lumbar spine treatment. [R.p. 87, Finding of Fact 16]. Appellants appeal this issue on the same grounds they appealed the award of treatment for the knee.

In its 2012 orders, the Commission had previously found as a fact that Rose injured his back (separately from the injury to his neck). [R.p. 19, Finding of Fact 2]. Appellants refused to provide treatment. Dr. Poletti observed that Rose had never been provided a lumbar spine MRI despite severe pain into his back, limited range of motion, and a positive straight leg raising test on the right. He opined "This man . . . requires further MRI imaging of his lumbar spine. . . ." [R.p. 501-502]. The lumbar MRI *is treatment* as it is necessary to determine specifically what is causing Rose's pain and what modalities are necessary to treat it. It makes no sense for an employer to deny treatment because there is no MRI scan, when the MRI scan ordered by an orthopaedic surgeon could not be done because the employer refused to provide it.

And while there may be evidence that Rose may not need additional lumbar treatment for his

spine, this merely creates a conflict in the evidence which must necessarily be resolved by the Commission. The Court should affirm the order to provide evaluation and treatment for Rose's lumbar spine as directed by Dr. Poletti.

E. Blanket Award.

Appellants argument against providing medical treatment veers into farce when they posit that "if Dr. Poletti recommends Hemlock injections in Timbuktu on a lark 20 years from now, the Appellants are 'liable for' this treatment under the terms of the Commission's June 24, 2019 Order." [Brief of Appellants, page 30]. This resort to *reductio ad absurdum* is transparently flawed.

Under our law, the employer has *never* had the unfettered right to direct or control medical treatment. The employer merely has the right to select the attending physician. Once that selection is made, the employer is required to provide "any medical care or treatment that is *considered necessary by the attending physician*, unless otherwise ordered by the commission for good cause shown." S.C. Code Ann. § 42-15-60 (A)(2007). The plain language of the statute shows that it is the doctor, not the insurance adjuster, who directs and controls the medical treatment. The same rule applies whether the employer chose the attending physician or, as here, where the employer failed to provide treatment forcing the Commission to choose the attending physician.

This Court dispensed with a similar argument in Risinger v. Knight Textiles. In Risinger, the employee had been awarded lifetime medical treatment with the doctor chosen by the employer. When the doctor referred Knight to another doctor, the employer refused to provide treatment, instead requesting a second opinion. The case went to a hearing, where the Commission refused to allow the second opinion and required the employer to continue providing the treatment recommended by the attending physician. The employer appealed on the grounds that it was error to find "it was no longer entitled to control Risinger's medical treatment pursuant to § 42-15-60."

The Court disagreed and affirmed the Commission. The Court reasoned "Under Knight's interpretation of the statute, the employer/carrier would be able to continue to seek a new doctor's opinion each time it did not like the opinion of the claimant's doctor. This would allow the employer/carrier to 'shop around' indefinitely until it found a favorable opinion, often sacrificing much needed treatment. We do not believe this result was intended by the legislature." Risinger v. Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002).

The Rice case cited by Appellants is on a different issue, specifically whether an order is sufficiently detailed for appellate review. In Rice, the Commission's order obligated the employer to pay "for such medical costs as will hereafter be incurred by claimant for medical services rendered by the Durham Rehabilitation Center." Rice v. Froehling & Robertson, Inc., 226 S.E.2d 705, 267 S.C. 155 (1976). The court affirmed the bulk of the order awarding specific medical treatment (two operations), but remanded the case to the Commission to make a more definitive order as to the Durham Rehabilitation Center.

In the instant case, the order is quite specific as to the various modalities which must be provided (right knee evaluation; cervical spine surgery; MRI of the lumbar spine). Should a dispute over treatment arise in the future, Appellants have the ability to petition the Commission to order a change in treatment upon a showing of good cause – as this right applies equally to both parties. It does not mean that they can *refuse* to provide treatment, as they would then run afoul of the statute providing sanctions for "wilful disobedience of an order." See S.C. Code Ann. § 42-3-175 (2007)(allowing claimant to bring an action before the commission to enforce an order authorizing medical treatment and providing for attorney's fees and costs for an employer who "without good cause, failed to authorize medical treatment and/or pay benefits when ordered to do so by the commission . . ."); see also S.C. Code Ann. § 42-3-150 (2007)("Any failure to obey an order of the

commission may be punished as a contempt thereof.").

No matter how unhappy Appellants may be at the prospect of providing much needed treatment to an injured worker who has gone without relief for the better part of a decade, the simple fact is the Commission acted within its authority in requiring them to do so. By the same token, the Commission properly required Appellants to provide "any medical care or treatment that is considered necessary by the attending physician," which in this case is Dr. Poletti. We know Dr. Poletti isn't really going to refer Rose to a hemlock provider in Timbuktu. He is going to do exactly what he said he would do in his report: operate on Rose's cervical spine, order an MRI for the lumbar spine, and provide the necessary followup for Rose to find relief from his pain, become more functional, and – hopefully – less disabled. This is all to the good.

4. The award of ongoing temporary total disability compensation is legally correct and supported by the evidence [in Response to Appellants' argument at pages 31-36].

Appellants raise several arguments contesting the Commission award of "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." [Brief of Appellants, pages 31-32; R.p. 88, Finding of Fact 18]. There are two components to this award with will be dealt with separately.

A. Ongoing temporary total disability compensation.

The Commission originally ordered ongoing compensation to be paid in Rose I. In the first set of orders, the Commission ordered that Appellants "shall pay for 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." [R.p. 21]. Once their appeal in Rose I had been dismissed as interlocutory, Appellants began paying TTD. Appellants then obtained the opinion from Dr. Jones

that Rose had reached MMI and was able to return to work, Appellants filed a Form 21 (Employer's Request for Hearing) seeking an order stopping compensation. [R.p. 99].

This led to the instant hearing on September 23, 2013. The merits were not ruled on until the order of June 24, 2019 due to the appeal in Rose II. When the Commission did rule, it found Appellants failed to prove Rose had reached MMI. As such, there was no legal basis on which to terminate temporary compensation and make an award for permanent disability. See Curiel v. Envtl. Mgmt. Servs. (MS), 376 S.C. 23, 655 S.E.2d 482 (2007)("Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of [MMI]; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member."). The previous order remained effective.

Appellants also contend Rose failed to prove his entitlement to ongoing compensation. This argument fails. Dr. Poletti opined Rose "is on off-duty status . . ." [R.p. 501-502]. This is express proof of ongoing disability. Furthermore, the regulations provide "Disability is presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." S.C. Code Ann. Regs. 67-502 (B)(2)(2011).

Appellants argue that there is no proof of ongoing disability because the record was closed on January 3, 2014. While it is true that the record was closed, the existing record shows Rose is on off duty status and is not at MMI. Appellants always had the option of providing treatment to bring him to MMI, yet understandably preferred to rely on the dismissal on collateral grounds they obtained in Rose II. Once this Court reinstated Rose's claim and remanded for the belated decision on the merits, Appellants reaped the consequences of their over aggressive trial strategy.

Appellants further argue that Rose is barred from receiving compensation because he "must

make 'reasonable efforts to secure employment' in order to satisfy his burden of proof under S.C. Code Ann. § 42-9-210." [Brief of Appellants, page 36]. The identical argument was rejected by this Court in Lee v. Bondex, 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013). The Court explained:

> [Employer argues that] a claimant must go into the marketplace and seek from other employers a job that does not conflict with his work restrictions. We disagree. This is not a claim for permanent disability compensation. For temporary disability benefits, a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position. Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits. Rather, the claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer.

Id.

Substantial evidence supports the Commission's finding that Rose is entitled to ongoing temporary total disability compensation until he reaches MMI. The should be affirmed.

B. Lump sum payment of accrued compensation.

The reference to a lump sum payment for temporary total disability compensation refers to the period during Rose II when Appellants terminated Rose's compensation. Per the documents filed with the Commission, Appellants paid TTD from August 8, 2011 before terminating compensation on January 9, 2014. [R.p. 244]. At the time, Appellants would have been within their rights to stop the payments as of September 2, 2014 when Commissioner Taylor issued her Decision and Order dismissing Rose's case for commencing a third-party action without serving an S-2 on Appellants. They jumped the gun by terminating compensation on January 9, 2014.

As of this writing, Appellants have begun paying ongoing weekly payments as required by S.C. Code Ann. § 42-17-60 (2007). However, they never paid the compensation accrued from

January 10, 2014 through the date payments resumed in 2019.

Once this Court reversed the dismissal and reinstated Rose's claim in Rose II, Appellants were required to pay the accrued compensation and restart ongoing weekly payments. This is because once the order of Commissioner Taylor and the following Appellate Panel Order had been reversed, those orders became a nullity. The orders effectively no longer exist and were stripped of any effect. See Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995)("When the award of the Commission was reversed . . . it became of no effect and was no longer in existence."). The parties were restored to their positions *status quo ante*. The previous Appellate Panel order requiring ongoing compensation payments controlled, thus Appellants were liable to comply with that order.[11] The order to pay *accrued* benefits is not an order to pay a future lump sum; it is an order to pay improperly withheld past due benefits in a lump sum.

Appellants argue that they were deprived of due process because they were not able to present evidence that Rose "has been working and earning wages consistently since September 23, 2013." [Brief of Appellants, page 35], Of course there is no such evidence because Rose has not been working. Appellants merely raise this as a hypothetical example of the supposed injury they have suffered due to their own aforementioned trial strategy. If such evidence did exist, Appellants have always had the ability to file a motion to submit after-discovered evidence with the Commission. The fact they have not is telling.

The Commission's order requiring payment of accrued compensation and ongoing temporary total disability compensation is legally correct and supported by substantial evidence. Therefore, the Decision and Order of the Full Commission should be affirmed.

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[11]A separate action is being filed at the Commission to enforce the May 13, 2013 order and require payment of the arrearage, as well as requiring ongoing medical treatment as set forth in § 42-17-60.

5. There was no procedural, factual or legal basis on which the Commission could address or find this claim was barred by an intervening accident [in Response to Appellants' argument at page 37].

Noting that there was testimony at the hearing that Rose had fallen down a flight of stairs on two occasions when his injured knee gave out, Appellants argue that the Commission erred in failing "to address the legal ramifications of these intervening, non-work-related accidents." [Brief of Appellants, page 37]. Although they elicited this testimony at the September 23, 2013 hearing, Appellants did not raise an intervening accident issue at the hearing before Commissioner Taylor. [R.p. 361-362]. As such, the issue is not preserved.

Even if the issue was before the Full Commission, there is no basis on which to find there was an intervening accident. The falls took place in November of 2011 and January 2012. [R.p. 362, lines 2-7]. This was *before* the first hearing in this case on May 15, 2012. If Appellants were to timely raise this issue, the time to raise it was at the May 2012 hearing; not a year later in 2013. Following the 2012 hearing, the Commission found "Rose sustained an injury by accident to his head, knee, leg back and neck . . ." [R.p. 20, Finding of Fact 2]. This finding is the law of the case.

The general rule is "Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954). The case law consistently requires an intervening cause to be a subsequent *accident* attributable to the *claimant's own intentional conduct*. See, e.g. Tims v. J .D. Kitts Constr., 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 201 l)(rejecting argument that heatstroke suffered by quadriplegic from being left in his attributable's car was an independent intervening cause because "neither Claimant's decision to ride in his caregiver's car nor his caregiver's negligence was an independent, intervening cause sufficient to break the chain of causation."), *citing* 1 Arthur Larson

& Lex K. Larson, Larson's Workers' Compensation Law§ 10.01, 10-1 (2010) (stating that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the claimant's own intentional conduct).

The evidence shows that Dr. Abel gave Rose a cane because he was falling down the stairs – a cane he was using at the 2013 hearing. Rose testified he uses the cane because "My knee gives out" and for dizziness due to the closed head injury. [R.p. 371-372]. This testimony shows the only reason Rose fell was because his disabled leg gave way. There was no other fact which could have contributed to or caused his fall.

In Whitfield, the claimant was prescribed medication for pain control of a laceration to his scalp. The medication's sedative affect made him drowsy. Later that same evening, the claimant was killed when he crashed his car into the guardrail of a bridge. The court upheld the finding of the Commission concluding that, "the deceased came to his death as a result of his taking drugs prescribed by the employer's physician, necessitated by the original injury, which impaired his mental and physical faculties, thereby causing the fatal collision at the bridge." Id. at 43, 83 S.E.2d at 464.

Whitfield stands for the proposition that the natural consequences of an injury are compensable unless there is an independent intervening cause. Another accident – even something as dramatic as a car accident – will not necessarily break the chain of causation, so long as the second accident is a natural consequence of the original injury. See, also South Carolina Dep't. Of Highways & Pub. Transp. v. Higgins, 284 S.C. 359, 326 S.E.2d 425 (Ct. App. 1985)(highway patrolman's death after he crashed his personal car while drinking was compensable result of his previous compensable head injury where the original injury altered his mental state and made him

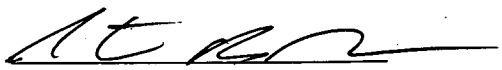
prone to consume alcohol).

Additionally, for an intervening accident to make a difference, it must cause injuries sufficiently severe to break the chain of causation. Here, there is no evidence that the falls down the stairs resulted in serious injury – or even altered the course of treatment in any manner. No doctor gave an opinion that there had been an intervening accident. Indeed, Appellants never asked any doctor for such an opinion. The proof of an intervening accident utterly fails.

There was no basis for the Commission to address Appellants belated attempt to raise an intervening accident defense. Not procedurally; not legally; not factually. The Court should reject this argument in its entirety.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be affirmed.



Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Respondent

Columbia, South Carolina
May 11, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

WCC 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

CERTIFICATE OF COUNSEL

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

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Appellant

Columbia, South Carolina
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