

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Civil Action No. 2020-CP-21-00755  
S.C.W.C.C. Claim No. 1222136

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Otis Nero,

Plaintiff,

v.

South Carolina Department of  
Transportation and the South Carolina  
State Accident Fund,

Appellants.

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**RETURN TO MOTION  
TO DISMISS APPEAL**

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The Respondent, Otis Nero, has moved this honorable Court to dismiss the above-referenced appeal based on his allegation that notice to a person who is neither a party to the case, nor counsel of record for any party, constitutes actual notice to the Appellants of entry of judgment under Rule 77(d), thus rendering the Notice of Appeal untimely. The Appellants, the South Carolina Department of Transportation and the South Carolina State Accident Fund, respectfully contend that only notice to the attorney of record in accordance with Rule 5(b)(1), S.C.R.C.P., satisfies the requirements of Rule 77(d); respectfully contend that their Notice of Appeal was timely filed, and; therefore, respectfully request that the Respondent's Motion to Dismiss the Appeal be DENIED based upon the following:

**RECEIVED**  
JUN 19 2020  
SC Court of Appeals

### **Timeliness of Notice of Appeal**

1. On June 5, 2020, the Appellants served the Respondent, Nero, with a Notice of Appeal to the Court of Appeals. (*See attached* Exhibit 1).
2. Rule 203(b)(1), S.C.A.C.R., requires that service of the Notice of Appeal be made within 30 days after “written notice of entry of the order” denying a motion to alter or amend judgment.
3. Nero admits in his Motion to Dismiss that written notice of the denial of the Appellant’s Motion to Alter or Amend Judgment pursuant to Rule 59(e), S.C.R.C.P., was received on June 4, 2020.
4. The June 5, 2020 service date is well-within thirty (30) days of June 4, 2020 and; therefore, the Notice was timely served pursuant to Rule 203(b)(1), S.C.A.C.R.
5. The Notice of Appeal was filed with the Court of Appeals on June 5, 2020 (the same day it was served) and was filed with the Court of Common Pleas on June 7, 2020. (*See attached* Exhibit 1 and Exhibit 2).
6. Rule 203(d)(1)(B); S.C.A.C.R., requires that Notice of the Appeal be filed within ten (10) days after the notice of appeal is served.
7. Because the June 5, 2020 filing date is within ten (10) days of June 5, 2020, the Notice of Appeal was timely filed with the Court of Appeals pursuant to Rule 203(d)(1)(B), S.C.A.C.R.

### **Timeliness of Motion to Alter or Amend**

8. Prior to the service and filing of the Motion to Dismiss the Appeal, Nero raised no argument regarding the timeliness of the Appellant’s Motion to

Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60.

9. The Court of Common Pleas did find the Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 to be untimely, but instead heard the Motions at a hearing on May 29, 2020 without objection.
10. Furthermore, the Appellant's Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 was, in fact, timely served on Nero and filed with the Court; therefore, Nero's arguments regarding this issue are devoid of any factual or legal basis.
11. The matter *sub judice* involves a Workers' Compensation claim, which is currently pending before the Workers' Compensation Commission following a Remittitur sent by the Supreme Court on February 12, 2020. (*See attached Exhibit 3*).
12. By Order dated June 26, 2019, the Court of Appeals reversed the Workers' Compensation Commission regarding a procedural notice issue under S.C. Code Ann. § 42-15-20 and the Supreme Court denied a Petition for Writ of Certiorari on February 12, 2020. (*See attached Exhibit 4 and Exhibit 5*).
13. By Order of the Supreme Court dated February 3, 2020, the undersigned was substituted as counsel of record for the Appellants, the South Carolina Department of Transportation and the State Accident Fund, and Nero was notified of this fact. (*See attached Exhibit 6*).
14. In fact, Nero acknowledged that the undersigned is counsel of record for the Appellants in a letter dated February 14, 2020. That letter, signed by Nero's

attorney and addressed to the undersigned, references “Otis Nero v. SC Department of Transportation” and states, “I understand that you now represent the SCDOT and State Fund in the above-referenced matter.” (*See attached Exhibit 7*).

15. Following the Remittitur and Nero’s February 14, 2020 demand letter to the undersigned, Nero did not file any Motion with the Workers’ Compensation Commission to request a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90, as required by S.C. Code Reg. 67-1605 and S.C. Code Reg. 67-215(A)(7), which govern the proper procedures for an award of a lump sum payment, interest, or penalties under the Workers’ Compensation Act.
16. Of course, all questions arising under the Workers’ Compensation Act, including lump sum payments, interest, and penalties, are within the “exclusive jurisdiction” of the Workers’ Compensation Commission by virtue of the plain terms of S.C. Code Ann. § 42-3-180, which states that “[a]ll questions arising under [Title 42]...shall be determined by the commission.” (*See Sabb. v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002) (holding that S.C. Code Ann. § 42-3-180 “has vested the Commission with exclusive original jurisdiction...and the circuit court [is] divested of its original jurisdiction”)).
17. Instead of moving before the Commission for an award under the Workers’ Compensation Act, Nero surreptitiously filed a proposed Form 4 Judgment with the Court of Common Pleas by which he granted himself, *sua sponte*, a lump sum payment of benefits under S.C. Code § 42-9-301, interest under

S.C. Code § 42-17-60, and penalties under S.C. Code § 42-9-90. (*See attached Exhibit 8*) on March 6, 2020.

18. Despite the clear mandates of Rule 5(b)(3), S.C.R.C.P., which requires that “[a]ny party providing a ... proposed judgment or other paper to the court for its consideration in any pending matter **shall serve the same on all counsel of record at the same time and by the same means**” (emphasis added), Nero did not serve the undersigned counsel of record with his proposed Form 4 Judgment in any manner when he electronically filed the same with the Court of Common Pleas on March 6, 2020.
19. In fact, when Nero filed the proposed Form 4 Judgment on March 6, 2020, *sua sponte* granting himself a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, and penalties under S.C. Code § 42-9-90, he did not serve or notify the Appellants whatsoever.
20. No person or entity was served with Nero’s proposed Form 4 Judgment secretly filed with the Court of Common Pleas on March 6, 2020 and the Appellants had no knowledge that any matter was being considered by the Court of Common Pleas concerning this case. (*See attached Affidavit of Counsel*).
21. According to the Notice of Electronic Filing (NEF) sent to Nero by the Court of Common Pleas on March 9, 2020, neither the South Carolina Department of Transportation, nor the State Accident Fund, had been served with a copy of the proposed Form 4 Judgment and; “[t]herefore, they must be served by traditional means.” However, neither the Court, nor Nero, made any effort to

serve the Appellants by traditional means on March 9, 2020. (*See attached Exhibit 9*).

22. Despite Nero's failure to properly serve the proposed Form 4 Judgment on the Appellants, or to notify the Appellants of his covert machinations in any way, the Honorable William H. Seals, Jr., signed the Form 4 Judgment on March 11, 2020, without affording the Appellants their constitutional right to notice and opportunity to be heard, despite a clear want of subject matter jurisdiction, and in contravention of the South Carolina Workers' Compensation Act.

23. In further violation of the plain requirements of Rule 5(b)(1) and Rule 77(d), S.C.R.C.P., the Court of Common Pleas failed to serve any party other than Nero with the Form 4 Judgment signed by Judge Seals on March 11, 2020. (*See attached Exhibit 10*)

24. Rule 77(d), S.C.R.C.P., requires that "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby" or by "electronically transmitting a Notice of Electronic Filing to all parties." Rule 77(d), S.C.R.C.P. further provides that "[s]uch mailing or electronic transmission is sufficient notice for all purposes for which notice of the entry of an order or judgment is required..."

25. The Florence County Clerk of Court did not serve any notice of entry of judgment on the Appellants, electronically or by mail, at any time, despite the mandatory requirements of Rule 77(d), S.C.R.C.P., and; therefore, the Court failed to give the Appellants written notice of entry of judgment as required by the Rules of Civil Procedure.

26. To the extent Nero alleges that any failure by the Court to serve the Appellants with the Form 4 Judgment is due to the fact that the undersigned had not yet filed a Notice of Representation in the Court of Common Pleas, such argument is without merit and only serves to underscore the prejudicial nature of the actions taken by Nero and the Court without any notice to the Appellants that would have allowed them any opportunity to participate in the proceedings against them.
27. Furthermore, on the proposed Form 4 Judgment filed on March 6, 2020, Nero himself listed “Kirsten Barr, PO Box 2167, Mt. Pleasant, SC 29464” as the “ATTORNEY(S) FOR THE DEFENDANT(S),” the South Carolina Department of Transportation and the State Accident Fund. (*See attached Exhibit 12*).
28. Therefore, both Nero and the Court of Common Pleas were clearly apprised that the undersigned was to whom proposed judgments and notice of entry of judgment should be sent on behalf of the South Carolina Department of Transportation and the State Accident Fund. (*See attached Exhibit 12*).
29. Rule 77(d), S.C.R.C.P., provides that a “party may in addition [to the clerk of court] serve a notice of entry on any party *in the manner provided in Rule 5* for the service of such papers.” (emphasis added).
30. The “manner provided in Rule 5” clearly and unequivocally requires that when service is “to be made upon a party represented by an attorney the service *shall be made upon the attorney.*” (emphasis added) (*See S.C. Dep’t of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135

(1986) (holding that use of the term “shall” makes the action mandatory and not discretionary) (internal citations omitted)).

31. The undersigned counsel of record for the Appellants did not receive notice written notice of the entry of the Form 4 Judgment until March 17, 2020, when a copy of the proposed Form 4 and the Judgment signed by Judge Seals was received in the mail, as attested in the attached affidavit of counsel. (*See attached Affidavit of Counsel*)
32. Nero’s March 12, 2020 cover letter to the undersigned counsel accompanying the proposed Form 4 and the signed Judgment states that its purpose was “for service upon you as attorney for the Defendants in the above action.” (*See attached Exhibit 13*).
33. The Appellants respectfully contend that when a party is represented by counsel, *counsel* must actually receive written notice of entry of judgment before the requirements of Rule 77(d) and Rule 59(e), S.C.R.C.P., are satisfied and the time to file a Motion under Rule 59(e) begins to run.
34. The Appellants further respectfully contend that it is undisputed that the undersigned was known by Nero to be, at all relevant times, counsel of record for the South Carolina Department of Transportation and the State Accident Fund in this matter.
35. Although Nero was fully apprised that the Appellants were represented by the undersigned counsel in this matter and had previously acknowledged this fact in writing both to the undersigned and in pleadings filed with the Court of Common Pleas, Nero mailed copies on the office of the Attorney General, the

Secretary of the Department of Transportation, and the Director of the State Accident Fund, in contravention of the clear mandates of Rule 5(b)(1).

36. The Office of the Attorney General received a copy of the Form 4 Judgment on March 13, 2020. (*See attached Exhibit 14*).

37. Because the Attorney General is not now and has not ever been counsel of record, and because the Attorney General is not now and has not ever been a party to this workers' compensation claim at any time, the Appellants respectfully contend that service of a judgment on the Attorney General does not constitute proper or effective notice to the Appellants of entry of judgment in accordance with Rule 5, Rule 77(d), or Rule 59(e), S.C.R.C.P..

38. The Director of the State Accident Fund received a copy of the Form 4 Judgment on March 16, 2020 and the Secretary of the Department of Transportation received a copy on March 13, 2020 (*See attached Exhibit 15 and Exhibit 16*).

39. Because both the State Accident Fund and the Department of Transportation were represented by the undersigned counsel at the time in question and this fact was known to and acknowledged by Nero, the Appellants respectfully contend that improper service under Rule 5(b)(1), S.C.R.C.P., to a party known to be represented by counsel does not constitute proper or effective notice of entry of judgment as required by Rule 5, Rule 77(d), or Rule 59(e), S.C.R.C.P.

40. To the extent that Nero now argues in his Motion to Dismiss that either the Department of Transportation or the State Accident Fund were unrepresented, or that the Attorney General and not the undersigned was the

attorney of record for the Appellants on or about March 12, 2020, such argument is both specious and contrary to Nero's own pleadings and admissions in connection with this matter. (*See attached Exhibit 12*)

41. Therefore, the Respondents respectfully contend that the time to file a Motion under Rule 59(e) did not begin to run until March 17, 2020, when the undersigned counsel, as the attorney of record for the Appellants, received proper, written notice of the entry of judgment in accordance with Rule 5, Rule 77(d), and Rule 59(e), S.C.R.C.P.
42. Rule 59(e), S.C.R.C.P., states that a "motion to alter or amend the judgment shall be *served* not later than 10 days after receipt of written notice of the entry of the order." (emphasis added).
43. The Appellants "served" the Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 on Nero electronically on March 23, 2020 and March 24, 2020<sup>1</sup> and served him again by mail on March 26, 2020. (*See attached Exhibit 17, Exhibit 18, and Exhibit 19*).
44. Because electronic service on March 24, 2020 (and even service by mail on March 26, 2020) is within ten (10) days of March 17, 2020, the date on which counsel received notice of entry of judgment in accordance with Rule 77(d) and Rule 5(b)(1), the Appellants timely "served" Nero with their Motion in accordance with Rule 59(e).

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<sup>1</sup> The Motion served on March 23, 2020 inadvertently contained a PDF signature of the undersigned and was rejected by the Clerk after being served on Nero. The identical Motion, bearing a typed "signature," was refiled and served on March 24, 2020. There is no evidence that Nero did not actually receive the Motion when first served upon him electronically on March 23, 2020.

45. After proper and timely *service* of the Appellants' Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 on March 23, 2020, the Appellants timely *filed* that Motion in accordance with Rule 5(d), S.C.R.C.P., on March 24, 2020, because March 24, 2020 is clearly "within five (5) days" of March 23, 2020. (*See attached*, Exhibit 17).
46. Therefore, the Appellant's Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 was timely *served* upon Nero and timely *filed* with the Court.
47. Pursuant to Rule 203(b), S.C.A.C.R., "w]hen a timely motion...to alter or amend the judgment...has been made, the time for appeal for all parties shall be stayed and run from receipt of written notice of entry of the order granting or denying such motion."
48. Because the Appellant's Motion to Alter or Amend Judgment under Rule 59(e) and for Relief from Judgment under Rule 60 was timely served and timely filed, the time for appeal was stayed until June 4, 2020 when this Motion was denied by Judge Seals.
49. Accordingly, the Appellant's Notice of Appeal, which was filed and served on June 5, 2020, was also timely and proper and timely in accordance with Rule 203(b), S.C.A.C.R., and Nero's Motion to Dismiss the Appeal should be denied.

### **Res Judicata**

50. Nero attempts to argue that the Form 4 Judgement signed by Judge Seals on March 11, 2020, by which Nero awarded himself lump sum payment of

benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, and penalties under S.C. Code § 42-9-90, is not appealable, ostensibly due to the doctrine of *Res Judicata*.

51. While the doctrine of *Res Judicata* prohibits the re-litigation of issues where there is a prior, final adjudication same issue, the parties hereto have never actually litigated the issue of whether the Court of Common Pleas has the jurisdiction or authority to award Nero a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90 without affording the Appellants their due process rights. Because there has never been any adjudication of these issues prior to Judge Seal's *ex parte* Form 4 Judgment dated March 11, 2020, the doctrine of *Res Judicata* is simply inapplicable. (See Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986) (holding that to establish *Res Judicata*, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.)
52. At no time has Nero filed a Motion pursuant to S.C. Code Reg. 67-1605 or S.C. Code Reg. 67-215(A)(7) requesting that the Workers' Compensation Commission award him a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90.
53. No hearing has ever been held before the Workers' Compensation Commission on the issue of whether Nero is entitled to a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90 because Nero never raised this issue in

any forum prior to secretly filing a proposed Form 4 Judgment on March 6, 2020.

54. The Workers' Compensation Commission's previous Orders dated August 5, 2014 and May 29, 2015 do not address the issue of whether Nero is entitled to a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, and penalties under S.C. Code § 42-9-90, as these issues were not ripe or relevant at the time. (*See attached Exhibit 20 and Exhibit 21*).
55. The Order of the Court of Appeals dated June 26, 2019 does not address the issue of whether Nero is entitled to a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90 and does not otherwise speak to the jurisdiction or authority of the Court of Common Pleas to address these issues *ex parte*. (*See attached Exhibit 4*).
56. Prior to Judge Seals signing the Form 4 Judgment on March 11, 2020, there existed no Order addressing the issues of whether Nero is entitled to a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90.
57. To argue that the doctrine of *Res Judicata* bars the Appellants from any opportunity for review of Judge Seals's March 11, 2020 Form 4 Judgment, which addresses, for the first time ever, the issues of whether Nero is entitled to a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90, especially when the Appellant was afforded no opportunity to be heard on these issues prior to

Judgement and the Court lacked subject matter jurisdiction to address these issues, is entirely baseless and violative of the Appellants' statutory and constitutional rights.

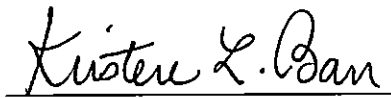
58. Furthermore, Nero's allegation that the Court of Appeals "finally determined the rights of the parties on June 26, 2019" is baseless because the June 26, 2019 Order does not address the issues presently on appeal, specifically whether the Court of Common Pleas has the jurisdiction or authority to award Nero a lump sum payment of benefits under S.C. Code § 42-9-301, interest under S.C. Code § 42-17-60, or penalties under S.C. Code § 42-9-90 without affording the Appellants their constitutional right of due process.

59. Because the prior orders of the Court of Appeals and the Workers' Compensation Commission otherwise have no preclusive effect on the present appeal under any legal theory, Nero's Motion to Dismiss the Appeal should be denied.

THEREFORE, the Appellants, the South Carolina Department of Transportation and the South Carolina State Accident fund respectfully request that Nero's Motion to Dismiss the Appeal be DENIED pursuant to Rule 260(a), S.C.A.C.R., as the Appellants have complied with the Appellate Court Rules by timely filing a Notice of Appeal and because the Respondent's "*Res Judicata*" argument is without merit. The Appellants further respectfully contend that the Court should impose upon the Respondent and counsel for the Respondent "such sanctions as the circumstances of the case and discouragement of like conduct in the future may require," in accordance with Rule 269, S.C.A.C.R.

June 16, 2020

Respectfully submitted,

A handwritten signature in cursive script that reads "Kirsten L. Barr". The signature is written in black ink and is positioned above a horizontal line.

Kirsten L. Barr  
S.C. Bar #15525  
Trask & Howell, LLC  
P.O. Box 2167  
Mt. Pleasant, SC 29465  
(843) 881-1027  
[kbarr@trask-howell.com](mailto:kbarr@trask-howell.com)

ATTORNEYS FOR THE APPELLANTS

# **ATTACHMENT**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Civil Action No. 2020-CP-21-00755  
S.C.W.C.C. Claim No. 1222136

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Otis Nero,

Plaintiff,

v.

South Carolina Department of  
Transportation and the South Carolina  
State Accident Fund,

Appellants.

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**AFFIDAVIT OF KIRSTEN L. BARR**

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**PERSONALLY, APPEARED BEFORE ME** on June 16, 2020, Kirsten L. Barr, who doth depose and state:

1. She is the attorney of record for the South Carolina Department of Transportation and the South Carolina State Accident Fund in the above-captioned matter and in associated matters pending before the South Carolina Workers' Compensation Commission and the Florence County Court of Common Pleas.
2. By Order of the South Carolina Supreme Court dated February 3, 2020, Kirsten L. Barr of Trask & Howell, LLC, was substituted as counsel of record



for the South Carolina Department of Transportation and the State Accident Fund and the Respondent, Otis Nero, was notified of this fact by copy of that Order from the Supreme Court.

3. Nero acknowledged that Ms. Barr is counsel of record for the South Carolina Department of Transportation and the State Accident Fund in this matter by letter dated February 14, 2020. That letter, signed by Nero's attorney and addressed to Ms. Barr, references "Otis Nero v. SC Department of Transportation" and states, "I understand that you now represent the SCDOT and State Fund in the above-referenced matter."
4. Nero electronically-filed a proposed Form 4 Judgment with the Court of Common Pleas on March 6, 2019, but he did not serve Ms. Barr with the proposed Form 4 Judgment on March 6, 2020.
5. On the face of the proposed Form 4 Judgment filed on March 6, 2020, Nero himself listed "Kirsten Barr, PO Box 2167, Mt. Pleasant, SC 29464" as the "ATTORNEY(S) FOR THE DEFENDANT(S)," the South Carolina Department of Transportation and the State Accident Fund.
6. Despite both Nero's acknowledgment that Ms. Barr was the attorney of record, and despite the Court being informed of this fact, Ms. Barr did not receive notice from the Court of Common Pleas, by mail or electronic transmission at any time, that Judge Seals had taken a proposed Form 4 Judgment under consideration.
7. Ms. Barr did not receive a copy of the Form 4 Judgment signed by Judge Seals on March 11, 2020 from the Court of Common Pleas by mail or electronic transmission at any time.



8. Ms. Barr did not receive notice written notice of the entry of the Form 4 Judgment until a copy of the same was actually received by Ms. Barr on March 17, 2020.
9. Nero's March 12, 2020 cover letter to Ms. Barr accompanying the Form 4 Judgment states that its purpose was "for service upon you as attorney for the Defendants in the above action."
10. Nero's March 12, 2020 cover letter and the Form 4 Judgment states that they were sent to Ms. Barr by certified mail, return receipt requested.
11. March 17, 2020 is the first date on which Ms. Barr had sufficient information to access the Court of Common Pleas e-file system regarding this matter or to independently obtain a copy of the Form 4 Judgment from the Court.
12. On information and belief, the Form 4 Judgment was delivered to the post office box for Trask & Howell, LLC, on March 17, 2020, because this is the date that it was actually received by Ms. Barr and electronically-scanned by her legal assistant and because it is the policy and procedure of Trask & Howell, LLC, to electronically-scan all mail and to physically-deliver the same to the addressee on the date it is actually delivered by the U.S. Postal Service.
13. Ms. Barr does not have possession of any certified mail return receipt accompanying the March 12, 2020 letter and Form 4 Judgment, nor does she have possession of the U.S.P.S. "article number," and is therefore unable to confirm her belief that March 17, 2020 is the actual date upon which the certified mail containing the Form 4 Judgment was delivered to the post office box for Trask & Howell. Such documentation, if it exists, would be in the possession of Nero's counsel of record, Mr. Wukela.



14. Mr. Wukela has not acknowledged possession of the certified mail receipt from Trask & Howell, LLC, in his filings with the Court of Common Pleas, or in his pleadings before the Court of Appeals, but instead bases his arguments on the date mail was delivered to the Office of the Attorney General, which is not a party, or counsel of record for any party, to this matter.
15. Should Mr. Wuklea fail to produce a certified mail, and should it be assumed that the Form 4 Judgment was actually mailed on March 12, 2020, Rule 6(e), S.C.R.C.P., provides that five (5) days should be added to the prescribed period for filing a Rule 59(e) Motion.
16. Prior to the filing of the Motion to Dismiss on June 12, 2020, Ms. Barr was unaware that Nero was contesting the timeliness of the Appellants' Motions pursuant to Rule 59(e) and Rule(60) served and filed on March 24, 2020, as this issue was not raised by Nero before the Court of Common Pleas, either by Return to said Motion, or at the May 29, 2020 Hearing on these Motions.
17. The Notice of Appeal inadvertently states that the Appellants received notice of entry of judgment on March 18, 2020, because this is the date on which Ms. Barr formally noticed her appearance with the Court of Common Pleas. On closer inspection, Ms. Barr concedes that notice of entry of judgment was actually received on March 17, 2020 as stated above. It was not the intention of Ms. Barr to mislead the Court, nor did she have any indication that this date was relevant to any contested or jurisdictional matter, as the Motions pursuant to Rule 59(e) and Rule(60) were served and filed on March 24, 2020 and; therefore, notice on either March 17<sup>th</sup> or March 18<sup>th</sup> would equally render said Motion timely.

*LLS*

**FURTHER AFFIANT SAYETH NOT.**

June 16, 2020

*Kirsten L. Barr*

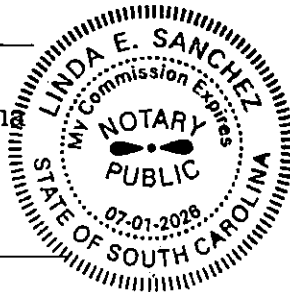
\_\_\_\_\_  
Kirsten L. Barr  
S.C. Bar #15525  
Trask & Howell, LLC  
P.O. Box 2167  
Mt. Pleasant, SC 29465  
(843) 881-1027  
[kbarr@trask-howell.com](mailto:kbarr@trask-howell.com)  
ATTORNEYS FOR THE APPELLANTS

**SWORN BEFORE ME THIS 16<sup>TH</sup> DAY OF JUNE 2020**

*Linda E. Sanchez*

\_\_\_\_\_  
Linda E. Sanchez  
Notary Public for the State of South Carolina

My Commission ends: 7/1/2026



# **EXHIBIT 1**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Civil Action No. 2020-CP-21-00755  
S.C.W.C.C. Claim No. 1222136

Otis Nero,

Plaintiff,

v.

South Carolina Department of  
Transportation and the South Carolina  
State Accident Fund,

Appellants.

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**NOTICE OF APPEAL**

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The South Carolina Department of Transportation and the South Carolina State Accident Fund appeal the Orders of the Honorable William H. Seals, Jr., dated March 11, 2020 and March 19, 2020. The Appellants received written notice of entry of Judgment on March 18, 2020 and written notice of Execution on March 19, 2020. The Motion to Alter or Amend Judgment pursuant to Rule 59 and Rule 60(b), S.C.R.C.P., and the Motion to Stay Execution of Judgment pursuant to Rule 62, S.C.R.C.P. were denied on June 4, 2020.

June 5, 2020

Respectfully submitted,

*Kirsten L. Barr*

Kirsten L. Barr

S.C. Bar #15525

Trask & Howell, LLC

P.O. Box 2167

Mt. Pleasant, SC 29465

(843) 881-1027

[kbarr@trask-howell.com](mailto:kbarr@trask-howell.com)

ATTORNEYS FOR THE APPELLANTS

## **EXHIBIT 2**

## Certificate of Electronic Notification

### Recipients

**Kirsten Barr** - Notification transmitted on 06-07-2020 04:09:27 PM.

**Stephen Wukela** - Notification transmitted on 06-07-2020 04:09:27 PM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

-

**A filing has been submitted to the court RE: 2020CP2100755**

**Official File Stamp:** 06-07-2020 04:09:09 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Florence  
**Case Caption:** Otis Nero VS Department Of Transportation  
South Carolina , defendant, et al  
**Document(s) Submitted:** Appeal/Notice of Appeal to Court of Appeals  
**Filed by or on behalf of:** Kirsten Leslie Barr

This notice was automatically generated by the Court's auto-notification system.

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**The following people were served electronically:**

Kirsten Leslie Barr for Department Of  
Transportation South Carolina et al  
Stephen J. Wukela for Otis Nero

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

# **EXHIBIT 3**



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
CHIEF DEPUTY CLERK

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[www.sccourts.org](http://www.sccourts.org)

February 12, 2020

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

### REMITTITUR

Re: Otis Nero v. SCDOT  
Lower Court Case No. 1222136  
Appellate Case No. 2015-001277

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 "J.A. Kitchings".

CLERK

Enclosure

cc: Stephen J. Wukela, Esquire  
Kirsten Leslie Barr, Esquire

# **EXHIBIT 4**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

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Appeal From The Workers' Compensation Commission

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Opinion No. 5660  
Submitted May 3, 2018 – Filed June 26, 2019

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**REVERSED**

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Stephen J. Wukela, of Wukela Law Firm, of Florence, for  
Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter &  
Baxley, P.A., of Columbia, for Respondent.

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**MCDONALD, J.:** Otis Nero lost consciousness and fell to the ground in the presence of his two immediate supervisors while working on a South Carolina Department of Transportation (SCDOT) road crew. Nero argues the Appellate Panel of the Workers' Compensation Commission erred in reversing the Single Commissioner's findings that (1) SCDOT received adequate notice of his workplace accident and (2) Nero demonstrated reasonable excuse for—and

SCDOT was not prejudiced by—Nero's late formal notice. Upon our prior review of Nero's arguments, we considered the question of timely notice as a jurisdictional issue and applied a de novo standard of review in reversing the Appellate Panel decision. *Nero v. S.C. Dep't of Transp.*, 420 S.C. 523, 804 S.E.2d 269 (Ct. App. 2017). Our supreme court granted SCDOT's petition for a writ of certiorari and reversed, reiterating that "timely notice under section 42-15-20 is not a jurisdictional determination, and must be reviewed under the substantial evidence standard." *Nero v. S.C. Dep't of Transp.*, 422 S.C. 424, 812 S.E.2d 735 (2018). We now reverse the Appellate Panel because the substantial evidence in the record does not support its findings that Nero failed to provide SCDOT with adequate notice of his workplace injury or that SCDOT was prejudiced by Nero's late formal notice.

### **Facts and Procedural History**

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing the day's work and cleaning up, the crew, including Nero, Durant, and Bostick, were talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again in his driveway. His wife immediately took him to the hospital where he was admitted, diagnosed with cervical stenosis, and treated by a neurosurgeon.

While at the emergency room, Nero filled out a "History and Physical Report" stating in part, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the employer's human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not specifically mention a neck "popping" incident with the squeegee

board in this submission, but did report that he required neck surgery. Under the section designated "approximate date condition commenced," Nero wrote, "several years—neck and syncope."

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's two immediate supervisors witnessed him collapse, Nero never reported that an incident with the squeegee board involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated any preexisting cervical stenosis.

### **Standard of Review**

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court may reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 829–30 (Ct. App.

2009). "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." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

## Law and Analysis

### I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42-15-20(A) of the South Carolina Code (2015). We agree.

Section 42-15-20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472, 617 S.E.2d 369, 379 (Ct. App. 2005); *see also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.").

"Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). Satisfaction of the notice provision should be liberally construed in favor of claimants. *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury").

We agree with SCDOT that Nero never formally reported the mechanics of his injury to his employer. However, the undisputed evidence in the record demonstrated SCDOT had adequate notice within the statutory requirement. On the day of the incident, Bostick became concerned about Nero and temporarily pulled him off of the squeegee board work.<sup>1</sup> Later that day, as the crew was

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<sup>1</sup> Bostick explained in his deposition that although Nero never made any complaints to him about his ability to pull the squeegee board, he was concerned for Nero due to both the summer heat and Nero's age.

cooling down and preparing to leave the job site, Nero lost consciousness and fell to the ground. Durant and Bostick both witnessed this. Both men called Nero while he was in the hospital, and both were aware he needed to have neck surgery. Both were aware that Nero did not return to work at SCDOT following his surgery, and Nero filled out the necessary leave paperwork through SCDOT's human resources department.

Significantly, the undisputed documentary evidence in the record further established notice. As early as July 13, 2012, SCDOT received written notification from Nero's family doctor, Richey, that Nero had been out of work since the date of his collapse and needed neck surgery. In July and August 2012, SCDOT received correspondence from Florence Neurosurgery and Spine confirming Dr. Naso was treating Nero for cervical radiculopathy. SCDOT corresponded with the medical provider in November 2012 regarding whether Nero would be able to return to work. There is simply no support in the record for the Appellate Panel's finding that SCDOT lacked knowledge of Nero's workplace injury—or of the cervical problems for which he was being treated—for purposes of section 42-15-20(A).

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" form (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department in July 2012.<sup>2</sup> Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."<sup>3</sup> SCDOT contends Nero never actually reported an "injury," despite his

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<sup>2</sup> Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident. Nero received this form with his "paperwork from Human Resources," Dr. Richey completed a portion of the FMLA form, and it was returned to SCDOT.

<sup>3</sup> However, SCDOT's own Question 4 and Nero's response provide additional context: "4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such relevant facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment): Have to have neck surgery." Nero's beginning date for the period of incapacity was listed as June 20, 2012 (the day he collapsed at the job site). As for

conversations with both Bostick and Durant while hospitalized. SCDOT further remarks on the medical evidence in the record, however, the medical opinions it references address causation, not notice.<sup>4</sup>

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

Q: And tell me what happened during that process of you pulling the squeegee board?

A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.

Q: Yes Sir.

A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .

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Nero's possible return to work date, Dr. Richey noted on the form "For now he is out - after surgery we can estimate this 7/12/12."

<sup>4</sup> It appears the Appellate Panel conflated the concept of notice with the evidentiary concept of an injured worker's proof of his claim. Still, we recognize that some of the evidence SCDOT submits in support of its argument that SCDOT lacked notice of the mechanism of Nero's injury may be relevant to both notice and causation. For example, in the medical history questionnaire Nero prepared and signed for Dr. Naso, Nero left blank this line: "Complaint Related to an Injury? \_\_\_\_\_ Workman's Compensation? \_\_\_\_\_." And Dr. Naso initially commented, "I do not think his syncope is related to cervical spine pathology." But Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?

A: No, I didn't tell him that.

Q: Okay, when he took you off, what did you do?

A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not tell them he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Supervisor Bostick's deposition testimony is more illustrative of SCDOT's notice. With regard to Nero's "Family Medical Leave Act" form completed in part by Dr. Richey, Nero's counsel asked:

Q: You haven't ever seen [the SCDOT FMLA leave form], but you would agree with me that by July of 2012—this document is dated July the 9th of 2012, I think—yeah, July the 9th. By July the 9th, DOT was aware that Mr. Nero had been out of work since June the 20th and that he had to have neck surgery?

A: Would I have known that?

Q: No. No. I'm asking if you agree with me that the Department of Transportation knew that.

A: I don't know, because I don't know what paperwork he passed on to get to that point.

Q: Fair enough.

Well, I got this document from the Department of Transportation.

A: Right.

Q: So --

A: But I wouldn't have known.

Q: I'm—well, you know. I'm not asking what you knew. I'm asking whether you would agree with me that, given this document, the Department of Transportation would have known that.

[Objection to the form].

Q: Go ahead and answer.

A: That they would have known something then?

Q: Yeah.

A: I guess they would have start[ed] doing their investigation.

Q: Okay. Do you know whether they did start doing an investigation at that point?

A: No, I don't. Like I said, the only—the only thing we ever heard of this is whenever that initial call was made, and whoever they talked to, I wouldn't [know] all that. The only thing I knew, Greg, my boss, called me in and asked me about the situation.

Bostick testified that he provided a written statement over a year prior to his March 2014 deposition in response to a call from his own supervisor. Bostick elaborated, "The only time I ever wrote anything, when they—we—it was brought to our attention that he called the department to say he got hurt on the job, so then that's when our safety guy—district safety guys started investigating what's going on, trying to find out was this eligible that happened, when it happened, whatever." Although Bostick's written statement is undated, a file notation of 2012-4525 appears at the top of the document.

Nero's situation is a far cry from that of the auto body paint technician who reported to his employer that he was "pretty sore" and "must have hurt [himself]" in *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 620, 785 S.E.2d 194, 195 (2016). The *Hartzell* petitioner did not seek immediately seek medical care, and he ended his employment approximately one month after this conversation because "business was slow." *Id.* at 620, 785 S.E.2d at 196. Over one year later, Hartzell filed a claim alleging a partial permanent injury to his back. *Id.* Although both the single commissioner and the Workers' Compensation Commission determined Hartzell "reported his work-related injury to Employer within the requisite time" as required by 42-14-20, this court reversed the Commission's notice finding. *Id.* at 621, 785 S.E.2d at 196.

Our supreme court reversed the court of appeals' finding of a notice failure in *Hartzell*, explaining, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." *Id.* at 623, 785 S.E.2d at 197. There, the employer, while not denying a conversation with the employee may have occurred, testified it did not "ring a bell." *Id.* at 620, 785 S.E.2d at 196. In *Hartzell*, the substantial evidence of notice was this forgotten conversation— with no seeking of immediate medical care or correspondence between the treating physicians and employer prior to the claimant's filing of a Form 50. *Id.* at 623, 785 S.E.2d at 197.

Conversely, here, as the single commissioner's order explained, the "evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1-5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5)." In sum, the substantial evidence in this record simply does not support the Appellate Panel's finding that SCDOT lacked adequate notice of Nero's workplace injury under section 42-15-20(A). See *Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim").

## II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for the formal notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42-15-20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129-30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness and he was hospitalized the same day of the incident. Further, as the single commissioner recognized, Nero's lead man, Durant, testified he never reported the incident to his own supervisor, Bostick, because Bostick was "right there."

Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?

A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.

Q: I mean, a guy hurts his thumb, you've got to report it?

A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.

.....

Q: But do you have any responsibility as the lead man to report injuries?

A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A: Well—

Q: Can you say, no, we're not going to tell the supervisor?

A: No, I am not going to do that because there's too much that [can] come back and bite you.

Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?

A: He was right there.

.....

Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.<sup>5</sup>

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<sup>5</sup> And we know, based on Bostick's own deposition testimony as to when he provided his statement to SCDOT, that "the district safety guys" and Bostick's own supervisor were investigating Nero's incident and injury at least a year prior to Nero's filing of the Form 50 on January 6, 2014.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. SCDOT was aware Nero never returned to work following the June 2012 episode and knew of his hospitalization and need for neck surgery well within the ninety-day notice window. Within a few weeks of Nero's collapse, SCDOT was aware of Nero's treatment by a qualified neurosurgeon, that he was having neck surgery, and that he would be unable to return to work. At some point long before Nero filed his Form 50, SCDOT was conducting its own investigation as to Nero's injury at the job site. Thus, the employer suffered no prejudice to either its ability to investigate or furnish medical care in order to minimize Nero's disability and its own liability. As the substantial evidence in the record does not support the contrary conclusions of the Appellate Panel, we reverse.

### **Conclusion**

Based on the foregoing analysis, we reverse the decision of the Appellate Panel and reinstate the order of the single commissioner.

**REVERSED.**

**LOCKEMY, C.J., and KONDUROS, J., concur.**

# **EXHIBIT 5**

# The Supreme Court of South Carolina

Otis Nero, Respondent,

v.

South Carolina Department of Transportation, Employer,  
and State Accident Fund, Carrier, Petitioners.

Appellate Case No. 2019-001586  
Lower Court Case No. WCC 1222136

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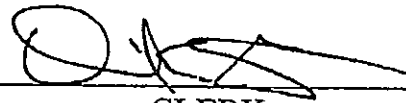
## ORDER

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Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

February 12, 2020

cc:

Stephen J. Wukela, Esquire  
Kirsten Leslie Barr, Esquire  
The Honorable Jenny Abbott Kitchings  
The Honorable Amy Bracy

# **EXHIBIT 6**

# The Supreme Court of South Carolina

Otis Nero, Respondent,

v.

South Carolina Department of Transportation, Employer,  
and State Accident Fund, Carrier, Petitioners.

Appellate Case No. 2019-001586

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## ORDER

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The motion to allow John Gabriel Coggiola, Esquire, to withdraw as counsel for petitioners is granted, and Kirsten Leslie Barr, Esquire, is hereby substituted as counsel for the petitioners.

FOR THE COURT

BY



CLERK

Columbia, South Carolina  
February 3, 2020

cc: Stephen J. Wukela, Esquire  
John Gabriel Coggiola, Esquire  
Kirsten Leslie Barr, Esquire

# **EXHIBIT 7**

# WUKELA LAW FIRM

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Steve Wukela, Jr.  
Benjamin D. Moore  
Christi B. McDaniel  
Stephen J. Wukela  
Patrick J. McLaughlin  
Pheobe A. Clark  
Frank C. Swaggard

403 Second Loop Road  
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(843) 669-5634  
FAX (843) 669-5150

February 14, 2020

Ms. Kirsten Barr  
Attorney at Law  
PO Box 2167  
Mt. Pleasant SC 29464

Re: Otis Nero v. SC Department of Transportation

Dear Ms. Barr:

I understand that you now represent the SCDOT and State Fund in the above-referenced matter.

As I am sure you are aware, the Supreme Court denied Certiorari on February 12th; thus, the Single Commissioner's Order of August 5, 2014 is affirmed.

That Order called for the payment of temporary total benefits at the weekly rate of \$346.57 from June 20, 2012 to date and continuing.

By my calculations, as of February 17, 2020, 400 weeks have passed since June 20, 2012; resulting in a back due temporary total amount of \$138,628.00.

Also, as you know, SC Code §42-9-240 provides:

The first installment of compensation payable under the terms of an award by the commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid, including interest from the original date of the award at the maximum legal rate.

By my calculations (using the [www.calculators.org](http://www.calculators.org) calculator for compound interest on periodic installments at 7.25% compounded annually, pursuant to SC Code §34-31-20, and Supreme Court Order), the interest due as of February 17, 2020 totals \$42,153.58.

This brings the total back due indemnity and interest to \$180,781.58.

Ms. Kirsten Barr  
Page 2  
February 14, 2020

Further, the August 5, 2014 Order called for the payment of medical, including the surgery of August 28, 2012.

Attached find a letter from Blue Cross dated March 7, 2016, indicating that, as of that date, Blue Cross had paid \$34,985.59 on bills related to the accident totaling \$200,612.51.

In addition to the \$34,985.59, interest of \$14,659.43 has also accrued on that medical total and is, pursuant to §42-9-240, due to Mr. Nero.

In sum, according to the calculations above, the current amount due on the award (as of 02/17/2020) totals:

Indemnity:	\$138,628.00
Indemnity interest:	\$ 42,153.58
Medical	\$ 34,985.59
Medical interest	<u>\$ 14,659.43</u>
Total:	\$230,426.60

Of course, the Defendants' obligation to pay temporary total benefits and medical continues.

Pursuant to §42-9-240, the above amount is due 2/19/2020, 7 days from the February 12, 2020 Order.

I'll be happy to come to the Fund to pick up the check.

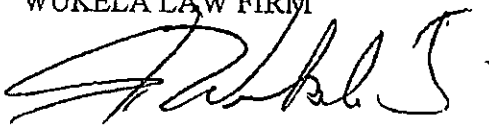
Please recall that if the payment is not received by March 4, 2020, (14 days after the due date) §42-9-90 mandates a 10% penalty.

Let me know when the Fund would like me to pick up the check.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

  
for STEPHEN J. WUKELA

SJW:jpb

# **EXHIBIT 8**

STATE OF SOUTH CAROLINA  
 COUNTY OF FLORENCE  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. CP-21-

OTIS NERO

SC DEPARTMENT OF TRANSPORTATION

PLAINTIFF(S)

AND STATE ACCIDENT FUND  
 DEFENDANT(S)

Submitted by: <b>STEPHEN J. WUKELA</b>	Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
--	--

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: This Court hereby renders judgment in the amount of \$190,648.00, along with weekly benefits in the amount of \$346.57 in accordance with the Order of the S.C. Court of Appeals, Op. No. 5660, (06/26/19)(cert. den'd., 02/12/2020)(attached), which reinstated the Order of the Workers' Compensation Commission dated 08/05/2014. (Attached).

**ORDER INFORMATION.**

This order  ends  does not end the case.

Additional Information for the Clerk : See Page 2 for additional information

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
OTIS NERO	S.C. DEPT. OF TRANS. AND STATE ACCIDENT FUND	\$190,648 along with weekly benefits in the amount of \$346.57
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.  
**E-Filing Note:** In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Stephen J. Wukela  
PO Box 13057  
Florence SC 29504  
ATTORNEY(S) FOR THE PLAINTIFF(S)

Kirsten Barr  
PO Box 2167  
Mt. Pleasant SC 29464  
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This is a Workers' Compensation matter. By Order of August 5, 2014, the Single Commissioner of the Workers' Compensation Commission Ordered inter alia that the Defendants "shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission." (attached).(The Single Commissioner's Order also ordered the payment of certain medical bills. That portion will, if necessary, be addressed by subsequent judgment when those amounts are ascertained).

Thereafter, the case had a long appellate history; culminating in the Court of Appeals reinstating the Order of the Single Commissioner by Order of June 26, 2019.(attached). The Defendants petitioned certiorari to the Supreme Court and certiorari was denied by the Supreme Court by Order dated February 12, 2020. (attached).

The Workers' Compensation Act, S.C. Code §42-17-70 provides: "Any party in interest may file in the court of common pleas of the county in which the injury occurred ... an award of the commission affirmed upon appeal, whereupon such court shall render judgment in accordance therewith and notify the parties."

The Claimant, therefore, filed the attached Order of the Court of Appeals dated June 26, 2019 reinstating the Order of the Single Commissioner dated August 5, 2014.

The amount of the judgment is calculated as follows:

**A. Indemnity Benefits**

The Single Commission ordered the payment of weekly compensation benefits at the weekly rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012, to the date of the Single Commission Order and continuing until further Order of the Commission. That amount, as of March 6, 2000, totals \$139,321.14; representing weekly benefits of \$346.57 for the 402-week period of 06/20/2012-03/06/2020.

**B. Interest**

The Workers' Compensation Act, S.C. Code §42-9-240 provides:

**Date on which compensation payable under award becomes due.**  
The first installment of compensation payable under the terms of an award by the commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid, including interest from the original date of the award at the maximum legal rate.(emphasis added).

By Order of the Supreme Court, 2014-01-03-01, dated 01/03/2014, (attached), for the period 01/15/2014 through 01/14/2015, the legal rate of interest is 7.25% compounded annually. The Single Commission Order was issued on 08/05/2014. Therefore, as of March 6, 2020, the total amount of interest owed was \$33,995.22.

ELECTRONICALLY FILED - 2020 Mar 11 10:19 AM - FLORENCE - COMMON PLEAS - CASE#2020CP2100755

**C. Ten (10%) Percent Penalty**

The Workers' Compensation Act, S.C. Code §42-9-90 provides:

... if any installment of compensation payable in accordance with the terms of an award by the commission is not paid within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

No payment was made within fourteen (14) days after it became due, i.e. February 26, 2020. (see attached Certificate of Non-payment). A ten (10%) percent penalty shall be added. Ten (10%) percent of the amount above is \$17,331.64.

Therefore, the total amount of the judgment, (including interest and penalties), as of March 6, 2020, is \$190,648.00, along with weekly benefits in the amount of \$346.57.

\*\*\*\*\*

**FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE**  
**(Instructions for Information Only-Not to be filed with Form 4C)**

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The “Information for the Judgment Index” section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the “Judgment in Favor of” column, enter the name of the party to whom the judgment is awarded. In the “Judgment Against” column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the “Judgment Amount” column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate “N/A” in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section “For the Clerk of Court Office Use Only” should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through “Circuit Court Judge” and indicate “Arbitrator” in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.



Florence Common Pleas

**Case Caption:** Otis Nero VS Department Of Transportation South Carolina ,  
defendant, et al  
**Case Number:** 2020CP2100755  
**Type:** Master/Order/Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Electronically signed on 2020-03-11 09:49:12 page 6 of 6

# **EXHIBIT 9**

## Certificate of Electronic Notification

### Recipients

**Stephen Wukela** - Notification transmitted on 03-06-2020 05:24:00 PM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2020CP2100755

**Official File Stamp:** 03-06-2020 05:23:42 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Florence  
**Case Caption:** Otis Nero VS Department Of Transportation  
South Carolina , defendant, et al  
**Event(s):**  
Order/Order Cover Sheet \$25.00  
**Document(s) Submitted:** Proposed Master/Order/Form 4  
**Filed by or on behalf of:** Stephen J. Wukela

This notice was automatically generated by the Court's auto-notification system.

-

**The following people were served electronically:**

Stephen J. Wukela for Otis Nero

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

State Accident Fund  
Department Of Transportation South Carolina

## **EXHIBIT 10**

## Certificate of Electronic Notification

### Recipients

Stephen Wukela - Notification transmitted on 03-11-2020 10:20:07 AM.

# **EXHIBIT 11**

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

-

**A filing has been submitted to the court RE:** 2020CP2100755

**Official File Stamp:** 03-11-2020 10:19:59 AM

**Court:** CIRCUIT COURT

Common Pleas

Florence

**Case Caption:** Otis Nero VS Department Of Transportation  
South Carolina , defendant, et al

**Document(s) Submitted:** Master/Order/Form 4 Master/Order/Form 4

**Filed by or on behalf of:** William H. Seals

This notice was automatically generated by the Court's auto-notification system.

-

**The following people were served electronically:**

Stephen J. Wukela for Otis Nero

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

State Accident Fund

Department Of Transportation South Carolina

## **EXHIBIT 12**

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Stephen J. Wukela  
PO Box 13057  
Florence SC 29504  
ATTORNEY(S) FOR THE PLAINTIFF(S)

Kirsten Barr  
PO Box 2167  
Mt. Pleasant SC 29464  
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCF.

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This is a Workers' Compensation matter. By Order of August 5, 2014, the Single Commissioner of the Workers' Compensation Commission Ordered *inter alia* that the Defendants "shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission." (attached). (The Single Commissioner's Order also ordered the payment of certain medical bills. That portion will, if necessary, be addressed by subsequent judgment when those amounts are ascertained).

Thereafter, the case had a long appellate history; culminating in the Court of Appeals reinstating the Order of the Single Commissioner by Order of June 26, 2019.(attached). The Defendants petitioned certiorari to the Supreme Court and certiorari was denied by the Supreme Court by Order dated February 12, 2020. (attached).

The Workers' Compensation Act, S.C. Code §42-17-70 provides: "Any party in interest may file in the court of common pleas of the county in which the injury occurred ... an award of the commission affirmed upon appeal, whereupon such court shall render judgment in accordance therewith and notify the parties."

The Claimant, therefore, filed the attached Order of the Court of Appeals dated June 26, 2019 reinstating the Order of the Single Commissioner dated August 5, 2014.

The amount of the judgment is calculated as follows:

**A. Indemnity Benefits**

The Single Commission ordered the payment of weekly compensation benefits at the weekly rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012, to the date of the Single Commission Order and continuing until further Order of the Commission. That amount, as of March 6, 2020, totals \$139,321.14; representing weekly benefits of \$346.57 for the 402-week period of 06/20/2012-03/06/2020.

**B. Interest**

The Workers' Compensation Act, S.C. Code §42-9-240 provides:  
**Date on which compensation payable under award becomes due.**  
The first installment of compensation payable under the terms of an award by the commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid, including interest from the original date of the award at the maximum legal rate.(emphasis added).

By Order of the Supreme Court, 2014-01-03-01, dated 01/03/2014, (attached), for the period 01/15/2014 through 01/14/2015, the legal rate of interest is 7.25% compounded annually. The Single Commission Order was issued on 08/05/2014. Therefore, as of March 6, 2020, the total amount of interest owed was \$33,995.22.

ELECTRONICALLY FILED - 2020 Mar 06 3:45 PM - FLORENCE - COMMON PLEAS - CASE#2020CP2100765

# **EXHIBIT 13**

# WUKELA LAW FIRM

---

Steve Wukela, Jr.  
Benjamin D. Moore  
Christi B. McDaniel  
Stephen J. Wukela  
Patrick J. McLaughlin  
Pheobe A. Clark  
Frank C. Swaggard

403 Second Loop Road  
P.O. Box 13057  
Florence, SC 29504-3057

(843) 669-5634  
FAX (843) 669-5150

March 12, 2020

## CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Kirsten Barr  
Attorney at Law  
PO Box 2167  
Mt. Pleasant SC 29464

Re: Otis Nero v. SC Department of Transportation and  
State Accident Fund  
Civil Action No. 2020-CP-21-00755

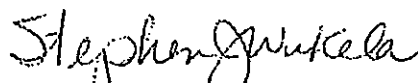
Dear Ms. Barr:

Pursuant to the South Carolina Rules of Civil Procedure regarding service of process, enclosed please find a filed copy of the Form 4 Order and attachments filed in the Court of Common Pleas; and the Form 4 Judgment issued by the Court of Common Pleas, for service upon you as attorney for the Defendants in the above action.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

  
STEPHEN J. WUKELA

SJW/jpb

Enclosures

cc: SC Department of Transportation  
State Accident Fund  
SC Attorney General

## **EXHIBIT 14**



**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
 Honorable Alan Wilson  
 SC Attorney General  
 Rembert Dennis Bldg  
 1000 Assembly St Room 519  
 Columbia SC 29201



9590 9402 4498 8278 4176 95

2. Article Number (Transfer from service label)  
 7018 2290 0001 5496 2295

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee  
*x [Signature]*

B. Received by (Printed Name) C. Date of Delivery  
*F Smith 2-13*

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below.  No

3. Service Type
- |  |   |
|--|---|
| <input checked="" type="checkbox"/> Adult Signature                    | <input type="checkbox"/> Priority Mail Express®                     |
| <input type="checkbox"/> Adult Signature Restricted Delivery           | <input type="checkbox"/> Registered Mail™                           |
| <input checked="" type="checkbox"/> Certified Mail®                    | <input type="checkbox"/> Registered Mail Restricted Delivery        |
| <input type="checkbox"/> Certified Mail Restricted Delivery            | <input checked="" type="checkbox"/> Return Receipt for Merchandise  |
| <input type="checkbox"/> Collect on Delivery                           | <input type="checkbox"/> Signature Confirmation™                    |
| <input type="checkbox"/> Collect on Delivery Restricted Delivery       | <input type="checkbox"/> Signature Confirmation Restricted Delivery |
| <input type="checkbox"/> Insured Mail                                  |   |
| <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500) |   |

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt

USPS TRACKING#



First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

9590 9402 4498 8278 4176 95

United States  
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box•

Stephen J Wukela  
PO Box 13057  
Florence SC 29504

0 Heron  
SAF

# **EXHIBIT 15**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2020-CP-21-00755

Otis Nero, Employee, )  
 )  
 )  
Claimant, )

vs. )

CERTIFICATE OF SERVICE  
BY CERTIFIED MAIL,  
RESTRICTED DELIVERY


SC Department of Transportation, )  
Employer, and State Accident Fund, )  
Carrier, )  
 )  
Defendants. )

The Form 4 Order and attachments filed in the Court of Common Pleas; and the Form 4 Judgment issued by the Court of Common Pleas in the above action were served upon the Defendant, State Accident Fund, by Certified Mail, Restricted Delivery, as indicated by the attached Domestic Return Receipt.

WUKELA LAW FIRM

BY: s/Stephen J. Wukela  
STEPHEN J. WUKELA  
ATTORNEY FOR CLAIMANT  
SC BAR ID 68351  
PO BOX 13057  
FLORENCE SC 29504  
843-669-5634

March 19, 2020

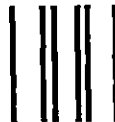
SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <span style="float: right;"><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</span></p> <p>X <i>E Robert</i></p>	
<p>1. Article Addressed to:</p> <p><i>Honorable Amy V Cofield Director, State Accident Fund PO Box 102100 Columbia SC 29221</i></p>  <p>9590 9402 4498 8278 4177 56</p>	<p>B. Received by (Printed Name)</p> <p><i>E Robert</i></p>	<p>C. Date of Delivery</p> <p><i>3-26-20</i></p>
<p>Article Number (Transfer from service label)</p> <p>7018 2290 0001 5496 2288</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>PS Form 3811, July 2015 PSN 7530-02-000-9053</p>	<p>3. Service Type <span style="float: right;"><input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™</span></p> <p><input checked="" type="checkbox"/> Adult Signature <span style="float: right;"><input type="checkbox"/> Registered Mail Restricted Delivery</span></p> <p><input type="checkbox"/> Adult Signature Restricted Delivery <span style="float: right;"><input type="checkbox"/> Return Receipt for Merchandise</span></p> <p><input type="checkbox"/> Certified Mail® <span style="float: right;"><input type="checkbox"/> Signature Confirmation™</span></p> <p><input type="checkbox"/> Certified Mail Restricted Delivery <span style="float: right;"><input type="checkbox"/> Signature Confirmation Restricted Delivery</span></p> <p><input type="checkbox"/> Collect on Delivery <span style="float: right;"><input type="checkbox"/> Insured Mail</span></p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery <span style="float: right;"><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</span></p>	

Domestic Return Receipt

USPS TRACKING#



9590 9402 4478 8278 4177 56

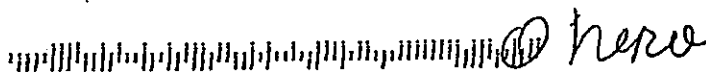


First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

United States  
Postal Service


• Sender: Please print your name, address, and ZIP+4® in this box•

Stephen J. Wukela  
PO Box 13057  
Florence SC 29504



# **EXHIBIT 16**



SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY																
<ul style="list-style-type: none"> <li>■ Complete Items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature  <input checked="" type="checkbox"/> <i>J. A. [Signature]</i> <input type="checkbox"/> Agent  <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) _____ C. Date of Delivery <u>3-10</u></p>																
<p>1. Article Addressed to:                  Honorable Christy Hall                  Secretary of Transportation                  SC Dept of Transportation                  955 Park Street                  Columbia SC 29201</p>  <p>9590 9402 4498 8278 4177 49</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes                  If YES, enter delivery address below: <input type="checkbox"/> No</p>																
<p>2. Article Number (Transfer from service label)                  7012 2210 0001 1505 5271</p>	<p>3. Service Type</p> <table border="0"> <tr> <td><input checked="" type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input checked="" type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td> <td></td> </tr> </table>	<input checked="" type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input checked="" type="checkbox"/> Certified Mail Restricted Delivery	<input checked="" type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
<input checked="" type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®																
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™																
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery																
<input checked="" type="checkbox"/> Certified Mail Restricted Delivery	<input checked="" type="checkbox"/> Return Receipt for Merchandise																
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™																
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery																
<input type="checkbox"/> Insured Mail																	
<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																	
<p>PS Form 3811, July 2015 PSN 7530-02-000-9053 <span style="float: right;">Domestic Return Receipt</span></p>																	



## **EXHIBIT 17**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FLORENCE. )  
 )  
OTIS NERO; )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SOUTH CAROLINA DEPARTMENT )  
OF TRANSPORTATION, and )  
SOUTH CAROLINA STATE )  
ACCIDENT FUND, )  
 )  
Defendants. )

**IN THE COURT OF COMMON PLEAS  
FOR THE 12th JUDICIAL CIRCUIT**

Civil Action No. 2020-CP-21-00755  
S.C.W.C.C. Claim No. 1222136

**MOTION TO ALTER OR AMEND  
AND MOTION FOR RELIEF**

**TO STEPHEN J. WUKELA, ATTORNEY OF RECORD FOR OTIS NERO:**

PLEASE TAKE NOTICE that the Defendants, the South Carolina Department of Transportation and the South Carolina State Accident Fund, by and through their undersigned counsel, will move before the Honorable William H. Seals, Jr., at such time and place as is convenient for the Court and counsel, for an order altering, amending, or granting for relief from the March 11, 2020 Form 4 Order granting Judgment in the amount of \$190,648 against the Defendants pursuant to Rule 59(e) and Rule 60(b), S.C.R.C.P.. The Defendants further seek a a Stay of Execution of Judgment pursuant to Rule 62(b), S.C.R.C.P.

**I. Procedural History and violation of Due Process**

On March 5, 2020, the Plaintiff, Otis Nero, initiated the above-referenced civil action in the Court of Common Pleas against the South Carolina Department of Transportation and the South Carolina State Accident Fund by filing a Civil Action

Coversheet for a "Transcript Judgment" and a Form 4 "Judgment in a Civil Case." Prior to March 5, 2020, there has never been any civil action by the Plaintiff, Otis Nero, against the Defendants, the South Carolina Department of Transportation or the State Accident Fund. The Plaintiff failed to give the Defendants any notice of this civil action and did not serve the Defendants with his proposed Form 4 Order when filed. The Form 4 was endorsed by Judge Seals, without notice to the Defendants, on March 11, 2020. The Defendants were given no opportunity to be heard.

The Plaintiff has an existing workers' compensation claim against the Defendants, which is currently pending before the South Carolina Workers' Compensation Commission following the Remittitur sent from the Court of Appeals to the Workers' Compensation Commission on February 12, 2020. (*See attached Exhibit 1, Remittitur*). The Remittitur was not sent to the Court of Common Pleas because the Court of Common Pleas does not have appellate or subject matter jurisdiction over this claim.

By its Order dated June 26, 2019, the Court of Appeals reversed the Workers' Compensation Commission's ruling that the Plaintiff is not entitled to any benefits under the South Carolina Workers' Compensation Act. The Commission's Appellate Panel concluded that the Plaintiff's workers' compensation claim is barred by his failure to give notice under S.C. Code Ann. § 42-15-20, but did not address the merits of his claim or his substantive entitlement to benefits under the Act. Likewise, the Court of Appeals did not address whether or to what extent the Plaintiff is entitled to any benefits under the Workers' Compensation Act because the Workers' Compensation Commission

has not yet finally decided these issues.<sup>1</sup> Pursuant to the Defendant's Form 30, the issues remaining before the Commission's Appellate Panel include (but are not limited to) whether the Plaintiff sustained any injury by accident arising out of or in the course of his employment; whether the Plaintiff sustained a subsequent intervening accident breaking the chain of causation; and whether or to what extent the Plaintiff is entitled to any medical or compensation benefits under the Workers' Compensation Act. (See *attached* Exhibit 2, Form 30, and Exhibit 3, Order of the Appellate Panel).

Prior to the issuance of the Form 4 Order, the Plaintiff did not file any motion for interest or penalties before the South Carolina Workers' Compensation Commission or the Court of Common Pleas, as is required by law, in violation of the Defendants' right of Due Process. For example, in Johnson v. Sonoco Products Co., 381 S.C. 172, 672 S.E.2d 567 (2009), the Supreme Court considered whether the Court of Common Pleas had appellate jurisdiction under the prior version of S.C. Code Ann. § 42-17-60 to address a motion for interest and penalties; however, the Court of Common Pleas has no such jurisdiction under the current version of S.C. Code Ann. § 42-17-60. Additionally, the Johnson Court recognized, but did not address the issue of subject matter jurisdiction because it was not timely raised or preserved. Nevertheless, the Johnson Court required a motion under the circumstances. Here, the Plaintiff has filed no motion and the

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<sup>1</sup> While the Order of the Court of Appeals indicates that the single commissioner's order is to be "reinstated," this is necessarily limited to the single commissioner's legal ruling as to the notice issue, as that was the only issue before the Court of Appeals. Furthermore, as previously explained by our Supreme Court and Court of Appeals, an appellate court lacks the authority to reinstate "a single commissioner's award...Only the commission is authorized to do this." Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (1991) (citing Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 647 (1967)). The Court of Appeals gave no indication of any intention to overrule or otherwise deviate from this half-century body of precedent in its June 26, 2019 Order.

Defendants respectfully contend that the Court of Common Pleas has neither appellate jurisdiction, nor subject matter jurisdiction to address whether or to what extent the Plaintiff is entitled to any benefits under the Workers' Compensation Act, interest, or penalties. Therefore, these issues are not properly before the Court of Common Pleas and the Form 4 Order should be withdrawn and vacated.

Furthermore, by addressing these issues without notice to the Defendants and without permitting them any meaningful opportunity to be heard, the Court of Common Pleas has violated the Defendants' rights under the Constitutions of the United States and the State of South Carolina. In particular, the constitutional right of procedural due process mandates that the parties be given notice of the issues that the court is to consider. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). Indeed, the Due Process clause demands notice to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Without notice and opportunity to be heard, a court has no jurisdiction to adjudicate the rights of the parties. Murdock, supra. Here, the Defendants had no notice of the request made by the Plaintiff for the Court of Common Pleas to adjudicate his entitlement to benefits under the Workers' Compensation Act or the application or calculation of interest or penalties. The Court of Common Pleas afforded the Defendants no notice that it intended to address or enter judgment on these novel claims, nor did the Court afford the Defendants any opportunity to be heard. Therefore, the Court's Form 4 Order should be withdrawn and vacated, as it violates the fundamental requirements of due process and is thus a nullity. Id.

**II. Sovereign Immunity precludes entry or execution of judgment.**

The Court of Common of Common Pleas has neither the authority or jurisdiction to render or execute judgment against the Defendants with regard to the Plaintiff's workers' compensation claim as a result of the sovereign immunity of the South Carolina Department of Transportation and the South Carolina State Accident Fund, which has not been waived or abrogated. Pursuant to S.C. Code Ann. § 15-78-140(c), the "immunity of the State and its political subdivisions, with regard to the seizure, execution, or encumbrance of their properties is reaffirmed." Furthermore, a "governmental entity is not liable for a loss resulting from...any claim covered by the South Carolina Workers' Compensation Act," except as defined by the Workers' Compensation Act. S.C. Code Ann. § 15-78-60(14). As this is a claim covered by the Workers' Compensation Act, the Defendants' waiver of immunity is strictly governed by the terms of the Act, specifically S.C. Code Ann. § 42-7-80, which grants the Court of Common Pleas no authority or jurisdiction to determine whether or to what extent the Defendants are liable to the Plaintiff.

Generally speaking, the Court of Common Pleas may enter judgment upon the verdict of a jury or upon a decision by the Court pursuant to Rule 58(a), S.C.R.C.P.; however, the Court of Common Pleas has not made any decision in this case, as no action is pending, and the Court of Common Pleas does not have authority to render any decision against the sovereign authority of the Defendants pursuant to S.C. Code Ann. § 15-78-60(14). Additionally, pursuant to Rule 58(b), S.C.R.C.P., the Court of Common Pleas may enter judgment when "a judgment is rendered by an appellate court is remitted to the trial court;" however, this provision does not authorize entry of judgment in this case because the Court of Common Plea did not remit the case to the

Court of Common Pleas, but instead remitted the case to the South Carolina Workers' Compensation Commission, which has exclusive jurisdiction. Because the Form 4 Order was issued in the absence of subject matter jurisdiction and otherwise abrogates the sovereign immunity of the State, the Defendants respectfully request that it be withdrawn and vacated.

**III. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over the matters decided in the Form 4 Order.**

The South Carolina Workers' Compensation Commission has exclusive jurisdiction to adjudicate all issues between the parties regarding the Plaintiff's workers' compensation claim, including whether and to what extent he is entitled to any award of workers' compensation benefits and whether the Plaintiff is entitled to an award of interest or penalties. Neither these issues, nor the rights of the parties generally, have been finally determined and no final judgment<sup>2</sup> has been rendered by the Workers' Compensation Commission. More importantly, there is no statutory authority which

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<sup>2</sup> The August 5, 2014 Order of the single commissioner is not a final "judgment" because it is not a "final agency decision" pursuant to S.C. Code Ann. § 1-23-380. In proceedings governed by the APA, "[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." Nucor v. Dept. of Employment & Workforce, 410 S.C. 507, 765 S.E.2d 558 (2014) (quoting Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dep't of Health and Env'tl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). Even if the Commission's Appellate Panel were to affirm the award of the single commissioner following the Remittitur, the "whole subject matter" of the workers' compensation claim would not be determined, nor would the workers' compensation claim be "terminated." See also Rule 54(a), S.C.R.C.P. ("Judgment' as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party.").

would permit the Court of Common Pleas to assume subject matter jurisdiction over the determination of an award, interest, or penalties under the Workers' Compensation Act.

S.C. Code Ann. § 42-1-540 provides that the

“rights and remedies granted by [the South Carolina Workers' Compensation Act] to an employee ... shall exclude all other rights and remedies of such employee...on account of such injury.”

Furthermore, according to S.C. Code Ann. § 42-3-180,

“[a]ll questions arising under [Title 42]...shall be determined by the commission.”

As explained by our Supreme Court, the Court of Common Pleas has been “divested of its original jurisdiction” over an employee’s claims against his employer by virtue of S.C. Code Ann. § 42-1-310<sup>3</sup>, which instead “vested the Commission with exclusive original jurisdiction.” See Sabb. v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). The Court of Appeals has further explained that it was

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<sup>3</sup> S.C. Code Ann. § 42-1-310 provides that “[e]very employer and employee ...shall be presumed to have accepted the provisions of [the South Carolina Workers' Compensation Act] respectively to pay and accept compensation for personal injury or death arising out of and in the course of the employment and shall be bound thereby.”

“apparent the General Assembly intends for employees to seek a remedy from employers for their work-related injury only through the Workers’ Compensation Commission and not through the circuit courts.”

Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008); see also Poch v. Bayshore Concrete, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

Therefore, the Court of Common Pleas has been divested of jurisdiction to hear the Plaintiff’s request for judgment and assessment of penalties and interest under the Workers’ Compensation Act. See Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992). This includes a Form 4 Order addressing the amount of an award, interest, and penalties, such as that filed, *sua sponte*, by the Plaintiff.

Of course,

“[i]t is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property.”

Ross v. Richland Cty., 270 S.C. 100, 103, 240 S.E.2d 649, 651 (1978); see also Simmons v. Simmons, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct.App.2006) (stating that “[i]t is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void.”). Therefore, the Defendants respectfully contend that the Form 4 Order should be withdrawn and vacated.

In addition, the Court of Common Pleas does not have authority or jurisdiction to determine an award of workers’ compensation benefits, interest, or penalties, under the

terms of the Workers' Compensation Act itself. While S.C. Code Ann. § 42-17-70 permits entry of judgment by the Court of Common Pleas in certain circumstances, none of these circumstances are applicable in the case *sub judice*. According to the terms of S.C. Code Ann. § 42-17-70,

“Any party in interest may file in the court of common pleas of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the commission, an order or decision of the commission, an award of the commission unappealed from or an award of the commission affirmed upon appeal...”

Here, there exists no “memorandum of agreement.” The final “order or decision of the commission” concludes that the Plaintiff is not entitled to any award of benefits. (*See attached Exhibit 3; see also footnote 2, supra* ). Lastly, the final decision of the Commission was not “affirmed on appeal,” but was instead *reversed* by the Court of Appeals. *See Riddle v. Fairforest Finishing Co.*, 18 S.E.2d 341 (S.C. 1942) (holding that “the award of a single commissioner...is not a final adjudication of a claim”), *see also* S.C. Code Ann. § 42-17-60. Therefore, S.C. Code Ann. § 42-17-70 does not permit entry of judgment by the Court of Common Pleas under the facts of the case.

Even if S.C. Code Ann. § 42-17-70 were applicable, it only permits the Court of Common Pleas to enter judgment in accordance with the very terms Commission’s award. Here, the Commission’s Appellate Panel has not finally determined whether the Plaintiff is even entitled to an award. In addition, even assuming, *arguendo*, that the

Court of Common Pleas were authorized to render judgment in accordance with the single commissioner's award, that award only provides for payment of "benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$246.57) Dollars from June 20, 2012 until the date of this order and continuing until further Order of this Commission." However, the Form 4 Order prepared, *sua sponte*, by the Plaintiff and endorsed by the Court of Common Pleas goes significantly beyond the terms of the single commissioner's "award" and addresses issues such as a lump sum payment, interest, and penalties. The Defendants respectfully contend this is an error of law and that by rendering such a judgment, the Court of Common Pleas acted in excess its statutory authority and jurisdiction, necessitating that the Form 4 Order be withdrawn and vacated.

**IV. The Form 4 Order was obtained by, and is premised upon, material misrepresentations of fact.**

The Form 4 "Judgement in a Civil Case" filed, *sua sponte*, by the Plaintiff and endorsed by the Court, avers that it is based on a "Decision by the Court" and states that

"This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered."

This is a material misstatement of fact, as there has never been any civil action by the Plaintiff against the Defendants, there has never been any trial or hearing by the Court of Common Pleas, and the Court of Common Pleas has never (heretofore) rendered a

decision. Indeed, the Court of Common Pleas does not even have jurisdiction over the subject matter. *See* S.C. Code Ann. § 42-3-180 and S.C. Code Ann. § 15-78-60(14).

The Plaintiff, by their proposed Form 4 “Judgement in Civil Case,” further misrepresented to the Court that there existed a “Statement of Judgment by the Court,” as follows:

“This Court hereby renders judgment in the amount of \$190,648.00, along with weekly benefits in the amount of \$346.57 in accordance with the Order of the S.C. Court of Appeals, Op. No. 5660 (06/26/19) (cert. den’d 02/12/2020) (attached) which reinstated the Order of the Worker’ Compensation Commission dated 08/05/2014 (Attached).”

Again, the Court of Common Pleas has not previously rendered any judgment because no civil action was pending between the parties and the Court of Common Pleas has no jurisdiction to render any such judgment in a workers’ compensation claim. *See Posey v. Proper Mold & Engineering, Inc.*, 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008)

Furthermore, the South Carolina Court of Appeals did not render judgment in any amount and the South Carolina Workers’ Compensation Commission has never awarded the Plaintiff \$190,648.00. The Court of Appeals did not address whether or to what extent the Plaintiff may be entitled to an amount of workers’ compensation benefits whatsoever, but instead dealt solely with a narrow procedural defense. In addition, the final Decision and Order of the South Carolina Workers’ Compensation Commission ruled that the Plaintiff is not entitled to any benefits under the Worker’

Compensation Act and following the February 12, 2020 Remittitur, the Workers' Compensation Commission has issued no final decision or judgment regarding the Plaintiff's entitlement to any sum certain.

The Plaintiff's Form 4 further misrepresents (at page 2) that

“[t]his action came to trial or hearing before the Court. The issues have been tried or heard and a decision rendered.”

Again, this is false. There has never been a trial or hearing before the Court of Common Pleas, which does not have jurisdiction over the subject matter. Instead, the matter is currently pending before the South Carolina Workers' Compensation Commission.

Because the Form 4 Order was obtained by and is premised upon material misrepresentations about the facts of the Plaintiff's workers' compensation claim, the Defendants respectfully request that it be withdrawn and vacated.

**V. The Form 4 Order was obtained by, and is premised upon, material misrepresentations of law**

**A. Interest**

The Plaintiff's Form 4 also misrepresents the manner in which interest is calculated under S.C. Code Ann. § 42-17-60, arguing that he is entitled to interest from August 5, 2014, the date of the single commissioner's Order. This claim is in direct contravention of the Supreme Court's holding in Johnson v. Sonoco Products Co., 381 S.C. 172, 672 S.E.2d 567 (2009). In Johnson, a single commissioner awarded workers' compensation benefits, the Commission's Appellate Panel reversed and denied benefits,

and the Circuit Court purportedly “reinstated” the single commissioner’s award on appeal, leaving the question as to the proper interval during which interest accrued on the award. This is a similar procedural posture to the Plaintiff’s workers’ claim. According to the Supreme Court, any award of interest should be calculated as of 30 days from the award of benefits in the appellate court and specifically held that an employee

“is not entitled to interest from the date of the single commissioner’s order.” (emphasis added).

Therefore, the Plaintiff is not entitled to interest from August 5, 2014, the date of the single commissioner’s Order, as a matter of law.<sup>4</sup>

While the Defendants deny the Plaintiff is entitled to any interest given the non-final posture of the workers’ compensation claim currently pending before the Commission’s Appellate Panel, it is clear the calculation of interest in the Form 4 Order is incorrect regardless. In accordance with Johnson, supra, interest would not accrue until 30 days after the Order of the Court of Appeals on June 26, 2019. For the sake of argument, the principal as of June 26, 2019 totaled \$126,894.14 (366.1429 weeks at the rate of \$346.57 per week). Between June 27, 2019 and the date of the Supreme Court’s Order of February 12, 2020, an additional 33 weeks of principal accrued at the rate

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<sup>4</sup> Accord Case v. Hermitage Cotton Mills, 236 S.C. 534, 115 S.E.2d 57 (1960) (holding that if the Commission’s Appellate Panel denies an employee compensation and this denial is reversed on appeal, the weekly payments to be made by the employer commence from the date of the appellate court’s order “and should not be calculated retroactively from the date of the Commission’s decision”).

\$346.57 per week (\$11,436.81). In accordance with S.C. Code Ann. § 34-31-20(B), interest is compounded annually for the 0.63 years (33 weeks) between the Order of the Court of Appeals and the Supreme Court's Order and the applicable rate is 9.5% (based on the 2019 Court of Appeals Order) . Therefore, the total amount of interest on the principal following the Order of the Court of Appeals is \$8,274.47. Because the Plaintiff's claim for \$33,995.22 interest was calculated using an incorrect principal amount, an incorrect period for which interest accrued, and an incorrect rate of interest, the Defendants respectfully contend that the Form 4 Order, which enters judgment for interest in this erroneous amount, should be amended if not withdrawn and vacated.

#### **B. Penalty**

The Plaintiff's Form 4 Order endorsed by the Court mistakenly suggests that a 10% penalty is due upon the principal and interest (which were wrongly calculated) because S.C. Code Ann. § 42-9-90 provides a penalty when "an award by the commission is not paid within fourteen days after it becomes due." However, no award of benefits is due or payable for the reasons set forth above and based upon the specific, mandatory provisions of S.C. Code Ann. § 42-7-80.

The calculation of a workers' compensation award, any payments to be made thereunder, and the procedure for making such payments in a case involving the South Carolina State Accident Fund is governed exclusively by S.C. Code Ann. § 42-7-80. Section 42-7-80 is entitled "Payment of awards" and mandates that only the Workers' Compensation Commission can determine "the payments to be made" by the State Accident Fund when "awards under [Title 42] are made by the commission." Once the Workers' Compensation Commission determines "the payments to be made" by the State Accident Fund, the law requires that the Commission "shall transmit to the

director of the fund an official copy of such award” and “an itemized statement of the payments to be made,” whereupon the director of the State Accident Fund “shall forward an official copy thereof to the Comptroller General who shall issue his warrant upon the State Treasurer in payment of the claim.”<sup>5</sup> Therefore, the Court of Common Pleas has no authority under S.C. Code Ann. §42-9-90 or § 42-17-70 to order the payment of benefits in contravention of S.C. Code Ann. § 42-7-80, as it is a more specific statute that specifically governs the payment of awards by the State.<sup>6</sup> Moreover, the Commission has not yet transmitted any “itemized statement of the payments to be made” by the State Accident Fund, which means that no award is due or payable as a matter of law.

Even if it were assumed that proper and timely payments have not been made by the Defendants, it is clear that the Plaintiff’s Form 4 misrepresents the calculation of a penalty under S.C. Code Ann. § 42-9-90. Clearly, because both the amount of the

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<sup>5</sup> See Johnston v. S.C. Dep’t of Labor, Licensing, & Regulation, S.C. Real Estate Appraisers Bd., 365 S.C. 293, 296–97, 617 S.E.2d 363, 364 (2005) (holding the term “shall” in a statute means that the action is mandatory); see also, Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Charleston County Parents for Pub. Schools, Inc. v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001).

<sup>6</sup> See Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (holding that where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect); see also, Wilder v. South Carolina Hwy. Dep’t, 228 S.C. 448, 90 S.E.2d 635 (1955); Wooten ex rel. Wooten v. S.C. Dep’t of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (holding that a specific statutory provision prevails over a more general one); Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (stating the general rule of statutory construction is that a specific statute prevails over a more general one).

alleged award and the amount of any interest legally due was miscalculated, the calculation of a 10% penalty is also incorrect. This further merits amendment of the Form 4 Order if it is not withdrawn and vacated.

## VI. Conclusion

Based upon the arguments set forth herein above, and based upon arguments to be made before the Court at a hearing on this Motion, the Defendants, the South Carolina Department of Transportation and the South Carolina State Accident Fund respectfully request that the Form 4 Order dated March 11, 2020 be withdrawn and vacated because it exceeds the jurisdiction and statutory authority of the Court of Common Pleas to address issues in a non-final workers' compensation claim or to otherwise abrogate the sovereign immunity of the State of South Carolina and, in addition, the Form 4 Order was obtained by, and is premised upon, material misrepresentations of fact and law. In the alternative, the Defendants respectfully request that the Form 4 Order be amended to more appropriately state the amount of judgment by properly calculating interest in accordance with Supreme Court precedent and denying any penalty assessment.

Respectfully submitted,

/s/ Kirsten L. Barr

S.C. Bar #15525

Trask & Howell, LLC

P.O. Box 2167

Mt. Pleasant, SC 29465

(843)881-1027

[kbarr@trask-howell.com](mailto:kbarr@trask-howell.com)

ATTORNEYS FOR THE DEFENDANTS

March 23, 2020

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2020CP2100755

**Official File Stamp:** 03-24-2020 03:01:19 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Florence  
**Case Caption:** Otis Nero VS Department Of Transportation South Carolina , defendant, et al  
**Document(s) Submitted:** Motion/Alter and/or Amend  
- Exhibit/Filing of Exhibits  
**Filed by or on behalf of:** Kirsten Leslie Barr

This notice was automatically generated by the Court's auto-notification system.

**The following people were served electronically:**

Kirsten Leslie Barr for Department Of Transportation South Carolina et al  
Stephen J. Wukela for Otis Nero

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# **EXHIBIT 18**

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

NOTICE OF ELECTRONIC FILING [NEF]

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A filing has been submitted to the court RE: 2020CP2100755

**Official File Stamp:** 03-23-2020 04:49:53 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Florence  
**Case Caption:** Otis Nero VS Department Of Transportation South Carolina , defendant, et al  
**Document(s) Submitted:** Motion/Alter and/or Amend  
**Filed by or on behalf of:** Kirsten Leslie Barr

This notice was automatically generated by the Court's auto-notification system.

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**The following people were served electronically:**

Kirsten Leslie Barr for Department Of Transportation South Carolina et al  
Stephen J. Wukela for Otis Nero

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## **EXHIBIT 19**

TRASK  
HOWELL  
WORKERS' COMPENSATION DEFENSE

Reply to  
Kirsten L. Barr  
(843) 881-1027  
kbarr@trask-howell.com

March 26, 2020

Honorable William Barnes  
Sheriff Florence County  
6719 Friendfield Road  
Effingham, SC 29541

Re: Otis Nero v. SCDOT  
W.C.C. File No.: 1222136  
Civil Action No.: 2020-CP-21-00755  
Carrier File No.: 2012-4525  
Date of Accident: 6/20/12

Dear Sheriff Barnes:

My office represents the South Carolina Department of Transportation and the South Carolina State Accident Fund in the above-referenced matter. We are in receipt of Mr. Wukela's request that you levy the property of the South Carolina Department of Transportation. I am writing to request that you withhold further action in this matter pending disposition of a Motion for Relief from Judgment, which is currently pending before the Court of Common Pleas. I have attached a copy of said Motion for your convenience, which outlines the highly unusual circumstances of Mr. Wukela's request.

Perhaps most importantly, we respectfully contend that there exists no authority by statute or common law that would permit any person to levy the property of the State of South Carolina or any of its agencies, including the South Carolina Department of Transportation. The sovereign immunity of South Carolina against such execution is inviolate and was reaffirmed by the General Assembly with the passage of S.C. Code Ann. § 15-78-140(c), which states that the "immunity of the State and its political subdivisions, with regard to the seizure, execution, or encumbrance of their properties is reaffirmed." We would ask your consideration of these concerns, as set forth in the attached Motion, in responding to Mr. Wukela's request.

Yours very truly,



Kirsten L. Barr

KLB/cab/les  
Enc.

763 JOHNNIE DODDS BLVD. | P.O. BOX 2167  
P 843.881.4228 | F 843.881.8784



MT. PLEASANT, SOUTH CAROLINA 29465  
www.TRASK-HOWELL.com

Honorable William Barnes

March 26, 2020

Page 2

cc Hanna Bourne, South Carolina State Accident Fund (w/enc.) (email only)  
Erin Farthing, Esq, South Carolina State Accident Fund (w/enc.) (email only)  
The Honorable Amy Cofield, Esq., Director, State Accident Fund, (w/enc.) (email only)  
Linda McDonald, Esq., Chief Counsel, S.C.D.O.T. (w/enc.) (email only)  
The Honorable Alan Wilson, Esq., Attorney General, State of South Carolina (w/enc.)  
Malloy McEachin, Esq., Florence County Attorney (w/enc.) (email only)  
Michael M. Nunn, Esq., General Counsel, Florence County Sheriff's Office (w/enc.)  
Steven J. Wuklea, Esq. (w/enc.)

## **EXHIBIT 20**

DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 1222136

Otis Nero, Employee,

Claimant,

vs.

S.C Department of Transportation, Employer,  
and State Accident Fund, Carrier,

Defendants.

HEARING: Held in Columbia, South Carolina, on March 28, 2014

APPEARANCES: Claimant represented by Stephen J. Wukela, Esquire,  
Florence, SC

Defendants represented by Justin T. Williams, Esquire,  
Columbia, SC

PURPOSE OF HEARING: To determine the issues set forth in the Form 50 and Form  
51

DECISION AND ORDER: By: Aisha Taylor, Commissioner

FILED: August 5, 2014

## I. STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51, and any other issues which may timely come before the Commissioner;
2. Notice of the hearing was timely and properly served upon all parties of interest;
3. Venue, set in Richland County, is proper;
4. The Claimant has an average weekly wage of \$519.83 yielding a compensation rate of \$346.57. (Hrg. Tr. p. 5 ll. 21 - 24).

## II. APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

### Claimant's APA Submissions:

| APA # | PHYSICIAN/<br>OTHER    | GROUP/AGENCY                        | DATE OF<br>REPORT   | PAGES           |
|-------|------------------------|-------------------------------------|---------------------|-----------------|
| APA#1 |                        | Carolinas Hospital System           | 06/20/12 - 08/29/12 | 000001 - 000016 |
| APA#2 | William B. Naso, M.D.  | Florence Neurosurgery & Spine, P.C. | 06/28/12 - 09/11/12 | 000017 - 000037 |
| APA#3 | Robert M. Richey, M.D. |                                     | 07/09/12 - 12/13/12 | 000038 - 000047 |
| APA#4 | Claimant's Check Stub  |                                     | 07/16/12            | 000048          |
| APA#5 | Claimant's Statement   |                                     | 06/18/13            | 000049          |

## EXHIBITS

|    | EXHIBITS                            | DATE OF<br>REPORTS | PAGES    |
|----|-------------------------------------|--------------------|----------|
| A. | SCDOT Safety Memo and Sign-In Sheet | June 12, 2012      | A1 - A5  |
| B. | SCDOT Power Point                   |                    | B1 - B14 |
| C. | SCDOT FMLA Leave Letter             | June 26, 2012      | C1 - C2  |
| D. | SCDOT Leave Transaction Form        | December 10, 2012  | D1       |
| E. | Ben Durant Statement                | June 20, 2013      | E1       |
| F. | Danny Bostic Statement              |                    | F1       |

|    |  |  |  |
|----|--|--|--|
| G. | Deposition Transcript of Dr. Robert Richey |  |  |
| H. | Deposition Transcript of Ben Durant        |  |  |
| I. | Deposition of Danny Bostic                 |  |  |
| J. | Deposition of Cristi Junkin                |  |  |
| K. | Deposition of the Claimant                 |  |  |

Also, admitted into evidence without objection were Plaintiff's Exhibits 1 – 5 containing portions of the employer's personnel file on the Claimant as follows:

|    | EXHIBITS  | DATE OF REPORTS |
|----|---|-----------------|
| 1. | Certification of Healthcare Provider for Employee's Serious Health Condition (Family & Medical Leave Act) | 07/09/12        |
| 2. | Work Excuse completed by Dr. R. Blake Kline, M.D.   | 07/12/12        |
| 3. | Medical Release Letter by Dr. Robert Richey, M.D.   | 07/13/12        |
| 4. | Work Excuse from Lisa Jones, RN   | 11/23/12        |
| 5. | Letter from Employer to Dr. William Naso, M.D.  | 11/27/12        |

(Hrg Tr. p. 6, l. 1 – 22).

#### STATEMENT OF THE CASE

This is a denied case before the Commission on the Claimant's Form 50. Claimant alleges that on June 20, 2012, while working on a S.C. Department of Transportation (hereinafter "DOT") crew at the DOT shop yard, while using a squeegee board smoothing cement, Claimant suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope.

Defendants admit that Danny Bostick, the road crew supervisor, and his immediate subordinate Ben Durant, the crew lead man or foreman, witnessed the syncopal episode, resuscitated Mr. Nero and directed him to go home. The Claimant drove home by himself and had another passing out episode when he got into the yard at his house. His wife then took him to the emergency room at Carolinas Hospital System.

There the records reflect he was seen, and admitted by, Dr. Robert Richey, his family doctor. Dr. Richey ordered a CT of the brain, right foot and chest x-ray, a stress test and, ultimately, a MRI of the cervical spine. After the cervical MRI revealed abnormality at multiple levels, Dr. Richey consulted with neurosurgeon, Dr. William Naso. (Claimant's APA No. 1, pp. 1 – 11).

Dr. Naso noted a chief complaint of neck pain and in his history recorded that "the patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand. He complains of numbness and weakness in both hands." (Claimant's APA No. 1, p. 10).

Ultimately, Dr. Naso diagnosed cervical radiculopathy and recommended conservative measures including a series of epidural steroid injections and physical therapy. Although he opined, "I do not think his syncope is related to his cervical spine pathology." (Claimant's APA No. 1, pp. 10 – 11).

Dr. Richey discharged the Claimant from the hospital on June 24, 2012 and indicated, "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism." (Claimant's APA No. 1, p. 12).

After discharge, the Claimant followed up with Dr. Naso who recommended anterior cervical discectomy and fusion at C6-7 and C7-T1. That was performed by Dr. Naso on August 28, 2012. (Claimant's APA No. 1, pp. 13 – 14).

The Claimant contends that he suffered a cervical spine and upper extremity injury, that he is entitled to treatment at the hands of Dr. Richey and Dr. Naso, and that he is entitled to temporary total disability from the date of the accident and continuing.

The Defendants deny the claim on notice and causation.

**EVIDENCE**

Above-listed APAs, depositions, and exhibits were admitted into evidence without objection. In addition, the following testimony was admitted into evidence:

**CLAIMANT: OTIS NERO**

Claimant testified at trial that he is 64 years old and has a ninth grade education but he has very few reading skills and is unable to read a newspaper. He testified that he left school in the ninth grade to go to work to take care of his family as his father was ill. He started off plowing fields with a mule, has driven trucks, run backhoes, trackhoes, and bulldozers, welded, and performed other sorts of labor-type work. (Hrg. Tr. p. 17, l. 25 – p. 18, l. 10).

He testified that he has worked for the Department of Transportation for two stints. The most recent period was approximately three and a half to four years. (Hrg. Tr. p. 18, l. 11 – p. 19, l. 3). He testified that on June 20, 2012 he was working for a DOT road crew, that Mr. Durant was the lead man of that crew, and that Mr. Bostick was the supervisor. (Hrg. Tr. p. 19, ll. 4 – 14).

He testified that on June 20, 2012 he and other members of the road crew were pouring a slab of cement approximately 30 feet wide. (Hrg. Tr. p. 19, ll. 15 – 22). He testified that leveling the cement involved the use of a squeegee board that was in fact a two-by-four approximately 30 feet in length. He testified that he squeegee board was operated by a number of men who stretched the board across the form and worked it back and forth; pulling it to level the cement. (Hrg. Tr. p. 20, l. 6 – p. 22, l. 8).

Mr. Nero testified that during that process he felt an onset of pain in his shoulder and his neck. He testified:

- A. So as I was doing that, I felt a pressing like a, you know, snap of back there between my shoulder and my neck. And I don't know whether it's the boss that was spotting me or something when I -- when that happened or then that. I don't know exactly that's when -- when he took me off towards there, you know.

(Hrg. Tr. p. 22, ll. 11 - 17).

Mr. Nero further testified:

- Q. Okay. Now, did you tell him, "Hey, Mr. Bostick, I -- I think I've hurt my neck just now"?
- A. No, I didn't tell him that.
- Q. Okay. When he took you off, what did you do?
- A. I just stepped out the way, got off to see -- out of the cement, took a little break, and then I went back.

(Hrg. Tr. p. 22, ll. 18-24).

Mr. Nero testified that after finishing that job the employees cleaned up the equipment and walked to the parking lot where their supervisor and lead man were sitting in a truck. Mr.

Nero testified:

- A. .... Mr. Bostick and my supervisor -- supervisor and lead man, Mr. Bostick and Ben Durant, they pulled up in the truck, parked it right beside facing in the shed. Then I walked on over there and walked around the right hand side of the truck, and Mr. Durant had the door open. I just walked up there and was standing and was just talking to him, you know. And we were talking, just like jiving and a laugh, you know, laughing, cutting a fool laughing, you know. Then just all of the sudden, I -- went out. It was hot, and he asked me, he said, "Are you all right?" I had done fell to the ground then. Matter of fact, he was getting out -- out of the truck, then and trying to help me get up.
- Q. And -- And what did you tell him?
- A. I -- I told him then, I said -- I said, "Well I feel like I'm all right." You know, I said -- I said, "I feel okay." I said, "I don't know what happened, you know," So I just went out. So generally when we leave, we knock off, we walk -- I said, "Well, I tell you what, let me walk around..."

(Hrg. Tr. p. 24, ll. 4-25).

Mr. Nero further testified that he drove home, but that as soon as he pulled up in the yard and started to get out of the truck he had a second episode of syncope. (Hrg. Tr. p. 25, ll. 14-18).

Thereafter, his wife took him to the emergency room where he was admitted by Dr. Robert Richey. (Hrg. Tr. p. 25, ll. 19 - 22). The hospital records reflect that Dr. Richey performed a number of tests and consulted with a neurosurgeon, Dr. William Naso, who ultimately performed neck surgery. (Claimant's APA No. 1, p. 2). Mr. Nero testified that he had never had neck pains or problems before that day. (Hrg. Tr. p. 26, ll. 1 - 13).

He further testified that, after the accident, Mr. Benjamin Durant called him and he let Mr. Durant know that he was in the hospital and that he was going to have surgery. He talked to Mr. Bostick while in the hospital as well in the same vein. (Hrg. Tr. p. 26, ll. 17 - 23). He testified that he received some paperwork from Human Resources, had it signed by his doctor, and returned it to them as well. (Hrg. Tr. p. 26; l. 24 - p. 27, l. 17). Claimant's Exhibit No. 1 is a Family Medical Leave form that is filled out by Dr. Richey on July 9, 2012 and was produced from the records of the South Carolina Department of Transportation. (Hrg. Tr. p. 6, ll. 2- 11; Plaintiff's Exhibit 1).

Mr. Nero testified that he had an accident on the job in the past during which he was operating a machine and injured his knee. (Hrg. Tr. p. 27, l. 17 - p. 28, l. 15). He testified that during that accident his supervisor at the time was present. He testified:

- Q. Okay. And did you report that accident to anybody?
- A. Yes, sir. A matter of fact, it was the workers around there at that time see'd (sic) what happened. And I tried to, thought I could walk, went to get down off the machine, and when I got down to the ground, I noticed I ain't had no -- nothing in my leg. I just fell out.
- Q. Mr. Phillips saw the accident?
- A. Yeah.

(Hrg. Tr. p. 29, ll. 1-9).

Mr. Nero went on to testify:

- Q. Okay. Now, the -- the -- the one of the issues in this case is the employer says, listen, they never -- he never said to Mr. Bostick and Mr. Durant, "Hey, I hurt my neck that day pulling that squeegee board;" Is that correct?
- A. Correct.
- Q. Okay. And they say, you know, you never told Ms. Christy, "Hey, Ms. Christy, I hurt my neck that day pulling that squeegee board;" Is that correct?
- A. That's correct.
- Q. Okay. Why didn't you report it?
- A. Well, I didn't report it because they was there. You know, they -- they saw what happened. And from the time when I went to the hospital, I didn't never get back to work. That's why when Ben called me, I let him know. And then Ben obviously had to tell Danny 'cause he turned around and called me directly behind them but right after he called, both of them calling. So I figured they'd know, you know.

(Hrg. Tr. p. 29, l. 10 -- p. 30, l. 3) (emphasis added).

The Claimant testified he was still having problems with his neck and his hands and he had to take medication every night. (Hrg. Tr. p. 30, ll. 4 -- 8). He is receiving social security disability benefits. (Hrg. Tr. p. 30, ll. 9 -- 21).

On cross examination, Mr. Nero testified that he was working with approximately six people on the squeegee board. He testified:

- Q. Thank you, sir. And isn't it true that you -- you're saying that you hurt your back or you felt some pain while you were on that squeegee board; Is that true, sir?
- A. I said I heard something snap, a pop in my -- my neck and my shoulder.
- Q. Okay. All right, sir. And at any -- Isn't it true that at no time when you heard that snap, crackle, and pop in your neck and shoulder, at no time did you tell anyone that you had sustained that injury; Isn't that true?
- A. That's true. That's true.

- Q. Isn't it also true, sir, that at some point in time your supervisor, crew leader, Mr. Bostick, took you off of that squeegee board; Is that true, sir?
- A. Yes, sir.
- Q. Isn't it true that at that time you did not notify him that you heard a snap, crackle, and pop in your neck; Is that true, sir?
- A. That's true.

(Hrg. Tr., p. 32, l. 7 – p. 33, l. 1).

He further testified:

- Q. Okay. Now, isn't it true that while you were pulling that squeegee board that you did not pass out?
- A. No, I did not pass out ---
- Q. Okay.
- A. --- While I was pulling the squeegee board.
- Q. Okay. Isn't true that when you were pulled off that squeegee board that you did not pass out?
- A. No, not until after I took off again.
- Q. And isn't it also true that you did not pass out while you walked to the shed?
- A. No. I passed -- No, I -- that's true.
- Q. Okay. So isn't it also true that you passed out after you were laughing; isn't that true, sir?
- A. Yes, sir. We was standing, like I said, I was standing at the boss man's truck.
- Q. Okay. And isn't it true that you didn't pass out until you started laughing; isn't that true?
- A. Yeah, I was laughing. We was laughing or just finished laughing when that -- when that -- when that occurred. Yes, sir.

(Hrg. Tr. p. 33, l. 17 – p. 34, l. 12).

Mr. Nero admitted to having had dizzy spells in the past while on the job. (Hrg. Tr. p. 34). He admitted to having a workers' compensation claim in the past. (Hrg. Tr. p. 34). He further admitted that when he was asked on this injury by Mr. Durant and Mr. Bostick whether he was okay, he indicated that he felt like he was okay. (Hrg. Tr. p. 36). He admitted having been trained about how to report a workers' compensation claim, that he had the opportunity to

communicate with members of the Department of Transportation after the injury and that no one encouraged him not to file a workers' compensation claim. (Hrg. Tr. pp. 38 – 40).

On re-direct, the Claimant testified that in his prior workers' compensation claim he did not have to report it to his supervisor because the supervisor witnessed the incident. (Hrg. Tr. pp. 42-43).

### BENJAMIN DURANT

The deposition of Benjamin Durant, lead man, was also admitted into evidence. Mr. Durant testified that he remembered Mr. Nero passing out on the date of the accident. (Dep. Durant, pp. 10 – 11). He described the employees pouring of the concrete pad that day and the spreading of the pad using the squeegee board. (Dep. Durant, pp. 12 – 13). He testified that he did not recall specifically one way or another whether Mr. Nero was one of the guys pulling the squeegee board. (Dep. Durant, p. 18). He testified, however, that it would not have been unusual for him to have done so. (Id.).

He further testified:

- Q. Okay. At any point during the time he worked for you, did Mr. Nero complain about his neck giving him trouble or his arms giving him trouble?
- A. I never heard him say anything about his neck, and I never heard him say anything about his arms.
- Q. Did he ever complain about any body part?
- A. I've heard him say, "Oy. Owe." I don't what Oy, owe could mean for anything. I say Oy, Owe sometimes. You know what I mean?
- Q. Did he -- did he say that that day?
- A. Did he say it that day?
- Q. Yes, sir.
- A. I can't remember, sir.
- Q. Is it possible that he did?
- A. He may have. Like I said, I don't -- I don't -- we all -- like I said, we're always back there cutting the fool, laughing, doing whatever under the shed. Well, I wasn't under the shed. I actually was, like I said, sitting in the truck, and a few of them was under the shed or

whatever, and he was standing right there with me talking with me on my side of the truck.

(Dep. Durant, p. 27, ll. 3 - 23).

He went on to testify:

- A. Yeah. I don't remember who he -- I don't remember what he was doing or what, but I know -- like I said, we was sitting in the truck, me and him. And I don't remember him -- I don't know if he seen something of what, I mean, as far as, you know, that, but I know when I looked over there, I heard the loud noise, and it was him.
- Q. It was Mr. Nero?
- A. It was Mr. Nero.  
Like I said, the cooler he had in his hand fell. He hit the ground with the cooler.
- Q. So what did you do -- what did Mr. Nero say to you once he staggered?
- A. Whew, like that.  
And I said, Otis, are you all right?  
He said, Yeah, I'm all right. I just go a little dizzy.
- Q. At that point in time did he tell you that he hurt himself while working that day?
- A. No. He didn't tell me anything like that.
- Q. Did he tell you that his neck was hurting?
- A. No.
- Q. Did he tell you that his back was hurting?
- A. No.
- Q. Did he tell you that his shoulders were hurting?
- A. No. He didn't tell me anything.  
He didn't tell you -- did he tell you anything was hurting?
- A. No, sir.
- Q. Did he tell you what caused him to have that dizzy spell?
- A. No, sir, he didn't.

(Dep. Durant, p. 37, l. 6 - p. 38, l. 13).

Mr. Durant testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 - p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

- Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some

discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

\* \* \*

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, l. 18 - p. 47, l. 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

### DANNY BOSTICK

The deposition of Danny Bostick was also admitted into evidence. Mr. Bostick described the use of the squeegee board. (Dep. Bostick, pp. 9 - 10). He further testified:

A. I was sitting in the truck talking to the guys up under the shed. Ben was in the passenger seat of the truck. My back is turned to them. Nero is standing inside the truck talking to Ben.

So the only thing I knew, I felt the truck rock, because I'm sitting in the truck. When I looked back, he was holding on to the side of the door, so I said, Ben ask him and see what's wrong with him. So when that happened, he asked, well -- he asked him what was wrong, and he said, well, I just get dizzy like that, and he stood up. I said, Are you okay?  
He said, yeah.

(Dep. Bostick, p. 13 l. 13 – 25).

With regard to Plaintiff's Exhibit 1, the Family Medical Leave Act form filled out by Dr. Richey, Mr. Bostick testified:

- Q. You haven't ever seen [Plaintiff's Trial Exhibit 1], but you would agree with me that by July of 2012 -- this document is dated July the 9<sup>th</sup> of 2012, I think -- yeah, July the 9<sup>th</sup>.  
By July the 9<sup>th</sup>, DOT was aware that Mr. Nero had been out of work since June the 20<sup>th</sup> and that he had to have neck surgery?
- A. Would I have known that?
- Q. No. No. I'm asking if you agree with me that the Department of Transportation knew that.
- A. I don't know, because I don't know what paperwork he passed in to get to that point.
- Q. Fair enough.  
Well, I got this document from the Department of Transportation.
- A. Right.
- Q. So --
- A. But I wouldn't have known.
- Q. I'm -- well, I know. I'm not asking what you knew. I'm asking whether you would agree with me that, given this document, the Department of Transportation would have known that.

MR. WILLIAMS: Objection to the form.

BY MR. WUKELA:

- Q. Go ahead and answer.
- A. That they would have known something then?
- Q. Yeah.
- A. I guess they would have start doing their investigation.
- Q. Okay. Do you know whether they did start doing an investigation at that point?
- A. No, I don't.

(Dep. Bostick, p. 27, l. 11 – p. 28, l. 17).

When Claimant's counsel asked Mr. Bostick whether he would have conducted an investigation into the accident if he had received Plaintiff's Trial Exhibit 1, Mr. Bostick testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 -- p. 29, l. 12).

On cross examination, Mr. Bostick testified that Mr. Nero had dizziness in the past while laughing. (Dep. Bostick pp. 30 -- 31). He further testified:

- Q. So on June 20, 2012, did you see him do any of what you describe as straining work?
- A. Well, I have -- I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.
- Q. Okay.
- A. And he will come off of it.
- Q. So --
- A. Because it's hot.
- Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?
- A. Yes.
- Q. Okay. You told him to get off the squeegee board?
- A. Yes.
- Q. Okay. Now, why did you do that?
- A. It's hot, and I know he's an older guy, so if I know I can -- we've got other people that can relieve him, I try to take him off of that.

(Dep. Bostick, p. 33, ll. 2 -- 23).

He testified that his crew members have all had training on reporting injuries if they get injured on the job. (Dep. Bostick, pp. 38 – 39). On re-direct he testified:

- Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
- A. Exactly.
- Q. But you didn't -- he didn't come back?
- A. He never came back.
- Q. You didn't know why he didn't come back?
- A. No.
- Q. Okay. If he had, on July the 9<sup>th</sup>, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20<sup>th</sup>, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?
- A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.
- Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?
- A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets - - starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.
- Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]
- A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.
- Q. But if it had --
- A. We would have went back in the office.
- Q. And you have said let's -- let's go through this work-related injury paperwork?
- A. Yeah. We would have talked to the people we needed to talk to, to get it -- get that -- get it solved, whatever is going on.

(p. 43, l. 6 – p. 44, l. 25) (emphasis added).

## MEDICAL RECORDS

The medical records of Carolinas Hospital System, Florence Neurosurgery and Spine, and Dr. Robert Richey were also admitted without objection. Those records reveal that the Claimant presented at Carolinas Hospital System on June 20, 2012. (Claimant's APA No. 1, p. 1).

There he was seen and admitted by Dr. Robert Richey, his family doctor. Dr. Richey ordered a CT of the brain, right foot and chest x-rays, a stress test and, ultimately, a MRI of the cervical spine. (Claimant's APA No. 1, pp. 1 – 8). After the cervical MRI revealed abnormality at multiple levels, Dr. Richey consulted with neurosurgeon, Dr. William Naso. (Claimant's APA No. 1, pp. 10 – 11).

Dr. Naso noted a chief complaint of neck pain and that "the patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand. He complains of numbness and weakness in both hands." (Claimant's APA No. 1, p. 10).

Ultimately, Dr. Naso diagnosed cervical radiculopathy and recommended conservative measures including a series of epidural steroid injections and physical therapy. (Claimant's APA No. 1, pp. 10 – 11; Claimant's APA No. 2). Although he opined, "I do not think his syncope is related to his cervical spine pathology." (Claimant's APA No. 1, p. 11).

Dr. Richey discharged the Claimant on June 24, 2012 and indicated, "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism." (Claimant's APA No. 1, p. 12).

After discharge, the Claimant followed up with Dr. Naso who recommended anterior cervical discectomy and fusion at C6-7 and C7-T1. That procedure was performed by Dr. Naso on August 28, 2012.

**DR. ROBERT RICHEY**

The deposition of Dr. Robert Richey, who saw him at Carolinas Hospital beginning June 20, 2012, was admitted into evidence. He testified that he began taking care of Mr. Nero as his family doctor in 2007. (Dep. Richey, p. 8, ll. 5 – 11).

In the hospital on June 24, 2012, Dr. Richey ordered a cervical MRI given Mr. Nero's complaints of bilateral hand, and arm numbness, and syncope. (Claimant's APA No. 1, p. 8; Dep. Richey, p. 10, ll. 6 – 23). The MRI report showed moderate narrowing at C6-7 and C7-T1 and stenosis at C3-4. (Claimant's APA No. 1, pp. 8-9). In the hospital, Dr. Richey had also performed other tests including an EKG, telemetry, and CT of the brain, all to exclude alternate possible causes for the Claimant's syncope. (Dep. Richey, p. 9). None of those other tests explained the syncope. (Dep. Richey, p. 10, ll. 2 – 5).

He testified:

- Q. Okay. Was it your conclusion at that time that you had solved the mystery, if you will, that you had figured out what was the cause of this syncopal episode?
- A. I didn't solve the mystery, but I had a hypothesis.
- Q. All right. Talk to me about that.
- A. Well, on page 12 --
- Q. Yes, sir.
- A. --- the next to the last paragraph it's the cause -- "The cause of the syncope, I think, I think has something to do with his spinal stenosis and a reflex mechanism. We really cannot prove it, but from a monitoring standpoint, we found no problems. Cardiology consultation was also made."
- Q. All right. Tell me what you mean by that, and you say -- when you use this term "a reflex mechanism," explain to me what you mean by that?

A. Well, first I will say that the opinion of the neurosurgeon was that that wasn't the case.

Q. Uh-huh.

A. Although, he's not an expert on syncope. I would also state that I have seen a case that he and I were both involved in to where we were certain that it was the cause of the syncope and yet he said it wasn't, so we all differ.

Q. Sure.

A. And there is literature on this, but the body is very, very complicated and the sympathetic nervous system comes out of the brain. They both are involved in the neck and mechanisms of pain make people pass out. I did not document as well as I could have possibly what happened to make him pass out. It is so infrequently we really find the cause and so you have to go through the exercise of what happened. And so my hypothesis was that that this was some type neurogenic mechanism.

Q. Well, good and I'm sure he's glad of that as well. Well, can you say that of all the possible causes of the syncope that this was the most probable even if you can't be absolutely sure about it?

A. It was my opinion at the time.

Q. Okay. And was that opinion to a reasonable degree of medical certainty.

A. I would argue it is.

(Dep. Richey, p. 12, l. 22 - p. 14, l. 9; p. 16, l. 4-11) (emphasis added).

Dr. Richey also noted that he consulted with Dr. William Naso, who did not believe that the syncope was caused by the stenosis; however, Dr. Naso did ultimately recommend and perform anterior cervical discectomy and fusion at C6-7 and C7-T1 to correct the stenosis. With regard to Dr. Naso's opinion about the cause of the syncope, Dr. Richey testified:

A. -- and so I gave you a hypothesis or an opinion which is reasonable

Q. Right.

A. --- and I think that you can find people on both sides of that issue if you wanted to, but I would say I disagree with the neurosurgeon in regard to the fact that but for the fact that he had spinal stenosis, this probably wouldn't have happened. That's my opinion and I'm entitled to it, but he's entitled to his.

Q. So you're saying but for the fact a spinal ---

- A. If he, if he didn't have that spinal cord pressure, I don't think he would have passed out.  
(Dep. Richey, p. 56, l. 18 – p. 57, l. 6).

Nevertheless, setting aside whether the stenosis directly caused the syncope, as Dr. Richey opined, Dr. Richey also testified to a reasonable degree of medical certainty that it was also his opinion that Mr. Nero had preexisting stenosis that was aggravated by pulling the squeegee board. He testified:

- Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?  
A. More than likely, certainly.  
Q. And is that opinion to a reasonable degree of medical certainty?  
A. I think so.

(Dep. Richey, p. 19, ll. 12 – 18) (emphasis added).

In sum, he testified:

- Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20<sup>th</sup>, 2012, that he had a arthritic condition?  
A. He would have to have.  
Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?  
A. Yes, sir.  
Q. That was caused -- that was age and years of working?  
A. That's my opinion.  
Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?  
A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.  
Q. Potentially causing that syncope?  
A. Adding to it.  
Q. Adding to it?  
A. Yes.  
Q. Given the fact that it's June and he's been working?

- A. Correct.
- Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?
- A. Yes, sir.
- Q. Okay. And that's your opinion to a reasonable degree of medical certainty?
- A. That's the fact.

(Dep. Richey, p. 54, l. 6 – p. 55, l. 15).

### FINDINGS OF FACT

After the hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals:

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. I find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

This is pursuant to the stipulation of the parties at the commencement of the hearing.

3. I find that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical

evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic until the accident.

This finding is based on the above set out evidence. The preponderance of the medical evidence, including the diagnoses of Dr. Naso and the causation statement of Dr. Richey, forms the basis, in particular, for this conclusion.

Dr. Naso, the treating neurosurgeon, saw the Claimant on June 24, 2012 in the hospital at the request of Dr. Richey. (Claimant's APA No. 1, pp. 10 – 11). This evaluation was performed only four days after the accident. Dr. Naso reviewed an MRI of the cervical spine dated June 24, 2012 which showed:

On the axial images, C2-3 is unremarkable.

At C3-4 there is mild spinal stenosis with the AP diameter of the canal measuring 9.5 mm. There is moderate narrowing of the right foramen and mild narrowing of the left foramen due to a diffuse disc bulge.

At C4-5 there is moderate narrowing of both foramen and mild spinal stenosis due to a diffuse disc bulge. AP diameter of the canal is 1 cm.

At C5-6 there is mild narrowing of the right foramen. The left foramen is spinal stenosis secondary to diffuse disc bulge. AP diameter of the canal is 9.5 mm.

At C6-7 there is moderate narrowing of both foramen with spinal stenosis. AP diameter of the canal measures 9.5 mm.

At C7-T1 there is moderate spinal stenosis with the AP diameter of the canal measuring 8 mm. There is moderate narrowing of both neural foramen due to a diffuse disc bulge.

**IMPRESSION:**

ABNORMALITY AT MULTIPLE LEVELS. MOST SEVERELY INVOLVED IS C7-T1. CLINICAL CORRELATION RECOMMENDED.

(Claimant's APA No. 1, p. 8).

On June 24, 2012, Dr. Naso noted the Claimant's complaints of syncope and neck pain into both arms, predominantly the right upper extremity, as well as numbness and weakness in both hands. He diagnosed cervical radiculopathy and ordered epidural steroid injections. (APA No. 1, pp. 10 – 11).

The Claimant's uncontradicted testimony was that he had not had any neck pain prior to June 20, 2012. (Hrg. Tr. p. 26, ll. 11 – 13).

Dr. Richey testified unequivocally that the Claimant suffered from a preexisting condition that was aggravated by pulling the squeegee board to level the concrete on June 20, 2012. He testified:

Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?

A. More than likely, certainly.

Q. And is that opinion to a reasonable degree of medical certainty?

A. I think so.

(Dep. Richey, p. 19, ll. 12 – 18).

Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20<sup>th</sup>, 2012, that he had a arthritic condition?

A. He would have to have.

Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?

A. Yes, sir.

Q. That was caused -- that was age and years of working?

A. That's my opinion.

Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?

A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.

Q. Potentially causing that syncope?

A. Adding to it.

Q. Adding to it?

- A. Yes.  
Q. Given the fact that it's June and he's been working?  
A. Correct.  
Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?  
A. Yes, sir.  
Q. Okay. And that's your opinion to a reasonable degree of medical certainty?  
A. That's the fact.

(Dep. Richey, p. 54, l. 6 – p. 55, l. 15).

Also, while there appears to be some disagreement between Drs. Richey and Naso as to whether the neck condition directly caused the syncope, it was Dr. Richey's uncontradicted testimony that pulling the squeegee board on the afternoon of June 20, 2012 aggravated the preexisting but previously asymptomatic stenosis in Mr. Nero's neck; causing neck pain and bilateral upper extremity pain.

**4. I find that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.**

This finding is based on the above set out records and testimony. In particular, both Dr. Richey and Dr. Naso clearly opined that the Claimant was suffering radiculopathy into his upper extremities as a result of his neck condition. Dr. Naso diagnosed cervical radiculopathy and noted:

The patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand.

(Claimant's APA No. 1, p. 10).

The uncontroverted testimony of the Claimant at trial was that he was still having problems with his hands, even subsequent to the two-level fusion. (Hrg. Tr. p. 30, ll. 4 – 6).

5. I find that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

This finding is based on the stipulation of the parties at the commencement of the hearing. (Hrg. Tr. p. 17, ll. 2 – 6).

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

The Courts have also held that the notice section should be liberally construed in favor of claimants, but that there are limitations upon the rule and the statutory requirements cannot be

disregarded altogether. (Id.) (See also Hartzell v. Palmetto Collision, LLC, 406 S.C. 233 (S.C. App. 2013)).

The Claimant bears the burden of proving either notice or reasonable excuse. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005). However, once reasonable excuse has been shown, it is the employer's burden to show prejudice resulting from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)).

Here, I find that the employer had actual knowledge and informal notice of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and; therefore, trigger investigation of the accident and treatment of the injury. The Claimant's supervisors were present during the incident of syncope which ultimately led the Claimant to the hospital on the same day. The employer was also aware that the Claimant remained in the hospital and was treated by a neurosurgeon, who performed two-level fusion shortly thereafter. (See Plaintiff's Exhibits 1 – 5).

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital. (Hrg. Tr. p. 29, l. 21 – p. 30, l. 3) Moreover, the Claimant subsequently provided the employer with documents describing his condition including Plaintiff's Exhibit 1, which is a Family Medical Leave Act form from his family doctor, Dr. Richey, dated July 9, 2012, just under three weeks after the accident. The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Plaintiff's Exhibit 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have in the normal course of business. Instead, as was customary, Plaintiff gave the form to the Human Resources office. (Dep. Bostick, pp. 16 - 29). Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, it would have caused him to do further investigation into the accident. He testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 - p. 29, l. 12).

- Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
- A. Exactly.
- Q. But you didn't -- he didn't come back?
- A. He never came back.
- Q. You didn't know why he didn't come back?
- A. No.
- Q. Okay. If he had, on July the 9<sup>th</sup>, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20<sup>th</sup>, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?
- A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.
- Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?

- A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets - - starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.
- Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]
- A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.
- Q. But if it had --
- A. We would have went back in the office.
- Q. And you have said let's -- let's go through this work-related injury paperwork?
- A. Yeah. We would have talked to the people we needed to talk to, to get it -- get that -- get it solved, whatever is going on.

(p. 43, l. 6 - p. 44, l. 25) (emphasis added).

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 - p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

- Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?
- A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.
- Q. I mean, a guy hurts his thumb, you've got to report it?
- A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

\* \* \*

- Q. But do you have any responsibility as the lead man to report injuries?

- A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.
- Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.
- A. Well --
- Q. Can you say, no, we're not going to tell the supervisor?
- A. No. I'm not going to do that because there's too much that come back and bite you.
- Q. **All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?**
- A. **He was right there.**

(Dep. Durant, p. 44, l. 18 – p. 47, l. 12) (emphasis added).

- Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?
- A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

The Plaintiff's Exhibits 2 – 4 contain out-of-work slips from the Claimant's treating neurosurgeon, Dr. Naso, to the employer indicating he was unable to work due to cervical radiculopathy. Indeed, Plaintiff's Exhibit 5 contains a letter written by the employer to Dr. Naso acknowledging that they were aware that Dr. Naso was treating the Claimant and asking Dr. Naso his opinions as to the Claimant's ability to return to work.

Thus, the employer was obviously aware the Claimant had an incident where he passed out after pulling the squeegee board; that he had not returned to work, and that, instead, he had been taken to the hospital where he was treated by his family doctor and a neurosurgeon, who diagnosed cervical stenosis and recommended, and ultimately performed, neck surgery.

The Claimant's lead man testified that he did not fill out a formal report of incident after the Claimant's passing out episode because his supervisor was present and he believed that was sufficient. It is certainly reasonable for Mr. Nero to have believed the same thing.

Claimant's crew supervisor, Danny Bostick, testified that if he had been aware of the details that the Human Resources department received in the form of the FMLA form contained in Plaintiff's Trial Exhibit 1, he would have further investigated the incident.

On cross examination, the Defendants explored the fact that the Claimant had a prior workers' compensation injury on the job. However, the testimony revealed that during that prior incident, like this one, his employer was present and therefore no more formal mode of notice was required. (Hrg. Tr. p. 27, l. 18 – p. 29, l. 9).

Thus, the undersigned finds that the employer had sufficient actual knowledge and informal notice of the pertinent facts surrounding Mr. Nero's injury to indicate the possibility of a compensable injury, and, therefore to trigger them to do an investigation of Claimant's injury and to direct Claimant's medical treatment. The undersigned further finds that given the Claimant's knowledge that the employer had been present during his passing out episode and was aware of his subsequent treatment, it was reasonable for the Claimant to conclude that no more formal reporting was required.

**7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.**

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizée v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the

facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, l. 24 – p. 12, l. 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections

and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

**8. I find that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.**

This finding is based on the above set out records and testimony. In particular, Dr. Richey's uncontroverted statement in Claimant's Exhibit 1 indicates that he expects that the Claimant will be incapacitated due to his medical condition from June 20, 2012, indefinitely. Also, Claimant's Exhibits 2 and 3 contain out-of-work slips from Dr. Richey and Dr. Kline of Florence Neurosurgery & Spine.

**9. I find that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen**

the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012.

#### CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.
2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.
3. Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident.
4. Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.
5. The Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

6. Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

7. Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury.

8. Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.

9. Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

ORDER

IT IS, THEREFORE, ORDERED that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident.

IT IS FURTHER ORDERED that the Employer, South Carolina Department of Transportation, and their Carrier, State Accident Fund, shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission.

No hearing costs are assessed in this instance.

S.C. WORKERS' COMPENSATION COMMISSION



\_\_\_\_\_  
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).

August 5, 2014

By: Renee Smith, Administrative Assistant to Commissioner Taylor

## **EXHIBIT 21**

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 1222136

Otis Nero,

vs.

South Carolina Department of Transportation,

AND

State Accident Fund,

Respondent  
CLAIMANT,

EMPLOYER,

CARRIER,  
DEFENDANTS/Appellants

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Appellate Panel Review held in Columbia, South Carolina,  
on per notices timely and properly served  
upon all parties of interest.

Appellate Panel Decision and Order filed  
May 29th, 2015

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APPEARANCES:

Respondent Otis Nero, Claimant, of Florence, South  
Carolina represented by Stephen J. Wukela.

Defendants/Appellants represented by John Gabriel  
Coggiola, Esquire of Willson Jones Carter & Baxley, P.A. in  
Columbia, South Carolina.

NOIA due 6/26 (6/28)

### STATEMENT OF THE CASE

On January 6, 2014, Claimant filed a Form 50 Request for Hearing, alleging injuries to the neck and bilateral shoulders, as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012. Claimant's Form 50 alleges that Claimant suffered an immediate onset of pain in his neck and shoulders, which was subsequently followed by an episode of syncope. On his Form 50, Claimant requested additional medical treatment to his neck and shoulders and TTD benefits for "various dates and times" from 06/20/12 to the present.

On January 9, 2014, Defendants timely filed a Form 51 Answer to Claimant's Request for Hearing. Defendants denied Claimant sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged. Specifically, Defendants argued that Claimant failed to provide the employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and Claimant lacked sufficient causation to establish a compensable injury by accident.

A hearing was held before Commissioner Aisha Taylor on March 28, 2014. At the hearing, Claimant took the position that while working on June 20, 2014 with a crew laying a large concrete pad, Claimant felt an onset of pain in his back and shoulders, although he admits that he did not report the incident to his supervisors and continued to work. Claimant further alleges that at the end of the work day, he was standing around, talking, and joking with his supervisors at the shed, and he had a sudden syncope episode, causing him to fall to the ground and knocking him unconscious. After Claimant was revived, he instructed his supervisors that he was fine to drive home, but when he reached his house he suffered another syncope episode in the driveway, and he was taken to the E.R. by his wife. In an effort to determine the cause of his syncope episode, Claimant underwent a variety of tests, including a cervical MRI, which identified cervical stenosis. Claimant was referred to a neurosurgeon, Dr. William Naso, who

performed a fusion surgery on August 28, 2012. Claimant alleges that the he suffered an aggravation of pre-existing stenosis that caused the syncope episode and aggravation of his cervical spine.

Defendants' position at the hearing was that Claimant lacked sufficient evidence of causation to satisfy their burden of proving Claimant sustained an injury by accident while pulling the squeegee board, and Claimant failed to prove that that pulling the squeegee board caused the syncope episode and aggravation of Claimant's pre-existing cervical condition, which led to surgery. Further, Defendants took the position that Claimant failed to provide his employer notice within the required ninety (90) day notice period set forth in S.C. Code Ann. §42-15-20 and supporting case law, and as a result, Claimant's request for benefits should be denied.

On August 5, 2014, Commissioner Taylor issued the following Findings of Fact, Conclusions of Law, and Order:

#### **FINDINGS OF FACT**

- 1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.**

This finding is based upon stipulation of the parties at the commencement of the hearing.

- 2. I find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.**

This is pursuant to the stipulation of the parties at the commencement of the hearing.

- 3. I find that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic**

**until the accident.**

This finding is based on the above set out evidence. The preponderance of the medical evidence, including the diagnoses of Dr. Naso and the causation statement of Dr. Richey, forms the basis, in particular, for this conclusion.

Dr. Naso, the treating neurosurgeon, saw the Claimant on June 24, 2012 in the hospital at the request of Dr. Richey. (Claimant's APA No. 1, pp. 10 - 11). This evaluation was performed only four days after the accident. Dr. Naso reviewed an MRI of the cervical spine dated June 24, 2012 which showed:

On the axial images, C2-3 is unremarkable.

At C3-4 there is mild spinal stenosis with the AP diameter of the canal measuring 9.5 mm. There is moderate narrowing of the right foramen and mild narrowing of the left foramen due to a diffuse disc bulge.

At C4-5 there is moderate narrowing of both foramen and mild spinal stenosis due to a diffuse disc bulge. AP diameter of the canal is 1 cm.

At C5-6 there is mild narrowing of the right foramen. The left foramen is spinal stenosis secondary to diffuse disc bulge. AP diameter of the canal is 9.5 mm.

At C6-7 there is moderate narrowing of both foramen with spinal stenosis. AP diameter of the canal measures 9.5 mm.

At C7-T1 there is moderate spinal stenosis with the AP diameter of the canal measuring 8 mm. There is moderate narrowing of both neural foramen due to a diffuse disc bulge.

**IMPRESSION:**

**ABNORMALITY AT MULTIPLE LEVELS. MOST SEVERELY INVOLVED IS C7-T1. CLINICAL CORRELATION RECOMMENDED.**

(Claimant's APA No. 1, p. 8).

On June 24, 2012, Dr. Naso noted the Claimant's complaints of syncope and neck pain into both arms, predominantly the right upper extremity, as well as numbness and weakness in both hands. He diagnosed cervical radiculopathy and ordered epidural steroid injections. (APA No. 1, pp. 10 - 11).

The Claimant's uncontradicted testimony was that he had not had any neck pain prior to June 20, 2012. (Hrg. Tr. p. 26, ll. 11 - 13).

Dr. Richey testified unequivocally that the Claimant suffered from a preexisting condition that was aggravated by pulling the squeegee board to level the concrete on June 20, 2012. He testified:

Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?

A. More than likely, certainly.

Q. And is that opinion to a reasonable degree of medical certainty?

A. I think so.

(Dep. Richey, p. 19, ll. 12 – 18).

Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20th, 2012, that he had a arthritic condition?

A. He would have to have.

Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?

A. Yes, sir.

Q. That was caused -- that was age and years of working?

A. That's my opinion.

Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?

A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.

Q. Potentially causing that syncope?

A. Adding to it.

Q. Adding to it?

A. Yes.

Q. Given the fact that it's June and he's been working?

A. Correct.

Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?

A. Yes, sir.

Q. Okay. And that's your opinion to a reasonable degree of medical certainty?

A. That's the fact.

(Dep. Richey, p. 54, l. 6 – p. 55, l. 15).

Also, while there appears to be some disagreement between Drs. Richey and Naso as to whether the neck condition directly caused the syncope, it was Dr. Richey's uncontradicted testimony that pulling the squeegee board on the afternoon of June 20, 2012 aggravated the preexisting but previously asymptomatic stenosis in Mr. Nero's neck; causing neck pain and bilateral upper extremity pain.

**4. I find that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.**

This finding is based on the above set out records and testimony. In particular,

both Dr. Richey and Dr. Naso clearly opined that the Claimant was suffering radiculopathy into his upper extremities as a result of his neck condition. Dr. Naso diagnosed cervical radiculopathy and noted:

The patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand.

(Claimant's APA No. 1, p. 10).

The uncontroverted testimony of the Claimant at trial was that he was still having problems with his hands, even subsequent to the two-level fusion. (Hrg. Tr. p. 30, ll. 4 – 6).

**5. I find that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time.**

This finding is based on the stipulation of the parties at the commencement of the hearing. (Hrg. Tr. p. 17, ll. 2 – 6).

**6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.**

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., *Mintz vs. Fiske-Carter Construction Company*, 218 S.C. 409 (1951)).

The Courts have also held that the notice section should be liberally construed in favor of claimants, but that there are limitations upon the rule and the statutory requirements cannot be disregarded altogether. (*Id.*) (See also *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233 (S.C. App. 2013)).

The Claimant bears the burden of proving either notice or reasonable excuse. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)). However, once reasonable excuse has been shown, it is the employer's burden to show prejudice resulting from the absence of formal notice. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)).

Here, I find that the employer had actual knowledge and informal notice of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and; therefore, trigger investigation of the accident and treatment of the injury. The Claimant's supervisors were present during the incident of syncope which ultimately led the Claimant to the hospital on the same day. The employer was also aware that the Claimant remained in the hospital and was treated by a neurosurgeon, who performed two-level fusion shortly thereafter. (See Plaintiff's Exhibits 1 - 5).

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital. (Hrg. Tr. p. 29, l. 21 - p. 30, l. 3) Moreover, the Claimant subsequently provided the employer with documents describing his condition including Plaintiff's Exhibit 1, which is a Family Medical Leave Act form from his family doctor, Dr. Richey, dated July 9, 2012, just under three weeks after the accident. The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Plaintiff's Exhibit 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have in the normal course of business. Instead, as was customary, Plaintiff gave the form to the Human Resources office. (Dep. Bostick, pp. 16 - 29). Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, it would have caused him to do further investigation into the accident. He testified:

- Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
- A. Right.
- Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
- A. Well, I would have went to the safety coordination.
- Q. Okay. Okay. Which is what you're --
- A. -- suppose to do.
- Q. -- supposed to do?
- A. Yeah.

(Dep. Bostick, p. 28, l. 23 - p. 29, l. 12).

- Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
- A. Exactly.
- Q. But you didn't -- he didn't come back?
- A. He never came back.
- Q. You didn't know why he didn't come back?
- A. No.

- Q. Okay. If he had, on July the 9th, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20th, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?
- A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.
- Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?
- A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets - - starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.
- Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]
- A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.
- Q. But if it had --
- A. We would have went back in the office.
- Q. And you have said let's -- let's go through this work-related injury paperwork?
- A. Yeah. We would have talked to the people we needed to talk to, to get it - - get that -- get it solved, whatever is going on.

(p. 43, l. 6 – p. 44, l. 25) (emphasis added).

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 – p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

- Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?
- A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.
- Q. I mean, a guy hurts his thumb, you've got to report it?
- A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

\* \* \*

- Q. But do you have any responsibility as the lead man to report injuries?
- A. Do I have any? Yes, if it happens right here with me, I have a

- responsibility to report it.
- Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.
- A. Well --
- Q. Can you say, no, we're not going to tell the supervisor?
- A. No. I'm not going to do that because there's too much that come back and bite you.
- Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?
- A. He was right there.

(Dep. Durant, p. 44, l. 18 – p. 47, l. 12) (emphasis added).

- Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?
- A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

The Plaintiff's Exhibits 2 – 4 contain out-of-work slips from the Claimant's treating neurosurgeon, Dr. Naso, to the employer indicating he was unable to work due to cervical radiculopathy. Indeed, Plaintiff's Exhibit 5 contains a letter written by the employer to Dr. Naso acknowledging that they were aware that Dr. Naso was treating the Claimant and asking Dr. Naso his opinions as to the Claimant's ability to return to work.

Thus, the employer was obviously aware the Claimant had an incident where he passed out after pulling the squeegee board; that he had not returned to work, and that, instead, he had been taken to the hospital where he was treated by his family doctor and a neurosurgeon, who diagnosed cervical stenosis and recommended, and ultimately performed, neck surgery.

The Claimant's lead man testified that he did not fill out a formal report of incident after the Claimant's passing out episode because his supervisor was present and he believed that was sufficient. It is certainly reasonable for Mr. Nero to have believed the same thing.

Claimant's crew supervisor, Danny Bostick, testified that if he had been aware of the details that the Human Resources department received in the form of the FMLA form contained in Plaintiff's Trial Exhibit 1, he would have further investigated the incident.

On cross examination, the Defendants explored the fact that the Claimant had a prior workers' compensation injury on the job. However, the testimony revealed that during that prior incident, like this one, his employer was present and therefore no more

formal mode of notice was required. (Hrg. Tr. p. 27, l. 18 – p. 29, l. 9).

Thus, the undersigned finds that the employer had sufficient actual knowledge and informal notice of the pertinent facts surrounding Mr. Nero's injury to indicate the possibility of a compensable injury, and, therefore to trigger them to do an investigation of Claimant's injury and to direct Claimant's medical treatment. The undersigned further finds that given the Claimant's knowledge that the employer had been present during his passing out episode and was aware of his subsequent treatment, it was reasonable for the Claimant to conclude that no more formal reporting was required.

**7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.**

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See *Lizee v. S.C. Department of Mental Health*, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., *Mintz vs. Fiske-Carter Construction Company*, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, l. 24 – p. 12, l. 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he

recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

**8. I find that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.**

This finding is based on the above set out records and testimony. In particular, Dr. Richey's uncontroverted statement in Claimant's Exhibit 1 indicates that he expects that the Claimant will be incapacitated due to his medical condition from June 20, 2012, indefinitely. Also, Claimant's Exhibits 2 and 3 contain out-of-work slips from Dr. Richey and Dr. Kline of Florence Neurosurgery & Spine.

**9. I find that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012.**

#### **CONCLUSIONS OF LAW**

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

- 1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.**
- 2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.**

3. Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident.
4. Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.
5. The Claimant is not at maximum medical improvement and determination of permanency is premature at this time.
6. Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.
7. Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury.
8. Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission.
9. Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

#### ORDER

**IT IS, THEREFORE, ORDERED** that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident.

**IT IS FURTHER ORDERED** that the Employer, South Carolina Department of Transportation, and their Carrier, State Accident Fund, shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

**IT IS FURTHER ORDERED** that the Employer/Carrier shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission.

No hearing costs are assessed in this instance.

Following receipt of the executed Decision and Order, counsel for Defendants filed an

**Application for Review in the case setting forth the following Assignments of Error:**

1. Whether the Hearing Commissioner erred in Finding of Fact No. 3 that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, further finding, that pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic until the accident, when such a Finding is against the greater weight of the evidence in the record.
2. Whether the Hearing Commissioner erred in Finding of Fact No. 4 that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such a Finding is against the greater weight of the evidence in the record.
3. Whether the Hearing Commissioner erred in Finding of Fact No. 5. that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such a Finding is against the greater weight of the evidence in the record.
4. Whether the Hearing Commissioner erred in Finding of Fact No. 6 that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck

surgery, when such a Finding is against the greater weight of the evidence in the record.

5. Whether the Hearing Commissioner erred in Finding of Fact No. 7 that the Defendants were not prejudiced by the late formal reporting of the injury, when such a Finding is against the greater weight of the evidence in the record.
6. Whether the Hearing Commissioner erred in Finding of Fact No. 8 that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission, when such a Finding is against the greater weight of the evidence in the record.
7. Whether the Hearing Commissioner erred in Finding of Fact No. 9 that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012, when such a Finding is against the greater weight of the evidence in the record.
8. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident, when such conclusion is against the greater rule of the evidence in the record.
9. Whether the Hearing Commissioner erred in Concluding that Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such conclusion is against the greater rule of the evidence in the record.
10. Whether the Hearing Commissioner erred in Concluding that The Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such conclusion is against the greater rule of the evidence in the record, when such conclusion is against the greater rule of the evidence in the record.
11. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable

injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery, when such conclusion is against the greater rule of the evidence in the record.

12. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury, when such conclusion is against the greater rule of the evidence in the record.
13. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars until further Order of this Commission, when such conclusion is against the greater rule of the evidence in the record.
14. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012, when such conclusion is against the greater rule of the evidence in the record.
15. Whether the Hearing Commissioner erred in ordering that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident, when such an Order is against the preponderance of evidence in the record.
16. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012, when such an Order is against the preponderance of evidence in the record.
17. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission, when such an Order is against the preponderance of evidence in the record.

Copies of the above assignments of error were furnished to all interested parties prior to oral argument presented before the Appellate Panel on February 23, 2015.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and weighed the evidence in the record as presented at the initial hearing. The Panel also considered all issues raised in the briefs of both parties.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined the Order of the Hearing Commissioner is hereby **REVERSED**.

#### **FINDINGS OF FACT**

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, **WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACTS:**

✓ 1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.

✓ 2. We find that pursuant to S.C. Code §42-1-40, the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

3. We find that the Claimant alleges he sustained an injury by accident to his back (Cervical spine), affecting both shoulders and arms in the form of radiculopathy, on June 20, 2012 while pulling a large squeegee board over concrete with a road crew.

4. We find that Claimant admits he did not report the alleged incident pulling the squeegee to his supervisors, and he continued to work for the remainder of his shift.

5. We find that the knowledge the employer had that anything was wrong with Claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift.

6. We find that Claimant admitted to having other previous dizzy spells on the job. (Hr. Tr., p. 34).

7. We find that none of medical records of Dr. Richey or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as Claimant passing out while talking to his boss.

8. We find that on June 28, 2014, Claimant's handwritten answers on a "Patient Health Questionnaire" stated that his problems were not related to a job and this was not a worker's compensation injury.

9. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Naso, the neurosurgeon who performed Claimant's surgery, stated, "I do not think his syncope is related to his spinal pathology."

10. We find that the only actual or informal notice the employer had of an injury was that Claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the work day.

11. We find that Claimant assured the employer that he was fine to return home, and he suffered a second syncope episode in his driveway, and he was taken to the hospital by his wife.

12. We find that Claimant spoke with both Mr. Durant and Mr. Bostick while he was in the hospital, and although he informed them he was having neck surgery, Claimant never reported any work related accident.

13. We find that Claimant submitted FMLA paperwork to his employer, describing his condition as "several years – neck and syncope," but again Claimant made no mention of a work accident to his employer at that time.

14. We find that pursuant to S.C. Code §42-15-20, Claimant failed to provide Defendants the required ninety (90) day notice of his accident so as to be entitled to benefits under the Act.

15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers' compensation.

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.

### CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, **WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:**

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.

2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 (\$519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 (\$346.57) Dollars.

3. Pursuant to S.C. Code §42-15-20 and supporting case law, Claimant failed to provide Defendants with proper Notice as required by S.C. Code Ann. §42-15-20, so as to afford protection of the defendant employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it may afford the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

4. Pursuant to Sanders v. Richardson, "an employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury," so the Defendant Employer's witness of the syncope episode itself does not constitute either actual or informal notice. 251 S.C. 325, 162 S.E.2<sup>nd</sup> 257 (1968).

5. Pursuant to Cranford v. Hutchison Construction, "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." 399 S.C. 65, 731 S.E.2<sup>nd</sup> 303 (S.C. Ct.App., 2012)(see Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999)).

6. Pursuant to S.C. Code Ann. §42-15-20(B) and supporting case law, Claimant failed to provide a reasonable excuse to the satisfaction of the Commission for his failure to report a work accident to Defendants within the ninety (90) notice period, and therefore no compensation is payable.

7. Pursuant to S.C. Code §42-15-20 and supporting case law, Defendants were prejudiced by Claimant's failure to timely report his alleged June 20, 2012 work accident within the ninety (90) day period required.

8. Pursuant to S.C. Code Ann. §42-15-20 and supporting case law, Claimant's failure to provide timely notice or a reasonable excuse to the Commission for failure to provide notice, bars Claimant's entitlement to benefits, including medical benefits and/or compensation, under the Workers' Compensation Act as a result of his alleged June 20, 2012 accident.

#### ORDER

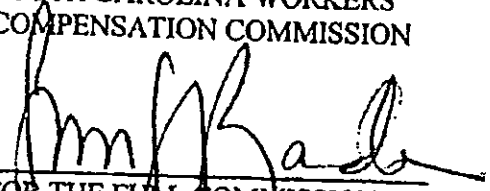
Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS, THEREFORE, ORDERED** that Claimant's request for benefits as a result of his alleged accident on June 20, 2012 is **DENIED**. Claimant failed to provide Defendants the required ninety (90) day notice of an alleged work accident as required by S.C. Code Ann. §42-15-20, and Claimant further failed to provide a reasonable excuse made to the satisfaction of the commission for not giving timely notice. As a result, Defendants were prejudiced by Claimant's


Claimant's failure to provide timely notice, and Claimant is not entitled to any benefits under the Act.

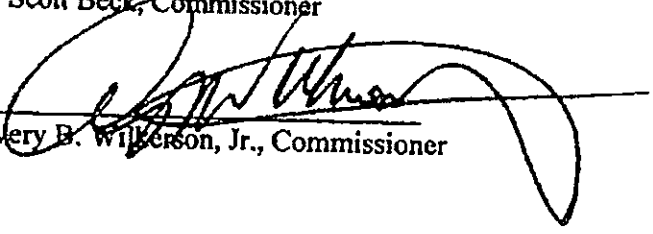
**AND IT IS SO ORDERED.**

SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

  
\_\_\_\_\_  
FOR THE FULL COMMISSION  
Susan S. Bardon, Commissioner

WE CONCUR:

  
\_\_\_\_\_  
T. Scott Beck, Commissioner

  
\_\_\_\_\_  
Avery B. Wilkerson, Jr., 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 May 29, 2015***

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas

JUN 19 2020  
SC Court of Appeals

William H. Seals, Jr., Circuit Court Judge

Civil Action No. 2020-CP-21-00755  
S.C.W.C.C. Claim No. 1222136

Otis Nero,

Plaintiff,

v.

South Carolina Department of  
Transportation and the South Carolina  
State Accident Fund,

Appellants.

**PROOF OF SERVICE**

The undersigned hereby certifies that the above-named Plaintiff, Otis Nero, was served with a copy of the attached Return to Motion to Dismiss this 16th day of June 2020, by email and depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

Stephen J. Wukela, Esq  
P.O. Box 13057  
Florence, SC 29504  
Stephen@wukelalaw.com

June 16, 2020

*Kirsten L. Barr*

Kirsten L. Barr, S.C. Bar #15525  
Trask & Howell, LLC  
P.O. Box 2167  
Mt. Pleasant, SC 29465  
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[kbarr@trask-howell.com](mailto:kbarr@trask-howell.com)  
ATTORNEYS FOR THE APPELLANTS

TRASK  
HOWELL  
WORKERS' COMPENSATION DEFENSE

*Reply to*  
Kirsten L. Barr  
(843) 881-1027  
kbarr@trask-howell.com

June 16, 2020

**Via Email to: ctappfilings@sccourts.org and Regular Mail**

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

Re: Otis Nero v. SCDOT  
W.C.C. File No.: 1222136  
Civil Action No.: 2020-CP-21-00755  
Carrier File No.: 2012-4525  
Date of Accident: 6/20/12

**RECEIVED**  
JUN 19 2020  
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herewith for filing, please find our Return to Motion to Dismiss Appeal and original Proof of Service of the same in the above-referenced case. By a copy of this correspondence, I am serving the other counsel of record with a copy of our Return to Motion.

Yours very truly,

*Kirsten L. Barr*  
Kirsten L. Barr

KLB/ebw/les

Enc.

cc Hanna Bourne, South Carolina State Accident Fund (w/enc.) (email only)  
Amy Cofield, Esq., Director, State Accident Fund, (w/enc.) (email only)  
Linda McDonald, Esq., Chief Counsel, S.C.D.O.T. (w/enc.) (email only)  
Dennis Copeland, S.C.D.O.T. (w/enc.) (email only)  
Stephen J. Wukela, Esq. (w/enc.) (email [Stephen@wukelalaw.com](mailto:Stephen@wukelalaw.com)/mail)





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JUN 19 2020  
SC Court of Appeals



TRASK & HOWELL, LLC  
P.O. BOX 2107  
MT. PLEASANT, SC 29465

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