



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 25, 2020

Terry Capone
130 Summerlea Drive
Columbia SC 29203

Re: Terry Capone v. City of Columbia (2)
Appellate Case No. 2019-000369

Dear Mr. Capone:

The Court received your ex parte email, received August 25, 2020, requesting a copy of your motion for mandatory judicial notice or in the alternative or supplement the record. Enclosed is a copy of your email and the requested motion.

Very truly yours,

V. Claire Allen

CLERK

cc: Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro, Esquire

From: [Capone, Terry](#)
To: [Court Of Appeals Filings](#)
Subject: Re: 8/19 TCAPONE: 2019 -000369 Request Copy 12/23/2019 Motion for Mandatory Judicial
Date: Tuesday, August 25, 2020 9:26:33 AM

Greetings,

In regards to Case #2019-000369, Can I please have a copy of my 12/23/2019 Motion - Motion for Mandatory Judicial Notice or in the Alternative or Supplement the Record, this motion seems to be closed off on the sight and I really need a copy of it please. Thank you.

Sent from Terry H Capone's Verizon 4G LTE smartphone

PSALM 35 -The Lord the Avenger of His people

A Psalm of David. Plead my cause, O Lord, with those who strive with me;

CONFIDENTIAL & PRIVILEGED

The preceding email message, including any attachments, may be confidential and/or protected by the attorney-client or other applicable privileges. It is intended for the sole use of the individual or entity named above. If the reader of this transmission is not the intended recipient, please notify the sender immediately and destroy any copies, electronic, paper or otherwise, that you may have of this communication. Any unauthorized review, use, disclosure or distribution is strictly prohibited and may be unlawful.

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9/17/19

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

★VOLUNTARY REMANDED ★

BY THE APPELLATE PANEL

Appellate Case No. 2019-000369
Formerly 2018-001364
W.C.C. File Nos. 1322451, 1319203, 1420487

RECEIVED
DEC 23 2019
SC Court of Appeals

Terry H Capone,

Appellant,

v.

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

Respondents,

APPELLANTS' MOTION TO TAKE JUDICIAL

Terry H Capone, Pro Per, Appellant.

Mr. Terry H Capone
Fire Battalion Chief-Retired
130 Summerlea Drive
Columbia, South Carolina 29203
(803) 622-6578
tcapone@liberty.edu
Pro Per Appellant

December 23, 2019

**APPELLANTS MOTION FOR MANDATORY JUDICIAL NOTICE OR, IN THE
ALTERNATIVE, TO SUPPLEMENT THE RECORD**

PLEASE TAKE NOTICE, In Propria Persona, on my own behalf, in person, Appellant Terry H Capone (“Capone”), pursuant to the S.C.R.Civ. P 201(c) applicable to the Federal Rule of Evidence 201, respectfully move the Court to take mandatory judicial notice of two of its own records from Terry Capone, Appellant, v. City of Columbia, Employer, and Companion Third Party Administrator, LLC, Carrier, Respondents. Case Information: 2019-000369 Lower Court or Tribunal: 1322451, 1319203, 1420487 on file with the court and available publicly on its website South Carolina Appellant Case Management System.

FURTHER NOTICE, This Court *shall* take Mandatory Judicial Notice of the following documents:

1. Judicial Notice Exhibit I: Motion for Extension of Time (3rd FINAL) To include entire document and enclosures dated November 12, 2019.
2. Judicial Notice Exhibit II: Return To Motion in Opposition To Dismiss Appeal-Exclusive Remedy Doctrine, Lack of Jurisdiction, Void Judgment, Violation of Constitutional Protections, Fraud On The Court, Crime Fraud Exceptions, “Active Concealment For Fraud In Real Property” 15-3-670 (C)(1)(2) And Other Actionable Violations of Law and Tolling of Statue of Limitations and accompanying Exhibits 1-8.

Appellant alternatively move to supplement the record under Federal Rule of Appellant Procedure, as applicable to the States and this Court’s inherent power, in the interest of justice

on the grounds of all materials that did not exist before the South Carolina Workers Compensation Appellant Panel issued the appealed from order.

FURTHER NOTICE, This Court is a Judicial, and not an administrative proceeding, and it governed by Equity Jurisprudence, against public officers in their individual capacity, and

FURTHER NOTICE, This Court *shall* take Mandatory Judicial Notice of the Maxims governing

Equity Jurisprudence.[1] They lie at the foundation of universal justice, and have been worthily and aptly called legume leges- the laws of the laws.[2] See, “A Treatise On Suits IN Chancery” by Henry R.Gibson, §§31-64 (1907), incorporated herein by referenced

ARGUMENT

The allegations in Appellants’ Final Brief and accompanied Designation of Matters are inextricably intertwined with the following documents that this Court may judicially notice.

Judicial notice of these documents is necessary to give the Court a more complete understanding of the allegations upon which Plaintiff’s claims rest and may be dispositive to the record and Final Brief of Appellant.

1. Maxime ita dicta quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur. A maxim is so called because its dignity is greatest and its authority is the most certain, and because it is approved most by all.

2. 2 Kent’s Comm., 553. So fundamental are these maxims that he who disputes their authority is regarded as beyond the reach of reason.

LEGAL STANDARD/ DISCUSSION

1. Legal Standard Regarding Judicial Notice

Pursuant to SC R Civ P and Federal Rule of Evidence 201 (a), a court may take judicial notice of adjudicated facts only. In addition, “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed.R.Evid. 201(b). As in the case before it, a court “must” take judicial notice if a party request it and supplies the court with the requisite information. *Id.*, Rule 201 (c). Only relevant facts may be judicially noticed. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F. 3d 983, 991 n8 (9th Cir. 2012).

Because “[t]he court may take judicial notice at any stage of the proceeding,” it may be taken for the first time on appeal. Fed. R. Evid. 201(d); *see Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971). Paragraph (b)(2) of Rule 201 states in part that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

This Court regularly takes judicial notice of facts from court documents. “[T]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.” *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989). Accordingly, this Court has held that it “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *cf.* Fed. R. App. P. 32.1(b) (instructing parties to submit a copy of an

“opinion, order, judgment, or disposition” unavailable on publicly accessible electronic databases). Records subject to judicial notice on appeal include “the records of an inferior court in other cases.” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

2. Inherent Equitable Authority

A majority of circuits recognize the existence of the courts' equitable authority to supplement the appellate record as justice requires regardless of inadvertent omission, though the courts rarely exercise that power absent extraordinary circumstances. See *Ross*, 785 F.2d at 1474-75; see also *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 227 (3d Cir. 2009); *Adan*, 437 F.3d at 388 n. 3; *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Cir. 1984); *Turk v. U.S.*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Lowry*, 329 F.3d at 1024 (referring to “unusual circumstances”); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n. 11 (10th Cir. 2010) (recognizing power but declining to exercise it); *U.S. v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Dickerson v. Ala.*, 667 F.2d 1364, 1367 n. 5 (11th Cir. 1982); *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006); *Goland v. CIA*, 607 F.2d 339, 371 (D.C. Cir. 1978).

The Supreme Court has held that courts of appeal are required to “consider any change, either in fact or in law, which has supervened” since the disputed decision was issued. *Patterson v. Ala.*, 294 U.S. 600, 607 (1935); *Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918).

“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the

other.” Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006). Equitable tolling may be applied where it is justified under all the circumstances.

3. Judicial Notice

“Notice may be taken of judicially cognizable facts” in administrative cases. S.C.Code Ann. § 1–23–330(4) (2005).

Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct.App.1984) (citations omitted). “A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.” Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984). “It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case.” Id.

4. Additional and Newly Discovered Evidence

Additionally, the evidence of the civil claim could be admitted as new evidence under Regulation 67–707 of the South Carolina Code of Regulations (Supp.2010), which provides the requirements for the admission of additional evidence in workers' compensation cases.

Regulation 67–707 states:

A. When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner.

B. When a party seeks to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the Commission's Judicial Department.

C. The moving party must establish the new evidence is of the same nature and character required for granting a new trial and show:

(1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and

(2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

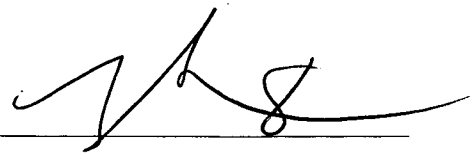
The evidence of the civil claim meets the criteria in the Regulation for the admission of new evidence: (1) it is not cumulative or impeaching character and would have produced a different result if produced at the first hearing and (2) was not known and could not have been discovered at the time of the first hearing and was brought to the attention of the Commission immediately upon its discovery. Nothing requires that the facts be in existence at the time of the first hearing by the single commissioner.

CONCLUSION

For these reasons, the Court should grant this motion to take judicial notice.

Date: December 23, 2019

By: _____



Mr. Terry H Capone
130 Summerlea Drive
Columbia, SC 29203
(803) 622-6578
Email: tcapone@liberty.edu
APPELLANT, PRO PER

Judicial Notice

Exhibit I

9/12/17

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

RECEIVED

NOV 12 2019

SC Court of Appeals

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

Terry H Capone, Claimant.....Appellant,

v.

City of Columbia, Employer, and

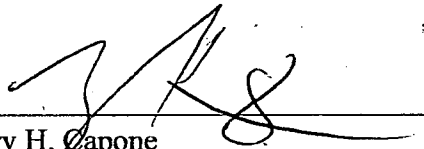
Companion Third Party Administrator, LLC, Carrier, ...Respondents.

MOTION FOR EXTENTION OF TIME (3rd FINAL)

Pursuant to Rule 240, SCACR, the Appellant *pro se* Terry H Capone, Employee ("Appellant") request a (30) day extension of time 2nd to prepare and file the Appellant Briefs Due November 12, 2019, Designation of Matter to be included in the Record on Appeal and other filings. In the interest of Judicial Economy I am a disabled Fire Battalion Chief and Marine veteran and I have previously noticed this Court that I suffer from PTSD, TBI dementia, Migraines and chronic pain and others, causing extraordinary circumstance to exist that are out of my control, in which I am rendered incapable of managing myself and my affairs in my ordinary life due to the worsening of my disabilities making it impossible for me to comply with the courts request of a November 12, 2019 date. I am asking this Court not to be cast-iron or rigged, as it would be contrary to my life and God's will. I am not a doctor, but I have started the human heart in my hands and with God's grace. I ask this Court to be flexible, as

it has been for the South Carolina Workers Compensation Commission taking 6 months to make a decision in the present matters and 1 year in matters that will soon come before this Court. I am requesting that you allow a third and (Final) extension, which is half the time the SCWCC took to make theirs, as requested. I have a God given right to protect my rights and I aim to do that, if just given another opportunity to do so. In the event I am not able to do so, within the (Final) time frame of this request if granted, I will understand your dismissal. I am requesting an additional 30 days Extension 3rd and (Final) from the Court.

Respectfully Submitted,

By: 
Mr. Terry H. Capone
Fire Battalion Chief-Retired
130 Summerlea Drive
Columbia, South Carolina 29203
Email: tcapone@liberty.edu
(803) 622- 6578

Richland, South Carolina
November 12, 2019

Eosure(s) as stated
Cc: Cythia Dooley, Carmelo Sammataro
Attorney's for Respondents (w/all enclosures)



South Carolina Department of Motor Vehicles
Application for Placard and/or License Plate for
People who have a Disability

RG-007A
(Rev 11/18)

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SC Court of Appeals

Section 1 - Check type of transaction

☒ Original ☐ Renewal ☐ Replacement - Prior Plate/Placard No. ☐ Add Parking Authorized (\$1.00)

LICENSE PLATE ☒ Passenger Vehicle (\$20.00) ☐ Motorcycle (\$10.00)

☐ Purple Heart Wheelchair (Must also meet requirements for Purple Heart; No fee - Permanent Plate) ☐ Veteran Wheelchair (Must also meet requirements for Veteran)

☐ Veteran Wheelchair (HV) (Must also meet requirements for Veteran who has a disability; No fee - Permanent Plate)

PLACARD - \$1.00 Limit 1 per applicant. Applicant must have a SCDL, BP or ID photo on file with SCDMV.

☐ Temporary (Impairment must be at least 4 months not to exceed 1 year)

☒ Permanent (valid for 4 years)

Placard Registration Certificate must remain in the vehicle when the placard is being used.

☐ DECAL (For display on Purple Heart motorcycle, Veteran who has a disability motorcycle, and World War II plates only)

Applications are accepted at SCDMV branches or can be mailed along with a check or money order (no cash accepted) payable to the SCDMV.
SC Department of Motor Vehicles, PO Box 1498, Blythewood, SC 29016-0019

Warning: A person who duplicates, forges, or sells a placard or a person who falsifies information on an application form for a placard or plate is guilty of a misdemeanor and, upon conviction, must be imprisoned for 30 days and fined not less than \$500 and not more than \$1,000.

Section 2 - Person's Information - Required for Placard or Plate (** indicates optional information)

Last Name: CAPONE First Name: TERRY Middle Name: H

Residential Address: 4209 WOODRIDGE DRIVE

City: Columbia State: SC Zip Code: 29203

Mailing Address (if different): 130 summerlea drive

All correspondence will be mailed to the address of the applicant.

City: COLUMBIA State: SC Zip Code: 29203

(Area Code) Telephone Number: (803) 622-6578 Person's SC Driver License, BP, or ID Number: 007051734

Date of Birth: 06-10-1970 Social Security No.: 133-58-7472 Email Address: tcapone@liberty.edu

I certify that this information is true and correct.

Signature of Person: TERRY H CAPONE Date: 09/04/2019

Printed Name of Person

Section 3 - Vehicle Information - Required for Plate Only

Vehicle Identification Number: 4K8886E86A035016 Make: MERZ Year: 2006 Gross Vehicle Weight: 6329

Owners Information Last Name: CAPONE First Name: DEMETRIA Middle Name: T Current Vehicle Plate Number: VT14386

Street Address: 4209 WOODRIDGE DRIVE

Mailing Address (if different):

City: Columbia State: SC Zip Code: 29203 Email: tcapone@liberty.edu

(Area Code) Telephone Number: (803) 312-1042 SC Driver's License, BP or ID: 008789079

YES, I wish to donate \$5.00, more or less, to Donate Life SC. Amount of donation \$.00

INSURANCE CERTIFICATION

Under penalties of perjury, I declare this vehicle is insured with USAA and I will maintain liability insurance throughout the registration period.

Signature of Vehicle Owner: DEMETRIA T CAPONE Date: 09/04/2019

Printed Name of Vehicle Owner

Section 4 - Physician's Statement

A licensed physician or an Advanced Practice Registered Nurse (APRN) must complete this portion of the application and must indicate the disability and length of disability.

APRNs are nurse practitioners; certified nurse-midwives, clinical nurse specialists, and certified registered nurse anesthetists.

APPLICANTS WHO HAVE A DISABILITY MUST BE CERTIFIED BY A LICENSED PHYSICIAN OR AN APRN.

This is to certify that TERRY H CAPONE Date of Birth: 06-10-1970 has the following condition(s):

☒ an inability to ordinarily walk one hundred feet nonstop without aggravating an existing medical condition, including the increase of pain;

☐ an inability to ordinarily walk without the use of, or assistance from a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device;

☐ a restriction by lung disease to the extent that the person's forced expiratory volume for one second when measured by spirometry is less than one liter, or the arterial oxygen tension is less than sixty mm/hg on room air at rest;

☐ requires use of portable oxygen;

☐ a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standards established by the American Heart Association. If the person's status improves to a higher level, for example as a result of bypass surgery or transplantation, he no longer meets this criteria;

☒ a substantial limitation in the ability to walk due to an arthritic, neurological, or orthopedic condition, for example, coordination problems and muscle spasticity due to conditions that include Parkinson's disease, cerebral palsy, or multiple sclerosis; or

☐ blindness.

This disability is: ☒ Permanent ☐ Temporary - length of time (impairment must be at least for 4 months not to exceed 1 year) Physician Office Phone Number: 803-251-0101

I certify that I am: ☒ a licensed Physician ☐ an APRN Professional License No: 35843

Print Name of Physician or APRN: Liona Taylor MD Signature of Physician or APRN: Date: 09/04/2019

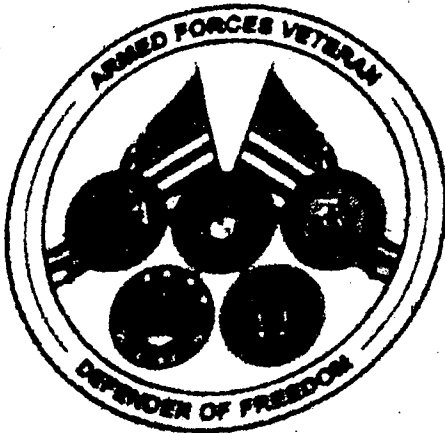
Check No. Amount Plate No. Placard No. 8180210 Specialist Initials: JPB DMV USE ONLY

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NOV 12 2019

SC Court of Appeals

DISABLED VETERAN



H 22192
V

South Carolina

XXXXXXXXXXXX



RECEIVED

NOV 12 2019

SC Court of Appeals

This is not a credit card

For Questions Concerning Health Benefits:

1-877-222-VETS (8387)

www.va.gov/healthbenefits

Veterans Crisis Line 1-800-273-8255

Foreign Medical Program 1-877-345-8179

In emergency call 911 or go to nearest medical facility

Report any emergency care to your VA treatment team within 24 hours.

For questions concerning non-health care VA benefits 1-800-827-1000

Property of the U.S. Government. If found, drop in nearest U.S. mail box.

POSTMASTER - RETURN TO:

Health Eligibility Center, 2957 Clairmont Road, Suite 200, Atlanta, GA 30329



Department Of Veterans Affairs
6437 Garners Ferry Road
Columbia, SC 29209

RECEIVED

NOV 12 2019

October 18, 2019

TERRY CAPONE
130 SUMMERLEA DR
COLUMBIA SC 29203

In Reply Refer To: **SC Court of Appeals**

CSS XXXXX
Capone T H

Dear Terry H Capone,

This is in reply to your request for a statement verifying your service-connected disabilities.

Department of Veterans Affairs (VA) records show your service-connected disabilities are as follows:

<u>Percentage</u>	<u>Disability</u>	<u>Diag Code</u>
70	posttraumatic stress disorder (PTSD) and traumatic brain injury (TBI)	9411
30	migraine headache	8100
10	peripheral neuropathy, right lower extremity	8520
0	pseudofolliculitis barbae	7806
0	tinea cruris	7813
0	tinea pedis	7813
80	Combined Rating	

Do You Have Questions or Need Assistance?

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	For Compensation, call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 711. For Pension, call us at 1-877-294-6380.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov .
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address below: Department of Veterans Affairs Claims Intake Center PO Box 5235 Janesville, WI 53547-5235 Toll Free Fax: 844-531-7818 DID Fax: 248-524-4260

For the Veteran's Use Only

With sincere regard for the Veteran's service,

RO Director
VA Regional Office

To email us visit <https://iris.va.gov>

Do You Know About eBenefits?

Please be aware that you can change your address or direct deposit, create a benefits letter, check the status of your claim, obtain a copy of your DD 214, and access additional VA benefit information via eBenefits at www.ebenefits.va.gov. To register for an account, you can speak with an eBenefits specialist by dialing 1-800-827-1000 or visit your local VA regional office.



Department Of Veterans Affairs
6437 Garners Ferry Road
Columbia, SC 29209

RECEIVED

NOV 12 2019

SC Court of Appeals

September 18, 2019

TERRY CAPONE
130 SUMMERLEA DR
COLUMBIA SC 29203

In Reply Refer To: 319/VSC/BL
CSS XXXXX
Capone T H

Dear Terry H Capone,

This letter is a summary of benefits you currently receive from the Department of Veterans Affairs (VA). We are providing this letter to disabled Veterans to use in applying for benefits such as state or local property or vehicle tax relief, civil service preference, to obtain housing entitlements, free or reduced state park annual memberships, or any other program or entitlement in which verification of VA benefits is required. Please safeguard this important document. This letter is considered an official record of your VA entitlement.

Our records contain the following information:

Personal Claim Information

Your VA claim number is:
You are the Veteran.

Military Information

The character(s) of discharge and service date(s) of the veteran include:
Honorable for VA Purposes, Marine Corps, 10/26/1988-04/16/1997
(There may be additional periods of service not listed above)

VA Benefits Information

Service-connected disability: Yes

Your combined service-connected evaluation is: 80%

Your current monthly award amount is:

Are you entitled to a higher level of disability due to being unemployable: Yes

Are you considered to be totally and permanently disabled due to your service-connected disabilities:

Yes, effective date: February 3, 2014

Are you service-connected for loss of or loss of use of a limb, or are you totally blind in or missing at least one eye: No

Have you received a Specially Adapted Housing (SAH) and/or Special Home Adaptation (SHA) grant: No

You should contact your state or local office of veterans' affairs for information on any tax, license, or fee-related benefits for which you may be eligible. State offices of veterans' affairs are available at <http://www.va.gov/statedva.htm>.

Do You Have Questions or Need Assistance?

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	For Compensation, call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 711. For Pension, call us at 1-877-294-6380.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov .
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address below:

With sincere regard for the Veteran's service,

RO Director
VA Regional Office

To email us visit <https://iris.va.gov>



**COLUMBIA FIRE
DEPARTMENT**

Aubrey Jenkins
Fire Chief

Harry Tinsley
Deputy Chief

Michael Edmonds
*Assistant Chief of
Administration*

Albert k. Owusu
OH&S Chief

**CONTACT
INFORMATION**

Occupational Health &
Safety Division
Phone: 803-545-0223
Fax: 803-545-4063



Occupational Health &
Safety Division
Columbia Fire Department
1800 Laurel Street
Columbia, South Carolina
29201
www.columbiasc.net/fire

October 20, 2014

TO WHOM IT MAY CONCERN

This letter is to notify you that Terry Capone is a former member of the Columbia Fire Department. On March 29, 2014, Mr. Capone retired on medical disability due to Post Traumatic Stress Disorder.

Sincerely,


Aubrey D. Jenkins,
Fire Chief

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NOV 12 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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NOV 12 2019

SC Court of Appeals

Appellate Case No.: 2019-000369

PROOF OF SERVICE

Terry H Capone, Claimant.....Appellant,
v.
City of Columbia, Employer, and
Companion Third Party Administrator, LLC, Carrier, ...Respondents.

Terry H Capone, of Richland County, Pro Se Appellant.

I certify this 12th day of November 2019 that I have served a copy of the Appellants' Motion for Extension of Time 3rd (FINAL) on the Respondents by personal service or mailing same, postage prepaid in the United States mail, addresses to the following:

Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro, Esquire
TURNER PADGET GRAHAM & LANEY P.A.
P.O. Box 1473
Columbia, SC 29202

ATTORNEYS FOR RESPONDENTS

November 12, 2019

By: 
Mr. Terry H Capone
130 Summerlea Drive
Columbia, SC 29203
(803) 622-6578
Email: tcapone@liberty.edu
APPELLANT, PRO PER



RETIRED

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NOV 12 2019

SC Court of Appeals

November 12, 2019

VIA USPS MAIL OR PERSONAL SERVICE

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

Re: Request Motion for Extension of Time (2nd) To the Court Terry Capone, Appellant, v. City of Columbia, Employer, and Companion Third Party Administrator, LLC, Carrier, Respondent Case No.2019-000369

The Honorable Jenny Abbott Kitching, Clerk and SC Court of Appeals:

Respectfully request a (30) day extension of time 3rd (Final) to prepare and file the Appellant Briefs Due November 12, 2019, Designation of Matter to be included in the Record on Appeal and other filings. In the interest of Judicial Economy, I am a disabled Fire Battalion Chief and Marine veteran and I have previously noticed this Court that I suffer from PTSD, TBI dementia, Migraines and chronic pain and others, causing extraordinary circumstance to exist that are out of my control, in which I am rendered incapable of managing myself and my affairs in my ordinary life due to the worsening of my disabilities making it impossible for me to comply with the courts request of a November 12, 2019 date. I am requesting that you allow a third and (Final) extension, which is half the time the SC WCC took in the remand of my case, as requested. I have a God given right to protect my rights and I aim to do that, if just given another opportunity to do so. In the event I am not able to do so, within the (Final) time frame of this request if granted, I will understand your dismissal. I am requesting an additional 30 days Extension 3rd and (Final) from the Court.

SIGNATURE PAGE TO FOLLOW

With Regards,

A handwritten signature in black ink, appearing to be 'T. Capone', written in a cursive style.

Mr. Terry H. Capone
Fire Battalion Chief-Retired
130 Summerlea Drive
Columbia, SC 29203
(803) 622-6578
Email: tcapone@liberty.edu

Judicial Notice

Exhibit II



RECEIVED
MAY 21 2019
SC Court of Appeals

May 21, 2019

US MAIL DELIVERY OR PERSONAL SERVICE

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

Re: Terry Capone v. City of Columbia and Companion Third Party Administrator, LLC
Appellate Case No.: 2018-000369 associated with 2018-001364
W.C.C. File Nos. 1322451, 1319203, 1420487

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Appellants:

Return To Motion in Opposition To Dismiss Appeal – Exclusive Remedy Doctrine, Lack Of Jurisdiction, Void Judgment, Violation Of Constitutional Protections, Fraud On The Court, Crime Fraud Exception, “Active Concealment For Fraud In Real Property” 15-3-670 (C) (1) (2) And Other Actionable Violations of Law and Tolling of Statue of Limitations.

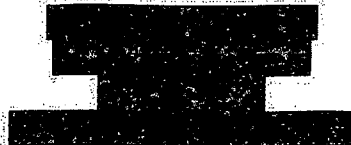
I am not a lawyer. Also enclosed are the original and seven copies of the Proof of Service. Thank you for your assistance with this matter, please contact me if you have any questions.

Thank you for your consideration.

With The Highest Regards,

Enclosure(s) as Stated
Cc: Cynthina C Dooley
Carmelo B. Sammataro Attorney for Respondents
Amy Bracy

Mr. Terry H. Capone
Fire Battalion Chief-Retired



THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from The South Carolina Workers' Compensation Commission Appellate Panel
Voluntary Remanded

W.C.C. File Nos. 1322451, 1319203, 1420487
Appellate Case No.: 2018-000369 associated with 2018-001364

RECEIVED
MAY 21 2019
SC Court of Appeals

PROOF OF SERVICE

Terry H Capone, Claimant.....Appellant,
v.
City of Columbia, Employer, and
Companion Third Party Administrator, LLC, Carrier, ...Respondents.

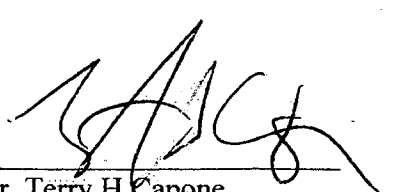
Terry H Capone, of Richland County, Pro Se Appellant.

I certify this 21st day of May 2019 that I have served a copy of the APPELLANTS RETURN TO MOTION IN OPPOSITION TO DISMISS APPEAL – EXCLUSIVE REMEDY DOCTRINE LACK OF JURISDICTION, VOID JUDGMENT, VIOLATIONS OF CONSTITUTIONAL PROTECTIONS, FRAUD ON THE COURT, CRIME FRAUD EXCEPTION, “ACTIVE CONCEALMENT FOR FRAUD IN REAL PROPERTY” 15-3-670 (C) (1) (2) AND OTHERS ACTIONABLE VOLATIONS OF LAW AND TOLLING OF STATUE OF LIMITATIONS for filing in the above referenced matters herein, Pursuant to Regulations 67-705(A) , 67-205, and any other authorities on behalf of myself the Appellate/ Claimant for filing in the above referenced matters, by mailing same, postage prepaid in the United States mail, or Personal Service addressed to the

Following:

Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro, Esquire
TURNER PADGET GRAHAM & LANEY P.A.
P.O. Box 1473
Columbia, SC 29202
ATTORNEYS FOR RESPONDENTS
Amy Bracey SCWCC

May 21, 2019

By: 
Mr. Terry H Capone



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2018-001364
W.C.C. File Nos. 1322451, 1319203, 1420487

Terry H Capone, Claimant.....Appellant,

v.

City of Columbia, Employer, and

Companion Third Party Administrator, LLC, Carrier, ...Respondents.

**RETURN TO MOTION IN OPPOSITION TO DISMISS APPEAL – EXCLUSIVE
REMEDY DOCTRINE LACK OF JURISDICTION, VOID JUDGMENT, VIOLATIONS
OF CONSTITUTIONAL PROTECTIONS, FRAUD ON THE COURT, CRIME FRAUD
EXCEPTION, “ACTIVE CONCEALMENT FOR FRAUD IN REAL PROPERTY” 15-3-
670 (C) (1) (2) AND OTHERS ACTIONABLE VIOLATIONS OF LAW AND TOLLING
OF STATUE OF LIMITATIONS**

Pursuant to Rule 240, SCACR, Appellant *pro se* Terry H Capone, Employee

(“Appellant”) submits this return to the Respondents City of Columbia, Employer, and

Companion Property & Casualty, Carrier (collectively “Respondents”) respectfully opposing

their motion to dismiss the appeal. For reasons stated in greater detail, below, Appellant asserts

the Notice of Appeal filed is timely, because the above entitled claim numbers that were heard

before Single Commissioner Gene H McCaskill on August 21, 2015, and his Decision and Order

denying benefits on these claims was decided and filed December 2, 2015 is a Void Judgment

(Order) /Judgment (Order) that exceeded jurisdiction and was produced by Fraud Upon the Court can be attacked at any time, which in addition was rendered in violation of constitutional protections, to include but not limited to Due Process, Procedural and Substantive Due Process and Equal Protection Under the Color of law, No Opportunity to be Heard, Crime Fraud Exception, "Active Concealment For Fraud In Real Property" 15-3-670 (c) (1) (2) and that includes but not limited to other actionable violations of Law by Defendants and as these are matters in Equity, Equitable Tolling and other grounds for Tolling of Statue of limitations applicable. See Exhibits 1-8

Accordingly, Appellant asserts the Respondents are not entitled to an order dismissing the appeal in its entirety and with prejudice due to aforementioned violations of law. In addition, Appellant request the order the Respondents seek from this Court relieving them or any further obligation to respond to appellate filings by Appellant *pro se* related to WCC File Nos. 1322451, 1319203, and 1420487 also be denied with prejudice due to the aforementioned violations of law.

FACTUAL AND PROCEDURAL BACKGROUND

My opposition is based upon and supported by the affidavits, pleadings and papers herein, See Exhibits 1-8, to support those already on file with the Court, and for the reasons stated in greater detail, below, Appellant assert The original Notice of Appeal filed by Appellant *pro se* Terry Capone ("Capone") with this Court July 18, 2018 and active concealment for fraud in real property 15-3-670 (C) (1) (2) and others which the Respondents are well aware of regarding the above referenced matters was not untimely; A void judgment, and produced by fraud Upon the

Court does not create any binding obligation, can be attached at any time and there is no statute of limitations. This Court has not here been deprived of appellate jurisdiction to consider the merits of Capone's claim, here as the Respondents through their attorney suggest, based on the South Carolina Workers Compensation Commission lack of subject matter jurisdiction and defects thereof and the tolling of statute of limitations or by July 18, 2018 original Notice of Appeal mailed certified (see exhibit #1 USPS Tracking History) by Appellant pro se Terry H Capone ("Capone") of the Interlocutory Order, dated June 18, 2018, affecting fundamental and substantial rights, and in which "extraordinary circumstances existed" based on crime fraud exception, fraud on the court, was of unsound mind/insane due to mental illness and intoxication due to combined medications regiment and Neurocognitive Disorder due to Traumatic Brain Injury under disability, as a Firefighter which is permanently and totally disabled as a result of firefighting service related disabilities in the Columbia (RICHLAND) State of South Carolina, by (4) State agencies as well as federal agencies (see exhibit #5 &6), which include South Carolina Police Retirement System (PORS) as of 3/10/2014; South Carolina Internal Revenue Service as of 11/12/2014; South Carolina Employment And Workforce as of 10/17/2014; South Carolina Education Commission, Social Security Administration Office of Disability adjudication as of October 21, 2013, and U.S. Department of Education and SC Code 15-3-670 (C) The limitation provided by Section 15-3- 640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or property damage which is: (1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence;

and (2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma i.e. Toxic Mold found in Fire Stations although concealed, same found on Appellants body (see Exhibit #8, #9, 17,#18). Accordingly, Respondents are not entitled to an order dismissing this appeal in its entirety and/ or with prejudice, but are entitled to an order dismissing the motion in its entirety and/ or with prejudice. I oppose the motion on file with the Court for the following reasons and based upon the laws of equity and legal analysis below. The Respondents have not been deprived due to omitting evidence crime fraud exception, fraud on the court and "active concealment" of fraud in real property.

On December 20, 2013 City of Columbia Fire Department Health and Safety Officer Albert Owusu, under the Subject: 2014 Annual Fire Brigade Physical TCapone 12/6 Ortho Status excerpts stated: "Chief Capone, With regards to the completion of your fire brigade physical and your request for restricted duty, you are out due to multiple physical and psychological conditions you have brought to the forefront. The Fire department will need clearance from licensed medical professionals that address each and every one of the issues you have brought to light. Each will need to be evaluated separately and clearances will be required for each of the conditions before we can integrate you back into any fire department function, including the fire brigade physical process and/ or being considered for restricted duty. I wish you a speedy recovery."

On February 6, 2014 Companion P&C Senior Claims Adjuster Doris J McCubbins, AIC, AID, under the Subject: TCAPONE Claim: 700000004250 excerpts Stated: "...At your most recent appointment on 1/21/14, Dr. Fulton released you to return to work with restrictions and the City has offered accommodations to these restrictions effective 2/3/14. Therefore, as of 2/3/14 your weekly temporary total benefits which you were receiving through us have been terminated."

This was a Denial of Due Process, Procedural and Substantive Due Process and Equal Protection under the Color of Law of the Constitutional 5th & 14 Amendments. Appellant *pro-se* Capone

has a protected property right/ interest not only in the ultimate receipt of South Carolina Workers' Compensation Benefits (property), but in the application for the same and the Respondents (employer and carrier) and South Carolina Workers' Compensation Commission action constitutes an unlawful "taking".

As a Firefighter permanently disabled in the line of duty the State of South Carolina, "The State" shows great difference:

I have a protected property right/ interest in being a "Firefighter that is permanently disabled in the line of duty" under the State of South Carolina Constitution.

Pursuant to the provisions of Section 3 of Article X of the state constitution and subject to the provisions of Section 12-4-720, there is exempt from Ad Valorem Taxation

Tuition waived for four years of undergraduate study at state-supported colleges, universities, or vocational or technical schools. Children must be 18-22 years of age at the time of application. Applies to career and volunteer firefighters (**Reference: SC Code 59-110-111**)

"[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a

legitimate claim of entitlement to it.” Id. At 1297 (alteration in original) (citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005)(quoting *Bd. Of Regents of State Colls. v. Roth*, 408 U.S. 564, 577(1972)).

Property Interest in Claim for Worker's Compensation Benefits:

“[w]hen a plaintiff’s personal injury is filtered through the [workers’ compensation system], it is converted into a property right.” App., *infra*, 32a.

We have previously recognized that entitlement to workers' compensation benefits constitutes a property interest. *Orszula v. Orszula*, 292 S.C. 264, 356 S.E. (2d) 114 (1987).

Jaffe and Asher v. Van Brunt, S.D.N.Y.1994, 158 F.R.D. 278. A “void” judgment, as we all know, grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack (thus here, by). No statute of limitations or repose runs on its holdings, the matters thought to be settled thereby are not *res judicata*, and years later, when the memories may have grown dim and rights long been regarded as vested, any disgruntled litigant may reopen old wound and once more probe its depths. And it is then as though trial and adjudication had never been.

STANDARD OF REVIEW ARE IN LAW: ACTIONS IN EQUITY

Arbitrary, Capricious, An abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedures required by law. Under the arbitrary and capricious standard, a reviewing court must consider whether an agency’s decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The court may reverse only when the agency has relied on impermissible factors, failed to consider an important aspect

of the problem, offered an explanation for its decision that runs counter to the evidence or is so implausible it could not be ascribed to a difference in view or to agency expertise. *See id.*;

County of Los Angeles v. Leavitt, 521 F.3d 1073, 1078 (9th Cir. 2008).

§22. Procedure before administrative agencies; judicial review. No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by mode of procedure proescribed by the General Assembly, and shall have all such instances the right to judicial review.(1970)(56) 2684; 1971 (57) 315.))

§23. Provisions of Constitution mandatory. The provision of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and merely directory, except where expressly made directory or permissory by it own terms. (1970 (56) 2684; 1971 (57) 315.))

The standard of review of factual findings differ if the findings are made in an action at law and in an action in equity. *Townes Assoc., Ltd. V. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775-776 (1976)

In equity cases, the Court's ability to find facts does not mean that disregards the trial judge's findings, particularly his or her credibility findings. Factual findings will be affirmed unless the appellant satisfies the Court that the preponderance of the evidence is against the findings of the Court. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

If the allegations in the complaint and the undisputed facts support jurisdiction, or if discovery is necessary to determine jurisdiction, the Court may not grant Respondents' 12(b)(1) motion to dismiss. *See State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 76-77 (2d Cir. 2007).

In a 12(b)(6) motion to dismiss, the Court must “constru[e] the complaint liberally, accept[] all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff’s favor.” *Aegis Ins. Svcs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 176 (2d Cir. 2013) (quotation marks omitted). “Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.” *Id.* (quotation marks omitted). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) (quotation marks omitted).

Federal Rule of Civil Procedure 56 provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Just as with the review in a motion for summary judgment, in a motion to dismiss, the Court must “view[] the facts in the light most favorable to the non-moving party.” *Aegis*, 737 F.3d at 176. The Rules also dictate that the pleadings be liberally construed “as to do substantial justice.” *Id.*

In reviewing plaintiff’s filing, the Court is mindful that pro se complaints are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972); see also *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984) (federal district courts must ensure that pro se litigants are given “fair and meaningful consideration”)

ARGUMENTS AND AUTHORITIES

EXCLUSIVE REMEDY DOCTRINE

Respondent's Motion should be denied in its entirety because South Carolina Workers' Compensation is the *pro se* Appellants Capone's Exclusive Remedy Doctrine, and the South Carolina Constitution protects him:

See, §22. Procedure before administrative agencies; judicial review. No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by mode of procedure proescribed by the General Assembly, and shall have all such instances the right to judicial review.(1970)(56) 2684; 1971 (57) 315.))

The Defendants already strut the grand bargain and the case before the Court is due to their "Breach of the grand bargain". Thus, the South Carolina Workers' Compensation scheme is unconstitutional, and inadequate remedy at law, no longer a fair exchange for losing the ability to sue the employer for a benefit (property) that has been reduced, and reduced, over the years and in the Appellants present case was reduced to zero by the Respondents (employer and carrier) and South Carolina Workers'

Compensation Commission. The adequacy of the benefits (property) no longer justifies the exclusive remedy enjoyed by the employer. The Respondents (employer and carrier) and South Carolina Workers Compensation Commission actions constitutes a unjust "Taking" of benefits (property) and a clear violation of law, that the Appellate *pro se* Capone has a substantial property right/ interest to and a compensation rate of $\$2,611.20 \times .666 =$ average weekly wage \$1739.06 x 500 Weeks or \$869, 530.00.

See Exhibits 1-8.

Because South Carolina workers' compensation law is fashioned after North Carolina's statute,

our courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. Nelson v. Yellow Cab Co., 343 S.C. 102, 117-118, 538 S.E.2d 276, 284 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002) (citing Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 424 S.E.2d 489 (1992); Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law).

ORIGINS OF THE ACT

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

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

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

The basic operating principle of the Act is that an employee is **automatically entitled** to certain benefits whenever he suffers either personal injury by accident occurring in the course of employment and arising out of it, or incurs an occupational disease. **Those benefits include both wages based on disability and medical compensation.**

DOCTRINE OF REVESTMENT

The Motion should be denied in its entirety with prejudice based on the Doctrine of Revestment, Applied to the Respondents through their Attorney's and the South Carolina Workers' Compensation Full Commission voluntarily remanding the original appeal of their Interlocutory Decision and Order on or about September 20, 2018 from the South Carolina Court of Appeals October 5, 2018 and said a hearing was to be held October 22, 2018, the decision order was not made until March 1, 2019, to voluntarily remand the order and decision and not grapple with any of the no-frivolous issues of the Appellate *pro se* Capone was Arbitrary on its face. Therein jurisdiction was obtained by Deceit and Trickery and was Fraud Upon the Court was again Fraud Upon the Court and violation of Due process, Procedural and Substantive Due Process protected by the Constitution.

Revestment applies as in this case where the parties (1) actively participate without objection (2) in further proceedings that are inconsistent with the merits of the prior judgment. *Id A swith the voluntary remand (Revestment) from the SC Court of Appeals to the full commission Oct 5, 2018 that was not decided until March 6, 2019, about 6 months later.*

FRAUD ON THE COURT/ UNCLEAN HANDS

Capone, Claimant below, sought workers' compensation benefits a fundamental right, via three separate claims: (1) WCC File Number 1319203 for re-injury of his hands and wrist; (2) WCC Files Number 1322451 for aggravation of a psychological injury; and (3) WCC File Number 1420487 for re-injury of his toe (Toe nail fungus). Prior to that hearing on August 21, 2015, the Single Commissioner Gene McCaskill, Commission via Judicial department and Attorney for the Respondent Dana Thye where all notified about the medical opinion I had obtained which stated the PTSD was aggravated. Commissioner McCaskill and Attorney Thye during the hearing denied me a fair and impartial hearing, when I attempted to testify they kept saying it was "hearsay", and they knew that Rules of evidence did not apply before the Workers' Compensation Commission and then to omit evidence / and Commissioner McCaskill to alter the medical opinions, which stand at the heart of the matters herein, was Fraud Upon The Court and is a Void judgment/ order . To have an injury produce a permanent disability, yet a doctor provided by the Respondent prescribes a rating of 0% produce an incompatible outcome. This is all to devaluation of Workers Compensation benefits (property) he and his family have a substantial property right /interest to and a compensation rate of $\$2,611.20 \times .666 =$ **average weekly wage \$1739.06 x 500 Weeks or \$869, 530.00, in which he and his family have been defrauded by the Respondents' and Commission.**

"While relied upon by the Panel and the circuit court, the South Carolina Rules of Evidence do

not apply in proceedings before the Workers' Compensation Commission. S.C. Code Ann. § 1-23-330(1) (2005). We further note that great liberality is exercised in permitting the introduction of evidence in proceedings under the Workers' Compensation Act. *Hallums v. Michelin Tire Corp.*, 308 S.C. 498, 504, 419 S.E.2d 235, 239 (Ct. App. 1992) ("An administrative or quasi judicial body is allowed a wide latitude of procedure and [is] not restricted to the strict rule of evidence adhered to in a judicial court."); *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("[G]reat liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts." (quoting *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 82, 7 S.E.2d 712, 719 (1940))); *id.* ("Hearsay testimony may be admissible in workers' compensation matters if corroborated by facts, circumstances, or other evidence.").

Cockerham v. Zikratch, 619 P.2d 739 (Ariz. 1980). Void judgments generally fall into two classifications, that is, judgments where there is want of jurisdiction of person or subject matter, and judgments procured through fraud, and such judgments may be **attacked directly or collaterally**,

"[A] plaintiff need only show compliance with the rules." *Roche v. Young Bros., Inc.*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995).

It is a fundamental doctrine of law that a party to be affected by a personal judgment must have his day in court, and an opportunity to be heard. *Renauld v. Abbott*, 116 US 277, 29 L Ed 629, 6 S ct 1194.

LACK OF JURISDICTION

The Motion should be denied because at the hearing held August 21, 2015 and December 2, 2015 Decision and Order is Void, due to the South Carolina Workers' Compensation Commission and Commissioner Gene McCaskill Lack of Personal Jurisdiction and Subject Matter Jurisdiction by violating Capone's Due process, Procedural and Substantive due process protected by the 5th and 14 Amendments: Where a court failed to observe safeguards, it amounts to denial of due process of law, court is de-prived of juris."Merritt v. Hunter, C.A. Kansas 170 F.2d 739 (10TH Cir. 1948). See Exhibits 1-8.

The Fifth Amendment to the United States Constitution reads in relevant part"...[n]o person shall be deprived of life, liberty, or property, without due process of law." The 14th Amendment to the United States Constitution contains similar due-process language and reads in relevant part"...nor shall any State deprive any person of life, liberty, or due process of law."

1. The South Carolina Workers' Compensation Commission employs Commissioners who are licensed as practicing attorneys and dully competent and qualified as administrative law judges to decide cases, and whose names are found on the roles of attorneys in The State of South Carolina. There can be no Law of the case, where the Commission and Commissioner Gene H McCaskill at a hearing held August 21, 2015 failed to disclose that he had no license to practice law and ignorant to the law in the State of South Carolina, while pretending to be authentic/ genuine, using legal jargon: "Juxtaposed this and that, but only merely himself juxtaposed to be an imposter/ a fraud. Subsequently it also determined that Commissioners Campbell and Wilkerson had no status as lawyers. Capone was subject to a Kangaroo Court, and did not and would not consent to such, and amounts to fraudulent misrepresentation by the Commission to obtain jurisdiction by Trickery, Acting without authority "induced" into jurisdiction

through Fraud Upon The Court/ Fraudulent misrepresentation which was a Denial of Due process, Procedural and Substantive Due Process.

Waivers of Constitutional Rights, not only must they be voluntary, they must be knowingly intelligent acts done with sufficient awareness. *Brady v. U.S.*, 397 U.S. 742, 748.

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

“Brutum Fulmen”: “An empty noise, an empty threat. A judgment void upon its face which is in legal effect no judgment at all, and no rights are divested, and from which none can be obtained; and neither binds nor bars anyone. *Dollert v. Pratt-Hewitt Oil Corporation*, Tex, Civ.Appl, 179 S.W.2d 346, 348.

Also, See *Corpus Juris Secundum*, “Judgments” §499, 512, 546, 549. *Black’s Law Dictionary*, 4th Edition.

2. The Commissioner Gene McCaskill committed Fraud Upon the Court when in his December 2, 2015 Decision and Order denied Mr. Capone Due Process, Procedural and Substantive Due Process committing Fraud Upon the Court , when he omitted key evidence and altered the April 2015 medical opinion, then quoted it as, a FINDING OF FACT-#18. “As to the Claimant’s Post Traumatic Stress Disorder claim being casually related to his employment, there is nothing in the record, other than the subjective complaints of the Claimant, that establish the origin or aggravation of the Claimant’s Post Traumatic Stress Disorder”...#19. “That is not to say that the Claimant does not suffer from Post Traumatic Stress

Disorder. However, it appears from the notes of both Dr. Nicholas Lind and Sheryl Mims-Williams, both of whom have a professional specialization to the Mind, that the Claimant does not suffer from Post Traumatic Stress Disorder which is casually related to his employment with the City.

Actual Unaltered version:Page #2, Dr. Nicholas Lind notes:“ **His PTSD were aggravated in 2013 when, as a firefighter, he responded to a traumatic call, which ultimate resulted in his retirement**”.(Post Trauma Resources 3 April 2015).

This Single Commissioner and Commission relied on the omitted evidence and altered the medical records (Specifically Dr. Linds medical opinion) in its decision to deny/ devaluation of benefits (property) and such reliance was prejudicial to the Appellants/ Claimants claim, the Single Commissioner Gene Henry McCaskill in his Workers’ Compensation Scheme denied Mr. Capone Due Process, Procedural and Substantive Due Process for non-discretionary and statutorily –mandated Workers’ Compensation disability benefits (property) Mr. Capone has a substantial property right /interest in, by the due process clause of the Fifth Amendment entitling him to a full and fair impartial hearing. Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir 2009). The due process clause of the Fifth Amendment only applies to property interest. It is well settled that an individual’s disability benefits are protected that may not be discontinued without process of law. “We have previously recognized that entitlement to workers’ compensation benefits constitutes a property interest”. Orszula v. Orszula, 292 S.C. 264, 356 S.E. (2d) 114 (1987).

Every person is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interest, before he is affected by any judicial decision on the question. Earle v. McVeigh, 91 US 503, 23 L Ed 398.

Reynolds v. Volunteer State Life Ins. Co., Tex.Civ.App., 80 S.W.2d 1087, 1092. One which from its

inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. Judgment is a "void judgment" if court that rendered judgment **lacked jurisdiction of the subject matter**, or of the **parties**, or acted in a manner inconsistent with **due process**.

Subject matter jurisdictional defects include any of the following:

Fraud committed in the procurement of jurisdiction, *Fredman Brothers Furniture v. Dept. of Revenue*, 109 Ill.2d 202, 486 N.E.2d 893 (1985).

Fraud upon the court, *In re Village of Willowbrook*, 37 Ill. App.3d 393 (1962)

Violation of due process, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *Pure Oil Co. v. City of Northlake*, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956); *Hallberg v. Goldblatt Bros.*, 363 Ill.2d 25 (1936);

If the court exceeded its statutory authority, *Rosenstiel v. Rosenstiel*, 278 F.Supp. 794 (S.D.N.Y. 1967).

In addition, any ruling that involves violation of due process of law under the Fifth, Sixth, or Seventh Amendments is also a void judgment. Void judgment can be attacked or vacated at any time and there is no statute of limitation. See *Long v. Shorebank Development Corp.*, 182 F.3d 548 (C.A. 7 Ill. 1999). A void judgment is one which, from its inception, was a complete nullity and without legal effect, *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 14 A.L.R.Fed. 298 (C.A. 1 Mass. 1972).

Loyd v. Director, Dept. of Public Safety, 480 So.2d 577 (Ala.Civ.App. 1985). A judgment shown by evidence to be invalid for want of jurisdiction is a void judgment or at all events has all attributes of a void judgment, *City of Los Angeles v. Morgan*, 234 P.2d 319 (Cal.App. 2 Dist. 1951). Void judgment which is subject to collateral attack, is simulated judgment devoid of any potency because of **jurisdictional defects**,

Cockett Oil Co. v. Effie, 374 S.W.2d 154 (Mo.App. 1964). Decision is void on the face of the judgment

roll when from four corners of that roll, it may be determined that at least one of three elements of jurisdiction was absent: (1) jurisdiction over parties, (2) jurisdiction over subject matter, or (3) jurisdictional power to pronounce particular judgment that was rendered

See *Weinhauer v. State*, 334 S.C. 327, 513 S.E.2d 840 (1999) (stating issues involving subject matter jurisdiction may be raised at anytime, including for the first time on appeal); *State v. Brown*, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002) (stating issues related to subject matter jurisdiction can be raised at anytime, can be raised for the first time on appeal, and can be raised sua sponte by the Court).

See *State v. Funderburk*, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972) (stating “the acts of a court with respect to a matter as to which it has no jurisdiction are void”).

REQUEST FOR NEW HEARING BASE ON NEW EVIDENCE UNOBTAINABLE

Based on the Administrative Procedure Act, Appellant paid the required fees for hearing was requested by the Appellant for an opportunity to being before the Commission, the new evidence that had been concealed that included Mold(Fungus) in Fire Station properties; wrong wage earnings and documents sent showing the injures where work related transmitted electronically and stored online to South Carolina Police Retirement System, and the release of the Appellants Employee medical records are conduct by the Respondents, their attorneys and the Commission that prevented the Appellant from receiving a fair and impartial hearing on the merits. See Exhibits 1-8.

TIMELINESS OF THE NOTICE OF MOTION AND MOTION TO ALTER, AMEND, SET ASIDE JUDGEMENT, ORDER, OR PROCEEDING UNDER RULE 60 (A) (B) [sinc] AND/OR SC Code 1-23-380 SEE NOTICE OF MOTION IN RESPONDENTS (Exhibit E) WAS PROPER AND TIMELY BEFORE THE WORKERS' COMPENSATION COMMISSION

The Motion should be denied in its entirety, because the appeal was timely, there is no time limit for fraud Upon the Court and it is another effort by Respondents and their Attorneys to commit Fraud Upon the Court and to hear an independent action for exceptional circumstances warranting equitable relief, Respondents Attorney p. 5 of motion (2) excerpts "The remaining grounds for relief provided for in Rule 60(b) are not at issue in these proceedings". See Exhibits 1-8.

The Appellant asserts the remaining grounds of relief provided for in Rule 60(b) are also at the very heart of the matter in these proceedings:

Where Rule 60 (b) (4) is properly invoked on the basis that the underlying judgment is void, "**Relief is not a discretionary matter; it is mandatory.**" Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994) (quoting V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (10th Cir. 1979))

A motion to set aside a judgment as void for lack of jurisdiction is not subject to the time limitations of Rule 60 (b). See Gracia v. Garcia, 712 P.2d 288 (Utah 1986)

Rule 60(b), SCRCF, reads: "On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied" Rule 60(b), SCRCF. The rule continues, stating: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." Id. Rule 60(b) also provides: "This rule does not limit the power of a court to entertain an independent action to relieve a

party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." *Id.*

Capone Appellant *pro se*, however, argues his action is timely because it is based on the authority granted in Rule 60(b) allowing an independent action, not subject to the one-year limitation, for fraud on the court, or under the authority in Rule 60 to hear an independent action for exceptional circumstances warranting equitable relief. See *Mr. T. v. Ms. T.*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (stating Rule 60 permits these two potential independent attacks on a judgment). Our supreme court has explained that while in most circumstances there is a time limitation on a party seeking to reopen a final judgment, there is no limit when a party seeks to set aside a judgment due to fraud on the court.

Chewning, 354 S.C. at 80, 579 S.E.2d at 609-10.

The hearing was held February 21, 2018, and fees for motions were paid

and presented at the hearing that resulted in *Res Judicata* as the decision, and the Appellant believed

Commissioner improperly denied the motion, and also made a decision in regards to the Appellant not

being under disability or that he did not have before him any evidence to that Disability or Incompetence

based on mental illness or Traumatic brain Injury. The Appellant then paid the required fee in the allotted

time to appeal, and that appeal was taken and a decision was made the Appellant timely appealed that

decision, requesting a Review by the Commission, which again was denied. That decision was timely

appealed to the South Carolina Court of Appeals (see exhibit #1) and jurisdiction and chain of custody

continues and remain with the South Carolina Court of Appeals. The Appellant asserted he was

entitled to file a Petition for Rehearing with under Rule 60 because federal provisions are

provided and to not allow deprives him of his fundamental right to Due Process, Procedural and

Substantive Due process and Equal Protection under the Color of Law, in addition it is also the

Appellate Panel because §1-23-380 of the APA provides a party with 30 days to file a notice of

appeal from the date of the final decision or “if a rehearing is requested, within 30 days after the decision is rendered.” The Workers’ Compensation Act is silent regarding Petitions for Rehearing; however, §42-17-60 provides the procedure for appealing Appellate Panel decisions. Pursuant to §42-17-60, a party has 30 days after an Appellate Panel award to file a Notice of Appeal with the Court of Appeals. It is well established in case law that SCRCF Rule 59(e) Motions to Alter or Amend a Judgment do not apply to matters before the Commission.

RULE 60 RELIEF FROM JUDGMENT OR ORDER

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

Rule 60(a) of the Federal Rules of Civil Procedure provides that “[t]he court may correct a clerical mistake or a mistake arising from oversight whenever one is found in a judgment, order, or other part of the record.” Fed. R. Civ. P. 60(a). In *Sartin v. McNair Law Firm, P.A.*, 756 F.3d 259 (4th Cir. 2014), a case in which Sowell Gray represented the prevailing party, the Fourth Circuit construed the scope of Rule 60(a) and concluded that the Rule’s scope is not confined to correcting typographical and other clerical errors, but also extends to “unintended ambiguities that obfuscate[] the court’s original intent.” *Id.* at 266.

Affirming the district court, the Fourth Circuit found that while it is true that Rule 60(a) “allows.

. . courts to perform mechanical adjustments to judgments, such as correcting transcription errors and miscalculations[,]" the Rule "is not confined to just fixing typographical and other clerical errors." Id. Instead, [t]he Rule's text also authorizes a court to correct 'a mistake arising from oversight or omission. Such a mistake occurs when there is an inconsistency between the text of an order or judgment and the district court's intent when it entered the order or judgment. A 'mistake arising from oversight or omission' also includes an unintended ambiguity that obfuscates the court's original intent. . . .In sum, the scope of a court's authority under Rule 60(a) to make corrections to an order or judgment is circumscribed by the court's intent when it issued the order or judgment.Id. at 266 (internal citations omitted).

Finally, the court concluded that the fact that the district court's clarification order related to litigation that was dismissed over a year ago was of no consequence with respect to the district court's jurisdiction over the matter because as "Sartin properly concedes . . . 'Rule 60(a) . . . has no time limit.'" Id. at 268 (citing cases).

(4) the judgment is void

;(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer Equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- or
- (3) set aside a judgment for fraud on the court.

S.C. Code Ann. §1-23-380

The SC Administrative Procedure Act applies and grants me the right to seek rehearing.

The South Carolina Administrative Procedure Act (APA) established governs appeals from the decision of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp.2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court has the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by error of law *Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004), “clearly erroneous in view of the reliable and substantial evidence on the whole record” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct.App. 2005) (citation and internal quotation marks omitted), or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct.App. 2000). S.C. Code Ann. § 1-23-380(5). If findings, inferences, conclusions, or decisions of that agency are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record,” a reviewing court may reverse or modify. *Id.* Substantial evidence is not a mere scintilla of evidence, not 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. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272,

274 (2004). An abuse of discretion

See 67–707. Additional and Newly Discovered Evidence. HISTORY: Amended by State Register Volume 21, Issue No. 4, eff April 25, 1997.

See Supremacy Clause

The Supremacy Clause of the United States Constitution provides that “the Laws of the United States . shall be the supreme Law of the Land . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. State and local laws are thus preempted when they conflict with federal law. See *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88 (2d Cir.1998).

THE DOCTRINE OF RES JUDICATA IS INAPPLICABLE TO A VOID JUDGEMENT

Respondents contend that the legally disabled *pro se* Appellant’s failure to appeal to the single commissioner McCaskill December 2, 2015 decision and order established the law of the case, resulting in the order becoming final and having preclusive effect. The Appellant disagrees.

The Appellant asserts the Motion should be denied, because the single commissioner McCaskill December 2, 2015 decision and order is a Void judgment, because the decision and order exceeded the jurisdiction and was rendered in violation of constitutional protections. The protections (safe guards) include Due Process, Procedural and Substantive Due Process, Equal Protection under the color of law and Fraud Upon the Court, and other actionable violations of law. The Appellant asserts, that based upon and supported by the pleadings and papers on file with the Court, it should be clear that he was not given a full and fair opportunity to be heard and the

Commission should not be allowed to invoke the doctrine of Res Judicata, especially since the Commission and Single Commissioner was complicit in the fraud on the Court and omitting of key evidence and the altering of medical opinions in case that went be for it. See Exhibits 1-8.

The doctrine of res judicata is inapplicable to void judgments. "Obviously a judgment, though final and on the merits, has no bidding force and is subject to collateral attack if it is wholly void for a lack of jurisdiction of subject matter or personal jurisdiction, or when it is obtained by extrinsic fraud. (Citations)" (7 Witkins, Cal. Procedure, supra, Judgment, §286. p. 828)

"The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008).

Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, whenunfairness or injustice results or public policy requires it, courts may refuse to apply it." *Carolina Renewal, Inc.v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

A "final" but void order can have no preclusive effect. "A void judgment [or order] is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It never binds nor bars anyone. (Citation)" (*Bennett v. Wilson* (1898) 122. Cal. 509. 513-514.

A void judgment does not create any binding obligation. Federal decisions addressing void state court judgments include *Kalb v. Feuerstein* (1940) 308 US 433, 60 S Ct 343, 84 L ed 370.

Federal judges issued orders permanently barring Stitch from filing any papers in federal courts.

After Judges Robert Jones and Edward Jellen corruptly seized and started to liquidate Stitch's assets, Judge Jones issued an unconstitutional order barring Stitch from filing any objection to the seizure and liquidation.

People v. Sales, 551 N.E.2d 1359 (Ill.App. 2 Dist. 1990). Res judicata consequences will not be applied to a void judgment which is one which, from its inception, is a complete nullity and without legal effect

The doctrine of res judicata, however, does not bar collateral attack of a judgment based on extrinsic fraud. Aaron, 381 S.C. at 592-93, 674 S.E.2d at 486. Our supreme court reiterated the rule that extrinsic fraud is necessary to set aside a judgment based on fraud in Chewning v. Ford Motor Company, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). The court explained the difference between intrinsic and extrinsic fraud:

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action."

Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.

Id. at 81, 579 S.E.2d at 610 (quoting Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Perjury by a party or a witness, use of forged documents, or failure to disclose documents by a party or witness are examples of intrinsic fraud. Id.; Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21 n.5, 594 S.E.2d 478, 483 n.5 (2004). However, the

subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud amounting to fraud on the court. *Chewning*, 354 S.C. at 82-84, 579 S.E.2d at 610-11. Any claim of fraud on the court must be accompanied by particularized allegations. *Id.* at 86, 579 S.E.2d at 613.

Appellant asserts the South Carolina Commission Appellant Panel erred in continuing to sustain the denial of the appeal on the basis of *res judicata*. Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for cases, as in the present one, of “injustices which, in certain instances, are deemed sufficiently gross to demand a departure” from rigid adherence to the doctrine of *res judicata*. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

**FRAUD UPON THE COURT/ CRIME FRAUD EXCEPTION / FRAUDULENT
CONCEALMENT - 8 YEAR STATUE OF REPOSE 15-3-670 AND DISCOVERY RULE**

The Motion should be denied in its entirety for Employer Insurance Fraud, Fraud on the Court (No Time Limitation), Fraudulent Concealment Exception, Statue of Repose, and Discovery Rule are the law in this case/ claim. The Appellant *pro se* Capone asserts the “Hand of One, Hand of All” if **NOT** for the unlawful conduct of the Respondent’s, Respondent’s Attorney’s, South Carolina Commission, and Commissioners Insurance Fraud, Fraud Upon the Court, Fraudulent Concealment, Abuse of Discovery, Wire fraud and Mail fraud, substantial rights of Appellant would **NOT** have been severely prejudiced, he would have had an opportunity to be heard by a fair and impartial decision maker, who had a license to practice law, with superior knowledge of the law at a hearing held August 21, 2015, extreme circumstance would **NOT** exist and clear violations disregarding the *safe guards* of his Constitutional rights to Due Process, Procedural and Substantive Due Process and Equal protection under the Color of Law , a “Taking” and Devaluation of his South Carolina Workers Compensation Benefits (property) that

he and his family have a substantial property right/interest to with a compensation rate of \$2,611.20 x .666 = average weekly wage \$1739.06 x 500 Weeks or \$869, 530.00, would NOT have occurred and the December 2, 2015 Judgment/ Order would NOT be VOID. But because of their extremely egregious unlawful actions, which were arbitrary, capricious, a clear abuse of discretion or otherwise not in accordance with any law, and was TAKEN without procedures (safe guards) required by law, its VOID and as a matter of Law **"Ex Nihilo Nihil Fit" Latin: "nothing is created from nothing"**.

See, Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault."); Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) ("The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee.").

"Discovery Rule":

Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. S.C. Code Ann. § 15-3-535 (2005); Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

In Santee Portland Cement v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E. (2d) 693, 694 (1989), The Court addressed the discovery rule, as it relates to statutes of limitations, in the following manner:

One policy behind the statute of limitations is the protection of a defendant from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable ... It affords defendants an opportunity to gather

evidence while facts are still fresh ... This concern must be balanced against a plaintiff's interest in prosecuting an action and pursuing his rights. Plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed ... "[S]tatutes of limitation which are susceptible to judicial construction should not be applied mechanically but rather construed in the manner most consistent with both their underlying purposes and the requirements of substantial justice for all parties involved."

[Quoting *Gattis v. Chavez*, 413 F. Supp. 33, 39 (D.S.C. 1976).]

"Fraudulent Concealment":

Fraudulent Concealment is founded on the principal of estoppel. A defendant / Respondent should not be able to invoke the statute of limitations if through fraud or concealment, "he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts." *Fine v. Checcio*, 870 A.2d 850, 860 (Pa.2005)

A non-disclosure becomes fraudulent concealment when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction. *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972). The seller of real property has a duty to disclose material facts to the purchaser "[w]here material facts are accessible to the [seller] only and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser." *Lawson*, 259 S.C. at 485, 193 S.E.2d at 128.

A following section, 15-3-670, provides, in part:

The limitation provided in §§ 15-3-640 through 15-3-660 may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or

control knows, or reasonably should have known, of the defective or unsafe condition.
(Emphasis supplied.)

The statute of repose is a law that requires that a lawsuit be brought against each defendant (Respondent) within a certain number of years following a specific date – usually the date of substantial completion. South Carolina’s statute of repose is found at S.C. Code Ann. §15-3-640-670.

South Carolina’s statute of repose provides that a lawsuit for damages based upon a defective or unsafe condition of an improvement to real property must be brought within **(8) eight years after substantial completion of the improvement**. Appellant *pro se* Capone asserts the defense the appeal was timely, the time is tolled for the Respondent’s Fraud upon the Court, Crime Fraud Exception/ Fraudulent Concealment of MOLD (FUNGUS) in Fire Stations Real Properties 15-3670, **which was released not by the Respondent’s to the Appellant until January 25, 2018**, Fraudulent Concealment of Appellants correct pay (Firefighters wages and Earnings to include overtime), Fraudulent Concealment of Appellants City of Columbia Employee Health records that was in Respondent’s custody and their control, Fraudulent Concealment of Appellant was Injured on the Job as a Firefighter-Fire Battalion Chief, Fraud Concealment that the Respondents were not given proper notification of Appellant’s injuries and and had no knowledge of all injuries at the time of the August 21, 2015 hearing before South Carolina Workers’ Compensation Commission and their Attorneys to commit Fraud Upon the Court.

Further I was unaware the Respondent had knowledge of toxic mold (fungus) in the fire stations I worked and, and it wasn’t until 2017, that I found through past and present news articles at the time, it was the same mold (fungus) found on my body “Chaetomium”. The Respondents

concealed this (see exhibits#9;17;18; 20 Attorney Thye Email) and submitted the incorrect average weekly wage, because they had changed the way firefighters shift pay was determined and did not inform me or the Commission of the change. Attorney Dana Thye for the Respondents and the Single Commissioner Gene McCaskill and Commission unfairly altered the medical opinion/ omitted evidence in their possession to deny the claims depriving me of my fundamental right to Workmens' Compensation benefits (property) a property right and interest. Appellant further asserts God never intended for him to be harmed or suffer Luke 10:18-19 NIV ¹⁸He replied, "I saw Satan fall like lightning from heaven. ¹⁹I have given you authority to trample on snakes and scorpions and to overcome all the power of the enemy; nothing will harm you.

UNDER DISABILITY/ UNSOUND MIND/INSANE

The Motion should be denied it entirety with prejudice, during the time period to appeal is tolled due to the Appellant being under legal disability and of Unsound mind/ Insane and the statue of limitations as a matter of law is tolled. See, Exhibits 1-8.

During the proceedings of August 21, 2015, and after any statute of limitations should be tolled I was and remain disabled, mentally incompetent due to mental illness and Neurocognitive Disorder due to Traumatic Brain Injury underdisability, as a Firefighter which is permanently and totally disabled as a result of firefighting service related disabilities in the Columbia (RICHLAND) State of South Carolina, by (4) State agencies as well as federal agencies (see exhibit #5 &6), which include South Carolina Police Retirement System (PORS) as of

3/10/2014; South Carolina Internal Revenue Service as of 11/12/2014; South Carolina

Employment And Workforce as of 10/17/2014; South Carolina Education Commission, Social Security Administration Office of Disability Adjudication as of October 21, 2013, and U.S.

Department of Education. Applying SECTION 15-3-40. Exceptions as to persons under disability; SECTION 15-3- 50. Disability must exist when right accrued; SECTION 15-3-60.

Effect of two or more disabilities; SECTION 42-15-50. Limitation of time on notice or claim of mentally incompetent person or minor and No person shall avail himself of a disability unless it existed when his right of action accrued.

Some personal injury victims who sustain serious traumatic brain injury are often considered by law to be of "unsound mind." A person of "unsound mind" is unable to manage his affairs or to understand his legal rights or liabilities. *Sahf v. Lake Havasu City Assn' for the Retarded*, 150 Ariz. 50, 55, 721 P.2d 1177, 1182 (1986); *Allen v. Powell's Int'l, Inc.*, 21 Ariz. App. 269, 270, 518 P.2d 588, 589 (1974).

Additionally, in *Cerami v. City of Rochester School District*, 624 N.E.2d 680 (N.Y. 1993), the claimant filed an untimely worker's compensation claim for a mental breakdown allegedly precipitated by stressful working conditions. The Court of Appeals of New York was required to construe the provision "any person who is mentally incompetent or a minor so long as he has no committee or guardian" to determine if the filing provision was tolled. 624 N.E.2d at 681.

This Court has said that words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386

S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation omitted).

Arizona recognizes that an action for personal injury is a fundamental right guaranteed by the Arizona Constitution. Further, Barrio makes clear that the controlling consideration under Arizona law is the inability of the injured individual to bring an action on his own behalf, not the possibility that a guardian or parent will assert his rights. This is in accord with Arizona's clear policy of protecting the disabled from statutes of limitations.

**SOUTH CAROLINA WORKERMENS' COMPENSATION SYSTEM IS
UNCONSTITUTIONAL DUE TO DENIAL OF EQUAL PROTECTION CLAUSE OF
U.S. CONSTITUTION/ DISPARATE TREATMENT AND IMPACT**

The Motion should be denied in its entirety, because the Appellant pro se Capone was not provided with Due process, Procedural Due Process and Equal Protection under the Color of Law and the Commissions' actions amounted to disparate treatment and had disparate impact protected by the Equal Protection Clause and negatively impacting me by denying benefits (property) compared to similarly situated Individuals claimant who where Caucasian/ White showing Irregular judgments in terms of people of color:

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

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

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

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

FRAME, a Caucasian, was often troubled by the dishonorable treatment of African-American employees under his charge from upper management, exacerbated by comments and admitted to never actually witnessing intimate sexual relations. The psychiatrist and psychologist agree (1) that Frame suffers from a bipolar type psychosis; (2) on the day in question he experienced what is known as a "decompensation" (a mental breakdown); (3) there is a certain genetic predisposition to this kind of psychosis; (4) this "decompensation" was the result of job-related stress; and (5) it was in no way certain that Frame would experience such a mental collapse regardless of exterior stimuli (i.e., his job). According to the psychiatrist and psychologist, Frame

is not currently capable of full-time work. In the SC Workers Compensation Commission Scheme, A hearing before a single commissioner resulted in an order granting Frame full benefits. The order of the single commissioner reads:

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

Note: In regards to above "FRAME", the record is absent that FRAME ever "DID ANYTHING" to help African-American people, only that it so troubled him along with other stress that he was made disabled. Disabled by Bipolar Disorder that often runs in families (Hereditary) and inherent parts appear to be part of the mobile genetic elements; of those with this mood disorder (Genetics).

EQUITABLE TOLLING

The Motion should be denied in its entirety, because the appeal was timely, the time is tolled based on Equitable Tolling. Appellant Capone asserts that based on the issue above cited "extraordinary circumstances" exist that that the Doctrine of Equitable Tolling should also be applied to serve the ends

of Justice and to stop the Respondents unjust enrichment of benefits (property) there are non discretionary and statutorily-mandated based on the Appellants pro se Capone's injuries and total disabilities. The Workers' Compensation disability benefits (property) Appellate pro se Capone has a substantial property right/ interest to and a compensation rate of $\$2,611.20 \times .666 = \text{average weekly wage } \$1739.06 \times 500 \text{ Weeks or } \$869,530.00.$

As an additional sustaining ground, Kimmer urges this court to apply the doctrine of equitable tolling. The South Carolina Supreme Court recently adopted this doctrine. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009). The court explained the doctrine of equitable tolling may be applied to toll the running of the statute of limitations "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* at 115, 687 S.E.2d at 32. The court explained:

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances. *Id.* at 116–17, 687 S.E.2d at 33 (citation and quotation marks omitted). The court noted the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Id.* at 115, 687 S.E.2d at 32.

CONCLUSION AND PRAYER

For the reasons stated supported by the affidavits, pleadings and papers on file with the Court and addressed herein, Plaintiffs request that the Court deny Defendants' Motion to Dismiss Appellant, *pro se* Terry Capone's Notice of Appeal is timely and should not be dismissed

because it would continue to deprive him of fundamental and substantial rights are affected. The Appellant alternately request the Respondent motion to dismiss be denied with prejudice, Appellant so moves. See Exhibits 1-8.

By:



APPELLANT, *pro se*

May 21, 2019

Enclosure(s) as stated
Cc: Cythia Dooley, Carmelo Sammataro
Attorney's for Respondents (w/all enclosures)

Mr. Terry H. Capone
Fire Battalion Chief-Retired
130 Summerlea Drive
Columbia, SC 29203
803.622.6578
Email: tcapone@liberty.edu

RECEIVED

MAY 21 2019

SC Court of Appeals

Exhibit 1

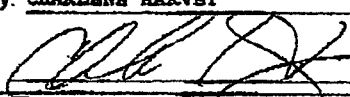
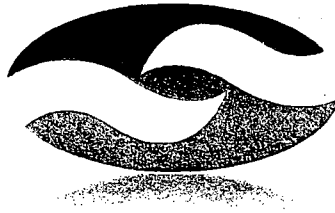
Form 8253 Revised 7/9/2012 Print or type in black ink		EMPLOYER'S DISABILITY EMPLOYMENT STATUS REPORT To Be Completed by Applicant's Payroll/Benefits Officer SC Public Employee Benefit Authority South Carolina Retirement Systems Attention: Customer Services Annuity Claims PO Box 11960, Columbia, SC 29211-1960		☐ SCRS ☒ PORS ☐ GARS
The individual indicated below has applied for disability retirement benefits. Please complete the information on the remainder of this form, and return it to the address listed above as soon as possible. Upon receipt of this completed form, the employee's application will be processed.				
Employee Name: TERRY H CAPONE		Social Security Number: 133-58-7472		
Employer: CITY OF COLUMBIA		Employer Code: 740.05		
Position Title: FIRE BATTALION CHIEF				
1. Is the position title shown above correct? ☒ Yes ☐ No (please explain)				
2. Annual salary on date of disability: \$ 54,688.66				
3a. Is the employee currently working? ☒ No (last day physically worked): 10/21/2013 (skip to Question 4a) ☐ Yes (proceed to Question 3b) MM-DD-YYYY				
3b. Is the employee performing all regular duties? ☐ Yes (skip to Question 6a) ☐ No (proceed to Question 3c)				
3c. In what capacity is the employee currently working? ☐ Leave without pay (not terminated) (attach copy of Personnel Policy) ☐ Light duty ☐ Diminished capacity ☐ Reduced hours ☐ Other (please explain):				
3d. Date member was placed in status shown at left: MM-DD-YYYY				
4a. Is this employee terminated? ☒ No (skip to Question 5) ☐ Yes (date of termination): (proceed to Question 4b) MM-DD-YYYY				
*Attach letter explaining current duties in relation to normal work functions.				
4b. Last day compensation was earned (including pay continuation, using annual and sick leave): MM-DD-YYYY		4c. Amount of lump-sum payments for unused leave Annual leave \$ Sick leave \$		4d. Number of days of unused leave: (complete and proceed to Question 6a) Annual leave Sick leave
5. Employee's current payroll status (check one and indicate appropriate date): ☐ On annual leave (date leave began): ☐ On sick leave (date leave began): ☒ Other (please explain): WORKERS COMP				
6a. Was this employee injured on the job? ☐ No ☒ Yes (date of injury): MM-DD-YYYY		6b. Is employee on leave without pay (not terminated) pending settlement of a Workers' Compensation claim? ☐ No ☐ Claim settled (date): ☒ Yes MM-DD-YYYY		
I hereby certify that to the best of my knowledge, the information above correctly reflects the records of the employing entity.				
Prepared by: CHARLENE HARVEY		Title: HR SPECIALIST		
Signature: 		Date: 01-15-14 Telephone: 545-3027		
Return completed form to the SC Retirement Systems (address: above). Please call SC Retirement Systems Customer Service with any questions: (800) 868-3002 (in state) or (803) 737-6800				

Exhibit 2

Post Trauma Resources

"Solutions for Life's Toughest Problems"



3 April 2015

Dr. Tiona Praylow
Envision Wellness Medial Group
2601 Read St, Suite I-7
Columbia, SC 29204

Thank you for allowing me to meet with Mr. Capone and conduct a psychological evaluation. I had a chance to interview him today and review his medical records.

Symptoms/Impairments

Mr. Capone reported that, in or around 26 June 1989, he was involved in a motor vehicle accident when he was riding as a passenger with another marine. "He drove into a tree when we were in North Carolina," he said, "I just remember a woman running up and looking at me," he said, "she said, 'Look at his face!' When I looked in the mirror and saw how bloody I was I thought, 'I'm going to die!'" He was diagnosed with post concussive disorder and he continues to experience symptoms of posttraumatic stress associated with injury. On 30 July 1993, he assaulted a man who was having an affair with Mr. Capone's wife. The response was violent and excessive, resulting in Mr. Capone's 11 month confinement in the brig and ultimate bad conduct discharge. Mr. Capone believed both then and now that his reaction was mitigated by his TBI and PTSD. He acknowledges that his actions were hostile and harmful in a manner that deviates sharply from the social norms. His service records do not reflect deliberate or intentional disregard for consequences. In fact, the preponderance of the data reflects "otherwise honest, faithful and meritorious" service (38 C.F.R.3.3.1(n)). He earned outstanding IRAM Standard of conduct marks (between 4.9 and 5.0). At the time of the incident leading to his discharge, he had completed the Meritorious Sergeant board and earned the MALS-11 NCO of the Quarter by unanimous decision. He spent four months in solitary confinement, in which he was placed in uncomfortable positions for long periods of time. He suffered knee damage as a result, he said, and continues to experience knee pain at the average intensity of five out of 10.

Mr. Capone reported having repeated nightmares of the accident and/or other military experiences at least once a week. He experiences frequent intrusive recollections of what he went through in jail and, after having such dreams and thoughts, feels as if the events are again occurring.

www.posttrauma.com

1709 Laurel Street Columbia SC 29201
(803) 765-0700 (800) 459-6780 Fax (803) 765-1607



As for avoidance symptoms, Mr. Capone reported that he actively avoids any type of confrontations. Negative thoughts and mood symptoms include a decreased interest in previously enjoyed activities, such as drawing and socializing. He noted feeling detached from others and described that, in general, he experiences overwhelming feelings of anger.

In terms of arousal symptoms, he reported sleeping approximately four hours each night, a reduction from the eight hours he experienced prior to his military service. He said he has noticed increased irritability and difficulty concentrating. Other symptoms include feelings of guilt and a noted loss of energy, decreased appetite and a loss of sex drive. His PTSD were aggravated in 2013 when, as a firefighter, he responded to a traumatic call, which ultimately resulted in his retirement.

He denied having current suicidal thoughts. His last thought was approximately one year ago, in which he fantasized about driving off the road. Current risk factors for suicide include his reported symptoms of anxiety and potential impulsivity secondary to TBI. Protective factors include his willing to seek help and his family. Based on Rudd et al's 2001 criteria for determining suicide risk, Mr. Capone is currently at No Risk for self-harm. The corresponding level of appropriate health care is outpatient therapy with recurrent risk assessment.

Mental Status

Mr. Capone appears stated age. Regarding level of consciousness, he appeared confused. Affect is flat. Reported mood is "agitated." He presented himself in a casually dressed and appropriate fashion. Eye contact can be described as good. His speech is tangential. Recent memory appears poor. Remote memory is poor. Psychomotor activity is normal. There is a negligible degree of conceptual disorganization evident. His thought content is characterized by no significant preoccupations. Regarding perceptual functioning, the examinee denies hallucinations and none are evident. Attitude can be described as cooperative. Insight and judgment appear poor. Concentration difficulty was noted in the interview. Regarding impulse control Mr. Capone demonstrated ability to resist urges.

Quality of Historian. The quality of Mr. Capone's self-reporting of symptoms appeared consistent with his presentation, records and testing.

Results of Psychological Testing

Mr. Capone articulated understanding of each instrument. His responses were consistent within and among measures and were determined to be valid reflections of his current functioning.

Personality. On the MMPI-2-RF, Mr. Capone endorsed a number of items that are infrequently answered by the normative sample (F-r=100). This response style is suggestive of overreporting of symptoms but may also be generated by individuals with genuine difficulties. Because even in non-compensation seeking settings people with PTSD are likely to report significantly higher subjective distress than people without PTSD, the authors of the VA's *Best Practice Manual for Posttraumatic Stress Disorder Compensation and Pension Examinations* (Watson et. al, 2002) suggest that the

Infrequency-Psychopathology Scale (F_p) be considered (this is now the " F_{p-r} " scale in the *Restructured* version of the MMPI-2). Citing Aribisi and Pen-Porath (1998), they suggest that when the F_p scale is elevated along with F , the clinician can more confidently attribute the high scores to be due to the overreporting of psychopathology, but only if the other validity scales are not also elevated significantly. While the F scale consists of items rarely endorsed by individuals from the normal population, the F_p contains items rarely endorsed by individuals within the clinical population. The F_{p-r} scale is within normal limits ($F_{p-r}=51$) and suggests that Mr. Capone's endorsement of emotional distress is legitimate. Individuals with profiles similar to Mr. Capone's have been found to be experiencing emotional distress likely to be perceived as a crisis. They report somatic complaints involving different body systems and display vegetative symptoms consistent with depression.

Mood/Emotional Symptoms. Mr. Capone was administered the Beck Depression Inventory-Second Edition, a 21-item self-report questionnaire assessing depressive symptoms in the time frame of the "past two weeks including today." Scores range from Minimal, Mild, Moderate to Severe levels of depressive symptoms. There is no validity measure. Compared to the normal population, he reported experiencing Severe levels of depression ($BDI-II=48$).

The examinee was administered the Beck Anxiety Inventory, a 21-item scale which measures the severity of anxiety in the time frame of the "past two weeks including today." Scores range from Minimal, Mild, Moderate to Severe levels of anxiety symptoms. There is no validity measure. Compared to an outpatient psychiatric population, he reported experiencing Severe levels of anxiety ($BAI=37$).

Mr. Capone was administered the Detailed Assessment of Posttraumatic Stress, a measure of the impact of potentially traumatic events. The resulting profile was determined to be valid and consistent with the diagnosis of Posttraumatic Stress Disorder. His scores were especially significant in the areas of general distress, re-experiencing the perceived traumas, avoidance of people and situations associated with the events and increased arousal. Mr. Capone reported significant emotional distress at the time of the traumas and endorsed the tendency to disassociate during traumatic events, a propensity associated with more severe posttraumatic symptoms (Koopman, Classen and Spiegel, 1996) and which may explain his reported increase in impairment.

The P3 is designed to identify pain patients who are experiencing emotional distress that may be affecting their symptoms and their response to treatment. The results suggest that Mr. Capone approached the test items in an open and honest manner. The profile suggests that he is experiencing more depression, anxiety, and somatization than the typical pain patient.

DSM-5 Diagnoses

309.81 Post Traumatic Stress Disorder, aggravated by chronic pain

References

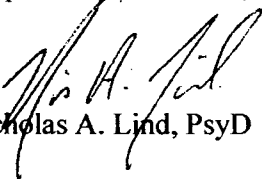
- Arbisi, P.A. & Ben-Porath, Y.S. (1998). The ability of MMPI-2 validity scales to detect fake-bad responses in psychiatric inpatients. *Psychological Assessment*, 10, 221-228.
- Watson, P., McFall, M. E., McBrine, C., Schnurr, P., Friedman, M., & Keane, T. (2002). Department of Veterans Affairs Best Practice Manual for Post-Traumatic Stress Disorder (PTSD) Compensation and Pension Examinations.

Conclusion and Responses to Specific Questions

Mr. Capone's current symptoms of anxiety and depression are consistent with the diagnosis of PTSD as well as Adjustment Disorder secondary to pain. In my opinion these symptoms are as likely as not associated with stressors experienced while on active duty. He is likely to experience ongoing symptoms in times of stress since PTSD has been shown to be influenced by the trauma itself as well as current psychosocial stressors, to include pain. I recommend combined psychological/psychiatric care to help normalize his sleep and mood. He would also benefit from physical therapy and pain management.

In my opinion, he was insane at the time of the 26 June 1989 incident that ultimately resulted in his discharge. His behavior was hostile and harmful to others and deviated sharply from societal norms. It was out of character for him, however, and his service records do not reflect deliberate or intentional disregard for consequences. In my opinion, his actions were more likely than not mitigated by his TBI and PTSD, which resulted in a prolonged deviation from his normal method of behavior.

Respectfully submitted,



Nicholas A. Lind, PsyD

Exhibit 3

220 Stoneridge Drive Suite 302
Columbia, South Carolina 29210

Phone: 803-779-2777
Fax: 803-779-5775

May 14, 2019

Re: SWORN AFFIDAVIT SHERYL MIMS WILLIAMS
Terry Capone: May 18, 2015 Altered Medical Health Opinion

To whom it may concern:

STATE OF SOUTH CAROLINA §

COUNTY OF RICHLAND §

Before me this day personally appeared SHERYL MIMS WILLIAMS who, being duly sworn, deposes and says:

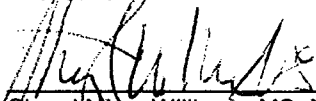
Mr. Capone has been in treatment with our services since 08/31/2012. I am the Mental Health Counselor for Terry Capone. In my capacity as a Licensed Professional Counselor, Mr. Capone was diagnosed with Post Traumatic Stress Disorder an occupational disease, Anxiety and Major Depression that was directly connected to and exacerbated by his employment with the City of Columbia Fire Department.

According to our records May 18, 2015, I composed a letter for Mr. Capone for reconsideration to The Department of Veterans Affairs, and according to Mr. Capone, he subsequently submitted this same letter for consideration in his South Carolina Workers Compensation Claim. The diagnoses of PTSD, which is an occupation disease, Anxiety and Major Depression have always resulted from and has been connected to his employment with the City of Columbia Fire Department. According to Mr. Capone the Decision and Order dated December 2, 2015 by a Commissioner McCaskill, was altered due to the letter that was written to the VA.

Dr. Nicholas Lind, PsyD, Dr. Tiona Praylow, MD as well as I, diagnosed Mr. Capone with PTSD which was aggravated by events he experienced as a firefighter and/or trauma in the workplace. According to my notes there are at least 2 incidents that Mr. Capone refers to as being very traumatic while working as a firefighter.

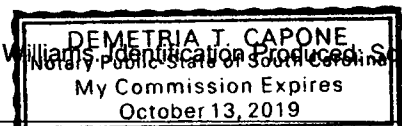
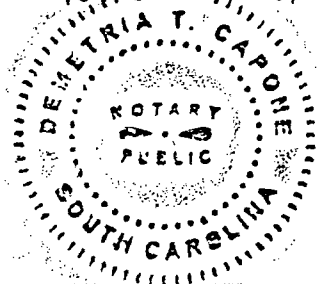
If you have any questions please feel free to call me at the above number.

I certify under penalty of perjury that the forgoing statement is true and correct to the best of my knowledge and belief.


Sheryl Mims Williams, MS, MAR, LPCS

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Sworn and subscribed before me this 14 day of May 2019, by Sheryl Mims Williams Identification Produced: South Carolina Drivers License# 204348816 Expires: 3/30/2025



PRINT OR STAMP NAME OF NOTARY

Demetria T. Capone



AGAPE COUNSELING AND TRAINING SERVICES

5000 Thurmond Mall Suite 211
Columbia, South Carolina 29201
Telephone: (803) 779-2777
Fax: (803) 779-5775

Date: May 18, 2015

To: The Department of Veterans Affairs

**RE: Mental Health opinion for
Mr. Terry H Capone,
4209 Woodridge Drive
Columbia, SC 29203**

Reference: Social Security Number

I am the Mental Health Counselor for Veteran Terry Capone. In my capacity as a Licensed Professional Counselor, Mr. Capone has been diagnosed with Post Traumatic Stress Disorder. He has been in treatment with our services since 08/31/2012.

While I've provided treatment for Mr. Capone, I've become familiar with his active duty medical history from 10/1988 to 06/1994, past and present ailments and I've reviewed pertinent parts of his military record that document his injury and clinical conditions related to the events that occurred.

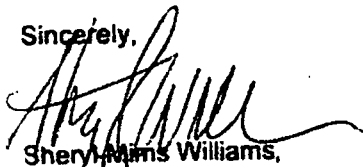
According to Mr. Capone, he was injured in a severe auto accident while riding as a passenger with another marine. The incident occurred during his active duty military service on or about June 26, 1989, in Kinston, located in Lenoir County North Carolina while assigned to MCAS Cherry Point North Carolina. He was diagnosed with Post Concussion Syndrome, Post Traumatic headaches, common migraines and he continues to experience symptoms of Post Traumatic Stress. Based on the records these symptoms are more likely than not associated with this injury. Mr. Capone is presently being treated for Post Traumatic Stress. There was no history reported prior to the service of any mental or physical nor any condition noted in his service records.

According to Mr. Capone, on July 30, 1993, he assaulted another marine who was having an affair with Mr. Capone's wife. The response was violent and excessive, resulting in Mr. Capone's 11 month confinement in the brig and ultimate bad conduct discharge. Mr. Capone believed both then and now that his reaction during service was mitigated by his Post Traumatic Stress Disorder of being in the accident.

He acknowledges that his actions during this time were hostile and harmful in a manner that deviates sharply from the social norms and his behavior disrupted the legal order of society. His service records do not reflect deliberate or intentional disregard of rules or consequences. In fact, the preponderance of the evidence in his files reflect "otherwise honest, faithful and meritorious" service. According to his records and Mrs. Capone, he earned outstanding IRAM standard of conduct marks between 5.0/5.0 in grade and average in service of 4.6. This includes a Navy Achievement Medal, Good Conduct Medal, Meritorious Promotion to the rank of Corporal and 3 Meritorious Mast (1991 to wit: "Your display of perseverance throughout this period motivated others and was instrumental in providing optimal support to both Operation Desert Storm and MAG-11(REAR) squadrons.") and a Certificate of Appreciation. At the time of the incident leading to his discharge, he had completed the Meritorious Sergeant board. It appeared that Mr. Capone was moving up in the military when he was discharged which could be another factor that would indicate that his actions were not his norm.

In my opinion, based on the records, statements from Mr. Capone, it appears that he was acting out of character and symptoms were more likely that not due to Post traumatic Stress at the time of his discharge. His behavior was hostile and harmful to others, deviated sharply from societal norms and disrupted the legal order of society. It was out of character for him, and his service records do not reflect deliberate or intentional disregard for rules or consequences. In my opinion, based on his records and the account as he describe them, his actions were more likely that not mitigated by his Post Traumatic Stress Syndrome while in the service, which resulted in a prolonged deviation from his normal method of behavior.

Sincerely,



Sherry Adams Williams,
Licensed Professional Counselor

Exhibit 4



2601 Read Street, Suite I-7
Columbia, SC 29204
Phone 803-256-0101 or Fax 800-854-3497

April 30, 2019

Dear Sir or Madam,

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Before me this day personally appeared TIONA PRAYLOW, being duly sworn, deposes and says:

I am writing to outline the clinical imperatives warranting a full and unequivocal waiver of the statute of limitations in Mr. Terry Capone's claim for Post-Traumatic Stress Disorder, an occupational injury incurred during his service in the City of Columbia fire battalion. Mr. Capone has been under my care since 2013. At the initial period of time traditionally allotted to file claims (9/15/2015-9/15/2016), it is my professional assessment to a reasonable degree of medical certainty that Mr. Capone was of an "unsound mind," and unable to execute the imperative procedures.

Per judicial and statutory definitions, an individual is determined to be of "unsound mind" based on at least the following conditions: 1) "His mind is so weak and feeble . . . that he is incapable of understanding and acting in the ordinary affairs of life" 2) Delusions existⁱ During the time period in question, Mr. Capone experienced both an incapacity to understand and to act in ordinary life affairs.

A comprehensive body of scientific literature documents a persistent linkage between cognitive impairment and Post-Traumatic Stress Disorder. In *Traumatic stress: effects on the brain*, Bremner MD concludes "brain areas implicated in the stress response include the amygdala, hippocampus, and prefrontal cortex. Traumatic stress can be associated with lasting changes in these brain areas."ⁱⁱ Further detailing these deficits, Qureshi et al explicate, based on over 35 neuropsychological instruments, deficits in attention, learning, executive function, and memory.ⁱⁱⁱ In a 2016 evaluation of World Trade Center published in the *Alzheimers Dementia* journal responders experiencing PTSD symptoms, scientists concluded that re-experiencing symptoms of PTSD were consistently associated with cognitive impairment (CI).^{iv}

During the time of treatment, Mr. Capone experienced extreme executive function and cognitive impairment as well as emotional dysregulation. These symptoms are neurobiologically driven by neurochemical and structural cerebral insults incurred as a result of traumatic stress. He reported



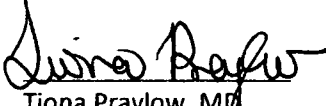
2601 Read Street, Suite I-7
Columbia, SC 29204
Phone 803-256-0101 or Fax 800-854-3497

ongoing difficulties sleeping. He noted episodes of severe mood lability and perseverative thought patterns that impaired his ability to organize, plan, execute, or participate in many of his functional activities of daily living. These PTSD symptoms evidence his incapacity to act in the ordinary affairs of life.

Mr. Capone's wife outlines paranoia as a critical symptom she observed and this is corroborated by client's own self-report during his treatment. He reported homicidal ideations triggered by the persistent recurrence of paranoid ideations. This delusional thought process evidences the existence of delusions.

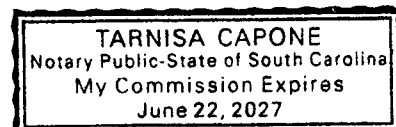
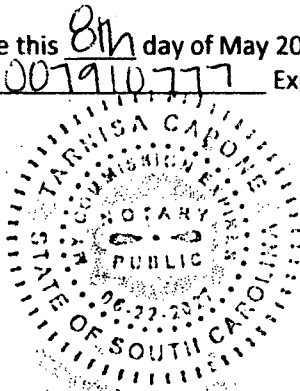
Based on scientific evidence describing neurobiological deterioration, resultant cognitive impairments present in PTSD survivors, as well as the subjective and objective observations of these symptoms in my client, I attest to a reasonable degree of medical certainty that Mr. Capone was of "unsound mind." Therefore, he was unable to organize and execute tasks essential to the affairs of his daily life. Moreover, his mental incapacity impaired him from appropriately participating in the claims process. It is imperative that my client be allowed to exercise his legal rights and seek warranted, deserving compensation for occupational disease incurred as a direct result of his valiant service to our community.

I certify under penalty of perjury that the forgoing statement is true and correct to the best of my knowledge and belief.

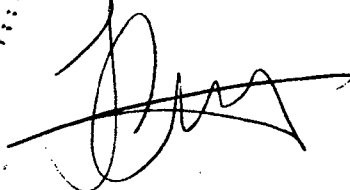

Tiona Praylow, MD

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Sworn and subscribed before me this 8th day of May 2019, by Tiona Praylow. Identification Produced:
South Carolina Drivers License# 007910777 Expires: 04/14/2023



PRINT OR STAMP NAME OF NOTARY





2601 Read Street, Suite I-7
Columbia, SC 29204
Phone 803-256-0101 or Fax 800-854-3497

ⁱ Editorial Staff of the National Reporter System (1905). *Judicial and Statutory Definitions of Words and Phrases*, Volume 8. P 7215

ⁱⁱ Bremner, Douglas, MD. (2006). Traumatic stress: effects on the brain. *Dialogues Clinical Neuroscience*. 8(4): 445-461.

ⁱⁱⁱ Quershi et al (2011). Does PTSD Impair Cognition Beyond the Effect of Trauma? *J Neuropsychiatry Clin Neurosci* 23:1(16-28)

^{iv} Clouston et al (2016) Cognitive impairment among World Trade Center responders: Long-term implications of re-experiencing the 9/11 terrorist attacks. *Alzheimers Dementia* 4: 67-75

Exhibit 5

SWORN AFFIDAVIT OF DEMETRIA T CAPONE (WIFE)

April 10, 2019

Mrs. Demetria T Capone
4209 Woodridge Drive
Columbia, SC 29203
(803) 312-1042

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

Re: Letter in Support of Fire Battalion Chief Terry H Capone, Disability Retired. Tolling of the statute of limitations: disability and unsound mind

Terry Capone v. City of Columbia and Companion Third Party Administrator, LLC Appellate Case No.: 2018-000369
W.C.C. File Nos. 1322451, 1319203, 1420487

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Before me this day personally appeared DEMETRIA T CAPONE who, being duly sworn, deposes and says:

- I. My name is Demetria T Capone, DOB September 9, 1970, SSN XXX-XX-6973, I am of sound mind and fully competent to make this sworn declaration. I have been married to my husband Terry H Capone over 21 years and have reviewed his military medical, personnel and civilian medical records and multiple South Carolina Workers Compensation files and various other records and have personal knowledge of the matters set forth below.
- II. My husband was under legal disability and of unsound mind during the period of 9/15/2015- 9/16/2016, as a result of the Marines and Fire Service through occupational exposures and effects thereof, has been diagnosed with PTSD an occupational disease, dementia due to metabolic causes(new), anxiety, depression (major), mild neurocognitive disorder, irritable bowel syndrome- diarrhea, insomnia, sleep apnea, migraine headaches, type II diabetes, Hypertension and others was unable to pursue legal recourse in the South Carolina Workers Compensation appeals process, and disassociated himself from it until a time in 2017, the statute of limitations should be tolled as noted in SC Code§ 15-3-40 (2013).

Exceptions as to persons under disability. In addition he was also impaired by the adverse effects of his medications that include Ambien 10 mg, Seroguel 300 mg, Ativan 1 mg, Depakote 500 mg, Prozac 20 mg, Relpax 40 mg, Dexilant 60 mg still prescribed today, along with others. Both Ambien and Ativan have known side effects that impair cognition, memory (amnesia) and should have been considered by the Commission during the August 21, 2015 hearing in regards to Ativan, which my husband had taken just prior to the start of the hearing for anxiety. See, Claimants 2015 APA's p.#590-620

- III. As a practicing nurse (RN) of over 16 years, I began to recognize mental and cognitive changes in my husband, as well as behavioral inconsistencies that included suicidal, homicidal ideation and paranoia. His sleep pattern were erratic with him staying up at times 24 hours for days ruminating, stuck and rehearsing the past. When he did sleep it was merely 4-6 hours and included nightmares. The impact of the disorders and medications led to him being irritable, over-reactive, having continued memory impairment, a lack of self care (haircuts, shaving and hygiene), and angry verbal outburst, led to an excessive strain on our family and marriage. He also requires the use of a CPAP (sleep apnea) machine due to him having periods of not breathing when he does sleep, but he feels the mask is smothering.
- IV. His psychological, physical and impairments due to the adverse effects of multiple medications continue to change his normal methods of behavior and during the period made him incapable of managing affairs of life, requiring him to see his counselor and psychiatrist on a weekly basis, he was no longer able to manage the home and finances, being an active husband, father to his children, interacting with family, friends and in marital activities. In addition my husband's affairs in life as a Fire Battalion Chief also included those of the City of Columbia Fire Department, in managing emergency scenes, that included: life safety, incident stabilization, and property conservation. This included managing multiple Fire Stations, personnel and pieces of equipment; pursuing his graduate degree and other educational courses that required travel to multiple states for self development throughout the course of his career. Also at a time included handling the nations affairs as a U.S. Marine, until he was made unfit for duty, on two separate occasions confined because of his inability to control his behavior, and subsequently discharged from service as a result; today he continues to remain under legal disability.
- V. I also observed the symptoms of diabetes at home prior to his diagnosis. He was having excessive trips to the bathroom, as well as an acetone smell to his breath. I encouraged him to seek medical help, as his wife, and as a nurse. He has frequent bowel movements

(6-8 times) after he eats, and this has also impeded him wanting or being able to accompany me in public. His diagnoses were confirmed.

- VI. Based on the medical documentation and definitions, my husband Terry Capone, who is a disability retired Fire Battalion Chief and Marine Veteran is legally disabled, and his military medical records show a long history of suffering from episodic periods and fluctuating levels of an unsound mind that began in 1989, was determined to be unfit for full duty until 1992 in the military and subsequent ended his career in the Fire Service.
- VII. In April 3, 2015, Dr. Nicholas A. Lind, provided a medical opinion, That stated: "His PTSD were aggravated in 2013 when as a firefighter, he responded to a traumatic call, which ultimately resulted in his retirement"..."In my opinion, he was insane at the time of the 26 June 1989, incident that resulted in his discharge" see, post trauma resources see claimants 12/2015 Book 1 of 2 APA's Pre-hearing brief- "Alleged aggravation of PTSD" p.#14, Pages 13-15 and p.#38, Pages 37-41.

VIII. On, September 12, 2016, Social Security Administrative Office of Disability Adjudication and Review excerpts:

3."The claimant has the following severe impairments: Irritable Bowel Syndrome, and mental impairments variously diagnosed as Post-traumatic Stress Disorder, depression, and anxiety (20 CFR 404.1520 (c)).Page 3-8.

The claimant's impairments are considered severe because, they are medically determinable impairments that, when considered either individually or in unison, significantly limit the claimant's mental and physical abilities to do one or more basic work activities. In addition, the claimant's impairments have persisted at a severe level for a continuous period of more than 12 months." Page 3-8.

11. "The claimant has been under a disability as defined in the Social Security Act since October 21, 2013, the alleged onset date of disability (20 CFR 404.1520(g))." Page 8-8.

Decision: "Based on the application for a period of disability and disability insurance benefits filed on December 26, 2013, the claimant has been disabled under section 216(i) and 223(d) of the Social Security Act since October 21, 2013, the alleged onset date of disability (20CFR 404.1520(g))." Page 8-8.

IX. On August 2, 2017, Dr. Conigliaro Jones, my husband primary care physician wrote a letter explaining the adverse effects due to medication prescribed in 2014 named Elavil (Amitriptyline), noting "it works by affecting the balance of certain natural chemicals [neurotransmitters such

as serotonin) in the brain, this medication was also prescribed to him in service. The Food and Drug Administration (FDA), reported among other adverse events physical assault, sudden and usual changes in behavior, altered sugar levels and others experienced by my husband and observed at home by myself and other family members and he was later diagnosed with Type II Diabetes.

X. On November 21, 2017, Dr. Tiona Praylow diagnosed my husband with "post traumatic stress disorder an occupational disease, arising from prolonged work-related stress that was ongoing and caused him to deviate from his normal method of behavior"... "The neurobiology of post traumatic stress disorder explains Mr. Capone's exposure to traumatic and critical incidents, or stressors beyond the range of the normal human experience resulted in [neurochemical alterations in multiple neurotransmitter systems]"..."PTSD appears to be associated with a significant disturbance of multiple neurobiological systems"... "may represent a multi system disorder". Dr. Praylow has been the psychiatrist treating my husband since November 7, 2013 for ptsd, anxiety, insomnia, depression and he has chronic pain and IBS-D, a referral for testing 3/2015 confirmed neurocognitive impairment and Dr. Praylow stated he was insane during the events that lead to his discharge while serving in the Marines. See, Envision Wellness Medical Group Mental Health Opinion.

XI. As of March 11, 2019, the US Veterans Administration determined February 26, 2019 a rating decision which deemed my husband was insane at the during the time of the circumstances surrounding his discharge and changed is his character of discharge to "Honorable" for VA purposes and made him eligible for benefits that include health care.

XII. On March 20, 2019, the Department of Veterans Administration provided my husband with a compensation and pension exam, where a VA Doctor determined my husband's PTSD was due to his service in the Marines and Fire Service and a TBI that was related the Marines; a rating is pending.

XIII. On April 5, 2019, the Department of Veterans provided my husband with another compensation and pension exam, where it was recommended his Headaches receive a disability rating of 50% and Unemployable 100% with Sciatic nerve 10% rating and both were due to injury during his service in the Marine; a final rating is pending.

XIV. My husband continues to suffer and remains under disability. His March 20, 2019 blood work noted a vitamin D deficiency at 18.9 of minimum of 30 and others noted and since been diagnosed by Dr. Jones, with dementia associated with another disease: metabolic associated.

XV. I also had the opportunity to review the South Carolina Worker's Compensation Commission correspondence, transcripts and their decisions in my husband's, most recently Appellant Panel Decision and Order dated March 1, 2019. I disagree at page 4 #4 "I find no medical evidence to suggest that the Claimant had a then existing mental condition which prohibited him from filing a timely appeal". I find the statement to be untrue, not based on information in the record, now or as they existed during the time for filing of appeal based on December 2, 2015 Decision and Order, and the commission is aware of that my husband's PTSD is an occupational disease, and all the other diagnosis, medications and adverse side effects that is before it.

XVI. Definitions

Suggest:

1 a Obsolete: to seek to influence: SEDUCE

b: to call forth: EVOKE

c: to mention or imply as a possibility

d: to propose as desirable or fitting *suggest* a stroll

e: to offer for consideration or as a hypothesis *suggest* a solution to a problem

2 a: to call to mind by association

B: to serve as a motive or inspiration

suggest [Def.1 and 2]. (n.d.). In Merriam Webster Online, Retrieved March 20, 2019, from <https://www.merriam-webster.com/dictionary/suggest>

Section 15-3-40 (Supp. 2013) Exceptions as to persons under disability.

states:

If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued either:

- (1) within the age of eighteen years; or
- (2) insane;

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

- (a) more than five years by any such disability, except infancy; nor
- (b) in any case longer than one year after the disability ceases.



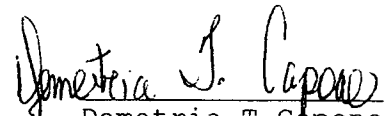
Disability. The want of legal capability to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus, persons under age, insane persons, and convicts are said to be under disability. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage, or the restraints placed upon clergymen by reason of their spiritual avocations, or lack of legal qualifications to hold office.

As used in connection with Workers' Compensation Acts, disability is a composite of (1) actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting there from, and (2) physical impairment of the body that may or may not be incapacitating. Russell v. Bankers Life Co., 46 Cal.App.3d 405, 120 Cal.Rptr. 627,633. Black's Law Dictionary 415(5th ed. 1979).

Unsound mind. Non-legal term referring to one who from infirmity of mind is incapable of managing himself or his affairs. The term, therefore, includes insane persons (see Insanity). It exists where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life. Oklahoma Natural Gas Corporation v. Lay, 175 Okla 75, 51 P.2d 580, 582. Black's Law Dictionary 1380(5th ed. 1979).

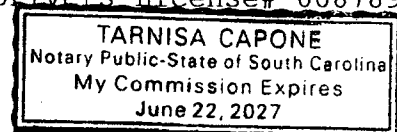
Mental incapacity; mental incompetency. Such is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life. Black's Law Dictionary 889 (5th ed. 1979)

I certify under penalty of perjury that the Forgoing statement is true and correct to the best of my knowledge and belief.

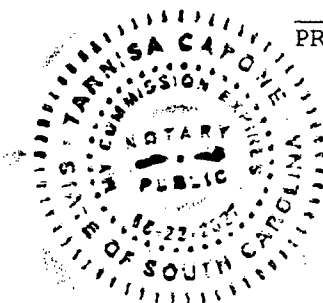

Demetria T Capone

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Sworn and subscribed before me this 10th day of April 2019, by Demetria T. Capone. Identification Produced: South Carolina Drivers License# 008789079 Expires 09-04-2026



PRINT OR STAMP NAME OF NOTARY



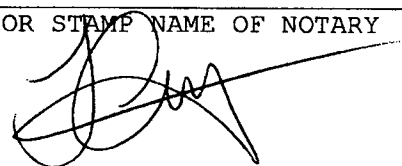


Exhibit 6



Department of Veterans Affairs

INITIAL POST TRAUMATIC STRESS (PTSD)
DISABILITY BENEFITS QUESTIONNAIRE**IMPORTANT:** This form is for use by VA staff and VA staff psychiatrists or psychologists.

NAME OF PATIENT/VETERAN

Terry Capone

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

→**IMPORTANT -** If the veteran experiences a medical or mental emergency during the interview, please terminate the interview and obtain help, using local resources as appropriate. You may also contact the VA Suicide Prevention Hotline at 1-800-273-TALK. Stay on the Hotline until help can link the veteran to emergency care.**NOTE -** Your patient is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the veteran's claim.

CRITERIA INFORMATION FOR PTSD EXAMINER

IMPORTANT: In order to conduct an initial examination for PTSD, the examiner must meet one of the following criteria: (1) be a board-certified or board-eligible psychiatrist; (2) a licensed doctorate-level psychologist; (3) a doctorate-level mental health provider under the close supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist; (4) a psychiatry resident under close supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist; (5) or a clinical or counseling psychologist completing a one-year internship or residency (for purposes of a doctorate-level degree) under close supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist.

SECTION I - DIAGNOSIS

1A. DOES THE VETERAN HAVE A DIAGNOSIS OF PTSD THAT CONFORMS TO DSM IV CRITERIA?

☒ YES ☐ NO (If "Yes," complete Item 1B) (If "No," complete Item 1C)PTSD

1B. PROVIDE THE DATE OF DIAGNOSIS, ICD CODE, & FACILITY

ICD CODE:

DATE OF DIAGNOSIS

NAME OF DIAGNOSING FACILITY OR CLINICIAN

DR. PRAYLOW

1C. PTSD NOT DIAGNOSED (Check all that apply)

- ☐ VETERAN'S SYMPTOMS DO NOT MEET THE DIAGNOSTIC CRITERIA FOR PTSD UNDER DSM IV CRITERIA
- ☐ VETERAN HAS ANOTHER AXIS I-IV DIAGNOSIS (If checked, list the Axis I-IV diagnosis and then complete the VA Form 21-0960P-2, Mental Health Disorder Disability Benefits Questionnaire and/or the VA Form 21-0960P-1, Eating Disorder Disability Benefits Questionnaire in lieu of this questionnaire):
- ☐ OTHER TRAUMA SPECTRUM DISORDER
- ☐ VETERAN DOES NOT HAVE A MENTAL DISORDER THAT CONFORMS WITH DSM IV CRITERIA
- ☐ OTHER (Describe):

1D. IF THERE IS A DIAGNOSIS OF PTSD, DOES THE VETERAN ALSO HAVE ANY OTHER AXIS I-IV DIAGNOSES?

☒ YES ☐ NO

(If "Yes," indicate additional diagnoses below)

☒ MENTAL HEALTH DISORDER #1(If checked, provide the ICD code PTSD, the date of the diagnosis _____ and the name of the diagnosing facility or clinician _____).

(If checked, indicate the Axis category):

☒ AXIS I ☐ AXIS II ☐ AXIS III ☐ AXIS IV

(If checked, describe the condition and its relationship to PTSD):

☐ MENTAL HEALTH DISORDER #2

(If checked, provide the ICD code _____, the date of the diagnosis _____ and the name of the diagnosing facility or clinician _____).

(If checked, indicate the Axis category):

☐ AXIS I ☐ AXIS II ☐ AXIS III ☐ AXIS IV

(If checked, describe the condition and its relationship to PTSD):

☐ MENTAL HEALTH DISORDER #3

(If checked, provide the ICD code _____, the date of the diagnosis _____ and the name of the diagnosing facility or clinician _____).

(If checked, indicate the Axis category):

☐ AXIS I ☐ AXIS II ☐ AXIS III ☐ AXIS IV

(If checked, describe the condition and its relationship to PTSD):

(If additional diagnoses, describe using the above format):

SECTION II - DIAGNOSTIC CRITERIA

2. THE DIAGNOSTIC CRITERIA FOR PTSD, REFERRED TO AS CRITERIA A-F, ARE FROM THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 4TH EDITION (DSM-IV) (Check boxes next to symptoms below)

CRITERION A: The Veteran has been exposed to a traumatic event where both A and B were present

- ☒ Veteran experienced, witnessed or was confronted with an event that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
- ☒ Veteran's response involved intense fear, helplessness or horror
- ☐ No exposure to a traumatic event

CRITERION B: The traumatic event is persistently reexperienced in 1 or more of the following ways:

- ☒ Recurrent and distressing recollections of the event, including images, thoughts or perceptions
- ☒ Recurrent distressing dreams of the event
- ☐ Acting or feeling as if the traumatic event were recurring; this includes a sense of reliving the experience, illusions, hallucinations and dissociative flashback episodes, including those that occur on awakening or when intoxicated
- ☐ Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- ☒ Physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- ☐ The traumatic event is not persistently reexperienced

CRITERION C: Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (*not present before the trauma*), as indicated by 3 or more of the following:

- ☒ Efforts to avoid thoughts, feelings or conversations associated with the trauma
- ☒ Efforts to avoid activities, places or people that arouse recollections of the trauma
- ☐ Inability to recall an important aspect of the trauma
- ☒ Markedly diminished interest or participation in significant activities
- ☒ Feeling of detachment or estrangement from others
- ☐ Restricted range of affect (e.g., unable to have loving feelings)
- ☐ Sense of a foreshortened future (e.g., does not expect to have a career, marriage, children or a normal life span)
- ☐ No persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness

CRITERION D: Persistent symptoms of increased arousal, not present before the trauma, as indicated by 2 or more of the following:

- ☒ Difficulty falling or staying asleep
- ☒ Irritability or outbursts of anger
- ☒ Difficulty concentrating
- ☒ Hypervigilance
- ☒ Exaggerated startle response

☐ No persistent symptoms of increased arousal

CRITERION E: Duration of symptoms

- ☒ The duration of the symptoms described in Criteria B, C and D is more than 1 month
- ☐ The duration of the symptoms described in Criteria B, C and D is less than 1 month
- ☐ No symptoms

CRITERION F: Clinically significant distress or impairment

- ☒ The symptoms described above in Criteria B, C and D cause clinically significant distress or impairment in social, occupational, or other important areas of functioning
- ☐ The symptoms described above in Criteria B, C and D do NOT cause clinically significant distress or impairment in social, occupational, or other important areas of functioning
- ☐ No symptoms

SECTION III - EVIDENCE REVIEW

NOTE: In order to provide an accurate medical opinion, the veteran's records should be reviewed (if available).

3A. WAS THE VETERAN'S VA CLAIMS FILE REVIEWED?

☒ YES ☐ NO (If "No," complete Item 3B)

3B. CHECK ALL RECORDS THAT WERE REVIEWED AS PART OF THIS EXAMINATION.

- ☐ Military service treatment records
- ☐ Military service personnel records
- ☐ Military enlistment examination
- ☐ Military separation examination
- ☐ Military post-deployment questionnaire
- ☐ Department of Defense Form DD214, Separation Documents
- ☒ Veterans Health Administration medical records (VA treatment records)
- ☒ Civilian medical records
- ☐ Interviews with collateral witnesses (family and others who have known the veteran before and after military service)
- ☐ No records were reviewed
- ☐ Other: _____

SECTION IV - STRESSORS

NOTE: For VA purposes, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

4. STRESSORS

A. STRESSOR # 1:

MVA

Describe the circumstance of stressor # 1 Car accident

Are the veteran's symptoms related to this stressor?

☒ YES ☐ NO (If "No," explain) _____

Does this stressor meet Criterion A (i.e., is it adequate to support the diagnosis of PTSD)?

☒ YES ☐ NO

Is this stressor related to the veteran's fear of hostile military or terrorist activity?

☒ YES ☒ NO (If "No," explain) _____

B. STRESSOR # 2:

Fire department saw individuals injured + burned killed, including kids

Describe the circumstance of stressor # 2

Are the veteran's symptoms related to this stressor?

☒ YES ☐ NO (If "No," explain) _____

Does this stressor meet Criterion A (i.e., is it adequate to support the diagnosis of PTSD)?

☒ YES ☐ NO

Is this stressor related to the veteran's fear of hostile military or terrorist activity?

☐ YES ☒ NO (If "No," explain) _____

C. STRESSOR # 3:

Describe the circumstance of stressor # 3

Are the veteran's symptoms related to this stressor?

☐ YES ☐ NO (If "No," explain) _____

Does this stressor meet Criterion A (i.e., is it adequate to support the diagnosis of PTSD)?

☐ YES ☐ NO

Is this stressor related to the veteran's fear of hostile military or terrorist activity?

☐ YES ☐ NO (If "No," explain) _____

D. ADDITIONAL STRESSORS (If additional stressors, describe):

SECTION V - SYMPTOMS

5. SYMPTOMS - FOR EACH LEVEL BELOW, CHECK ALL SYMPTOMS THAT APPLY. CONSIDER THE CUMULATIVE IMPACT OF ALL DIAGNOSED MENTAL DISORDERS THAT THE EXAMINER JUDGES RELATED TO MILITARY SERVICE, WITHOUT ATTEMPTING TO DIFFERENTIATE WHICH SYMPTOMS ARE SPECIFICALLY CAUSED BY WHICH MENTAL DISORDER

A. LEVEL I -

Has the veteran been diagnosed with PTSD (and/or other mental disorder), but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medications?

☐ YES ☐ NO

B. LEVEL II -

Does the veteran have occupational and social impairment due to mild or transient symptoms, which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or are the veteran's symptoms controlled by continuous medication?

☒ YES ☐ NO

C. LEVEL III -

Does the veteran have any symptoms from the list below?

☒ YES ☐ NO (If "Yes," check all that apply)

- ☒ Depressed mood
- ☒ Anxiety
- ☒ Suspiciousness
- ☒ Panic attacks that occur weekly or less often
- ☒ Chronic sleep impairment
- ☒ Mild memory loss, such as forgetting names, directions or recent events

D. LEVEL IV -

Does the veteran have any symptoms from the list below?

☒ YES ☐ NO (If "Yes," check all that apply)

- ☐ Flattened affect
- ☐ Circumstantial, circumlocutory or stereotyped speech
- ☐ Panic attacks more than once a week
- ☐ Difficulty in understanding complex commands
- ☐ Impairment of short - and long - term memory, for example, retention of only highly learned material, while forgetting to complete tasks
- ☐ Impaired judgment
- ☐ Impaired abstract thinking
- ☒ Disturbances of motivation and mood
- ☐ Difficulty in establishing and maintaining effective work and social relationships

E. LEVEL V -

Does the veteran have any symptoms from the list below?

☐ YES ☒ NO (If "Yes," check all that apply)

- ☐ Suicidal ideation
- ☐ Obsessional rituals which interfere with routine activities
- ☐ Speech intermittently illogical, obscure, or irrelevant
- ☐ Near-continuous panic or depression affecting the ability to function independently, appropriately and effectively
- ☐ Impaired impulse control, such as unprovoked irritability with periods of violence
- ☐ Spatial disorientation
- ☐ Neglect of personal appearance and hygiene
- ☐ Difficulty in adapting to stressful circumstances, including work or a work like setting
- ☐ Inability to establish and maintain effective relationships

F. LEVEL VI -

Does the veteran have any symptoms from the list below?

☐ YES ☒ NO (If "Yes," check all that apply)

- ☐ Gross impairment in thought processes or communication
- ☐ Persistent delusions or hallucinations
- ☐ Grossly inappropriate behavior
- ☐ Persistent danger of hurting self or others
- ☐ Intermittent inability to perform activities of daily living, including maintenance of minimal personal hygiene
- ☐ Disorientation to time or place
- ☐ Memory loss for names of close relatives, own occupation, or own name

SECTION V - SYMPTOMS (Continued)

5G. DOES THE VETERAN HAVE ANY OTHER SYMPTOMS ATTRIBUTABLE TO PTSD (and/or other mental disorder) THAT ARE NOT LISTED ON PAGE 4?

☐ YES ☒ NO (If "Yes," describe):

Calm, cooperative, verbal, logical, O&A, does not SE/HA

SECTION VI - OCCUPATIONAL AND SOCIAL IMPAIRMENT

6. WHICH OF THE FOLLOWING BEST REPRESENTS THE VETERAN'S LEVEL OF OCCUPATIONAL AND SOCIAL IMPAIRMENT?

- ☐ A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication
- ☐ Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or: symptoms controlled by medication
- ☐ Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation
- ☒ Occupational and social impairment with reduced reliability and productivity
- ☐ Occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking and/or mood
- ☐ Total occupational and social impairment

SECTION VII - GLOBAL ASSESSMENT OF FUNCTIONING (GAF)

7. PROVIDE THE CURRENT GLOBAL ASSESSMENT OF FUNCTIONING (GAF) SCORE

N/A

SECTION VIII - COMPETENCY

8. IS THE VETERAN CAPABLE OF MANAGING HIS OR HER FINANCIAL AFFAIRS?

☒ YES ☐ NO (If "No," explain):

SECTION IX - DIAGNOSTIC TESTING

9. HAS ANY MENTAL HEALTH TESTING BEEN PERFORMED?

☒ YES ☐ NO (If "Yes," provide dates, types of testing and results):

SECTION X - FUNCTIONAL IMPACT

10. DOES THE VETERAN'S PTSD AND/OR OTHER MENTAL DISORDER(S) IMPACT HIS OR HER ABILITY TO WORK?

☐ YES ☒ NO (If "Yes," describe impact, providing one or more examples)

SECTION XI - REMARKS

11. REMARKS (If any): *PTSD is at least as likely as not due to MVA + duties as a firefighter from 1997-2014. (7/19)*

SECTION XII - PSYCHIATRIST/PSYCHOLOGIST CERTIFICATION AND SIGNATURE

CERTIFICATION - To the best of my knowledge, the information contained herein is accurate, complete and current.

12A. PSYCHIATRIST/PSYCHOLOGIST SIGNATURE AND TITLE

12B. PSYCHIATRIST/PSYCHOLOGIST PRINTED NAME

12C. DATE SIGNED

Tanya C. Dilligan

Tanya Dilligan

3-20-19

12D. PSYCHIATRIST/PSYCHOLOGIST FAX

12E. PS

12F. INSE NUMBER

12G. PSYCHIATRIST/PSYCHOLOGIST ADDRESS

3

NOTE - For medical information, including additional examinations, if necessary to complete VA's review of the veteran's application.

IMPORTANT - PSYCHIATRIST/PSYCHOLOGIST send the completed form to:

(VA Regional Office FAX No.)

NOTE - A list of VA Regional Office FAX Numbers can be found at www.va.gov/disabilityexams or obtained by calling 1-800-827-1000.

Exhibit 7

March 11, 2019

Department of Veterans Affairs
San Diego VA Benefits Office
8810 Rio San Diego Drive
San Diego, CA 92108

C
Terry Capone

ADMINISTRATIVE DECISION

ISSUE: Statutory Bar Determination Under 38 USC 5303(a)

EVIDENCE:

- Statutory Bar Determination Under 38 USC 5303(a) Determination Administrative Decision dated December 15, 2014 and evidence listed therein.
- Statement of the Case (SOC) dated March 30, 2017 and evidence listed therein.
- Deferred Rating Decision raising the issue of insanity dated November 6, 2018.
- Rating Decision resolving the issue of insanity dated February 26, 2019.

DECISION:

This decision is an addendum to Statutory Bar Determination Under 38 USC 5303(a) Determination Administrative Decision dated December 15, 2014 as the issue of insanity was raised in Deferred Rating Decision dated November 6, 2018 and was resolved in Rating Decision dated February 26, 2019.

Mr. Capone's character of service from October 26, 1988 to April 16, 1997 is considered Honorable for VA Purposes under 38 CFR 3.12(b), and entitlement is established to all benefits administered by the VA for any disability incurred or aggravated during active military, naval, or air service in line of duty during this period of service.

Mr. Capone is entitled to health-care under Chapter 17 of Title 38, U.S.C. for any disability incurred or aggravated during active military, naval, or air service in line of duty for service from October 26, 1988 to April 16, 1997.

This discharge was a bad conduct discharge issued by sentence of a general court-martial.

REASONS AND BASES:

According to 38 U.S.C. 101(18), the term "discharge or release" includes (A) retirement from the active military, naval, or air service, and (B) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable. VA regulations consider the satisfactory completion of one

contracted period of enlistment while serving on a subsequent contracted period of service under a new enlistment to be a conditional discharge. An individual can establish eligibility to VA benefits under 38 U.S.C. 101(18) when that individual enlists or reenlists prior to the completion of a period of active service. If the period of active service for which the individual was obligated to serve is satisfactorily completed, eligibility to VA benefits is established. The individual can be entitled to VA benefits under 38 U.S.C. 101(18) even if, 1) The subsequent discharge was under dishonorable or other than honorable conditions, or; 2) A statutory bar exists for entitlement to benefits for the later period of service. M21-1 III.v.1.B.5.a-h also applies.

According to 38 CFR 3.12(a), if the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

According to 38 CFR 3.12(b), a discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

According to 38 CFR 3.12(c)(2), benefits are not payable where the former service member was discharged or released by reason of the sentence of a General Court-Martial.

According to 38 CFR 3.354(a), an insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides. As stated in 38 CFR 3.354(b), when a rating agency is concerned with determining whether a Veteran was insane at the time he committed an offense leading to his court-martial, discharge or resignation (38 U.S.C. 5303(b)), it will base its decision on all the evidence procurable relating to the period involved, and apply the definition in paragraph (a) of this section.

As stated in 38 CFR 3.360(a), the health-care and related benefits authorized by Chapter 17 of Title 38, United States Code shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty. Under 38 CFR 3.360(b), with certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in 38 CFR 3.12(c) applies.

According to 38 U.S.C. 5303(a), the discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence, or of an officer by the acceptance of such officer's resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to Section 1553 of Title 10.

According to 38 U.S.C. 5303(b), if it is established to the satisfaction of the Secretary that at the time of the commission of an offense leading to a person's Court-Martial, discharge, or resignation, that person was insane, such person shall not be precluded from benefits under laws administered by the Secretary based upon the period of service from which such person was separated.

The issue of insanity was raised per M21-1 III.v.1.E.1.a in Deferred Rating Decision dated November 6, 2018 based on the evidence of record. Per M21-1 III.v.1.E.1.b-d and M21-1 IX.ii.2.6, Rating Decision dated February 26, 2019 deemed that Mr. Capone was insane at the time of the circumstances surrounding his discharge.

Statutory Bar Determination Under 38 USC 5303(a) Determination Administrative Decision dated December 15, 2014 outline the Reasons and Bases for determining service from October 26, 1988 to April 16, 1997 Dishonorable for VA Purposes under 38 CFR 3.12(c)(2), and as such, will not be repeated in this Character of Discharge Determination. However, Deferred Rating Decision dated November 6, 2018 raised the issue of insanity based on the evidence of record. Rating Decision dated February 26, 2019 deemed that Mr. Capone was insane at the time of the circumstances surrounding his discharge.

Additionally, an individual can establish eligibility to VA benefits under 38 U.S.C. 101(18) when that individual enlists or reenlists prior to the completion of a period of active service. If the period of active service for which the individual was obligated to serve is satisfactorily completed, eligibility to VA benefits is established. The individual can be entitled to VA benefits under 38 U.S.C. 101(18) even if, 1) The subsequent discharge was under dishonorable or other than honorable conditions, or; 2) A statutory bar exists for entitlement to benefits for the later period of service. A careful review of the Military Service Records of record do not reveal that Mr. Capone reenlisted during this service period. Mr. Capone was placed on involuntary appellant leave and was confined for 18 months.

Therefore, considering the February 26, 2019 Rating Decision that deemed that Mr. Capone was insane at the time of the circumstances surrounding his discharge, it is therefore determined that

his character of service for the period from October 26, 1988 to April 16, 1997 is considered Honorable for VA Purposes under 38 CFR 3.12(b), and entitlement is established to all benefits administered by the VA for any disability incurred or aggravated during active military, naval, or air service in line of duty during this period of service.

Mr. Capone is entitled to health-care under Chapter 17 of Title 38, U.S.C. for any disability incurred or aggravated during active military, naval, or air service in line of duty for service from October 26, 1988 to April 16, 1997.

Submitted By:	 320	Digitally signed by Melissa D. Brown 521320 Date: 2019.03.11 13:16:01 -07'00'	Date: <u>03/11/2019</u>
Concurred By:	 19596	Digitally signed by GABRIEL TAROMA 119596 Date: 2019.03.11 15:14:35 -07'00'	Date: <u>03/11/2019</u>
Approved By:	 VANS	Digitally signed by WILLIE J. EVANS 122102 Date: 2019.03.11 15:56:51 -07'00'	Date: <u>03/11/2019</u>

Exhibit 8

=====

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4518040202
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Product Description	Sale Qty	Final Price
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(Saturday 10/06/2018)
(USPS Tracking #)
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First-Class	1	\$2.05
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(Tuesday 10/09/2018)

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RstrDel

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(70173040000001094730)
(Recipient name: CYNTHIA DOOLEY)

Return	1	\$2.75
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Receipt

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THE CAPONE FAMILY

October 5, 2018

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

RE: Terry Capone v. City of Columbia
WCC File Nos.: 1322451, 1319203, 142087

Dear Commission and Judicial Director,

Please Notice To Take Judicial Notice Pursuant to South Carolina Rules of Civil Procedure 201(c)(2),
Regulations 67-214, 67-215 and any others authority of law on behalf of myself the Appellate/Claimant for filing
in the above referenced matters.

By copy of this letter to Cynthia C Dooley, Attorney for Defendants, I am notifying her of this submission, and serving a
copy upon her by personal service or USPS certified mailing.

Thank you for your consideration.

With The Highest Regards,

Enclosure(s) as Stated

Cc:

Cynthia C. Dooley Attorney for defendants (w/all enclosures)

Mr. Terry H. Capone
Fire Battalion Chief-Retired
130 Summerlea Drive
Columbia, SC 29203
Email: tcapone@liberty.edu

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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

TERRY H CAPONE,

Employee
Pro Per Claimant,

CITY OF COLUMBIA,

et al.,

Employer (Self-Insured)
Defendants.

PROOF OF SERVICE

I certify that a copy of the enclosed Notice to Take Judicial Notice and others on behalf of myself the Claimant for filing in the above referenced matters for filing and was served upon SC Workers Compensation Commission and Attorney for Defendants, This 5th day of October 2018, In accordance With Regulations 67-211 and such other law as may be applicable, by depositing a copy to Cynthia Dooley address P.O . Box 1473 Columbia SC 29203 by personal service or certified mail, return receipt requested, delivery restricted to the addressee or better.



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

October 5, 2018
Columbia, South Carolina

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

1 Terry H Capone ,

2 Pro Per Claimant

3 *Employee*

4 v.

5 City of Columbia,

6 *Employer*

7 And

8 Companion Property and Casualty Group,

9 *Carrier*

10 Defendants

NOTICE TO TAKE
JUDICIAL NOTICE

11 **TO: COMMISSIONERS, SOUTH CAROLINA WORKERS' COMPENSATION**
12 **COMMISSION, DEFENDANTS AND THEIR ATTORNEYS OF RECORD:**

13 **PLEASE TAKE NOTICE**, In Propria Persona, on my own behalf, in person, I
14 Terry H Capone, Pursuant to S.C. R. Civ. P. 201 (c)(2), herby respectfully move this Court to
15 Take Judicial Notice, in the above referenced matters.

16 1. **NOTICE: STATUS**, Pursuant to 28 U.S.C § 1746, I hereby declare as follows: I am Mr.
17 Terry H. Capone, I was unable to file a timely response to the void December 2, 2015 decision,
18 that was procured by Fraud Upon the Court (omitting evidence) that effectively denied me a
19 full and fair hearing on the merits of my claim and is, and was a *Denial of Procedural Due*
20 *Process under the Fifth Amendment of the U.S. Constitution*, as applicable to the states through
21 the Fourteenth Amendment by Commissioner Gene Henry McCaskill (Chairman),[who I am
22 unable to find his name on South Carolina Judicial Department Attorney Information Search, is
23 practicing law without a license] and City of Columbia Attorney Dana M Thye, for
24 Defendants, who committed Fraud Upon the Court, False Statements, Fraudulent Concealment
Exception, Active Concealment of Fraud in Real Property, both who I know to be artificial and
had no Standing, no Authority and no Jurisdiction to deny *Worker's Compensation Benefits*:

TERRY H CAPONE PRO PER, CLAIMANT v. CITY OF COLUMBIA, EMPLOYER

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

1 that are automatic and guaranteed and with "No fault" by the Constitution. I remain and was
2 under disability prior to a hearing held August 21, 2015; this is due to multiple disabilities; that
3 include post traumatic stress disorder (PTSD) an occupational disease; major depression
4 disorder; anxiety and irritable bowel syndrome with diarrhea (IBS-D), and Neurocognitive
5 Disorder due to Traumatic Brain Injury under disability, as a Firefighter which is permanently
6 and totally disabled as a result of firefighting service related disabilities in the Columbia
7 (RICHLAND) State of South Carolina, by four (4) State agencies as well as federal agencies
8 (evidence is before this court), which include 1. The State of South Carolina Police Retirement
9 System (PORS) as of 3/10/2014; 2. The State of South Carolina Internal Revenue Service as of
10 11/12/2014 Pursuant to the provisions of Section 3 of Article X of the state constitution and
11 subject to provisions of sections 12- 4-720, there is exempt from Ad Valorem Taxation because
12 I am a firefighter who is permanently and totally disabled as a result of firefighter service
13 connected disability; 3. The State of South Carolina Employment And Workforce as of
14 10/17/2014; 4. The State of South Carolina Education Commission (2014) as a result of being
15 totally and permanently disabled in the line of duty, my children are entitled to free educational
16 benefits and my daughters are enrolled at the University of South Carolina, one in criminal
17 justice to become a lawyer and other nursing, to become a nurse midwife, both (Columbia
18 campus) and my son graduated with a Communications degree University of South Carolina
19 (upstate) campus SC Code § 59-111-120; U.S. Department of Education, and U.S. Social
20 Security Administration Office of Disability Adjudication as of October 21, 2013, day unable
21 to return to work and reported disablement as a matter of law, (October 18, 2013, last day
22 worked on Fire 2nd shift) to be "Severe" impairments (20 CFR 404.1520 (c)). And the
23 claimant also suffers from a variety of osteoarthritis, carpal tunnel syndrome; sleep related
24 breathing disorder, and migraine headaches, decided September 12, 2016. I have suffered from
temporary insanity. No Statute of limitations apply, as stated under the law based on Mental
Incompetence Title 42 Workers' Compensation SC Code § 42-15-50, SC Code § 15-3-40

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

1 exceptions as to person under disability; SC Code §15-3-60 effects of two more disabilities,
2 and SC Code § 15-3-50, disability must exist when right accrued.

3
4 **2. FURTHER NOTICE: STANDING** In this workers' compensation case, Appellant Mr.
5 Terry H Capone, Fire Battalion Chief-Disability Retired by the State of South Carolina Police
6 Retirement System, is of African -Decent (Claimant) is a Natural-born citizen of The Unites
7 States, The United States of America, and The State of South Carolina, and resides in Richland
8 County, South Carolina. The hearing held August 21, 2015 and decision filed December 2,
9 2015, "Extraordinary circumstances" exist, in which deprived me of "substantial rights" and
10 "fundamental rights" are prejudiced and because the Administrative findings, inferences,
11 conclusions, or decisions: violated constitutional and statutory provisions; exceeds statutory
12 authority of the agency; was made upon unlawful procedures; is effected by an error of law; is
13 clearly erroneous in view of the reliable, probative, substantial evidence on the whole record,
14 all records, documents and media to include any and all that lay before, or the possession of the
15 Jurisdiction of this Commission, including WCC File No: 1719990, 1519702, 1423445,
16 15036555, 1322789; and is arbitrary and capricious and characterized by abuse of discretion
17 and unwarranted exercise of discretion.

18 **3. FURTHER NOTICE:**South Carolina Workers' Compensation WCC FILE NO. 1322451
19 date of initial diagnosis was 11/07/2013; I sustained an aggravation of a psychological injury to
20 my "Psyche"; WCC FILE NO. 319203 on or about Oct 12, 2013, in which I re-injured my
21 bilateral hands and wrist; WCC File 1420487, due to a "scrivener's error" was originally noted
22 as June 24, 2014, but at the hearing held Aug 21, 2015, was corrected twice on the record
23 under oath, to be "June 24, 2013", (with no objection) sustained an injury to his toe Mold
24 (Fungus) to include Cladosporium; and "Chaetomiun" a now known toxic mold (fugus) at the
time was also diagnosed with 1. Tinea pedis 2. Ear pain/Vertigo 3. Onychomycosis 4.

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

1 Headaches , all while working at the employed at the City of Columbia, Columbia Fire
2 Department, and are known Botoxin symptoms' Top Symptoms associated with
3 Mold/Mytoxin-Associated Illness.

4
5 4. **FURTHER NOTICE:** I was not made aware until on or about December 2017, the City of
6 Columbia, Columbia South Carolina, was aware of Mold (Fungus) in Fire Stations, because a
7 publicly published news article dated: Thursday, May 21, 2015, that was uncontested, showed
8 two types: Aspergillus/ Penicillium and "Chaetomium". The same mold (fungus) determined
9 by lab results to be found on my body.

10 5. **FURTHER NOTICE:** Under the Act, The Defendants struck the "grand bargain", impart
11 that bargain gave me benefits (property) that is clearly defined as 1. "automatic" 2. "guaranteed"
12 and 3. regardless of fault "no fault"[emphasis], that are constitutionally protected. To allow
13 anything is else is a clear violation and deprivation of those constitutionally protected rights to
14 benefits (property) and clearly "frivolous" in violations in regard to rule 11 South Carolina rule
15 of civil procedures, Signing of Pleadings; Attorneys (A) and The South Carolina Frivolous
16 Civil Proceedings Sanction Act S.C. Code Ann. § 15-36-10, et seq.

17
18 6. **FURTHER NOTICE,** The Defendants and their Attorneys submitted False Information
19 with regards to my Average Weekly Wage (AWW) to this Commission: The defendants were
20 well aware of The City of Columbia violations of law in regards to Firefighters pay
21 calculations, in an effort to correct this violation defendant made changes to the way Fire Shift
22 Employees pay was calculated. The disability of a workers' compensation claimant reaches
23 into the future, not the past; his loss as a result of injury must be thought of in terms of its
24 impact on probable future earnings, for purposes of calculating the claimant's average weekly
wage. Code 1976, § 42-1-40. **Compensation rate \$2611.20 x .666= AWW \$1739.06**

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

1 **7. FURTHER NOTICE**, Stands in further violation *Deprivation of Equal Protection* and
2 *Denial Of procedural Due process Under the Color of law, constitutional protected rights*. It
3 has been my experience that the SC Workers' Compensation Commission Scheme, all
4 stakeholders are not treated fairly and equitably in a timely manner and the system is not
5 efficient or effective, as it bestowes privileges to white men while denying those to American
6 African/black men and woman of color, in comparison to my own, (3) cases below noted the
7 irregular judgment before us:

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

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

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

20 FRAME, a Caucasian, was often troubled by the dishonorable treatment of African-American
21 employees under his charge from upper management, exacerbated by comments and admitted
22 to never actually witnessing intimate sexual relations. The psychiatrist and psychologist agree
23 (1) that Frame suffers from a bipolar type psychosis; (2) on the day in question he experienced
24 what is known as a "decompensation" (a mental breakdown); (3) there is a certain genetic
predisposition to this kind of psychosis; (4) this "decompensation" was the result of job-related

BEFORE THE SOUTH CAROLINA
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WCC FILE NO. 1322451, 1319203, 1420487

1 stress; and (5) it was in no way certain that Frame would experience such a mental collapse
2 regardless of exterior stimuli (i.e., his job). According to the psychiatrist and psychologist,
3 Frame is not currently capable of full-time work.

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

7 1. The Claimant was predisposed to mental illness, although it is unclear whether the
8 predisposition was a result of genetics or something else. The basis of the predisposition is not
9 relevant.

10 2. The Claimant's work stress was a contributing factor to the decompensation and was the
11 major contributing factor .

12 3. Particular stressors in the workplace included: answering to "five bosses"; the constant
13 anxiety resulting from escalating pressure associated with being on call. Other examples were
14 trying to cut cost without cooperation, insufficient fire extinguishers to put out fires in the
15 plant, conflict with DOT standards or regulations, lack of cooperation from mechanics and
16 drivers, etc.

17 Note: In regards to above "FRAME", the record is absent that FRAME ever "DID
18 ANYTHING" to help African-American people, only that it so troubled him along with other
19 stress that he was made disabled. Disabled by Bipolar Disorder that often runs in families
20 (Hereditary) and inherent parts appear to be part of the mobile genetic elements; of those with
21 this mood disorder (Genetics).

22 CASE #3. Edward L. McLane v. City of Columbia \ African-American Male PHYSICAL
23 INJUIRES/ MENTAL INJURY

24 Mr. Edward L. McLane v. City of Columbia, an African American Firefighter-Fire Engineer --
Retired Claimant was a passenger in a motor vehicle accident (rolled over fire truck), while
employed with the City of Columbia Fire Department, Columbia, South Carolina

6 Mr. McLane was at the time and remains totally and permanently disabled under the law,
7 (6/6/2007).
8

9 **8. FURTHER NOTICE, JUDICIAL NOTICE BY STATUE:**

10 ☒ Status- "The status of a person is his legal position or condition"..." The term is chiefly
11 applied to persons under disability, or persons who have some peculiar condition which
12 prevents the general law from applying to them in the same way as it does to ordinary persons.
13 Sweet. See Barney v. Tourtellotte, 138 Mass. 108; De la Montanya v. De la Montanya, 112
14 Cal. 115. 44 Pac. 345, 32 L.R.A. 82, 53 Am. St. Rep. 105; Duram v. Durham, 57 111. App.407
15 There are certain rights and duties, with cer- tain capacities and incapacities to take rights and
16 incur duties, by which persons, as subjects of law, are variously determined to certain classes.
17 The rights, duties, capacities, or incapacities which determine a given person to any of these
18 classes, constitute a condition or status with which the person is invested. Aust. Jur. -Black's
19 Law Dictionary 2nd edition

20 ☒ violates art. I, § 22, of our State Constitution on several grounds. This provision states:

21 No person shall be finally bound by a judicial or quasi-judicial decision of an
22 Administrative agency affecting private rights except on due notice and an opportunity
23 to be heard; nor shall he be subject to the same person for both prosecution and
24 adjudication; nor shall he be deprived of liberty or property unless by a mode of
procedure prescribed by the General Assembly, and he shall have in all such instances

TERRY H CAPONE PRO PER, CLAIMANT v. CITY OF COLUMBIA, EMPLOYER

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1 (RICHLAND), due to his injuries included" whole body" and "psyche", did not receive the
2 maximum award for total disability or death limited by the law to five hundred 500 weeks of
3 compensation; guaranteed under the act. This was fraud Upon the Court, by the Commission
4 and the Attorney, and in violation of his procedural due process, illegally withholding his
5 (property) and today has not received the remainder of his benefits guaranteed under the Act.

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1 the right to judicial review. No person shall be deprived of life, liberty, or property
2 without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

3
4
5 ☒ A "legislative act will not be declared unconstitutional unless its repugnance to the
6 constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co.,
7 338 S.C. at 640, 528 S.E.2d at 650. Since the decision in *McCulloch v. Maryland*, 17 U.S. 316
8 (1819), it has been settled that state law that conflicts with federal law is "without effect."
9 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); see also *Maryland v. Louisiana*,
10 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state
11 provisions be without effect.").

12 ☒ The people's right under the Fourth Amendment to "be secure in their persons, houses,
13 papers, and effects, against unreasonable searches and seizures," U.S. CONST. amend. IV,
14 "extends to . the curtilage of the home," *State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490,
15 494 (2009) (citing *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326
16 (1987) and *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001)).

17 ☒ *Vernon v. Harleyville Mut. Cas. Co.*, 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964)
18 (citing 82 C.J.S. Statutes § 384b(2), page 904). "The Court must presume the legislature did
19 not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc.*
20 *v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citing *TNS Mills, Inc. v.*
21 *South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)).

22
23 ☒ *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698
24 (2012) ("[W]hen a statute is clear on its face, it is improvident to judicially engraft extra

BEFORE THE SOUTH CAROLINA
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1 requirements to legislation just because doing so may further the intent behind the statute.");
2 Consumer Advocate v. South Carolina Dept. of Ins., 397 S.C. 599, 602, 725 S.E.2d 708, 710
3 (Ct.App. 2012)("The court has no right to add words [the legislature] omitted, nor to
4 interpolate them on conceits of symmetry and policy.")

5
6 ☒ In seeking out the intention of the legislature from the act as a whole the court are not bound
7 to close their eyes to the consequences of the construction contended for (Ewen v. Thompson-
8 Starrett Co., 208 N.Y.245). It is to be presumed that the lawmakers did not intend an unjust,
9 absurd or oppressive result (Flynn v. Prudential Ins. Co., 207 N.Y.315; People v. Ahearn, 196
10 N.Y. 221).

11 ☒ In 1911, in response to these common-law inequities, the legislature passed our Workers'
12 Compensation Act. L, 1911, c. 95. The legislature involved historic trade-off whereby
13 employees relinquish their right to pursue common law remedies in exchange for automatic
14 entitlement to certain, but reduced, benefits whenever they suffered injuries by accident arising
15 out and in the course of employment.

16
17 ☒ Pursuant to the statutory scheme implemented by the Act, the employee gave up his
18 common law rights to sue his employer in tort, but recovery for injuries arising out of and in
19 the course of his employment became automatic without regard to any fault on his part. The
20 employer, who gave up the right to plead the numerous common law defenses, was compelled
21 to pay, but liability became fixed under strict and comprehensive statutory scheme, and was
22 not subjected to the sympathies of jurors whose compassion for fellow employees often led to
23 high recovery. (See 81 Am.Jur.2d Worker's Compensation sec. 1 et seq. (1976.) This trade- off
24 between employer and employees promoted the fundamental purpose of the Act, which was to

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1 afford protection to employees by proving them with prompt and equitable compensation for
2 their injuries. See *O'Brien v. Rautenbush* (1956), 10 III.2d 167.

3
4 ☒ The Workers' Compensation Act is a form of social legislation wherein and whereby the
5 employer and employee surrender benefits previously enjoyed under common law in exchange
6 for other benefits provided under the Act; one such benefit is an employee's swift and sure
7 compensation. *Brown v. Bi-Lo, Inc.* (S.C.App. 2000) 341 S.C. 611, 535 S.E.2d 445, rehearing
8 denied, certiorari granted, certiorari granted, reversed 354 S.C.436, 581 S.E.2d 836. Workers'
9 Compensation 11.

10 ☒ The South Carolina Workmen's Compensation Act having been fashioned to the North
11 Carolina Workmen's Compensation Act, and practically a copy thereof, the opinions of the
12 Supreme Court of that state construing such act are entitled to great respect. *Nolan v. Daley*
13 (S.C. 1952) 222 S.C. 407, 73 S.E.2d 449.

14
15 ☒ Since the South Carolina Workers' Compensation Act was tailored after the North Carolina Act,
16 and opinions of the North Carolina Supreme Court construing the North Carolina Act are entitled
17 to great weight with the appellate courts of South Carolina. *Holly v. Owens Corning Fiberglas*
18 *Corp.* (S.C.App.1990) 301 S.C. 519, 392, S.E.2d 804, certiorari granted, opinion adopted 302
19 S.C.518, 397 S.E.2d 377. Workers' Compensation 45.

20 ☒ Since the South Carolina Workers' Compensation Act was tailored after the North Carolina Act,
21 the opinions of the Supreme Court of North Carolina's act are entitled to great weight in South
22 Carolina workers' compensation cases. *Corbett v City of Columbia* (S.C.App.1986) 290 S.C. 71,
23 348 S.E.2d 191, reversed 294 S.C. 327, 364 S.E.2d 459.

24 ☒ North Carolina court decisions interpreting the state's workers' compensation statute are

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1 entitled to weight when South Carolina courts interpret our workers' compensation law because
2 the South Carolina statute was fashioned after that of North Carolina. *Stephen v. Avins Const.*
3 *Co.*, 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct.App.1996).

4 ☒ The referenced rule, Industrial Commission Rule 801, provides that:

5 In the interest of justice, these rules *may be waived* by the Industrial Commission. The rights of any
6 unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff
7 without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these
8 rules.

9 ☒ The primary purpose of the Workmen's Compensation Act is to protect the workman who
10 actually does the work. *Smith v. Fulmer* (S.C. 1941) 198 S.C. 91, 15 S.E.2d 681

11
12 ☒ The Petty court rejected the Commission's construction of section 97-12 as incompatible
13 with the Workers' Compensation Act-which was "to provide for the injured workman, or his
14 dependents in the event of his death, at the cost of the industry." *Id.* at 328. To that end the
15 court announced the rule of statutory interpretation in North Carolina: "[B]enefits under the
16 Act 'should not be denied by a technical, narrow, and strict construction.' " *Id.* (citing
17 *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E.2d 874, 882 (1968)).

18 ☒ The General Assembly enacted the Act in 1929 to both "provide swift and sure
19 compensation to injured without the necessity of protracted litigation," and to "insure[] a
20 limited and determinate liability for employers." E.g., *Rorie v. Holly Farms*, 306 N.C. 706,
21 709, 295 S.E.2d 458, 460(1982)

22
23 ☒ The philosophy which supports the Work[ers'] Compensation Act is "that the wear
24

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1 and tear of human beings in modern industry should be charged to the industry, just as the wear
2 and tear of machinery has always been charged. And while such compensation is presumably
3 charged to industry, and consequently to the Employer or Owner of the industry, eventually it
4 becomes a part of the fair money cost of the industrial product, to be paid for by the general
5 public patronizing such products."

6
7 ☒ Some personal injury victims who sustain serious traumatic brain injury are often
8 considered by law to be of "unsound mind." A person of "unsound mind" is unable to manage
9 his affairs or to understand his legal rights or liabilities. *Sahf v. Lake Havasu City Assn' for the*
10 *Retarded*, 150 Ariz. 50, 55, 721 P.2d 1177, 1182 (1986); *Allen v. Powell's Int'l, Inc.*, 21 Ariz.
11 *App.* 269, 270, 518 P.2d 588, 589 (1974).

12 ☒ "Active fraudulent Concealment", as defined:

13 The fraudulent concealment exception applies where an employer fraudulently conceals a
14 worker's injury and its connection to employment whereby the concealment results in an
15 aggravation of the injury. There are three necessary elements: (1) the employer conceals the
16 existence of the injury; (2) the employer concealed the connection between the injury and
17 employment; and (3) the injury was aggravated following the employer's concealment. (Lab.
18 Code, § 3602, subd. (b); *Jensen v. Amgen* (2003) 105 Cal. App 4th 1322, 1325; see also,
19 *Palestini v. General Dynamics Corp.* (2002) 99 Cal. App. 4th 80.)

20 ☒ The fraudulent concealment exception more typically arises in situations involving exposure
21 to asbestos, mold, or toxic chemical. (See, e.g. *John-Manville Products v. Sup. Ct* (1980) 27
22 Cal. 3d 465.) It is a very limited exception that requires actual knowledge by the employer and
23 a lack of awareness by the worker of the injury and its relationship to employment
24

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1 ☒ The revestment doctrine provides an exception. As the supreme court originally described it,
2 that doctrine provides that the trial court is revested with jurisdiction if the parties "actively
3 participate without objection in proceedings which are inconsistent with the merits of the prior
4 judgment." *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983).

5
6 ☒ *Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951) (quoting *Cox v.*
7 *Kansas City Refining Co.*, 108 Kan. 320, 195 P. 863 (1921)); see also *Barber v. Minges*, 223
8 N.C. 213, 216, 25 S.E. 2d 837, 839 (1943) ("The primary purpose of legislation of this kind is
9 to compel Industry to Take care if its own wreckage.")

10 ☒ The basic operating principle of the Act is that an employee is **automatically entitled** to
11 certain benefits whenever he suffers either person injury by accident occurring in the course of
12 employment and arising out of it, or incurs an occupational disease. **Those benefits include**
13 **both wages based on disability and medical compensation.** "Medical compensation"
14 includes hospital services "as may reasonably be required to effect a cure or give relief and for
15 such additional time as, in the judgment of the Commission, will lessen the period of
16 disability." N.C.G.S. § 97-2 (19)(1991). "Medical compensation shall be provided by the
17 employer". N.C.G.S. § 97-25 (1991). Medical compensation may be ordered by the
18 Commission if not provided by the employer. *Id.* The pecuniary liability of the employer
19 therefore "shall limited to such charges as prevail in the same community for similar treatment
20 of injured person of a like standard of living when such treatment is paid for by the injured
21 person." N.C.G.S. §97-26 (1991). "[C]harges of hospitals for medical compensation...shall be
22 subject to approval of the Commission." N.C.G.S. §97-90(a)(1991).

23 ☒ The General Assembly created the Industrial Commission see N.C.G.S. §97-77, to
24 administer the provisions of the Act, *Hanks v. Utilities Co.*, 210 N.C.312, 319, 186 S.E. 252,

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1 257 (1936), and authorized the Commission to "make rules, not inconsistent with [the Act], for
2 carrying out the provisions [thereof]. "N.C.G.S. § 97-80(a) (1991).

3
4 ☒The Workers' Compensation Act is the exclusive remedy against an employer for an
5 employee's work-related accident or injury. *Fuller v. Blanchard*, Op. No. 3763 (S.C. Ct. App.
6 filed March 22, 2004) (Shearouse Adv. Sh. No. 12 at 16); see also *Strickland v. Galloway*, 348
7 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South
8 Carolina Workers' Compensation Act covers an employee's work-related accident, the Act
9 provides the exclusive remedy against the employer."). The exclusivity provision of the Act
10 precludes an employee from maintaining a tort action against an employer where the employee
11 sustains a work-related injury. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552
12 S.E.2d 18 (2001).

13 ☒Arizona recognizes that an action for personal injury is a fundamental right guaranteed by
14 the Arizona Constitution. Further, Barrio makes clear that the controlling consideration under
15 Arizona law is the inability of the injured individual to bring an action on his own behalf, not
16 the possibility that a guardian or parent will assert his rights. This is in accord with Arizona's
17 clear policy of protecting the disabled from statutes of limitations.

18 ☒See, e.g., *GJR Invs., Inc. v. Cty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) (stating
19 that "[c]ourts do and should show a leniency to pro se litigants not enjoyed by those with the
20 benefit of a legal education").

21
22 ☒As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 (1972), a pro se
23 complaint, "however inartfully pleaded," must be held to "less stringent standards than formal
24 pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears

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1 "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
2 entitle him to relief." Id. at 520-521, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

3
4 ☒ In Stuckey, the legislature's subsequent adoption of a specific time period was interpreted by
5 the court as "evidence of legislative intent that 'directly' be given a time-related meaning." 339
6 S.C. at 401, 529 S.E.2d at 708.

7 ☒ Nevertheless, workers' compensation is a creature of statute. As such, we are bound to
8 strictly construe the terms of the statute and to rely on the General Assembly to amend the
9 statute where necessary. See Wigfall v. Tideland Utilities, Inc., Op. No. 25628 (S.C. Sup. Ct.
10 filed April 14, 2003) (Shearouse Adv. Sh. No. 14 at pg.10) (because Act provides
11 compensatory system in derogation of common law rights, Court must strictly construe the
12 statute and leave it to the General Assembly to amend and define any ambiguities).

13 ☒ SC CODE §42-9-440 SUSPECTED FALSE STATEMENTS OR
14 MISREPRESENTATIONS TO BE REPORTED TO INSURANCE FRAUD DIVISION OF
15 OFFICE OF ATTORNEY GENERAL. The Commission shall report all cases of suspected
16 false statement or misrepresentation, as defined in Section 38-55-530(D), to the Insurance
17 Fraud Division of the Office of the Attorney

18
19 ☒ The Supremacy Clause of the United States Constitution provides that "the Laws of the
20 United States . shall be the supreme Law of the Land . any Thing in the Constitution or Laws
21 of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State and local laws
22 are thus preempted when they conflict with federal law. See National Helicopter Corp. of Am.
23 v. City of New York, 137 F.3d 81, 88 (2d Cir.1998).

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1 "Waivers of Constitutional Rights, not only must they be voluntary, they must be
2 knowingly intelligent acts done with sufficient awareness." *Brady v. U.S.*, 397 U.S. 742,
3 748

4 ☒ In *United States v. Bagley* (1985), the Court narrowed the reach of *Brady* by stating the
5 suppressed evidence had to be "exculpatory" and "material" for a violation to result in the
6 reversal of a conviction.^[21] Harry Blackmun wrote in *Bagley* that "only if there is a reasonable
7 probability that, had the evidence been disclosed to the defense, the result of the proceeding
8 would have been different. A 'reasonable probability' is a probability sufficient to undermine
9 confidence in the outcome."

10
11 ☒ Since the decision in *M'Culloch v. Maryland*, 17 U.S. 316 (1819), it has been settled that
12 state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*,
13 505 U.S. 504, 516 (1992); see also *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("It is
14 basic to this constitutional command that all conflicting state provisions be without effect.").

15 ☒ the Fourteenth Amendment, provides: "No person shall * * * be deprived of life, liberty, or
16 property, without due process of law." But "[f]or all its consequence, 'due process' has never
17 been, and perhaps can never be, precisely defined. * * * Rather, the phrase expresses the
18 requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its
19 importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise
20 which must discover what 'fundamental fairness' consists of in a particular situation by first
21 considering any relevant precedents and then by assessing the several interests that are at
22 stake." *Lassiter v. Dept. of Social Servs. Of Durham Cty., North Carolina* (1981), 452 U.S. 18,
23 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640.

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1 ☒ The Federal Circuit determined that prior Supreme Court decisions offered relevant guidance
2 by explaining that “[t]o have a property interest in a benefit, a person clearly must have more
3 than an abstract need or desire’ and ‘more than a unilateral expectation of it. He must, instead,
4 have a legitimate claim of entitlement to it.” Id. at 1297 (alteration in original) (citing *Town of*
5 *Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Bd. of Regents of State*
6 *Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

7 ☒ The Federal Circuit also looked to Supreme Court case law addressing due process
8 protections in the context of Social Security Administration (SSA) administrative proceedings.
9 Id Specifically, the Federal Circuit observed that SSA and veterans’ disability benefits were
10 analogous in the sense that they were not awarded on the basis of need or other discretionary
11 criteria, but, rather, “ar[ose] from a source that is independent from the [claim] proceedings
12 themselves.” Id Moreover, the Federal Circuit noted that both SSA and VA disability claims
13 were adjudicated based on statutory terms of eligibility, which “provide[d] an absolute right of
14 benefits to qualified individuals.” Id

15 ☒ In light of the above precedents, the Federal Circuit determined that all applicants for
16 “nondiscretionary, statutorily mandated” VA disability benefits were entitled to them and thus
17 had a property interest in those benefits protected by the Due Process Clause “upon a showing
18 that [they met] the eligibility requirements set forth in the governing statutes and regulations.”
19 Judge Bryson then launched into a discussion of Supreme Court case law preceding *Walters*,
20 which “characterized the critical components of due process as notice and the opportunity to be
21 heard ‘at a meaningful time and in a meaningful manner.’”⁵⁴ He explained that the Supreme
22 Court has set forth three factors that warrant consideration in determining what specific
23 procedures must be provided in particular cases:
24

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(1) "[T]he private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail Id. (quoting Mathews, 424 U.S. at 334-35)

☒ The Citizen Clause is the first sentence of Section 1, Clause 1, of the Fourteenth Amendment to the United States Constitution, reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The Civil Rights Act of 1866, 14 Stat. 27-30, enacted April 9, 1866, was the first United States federal law to define citizenship and affirm that all citizens are equally protected by the law.

☒ The Equal Protection Clause is located at the end of Section 1 of the Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* [emphasis added]

☒ Procedural due process is a legal doctrine in the United States that requires government officials to follow fair procedures before depriving a person of life, liberty, or property.¹¹⁻⁶⁵⁷ When the government seeks to deprive a person of one of those interests, procedural due process requires at least for the government to afford the person notice, an

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1 opportunity to be heard, and a decision made by a neutral decisionmaker. Procedural due
2 process is required by the Due Process Clauses of the Fifth and Fourteenth Amendments to
3 the US Constitution. The article "Some Kind of Hearing" written by Judge Henry
4 Friendly created a list of basic due process rights "that remains highly influential, as to both
5 content and relative priority." The rights, which apply equally to civil due process and criminal
6 due process, are the following:

7 An unbiased tribunal.

8 Notice of the proposed action and the grounds asserted for it.

9 The opportunity to present reasons for the proposed action not to be taken.

10 The right to present evidence, including the right to call witnesses.

11 The right to know the opposing evidence.

12 The right to cross-examine adverse witnesses.

13 A decision based only on the evidence presented.

14 Opportunity to be represented by counsel.

15 The tribunal to prepare a record of the evidence presented.

16 The tribunal to prepare written findings of fact and the reasons for its decision.

17 Not all the above rights are guaranteed in every instance when the government seeks to deprive
18 a person life, liberty, or property. A person is due only notice, an opportunity to be heard, and a
19 decision by a neutral decisionmaker. Courts use various tests to determine whether a person
20 should also be guaranteed any of the other above procedural rights.

21 ☒ 42 U.S. Code § 1981 - Equal rights under the law

22 (a) STATEMENT OF EQUAL RIGHTS

23 All persons within the jurisdiction of the United States shall have the same right in every State
24 and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full
and equal benefit of all laws and proceedings for the security of persons and property as is

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1 enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes,
2 licenses, and exactions of every kind, and to no other.

3 (b) "MAKE AND ENFORCE CONTRACTS" DEFINED

4 For purposes of this section, the term "make and enforce contracts" includes the making,
5 performance, modification, and termination of contracts, and the enjoyment of all benefits,
6 privileges, terms, and conditions of the contractual relationship.

7 (c) PROTECTION AGAINST IMPAIRMENT

8 The rights protected by this section are protected against impairment by nongovernmental
9 discrimination and impairment under color of State law.

10 (R.S. § 1977; Pub. L. 102-166, title I, § 101, Nov. 21, 1991, 105 Stat. 1071.)

11 ☒ SC CODE §42-9-440

12 SUSPECTED FALSE STATEMENTS OR MISREPRESENTATIONS TO BE
13 REPORTED TO INSURANCE FRAUD DIVISION OF OFFICE OF ATTORNEY

14 GENERAL. The Commission shall report all cases of suspected false statement or
15 misrepresentation, as defined in Section 38-55-530(D), to the Insurance Fraud Division of the
16 Office of the Attorney General for investigation and prosecution, if warranted, pursuant to the
17 Omnibus Insurance Fraud and Reporting Immunity Act.

18
19 ☒ Violations in regard to Fed R.Civ.P. Rule 11- South Carolina rule of civil procedures,
20 Signing of Pleadings; Attorneys (A) and The South Carolina Frivolous Civil Proceedings
21 Sanction Act S.C. Code Ann. § 15-36-10, et seq.

22 ☒ To deter Continued Fraud On The Court, This Court must apply: Sanctions
23 Sanctions required for specific misconduct including continued Fraud On the Court, False
24 Statements, Privacy Act Violations and other , pursuant to Karppi v. Greenville Terrazzo Co.,

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1 Inc., in which the court of appeals held that the sanction should be aimed at the specific
2 misconduct of the party sanctioned. 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997).
3 Karppi further notes the policy reasons for the imposition of sanctions, which is to "penalize
4 those whose conduct may be deemed to warrant such a sanction, and to deter those who might
5 be tempted to such conduct in the absence of such a deterrent." 327 S.C. at 545, 489 S.E.2d at
6 683 (citing Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 S.C. 639, 643, 96 S. Ct.
7 2778, 2781 (1976).

8
9
10
11 ☒ South Carolina Code Ann. § 15-36-10 (2005) provides that any person who takes part in the
12 procurement, initiation, and continuation of any civil proceeding is subject to being assessed
13 for payment of all or a portion of the attorney fees and court costs of the other party if (1) he
14 does so primarily for a purpose other than that of securing the proper adjudication of the claim
15 upon which the proceedings are based, and (2) the proceedings have terminated in favor of the
16 person seeking an assessment of the fees and costs.

17
18 ☒ The Commission shall report all cases of suspected false statement or misrepresentation, as
19 defined in Section 38-55-530(D), to the Insurance Fraud Division of the Office of the Attorney
20 General for investigation and prosecution, if warranted, pursuant to the Omnibus Insurance
21 Fraud and Reporting Immunity Act.

22
23 ☒ The fraudulent concealment exception more typically arises in situations involving exposure
24 to asbestos, mold, or toxic chemical. (See, e.g. John-Manville Products v. Sup. Ct (1980) 27

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1 Cal. 3d 465.) It is a very limited exception that requires actual knowledge by the employer and
2 a lack of awareness by the worker of the injury and its relationship to employment.

3
4 ☒ "Nondisclosure is fraudulent when there is a duty to speak." Ardis, 314 S.C. at 517, 431
5 S.E.2d at 270. Non-disclosure becomes fraudulent concealment only when it is the duty of the
6 party having knowledge of the facts to make them known to the other party to the transaction.
7 Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972).

8
9 ☒ While relied upon by the Panel and the circuit court, the South Carolina Rules of Evidence
10 do not apply in proceedings before the Workers' Compensation Commission. S.C. Code Ann.
11 § 1-23-330(1) (2005). We further note that great liberality is exercised in permitting the
12 introduction of evidence in proceedings under the Workers' Compensation Act. Hallums v.
13 Michelin Tire Corp., 308 S.C. 498, 504, 419 S.E.2d 235, 239 (Ct. App. 1992) ("An
14 administrative or quasi judicial body is allowed a wide latitude of procedure and [is] not
15 restricted to the strict rule of evidence adhered to in a judicial court."); Hamilton v. Bob
16 Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("[G]reat liberality is exercised in
17 permitting the introduction of evidence in proceedings under Workmen's Compensation Acts."
18 (quoting Ham v. Mullins Lumber Co., 193 S.C. 66, 82, 7 S.E.2d 712, 719 (1940))); id.
19 ("Hearsay testimony may be admissible in workers' compensation matters if corroborated by
20 facts, circumstances, or other evidence.").

21 ☒ False Information. The evidence establishes by a preponderance of the evidence that affiant
22 made a false statement knowingly or with reckless disregard for the truth, then that false
23 information must be set aside.
24

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1 ☒ A following section, 15-3-670, provides, in part:

2 The limitation provided in §§ 15-3-640 through 15-3-660 may not be asserted as a defense by
3 any person in actual possession or control, as owner, tenant, or otherwise, of the improvement
4 at the time the defective or unsafe condition constitutes the proximate cause of the injury or
5 death for which it is proposed to bring an action, in the *352 event such person in actual
6 possession or control knows, or reasonably should have known, of the defective or unsafe
7 condition. (Emphasis supplied.)

8 ☒ As Larson states, "[t]he physical structure is not just bones and tissues considered as if they
9 were mechanical objects; it is the entire interrelated, living, functioning organism.' Larson,
10 supra, 56-17 ., 315 S.C. 119, 432 S.E.2d 454 (1993); Hamm v. Pub. Serv. Comm'n of S. C.,
11 310 S.C. 13, 425 S.E.2d 28 (1992).

12
13 South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an
14 appeal lies only from a final judgment. Hagood v. Sommerville, 362 S.C. 191, 194-195, 607
15 S.E.2d 707, 708 (2005); S.C.Code Ann. § 14-3-330(1) (1976 and Supp.2004); Rule 72,
16 SCRCPP; Rule 201(a), SCACR. By statute, an appeal from an interlocutory order is permitted in
17 certain circumstances, including when the order is one "involving the merits . [or] affecting a
18 substantial right." S.C.Code Ann. § 14-3-330(1) and (2). Appeals from administrative bodies,
19 such as the Workers' Compensation Commission, follow the same rules, such that an appeal
20 will not lie from an interlocutory order of the Commission unless the order affects the merits or
21 deprives the appellant of a substantial right. Green v. City of Columbia, 311 S.C. 78, 79-80,
22 427 S.E.2d 685, 687 (Ct.App.1993). Orders from the Commission remanding a case to the
23 single commissioner for further proceedings generally do not affect the merits and are not
24 considered final. Chastain v. Spartan Mills, 228 S.C. 61, 65-67, 88 S.E.2d 836, 837-38 (1955).

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

1 ☒ An exception exists to the application of res judicata where the original judgment was
2 obtained through the use of fraud. *Heiser v. Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed.
3 970 (1946); *see also Montalvo v. Banco Comercial de Mayaguez (In re Montalvo)*, 157 B.R.
4 510 (D.P.R.1993).

5
6 ☒ Real Property- Area of Law Action based upon defective or unsafe condition of
7 improvement to real property Statutes: 15-3-640 15-3-670
8 (8) years (statue establishes an outside limitation of 8 years after substantial completion of the
9 improvement during which normal statutes of limitation continue to run) (Limitation period
10 may not be asserted by (1) defendant in personal injury or wrongful death action
11 Who was in possession of property and knew or should have known of defect; (2) defendant
12 who engaged in fraud, gross negligence, or reckless misconduct in connection with the
13 improvements or who concealed any cause of
14 action; (3) defendants in personal injury or wrongful death action (a) if the injury, by its nature,
15 was not discoverable in the exercise of reasonable diligence at the time of its occurrence, and
16 (b) the injury was the result of exposure to a toxic or other harmful substance overtime, instead
17 of the result of a sudden and fortuitous trauma.

18 ☒ "[A] plaintiff need only show compliance with the rules." *Roche v. Young Bros., Inc.*, 318
19 S.C. 207, 211, 456 S.E.2d 897, 900 (1995).

20 ☒ It is a fundamental doctrine of law that a party to be affected by a personal judgment must
21 have his day in court, and an opportunity to be heard. *Renauld v. Abbott*, 116 US 277, 29 L Ed
22 629, 6 S ct 1194.

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

1 ☒ "The doctrine may not be invoked unless the precluded party has had a full and fair
2 opportunity to litigate the issue in the first action." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666
3 S.E.2d 224, 226 (2008).

4 ☒ Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel
5 are met, when unfairness or injustice results or public policy requires it, courts may refuse to
6 apply it." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779,
7 782 (Ct. App. 2009).

8
9 ☒ Clearly, the same period of exposure to the same chemicals or other agents or conditions can
10 give rise to various separate and distinct diseases or conditions. See *Chevron U.S.A., Inc. v.*
11 *Workers' Comp. Appeals Bd.*, 268 Cal.Rptr. 699, 703, 704 (Cal. Ct. App. 1990) (noting
12 medical testimony that "four different disease processes have been linked to asbestos exposure:
13 asbestosis, pleural plaques, diaphragmatic calcifications, and malignant mesothelioma . . .
14 [W]hile malignant mesothelioma and asbestosis are often seen together, . . . they are in fact
15 separate and distinct pathological disease processes" and concluding that claimant's
16 "mesothelioma was an entirely separate and distinct disease process resulting in an entirely
17 separate and distinct injury and disability [from claimant's previously compensated
18 asbestosis]"), review denied (July 10, 1990).

19 ☒ As the Duvall court noted, the term " 'exposure' indicates a passive relationship between the
20 worker and his work environment rather than an event or occurrence, or series of occurrences,
21 which constitute injury under the Workers' Compensation Act." 621 N.E.2d at 1125.

22
23 ☒ In South Carolina, an occupational disease is defined as a disease which the employee is
24 exposed to in the workplace.² As other courts have recognized in construing comparable

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1 provisions, the definition of an occupational disease is incomplete, and focuses on causation
2 while assuming the claimant suffers from a disease. See Duvall v. ICI Americas, Inc., 621
3 N.E.2d 1122, 1126 (Ind.App.Ct.1993).

4
5
6 In Rodney v. Michelin Tire Corporation, 320 S.C. 515, 466 S.E.2d 357 (1996), Justice Toal
7 stated the timehonored maxim for compensability: "An injury arises out of employment when
8 there is apparent to the rational mind, upon consideration of all the circumstances, a causal
9 relationship between the conditions under which the work is being performed and resulting
10 injury." Rodney, 466 S.E.2d at 358. These decisions simply reaffirm the definition of injury by
11 accident that the court has applied since 1939.

12 Glenn, 236 S.C. at 19-20, 112 S.E.2d at 714. This Court, in Hanks v. Blair Mills, Inc., 286 S.C.
13 378, 386, 335 S.E.2d 91, 96 (Ct. App. 1985), refused to adopt the apportionment rule "under
14 which liability is apportioned among all the employee's employers, and their carriers, whose
15 conditions of employment were of the type contributing to the disease." We found it would
16 place an unduly harsh burden on an employee to notify, file a claim, and prove a compensable
17 injury against the many employers whose conditions of employment may have contributed to
18 his injury. Id. See also Reese v. CCI Constr. Co., Op. No. 2948 (S.C. Ct. App. filed February
19 22, 1999)(Shearouse Adv. Sh. No. 8 at 1)(finding that although carpenter had only worked for
20 employer for three days at time of diagnosis of occupational disease, employer may be liable
21 under act).

22
23 ☒ To be compensable under the Act, the injury must be an "injury by accident arising out of
24 and in the course of the employment." S.C.Code Ann. § 42-1-160 (Supp.1999). To determine
whether an "injury by accident" has been established, the focus is on the injury itself, and not

BEFORE THE SOUTH CAROLINA
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1 on some specific event. Creech, 320 S.C. at 563, 467 S.E.2d at 116. " '[A]ccident' means an
2 unlooked for and untoward event which is not expected or designed by the person who suffers
3 the injury." Id. It is an event "not within one's foresight and expectation and may be due to
4 purely accidental causes or to oversight and negligence, carelessness, fatigue, or
5 miscalculation of the effects of voluntary action." Linnen v. Beaufort County Sheriff's Dep't,
6 305 S.C. 341, 344, 408 S.E.2d 248, 250 (Ct.App.1991). A slip, fall, or other fortuitous event or
7 accident in the cause of the injury is not required. Creech, 320 S.C. at 563, 467 S.E.2d at 116.
8 Proof of a "causative event" is not required to establish "injury by accident." Sigmon v. Dayco
9 Corp., 316 S.C. 260, 449 S.E.2d 497 (Ct.App.1994). The unexpected result or industrial injury
10 is considered the compensable accident. Creech, 320 S.C. at 563, 467 S.E.2d at 116.

11
12 ☒ An injury need only be unexpected to be considered an injury by accident. Creech, 320 S.C.
13 at 559, 467 S.E.2d at 114. There is no requirement in the Act that it be distinct, as opposed to
14 gradual. To impose such a requirement would refocus the inquiry on a discrete event, as
15 opposed to the injury itself, in violation of Creech, 320 S.C. at 559, 467 S.E.2d at 114, and
16 Sigmon, 316 S.C. at 260, 449 S.E.2d at 497.

17
18 ☒ The term "agency" includes any department, independent establishment, commission,
19 administration, authority, board or bureau of the United States or any corporation in which the
20 United States has a proprietary interest, unless the context shows that such term was intended
21 to be used in a more limited sense. Definition of Administrative Definition of Agency Black's
22 Law Dictionary 5th ed p.42

23
24 (SIGNATURE PAGE TO FOLLOW)

TERRY H CAPONE PRO PER, CLAIMANT v. CITY OF COLUMBIA, EMPLOYER

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

I DECLARE UNDER THE PENALTIES OF PERJURY UNDER THE LAWS OF
SOUTH CAROLINA THAT THE FORGOING IS TRUE AND CORRECT TO THE BEST
OF MY KNOWLEDGE



By: _____

Terry H Capone, Pro Per Claimant

130 Summerlea Drive Columbia, SC 29203

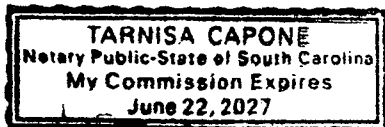
tcapone@liberty.edu

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Sworn and subscribed before me this 5th day of October 2018, by Terry H. Capone.

Identification Produced: South Carolina Drivers License# 007051734 Expires 06-10-2026



PRINT OR STAMP NAME OF NOTARY

Dated: October 5, 2018

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No.: 2019-000369

PROOF OF SERVICE

Terry H Capone, Claimant.....Appellant;

v.

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

Terry H Capone, of Richland County, Pro Se Appellant.

I certify this 23rd day of December 2019 that I have served a copy of the Appellants' Motion for Judicial
Notice on the Respondents by personal service or mailing same, postage prepaid in the United States mail,
addresses to the following:

Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro, Esquire
TURNER PADGET GRAHAM & LANEY P.A.
P.O. Box 1473
Columbia, SC 29202

ATTORNEYS FOR RESPONDENTS

December 23, 2019

RECEIVED
DEC 23 2019
SC Court of Appeals

By: 
Mr. Terry H Capone
130 Summerlea Drive
Columbia, SC 29203
(803) 622-6578
Email: tcapone@liberty.edu
APPELLANT, PRO PER



December 23, 2019

US MAIL DELIVERY

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

Re: Terry Capone v. City of Columbia and Companion Third Party Administrator, LLC
Appellate Case No.: 2019-000369
W.C.C. File Nos. 1322451, 1319203, 1420487

Dear Ms. Kitchings:

Enclosed please find the Appellants Motion For Judicial Notice in the above-referenced matters. I am not a lawyer. Also enclosed are the original and one copy of the Proof of Service. Thank you for your assistance with this matter, I will be (amending) this document, please contact me if you have any questions.

Thank you for your consideration.

With The Highest Regards,

Enclosure(s) as Stated
Cc: Cynthina C Dooley
Carmelo B. Sammataro Attorney for Respondents
Amy Bracy

RECEIVED

DEC 23 2019

SC Court of Appeals

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