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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEAL

Appellate Case No. 2020-000641(S.C.Ct. App. Filed Aug 13, 2020)
S.C. W.C.C. File Nos. 1322789, 1719990, 1423445, 1519702, 1503655

Terry H Capone, Claimant.....Petitioner,

v.

City of Columbia, Employer, and

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

PETITION FOR WRIT OF CERTIORARI

By: _____
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PETITIONER, PRO PER

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I. INTRODUCTION- THE JUDGMENT/DECISION IS VOID

Petitioner Terry H Capone, Employee ("Petitioner") submits this Request In Support of Petition For Writ of Certiorari of a VOID Judgment due to their Fraud On The Court, Crime Fraud Exception, "Active Concealment For Fraud In Real Property" 15-3-670 (c) (1) (2), Void Decision/ Order And Others Constitutional violations affecting substantial rights already brought to the attention of the Court of Appeals In Appellants Return to Motion to Dismiss Dated May 13, 2019, in the associated case# 2019-000369 SC WCC #1322451, 1319203, 1420487 a Void Decision /Order. Appellants' opposition is based upon and supported by the pleadings and papers on file with the Court, and for the reasons stated in greater detail, below. In addition because the above referenced claims central to this petition "substantially" relied upon and was founded upon the January 29, 2020 South Carolina Workers Compensation Single Commissioner Taylor Decision/ Order it to is a Void Decision.

The January 23, 2019 Remittitur See Exibits# 1-12 Appellate Case No, 2018-2190 SC W.C.C# 1322789, 1719990, 1423445, 1519702 and 1503655 submitted December 11, 2018 to this very Court; "Claimants Motion to Quash is denied as there are open claims regarding benefits requested under the Act. Discovery is not complete until a final order is served and the claims is/are closed and Claimants Motion to Reconsider "has been reviewed and is denied. A final decision and order on the merits of claimant's form 50 Request in the above referenced claims is still pending before the undersigned". The Court violated the Petitioners/ Appellants Constitutional rights to due process, Procedural due process, Substantive Justice and Equal protection under the color of law and this Court previously denied appeal in this matter, and without advising him of his right to petition a Constitutional and fundamental right; no rights are lost. The Appeal never became final. See Exhibit 1-4 attached herewith, incorporated herein.

II. LEGAL STANDARD

South Carolina Court Supreme Court analogue to the U.S. Supreme Court, when the Supreme Court reviews a final agency action under the APA, it also "sits as an Supreme appellate tribunal." PPG Indus., Inc. v. United States, 52 F.3d 363, 365 (D.C. Cir. 1995) (quoting Marshall Cty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993)). The court may "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that are "unsupported by substantial evidence." 5 U.S.C. § 706(2). "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." PPG Indus., 52 F.3d at 365 (citations omitted); see also Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the Unite States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their actions is judicial or extra-judicial; with or without the authority or of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. 6 *Peters,* 709; 4 Russell, 415; 3 *Peters*, 203-7.

See also Macktal v. Chao, 286 F.3d 822, 826 (5th Cir. 2002) ("An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion.").

The Supreme Court stated in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 861 (1967), that "a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." Id. at 140, 87 S. Ct. at 1511.

Relied upon by the appellants here is a quotation from 73 C.J.S., Public Administrative Bodies and Procedure, § 41, to the effect that the rule requiring the exhaustion of administrative remedies is an inflexible one. The text goes on to say, though, "However, in some jurisdictions it is a rule of policy, convenience, and discretion rather than of law, and is not jurisdictional." The decisions of this Court have committed us to the quoted view. *Pullman Company v. Public*

Service Commission, 234 S.C. 365, 108 S.E.2d 571; *Ex parte Allstate Insurance Company*, 248 S.C. 550, 151 S.E.2d 849. We quote the following from the last cited case:

"While we have, where the question was involved, rather consistently applied the doctrine of exhaustion of administrative remedies to avoid interference with the orderly performance of administrative functions, *we have recognized that it is not an invariable rule.* For example, in *Pullman Co. v. Public Service Commission*, 234 S.C. 365, 108 S.E.2d 571, the application of the doctrine was approved as a `proper exercise of the discretion of the court.' *The adoption of the view that the rule is discretionary in nature is a recognition that situations can exist where failure to exhaust administrative remedies may be excused.*" (Emphasis added.)

MEMORANDUM OF LAW

SWORN DECLARATION

STATE OF SOUTH CAROLINA §

COUNTY OF RICHLAND §

Pursuant to 28 U.S.C. 1746, I Terry H Capone, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief and In opposition, Plaintiff states as follows:

In the instant case Single Commissioner Aisha Taylor Decision/ Order filed January 29, 2020 is Void. Although the records were left open the Single Commissioner disregarded the Appellants evidence, affirmative defenses and counter claims. Failed to give an impartial review. Allowed the Defendants to write the order/ decision allowing them to additional input after the hearing instead of the Commission Writing their own order, the procedure is unconstitutional and does not even give the appearance of impartiality.

Petitioner asserts, the Single Commissioner Taylor claims of res judicata should not apply here, neither the Single Commissioner Wilkerson Order/Decision dated March 27, 2018 , as they are all based and premised on the Void December 2, 2015 Order/Decision of Gene McCaskill, the Appellant never received a fair hearing and they all denied him Procedural due Process and denied the following:

1. No unbiased decision Maker

2. No Substantial opportunity to be heard(allowing the Defendant to write orders/Decision for the agency is extra- judicial and unconstitutional and a denial of procedural due process and right to be heard in a meaningful way.
3. Right to present evidence that is counted and referenced in the decision
4. Written decision based on the records provided, supported by fact and reason
5. The Appellant /Claimant was denied the right to "discover" the other party's evidence by the Commissioner squashing his subpoenas denied him procedural due process
6. Single Commissioner Taylor took 18 months to make a Decision/ Order only to not give consideration to non –frivolous issues, affirmative defenses and evidence.

As the Supreme Court told us in *Goldberg v. Kelly* 397 U.S. 254(1970, in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Administrative law requires that an agency's decision set forth its reasons for decision, and failure to do so render the agency's decision arbitrary and capricious. *Remmie v. Mabus*, 898 F. Supp. 2d 108, 119 (D.D.C. 2012) (*Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001)).

FRAUD UPON THE COURT/TRIBUNAL

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 and Justice 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).

III. ADDITIONAL ARGUMENTS

A. Exceptions to Interlocutory are those affecting Substantial Rights, as in this case and they are appealable

Nevertheless, an appeal from an interlocutory order may be proper when the order from which appeal is taken affects a substantial right of the appellant. N.C. Gen. Stat. .. 7A-27(d) (1999); 1-277 (1999). This exception requires that the interlocutory order being appealed affect a right of the appellant which is a substantial one, the deprivation of which will potentially result in injury to the appellant if the order is not reviewed before final judgment. *Travco Hotels v. Piedmont Natural Gas Co.,* 332 N.C. 288, 420 S.E.2d 426 (1992); *see Plummer v.*

Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992) (applying substantial right analysis to workers' compensation case). Whether an order affects a substantial right is a case-by-case determination made by weighing the specific facts and procedural context. *Id.* "The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent loss of a substantial right." *Mills Pointe Homeowner's Association, Inc. v. Whitmire,* 146 N.C. App. 297, 299, 551 S.E.2d 924, 926 (2001) (citing *Jeffreys v. Raleigh Oaks Joint Venture,* 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). In *Jeffreys,* this Court stated that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order." 115 N.C. App. at 380, 444 S.E.2d at 254. Plaintiff has shown, in his brief, no substantial right which may be lost if the Commission's opinion and award is not reviewed before a final decision.

This Act was fashioned upon the North Carolina Workmen's Compensation Act and the opinion of the Supreme Court of North Carolina construing such Act are entitled to great weight. *Flemon v Dickett-Keowee,* Inc. (1972) 259 SC 99, 190 SE2d 751. Carter v Penney Tire & Recapping Co. (1973) 261 SC 341, 200 SE2d 64.

B. <u>Mr. Capone re-asserts the South Carolina Workers' Compensation Act is Unconstitutional, All Decisions/Orders stemming out of or relying on the December 2, 2015 Decision/Order and thereafter are VOID as a matter of law-</u> "Strict Scrutiny Applies".

The protections provided by our state Constitution are applicable in the instant case. Under our state Constitution, due process in the administrative context has been established by Article I, Section 22.[7] This section provides:

> 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 *391 *liberty or property* unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.
> S.C. Const. art. I, § 22 (emphasis added).

In explaining this provision, The Supreme Court stated: "[i]n recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution article I, § 22 was added to the 1895 Constitution in 1970 `as a safeguard for the protection of liberty and property of citizens.'" *Ross v. Med. Univ. of S.C.,* 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (quoting *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,* p. 21 (1969)).

Although our appellate courts have not always used the term "due process rights" when discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause

of our state and federal Constitutions. *See, e.g., Kurschner v. City of Camden Planning Comm'n,* 376_S.C._165, 171, 656_S.E.2d_346, 350 (2008) (citing Article I, Section 22 and stating "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." (citation omitted)); *Harbit v. City of Charleston,* 382_S.C._383, 393, 675_S.E.2d_776, 781 (Ct.App.2009) (citing Amendments V and XIV of the United States Constitution and Article I, Section 22 of the South Carolina Constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review").

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)

B1. Mr. Capone has Constitutional Property Right and Liberty interest in his South Carolina Workers Compensation Benefits and a Fundamental Right to be awarded for industry.

B2. The South Carolina Workers' Compensation Commission has failed to consider relevant factors .

B3. The Procedural Due Process requires the Court to allow motions to supplement the record/Extra Record Evidence: There has been a change in law, regulations and facts material to the claim.

B4. The Court requires background information to understand complex and technical matters

B5. The Court has evidence in its possession the South Carolina Workers Compensation Commission have act in "Bad Faith" by their failure to follow proper procedures, making decisions in contravention of its own procedures, Fraudulent Concealment, Violating Mr. Capone's right to due and committing fraud on the Court.

B6. Due process requires that the outcome of the hearing be determined by impartial decision makers. Impartiality is questioned, as here, the South Carolina Workers Compensation Commissioners have acted both judge and "prosecutors" have not been impartial and who's interest are opposed to the side of the Petitioner/Appellant/Claimant.

B6. The South Carolina Workers' Compensation Commission practices/ procedures of allowing the Defendants/ Respondents to "Participate" in preparation, Draft the order consistent with the below findings" of "Request For Proposed Order" of the Commission is a violation of the Petitioner/ Appellant/ Claimants and others Constitutional Right to Due

process, Procedural Due process and Equal Protection under the Color of law, as it allows the Defendants/ Respondents to create/ fabricate findings in their behalf and excludes the Claimant/ Appellant from the process.

B7. "Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interest with the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" *Matthews v. Eldridge,* 424 U.S. 319, 332 (1976) Mr. Capone has a liberty and Property interest in his South Carolina Workers Compensation Benefits.

To determine what process is due, *Mathews* requires a balancing of (1) the private interest affected, (2) the risk of erroneous deprivation under current procedure and the probable value of additional safeguards, and (3) Defendants' interest, including potential fiscal or administrative burdens of additional safeguards. 424 U.S. at 335.

Herein, Mr. Capone' interest far outweigh Defendants', First, Mr. Capone has a strong interest in the proper receipt of South Carolina Workers Compensation Benefits he has earned and has a fundamental right to be rewarded for industry, as a veteran of work that began at 14 years old in civil service. Second, there is a high and demonstrable risk of erroneous deprivation under the current procedures, based on the supported by the irregular judgments and race disparities created by the categorical denial of nearly every step in Mr. Capone's South Carolina Workers Compensation Commission process that begin in 2014, and *Extra Judicial.*

B.8 Failure by the South Carolina Workers' Compensation Commissioners and Appellate Panel to address a non-frivolous argument raised by the Petitioner/Appellant/Claimant is, by default, arbitrary, because it failed to grapple with what appears to be a substantial issue of Appellant/Claimant.

B.9 Because the South Carolina Workers' Compensation Commission Appellate panel provided no explanation on its denied motions of the Petitioners/Appellant/ Claimant, the Commission did "not meet the requirement that the agency adequately explain its result. " *Dickinson v. Sec 'y of Defense*, 68 f 3d 1396, 1407 (D.C. Cir. 1995) (internal quotation marks omitted).

To enable a court to perform the review and ensure that the decision is not "utterly unreviewable," the South Carolina Workers' Compensation Appellate Panel "must give a reason that a court can measure, albeit with all due deference, against the 'arbitrary or capricious' standard of the APA." *Kreis*, 866 F.2d at 1514- 15. ("Fail[ure] to provide anything approaching a reasoned explanation" rendered South Carolina Workers' Compensation Appellate Panel's

decision "arbitrary and capricious"); see also *Calloway v. Brownlee*, 366 F. Supp.2d 43, 53 (D.D.C. 2005)

B.10 In the case of Mr. Capone the hearings conducted by South Carolina Workers' Compensation Commission since 2015 and thereafter, resulted in Void Decisions/ Orders because they are conclusory, inaccurate, "counter to evidence before the agency, "and do not establish a "rational connection beteen the facts found and the choice made." Motor Vehicle Mf rs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (Internal quotation marks omitted).

B.11 All issues raised by Appellant / Claimant are due a written response and if not ruled on by the Commission is not abandoned, it's an abuse of discretion, a violation Constitutional protections, since the Motions, Hearings etc, require fees there is a property right/ interest attached and clear violation of Procedural Due process and Substantive Justice and failure of the agency to follow its on procedures and mandates.

B.12 An agency's failure to address a non-frivolous procedural claim is arbitrary and capricious. "[A]n agency action is arbitrary and capricious if the agency ... has entirely failed to consider an important aspect of the case presented.").

B.13 Mr. Capone was not provided with notice and directions on his appeal form this Court, because this violated his constitutional rights the order never became final. Failure to give notice and opportunity to be heard no rights are lost. Due process violation

"Notice is elementary and fundamental component of American concepts of due process". Mullane v. Central Hanover Trust Co., 338 US 306 (US Supreme Court, 1950).

C. Mr. Capone asserts a denial of his Petition affects Substantial Right: Property Right/Interest In his South Carolina Workers Compensation Benefits

Whether a person has a "property" interest is traditionally a question of state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property is an individual entitlement grounded in state law."). For that reason, "'[i]njury to property' for RICO purposes is generally determined by state law." *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999) (citing *DeMauro v. DeMauro*, 115 F.3d 94, 96 (1st Cir. 1997)).

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const.

amend. XIV, § 1; S.C. Const. art. I, § 3.

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 any benefit (property) arising, as a result of 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 exemption 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 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))

As a Firefighter we have a Property Right /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)

D. PETITIONER/ APPELLANT AFFIRMS THE RESPONDENTS/ DEFENDANTS AND THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DEVALUATION OF HIS WORKERS COMPENSATION BENEFITS VIOLATES

CIVIL RICO AND OTHER VIOLATIONS OF FEDERAL LAW ARE WELL FOUNDED

D1.Relationship Between RICO and the South Carolina Workers' Compensation Act

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C.§ 1962(c). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 [18 U.S.C. § 1341] (relating to mail fraud), section 1343 [18 U.S.C. § 1343] (relating to wire fraud)." *Id.*§ 1961(l).

That said, the language of the act is expansive, and Congress has mandated that RICO must be liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, 904(a), 84 Stat. 947 (1970).

The Supremacy Clause prevents the South Carolina Legislature from preempting a RICO remedy

By declaring its Workers' Compensation scheme to be exclusive of federal remedies.

CAVEAT:

An expected entitlement to benefits under the South Carolina Workers' Compensation Act

qualifies as property, as does the claim for such benefits, and the injury to such property

creates, under the circumstances, a RICO violation.

D2. ORIGINS OF THE SOUTH CAROLINA WORKERS' COMPENSATION 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.**

E. Collateral Order Rule -As the Court and Respondents are well aware, there are Exceptions To The "Final Judgment Rule"

Petitioner/ Appellant/ Claimant asserts the "Final Judgment Rule" is Unconstitutional and denies procedural due process, and is Inapplicable Firefighters injured in the line of duty.

Among other things, these exceptions allow the introduction of "extra record evidence" where the agency has failed to consider relevant factors, where the court requires background information to understand complex and technical matters, or where there is evidence of "bad faith" on the part of the agency, See Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2004) (listing exceptions to the record review rule) that bear immediately on the present Petition.

In their article, Stark and Wald identified eight "exceptions" to the record review rule that they believed had developed in the case law:

(1) when as in the case at bear, the agency action is not adequately explained in the record before the court;

(2) when as in the case at bear, the agency failed to consider factors which are relevant to its final decision

Factors Not Considered -The lower courts have recognized another exception to the rule limiting the record in those cases where the challenging party claims that factors relevant to an agency's decision were ignored.

Because a failure to consider all relevant factors automatically makes an adminis- trative decision inadequate under the APA,67 courts have reasoned that a party challenging agency action must be given a chance to show that relevant factors were ignored.

By definition, the only way a party can show that relevant factors were ignored is to introduce extra-record evidence. If an agency does not even consider certain issues, no mention of those issues will be on the record. Therefore, the plaintiffs can only identify those relevant factors to a court with new evidence. As one court noted:

"How is a court to determine whether all relevant factors were considered in the administrative record without knowing what factors outside the adminis- trative record were not considered in the decisionmaking process

67. See *Overton Park,* 401 U. S. 402 (197 ')Asarco,Inc.t 616 F.2d 1153 (9th Cir. 1980)(court cannot adequately discharge its duty to engage in a substantial inquiry, if it is required to take the agency's word that it considered all relevant factors).

68. *Hiatt Grain 8c Feed, Inc. v. Bergland,* 446 F. Supp. 457, 467 (D. Kan. 1978), off d, 602 F.2d 929 (10th Cir. 1979), cert, denied, 449 U.S. 1073 (1980). 69See Conservation Law Found, of N.E., Inc. v. Watt, No. 83-0506-NA, slip. op. (D. Mass. April 25, 1984). In that case the plaintiffs were allowed to introduce hundreds of pages of testimony showing that the defendants had failed to consider some of the possibilities of harm to the seashore by off-road vehicle traffic;

(3) when in the case at bear an agency considered evidence which it failed to include in the record;

(4) when as in this case at bear is so complex that a court needs more evidence to enable it to understand the issues clearly;

(5)When as in this case, in cases where evidence arising after the agency action shows whether the decision was correct or not;

(6) When as in this case, where agencies are sued for a failure to take action;

(7) in cases arising under the National Environmental Policy Act;

and (8) in cases where relief is at issue, especially at the preliminary injunction stage.49 Id. at 344

As the Article discussed further below, these exceptions"..."were given canonical status by the D.C. Circuit in the influential case of Esch v. Yeutter. 51 In that case, the court stated that "when the substantive soundness of the agency's decision is under scrutiny . . . it may sometimes be appropriate to resort to extra-record information to enable judicial review to become effective."52 As the court explained, in response to this problem, "the courts have developed a number of exceptions countenancing use of extra-record evidence," at which point the court cited the eight exceptions from the Stark and Wald article, noting that "[t]he caselaw supports these applications."53

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 Supremacy Clause prevents the South Carolina Legislature from preempting a RICO remedy By declaring its Workers' Compensation scheme to be exclusive of federal remedies. An expected entitlement to benefits under the South Carolina Workers' Compensation Act qualifies as property, as does the claim for such benefits, and the injury to such property creates, under the circumstances, a RICO violation.

F. The Petitioner/Appellant vehemently Opposes a Remand to Agency With Good Cause Shown.

Petitioner/ Appellant opposes a remand on the ground that it would be futile because the South Carolina Workers Compensation Commission since 2015 has consistently failed to adequately explain itself, review his claims fairly, impartially, in contravention of its own procedures and Federal and State laws. The evidence in the records and in possession of this Court is undisputable, a clear showing that based on all prior experiences before the South Carolina Workers Compensation in Petitioner/ Appellant Capone's case a remand would be futile. This is not a case where "[t]here is not the slightest uncertainty as to the outcome" on remand, A.L. Pharma, 62 F.3d at 1489, or where "reversal and remand would be an 'idle and useless formality' . . . because there is not the slightest doubt that the South Carolina Workers Compensation Commission would simply reaffirm its order," Am. Geri-Care, 697 F.2d at 64. Remand is definitely not appropriate when, as here, there is no chance the agency will come to a different conclusion. E.g., Nat'l Nutritional Foods Ass'n v. FDA, 504 F.2d 761, 798 & n.65 (2d Cir. 1974) (remanding to the FDA to allow for cross-examination of an expert because the court "simply cannot assume that if [the expert's testimony] had been shattered by vigorous cross-examination, however unlikely that may be, the FDA or we would reach the same result").

G. THIS COURT SHOULD DECLINE TO REMAND MR. CAPONE'S CASE; BECAUSE A REMAND WOULD BE FUTILE, AS THE PREVIOUS REMAND (REVESTMENT) BY THE AGENCY WAS IN BAD FAITH.

This Court can gleam for the District Court when "'the outcome of a new administrative proceeding is preordained,' a district court may forego the futile gesture of remand to the

agency." *Berge v. United States*, 949 F. Supp. 2d 36, 43 (D.D.C. 2013) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F. 3d 1484,1489 (D.C. Cir. 1995)).

E. A Remand Would Continue to Cause Delay and Subject Mr. Capone to the Very Legally Deficient Procedures He Continues To Receive and Challenge.

In addition to futility, a remand without protection from discrimination and prejudice will cause further delay. Remand is appropriate where "new evidence or later-acquired information demonstrated a potential to change the agency's initial decision" and "where the agency recognizes the merits of the plaintiff's challenges and is forthcoming about the challenges."

Frito-Lay, Inc. v. Dep't of Labor, 20 F. Supp. 3d 548, 554 (N.D. Tex. 2014); *see also SKF USA, Inc.*, 254 F.3d at 1028. In these instances, remand preserves judicial economy by providing the defendant the opportunity to cure its own mistakes. *Frito-Lay*, 20 F. Supp. 3d. at 555. Here, there is no new evidence or later acquired information that demonstrates a potential to change the Navy's initial decision. While the Navy has conceded that it should have considered Ms. Bradley's MWPA claim, there is no new evidence in the record to support her assertion that she filed a sexual harassment complaint.

Like the previous voluntary remand that was granted, judicial economy would not be served here. In *Frito-Lay*, the court found judicial economy would be served because the likely remedy, even if the plaintiff prevailed on summary judgment, was remand to the agency. *Frito-Lay*, 20 F. Supp. 2d at 555. In addition to causing delay, a remand would compel Mr. Capone to resubmit to the same flawed procedures that the instant appeal was filed to rectify.

F. ANY REMAND MUST INCLUDE SAFEGAURDS SUFFICIENT TO AVOID FURTHER PREJUDICE TO MR. CAPONE.

Should this Court nevertheless order a remand, the order should include conditions to ensure that Mr. Capone is not prejudiced. "Remand involves all interested parties and should receive the careful and thoughtful scrutiny of the court not mere deference to the desires of one party." Toni M. Fine, *Agency Requests For Voluntary Remand: A Proposal for the Development of Judicial Standards*, 28 Ariz. St. L.J. 1079, 1092 (1996). Attaching appropriate conditions to any remand ordered by this Court is essential to avoid prolonged re-litigation of South Carolina Workers Compensation Commission errors. Mr. Capone requests that, in the event this Court orders a remand, it does so on the under conditions necessary to protect him from prejudice as well as ensure the South Carolina Workers Compensation Appellant Panel functions fairly and without discrimination, as intended by Law.

IV. PLAINTIFF REQUEST MANDATORY JUDICIAL NOTICE

PLEASE TAKE NOTICE, In Propria Persona, on my own behalf, in person, Plaintiff Terry H Capone ("Capone"), pursuant to the FED R Civ P.201 (c) (2), (d), herby respectfully move this court to Take Mandatory Judicial Notice of the following:

FURTHER NOTICE: See also Macktal v. Chao, 286 F.3d 822, 826 (5th Cir. 2002) ("An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion.").

FURTHER NOTICE: The primary purpose of the workmen's compensation Act is to protect the workman who actually does the work. *Smith v. Fulmer* (S.C.19410 198 S.C. 91, 15 S.E.2d 681. Workers' Compensation ⊶11

FURTHER NOTICE: While the Worker's Compensation Act is to be liberally construed to the end that the benefits thereof may not be denied upon technical, narrow and strict interpretation, words should be given their established legal meaning or the meaning which the legislature intended; nor is the Court justified in so construing it as to do violence to a specific requirement of the Act. *Brown v. Martin* (S.C.1943) 203 S.C. 84, 26 S.E.2d 317.Workers' Compensation ⊶53

FURTHER NOTICE: Any reasonable doubt as to the construction of the Workers' Compensation Act will be resolved in favor of coverage.

FURTHER NOTICE: "Stopping payment on temporary award.-The rule and Code 1962 § 72-352 contemplate that if the insurance carrier desires to stop further payments of compensation under a temporary award, application should be made to the commission for permission to do so and the employee should receive notice of the application. Halks v Rust Engineering Co. (1946) 208 SC 39, 36 SE2d 852. Workers Compensation ⊶2013."

FURTHER NOTICE: Exclusivity provision of Workers' Compensation Act Does not involve subject matter jurisdiction. Sabb v. South Carolina State University (S.C. 2002) 350 S.C. 416, 567 S.E.2d 231. Workers' Compensation ⊶2084.

FURTHER NOTICE: The Court in Ortiz v. Principi, 274 F.3d 1361 (Fed. Cir. 2001) explained: Whether the positive and negative evidence renders a decision "too close to call" can perhaps be best understood by analogizing to Sandlot baseball's "tie goes to the runner."

V. SUPPLEMENTAL POINTS OF AUTHORITY

The Fifth Amendment Id. At 1295-96, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty; or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Cushman, 576 F.3d at 1296.

"[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 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))

An order that exceeds the jurisdiction of the court is void, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue.(See Rose v. Himely (1808) 4 cranch 241, 2 L ed 608; Pennoyer v. Neff (1877) 95 US 714, 24 L ed 565; Thompson v.Whitman (1873) 18 Wall 457, 21 I ED 897; Windsor v. McVeigh (1876) 93 US 274, 23 L ed 914; McDonald v. Mabee (1917) 243 US 90, 37Sct 343, 61 L ed 608.

A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded, or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It is not entitled to enforcement...All proceedings founded on the void judgment are themselves regarded as invalid.(30 Am Jur Judgments "44,45.

A judgment may not be rendered in violation of constitutional protections. The validity of a judgment may affected by a failure to give the constitutionally required due process notice and an opportunity to be heard. Earle v. McVeigh, 91 US 503, 23 L Ed 398. See also Restatements, judgments 4(b). Prather vLoyd, 86 Idaho 45, 382 P2d 910.

The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may not be rendered in violation of those constitutional limitations and guarantees. Hanson v. Denckia, 357 US 235, 2d 1283, 78 S Ct 1228.

The statute provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof...."
5 U.S.C. § 702 (1977).

The Administrative Procedures Act establishes the standard of review for decision By the Workers' Compensation Commission. Code 1976, § 1-23-310 et seq., Brown v. Bi-Lo, Inc, (S.C. App. 2000) , 341 S.C. 611, 535 S.E2d 445, rehearing denied, certiorari granted Section 1-23-380 provides for judicial review of final agency decisions, and states, in pertinent part, that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" but that "[t]his section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law."

Title IV. Estoppel- Art.1433 Under the New Civil Code. 1. Estoppel in pais (by conduct) - is that which arises when one by his acts, representations, or admissions, or by his silence when ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other, rightfully relies and acts on such belief, as a consequence of which he would be prejudiced if the former is permitted to deny the existence of such facts.

[T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his [or her] prior conduct, then the doors of the court will be shut against him [or her] in limine; the court will refuse to interfere on his [or her] behalf, to acknowledge his [or her] right, or to award him [or her] any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933), (quoting John Norton Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America § 397 (4th ed. 1918)). In a later case, the Supreme Court explained the rationale of unclean hands: "That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.'" *Id.* at 814 (quoting Bein v. Heath, 47 U.S. (6 How.) 228, 247 (1848)).

VI. CONCLUSION/ PRAYER AND RELIFE REQUESTED

For the forgoing reasons, the Petitioner Respectfully request that the Supreme Court grant the Petition for Writ of Certiorari of the Void Decision and Order due to Fraud Upon The Court, Denial of Due process, Procedural Due process, Substantive Justice and Equal protection under the color of Law by the South Carolina Workers Compensation Commission, and respondents.

Executed on this date September 14, 2020

Signed:

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
September 14, 2020

RECEIVED
SEP 14 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEALS

Appellate Case No.: 2020-000641 (S.C.Ct. App. Filed Aug 13, 2020)

PROOF OF SERVICE

Terry H Capone, Claimant, Petitioner,

v.

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

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

I certify this 14th day of September 2020, that I have served the Petition for Writ of Certiorari on the South Carolina Court of Appeals and Respondents Requesting to Petition for A Writ of Certiorari the August 13, 2020 SC COA Order by depositing a copy of the same in the United States Mail, postage prepaid, September 14, 2020 addressed to the South Carolina Court of Appeals and Defendant Legal Representative known to be:

Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro,
Esquire Attorneys for Respondents
TURNER PADGET
P.O. Box 1473
Columbia, SC 29202

The Hon. Jenny A Kitchings, Clerk
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

September 14, 2020

By: _____

Mr. Terry H Capone
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APPELLANT, PRO PER

The South Carolina Court of Appeals

Terry Capone, Appellant,

v.

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

Appellate Case No. 2020-000641

ORDER

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

Paula A. Thomas J.

D. Garrett J.

J. [illegible] J.

Columbia, South Carolina

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

FILED
Aug 13 2020

RETIRED

September 14, 2020

The Honorable Daniel E. Steakhouse , Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Case Information: 2020-001133 SC COA August 13, 2020 Order received evening of August 17, 2020 to the S.C. Supreme Court -Terry Capone, Appellant, v. City of Columbia, Employer, and Companion Third Party Administrator, LLC, Carrier, Respondent Case No. 2020-000641

The Honorable Daniel E. Steakhouse:

Please find enclosed my Petition for Writ of Certiotari of a Void Decsion/Order for filling in the above referenced matter.

By copy of this letter to Cynthia C. Dooley, and Carmelo B Sammataro, attorneys for Respondents, and the Honorable Jenny A Kitchings, I am serving then a copy of this Petiton.

I am not an attorney. Thank you for your assistance with this matter, please contact me if you have any questions. Thank you for your consideration.

With Regards,

Cc: SC Court of Appeals
Cynthia C. Dooley, Esquire
Carmelo Barone Sammataro, Esquire
Enclosure: Decision letter

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