THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
The Honorable T. Scott Beck, Commissioner

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

Samuel Rose, Employee, Respondent,

v.

JJS Trucking, Uninsured Employer; and
Chris Thompson Services, Upstream Employer; and
Bridgefield Casualty Insurance Co. and
South Carolina Uninsured Employers' Fund, Carriers;

of which the South Carolina Uninsured Employers' Fund is the Appellant,

and

JJS Trucking, LLC, Uninsured Employer, and
Chris Thompson Services, Upstream Employer, and
Bridgefield Casualty Insurance Co. are the Respondents,

AND

Samuel Rose, Employee, Respondent,

v.

JJS Trucking, Uninsured Employer; and
Chris Thompson Services, Upstream Employer; and
Bridgefield Casualty Insurance Co. and
South Carolina Uninsured Employers' Fund, Carriers,

of which Chris Thompson Services, Upstream Employer, and Bridgefield Casualty Insurance Co., Carrier, are the Appellants.

FINAL BRIEF OF THE APPELLANTS

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II. Does the June 24, 2019 Order of the Commission violate the Appellants' constitutional rights of due process and equal protection?

III. Must the Commission's award under S.C. Code Ann. § 42-15-60 be reversed by the Court of Appeals on the basis that it is not supported by substantial evidence or the applicable law?

IV. Must the Commission's award under S.C. Code Ann. § 42-9-10 and § 42-9-260 be reversed on the basis that it is not supported by substantial evidence or the applicable law?

V. Does the Commission's failure to address the implications of the Claimant's subsequent, intervening accidents constitute reversible legal error?

Statement of the Case

On November 18, 2011, the Claimant filed a Form 50 alleging various injuries by accident on August 20, 2011. (R. p.4). The Form 50 named the Claimant's direct employer, JJS Trucking, LLC, and its upstream contractor, Chris Thompson Services, LLC, as Defendants in the claim. The Appellants, Chris Thompson Services and Bridgefield Casualty, timely denied the claim by Form 51 and also filed a Petition to

Transfer Liability to the South Carolina Uninsured Employers Fund (UEF) on January 24, 2012. (R. pp.94—97).

A hearing was held in Summerville, South Carolina on May 15, 2012 before Commissioner Gene McCaskill. (R. pp.310—327). Following that hearing, Commissioner McCaskill issued a Decision and Order dated August 23, 2012, where he found and concluded, *inter alia*, that the "Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier" and "the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time." (R. p.19, p.21).

The Appellants, Chris Thompson Services and Bridgefield Casualty filed a Form 30, seeking review and reversal of Commissioner McCaskill's Decision and Order by the Workers' Compensation Commission's Appellate Panel. (R. pp.15—17). On May 15, 2013, the Appellate Panel issued an Order summarily affirming Commissioner McCaskill's conclusion that the Petition for Transfer of Liability was "not ripe for adjudication," without any discussion. (R. pp.12—22). The Appellants appealed the May 15, 2013 Order of the Workers' Compensation Commission to the Court of Appeals, arguing that the Commission erred as a matter of law in concluding that the Petition to transfer continuing liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 was "not ripe," based upon the undisputed evidence in the record and the applicable law. By Order dated January 28, 2015, the Court of Appeals dismissed the appeal as interlocutory. (R. pp.44—47).

Following Hearing Commissioner McCaskill's August 23, 2012 Decision and Order, the Appellants provided medical treatment and temporary total disability compensation as required. (R. p.244). The authorized treating physician, Dr. Gregory M. Jones, placed the Claimant at maximum medical improvement on March 20, 2013. (R. p.392). His diagnosis was "myofascial pain," with an underlying "multi-level degenerative, preexistent pathology" in his neck and back. (R. p.391). According to a report dated April 16, 2013, Dr. Jones opined that the Claimant was "capable of working without restrictions" and "should be able to return to gainful employment at any job that he desires." (R. p.392). Dr. Jones further opined that "[i]t does not appear that any future treatment would be warranted." (R. p.392).

Upon the Claimant's release at maximum medical improvement, the Appellants filed a Form 21, Stop Payment Application, requesting permission to terminate temporary total disability compensation. (R. p.99). The Stop Payment Application was scheduled for a hearing before Workers' Compensation Hearing Commissioner Aisha Taylor on September 23, 2013 in St. Matthews, South Carolina. (R. p.328—385). After the hearing before Hearing Commissioner Taylor, but before a decision was rendered (November 8, 2013), the Appellants learned for the first time that the Claimant had an ongoing third-party claim arising out to of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. The Claimant did not notify the Appellants, or the Commission, of his pending civil claim or otherwise file a Form S-2, as required by S.C. Code Ann. § 42-1-560.

On November 12, 2013, immediately after learning of the long-concealed third-party claim, the Appellants filed a Motion to Introduce Newly Discovered Evidence, specifically

the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas eight months earlier on February 20, 2013. (R. pp.104—107). The Appellants argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. As a result, the Appellants argued that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560.

The Claimant did not file a return[1] to the Appellants' Motion to Introduce Newly Discovered Evidence. The Appellants' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. (R. p.23). The Claimant then filed a Motion to Introduce New Evidence into the record. Hearing Commissioner Taylor denied the Claimant's Motion by Administrative Order dated January 3, 2014 on the basis that the evidence the Claimant sought to introduce was not "of the same nature and character required for granting a new trial" as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.[2] (R. p.27).

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by

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[1] The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's Motion was denied by Administrative Order dated January 3, 2014. (R. p.25).

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

which she concluded that the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560. (R. pp.20—42). Commissioner Taylor further granted the Appellants' Stop Payment Application, concluding that the Appellants were entitled to terminate temporary disability pursuant to S.C. Code Ann. § 42-9-210 and § 42-9-260. In addition, Commissioner Taylor concluded that the Claimant is not entitled to any additional medical care or treatment under S.C. Code Ann. § 42-15-60, or benefits for permanent disability or loss of use under S.C. Code Ann. § 42-9-10, § 42-9-20, or § 42-9-30. (R. pp.20—42).

Thereafter, the Claimant filed a Form 30 requesting the Commission's Appellate Panel review Commissioner Taylor's September 2, 2014 Order; however, the only exceptions raised related to "newly discovered evidence" and the application of S.C. Code Ann. § 42-1-560. (R. p117—120). The Claimant raised no exception to the remainder of the Hearing Commissioner's Conclusions of Law. Similarly, the Claimant raised no argument with regard to Commissioner Taylor's denial of benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief to the Appellate Panel. In fact, the Clamant did not even mention these statutes in his Form 30 or in his brief to the Appellate Panel. (R. p.117—120; p.121-135). Therefore, the Appellants argued that the Commissioner's conclusions of law with regard to the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case and is not subject to review by the Appellate Panel or the Courts. (R. pp.137—148).

After oral arguments in Columbia on April 21, 2015, an Appellate Panel issued the Commission's Decision and Order dated February 8, 2016, affirming the Decision and

Order of Commissioner Taylor in its entirety. (R. pp.48—57). The Claimant appealed to the South Carolina Court of Appeals. (R. p.150). In his 2016 brief to the Court of Appeals, the Claimant again failed to raise any argument with respect to (or even mention) the Commission's conclusions of law pursuant to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. (R. pp.162—185).

The Court of Appeals decided the case, without oral arguments, by unpublished decision dated April 18, 2018. (R. pp.58—60). The April 18, 2018 Order from the Court of Appeals merely states, "[w]e reverse the Appellate Panel's order and remand for further proceedings consistent with this opinion." (R. p.60). The Order of the Court of Appeals says nothing of awarding the Claimant medical or compensation benefits and does not purport to expand the Appellate Panel's jurisdiction on appeal, vested by virtue of S.C. Code Ann. § 42-17-50 and the Claimant's Form 30. Of course, the April 18, 2018, Court of Appeals opinion dealt solely with the application of S.C. Code Ann. § 42-1-560, as the Claimant similarly made no argument with regard to his entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 to the Court of Appeals.

Following remand and Remittitur dated July 5, 2018, the Workers' Compensation Commission reassigned the claim to Commissioner Taylor by Administrative Order dated July 16, 2018. (R. p.62; p.63). Approximately nine months after the Remittitur, Commissioner Taylor scheduled the matter for a new hearing on May 8, 2019. (R. p.254). Prior to the scheduled hearing, Commissioner Taylor held a telephone conference with some of the parties on April 25, 2019[3], at which time counsel for the Claimant asked

[3] JJS Trucking, the Claimant's Employer, is not represented by counsel and did not

Commissioner Taylor to recuse herself. (R. pp.247—253). Commissioner Taylor did not address the informal motion to recuse at that time, but did agree to cancel the May 8, 2019 hearing, as it was unnecessary to re-open the record to address the issues on remand. On April 29, 2019, Commissioner Taylor's office officially noticed a "Postponement" of the May 8, 2019 hearing, indicating that she would rule on the existing record. (R. p.254). A month later, on May 31, 2019, Commissioner Taylor notified the parties via e-mail that she was recusing herself from the case and sending it back to the Commission's Appellate Panel for review. (R. p.256).

The Appellate Panel did receive additional evidence or arguments from the parties in 2019. Instead, the Appellate Panel simply issued a new Decision and Order June 17, 2019[4] awarding extraordinary benefits to the Claimant. (R. pp.64—76). The Appellate Panel then issued a second Order dated June 24, 2017; however, did not withdraw the prior Order of June 17, 2019. (R. pp.77—90). Both Orders, *sua motu*, addressed the credibility of expert witnesses and "found" that the Claimant both requires additional medical treatment for the August 10, 2011 accident at the present time and has been totally disabled "from August 11, 2011 through the present and continuing." The Appellate Panel awarded the Claimant a "lump-sum payment of any back-owed TTD accrued during litigation," totaling approximately $136,935.44. In addition, the Appellate Panel stripped the Appellants of their statutory right to direct and control the provision of medical treatment, appointed the Claimant's IME doctor his authorized treating physician, and

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participate the in the telephone conference with Commissioner Taylor.

[4] The June 17, 2019 Order, on its face, was missing pages and contained no conclusions of law. (R. pp.64—76).

ordered the Appellants to pay for a cervical fusion surgery, any "future treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck or back injuries," and "an evaluation with an orthopaedic surgeon who specializes in the knee/lower extremity to obtain updated MRI scans and an assessment of the Claimant's continued complaints of pain in his right knee."

The Appellants filed a Motion to Reconsider the June 17, 2019 Order on June 21, 2019. (R. pp.257—277). The Appellants filed a second Motion to Reconsider the June 24, 2019 Order on June 24, 2019. (R. pp.278—309). These Motions were denied by Order dated July 15, 2019 and the present appeal ensued. (R. p.91). The Claimant's third-party claim against the at-fault driver in the August 11, 2011 accident is remains pending in the Court of Common Pleas.

Standards of Review

Appeals from the Workers' Compensation Commission are governed generally by the Administrative Procedures Act. Lark v. BiLo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Accordingly, a reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact; however, a reviewing court may reverse or modify a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. Clemmons v. Lowe's Home Centers, 420 S.C. 282, 803 S.E.2d 268 (2017 (citing S.C. Code Ann. § 1-23-3480(5)).

In accordance with the Administrative Procedures Act, the *factual findings* of the Commission may be set aside if they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," or "arbitrary or capricious or

characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. §§ 1-23-380(A)(6)(e), -380(6)(f); *see* Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, 466 S.E.2d. 357, 359 (1996) (citing Kearse v. State Health & Hum. Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Commission] reached." Shealy v. Aiken County, 241 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). While the Commission's factual findings will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999); Sharpe v. Case Produce Co., 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997), *rev'd on other grounds,* 336 S.C. 154, 519 S.E.2d 102 (1999).

However, the standard of review of *legal issues* is far different. A reviewing court may reverse or modify the decision of the Commission if substantial rights of an appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. S.C. Code Ann. § 1-23-380(A)(5)(d) (Supp. 2006); Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007), cert. denied, Dec. 5, 2007; Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344, 577 S.E.2d 475, 477 (Ct. App. 2003), aff'd as modified, 357 S.C. 619, 594 S.E.2d 272 (2004). In fact, citing S.C. Code Ann. § 14-3-330 and South Carolina Constitution, Article V,

Section 5, our Supreme Court has held that a reviewing court may decide novel questions of law with "no particular deference to the lower court." Madison *ex rel.* Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Therefore, a reviewing court may freely and absolutely review the Commission's decisions concerning an issue of law. *See* Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005) ("where the Commission's decision is controlled by an error of law, this court's review is plenary").

> "No passivity or complaisance is owed or given to the ruling of the appellate panel or circuit judge in this context. The highly deferential standards statutorily and universally applied in reviewing issues of fact, such as the 'clearly erroneous' and the 'manifest error' standards, have no efficacy in regard to an issue of law."

Houston v. Deloach & Deloach, 663 S.E.2d 85, 378 S.C. 543 (Ct. App. 2008) (*internal citations omitted*). Further, this Court has specifically held that, "[t]he South Carolina Court of Appeals exercises freedom and independence in deciding an issue of law in a workers' compensation case." Thompson ex rel. Harvey v. Cisson Const. Co., 659 S.E.2d 171 (Ct. App. 2008).

Furthermore, where the issue before the Commission involves a *jurisdictional question*, a reviewing court is governed by the preponderance of evidence standard. Hernandez Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007).

Consequently, a reviewing court is not bound by the Commission's findings of fact on which jurisdiction is based. Canady v. Charleston County Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975). A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence. Id.; *see also* Kirksey v. Assurance Tire Co., 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) (holding this court can find facts in accordance with the preponderance of evidence when determining a jurisdictional question in a Workers' Compensation case); Sanders v. Litchfield Country Club, 297 S.C. 339, 342, 377 S.E.2d 111, 113 (Ct.App.1989) (deciding where a jurisdictional issue is raised, this court must review record and make its own determination whether the preponderance of evidence supports the Commission's factual findings bearing on that issue).

Lastly, no court may review or otherwise disturb unappealed findings or conclusions by the Commission. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that "an unappealed ruling, right or wrong, is the law of the case" and citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)); Creech v. Ducane Co., 320 S.C. 559, 476 S.E.2d 114, *rehr 'g denied, cert. denied* (Ct. App. 1995) (holding that S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission"). According to Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940), all findings of fact and law by the Commission "become and are the law of the case, except only those within the scope of the exception." The question of compliance with rules, regulations, and statutes

governing an appeal is one of appellate jurisdiction. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011); *see also Ex parte* Morris, 367 S.C. 56, 624 S.E.2d 649 (2006) (holding that although the family court erred in rejecting Custodian's request for an evidentiary hearing, the Custodian failed to appeal the family court's ruling that the Custodian "is dismissed as a party," rendering that ruling the law of the case and requiring affirmation of the family court's order).

Arguments

I. No argument under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was preserved for review and; therefore, the Commission erred as a matter of law in addressing these statutes on remand.

By Order dated September 2, 2014, Commissioner Taylor concluded that the Claimant failed to satisfy the requirements of S.C. Code Ann. § 42-1-560. (R. p.40 #3). In addition, Commissioner Taylor specifically ruled that the Appellants were entitled to terminate temporary disability pursuant to S.C. Code Ann. § 42-9-260 and § 42-9-210; that the Claimant is not entitled to any additional medical treatment under S.C. Code Ann. § 42-15-60; and that the Claimant is not entitled any benefits under S.C. Code Ann. §§ 42-9-10, 42-9-20, and 42-9-30. (R. p.40). The Claimant appealed Hearing Commissioner Taylor's conclusion regarding the application of S.C. Code Ann. § 42-1-560 to the Commission's Appellate Panel. (R. pp.118—119). However, the Claimant's Form 30 dated September 14, 2014 raised no argument with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 and elucidated no question as to the Hearing

Commissioner's application of these statutes. (R. pp.118—120). Therefore, the Claimant did not comply with the requirements of S.C. Code Ann. § 42-17-50 or S.C. Code Reg. 67-701 and, as such, no argument under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was preserved for review by the Appellate Panel. *See* S.C. Code Reg. 67-701(A)(3)(a) (requiring that "[t]he grounds for appeal must be set out in detail on the Form 30 in the form of questions presented...Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error."); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (holding that to preserve an issue for appeal, it must be raised by the appellant in a timely manner and with sufficient specificity (citing Jean Hoefer Toal *et al.*, Appellate Practice in South Carolina 57 (2d ed. 2002)); Jones v. Anderson Cotton Mills, 205 S.C. 247, 31 S.E.2d 447 (1944) (holding that general exceptions, such as "the commission erred in making an award," are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review).

Furthermore, the Claimant did not make any argument with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his November 14, 2014 Brief to the Appellate Panel[5]. (R. pp.121—135). Of course, mere "conclusory

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[5] The Claimant's November 14, 2014 Brief to the Appellate Panel raises only 2 arguments, both of which deal solely with the application of S.C. Code Ann. § 42-1-560. (R. pp.129—130). In addition, according to the "Conclusion" of the Claimant's November 14, 2014 brief, relief sought by the Claimant did not involve the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. (R. p.135). The Claimant's Brief simply does not argue the merits of, or evidentiary support for, any

statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005) (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993 (holding that failure to provide argument or supporting authority for an issue renders it abandoned)). Therefore, even if the Claimant had properly raised any argument regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his Form 30, he clearly abandoned those issues in his November 14, 2014 Brief, such that the Appellate Panel had no jurisdiction or authority to disturb the Hearing Commissioner's conclusions regarding these statutes on remand.

Of course, the Appellate Panel, in reviewing the Hearing Commissioner's September 2, 2014 Decision and Order in the first instance, could have made its own findings and conclusions regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 had they actually been preserved for appeal and argued to the Appellate Panel. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967); S.C. Code Ann. § 42-17-50. However, the Claimant did not make any argument with regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his Form 30 or his Brief to the Appellate Panel; therefore, arguments regarding the application of these statutes could not be properly raised at any time in the future. *See* Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (holding that a party cannot raise that issue for the first time in a post-trial motion if the issue could have been initially presented to the trier of fact (citing generally C.A.H. v. L.H.,

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claim for medical or compensation benefits and does not request that the Appellate Panel award benefits under these statutes.

315 S.C. 389, 434 S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)). Indeed, the right to argue the propriety of the Hearing Commissioner's conclusions regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was forever relinquished in 2014 with the filing of a Form 30 and a Brief to the Appellate Panel that was silent on these issues. Wall v. CY Thomason Co., 232 S.C. 153, 101 S.E.2d 286 (1957) (holding that an award unappealed from is conclusive not only of the issues actually decided, but also of those that might have been raised before the Commission). Because the "adjudications and awards of compensation boards or commissions...in proceedings for the recovery of compensation, are generally held to be conclusive upon the parties and their privies, as to the matters involved or justiciable therein, so as to preclude, under the doctrine of *res judicata*, the relitigation thereof in subsequent proceedings," the Appellate Panel erred as a matter of law in addressing any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 on remand. *Id.* (citing 58 Am. Jur., Workmen's Compensation, Section 493, p. 886; Trigg v. Industrial Commission, 1936, 364 Ill. 581, 5 N.E. (2d) 394, 108 A.L.R. 153; and 122 A.L.R. at pp. 550 *et seq.*).

Similarly, the Claimant did not raise any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his 2016 Brief to the Court of Appeals. (R. p.165). Indeed, the Claimant did not present any argument to the Court of Appeals as to how or why the Hearing Commission erred in specifically denying him benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. (R. pp.162—182). Therefore, the propriety of the Commission's unappealed conclusions with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-

9-20, or 42-9-30 were not before the Court of Appeals in 2016, nor were they addressed in any way by the Court's Order of Remand dated April 18, 2018. (R. pp.58—60).

Therefore, the Appellants respectfully contend that the Hearing Commissioner's rulings regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30 are the law of the case and neither the Court of Appeals, nor the Commission's Appellate Panel, had any authority to address these statutes on appeal or on remand. (*See* S.C. Code Ann. § 42-17-50; Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that "an unappealed ruling, right or wrong, is the law of the case" and citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970); Creech v. Ducane Co., 320 S.C. 559, 476 S.E.2d 114, *rehr 'g denied, cert. denied* (Ct. App. 1995) (holding that S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission"); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940) (holding that all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception"). In addition, because the Hearing Commissioner's rulings regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case, neither the appellate courts, nor the Appellate Panel have jurisdiction to address any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011) (holding that the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction the Commission lacks the authority or jurisdiction to extend the fourteen days permitted for the perfecting of an

appeal). Considering the fact that the Commission has no authority and no jurisdiction to address any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Appellants respectfully contend that, on remand, the Commission acted arbitrarily and erred as a matter of law in awarding benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, or in otherwise disturbing the Hearing Commissioner's unappealed conclusions with regard to these statutes in its June 17, 2019 Order, necessitating reversal by the Court of Appeals.

While the Commission's June 17, 2019 Order vaguely suggests that it has jurisdiction by virtue of the remand instructions from the Court of Appeals, the April 18, 2018, Order of the Court of Appeals does not, and cannot, extend the Commission's jurisdiction to address any unappealed rulings under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. Allison v. W.L. Gore & Assoc., *supra*; *see also* Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that "an unappealed ruling, right or wrong, is the law of the case" and citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)); *see also* Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987) (holding that the Supreme Court could not address issues that were not argued before the lower appellate tribunal). In fact, the April 18, 2018 Order from the Court of Appeals says nothing of awarding the Claimant medical or compensation benefits and does not purport to expand the Commission's jurisdiction vested by virtue of S.C. Code Ann. § 42-17-50 and the Claimant's Form 30, but merely states, "[w]e reverse the Appellate Panel's order and remand for further proceedings consistent with this opinion." (R. p.46). Of course, that opinion dealt solely with the application of S.C. Code Ann. § 42-1-560, as the

Claimant made no argument with regard to his entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 to the Court of Appeals.

Therefore, because the Court of Appeals had no authority or jurisdiction to disturb the Hearing Commissioner's conclusions with regard to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Commission erred in assuming that the Court of Appeals remanded any issue with regard to these statutes to the Appellate Panel. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal," but must have been first raised and ruled upon by the lower appellate tribunal); Talley v. S.C. Higher Education, 28 S.C. 483, 487 (1986) (citing American Hardware Supply Co., Inc. v. Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983) for the proposition that it "is an axiomatic rule of law that issues may not be raised for the first time on appeal" to a higher appellate court, when not raised by the lower reviewing court). As such, the Appellants respectfully contend that the remand and Remittitur from the Court of Appeals merely returned the claim to the Commission to address the issues actually raised in the Claimant's November 14, 2014 Brief to the Appellate Panel, consistent with the Court's analysis of S.C. Code Ann. § 42-1-560, and consistent with the Appellate Panel's jurisdiction under S.C. Code Ann. § 42-17-50. Therefore, the Appellants respectfully request that the Court of Appeals reverse and vacate the Appellate Panel's June 17 and June 24, 2019, Orders and issue its own decision that the Claimant is not entitled to any additional benefits under the Workers' Compensation Act as a matter of law.

II. The June 24, 2019 Order of the Commission violates the Appellants' constitutional rights of due process and equal protection.

The Appellants respectfully contend that, not only does the Commission's June 24, 2019 Order exceed the Commission's authority and jurisdiction, but the Order also constitutes an abuse of discretion by the Commission and otherwise violates the Appellants' right to due process and equal protection under the law, including their right to notice and opportunity to be heard on the issues addressed, *sua sponte*, and without notice by the Commission, regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. No issues with respect to the Claimant's entitlement to benefits under these statutes were preserved for appeal by the Claimant in his Form 30, or his 2014 Brief to the Appellate Panel, and were not addressed by the Court of Appeals. Therefore, the Appellants did not and could not have had an opportunity to address the merits of such claims before the Commission's Appellate Panel in the first instance (*i.e.*, by brief or oral argument in 2015), much less on remand (in 2019). Indeed, the Appellants were not given any notice that the Commission intended to address the merits of long-abandoned claims under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, *sua motu,* in June 2019.

The Constitution of the United States of America and the Constitution of the State of South Carolina guarantee due process and equal protection rights to all parties. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 & § 22. The South Carolina Constitution provides:

> "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3.

Our state Constitution additionally assures:

> "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 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.

The South Carolina Supreme Court has interpreted this provision to provide "persons the right to notice and an opportunity to be heard by an administrative agency." Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (citing Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)); *accord* Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (holding the "fundamental requirements of due process include

notice, an opportunity to be heard in a meaningful way, and judicial review."). At a minimum, due process requires adequate notice and adequate opportunity for a hearing. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)); *accord* Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 353, 354 (2008). Importantly, an interested party must be given notice "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (2002) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Murdock v. Murdock, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999)).

Here, the Commission wholly failed to apprise the Appellants of their intent to address arguments regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, which were not preserved for appeal and which were not even briefed[6] or argued before the Commission's Appellate Panel at the initial review hearing in 2015. Therefore, the Appellants have been denied due process and the Commission's Orders of June 17 and 24, 2019 should be reversed and vacated. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 131-132, 530 S.E.2d 643, 650 (Ct. App. 2000) (holding that to "prove the denial of due process in an administrative

[6] The Claimant raised no argument with regard to regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief; however, the Defendants did argue to the Appellate Panel that the Hearing Commissioner's conclusions about these statutes are the law of the case.

proceeding, a party must show that it was substantially prejudiced by the administrative process") (quoting Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds by Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)). The Appellants' right of equal protection has likewise been infringed by the Appellate Panel's failure to adhere to the statutory mandates of S.C. Code Ann. § 42-17-50 and to confine its inquiry and its order to those matters properly before it.

III. The Commission's award under S.C. Code Ann. § 42-15-60 is not supported by substantial evidence or the applicable law.

The Commission does not have power, authority, or jurisdiction to disturb the Hearing Commissioner's conclusion of law with respect to S.C. Code Ann. § 42-15-60 by virtue of S.C. Code Ann. § 42-17-50 and the 2019 award of benefits under § 42-15-60 otherwise violates the Appellants' right to due process and equal protection. The Claimant was denied future medical treatment by the Hearing Commissioner's September 2, 2014 Order. The Claimant did not appeal this ruling and neither his Form 30 and his Brief to the Commission's Appellate Panel dated November 14, 2014 makes no mention of S.C. Code Ann. § 42-15-60, or even his entitlement to future medical benefits generally. Additionally, the Claimant at no time ever requested that the Appellants' right to choose the authorized treating physician under S.C. Code Ann. § 42-15-60 be revoked by the Commission.

Furthermore, the Commission's award of future medical benefits on remand is impermissibly vague and otherwise unsupported by substantial evidence or the applicable

law. Under S.C. Code Ann. § 42-15-60, an employee is only entitled to future medical treatment upon proof that such treatment "will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty." As explained by the Court of Appeals, this language constitutes a "heightened standard of medical evidence," which "limit[s] the Appellate Panel's broad discretion" to award future medical benefits. Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). While the Commission's June 24, 2019 Order briefly mentions the existence of S.C. Code Ann. § 42-15-60 (R. p.89), the Commission utterly failed to note its requirements or elucidate how they were possibly met in the instant case. This alone constitutes reversible error.[7]

In addition, the Appellants respectfully contend that there is no competent expert medial evidence "stated to a reasonable degree of medical certainty" addressing whether any proposed treatment would "lessen the period of disability;" therefore, the Commission's broad award of future medical treatment should be reversed as a matter of law.

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[7] The APA requires that "[a] final decision ... include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

A. Cervical Surgery

The Commission's June 17 and 24, 2019 Orders contains the following conclusory finding :

> "With regards [sic] to the Claimant's cervical spine...we find Claimant is entitled to additional medical treatment to include the recommended cervical fusion as recommended as it has been shown by a preponderance of the evidence that it would tend to lessen his period of disability." (R. p.74#15, p.87 #15).

The Commission failed to elucidate what "expert medical evidence stated to a reasonable degree of medical certainty" showed that any treatment would "lessen the period of disability," likely because no such evidence exists.

While the Commission cites the opinions of Dr. Wildstein and Dr. Poletti, their opinions do not satisfy the requisite burden of proof under S.C. Code Ann. § 42-9-260. According to Dr. Wildstein's report dated December 14, 2011, the Claimant "*could potentially benefit* from a one level C5-6 ACDF." (R. p.496) (emphasis added). However, Dr. Wildstein does not even relate the need for surgery to the August 10, 2011 accident, much less address the seminal issues lessening the "period of disability" to *any* degree of "certainty." Similarly, Dr. Poletti, who evaluated the Claimant once on July 16, 2013 for the purpose of litigation, merely posited that the Claimant "has a *potential* surgical lesion in his neck" and admitted that "surgery *may not be* a magic wand answer." (R. p.502) (emphasis added). While Dr. Poletti's report contains a catch-all "reasonable degree of

medical certainty" reference, the fact remains that that he was only reasonably certain that the Claimant had even a "potential" need for surgery, but Dr. Poletti otherwise made no mention of this potential surgery's impact on lessening the Claimant's disability.

Therefore, the Appellants respectfully contend that an award of a cervical fusion mentioned as mere potentiality some five to seven years ago is legally-insufficient As such, the Commission's award of a cervical fusion should be reversed as a matter of law.

B. Appointment of Dr. Poletti

Pursuant to S.C. Code Ann. § 42-9-260, the employer, not the employee, choses the authorized treating physician. S.C. Code Reg. 67-509 (stating that the "employer's representative chooses an authorized health care provider"); *see also* McKinney v. Kimberly Clark Corp., 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008). Section 42-9-260 further provides that the

> "refusal of an employee to accept any medical ... treatment when provided by the employer ... shall bar such employee from further compensation until such refusal ceases ...unless in the opinion of the Commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service."

This is the only circumstance in which the Commission can override an employers' right to choose an employee's authorized treating physician and is wholly inapplicable to the case at bar. Refusal has not been raised, nor has a justification been proffered.

Therefore, the Commission's ruling is clearly affected by an error of law and should be reversed.

In addition, the Claimant did not even request a change in treating physicians, or the appointment of Dr. Poletti, at the hearing on September 23, 2013, or at any time thereafter.[8] Dr. Poletti did not even see the Claimant for the purpose of treatment in the first instance. The issue of terminating the Appellants' rights under S.C. Code Ann. § 42-9-260 and S.C. Code Reg. 67-509 was not raised before the Hearing Commissioner, the Appellate Panel, or the Court of Appeals. Instead, the Commission unilaterally raised the issue, *sua motu*, on remand, without ever affording the Appellants notice or the opportunity to be heard regarding the revocation of their rights under S.C. Code Ann. § 42-15-60. The Appellants respectfully contend that this constitutes plain legal error, requiring reversal. *See* S.C. Code Ann. § 1-23-320(I) (stating that "[f]indings of fact must be based exclusively on the evidence and on matters officially noticed"). Not only does such a ruling exceeds the Commission's appellate jurisdiction, not only such a ruling violates the Appellants' right to due process, but because such a ruling is also clearly contrary the Commission's statutory authority and; therefore, constitutes an abuse of discretion. *See* Cox v. BellSouth Telecommunications, 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003) (holding that the Workers' Compensation Act provides

[8] Neither the Claimant's Form 58, Pre-Hearing Brief, dated August 5, 2013 (R. p.100), nor his arguments at the September 23, 2013 Hearing (*see* R. pp.337—338), makes even the slightest suggestion that the Appellants should be deprived of their statutory rights under S.C. Code Ann. § 42-15-60.

an exclusive compensatory system in derogation of common law rights, which must be strictly construed).

C. Knee Evaluation

According to the Commission's June 24, 2019 Order, the Claimant is "entitled to treatment" for his right knee at the expense of the Appellants. (R. p.89 #5). The Commission failed to specify what treatment he is entitled to for his right knee, most likely because no treatment was recommended at the time the record was closed in this claim back in January 2014. More importantly, the Commission made no finding or conclusion that any potential right knee treatment would "tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty" because there is no evidence that the Claimant requires (or in 2014 *required*) any treatment for his right knee to any degree of medical certainty. Therefore, the Commission's award of "treatment" for the knee is supported by neither substantial evidence, nor the applicable law and is otherwise violative of S.C. Code Ann. § 1-23-350, all of which require reversal.

The Commission again purportedly based its award on the opinions of Dr. Poletti, which were issued after his one-time evaluation for the purpose of litigation. However, Dr. Poletti's report only surmises, "[h]e requires evaluation by a knee specialist. I suspect that he *may require* additional MRI scanning of his knee and perhaps even knee surgery." (R. p.501) (emphasis added). Dr. Poletti did not recommend any treatment for the right knee, much less address causation or the tendency to "lessen the period of disability" required by S.C. Code Ann. § 42-15-60. While the Claimant was initially

diagnosed with a "superficial laceration" on his right knee (R. p.439), there was no evidence of any fracture or dislocation (only pre-existing Osgood-Schlatter disease) and not even his own personal physician, Dr. Abel, recommended any future treatment for the Claimant's right knee. (R. p.465).

Without "expert medical evidence stated to a reasonable degree of medical certainty," and without persuasive authority that specific medical treatment will "lessen the period of disability," the Commission lacks the power and authority to award the Claimant medical treatment for his right knee under the express terms of S.C. Code Ann. § 42-15-60. *See* Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). Here, the burden of proving his entitlement to benefits under S.C. Code Ann. § 42-15-60 was the Claimant's alone. *See* Glover v. Columbia Hosp., 236 S.C.410, 114 S.E.2d 565 (1960) (holding that claimants who assert their right to compensation must establish by the preponderance of the evidence the facts that will entitle them to an award); *see also* Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965) (stating "the difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party) (internal citations omitted)). By addressing, *sua motu*, a claim for medical treatment long-since abandoned, and where the requisite statutory burden of proof has not been met, the Commission has arbitrarily and capriciously exceeded its statutory authority and violated the Appellants' rights, necessitating reversal by the Court of Appeals.

D. Low Back

Much like the award for his right knee, the Commission made a vague conclusion that the Claimant is "entitled to treatment" for his back, without specifying what treatment he requires, much less what evidence has proven his entitlement. (R. p.89 #5). The Commission's findings of fact are no more instructive, as they contain only cursory mentions that "Dr. Poletti diagnosed Claimant with ...low back pain of indeterminate etiology," that "Dr. Poletti also opined Claimant needed an MRI scan of his lumbar spine" (R. p.86#13) and that; therefore, Dr. Poletti was appointed as the authorized provider for the Claimant's "lumbar spine treatment" (R. p.87 #16). Therefore, the Commission's findings and conclusions should be reversed as violative of S.C. Code Ann. § 1-23-350.

In addition, neither these vague and conclusory findings, nor the actual medical records themselves, support an award under S.C. Code Ann. § 42-15-60. Again, the burden was upon the Claimant to prove that additional medical treatment for his low back was required to "lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. S.C. Code Ann. § 42-15-60. However, not even the report of Dr. Poletti satisfies this burden, as Dr. Poletti did not recommend any treatment for the Claimant's low back – he didn't even provide a diagnosis or opine as to the cause of the Claimant's subjective complaints of low back pain. (R. p.502). The reports of Dr. Jones, Dr. Abel, and Dr. Wildstein similarly fail to recommend any medical treatment for the Claimant's low back complaints, which were described as "mild degenerative changes." (R. p.392, p. 463, p.465) Indeed, Dr. Jones

stated that it "does not appear that any future treatment would be warranted to help this patient achieve higher level of functional status or lessen his disability." (R. p.392).

There is simply no evidentiary basis upon which the Commission could have made the requisite findings regarding the need for low back treatment to "lessen the period of disability." Considering no treatment was recommended, it is obvious that the mandatory "reasonable degree of certainty" in such recommendation is also lacking. As such, the Commission's award of medical benefits for the low back under S.C. Code Ann. § 42-15-60 should be reversed by the Court of Appeals as a matter of law.

E. Blanket Award

According to the Commission's June 24, 2019 Order, the Appellants "are liable for Claimant's future medical treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck and back injuries" without limitation or qualification. (R. p.89 #5). This "blanket award" makes the Appellants responsible for any treatment Dr. Poletti recommends at any time in the future, regardless of whether it is causally-related to the August 10, 2011 accident, regardless of whether it would "tend to lessen the period of disability," and regardless of any degree of certainty in these recommendations. Essentially, the Commission has not only excused the Claimant's current burdens under S.C. Code Ann. § 42-9-250, but also excused his burden of proving entitlement to any treatment in the future, without reserving any opportunity for the Appellants to defend against such demands, as is their right under S.C. Code Ann. § 42-15-60.

For example, if Dr. Poletti recommends Hemlock injections in Timbuktu on a lark 20 years from now, the Appellants are "liable for" this treatment under the terms of

the Commission's June 24, 2019 Order. It would matter not that Dr. Poletti was not medically "certain" about the effects of Hemlock. It would be irrelevant that injecting Hemlock would not "lessen the period of disability." If the FDA concluded that Hemlock injections were dangerous, it would not change the Appellants' liability. The Appellants would not even be able to challenge the credentials of the Timbuktu provider, or even the fact that the provider is *in Timbuktu*. Regardless of any of these very serious issues, the Claimant would have a right to such treatment at the Appellants' expense under the very broad terms of the Commission's ruling and award of "medical treatment to [sic] the neck and back...with Dr. Steven C. Poletti or other referral made by Dr. Poletti."

However, neither S.C. Code Ann. § 42-15-60, nor any other provision of the Workers' Compensation Act authorizes the Commission to make such a broad, blanket award. In fact, the Supreme Court addressed such a situation in Rice v. Froehling & Robertson 267 S.C. 155, 226 S.E.2d 705 (1976). In Rice, the employer argued that the Commission's award of "such medical costs as will hereafter be incurred by claimant for medical services rendered by the Durham Rehabilitation Center" did not give them adequate notice or enable an appellate court to review the award; nor did it limit the services to those tending to limit the period of disability. The Supreme Court agreed, explaining that the vague nature of the award meant that future medical treatment "could be far ranging." Therefore, the Supreme Court held that the employer was

> "entitled to a more definitive order. Otherwise, they do not have an opportunity to argue that a specific medical care is unnecessary or that the proposed medical care will not tend to reduce the period of disability."

Id. The holding of Rice is clearly applicable to the "far ranging" award in the present claim and necessitates its reversal by the Court of Appeals.

IV. The Commission's award under S.C. Code Ann. § 42-9-10 and § 42-9-260 is not supported by substantial evidence or the applicable law.

The Commission's June 17, 2019 Order contains no legal conclusions whatsoever. (R. pp.70—75). By its Order dated June 24, 2019, the Commission made several vague conclusions regarding disability;[9] however, the Commission failed mention S.C. Code Ann. § 42-1-120, or S.C. Code Ann. § 42-9-10, or S.C. Code Ann. § 42-9-260, or even their requirements, despite awarding the Claimant

> "temporary total disability benefits from August 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment of any back-owed TTD accrued during litigation." (R. p.89 #6).

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[9] "Disability" is a term of art under the Workers' Compensation Act and is defined by S.C. Code Ann. § 42-1-120 as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury."

Of course, the record in this claim was closed on January 3, 2014, so the Commission has no evidence whatsoever pertaining to the Claimant's ability to earn wages after that date. (R. p.23). Additionally, neither the Claimant's Form 30 (R. pp.117—120), nor his November 14, 2014 Brief to the Appellate Panel (R. pp.121—136), makes any argument with respect to temporary total disability compensation or a lump sum payment; therefore, the Appellate Panel had no authority or jurisdiction to address these issues on remand. *See* Creech v. Ducane Co., *supra*, and Green v. City of Columbia, 427 S.E.2d 685 (1993). Furthermore, by addressing this issue, *sua motu*, despite the binding legal conclusions of the Hearing Commissioner, and without giving the Appellants notice or opportunity to make any arguments regarding the Claimant's entitlement to disability benefits on appeal or on remand, the Commission violated the Appellants' statutory and constitutional rights to due process and equal protection. Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997). In addition, the Appellate Panel had no authority or jurisdiction to disturb the unappealed legal conclusion that, pursuant to "S.C. Code Ann. Sec. 42-9-260, the [Appellants] are entitled to terminate temporary disability compensation effective...September 23, 2013." This conclusion, which was originally entered by the Hearing Commissioner and thereafter unappealed to either the Appellate Panel or the Court of Appeals, is the law of the case. *See* Atl. Coast Builders & Contractors, LLC v. Lewis, *supra*. Finally, the Appellate Panel has no authority or jurisdiction to speculate as to the Claimant's current ability to earn wages, or his ability to do so at any time since September 2013. *See* Sola v. Sunny Slope Farms, 244 S.C. 6, 10 (1964) (holding that claimants who assert their right to compensation must establish by the preponderance of the evidence the facts that will entitle them to an award under the

Workmen's Compensation Act and such award must not be based on surmise, conjecture or speculation).

In concluding that Claimant is entitled to temporary total disability compensation from August 11, 2011 "to the present and continuing" and further awarding him "a lump-sum award of any back payment of temporary disability benefits due," not only did the Commission err as a matter of law in failing to make any predicate finding of any actual, current, causally-related loss of wage-earning capacity, but there is no evidence in the record to support a finding that the Claimant is disabled at "present and continuing" because the record in this case was closed in January 2014. *See* Airco, Inc. v. Hollington, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977) (finding that the commission has a statutory duty to make a finding of fact for all "essential factual issues."); *see also* S.C. Code Ann. § 1-23-320(I) (stating that "[f]indings of fact must be based exclusively on the evidence and on matters officially noticed"); S.C. Code Ann. § 1-23-350 (requiring the Commission's decisions "include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."). Perhaps more importantly, the Commission's award of temporary total disability compensation "to the present and continuing," is not supported by substantial evidence or the applicable law and should be reversed, as it is based on pure, impermissible speculation. As our Supreme Court has explained,

> "awards of the...Commission may not rest upon surmise, conjecture or speculation but must be founded on substantial evidence...if the findings of

the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court."

Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1987) Therefore, the Commission's award, based on pure speculation, should be reversed by the Court of Appeals as a matter of law. *See* Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005) ("where the Commission's decision is controlled by an error of law, this court's review is plenary.").

Even assuming, *arguendo*, that the Commission had the authority or jurisdiction to address the Claimant's entitlement to temporary disability benefits for the period after September 23, 2013 (the date of the hearing), the Commission could only properly address whether the Appellants were permitted to terminate benefits on or before that date. There is no authority by which the Commission can award a lump sum of future disability benefits absent proof of permanent disability under S.C. Code Ann. §§ 42-9-10, 42-9-20, or 42-9-30, and only then can the Commission award a lump sum upon specific application by a claimant by complying with the provisions of S.C. Code Ann. § 42-9-301. By speculating as to the Claimant's temporary disability after the hearing and after the evidentiary record was closed, by awarding a lump sum in the absence of any request by the Claimant, and by basing a lump-sum award on impermissible speculation as to the Claimant's disability following the hearing, the Commission has eviscerated the Appellants' right to ever be heard on the issue of whether or to what extent he was capable of earning wages after September 23, 2013, necessitating reversal by the Court of Appeals. *See* Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (1947)

(holding that the parties have "clear" and "definite rights involved" in a lump sum request and "are entitled to notice of such proceedings and an opportunity to be heard.")

Certainly the issue of the Claimant's ability to earn wages after September 23, 2013 was not litigated at the September 23, 2013 hearing because such arguments would have been ridiculously speculative. Similarly, the Commission did not seek or obtain evidence or arguments on this issue following the remand from the Court of Appeals. However, under the terms of the Commission's June 24, 2019 Order, the Appellants will never have an opportunity to address this issue. For example, if the Appellants obtain proof that the Claimant has been working and earning wages consistently since September 23, 2013, they cannot dispute the Claimant's entitlement to benefits between September 23, 2013 and June 24, 2019 with such evidence at an actual hearing in the future because the Commission has already conclusively ruled that the Claimant is entitled to a lump sum payment of temporary total disability compensation for this period. This is plain legal error. *See* Rice v. Froehling & Robertson 267 S.C. 155, 226 S.E.2d 705 (1976) (reversing an award of the Commission that, by its sweeping terms, did not give the employer adequate notice or opportunity to be heard).

Pursuant to S.C. Code Ann. § 42-9-10, an employee is only entitled to temporary total disability compensation where "the incapacity for work resulting from an injury is total." The Supreme Court has explained that an employee must make "reasonable efforts to secure employment" in order to satisfy his burden of proof under S.C. Code Ann. § 42-9-210. Coleman v. Quality Concrete Products, Inc., 244 S.C. 625, 142 S.E.2d 43 (1965) (citing, *with approval*, Larson's Workmen's Compensation Law, Vol II, Section 56-66). Here, the Commission specifically acknowledged that the "Claimant admitted that he has

not applied for any jobs or even looked for work anywhere." (R. p.81 ¶4). Therefore, the Claimant did meet his burden of proving total disability as a matter of law.

However, under S.C. Code Ann. § 42-9-260, once temporary total disability compensation has been provided for 150 days, an employer must request permission to terminate benefits upon a showing that "the authorized health care provider reports the claimant has reached maximum medical improvement." S.C. Code Reg. 67-506(B). The Appellants requested to terminate benefits on June 13, 2019 based on the April 16, 2013 report of Dr. Jones, the authorized health care provider, stating that the Claimant had reached maximum medical improvement and was "capable of working without restrictions." (R. p.392). The Claimant's own personal physician, Dr. Abel, also placed the Claimant at maximum medical improvement on May 29, 2019. (R. p.465). Even if the Commission totally disregarded this evidence, it would not authorize the award of a lump sum of future benefits. Instead, the Commission's authority was limited to declining the request to terminate temporary disability benefits effective September 23, 2013 -- meaning the Claimant would continue to receive benefits indefinitely, whilst the Appellants' right to contest his entitlement to any future benefits would be preserved for future proceedings and future awards would be based on actual evidence.

V. The Commission's failure to address the implications of the Claimant's subsequent, intervening accidents constitutes legal error.

The June 24, 2019 Appellate Panel Order acknowledges that

> "the Claimant testified that he fell down a flight of stairs at his mother's house in November 2011 and again in January of 2012 and re-injured his back and neck on both occasions." (R. p.81 ¶2; (R. p.362, ll.2—7)."

While the Appellants maintain that the fact of these two intervening accidents breaking the chain of causation should be moot given the conclusive nature of Hearing Commissioner Taylor's denial of benefits S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Appellants would respectfully argue that if the Commission is authorized to address benefits under these statutes on remand, it was incumbent upon the Appellate Panel to address the legal ramifications of these intervening, non-work-related accidents. Based upon the Claimant's own admission, the proximate cause of his neck and low back problems is not work-related, but instead his problems are due to falls down a flight of stairs at home in November 2011 and again in January of 2012. The Commission's Conclusion of Law #3 acknowledges that an "intervening cause" can break the chain of causation, but fails to apply this law to the facts of the case, making the conclusion improper, and impermissibly vague. *See* S.C. Code Ann. § 1-23-350; *see also* Geathers v. 3V, 371 S.C. 570, 641 S.E.2d 29 (2007) (holding that an employer is not liable for additional benefits as a matter of law after an employee sustains a subsequent, intervening accident).

Conclusion

For the reasons set forth herein above, the Appellants, Chris Thompson Services and Bridgefield Casualty, respectfully request that the June 17 and June 24, 2019 Orders of the Workers' Compensation Commission be REVERSED.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
The Honorable T. Scott Beck, Commissioner

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

Samuel Rose, Employee, Respondent,

v.

JJS Trucking, Uninsured Employer; and
Chris Thompson Services, Upstream Employer; and
Bridgefield Casualty Insurance Co. and
South Carolina Uninsured Employers' Fund, Carriers;

of which the South Carolina Uninsured Employers' Fund is the Appellant,

and

JJS Trucking, LLC, Uninsured Employer, and
Chris Thompson Services, Upstream Employer, and
Bridgefield Casualty Insurance Co. are the Respondents,

AND

Samuel Rose, Employee, Respondent,

v.

JJS Trucking, Uninsured Employer; and
Chris Thompson Services, Upstream Employer; and
Bridgefield Casualty Insurance Co. and
South Carolina Uninsured Employers' Fund, Carriers,

of which Chris Thompson Services, Upstream Employer, and Bridgefield Casualty Insurance Co., Carrier, are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Appellants, Chris Thompson Services and Bridgefield Casualty Insurance Co., complies with Rule 211(b), SCACR, and

Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

March 31, 2021

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