SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NOS: 1322789, 1423445, 1503655, 1519702, 171990

Terry H. Capone

Employee,

Claimant,

vs.

City of Columbia

Employer,

AND

Companion Third Party Administrators, LLC

Carrier,

Defendants,

ORDER OF THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appearances: Claimant/Appellant appeared *pro se*.

Defendants/Respondents represented by Cynthia C. Dooley, Esq., of Turner, Padget, Graham and Laney, P.A.

Panel: Commissioner Susan S. Barden; Commissioner Melody L. James; and Commissioner Gene McCaskill.

Opinion by: Commissioner Susan S. Barden; Commissioner Melody L. James; and Commissioner Gene McCaskill.

STATEMENT OF THE CASE

Terry H. Capone (Claimant or Capone) has an extensive history of filing claims with, and obtaining decisions from, the South Carolina Workers' Compensation Commission (Commission). In that regard, the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) takes judicial notice of the following decisions and findings therein issued by the Commission: *Capone v. City of Columbia*, Nos: 1319203, 1322451, 1420487 (S.C. Workers'

Comp. Comm'n Dec. 2, 2015); *Capone v. City of Columbia*, Nos: 1319203, 1322451, 1420487, 2018 LEXIS 113 (S.C. Workers' Comp. Comm'n March 26, 2018); *Capone v. City of Columbia*, Nos: 1319203, 1322451, 1420487, 2019 LEXIS 19 (S.C. Workers' Comp. Comm'n March 1, 2019). *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records."); *Sloan v. Greenville Cty.*, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) ("We take judicial notice of our own docket and note that this very issue is currently on appeal . . . .").

The case *sub judice* stems from Capone's filing of five individual Form 50, Employee's Request for Hearing. Specifically, within his hearing request for WCC File Number 1322789, Capone alleged a December 12, 2013, work accident resulting in injuries to his "[b]rain to include Multiple Neurobiological Systems" in the form of shift work disorder, sleep deprivation, and post-traumatic stress disorder. Next, for WCC File Number 1423445, Capone alleged a September 25, 2014, work accident resulting in injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stressors. Third, for WCC File Number 1503655, Capone alleged a March 17, 2015, work accident resulting in injuries to his "Brain to include Multiple Neurobiological Symptoms" from a major impact injury in 2003 where he was catapulted some 16-feet off of a 24-foot ladder and other falls that caused/aggravated his traumatic brain injury. Fourth, in WCC File Number 1519702, Capone alleged an April 20, 2015, work accident resulting in injuries to his "Brain, Heart, Liver to include Multiple Neurobiological Symptoms" after exposure to carbon monoxide, Benzine, and other hazards. Lastly, in WCC File Number 1719990, Capone alleged a November 21, 2017, work accident resulting in injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stress.

In response, The City of Columbia and its claims administrator, Companion Third Party Administrators, LLC (collectively, "Respondents") denied compensability of each claim under the South Carolina Workers' Compensation Act, S.C. Code Ann. §§ 42-1-10 to –19-50 (2015 & Supp. 2020). For each claim, Respondents contested that Capone sustained an injury by accident, an occupational injury, or a repetitive trauma injury arising out of and in the course of his employment on the various dates alleged. In addition, Respondents maintained that each of Capone's alleged

conditions, if in existence, derived from his prior military service. Respondents also asserted, *inter alia*, the defenses of *res judicata*, that Capone's claim was barred by the applicable statute of limitation under section 42-15-40 of the South Carolina Code (2015), and that the fraud in the employment application applied.

Thereafter, on July 2, 2018, the Honorable Aisha Taylor (Single Commissioner) convened a merits hearing on the parties' respective filings—Forms 50 and 51. By Order dated January 29, 2020, the Single Commissioner ruled, *inter alia*, that Capone was not entitled to an award of benefits for any of his claims nor was he entitled to any form of medical treatment. The Single Commissioner made the following findings of facts:

1. These matters were heard before the undersigned on July 2, 2018, in Columbia, South Carolina.
2. At the call of the case for the hearing, the Claimant was advised of his right to have an attorney but elected to proceed *pro se*.
3. Claimant advised the Commission that in additional to his testimony, he had additional medical documentation that he was unable to produce that day and requested additional time to submit the evidence. Claimant was granted 45 days after the date of hearing to submit the evidence.
4. On or about August 7, 2018, the Claimant submitted a CD containing approximately 8,753 pages of APA submissions. On August 10, 2018, Claimant sent written correspondence advising that many of the pages were duplicates and his actual submission was approximately 200 pages. Nevertheless, On August 16, 2018, Defendants filed a Motion to Suppress Evidence related to the post-hearing submissions. The undersigned served an Order on August 31, 2018, denying Defendants Motion to Suppress Evidence. All evidence was admitted into the record for review by the undersigned. Defendants preserved their objection to the admitted evidence for appeal.
5. The matters pending before the undersigned on July 2, 2018, involve five different claims with five different dates of injury and/or occupational disease(s) as follows:
    a. WCC File Number 1322789 with a date of injury of December 12, 2013, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" in the form of shift work disorder, sleep deprivation, and

PTSD. Claimant also requested treatment for insomnia, sleep apnea, diabetes Type 2, hypertension, weight gain, and disease;

b. WCC File Number 1423445 with a date of injury of September 25, 2014, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stressors. Claimant also requested medical treatment for irritable bowel syndrome/diarrhea, GERD, bilateral knee pain, and back pain;

c. WCC File Number 1503655 with a date of injury of March 17, 2015, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from a major impact injury in 2003 where he was catapulted 16 feet off of a 24 foot ladder and other falls that caused/aggravated his traumatic brain injury. Claimant also requested treatment for mild neurocognitive disorder due to TBI including sleep, migraines, psychotherapy, and medications;

d. WCC File Number 1519702 with a date of injury of April 20, 2015, wherein Claimant alleged injuries to his "Brain, Heart, Liver to include Multiple Neurobiological Symptoms" after exposure to carbon monoxide, Benzine, and other hazards. Claimant also requested treatment for cardiomegaly and severe hepatic steatosis, heart, liver and brain; and

e. WCC File Number 1719990 with a date of injury of November 21, 2017, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stress. Claimant also requested medical treatment for Post-Traumatic Stress Disorder (PTSD) and occupational disease – multi system Disorder.

6. Claimant's request for benefits due to post-traumatic stress disorder, sleeplessness, sleep disorders, anxiety, and depression were previously ruled upon by the un-appealed Order of Commissioner McCaskill dated December 2, 2015 (WCC File No.: 1322451). Claimant re-filed the same claims with the Commission and the issues were deemed *res judicata* by the Order of Commissioner Wilkerson dated March 27, 2018, and affirmed by the Full Commission on March 1, 2019. Claimant asserts he is now filing his PTSD claim as an occupational disease as opposed to an injury by accident as previously pled. I find this is

a distinction without a difference in this claim as the underlying events and medical diagnosis are essentially the same and the facts have been previously ruled upon by this Commission. As such, I find claims 1322789, 1423445, 1503655, 1519702, and 1719990 as they relate to PTSD, other psychological conditions including depression and anxiety, and sleep disorders are governed by the doctrine of *res judicata.*

7. Notwithstanding the finding of *res judicata* relating to the PTSD, anxiety, depression, and sleep disorders, I find Claimant has a pre-existing condition of PTSD and other psychological and sleep disorders related to his service in the military and there is no statement to a reasonable degree of medical certainty that Claimant's service with the City of Columbia aggravated these pre-existing conditions as required by S.C. Code Section 42-9-35.

8. I find Claimant did not advise the city of Columbia of his pre-existing PTSD and related conditions in his employment application and that the City reasonably relied on Claimant's application when placing him with the Fire Department. I find the City's testimony compelling that Claimant could have been placed in many other capacities within the city other than the Fire Department, which Claimant alleges aggravated his pre-existing condition. As such I find the employer-employee relationship is void pursuant to *Cooper v. McDevitt & Street Co.*

9. Claimant's request for benefits for "back pain" was previously pled and ruled upon in WCC File No.: 1319203 and is governed by the doctrine of *res judicata.*

10. Claimant alleges he sustained a traumatic brain injury as a result of his employment with the City of Columbia (WCC File No.: 1503655). Although Claimant lists Claim Number 1503655 as having a date of injury of March 17, 2015, Claimant's Form 50 indicates the injury stems from a 2003 impact injury where he was catapulted off of a 24 foot ladder. As this claim related to an injury occurring in 2003, I find Claimant did not timely file this claim within the Statute of Limitations and is denied. I also find the doctrines of laches and estoppel apply to this claim, which also supports the basis for the denial.

11. Claimant asserts an occupational illness due to exposure to carbon monoxide benzine, and other hazards (WCC Claim No.: 1519702). Claimant alleges this exposure has injured or affected his heart, liver, and brain. Claimant has failed to meet his burden of proof under S.C. Code 42-11-10. Specifically, Claimant has failed to establish that he has an

occupational disease and that the occupational disease arose directly and naturally from exposure to hazards peculiar to his particular employment by a preponderance of the evidence. There is no medical evidence stated to a reasonable degree of medical certainty to support Claimant's contentions. As such, this claim is denied.

12. Claimant also alleges injuries to include Type 2 diabetes, hypertension, weight gain, general disease, irritable bowel syndrome, diarrhea, GERD, and bilateral knee pain related to his employment with the City of Columbia (WCC File Nos. 1322789 & 1423445). Claimant has failed to meet his burden of proving any if these conditions were either caused or aggravated by his employment with the City of Columbia. There is no medical evidence in the record stated to a reasonable degree of medical certainty that supports Claimant's contentions. As such, these claims are denied.
13. All claims for benefits related to WCC File Numbers 1322789, 1423445, 1503655, 1519702, and 1719990 are denied for the reasons set forth herein.

Based upon the foregoing Findings of Fact, the Single Commissioner concluded the following as a matter of law:

1. § 42-1-130 (1976, *as amended*), is applicable in determining a covered employee;
2. § 42-1-140 is applicable in determining a covered employer under the Act;
3. § 42-15-20 (1976, *as amended*), is applicable in determining notice;
4. Claims 1322789, 1423445, 1503655, 1519702, and 1719990 as they relate to PTSD, other psychological conditions including depression and anxiety, and sleep disorders are governed by the doctrine of *res judicata*. Claimant's request for benefits due to these alleged conditions were previously ruled upon by the un-appealed Order of Commissioner McCaskill dated December 2, 2015 (WCC File No.: 1322451), and Claimant re-filed the same claims with the Commission and the issues were deemed *res judicata* by the Order of Commissioner Wilkerson dated March 27, 2018 (and affirmed by the Full Commission on March 1, 2019). Although Claimant now asserts he is now filing his PTSD claim as an occupational disease as opposed to an injury by accident as previously pled, I find this is a distinction without a difference in this claim as the underlying events and medical diagnosis are essentially the same and the facts have been previously ruled upon by this Commission.

Claimant's request for benefits for "back pain" was also previously pled and ruled upon in WCC File No.: 1319203 and is governed by the doctrine of *res judicata*.

5. In addition, the Claimant has a pre-existing condition of PTSD and other psychological and sleep disorders related to his service in the military. Yet, under S.C. Code Ann. § 42-9-35 (1976, *as amended*), the Claimant has failed to meet his burden of proving an aggravation of any of these pre-existing conditions as there is no statement to a reasonable degree of medical certainty that Claimant's service with the City of Columbia aggravated these pre-existing conditions.
6. Under *Cooper v. McDevitt & Street*, 260 S.C. 463, 196 S.E.2d 833 (1973), the Claimant did not advise the city of Columbia of his pre-existing PTSD and related conditions in his employment application and that the City reasonably relied on Claimant's application when placing him with the Fire Department. Defendants' have proved through the City's testimony that Claimant could have been placed in many other capacities within the city other than the Fire Department, which Claimant alleges aggravated his pre-existing condition. As such, the employer-employee relationship is void pursuant to *Cooper*.
7. Pursuant to S.C. Code Ann. § 42-15-40, SCWCC No. 1503655 is barred by the statute of limitations. Although Claimant lists Claim Number 1503655 as having a date of injury of March 17, 2015, Claimant's Form 50 indicates the injury stems from a 2003 impact injury where he was catapulted off of a 24 foot ladder. As such, this claim is related to an injury occurring in 2003, and therefore the Claimant did not timely file this claim within the Statute of Limitations and is therefore denied. The doctrines of laches and estoppel also apply to this claim, which also supports the basis for the denial.
8. Under S.C. Code Ann. § 42-11-10, Claimant has failed to meet his burden of proof with regard to an alleged occupational illness affecting his heart, liver, and brain, due to exposure to carbon monoxide benzine, and other hazards (WCC Claim No.: 1519702). Specifically, Claimant has failed to establish that he has an occupational disease and that the occupational disease arose directly and naturally from exposure to hazards peculiar to his particular employment by a preponderance of the evidence. There is no medical evidence stated to a reasonable degree of medical certainty to support Claimant's contentions. As such, this claim is denied.

9. Under S.C. Code Ann. § 42-1-160 and § 42-1-35, Claimant has failed to meeting his burden of proving that his alleged Type 2 diabetes, hypertension, weight gain, general disease, irritable bowel syndrome, diarrhea, GERD, and bilateral knee pain were either caused or aggravated by his employment with City of Columbia (WCC File Nos. 1322789 & 1423445). Specifically, there is no medical evidence in the record stated to a reasonable degree of medical certainty that supports Claimant's contentions. As such, these claims are denied.
10. Under § 42-9-35 (1976, *as amended*), the Claimant has failed to meet his burden of proving an aggravation of a pre-existing condition as there is no medical statement to a reasonable degree of medical certainty that causally connects Claimant's alleged fall on December 11, 2016, to his need for additional surgery, and the facts do not show by a preponderance of evidence that Claimant sustained an aggravation of his severe pre-existing condition.
11. Under §42-1-160 (1976, as amended), the Claimant has failed to meet his burden of proof by a preponderance of evidence that he sustained any new injury by accident arising out of and in the course of employment as a result of the alleged incident on December 11, 2016.

Capone appealed the Single Commissioner's decision to the Appellate Panel in accordance with section 42-17-50 of the South Carolina Code (2015) and regulation 67-701 of the South Carolina Code of Regulations (2012) via a Form 30, Request for Commission Review (Form 30), dated February 12, 2020, wherein he listed five assignments of error. In support thereof, Capone submitted his appellate brief April 6, 2021. Thereafter, Respondents properly submitted their brief May 5, 2021, requesting that the Single Commissioner's decision be affirmed *in toto*. Respondents, as a threshold matter, asserted that aside from challenging the Single Commissioner's findings relative to *res judicata* and fraud in the employment application both involving his post-traumatic stress disorder claim, Capone failed to detail any additional assignments of error with proper specificity in his Form 30. On that ground, Respondents contended that the numerous findings of fact and conclusions of law rendered by the Single Commissioner falling outside of the ambit of those exceptions are the law of the case. In addition, Respondents maintained that the Single Commissioner correctly held that Capone's claims involving post-traumatic stress disorder, sleeplessness, sleep disorders, anxiety, and depression are barred by *res judicata* and that Capone's

post-traumatic stress disorder and related conditions claim is barred by the fraud in the employment application defense.

The parties appeared before Appellate Panel on July 21, 2021, for oral argument. After a thorough review of the evidence, arguments advanced by the parties on the issues before the Appellate Panel, and the applicable law, the Appellate Panel unanimously affirms the decision of the Single Commissioner *in toto*.

STANDARD OF REVIEW

In accordance with section 42-17-50, the Appellate Panel shall review the Single Commissioner's decision, weigh the evidence as presented at the initial hearing, and, if good grounds be shown therefore, amend the decision. Though the Appellate Panel is cloaked with the authority to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner, because the Single Commissioner is the fact finder who has the opportunity to observe witnesses first hand, it is only logical that the Appellate Panel should give great weight to her opinion. *See Green v. Raybestos–Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see generally Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996) (recognizing that a trial judge who observes a witness is in the best position to judge the witnesses' demeanor and veracity and to evaluate the credibility of her testimony). Notwithstanding, the final determination of witness credibility and the weight to be accorded to the evidence rests with the Appellate Panel. *E.g., Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989) (citation omitted). The Appellate Panel is, however, circumscribed to consideration of only the issues argued on appeal, and all other unchallenged findings of the Single Commissioner are final and not subject to review or reversal. *See Hams v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940).

DISCUSSION OF ISSUES ON APPEAL

I. **Issues not raised in Capone's Form 30 are not preserved for consideration by the Appellate Panel and, as a result, the Single Commissioner's findings of fact and conclusions of law on these issues are the law of the case.**

South Carolina jurisprudence has routinely recognized that "[o]nly issues raised to the [Appellate Panel] within the application for review [Form 30][1] of the single commissioner's order are preserved for review." *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016) (citation omitted); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) ("Due process requires that litigants receive notice of the issues to be met on trial, hearing or appeal. Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission.") (citation omitted). In that regard, unless within the scope of the appellant's or respondent's exceptions to the Appellate Panel, all findings of fact and law by the single commissioner become and are the law of the case. *E.g.*, *Ham*, 193 S.C. at 89, 7 S.E.2d at 722. Our Supreme Court also has held that a party lodging general exceptions within his Form 30, such as "the commission erred in making an award," are too amorphous to fulfill the notice requirements of due process and, accordingly, do not preserve an issue for review. *See Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944); *see also Hilton*, 418 S.C. at 250 n.2, 791 S.E.2d at 722 n.2 ("Flakeboard's claim that its four general exceptions raised these issues to the Commission is contrary to this Court's jurisprudence. *Each issue raised to the Commission must be done with specificity, not through blanket general exceptions.*") (emphasis added). In fact, "[t]he Commission has further emphasized the importance of including all appealed issues in the Form 30 through its own regulations." *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722. To wit, regulation 67-701 of the South Carolina Code of Regulations (2012) mandates particular requirements regarding the grounds for appeal:

> (3) The grounds for appeal *must be set out in detail* on the Form 30 in the form of questions presented.
>
> (a) Each question presented *must* be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error.

Id. (emphasis added); *see also Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (observing that "the legislature's use of the term 'must' in a statute means that the action is mandatory.") (citation omitted).

In this instance, within Capone's Form 30, he raised the following issues:

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[1] "I conclude that the Form 30 promulgated by the Commission implements the statutory mandate [of section 42-15-70 of the South Carolina Code] of 'an application for review.'" *Goodman v. City of Columbia*, 318 S.C. 488, 491, 458 S.E.2d 531, 533 (1995) (Finney, A.J., dissenting).

1. The Single [C]ommissioner [e]rred in law and [f]act in finding the Employer-Employee relationship is void and her reliance on Cooper v. McDevitt & Street is misplaced, as the Claimant did not knowingly and willfully make a false misrepresentation to his "physical condition" and unlike the case cited, no questions to include disability or injury where [sic] or have ever been asked on an application during his years of employment. As rebutted during his years of employment. As rebutted in the August 6, 2018[,] Pre hearing Brief page 13, *See* further Exhibit #109 p.317-321 and #110 page 322-324 in the Amended Pre Hearing Brief Aug [sic] 6, 2018[,] and Transcript.
2. The Commissioner erred in law and fact in finding claims 1322789, 1432445, 1503655, 1519702[,] and 1719990 as they relate to PTSD, other psychological conditions including depression and anxiety, and sleep disorders are governed by the doctrine of res judicata. *See Amended Pre-hearing Brief Aug* [sic] *6, 2018*[.]
3. The Commissioner erred in law and fact in finding "although Claimant now asserts he is now filing his PTSD claim as an occupational disease as opposed to any injury by accident as previously pled, I find this is a distinction without a difference in this claim as the underlying events and medical diagnosis are essentially the same and the facts have been previously ruled upon by this Commission." This fraud upon the Court [sic], as the Claimant detailed his rebuttal in his Amended pre-hearing [sic] August 6, 2018, [t]estimony and evidence which clearly have not been considered in the Decision and order dated January 29, 2020, and clearly violates the Claimants [sic] Constitutional rights, given not [sic] opportunity to be heard in a meaningful way or at meaningful time. *See Amended Pre-hearing Brief Aug* [sic] *6, 2018*[.]
4. The Single Commissioner error [sic] and abuse [sic] her discretion by failing to grapple with any of the Claimants [sic] Non Frivolous Claims or his rebuttals contained in the Amended Pre hearing Brief or address the testimony taken[,] and the decision and order is arbitrary on its face. *See Amended Pre-hearing Brief Aug [sic] 6, 2018*[.]
5. The January 29, 2020 Decision and Order of Single Commissioner. . . is a Void Judgement, As with [sic] December 2, 2015 Order and Decision of Singe [sic] Commissioner Gene Henry McCaskill, that was heard on August 21, 2015[,] that the present order relies on is equally a Void Judgment, both where [sic] rendered in violation of Constitutional [sic] to include but not limited to Due Process, Procedural and Substantive Due Process and Equal Protection Under the Color of law, no opportunity to be heard, Fraud Upon the Court, Crime Fraud Exception, "Active Concealment For Fraud In Real Property" 15-3-670(c)(1)(2) and other actionable violations of Law committed against Claimant. *See Amended Pre-hearing Brief Aug [sic] 6, 2018*[.]

Based on said issues, the Appellate Panel agrees with Respondents that, aside from challenging the Single Commissioner's findings relative to *res judicata* and fraud in the employment

application both involving his post-traumatic stress disorder claim and asserting two "blanket exceptions," Capone failed to detail any additional assignments of error in his Form 30. It follows, therefore, that the numerous findings of fact and conclusions of law rendered by the Single Commissioner falling outside of the ambit of these specific exceptions[2] are the law of the case. *See, e.g.*, *Ham*, 193 S.C. 66, 7 S.E.2d 712 (holding unchallenged findings of fact and conclusions of law of the single commissioner become the law of the case); *see also Hilton*, 418 S.C. at 249, 791 S.E.2d at 721 ("Only issues raised to the [Full] Commission within the application for review [Form 30] of the single commissioner's order are preserved for review."); *see generally Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (finding an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance"). Moreover, as Respondent's contended, Capone's fourth and fifth enumerated issues do not cure his omission of further challenges to the numerous findings of fact and conclusions of law outside of the specific exceptions as they are far too vague to fulfill the notice requirements of due process and, as such, do not preserve challenges to said issues for review. *See Jones*, 205 S.C. 247, 31 S.E.2d 447; *see also Hilton*, 418 S.C. at 250 n.2, 791 S.E.2d at 722 n.2 ("Flakeboard's claim that its four general exceptions raised these issues to the Commission is contrary to this Court's jurisprudence. *Each issue raised to the Commission must be done with specificity, not through blanket general exceptions.*") (emphasis added). Accordingly, with the exception of the Single Commissioner's findings corresponding to fraud in the employment application and *res judicata*, the Appellate Panel concludes that it need not reach any other issue due to Capone's failure to preserve the same for review. *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) ("Brunson, however, is not required to relitigate unchallenged findings which are the law of the case including Employer's admission in connection with the contact dermatitis injury."); *Green*, 311 S.C. at 81, 427 S.E.2d at 687 ("The full commission did not have authority to reach the election issue because Green did not raise it in his application for review."); *Green*, 311 S.C. at 80, 427 S.E.2d at 687 ("Here, the single commissioner required the election, and that ruling

[2] Other than challenging findings of fact 6 and 8 and conclusions of law 4 and 6, Capone did not appeal any of the Single Commissioner's findings of facts or conclusions of law within his Form 30. As will be further explained *infra*, the Appellate Panel finds that Capone's two general exceptions are too nebulous to preserve any additional challenge to the Single Commissioner's findings of fact and conclusions of law.

became the law of the case, even though it may have been in error. The City could therefore rely on the fact that it did not have to address the election issue on review by the full commission.").

II. The Single Commissioner correctly held that Capone's claims for post-traumatic stress disorder, sleeplessness, sleep disorders, anxiety, and depression are barred by *res judicata*.

Simply stated, "[t]he doctrine of *res judicata* prevents the relitigation of issues previously decided between the same parties." *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 183, 437 S.E.2d 130, 131 (Ct. App. 1993). Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (citation omitted). "Res judicata is shown if (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Johnson v. Greenwood Mills*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994) (citation omitted).

In this instance, each element of *res judicata* is met. Initially, as to the first element necessary to establish *res judicata*, the parties to matter—Capone and Respondents—are identical to the parties in the initial action heard before Commissioner McCaskill on August 21, 2015. As to the second element, any psychological problems currently claimed by Capone, to include post-traumatic stress disorder, depression, anxiety, and sleep disorders were precisely included as part of the subject matter at the hearing before Commissioner McCaskill. Moreover, to allow Capone to evade application of *res judicata* merely because he contended, for the first time at the hearing in this instance, that his alleged psychological conditions were the result of an occupational disease as opposed to an injury by accident or aggravation of a pre-existing condition, would produce an absurd result. *See Griggs v. Griggs*, 214 S.C. 177, 185, 51 S.E.2d 622, 626 (1949) (recognizing that "if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action."). Appellate Panel will not countenance this circuitous practice. *See Warren v. Raymond*, 17 S.C. 163, 189 (1882) (discussing *res judicata* and agreeing with the principle by a nameless but learned English judge that "[h]uman life is not long enough to allow matters once disposed of

being brought under discussion again . . . ."); *cf. Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990) ("There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties.").

Finally, as to the third element, on December 2, 2015, Commissioner McCaskill found, *inter alia*, that Capone failed to satisfy his burden of proving that his claims for post-traumatic stress disorder, depression, or anxiety, resulted from an injury by accident on November 7, 2013, or an aggravation of a pre-existing condition and were, as such, held non-compensable. Capone failed to timely appeal Commissioner McCaskill's Order, which became a final, valid judgment on the merits. Accordingly, the Single Commissioner correctly held that *res judicata* barred relitigation of whether Capone's post-traumatic stress disorder, depression, anxiety, and sleep disorder was compensable. *See Johnson*, 317 S.C at 251, 452 S.E.2d at 833 (finding employee's second attempt to establish compensability of her occupational disease before the single commissioner was barred by *res judicata* when the employee specifically raised the same issue and the single commissioner explicitly denied employee's claim in a prior unappealed order); *Mead v. Jessex, Inc.*, 382 S.C. 525, 534, 676 S.E.2d 722, 727 (Ct. App. 2009) (holding single commissioner's prior findings of non-compensability regarding hip and leg injuries were not appealed and, therefore, were barred by *res judicata*).

III. The Single Commissioner correctly determined that Capone's post-traumatic stress disorder and related conditions claim is barred by fraud in the employment application.

In *Cooper v. McDevitt & Street Co.*, our Supreme Court pronounced three necessary factors for a material misrepresentation in the employment application to vitiate the employment relationship:

> (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973) (citation omitted).

Here, ample evidence supports the Single Commissioner's conclusion that this test is met. In his application for employment with the City of Columbia, Capone, despite previously serving

in the U.S. Marine Corps (Marines), *see* H'rg Tr. 73:24-74:1-3, expressly denied being a member of the U.S. Armed Forces in his application and, concomitantly, did not answer the follow up questions in the event he had answered in the affirmative. Def. Ex. C 113. Additionally, Capone failed to apprise of his pre-existing post-traumatic stress disorder and related conditions within the application. *See* Def. Ex. C 112-13. During his testimony, Capone readily conceded to falsely concealing his prior involvement with the Marines. *See* H'rg Tr. 55:20-56:1-3. This evidence satisfies the first prong of the *Cooper* test. As to the second element, the City of Columbia's Chief of Staff H.R. Director's, Pamela Benjamin (Benjamin), testimony is sufficient to prove this factor. She testified that in the event Capone had disclosed his involvement with the Marines, further investigation would have been conducted, to include requesting his military records. H'rg. Tr. 79:19-22. Furthermore, said investigation would have revealed that Capone previously treated for post-traumatic stress disorder while in the Marines and, had she known that, Benjamin related that she would have denied his application. *See* H'rg Tr. 80:18-22. Benjamin also testified that City of Columbia relies on the answers given by applicants—to include the query of whether an applicant was a member of the U.S. Armed Forces—and considers them an important factor in the hiring of applicants. *See* H'rg Tr. 78:11-79:1-15. Lastly, as to the final *Cooper* element, a casual connection exists between the injury Capone pled—his post-traumatic stress disorder and related conditions—while working for the City of Columbia and the false representation since Capone had documented post-traumatic stress disorder well before the application process while serving in the Marines but failed to apprise of the same or reasonably alert the City of Columbia of such by denying his prior military service. *See Jones v. Ga.-Pacific Corp.*, 355 S.C. 413, 419, 586 S.E.2d 111, 114 (2003) (holding the third element of *Cooper* satisfied where the claimant "had documented back problems prior to employment and claims that she injured her back while working for [the employer].").

FINDINGS OF FACT

Having carefully considered the credibility of the testimony, exhibits, and the evidence presented, and taking into consideration the burden of persuasion of the parties, the Appellate Panel makes the following findings of fact by a preponderance of the evidence:

1. These matters were heard before the undersigned on July 2, 2018, in Columbia, South Carolina.
2. At the call of the case for the hearing, the Claimant was advised of his right to have an attorney but elected to proceed *pro se*.

3. Claimant advised the Commission that in addition to his testimony, he had additional medical documentation that he was unable to produce that day and requested additional time to submit the evidence. Claimant was granted 45 days after the date of hearing to submit the evidence.
4. On or about August 7, 2018, the Claimant submitted a CD containing approximately 8,753 pages of APA submissions. On August 10, 2018, Claimant sent written correspondence advising that many of the pages were duplicates and his actual submission was approximately 200 pages. Nevertheless, On August 16, 2018, Defendants filed a Motion to Suppress Evidence related to the post-hearing submissions. The undersigned served an Order on August 31, 2018, denying Defendants Motion to Suppress Evidence. All evidence was admitted into the record for review by the undersigned. Defendants preserved their objection to the admitted evidence for appeal.
5. The matters pending before the undersigned on July 2, 2018, involve five different claims with five different dates of injury and/or occupational disease(s) as follows:
    a. WCC File Number 1322789 with a date of injury of December 12, 2013, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" in the form of shift work disorder, sleep deprivation, and PTSD. Claimant also requested treatment for insomnia, sleep apnea, diabetes Type 2, hypertension, weight gain, and disease;
    b. WCC File Number 1423445 with a date of injury of September 25, 2014, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stressors. Claimant also requested medical treatment for irritable bowel syndrome/diarrhea, GERD, bilateral knee pain, and back pain;
    c. WCC File Number 1503655 with a date of injury of March 17, 2015, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from a major impact injury in 2003 where he was catapulted 16 feet off of a 24 foot ladder and other falls that caused/aggravated his traumatic brain injury. Claimant also requested treatment for mild neurocognitive disorder due to TBI including sleep, migraines, psychotherapy, and medications;

d. WCC File Number 1519702 with a date of injury of April 20, 2015, wherein Claimant alleged injuries to his "Brain, Heart, Liver to include Multiple Neurobiological Symptoms" after exposure to carbon monoxide, Benzine, and other hazards. Claimant also requested treatment for cardiomegaly and severe hepatic steatosis, heart, liver and brain; and

e. WCC File Number 1719990 with a date of injury of November 21, 2017, wherein Claimant alleged injuries to his "Brain to include Multiple Neurobiological Symptoms" from exposure to multiple traumatic and critical incidents and prolonged employer related stress. Claimant also requested medical treatment for Post-Traumatic Stress Disorder (PTSD) and occupational disease – multi system Disorder.

6. Claimant's request for benefits due to post-traumatic stress disorder, sleeplessness, sleep disorders, anxiety, and depression were previously ruled upon by the un-appealed Order of Commissioner McCaskill dated December 2, 2015 (WCC File No.: 1322451). Claimant re-filed the same claims with the Commission and the issues were deemed *res judicata* by the Order of Commissioner Wilkerson dated March 27, 2018, and affirmed by the Full Commission on March 1, 2019. Claimant asserts he is now filing his PTSD claim as an occupational disease as opposed to an injury by accident as previously pled. We find this distinction meaningless as the underlying events and medical diagnosis are essentially the same, and the facts have been previously ruled upon by this Commission. As such, we find claims 1322789, 1423445, 1503655, 1519702, and 1719990 as they relate to PTSD, other psychological conditions including depression and anxiety, and sleep disorders are governed by the doctrine of *res judicata*.

7. Notwithstanding the finding of res judicata relating to the PTSD, anxiety, depression, and sleep disorders, we find Claimant has a pre-existing condition of PTSD and other psychological and sleep disorders related to his service in the military, and there is no statement to a reasonable degree of medical certainty that Claimant's service with the City of Columbia aggravated these pre-existing conditions as required by S.C. Code Section 42-9-35.

8. We find Claimant did not advise the city of Columbia of his pre-existing PTSD and related conditions in his employment application and that the City reasonably relied on Claimant's

application when placing him with the Fire Department. We find the City's testimony compelling that Claimant could have been placed in many other capacities within the city other than the Fire Department, which Claimant alleges aggravated his pre-existing condition. As such we find the employer-employee relationship is void pursuant to *Cooper v. McDevitt & Street Co.*

9. Claimant's request for benefits for "back pain" was previously pled and ruled upon in WCC File No.: 1319203 and is governed by the doctrine of *res judicata.*
10. Claimant alleges he sustained a traumatic brain injury as a result of his employment with the City of Columbia (WCC File No.: 1503655). Although Claimant lists Claim Number 1503655 as having a date of injury of March 17, 2015, Claimant's Form 50 indicates the injury stems from a 2003 impact injury where he was catapulted off of a 24 foot ladder. As this claim related to an injury occurring in 2003, we find Claimant did not timely file this claim within the Statute of Limitations and is denied. We further find the doctrines of laches and estoppel apply to this claim, which also supports the basis for the denial.
11. Claimant asserts an occupational illness due to exposure to carbon monoxide benzine, and other hazards (WCC Claim No.: 1519702). Claimant alleges this exposure has injured or affected his heart, liver, and brain. Claimant has failed to meet his burden of proof under S.C. Code 42-11-10. Specifically, Claimant has failed to establish that he has an occupational disease and that the occupational disease arose directly and naturally from exposure to hazards peculiar to his particular employment by a preponderance of the evidence. There is no medical evidence stated to a reasonable degree of medical certainty to support Claimant's contentions. As such, this claim is denied.
12. Claimant also alleges injuries to include Type 2 diabetes, hypertension, weight gain, general disease, irritable bowel syndrome, diarrhea, GERD, and bilateral knee pain related to his employment with the City of Columbia (WCC File Nos. 1322789 & 1423445). Claimant has failed to meet his burden of proving any if these conditions were either caused or aggravated by his employment with the City of Columbia. There is no medical evidence in the record stated to a reasonable degree of medical certainty that supports Claimant's contentions. As such, these claims are denied.
13. All claims for benefits related to WCC File Numbers 1322789, 1423445, 1503655, 1519702, and 1719990 are denied for the reasons set forth herein.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Appellate Panel concludes the following as a matter of law:

1. § 42-1-130 (1976, *as amended*), is applicable in determining a covered employee;
2. § 42-1-140 is applicable in determining a covered employer under the Act;
3. § 42-15-20 (1976, *as amended*), is applicable in determining notice;
4. Claims 1322789, 1423445, 1503655, 1519702, and 1719990 as they relate to PTSD, other psychological conditions including depression and anxiety, and sleep disorders are governed by the doctrine of *res judicata*. Claimant's request for benefits due to these alleged conditions were previously ruled upon by the un-appealed Order of Commissioner McCaskill dated December 2, 2015 (WCC File No.: 1322451), and Claimant re-filed the same claims with the Commission and the issues were deemed res judicata by the Order of Commissioner Wilkerson dated March 27, 2018 (and affirmed by the Full Commission on March 1, 2019). Although Claimant now asserts he is now filing his PTSD claim as an occupational disease as opposed to an injury by accident as previously pled, we find this is a distinction without a difference in this claim as the underlying events and medical diagnosis are essentially the same and the facts have been previously ruled upon by this Commission. Claimant's request for benefits for "back pain" was also previously pled and ruled upon in WCC File No.: 1319203 and is governed by the doctrine of *res judicata*.
5. In addition, the Claimant has a pre-existing condition of PTSD and other psychological and sleep disorders related to his service in the military. Yet, under S.C. Code Ann. § 42-9-35 (1976, *as amended*), Claimant has failed to meet his burden of proving an aggravation of any of these pre-existing conditions as there is no statement to a reasonable degree of medical certainty that Claimant's service with the City of Columbia aggravated these pre-existing conditions.
6. Under *Cooper v. McDevitt & Street*, 260 S.C. 463, 196 S.E.2d 833 (1973), Claimant did not advise the city of Columbia of his pre-existing PTSD and related conditions in his employment application and that the City reasonably relied on Claimant's application when placing him with the Fire Department. Defendants have proved through the City's testimony that Claimant could have been placed in many other capacities within the city

other than the Fire Department, which Claimant alleges aggravated his pre-existing condition. As such, the employer-employee relationship is void pursuant to *Cooper*.

7. Pursuant to S.C. Code Ann. § 42-15-40, SCWCC No. 1503655 is barred by the statute of limitations. Although Claimant lists Claim Number 1503655 as having a date of injury of March 17, 2015, Claimant's Form 50 indicates the injury stems from a 2003 impact injury where he was catapulted off of a 24 foot ladder. As such, this claim is related to an injury occurring in 2003, and therefore Claimant did not timely file this claim within the Statute of Limitations and is therefore denied. The doctrines of laches and estoppel also apply to this claim, which also supports the basis for the denial.
8. Under S.C. Code Ann. § 42-11-10, Claimant has failed to meet his burden of proof with regard to an alleged occupational illness affecting his heart, liver, and brain, due to exposure to carbon monoxide benzine, and other hazards (WCC Claim No.: 1519702). Specifically, Claimant has failed to establish that he has an occupational disease and that the occupational disease arose directly and naturally from exposure to hazards peculiar to his particular employment by a preponderance of the evidence. There is no medical evidence stated to a reasonable degree of medical certainty to support Claimant's contentions. As such, this claim is denied.
9. Under S.C. Code Ann. § 42-1-160 and § 42-1-35, Claimant has failed to meet his burden of proving that his alleged Type 2 diabetes, hypertension, weight gain, general disease, irritable bowel syndrome, diarrhea, GERD, and bilateral knee pain were either caused or aggravated by his employment with City of Columbia (WCC File Nos. 1322789 & 1423445). Specifically, there is no medical evidence in the record stated to a reasonable degree of medical certainty that supports Claimant's contentions. As such, these claims are denied.
10. Under § 42-9-35 (1976, *as amended*), the Claimant has failed to meet his burden of proving an aggravation of a pre-existing condition as there is no medical statement to a reasonable degree of medical certainty that causally connects Claimant's alleged fall on December 11, 2016, to his need for additional surgery, and the facts do not show by a preponderance of evidence that Claimant sustained an aggravation of his severe pre-existing condition.

11. Under §42-1-160 (1976, as amended), Claimant has failed to meet his burden of proof by a preponderance of evidence that he sustained any new injury by accident arising out of and in the course of employment as a result of the alleged incident on December 11, 2016.

ORDER

IT IS HEREBY ORDERED that, based on the foregoing, the Decision and Order of the Single Commissioner is **AFFIRMED.**

AND IT IS SO ORDERED.

Commissioner Susan S. Barden

Commissioner Melody D. James

Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on September 20, 2021

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
REQUEST FOR A PROPOSED DECISION AND ORDER

This document is not a Decision and Order. It is a request for a proposed order. The Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order.

Terry Capone v City of Columbia
SCWCC: 1322789, 1423445, 1503655, 1519702, 1719990
Commission Panel: McCaskill, James, Barden; Chair
Order Assigned to Commissioner: Barden
Court Reporter – Sean Cary - 803-252-3445

Terry Capone	Pro Se/Appellant
Cynthia D. Dooley	Defendants/Respondents

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **Affirm** the decision and order of the Single Commissioner.

Ms. Dooley please prepare a proposed order and submit to the Judicial Department within thirty (30) days of this notice. The proposed order shall be submitted in Word format to appeals@wcc.sc.gov and shared with each Party. Please make sure the Appellate Panel Decision and Order recites the specific Finds of Fact and Rulings of Law of the Single Commissioner's Decision and Order and reflects any comments requested by a Commissioner.

The signature page shall include a signature line for each Commissioner and the first signature should be the name of the Commissioner assigned the case as indicated above.

If you have any questions, please do not hesitate to email me at ehollmon@wcc.sc.gov or call at 803.737.5737

Judicial
Transmitted via email this 19 July 2021

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