THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

Patricia Fore, Employee ..... Appellant,

v.

Griffco of Wampee, Inc., Employer, and Chartis Claims, Inc., Carrier, ... Respondents.

REPLY BRIEF OF APPELLANT

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1. Fore was denied a fair trial due to the Commission's *ex parte* communication with a witness and the Carrier [In reply to Respondents' arguments at pages 10-22].

Respondents primary argument is to overlook the prejudicial impact of the improper ex parte communication by arguing "the Commission correctly held that there was no ex parte contact." [Brief of Respondents, page 10]. The record not only shows there was ex parte contact between a material witness and the Commission, but that the Commission improperly engaged in *ex parte* communicated with the Respondents regarding that witness. The Commission's unbridled zeal to assist the Carrier in this case[1] violated the APA, violated Canon 3B7, and caused manifest prejudice to the rights of the Appellant.

This is a civil matter between two private parties. It is fundamental to our system of justice that no court – nor the Commission acting as a quasi-court – is ever permitted to secretly provide behind-the-scenes information from a material witness to one party and not the other. When a tribunal receives unsolicited evidence from a potential witness in a case, the tribunal has a duty to cure the harm by sharing the information with all parties. See Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)("When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties."). The failure to do so mandates reversal – even more so when the harm is compounded by affirmatively engaging in *ex parte* communication to expressly give one party an advantage over the

[1]Director Smith specifically instructed the Attorney General to forward his letter to the Carrier "so it can conduct an investigation" – even while simultaneously acknowledging that "I don't believe I can alert the carrier to the alleged fraud." [R. page 382].

other in "conduct[ing] an investigation." [R. pages 381-383].

A. The communication in this matter fits within the definition of *ex parte* communication.

Respondents argue at length that there was no *ex parte* contact because "*ex parte* communication is defined as 'prohibited communication between counsel and the court when opposing counsel is present.'" [Brief of Respondents, page 11 (quoting Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003)]. The referenced quote is from a footnote in which the court observes that the narrow black-letter definition of *ex-parte* communication used in legal dictionaries is used much more broadly in workers' compensation. In Brown, the court specifically endorsed the term to bar "'*ex parte*' methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider." Id.

Although Brown is the leading South Carolina case defining *ex parte* communication broadly, other cases and other jurisdictions share the same concerns – most particularly when the communication is prejudicial (or has the appearance of being prejudicial) to the opposing party. See In re Newberry County Magistrate English, 625 S.E.2d 919, 367 S.C. 297 (2006)(violation of Canon 3B(7) in traffic ticket case where magistrate committed "judicial misconduct to have had an *ex parte* communication with the charging trooper and to even suggest the trooper 'help' the employee"); In re Cummings, 292 P.3d 187 (Alaska 2013)(judge "violated Canon 3B(7) by engaging in '*ex parte* communication that had the appearance of aiding the prosecution' and 'by giving the prosecution relevant case law that may have not been available to the defense.'"). The Nebraska Supreme Court condemned *ex parte* communication in no uncertain terms, stating: "[Canon 3B(7)] indicates that an *ex parte* communication occurs when a judge communicates with *any person*

concerning a pending or impending proceeding without notice to an adverse party." State v. Lotter, 586 N.W.2d 591, 610 (Neb. 1998)(emphasis added).

Respondents contend the chain of communication between witness Steve McGowan to Director Smith to Deputy Attorney General Weiss to the Carrier cannot be considered *ex parte* contact because none of this "communication was between counsel and the court." [Brief of Respondents, page 11]. This Court should reject any attempt to segregate these individual communications. The analysis commands an examination of the totality of the circumstances. See In re Beckham, 620 S.E.2d 69, 365 S.C. 637 (2005)(judicial misconduct for magistrate to convey message from defendant's family member to law enforcement about pending case).

First, Respondents contend the communication from McGowan to Director Smith "is not an *ex parte* contact for the simple reasons that Mr. McGowan is not and never has been a party in this case." [Brief of Respondents, pages 11-12]. In fact, this is an *ex parte* contact – for it involves a potential witness in a civil case contacting the adjudicative body concerning the facts of a pending case. See Arnau v. Arnau, 429 S.E.2d 116 (Ga.App. 1993)(new trial granted where trial judge conducted *ex parte* meeting with witness). It is no different than a potential witness contacting a clerk of court, a judge's administrative assistant, or a judge's law clerk.

As the Commission did not solicit the communication, there is no fault attached to the Commission for taking the initial phone call.[2] However, the mere fact the communication was initiated by the witness does not permit the Commission to forward the communication to one party

[2]Strictly speaking, the phone call was solicited by the Commission, for it had a link on its website inviting members of the public to call in and report suspected fraud. Such inquires were routinely turned over to insurance carriers via the same back-door method used in this case. As the Commission's chairman acknowledged at oral argument, that procedure has been changed. [R. page 241, lines 19-24].

and not the other. Rule 3B(7) explicitly requires that provision be made "promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond." Rule 501, Canon 3B(7), SCACR.

Respondents argue that Gary Smith is not part of the hearing Commissioners' staff. The argument appears to be that only the individual Commissioner and his administrative assistants are subject to the prohibition on *ex parte* contact. The Appellate Panel appears to have relied on the second paragraph of the statute subjecting the commissioners to the Code of Judicial Conduct. This paragraph merely sets forth the requirement that "the commissioners and their administrative assistants must attend a workshop of at least three continuing education hours concerning ethics and the Administrative Procedures Act." S.C. Code Ann. § 42-3-250 (2007). Requiring ethics training for the individuals who run the Commission (and their assistants) can hardly be construed as giving everyone else at the Commission free reign to send material evidence to parties with pending cases. Cf. People v. Kangas, 113 N.W.2d 865 (Mich. 1962)("[W]e . . . caution trial judges that bailiffs, sheriffs, and other court personnel should be warned about practices involving associations with jurors both in and out of the courtroom which might create the opportunity to influence their decisions.").

The statute confirms that Smith is part of the hearing Commissioners' staff. The Workers' Compensation Commission consists of seven members appointed by the Governor – one of whom is designated as the chairman of the Commission. See S.C. Code Ann. § 42-3-20 (2007). "The chairman is the chief executive officer of the commission and shall execute the policies established by the *commission in its capacity as the governing body of the judicial and administrative departments*." S.C. Code Ann. § 42-3-25 (2007)(emphasis added). The Director of the Compliance

Division is supervised by and responsible to the Commissioners. See, also S.C. Code Ann. § 42-3-80, 90 (2007)(establishing that division directors "shall perform such functions and duties as may be assigned . . . by the director of the administrative department subject to the provisions of § 42-3-25."). The letter sent by Gary Smith was not an isolated, random occurrence. It was part of a deliberate policy promulgated by the chairman of the Commission. [R. page 241, lines 19-24].

Respondents further argue that any communication by or from Smith does not implicate the adjudicative side of the Commission because the Director of the Compliance Division works on the administrative side. [Brief of Respondents, page 14]. The administrative side of the Commission is akin to court administration in the state judicial system. Just as the State Constitution provides that the Chief Justice is the "administrative head of the unified judicial system," Title 42 provides that the Chairman is the administrative head of the Workers' Compensation Commission. S.C. Const. Art. V, § 4.

The fact Smith was the Director of the Compliance Division does not give him authority to violate the prohibitions on *ex parte* communication. See S.C. Code Ann. § 1-23-360 (2007)(prohibiting *ex parte* communication by "*members or employees* of an agency assigned to render a decision . . ." (emphasis added)). There is never a circumstance where an employee of an agency or court personnel can engage in *ex parte* communication about the merits of a case with one of the parties. Therefore, this Court should find as a matter of law that the Smith letter was a prohibited *ex parte* communication between the Commission and Respondents.

B. The actions taken by the Commission in this case violated the ethical rules and statute barring *ex parte* communication.

Respondents absurdly mischaracterize the issue by arguing "To accept Claimant's argument

would mean that every single time a fraud complaint is lodged with the Commission, the entire Commission would have to recuse itself from any proceedings involving the referenced claimant."[3] Appellant is arguing no such thing. The argument is simply that the Commission must comply with the Code of Judicial Conduct and the APA. When it receives *ex parte* communication about a pending case from a witness, party or attorney in a case, it must cure the potential prejudice by immediately disclosing the *ex parte* communication to all parties. Only when the Commission fails to disclose the ex parte communication – or worse, conveys it to only one party as was done here – must the Commission recuse itself. It may be that only a single commissioner need be recused, but when the prejudice is as pervasive as it is here – resulting from an affirmative policy to deliberately assist insurance carriers in investigating cases – it is more than reasonable for the entire Commission to be recused. Cf. S.C. Code Ann. § 42-17-40 (B) (2007) (providing that the entire Commission is prohibited from hearing any case involving a commissioner, a member of a commissioner's household, or any employee of the commission).

Respondents further argue that section 1-23-360 applies only to "adjudicators." [Brief of Respondents, pages 13-14]. Presumably the argument is that only the actual commissioners are adjudicators. This argument is untenable. The statute explicitly refers to "members or employees of an agency assigned to render a decision . . ." S.C. Code Ann. § 1-23-360 (2007). Here, the "agency assigned to render a decision" is the Workers' Compensation Commission. The prohibition on *ex parte* communication applies equally to members (the actual commissioners) and employees (everyone else).

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[3]Respondents' statement ignores the fact that the anti-fraud statute applies equally to "any applicant, policyholder, claimant, medical provider, vocational rehabilitation provider, attorney, agent, insurer, fund, or advisory organization." S.C. Code Ann. § 38-55-530 (2007).

The section is the APA's analogue to Judicial Canon 3B(7). It includes the same exceptions for internal communications within the agency. "The exception embodied in Canon 3B(7)(C) was designed to give a judge some flexibility in supervising judicial employees in the performance of their duties. For example, a judge must necessarily engage in ex parte communications with a law clerk in order to advise the law clerk on how to draft a disposition or research an issue. **It was not intended to permit a judge to circumvent other provisions of the Canons or become an advocate for one of the parties. Thus a judge could not, under the auspices of communicating with court personnel, instruct a law clerk to independently gather evidence in support of a party's position.**" In re Fine, 13 P.3d 400, 409-410 (Nev. 2000)(*ex parte* communication with witnesses warranted removal of judge from office).

The procedure established by the Commission for surreptitiously conveying *ex parte* fraud allegations to insurance companies via the Attorney General's office is *exactly* the type of abuse and unfairness the APA and Judicial Canons seek to prevent. It is a patent abuse of the State's authority which fundamentally undermines the judicial process. For the rule of law to reign supreme, both courts and administrative agencies must not only be fair – but must also scrupulously avoid any appearances of unfairness. Providing investigative support to a private litigant is a fundamental violation of this principle; even more so when the Commission's director acknowledges the violation within the prohibited communication by admitting: "I don't believe I can alert the carrier to the alleged fraud." [R. pages 381-383].

C. The actions of the Commission and the Respondents regarding the *ex parte* communication resulted in substantial prejudice to the Appellant.

Respondents allege there was no prejudice in this case because "Insurance fraud was **not** an

allegation in this case." [Brief of Respondents, page 17 (emphasis in original)]. On this one point the parties can agree: *there is absolutely no evidence nor even an allegation that Patricia Fore engaged in insurance fraud.*[4]

However, that begs the question, as there was no allegation of insurance fraud, why then did Respondents introduce the Smith letter in the first place? The answer is self-evident; Respondents wanted to give the Commission (and this Court) the false impression that Fore had committed fraud. Indeed, counsel admitted this at the hearing when he stated: "It is simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim, and it is properly admissible."[5] [R. page 99, lines 2-5]. To suggest "the July 18 Letter was not presented as either character evidence or for impeachment purposes" is, frankly, astoundingly disingenuous. [Brief of Respondents, page 21].

This argument was highly improper. Not only would evidence of an ongoing fraud investigation by the attorney general be inadmissible, *there never was any such fraud investigation.* Rule 404; Rule 609, SCRE. See, also S.C. Code Ann. § 38-55-570 (D) (2007)(". . . any information furnished pursuant to this section is privileged and shall not be part of any public record."). The sole action taken by the attorney general's office was to transmit the Smith letter to the Carrier – as duly

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[4]Fore went to work for ABC Bonding on the advice of her doctor with the participation of the Carrier's nurse case manager, Cathy Nelson. She was released to work with restrictions on August 27, 2010. [R. page 306, 308]. Her work efforts were documented by Dr. Wolgin on September 30, 2010, where he noted, "She is able to continue with her work which is 3 hours per day 3 days per week helping in an office setting." [R. page 312]. As Fore *never* concealed her attempt to work from her doctor and the Carrier's nurse, *there is no evidence of insurance fraud.*

[5]The Rules of Evidence allow admission of an *actual conviction* of certain crimes; never mere allegations – and certainly not when counsel later concedes "Insurance fraud was not an allegation in this case." [Brief of Respondents, page 17]. Rule 404; Rule 609, SCRE.

instructed by the Commission.[6] The AG made no investigation itself nor did it turn the case over to SLED for investigation. This was simply an attempt by counsel to taint the proceedings with improper, unsubstantiated and unduly prejudicial allegations – an effort which, sadly, was successful.[7]

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[6]The Smith letter openly admitted that the Workers' Compensation Commission has no authority to "alert the carrier to the alleged fraud." [R. page 381-383]. However, not only does the Commission lack such authority, neither does the Attorney General. The Attorney General "is empowered to . . . refer the matter for investigation to the State Law Enforcement Division who shall investigate thoroughly all claims or allegations . . ." S.C. Code Ann. § 38-55-560 (2007). The Attorney General is not allowed to delegate SLED's investigative powers to a private party. See S.C. Code Ann. § 38-55-520 (2007)("The purpose of this article is . . . require the investigation of alleged insurance fraud by State Law Enforcement Division."). Turning over communication received from a potential witness in a pending case to an insurance company "so it can conduct an investigation" is a serious misuse of authority. No state agency should inject the weight of state authority into a private matter without explicit statutory authority. Cf. In re Estate of Brown, Op. No. 27227 (S.C.Sup.Ct. filed February 27, 2013)(Shearouse Adv.Sh. No. 10 at 14)(Attorney General's "influence over [dispute involving individual's] estate has exceeded the statutory authority allowed in such matters.")

[7]This is not to suggest that it was improper of counsel to argue that Fore had worked for Steve McGowan and provided assistance, albeit unpaid, to Tony Owens as evidence that she "has been able to earn occasional wages or perform certain kinds of gainful work . . ." Colvin v. E.I. Du Pont De Nemours Company, 227 S.C. 465, 88 S.E.2d 581 (1955). These facts – openly testified to by Fore on direct examination – were properly before the Commission. The line requiring candor to the court was crossed when Respondents intentionally introduced patently inadmissible evidence to mislead the Commission into believing "that there is a fraud investigation ongoing by the A.G.'s office in this claim." [R. page 99, lines 2-5]. This was improper because, "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the *lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false*." Rule 3.3, Comment 2, SCACR (emphasis added). See, also Rule 3.4, SCACR ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . , or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . ."); Rule 4.5, SCACR ("A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.").

The protestations of Respondents that no prejudice resulted from the *ex parte* communication – and, indeed, the protestations of the Appellate Panel in trying to justify its own role – cannot survive even superficial scrutiny. As our Supreme Court stated:

> The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" *ex parte* communications, but against *ex parte* communications. Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

See, also Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993)(reversing despite finding by the trial judge that the *ex parte* communication "if consulted at all, had no bearing on the trial court's decision.").

The existence of *ex parte* communication raises a rebuttable presumption of prejudice. See, e.g., Ellis; Blaker v. Planning and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989). Once there has been a showing of improper *ex parte* communication, the burden of showing that the communication was harmless shifts to the party seeking to uphold the decision below. The presumption may be rebutted by evidence that (1) the *ex parte* evidence or testimony was not received by the Commission or (2) was not considered by it and, therefore, did not affect the Commission's final decision. It is undisputed the Smith letter was received by the Commission, so the only remaining avenue is whether Respondents can prove the improper *ex parte* communication was not considered in the Commission's final decision. This they cannot do.

The Appellate Panel found: "I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. This finding demonstrates just how critical the *ex parte* communication was in tainting the outcome of this case. It shows the Commission's decision was based *entirely* on Fore's credibility – to the exclusion of the overwhelming medical and other

evidence of her disability. See South Carolina Dept. of Social Services v. Lisa C., 669 S.E.2d 647, 380 S.C. 406 (Ct. App. 2008)(improper for the fact-finder to make a credibility determination based on inadmissible evidence). Harmful error exists when the trier of fact "directly and indirectly communicated" *ex parte* with an adverse party and "the evidence against [the aggrieved party] was *entirely based on a credibility determination* by the judge."[8] In re D.D., 713 S.E.2d 440, 310 Ga.App. 329 (Ga.App. 2011)(emphasis added).

The findings added by the Appellate Panel that the *ex parte* communication played no part in the ultimate decision are simply not believable. Respondents contend this point was conceded at oral argument. [Brief of Respondents, page 31]. This is not quite accurate. The panel asked this question: "Can you point me to a Finding of Fact, Conclusion of Law or in the order section of [the Single Commissioner's order] that Commissioner Lyndon relied upon the communication in his making this decision?" Fore's counsel candidly replied: "No, don't believe there was." [R. page 247, lines 11-22]. Admitting that there is nothing in the order itself – as counsel is required to do – does not equate to a concession that the *ex parte* communication and supposed "fraud investigation" had no influence on the Commissioners. Counsel's attempt at oral argument "to explain to Commissioner Williams' question that I answered 'no' to on specific Finds of Fact – " was cut short by the Panel. [R. page 250, lines 1-19].

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[8]In candor to the Court, the Georgia Court of Appeals did not definitively find harmful error existed due to the *ex parte* communication. The court remanded for a determination of when the defendant learned of the *ex parte* communication and if he preserved the issue by objecting at the first opportunity. However, in a later opinion citing D.D., the same court reversed a criminal conviction based on the trial judge's refusal to recuse after receiving *ex parte* communication. Hargis v. State, 735 S.E.2d 91 (Ga. App. 2012). See, also Arnau v. Arnau, 429 S.E.2d 116 (1993)("the fact that ex parte communication is merely cumulative would not make the consideration of such evidence harmless error" because "[e]x parte communications are presumed to have been in error.").

The prejudice is readily apparent when one compares the totality of the evidence with the ultimate decision – particularly the findings on credibility, but also the patently punitive disability award and denial of future medical treatment. This is further confirmed by the Single Commissioner's expression of surprise when presented with the evidence of the supposed "fraud investigation." Commissioner Lyndon stated on the record: "I didn't have any idea – this seemed like such a – I worked the case up, and we're on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we're in." [R. page 157, lines 5-16]. The Commissioners receive the Form 58 and Notice of APA submissions at the same time as the parties serve them. The actual exhibits – including the Smith letter – were submitted at the hearing itself. 25A S.C. Reg. 67-611; 67-612 (2007).

Commissioner Lyndon would have seen the 36-percent whole person impairment rating from Fore's treating surgeon on the Form 58's submitted by both sides. This is an exceptionally high impairment rating – one which historically has always resulted in the injured worker being deemed permanently and totally disabled.[9] See Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating). The impairment rating was coupled with the additional facts that (1) Respondents did not retain a vocational expert to rebut the expert opinion of Glenn Adams, and (2) Respondents had not requested a hearing to terminate temporary compensation even though Fore had been placed at MMI a full seven months before the hearing. [R. pages 51-67]. The obvious inference is that Commissioner Lyndon "worked the case up" and logically presumed this would be a simple, straightforward case of total disability – virtually a pro forma hearing. Instead, as he himself stated,

[9]Respondents did not dispute the accuracy of the impairment rating.

the hearing devolved into a "tangled mess." [R. page 157, lines 5-16].

The "tangled mess" comment was made as Fore's attorney was discussing calling Tony Owens to rebut Steve McGowan's expected testimony. It is clear that the Commissioner's irritation was a direct by-product of the fraud allegations raised in the Smith letter.

Respondents further contend Fore was not prejudiced because she was given notice that Respondents intended to introduce the Smith letter and call Steve McGowan as a witness. There is no prejudice from the mere fact McGowan testified – had his appearance and testimony not already been tainted by improper *ex parte* communication and the introduction of the Smith letter. McGowan's testimony would not have been a problem had he been discovered by Respondents in the normal course of discovery or even if he had called the insurance carrier rather than the Commission. It became a problem because McGowan was called after Respondents had already tainted the proceeding with unsupported allegations of insurance fraud (despite their self-serving denial of this and the equally specious explanation that it was merely evidence of an ongoing investigation). McGowan's testimony took place after the *ex parte* communication had already been improperly admitted into evidence. The Smith letter gave his testimony an unwarranted and prejudicial imprimatur of legitimacy by its association with a non-existent fraud investigation by the Attorney General.

The definitive prejudice occurred when the Single Commissioner refused to allow Fore to call a witness to rebut the spurious allegations made by McGowan. Tony Owens was an absolutely critical rebuttal witness. Only he could confirm that (1) Fore's assistance to him was temporary and unpaid; (2) he asked her to assist him due to health problems; (3) the assistance included training an employee (Mary Weaver) since she herself was unable to do the work; and (4) that he would have

hired her as a employee had she been able to do the work involved. See Orlando v. Boyd, 466 S.E.2d 353, 320 S.C. 509 (1996)(trial judge abused his discretion in excluding crucial witness when there is no evidence of misconduct in naming witness outside scheduling order deadline) Perhaps even more importantly, Owens was able to explain the basis of McGowan's grudge against Fore. [R. page 194, lines 1-18]. After she left his employment, McGowan harassed Fore to the point she had to take out a restraining order against him. [R. page 128, line 131-page 42, line 1; pages 377-378].

Even more importantly – in a decision based *entirely* on credibility – Owens was the one neutral witness with no personal stake in the result. As Fore's nemesis, McGowan had a demonstrated bias against her – a bias he demonstrated by making spurious allegations with no basis in fact or personal knowledge in his call to Gary Smith,[10] and by being outwardly rude and nonresponsive during cross-examination. [R. page 173, lines 1-3]. Indeed, the Georgia Magistrate heard the case against McGowan and found his "conduct to be such as to justify the belief that the safety of persons in the county or their property or peace are in danger of being injured or disturbed

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[10]For example, McGowan told Gary Smith: "Because she is getting paid off the books, her employer is avoiding paying premium. So ultimately, my overhead is higher than A1 Bonding's because my insurance costs are higher." [R. pages 381-383]. Yet, on cross-examination he admitted to committing tax fraud by not paying taxes on Fore's wages. [R. page 176, lines 5-17].

He also told Smith that Fore "takes her niece with her, probably as a cover to confuse the issue as to who is actually picking up the prisoner. The niece probably initials the release sheet for Patricia." [R. page 381-383] This was also patently false. Fore took Mary Weaver with her as part of training Weaver to be Owens' employee. Weaver did not sign for any bonds until August 15, 2011 when she became licensed. [R. page 375]. Fore herself signed the one bond on February 5, 2011, to transfer her license to Tony Owens and A1 Bonding. Thereafter, every other bond was signed by Owens until July 2011 when his health failed and Fore began helping him out. She personally signed for a total of 18 bonds from July through September 2011. [R. pages 368-376].

thereby . . ." [R. page 379].

The exclusion of a crucial witness is fundamentally prejudicial. See Orlando v. Boyd, 466 S.E.2d 353, 320 S.C. 509 (1996)(reversing grant of summary judgment after trial judge erroneously excluded crucial witness); Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003)(trial court abused its discretion in excluding an expert witness when there was no disobedience of any court order and no prejudice to the opposing party other than necessity of further discovery). Our system "is designed to promote decisions on the merits after a full and fair hearing . . ." Barnette.

This Court should find that Fore was prejudiced by the *ex parte* communication. The Court should vacate the Order of the Appellate Panel. The case should be remanded for a *de novo* hearing before an impartial tribunal such as the Horry County Court of Common Pleas or a deputy commissioner appointed by the Court. If the case is to be tried before the Commission, then the hearing Commissioner should have no prior knowledge of the case and all extraneous material – specifically the Smith letter – must be removed or segregated from the Commission's file.

2. Fore proved she is permanently and totally disabled (in reply to Respondent's argument at pages 22-31].

Respondents essentially make two arguments as to how the Commission could have been correct in failing to find Fore permanently and totally disabled. They disregard the medical and vocational evidence, and they argue since she attempted to work, she must not be disabled. These arguments essentially boil down to an attack on her credibility – thereby implicitly confirming their real motivation in introducing the Smith letter as "simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim . . ." [R. page 99, lines 2-4].

A. Permanent and Total Disability under § 42-9-10 [in reply to Respondents' argument at pages 29-31].

Respondents sidestep the legal issue presented by the Commission's misapplication of the proper test for determining permanent and total disability. The test applied by the Appellate Panel ("I think she can work.") is not the law and commands automatic remand, if not outright reversal. Not surprisingly, Respondents never even mention the correct legal test – a test met by Fore. See, e.g., Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961)(total disability is the inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.").

Perhaps the best way to analyze this is to look at the facts – rather than focusing on the unsubstantiated allegations of fraud made by Respondents and Steve McGowan. If one puts aside these irrelevant and prejudicial insinuations (as the Commission should have), the chain of events is fairly simple to discern.

Fore injured her back, hip and leg in a work-related accident on February 21, 2008. Following her accident, she became unable to work and moved to her hometown of Leesburg, Georgia. Leesburg has a population of around 5-10,000 people. [R. page 107, lines 14-21].

Due to her injury, Fore underwent back surgery on May 6, 2010. The surgery was not successful, leaving Fore with a non-union of the fusion at L5-S1. [R. page 327].

On August 27, 2010, her surgeon allowed her to "limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weight lifting limit." [R. page 308]. Around that time in late August, Fore began working for Steve McGowan at ABC Bonding. Both her doctor and the workers' compensation nurse, Cathy Nelson, were aware of this.

Fore worked for ABC Bonding until January 21, 2011. The parties dispute the reason she stopped working for ABC. Fore testified she had to quit "because the pain was just – it was too much; I couldn't handle it." [R. page 115, lines 16-24]. Steve McGowan claimed: "She basically said she needed to make more money to pay for the daycare, because she wasn't making enough hours to pay for her child's daycare, and she needed to go away." [R. page 167, lines 8-11]. As to each of those statements, there is an obvious way to test them.

In the journal she was keeping at the time, Fore wrote, "I gave Bill the phone, the charger, hurting too bad work in the office anymore." [R. page 367]. This also matches up with her next visit to Dr. Wolgin on February 14, 2011, when he wrote she is "unable to return to work until further notice." [R. page 328]. The contemporaneous evidence thus supports a finding that Fore quit the job at ABC Bonding because of her medical condition.

If McGowan's allegation were true, Fore would have quit working at ABC and immediately taken a higher paying job elsewhere. The documentary evidence shows she did not. Even if one assumes Fore took a paying job at A1 Bonding (despite the complete lack of evidence for this proposition), Tony Owens testified he paid his employee, Mary Weaver, a commission of 30% of each bond. [R. page 191, lines 1-12]. The official records from the Lee County Jail Facility show Fore did one bond on February 5, 2011. After that, she did no bonds until July 7, 2011 when Owens became ill and needed her help. Between those dates, Tony Owens signed for every single bond done by A1. [R. pages 368-374]. These records confirm that Fore could not have and did not leave ABC for a higher-paying job.

In any case, Fore candidly stated that she helped out Tony Owens from July through September 2011. She did a total of did 5 bonds in July; 12 bonds in August; and one bond in

September. [R. pages 368-376]. She also helped train Mary Weaver to do the job.

Whether or not Fore got paid for the bonds she did for A1 is not really material. Anything she might have earned was minimal. The question is whether these *de minimus* activities prove she is not disabled in light of Dr. Wolgin taking her entirely out of work, along with Tony Owens' testimony that he could not hire her permanently because she was physically unable to do the work the job required.[11] [R. page 192, lines 16-24].

The case law is clear that retaining some ability to do minimal work-type activities does not prevent a finding of permanent and total disability. "Total disability does not require complete helplessness; rather the inability to perform common labor is considered total disability for one who is not qualified by training or experience for any other employment." Eaddy v. Smurfit-Stone Container Corp., 584 S.E.2d 390, 355 S.C. 154 (Ct. App. 2003). "Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996). "[A]lthough earning capacity may be the sole measure for determining the extent of [a claimant's] disability . . . the mere fact of employment is not always indicative of earning capacity." Id.

As the case law, particularly Stephenson, confirms that the mere fact Fore did some minimal work-type activities for A1 is not indicative of her earning capacity, the question is whether she proved the inability to perform services other than those that are "so limited in quality, dependability,

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[11]Fore's pre-injury occupation was the very heavy job of meat cutter in a grocery store. She described her attempt to work as a bail bondsman as "literally the easiest thing I've ever done." [R. page 128, line 17]. In the small town of Leesburg, Georgia, the only two bail bonding companies are ABC and A1. Even if she could work as a bail bondsman, there is no reasonably stable market for such work in her locality.

or quantity that a reasonable stable market for them does not exist." Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). This she has done. The unrefuted opinion of the vocational expert is that even if Fore could perform sedentary duties – which he noted "is not supported by Dr. Wolgin's work statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies." He opined she "is considered to be totally vocationally disabled." [R. pages 356-357].

This is the evidence that proves total disability under the correct legal test. The Commission did not apply the proper test. This alone requires a remand. Even had the Commission applied the correct test, any finding other than permanent and total disability is unsupported by substantial evidence. Therefore, the Court should either reverse outright or remand for a *de novo* hearing with instructions to apply the correct law.

B. Permanent and Total Disability under § 42-9-30 (21) [in reply to Respondents' argument at pages 22-29].

As to the claim for total disability under the medical model, Respondents frame virtually their entire argument as another attack on Fore's credibility. However, under the medical model, it is the medical evidence that controls.

Dr. Wolgin assigned a 36% whole person impairment rating to Fore for her back injury and failed back surgery. [R. page 327]. The rating alone supports a finding deeming Fore totally disabled under the medical mode. See S.C. Code Ann. § 42-9-30 (21) (2007); Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(claimant deemed totally disabled due to 50% loss of use of the back despite impairment ratings of 15% and 20-30%).

However, in Fore's case, there is the additional evidence of a non-union of the fusion, along

with the unrefuted opinion of her surgeon stating she is "unable to return to work until further notice." [R. page 328]. Dr. Wolgin gave her specific restrictions to "sit or stand only for about 15 or 20 minutes at a time and unless employment is able to be found within those restrictions, functionally she is not able to participate in the workplace and will remain so until her condition changes or further notice." [R. page 327]. Vocational Expert Glenn Adams confirmed there are no such jobs within these restrictions. [R. pages 356-357].

Respondents presented no evidence to rebut the medical and vocational evidence. Instead, they speculate that Dr. Wolgin and Mr. Adams must have relied on false statements by Fore. This truly is speculation. Dr. Wolgin performed surgery on Fore. He took a CT scan of her back because he was concerned about the non-union; a concern which was validated. Dr. Wolgin based his opinions and work restrictions on the medicine. He has literally looked inside her back and he knows, better than anyone else, its condition. There is zero evidence disputing his opinions. Cf. Walker v. Bowen, 876 F.2d 1097, 1099 (4th Cir.1989)(requiring a social security disability claimant to show objective medical evidence of some condition that could reasonably be expected to produce the pain alleged, not objective medical evidence of the pain itself).

Similarly, Glenn Adams based his opinion on matching up Fore's qualifications with her physical abilities (as determined by Dr. Wolgin). [R. page 347-357]. Her report to him of her failed work attempt is mentioned, but is of little consequence to his opinion. Adams' opinion is likewise unrefuted.

The evidence conclusively compels a finding that Fore is deemed permanently and totally disabled due to 50% loss of use of her back. Therefore, the Court should reverse.

3. The finding on Fore's credibility must be vacated because it is based on inadmissible evidence of an "ongoing fraud investigation." [in reply to Respondents' argument at pages 31-34].

The Commission's ruling was based entirely on a credibility finding, to wit: "After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. Notwithstanding the protestations of Respondents and the bolstering of the decision by the Appellate Panel, the credibility finding was tainted by patently prejudicial inadmissible evidence. It is simply impossible to separate out the prejudicial effect of the Smith letter. Indeed, the reference in the finding to "considering all of the evidence" definitively proves the Smith letter played a key role in the result. See South Carolina Dept. of Social Services v. Lisa C., 669 S.E.2d 647, 380 S.C. 406 (Ct. App. 2008)(improper for the fact-finder to make a credibility determination based on inadmissible evidence).

The inclusion of the credibility finding and the "she can work" finding in the same sentence shows that the two are intertwined. This is simply improper. A finding of disability must be based on all the evidence – medical, vocational, documentary and testimonial. The evidence must be applied to the proper legal standard. Letting the decision devolve to a black and white credibility determination simply allows the Commission to punish people it doesn't like and reward those it does. See Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974) ("[A]dministrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained.").

As to the specific arguments made by Respondents, they do not address the issue actually appealed – which is that the Commission's credibility determination must be vacated because it was

based on inadmissible evidence. Respondents argue the Smith letter had no bearing on the credibility finding, instead arguing Fore "lied until she was backed into a corner." [Brief of Respondents, page 33]. It should be noted that the sole credibility finding actually made by the Single Commissioner himself is the conclusory finding: "I did not find her a credible witness and believe she can work." Other findings relied on by Respondents were added by Respondents' attorney to bolster their theory of the case when counsel drafted the proposed order. There is nothing inherently improper about counsel bolstering an order for appeal nor does it invalidate the order as the order was signed by the Commissioners as written. Nonetheless, the Court should be aware that these additional credibility findings did not originate from the Commissioner who heard the case.

Despite Respondents' protests to the contrary, Fore was exceptionally forthcoming about the help she gave to Tony Owens and her work for Steve McGowan. She testified at length about this on direct examination. She produced the *original* notebook in which she contemporaneously recorded her work hours, along with her pain complaints and doctors appointments. [R. page 135, lines 5-7; R. pages 358-367]. She produced the official documents from the Lee County Jail confirming that she had actually signed 18 bonds for Tony Owens. [R. page 368-376].

The only "blip" in her testimony was an inconsistent statement in her deposition, where she said "no" when asked if she had earned money since her accident. [R. page 125, line 23-page 126, line10]. However, she admitted this inconsistency on direct and further explained it on cross-examination. It is perfectly reasonable for a person to consider volunteer assistance to a friend to not be work - and she never denied she helped out Tony Owens; even going so far as to bring written proof of the help she provided. As to work for Steve McGowan, it appears he was the one who insisted on paying her in cash – as evidenced by his admission that he paid no taxes on her wages.

And again, there was no reason for her to cover up working for Steve McGowan because *she knew everyone already knew about it.* She had told her doctor, the carrier's rehab nurse, and her vocational counselor.

No matter how much Respondents repeat the allegations that all of the above is evidence of a lack of credibility, it cannot erase the prejudicial effect of the inadmissible Smith letter. The credibility finding by the Commission was tainted by inadmissible evidence and must be reversed as a matter of law.

4. The Single Commissioner committed reversible error in excluding the rebuttal testimony of Tony Owens [in reply to Respondents' argument at pages 35-39].

Fore attempted to call Tony Owens as a rebuttal witness in response to the testimony of Steve McGowan. The Single Commissioner excluded the rebuttal testimony on the grounds Owens was not timely listed as a witness. Respondents argue the "Commission's Regulations do not grant the Commission the discretion to waive the notice requirement and proceed with a Hearing with improperly noticed witnesses." [Brief of Respondents, page 38]. This argument is patently untenable. As do trial judges, the Commissioners have discretionary authority concerning the calling of late witnesses and rebuttal witnesses. In this case, the Commissioner abused his discretion.

Respondents' brief was received by Fore's attorney on September 20, 2011. Fore's attorney filed and served an Amended Pre-Hearing Brief the same day – September 20, 2011 – listing Tony Owens as an additional witness. [R. page 61]. This was seven days before the hearing.[12] Tony Owens was listed specifically because of the unexpected naming of Steve McGowan as a defense

[12]Respondents themselves filed and served their own "**Amended** Pre-Hearing Brief and **Supplemental** Notice of Witnesses" on September 23, 2011. The Brief identified a new witness: Bill Moore." [R. page 65]. This was 4 days before the hearing.

witness.

The regulations cited by Respondents require the parties to file and serve the Form 58 "at least 10 days before the hearing." Overlooked by Respondents is the additional "duty to promptly supplement a response with respect to any question directly addressed on the form . . ." 25A Reg. 67-611 (2007). This includes naming additional witnesses – which is something both parties did.

If witnesses are called to testify who were not named within the 10 day deadline for filing the original form 58, then the Commissioner must exercise discretion on whether to allow the witness to testify. In the instant case, the Commissioner failed to exercise discretion. Instead, he summarily refused to allow Owens to testify because "I had no clue that we were going to get in this tangled mess that we're in. If I had known that, you know, you should have asked for three hours or somebody, but you didn't. That's why I don't want to put the witness up, but if he wants to proffer the testimony, that's fine. I'll leave the room while he testified." [R. page 157, lines 5-16]. This was plainly an arbitrary and capricious ruling – if for no other reason than leaving the room during the proffered testimony saved no time at all.

The exercise of discretion requires the Commissioner to several factors. "Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party." Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996). Here, the Commissioner considered none of these factors. The failure to do so is an abuse of discretion.

Had the factors been considered, the proper ruling would have been to permit the testimony. Owens was a rebuttal witness to Steve McGowan's testimony. See Brandi v. Brandi, 396 S.E.2d 124,

302 S.C. 353 (Ct. App. 1990)(where party is allowed to call witness previously unknown to opposing party, opposing party "should have the opportunity to call rebuttal witnesses if deemed necessary."). He testified to Fore's physical condition and inability to actually work as a bail bondsman; to the reasons she helped him out for free; to the short duration of the help (until Mary Weaver was trained); to the pay Weaver received and the fact he did not pay Fore; and to the character, credibility and motivation of Steve McGowan in harassing Fore and appearing at the hearing. All of this testimony had a direct bearing on the material issues.

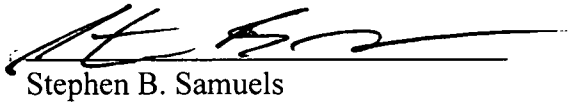
As to the reasons for the failure to identify the witness, Fore had no way of knowing McGowan would be a witness nor did she know – or have any reason to suspect – that Respondents would introduce "evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim . . ." [R. page 99, lines 2-5]. Upon learning of this, her attorney immediately filed a supplemental Pre-Hearing Brief naming Tony Owens. Respondents suffered no prejudice from this as Respondent's counsel "has had the opportunity to speak with Mr. Owens, and Mr. Owens had cooperated with him as far as speaking to him on the telephone." [R. page 155, lines 5-10].

This analysis proves the Single Commissioner abused his discretion in refusing to hear testimony from Tony Owens. As such, the Commission's order must be vacated and the case remanded for a *de novo* hearing.

CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order of the Appellate Panel as unsupported by substantial evidence. The Court should hold Fore has proven that she is permanently and totally disabled as a matter of law. She should be awarded the balance of the remaining weeks in a lump sum allocated per James along with lifetime medical treatment. Alternatively, the Court should vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or direct the Commission appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

Respectfully Submitted,



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August 5, 2013

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In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

Patricia Fore, Employee ..... Appellant,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Reply Brief of Appellant** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **August 5, 2013**, addressed as follows:

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