THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Gene McCaskill, Derrick L. Williams, Commissioners

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WCC File No. 1014489

Diane Fleher, Claimant, Appellant,

v.

Dolphin Cove Marina, Employer, and Carolina Casualty Ins. Co., Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Full Commission erred in assessing a fee against the Claimant for making an "appeal without merit," when the Claimant had reasonable grounds for filing an appeal, and when she is *entitled* to appeal the Commission's decision.**

2. **Whether the Full Commission erred in upholding the Hearing Commissioner's assessment of costs against the Claimant for prosecuting her claim "without reasonable grounds," even though the Commissioner Ordered the Claimant to appear at the hearing, on his own motion, and over the Claimant's objection.**

STATEMENT OF THE CASE

This case arises out of a workers' compensation claim filed by the Appellant, Ms. Diane Fleher ("Ms. Fleher") following an alleged workplace assault and injury on October 12, 2010. This matter came before the Workers' Compensation Commission in St. Matthews, SC at 10:00 A.M. on March 1, 2012.

The Respondents had filed a Petition for Hearing on December 2, 2012. The Respondents were paying no benefits at the time and had denied Claimant's claim. On February 7, 2012, a telephonic hearing was held by Commissioner T. Scott Beck pursuant to the Petition. The attorney for Ms. Fleher requested that the Petition be denied, asserting that the claim was not yet ready for a hearing on the merits, that Ms. Fleher had a two-year Statute of Limitations to develop her case and file for a hearing on the merits, that the Respondents were paying no benefits, and that accordingly the Commission lacked jurisdiction to hear the Claim. The attorney for the Respondents asserted that they were entitled to a timely adjudication of the Claim. Over Ms. Fleher's objection, Commissioner Beck ruled that there would be a hearing pursuant to Regulation 67-601 which provides that "the Commission may, on its own Motion, Order a hearing."

During the pre-trial conference on March 1, 2012, the undersigned attorney for Ms. Fleher reasserted his jurisdictional objection and objected to going forward. Regulation 67-601 part (B) states that "the Commission will not set a hearing until a conflict arises." Commissioner Beck ruled that clearly a conflict among the parties had arisen based on the failure to agree as to compensability of the claim as well as benefits owed to the Claimant, so the requirements of part (B) had been met. Therefore, it was Ordered that the hearing go forward.

On July 25, 2012, Commissioner Beck issued a Decision and Order finding that Ms. Fleher's employment conditions were not extraordinary and unusual, that her mental injury is not compensable, that her claims for aggravation to Claimant's lupus, fibromyalgia, and two facial tics are not compensable as they emanate from her mental claim, and that any causation established by medical evidence is moot. The Commissioner then Ordered hearing costs of $1,014.86 be assessed to Ms. Fleher, stating that "this case was prosecuted without reasonable grounds" and "[the Commissioner is] at an utter loss to understand why this claim was ever filed." Ms. Fleher timely filed a Form 30 appealing the Decision and Order on August 6, 2012.

The Full Panel of the Workers' Compensation Commission heard appellate arguments of the parties in Columbia, SC at 10:00 A.M. on December 8, 2012. The Full Commission affirmed in full the findings of the Single Commissioner, issuing two Orders, both dated January 31, 2013. The Full Commission assessed an additional fee of $250.00 against Ms. Fleher for an "appeal without merit." Ms. Fleher timely filed a Notice of Appeal to this Honorable Court.

ARGUMENT

I. The Full Commission erred in assessing a fee against the Claimant for making an "appeal without merit," because the Claimant had reasonable grounds for filing an appeal, and because the Claimant is *entitled* to appeal the Commission's decision

a. The Claimant is *entitled* to appeal the Commission's decision as a part of the claim adjudication process, and is *required* to appeal to the Full Commission before appealing to this Honorable Court

It is well-settled in South Carolina law that a workers' compensation claimant may appeal a decision by the Commission to our Courts, as it is an integral part of the claims adjudication process put in place by our legislature. However, the claimant *must* first present its appeal to the Full Commission. In *Janhrette v. Union Camp Paper Corp.*, 293 S.C. 59, 358 S.E.2d 704 (S.C. 1987) (citing *Riddle v. Rainforest Finishing Co. et al*, 198 S.C. 419, S.E.2d 341 (S.C. 1942) our Supreme Court explained:

> "Thus, it seems to us made plain, that the intention of the legislature was to provide for the disposition of a claim made to the Industrial Commission by the orderly process of a hearing before a single commissioner, or a deputy appointed by the full commission; a review, by the full commission, of the single commissioner's award; **an appeal from an award by the full commission** to the Court of Common Pleas; **and an appeal** from the Court of Common Pleas to the Supreme Court." [emphasis added]).

This right to an appeal is enshrined in S.C. Code Sect. 1-23-380, which states: "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is ***entitled*** to judicial review pursuant to this article and Article 1. . . . Except as otherwise provided by law, an appeal is to the court of appeals." (Emphasis added.)

The statute then sets out the bases for reversal of the Commission's decision as

follows:

> . . . The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> **(d) affected by other error of law;**
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> **(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.** S.C. Code Sect. 1-23-380(5) (emphasis added).

At least two of these bases are implicated here, and justify a reversal of the Commission's decision. The Claimant is "entitled" to appeal to this Honorable Court for judicial review of the administrative decision of the Commission as an inherent part of the adjudication of her claim, and as a necessary step in exercising that statutory right she was required to appeal first to the Commission's appellate panel. Therefore, the Commission acted arbitrarily and committed an "error of law" in assessing a $250.00 fee. *Cf. Smith v. Union Bleachery/Cone Mills*, 276 S.C. 454, 280 S.E.2d 52 (1981) (workers' compensation commission's failure to apply legal principles correctly to case amounts to an "error of law").

Even if the assessment does not constitute an error of law, it at least constitutes an "unwarranted exercise of discretion." *E.g.*, *Bursey v. South Carolina Dept. of Health and Env'l Ctrl.*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004) (an abuse of discretion occurs when a factual ruling is without evidentiary support). *See also Winchester v. United Ins. Co.*, 231 S.C. 288, 98 S.E.2d 530 (1957) ("abuse of discretion" means the trial judge committed an error of law in the circumstances).

The regulations also provide that if the Appellate Panel "determines that the appeal

was without merit, it may charge, in its sole discretion, the appealing party an additional fee not to exceed two hundred fifty dollars." 25A S.C. Code Ann. Regs. 67-703 (Supp. 2012). The assessment of costs under the Workers' Compensation Act is authorized by Section 42-17-80 of the South Carolina Code, which provides "[i]f the Commission or any court before whom any proceedings are brought under this Title shall determine that such proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings upon the party who has brought or defended them." Here, the proceedings were not brought or defended by Claimant; instead, the proceedings were called by the hearing commissioner *sua sponte*. Claimant then sought appellate panel review as a matter of course so as to preserve the ability to seek judicial review. Section 42-17-80 does not authorize an assessment of costs either before the hearing commissioner or the appellate panel under the circumstances of this case.

Appellant asks this Honorable Court to **REVERSE** the Full Commission's Order for her to pay a $250.00 fee for exercising her right and obligation to seek Appellate Panel Review before seeking judicial review of the hearing commissioner's arbitrary decision.

b. <u>The Claimant had reasonable grounds for filing her appeal</u>

Ms. Fleher did not assert an appeal without merit. On the contrary, she filed a well-reasoned, thirteen-page appellate brief to the Full Commission, consisting of three separate appellate issues, with sub-parts (R. pp. 358-370). She did not raise frivolous or novel arguments, but rather raised logical objections to the Hearing Commissioner's rulings and findings, pursuant to her right to file an appeal. *See* S.C. Code Ann. § 42-17-50 (2007 & Supp. 2012) (permitting a party to file an application for review of any decision by a hearing commissioner).

The first appellate issue raised to the Full Commission was whether "the Hearing Commissioner err[ed] in asserting jurisdiction to hear the claim on the merits even though neither a Form 50 nor Form 21 had been filed." (R. p. 360) There was no case law found on point. Ms. Fleher necessarily relied on the long experience of several workers' compensation practitioners, who advised that the Hearing Commissioner had adopted a never-before-seen—and possibly improper—approach in ordering a hearing *sua sponte*, pursuant to Regulation 67-601. In light of these misgivings, it was perfectly reasonable for Ms. Fleher to elevate this issue to the Full Commission for review.

The second appellate issue raised to the Full Commission was whether "the Hearing Commissioner err[ed] in ordering the Claimant to pay the costs of the hearing, even though the Commissioner ordered the Claimant to appear at the hearing, on his own motion, and over the Claimant's objection." (R. p. 360) The Claimant asserted two separate rationales—grounded in the procedural history and appellate record of the case—in appealing this point to the Full Commission. The Appellant once again raises this matter on appeal to this Honorable Court (*see* para. II, *infra*).

The Commission's regulations provide a hearing commissioner "may issue an order assessing the actual costs of a hearing as established by the Commission if the Commissioner determines that the hearing has been brought, prosecuted, or defended on unreasonable grounds." 25A S.C. Code Ann. Regs. 67-614 (A) (Supp. 2012). The regulation provides further that "[t]he party assessed has the right to review **and appeal** as in other cases." 25A S.C. Code Ann. Regs. 67-614(B) (Supp. 2012) (emphasis added).

The third and final appellate issue raised to the Full Commission was whether "the Hearing Commissioner erred in finding that the Claimant's injuries were not

compensable . . . ." (R. p.360) On appeal to the Full Commission, Ms. Fleher asserted both an error in a matter of law (and cited case law to support her position), as well as an abuse of discretion by the Hearing Commissioner for refusing to consider relevant evidence.

Because Ms. Fleher's appeal to the Full Commission was chock-full of well-reasoned, non-frivolous arguments, it was improper for the Full Commission to sanction her simply because it disagreed with her positions. The Appellant asks this Honorable Court to **REVERSE** the Full Commission's Order for her to pay a $250.00 fee.

II. The Full Commission erred in upholding the Hearing Commissioner's assessment of costs against the Claimant for prosecuting her claim "without reasonable grounds," even though the Commissioner Ordered the Claimant to appear at the hearing, on his own motion, and over the Claimant's objection.

a. The Commissioner abused his discretion by punishing the Claimant for obeying his Order

The Commissioner's Order for the costs of the hearing to be assessed to Ms. Fleher constitutes a *per se* abuse of discretion. Ms. Fleher, through her attorney, objected to going forward with the hearing during the February 7, 2012 telephonic hearing and again during the March 1, 2012 pre-trial conference. Ms Fleher asserted that the claim was not yet ready for a hearing on the merits, that she had a two-year Statute of Limitations to develop her case and file for a hearing on the merits, that the Respondents were paying no benefits (and therefore would not be prejudiced by delay), and that accordingly the Commission lacked jurisdiction to hear the Claim. The Respondents argued that they were entitled to request a hearing pursuant to Section 42-17-20. The Commissioner Ordered that the hearing go forward. However, he specifically stated in his Order of March 23, 2012 that "a hearing is hereby Ordered, not pursuant to Section 42-17-20 but pursuant to Regulation 67-601 which

provides that 'The Commission may, on its own Motion, Order a hearing.'" (R. pp. 308-309).[1]

Following the merits hearing of March 1, 2012, the Commissioner then sanctioned Ms. Fleher for appearing and prosecuting a claim at the hearing that he himself had Ordered. In his Decision and Order dated July 25, 2012, the Commissioner made the following Finding of Fact: "As I am at an utter loss to understand why this claim was ever filed, hearing costs of $1014.86 are assessed to the Claimant as I find this case was prosecuted without reasonable grounds." (R. p. 346). It is inherently abusive to sanction a party for complying with an Order.

b. <u>The Commissioner erred by disregarding relevant evidence in making his finding</u>

The Commissioner also abused his discretion and erred by disregarding evidence in making his finding that Ms. Fleher had no reasonable grounds for prosecuting her claim. Claimant APA exhibit 11, admitted into evidence without objection, is a letter to Ms. Fleher from the State of South Carolina, Office of the Governor, State Office of Victim Assistance, dated May 25, 2011, which states:

> Your claim meets the eligibility criteria established by state law. However, because the incident occurred while you were on the job, your claim with Worker's Compensation would have to be resolved with a final conclusion before the claim can be forwarded to the Processing Services Department for payment consideration. After your claim has been resolved with Worker's Compensation and there are still compensable expenses, please provide this agency with the

[1] It is questionable whether the Commissioner had the authority to call the hearing *sua sponte*. Hearings before the Commission are set in response to an application by either party. S.C. Code Ann. § 42-17-10 (1976 & Cum. Supp.). The statute does not allow the commission or any of its members to call a hearing *sua sponte*. Although Regulation 67-601 appears to permit the procedure the hearing Commissioner employed in this case, the regulation cannot bestow authority beyond the authority found in the Act itself. Although regulations have the force of law in this State, regulations may not alter or add to the terms of a statute. *United States Outdoor Advertising, Inc. v. South Carolina Dep't of Transp.*, 324 S.C. 1, 481 S.E.2d 112 (1997); *Gadson v. Mikasa Corp.*, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006). Thus, the entire procedure in this case was improper, and Claimant had the right to challenge that procedure before the Appellate Panel and then to this Court.

> documentation from Worker's Compensation. We will be glad to consider your bills at that time. Because the State Office of Victim Assistance is the **payer of last resort**, you must ensure that all bills have been filed with your Worker's Compensation carrier before submitting them to this office. (Boldface in original.) (R. p.126).

Because Ms. Fleher reasonably believed that she was *required* to resolve her claim with Worker's Compensation, it constitutes an abuse of discretion for the Commissioner to find as a fact that her Worker's Compensation claim "was prosecuted without reasonable grounds."

c. The Claimant acted in good faith

As argued above, neither the hearing commissioner nor the Appellate Panel had authority to impose the harsh sanctions they imposed in this case. Furthermore, nothing within Section 42-17-80 defines "without reasonable grounds." Further, nothing in Regulation 67-614 defines "unreasonable grounds." And nothing in Regulation 67-703 defines "without merit." Logically, each of these phrases is intended to address the bringing or defending of positions that are "frivolous." However, that term is not used in the Act and is also not defined therein.

Under the Restatement, "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." Restatement (Third) of Law Governing Lawyers § 110, cmt. d. (2000). Other jurisdictions follow this very restrictive view of the definition of "frivolous." *See, e.g., Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l. L.L.C.*, 97 P.3d 140, 151 (Colo. App.2003) (a claim is frivolous if its proponent can present no rational argument based on the evidence or the law to support it); *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So.2d 520, 524 (Fla. 1st DCA 2003) (under Florida law, there are

established guidelines for determining when an action is frivolous, including where a case is found: (a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be contradicted by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (d) as asserting material factual statements that are false); *Miller v. Reinert*, 839 N.E.2d 731 (Ind. App. 2005) (an action is "frivolous" if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law); *Mark S. Bounds Realty Partners, Inc. v. Lawrence*, 34 So.3d 1224 (Miss. App. 2010) (a claim is frivolous when objectively speaking, the pleader or movant has no hope of success, that is, the court's inquiry is an objective one to be exercised from the vantage point of a reasonable party in the litigant's position as it filed and pursued its claim); *Fronk v. Fowler*, 456 Mass. 317, 923 N.E.2d 503 (2010) (a claim is frivolous if there is an absence of legal or factual basis for the claim, and if the claim is without even a colorable basis in law); *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003) (a frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position); *Savona v. Di Giorgio Corp.*, 360 N.J. Super. 55, 62, 821 A.2d 518 (App. Div.2003) (a claim will be found to be "frivolous" only if it was commenced or maintained in bad faith or the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for extension, modification or reversal of existing law); *Riston v. Butler*, 149 Ohio App.3d 390, 2002-

Ohio-2308, 777 N.E.2d 857 (2002) (a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim); *Skimming v. Boxer*, 119 Wash. App. 748, 756, 82 P.3d 707 (2004) (a lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law); *Jandrt v. Jerome Foods, Inc.*, 227 Wis.2d 531, 550, 597 N.W.2d 744 (1999) (a claim is frivolous if it is not well-grounded in fact or law). Like the Restatement, these jurisdictions require that there be some element of bad faith or complete lack of merit under any possible scenario, including an attempt to expand the existing law, before a court will find a claim was "frivolous" so as to justify the imposition of sanctions. The same should be true of the provisions under the Workers' Compensation Act and regulations before the Commission imposes sanctions on a party.

Because the Hearing Commissioner sanctioned Ms. Fleher for prosecuting her claim at a hearing he himself had Ordered, and because she had a good-faith belief that she was required to resolve her claim with Workers' Compensation, it was an abuse of discretion to assess hearing costs against her for prosecuting a claim "without reasonable grounds." Ms. Fleher asks this Honorable Court to **REVERSE** the Full Commission's affirmation of the Order for her to pay hearing costs of $1,014.86.

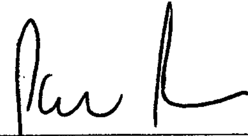
CONCLUSION

For the reasons stated above, the Appellant asks this Honorable Court to **REVERSE** the Worker's Compensation Commission's Orders requiring the Appellant to pay hearing costs of $1,014.86 and a fee of $250.00 for filing her appeal, and such other relief as this

Honorable Court deems just.

Respectfully submitted,

September 12, 2013



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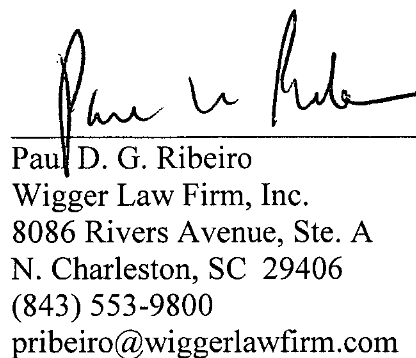
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I, Margaret A. Teasley, paralegal for the Wigger Law Firm, do hereby certify that I have served the following named individuals and/or companies with a copy of the Final Brief by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked, on the date indicated below:

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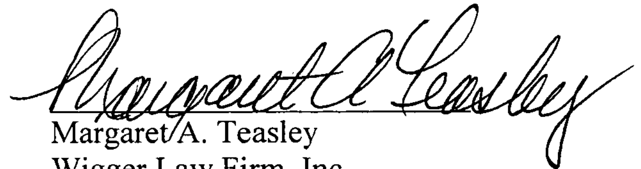

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