THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Opinion No. 2012-UP-302
(SC Ct. App. filed May 16, 2012;
Withdrawn, Substituted and Refiled June 27, 2012)

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Margaree Maple, Employee, .....Petitioner,

v.

Heritage Healthcare of Ridgeway,
Employer, and Phoenix Insurance
Company, Carrier, ..... Respondents.

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# BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

I. Did the Court of Appeals misapprehend the central issues on appeal and did the Commission err as a matter of law by failing to make Findings of Fact on the central issues for decision (i.e., the Appellant's right to disability compensation and for what periods of time), which are sufficiently definite and detailed enough to enable the Court to properly determine whether the Findings are supported by the evidence and whether the law has been properly applied?

II. Was the Claimant denied due process of law based on the sua sponte decision of the Hearing Commissioner at the conclusion of the Hearing directing the Respondents to take the deposition of the doctor in the emergency room, where no such request was made by either party; where it concerned an issue not raised by the pleadings; and where it is contrary to the authority of a Commissioner as a Judge under this Court's decision in Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985)?

III. Did the Court of Appeals err by not addressing the central issue of whether the Commission erred under S.C. Code §42-9-10 by denying the Appellant's request for temporary disability benefits starting 9-9-08 based on the uncontradicted evidence including the authorized doctor's work statement issued that date taking the Appellant out of work through 9-18-08 and making a decision that is not justified under the law and the facts?

## STATEMENT OF THE CASE

This case involved an appeal from the decision of the South Carolina Workers' Compensation Commission which was commenced by the Petitioner, the injured worker, by the filing of a South Carolina Workers' Compensation Commission (SCWCC) Form 50 on October 16, 2008: noting an injury by accident on August 31, 2008; that medical was being provided; and requesting temporary disability benefits which was properly served pursuant to the Act. (App. pp. 213-214). No responsive Form 51 was filed within thirty (30) days and a hearing notice was received on January 5, 2009 setting the matter for hearing on February 9, 2009. Subsequently Defense Counsel was retained and filed a SCWCC Form 51 on January 14, 2009 and although this filing was subsequent to the amendments to the Act that went into effect on July 1, 2007, the Form 51 was a blanket denial including injury by accident, notice, employment status, employee/employer relationship, entitlement to any benefits and all other applicable remedies. (App. pp. 217-218). The Petitioner timely filed her Pre-Hearing Brief and Administrative Procedures Act submissions on January 23, 2009 (App. pp. 219-243). The Defendants timely filed a Pre-Hearing Brief and Administrative Procedures Act submissions on January 28, 2009 (App. pp. 244-262).

A hearing was held on February 9, 2009 at the beginning of which the Hearing Commissioner stated:

> "From my review of the file, and I don't think ya'll had any objection to this, but I think she would be entitled to TTD from September the 9th through September 18th when she was completely written out of work at that point; and I think everybody is in agreement of that." (App. p. 328, ll. 10-15).

Then at the conclusion of the Hearing the Commissioner ad initio left the Record open and ex mero motu directed the Defendants to take the deposition of Dr. Ross, which was not subsequently taken until April 21, 2009. (App. p. 215; p. 410, ll. 5-7; p. 437). After letters concerning the status to the Commissioner (App. pp. 529-530), the deposition of Dr. Ross lead to the deposition of Ms. Starr Connor, RN, taken on June 1, 2009 (App. p. 531; 484). The Defendants then by letter almost three (3) months later filed the depositions with the Hearing Commissioner on August 28, 2009 (App. p. 531). Thereafter the Hearing Commissioner by email on October 13, 2009 issued her notes requesting that Defense Counsel prepare the proposed Order, to include certain findings (App. p. 535). A de novo hearing request and/or for reconsideration and/or for specific Findings of Fact and Conclusions of Law was filed with the Commissioner on November 4, 2009, after which the Hearing Commissioner issued an Order on December 18, 2009 (App. p. 536; p. 263; p. 167). A Request for Review was made by the Petitioner,

the injured worker, in this matter on December 23, 2009 by the filing of SCWCC Form 30 setting out general and specific exceptions to the Order. (App. pp. 266-269).

An Appellant's Brief was filed with the Full Commission on March 17, 2010; a Hearing Notice was received on March 23, 2010 setting a hearing on April 20, 2010; and the Defendants filed a responsive brief on April 1, 2010. (App. pp. 272-292; p. 293; pp. 295-322). The hearing was held before a three-member panel of the South Carolina Workers' Compensation Commission and on May 3, 2010, a one (1) page form was issued by the Workers' Compensation Commission Judicial Director directing Defense Counsel to prepare a proposed Order on behalf of the three-member appellate Panel affirming the decision of the Hearing Commissioner (App. p. 413; p. 537). The Order was prepared and submitted by Defense Counsel and was issued by the Appellate Panel on June 16, 2010 (App. pp. 190-212). From that Decision, a timely Notice of Intent to Appeal was filed with the Court of Appeals on July 16, 2010 (App. p. 323).

After briefing and oral argument, on May 16, 2012 the Court of Appeals issued its Opinion in which the Court affirmed in part and remanded in part. Margaree Maple, Employee v. Heritage Healthcare of Ridgeway, Employer, and Phoenix Insurance Company, Carrier, Unpublished Op. No. 2012-UP-302 (Filed May 16, 2012). (App. pp. 545-548)/ A

timely Petition for Rehearing was filed on May 31, 2012 and by Order filed June 27, 2012, the Petition was granted in part and the original Opinion was withdrawn, substituted and refiled June 27, 2012. (App. pp. 549-569). The Court of Appeal's Opinion addressed three (3) different arguments made by the Petitioner in this matter and those are set out in the Opinion as follows:

> "She argues (1) the Appellate Panel erred in holding she refused an offer of suitable employment; (2) the single commissioner erred in sua sponte directing and admitting the depositions of Dr. Roger Gaddy and Star Connor; and (3) the Appellate Panel erred in adopting a proposed order." (Emphasis added). (App. p. 567).

## STATEMENT OF FACTS

Ms. Maple does not have a home telephone nor a car and walked to work every day from her home. She fell at work on August 31st; was taken to the emergency room (ER); was given an out of work statement by ER personnel either through the 1st or the 4th; was off work due to the injury on September 1st, not scheduled to work the 2nd and 3rd and returned to work on her next scheduled work day, September 4th. That day, due to her condition her employer scheduled her a doctor's visit on the 5th, which was rescheduled for the 9th. She did not work the 5th, worked the 6th and 7th, her normal shift schedule and on September 9th went to the Employer's doctor who gave her an out of work statement, which she took

to her employer that day, taking her out of work until the 18th. She saw the doctor again on the 16th when he gave her a statement to return to sedentary duty, which she took that day to her employer; after which there is no evidence of any offer of employment by the employer. On September 19th, her niece picked up her check at her request and in the pay envelope was a notice that she was being terminated for falsifying "medical documentation". She again saw Dr. Gaddy, the authorized treating physician, on September 30th at which time he prescribed more medication and directed her to return in four (4) weeks.

**RECORD SUPPORTING STATEMENT OF FACTS**

The statement of facts set forth hereinbefore is specifically supported by/contained in the Record as set forth hereinafter. Ms. Margaree Maple is a 57-year-old lady who has lived in Ridgeway all her life and in her home for over 40 years, where she lives with her daughter and 3 grandchildren. She has no home or cell phone and no car. She has a 9th grade education and after leaving school after doing a few odd jobs doing home healthcare, she has worked for the same nursing home where she was injured and where she also obtained a CNA certificate for a total period of over 27 years. The remainder of her life was spent at home birthing and raising a family. While working for the nursing home, she would get to and from work by walking to

work and at night riding home with a co-worker. (App. p. 330, l. 23 - p. 334, l. 6; p. 336, l. 24 - p. 337, l. 7).

On August 31, 2008, Ms. Maple was injured in an accident at the nursing home, which the Defendants do not deny:

> "Q: Okay. Now, if you would, tell Commissioner Roche what happened on August 31st, the day you got hurt; what were you doing and what happened?
>
> A: It was suppertime and we were passing out supper trays. Some water was on the floor, I slipped in it and fell face down on my knees and my hands hitting the floor."

(App. p. 334, ll. 11-18).

The accident was witnessed by a co-worker named Branch and her supervising nurse, Ms. Tonya Shepherd, RN. Ms. Shepherd called Ms. Maple's sister, who also worked at the nursing home to drive her home. Ms. Shepherd told Ms. Maple to go to the Emergency Room so after being taken in a wheelchair to her sister's car and being taken home, her daughter took her directly to the Emergency Room. (App. p. 335, l. 1 - p. 336, l. 23.) After being checked out by the doctor at the Emergency Room, being given medication and placed in a wheel chair, Ms. Maple testified that she thought the doctor had given them the out-of-work statement but later stated that it was a nurse who had given them the paperwork. She testified that when she was put into her

daughter's car from the wheelchair, she thought her daughter was given the paperwork and that her daughter had the paperwork when they left the hospital. (App. p. 338, ll. 11-22; p. 339, ll. 6-14; p. 362, ll. 5-11.)

Ms. Maple testified that her normal work schedule was to work 4 days on and then be off 2 days. She got hurt on the 31st of August and was scheduled to work on September 1st. She was then scheduled to be off on the 2nd and 3rd and was to return to work on September 4th. (App. p. 337, l. 14 p. 338, l. 2; p. 340, ll. 13-15; p. 341, ll. 1-5.)

Ms. Maple testified she talked with **Ms. Shirley Goodwin, Director of Nursing** (App. p. 358, ll. 1-2) and then with Ms. Burr on September 3rd or 4th about the fact that her legs were still hurting real bad, that she could not work the 4th but she would try to return to work on Saturday, which she did working Saturday (6th) and Sunday (7th). She was then written out of work by the doctor on the 9th through the 18th (App. p. 341, l. 6 - p. 343, l. 25; p. 358, ll. 1-9).

Ms. Burr testified that she, Ms. Burr, was out of work on September 1st and 2nd and when she returned to work on the 3rd she found out about the accident and immediately tried to get in touch with Ms. Maple supposedly through her sister who worked at the facility and that she then meet and spoke with Ms. Maple on September 4th at which time she made Ms. Maple a doctor's appointment for the 5th. [Later Ms. Burr

admitted that the attempts to get in touch with Ms. Maple through her sister were not until later on the 11th, 12th and 13th when she was again trying to get in touch with Ms. Maple. (App. p. 394, ll. 2-23.]

On direct examination Ms. Burr testified concerning the doctor's appointment she scheduled for the 5th:

> "Q: Did she tell you if she had any problems with making the appointment scheduled?
>
> A: With the doctor's appointment --
>
> Q: Yes.
>
> A: -- for our regular doctor -- she sat in my office while I made that appointment. I verified the time and everything with her **and she said that was fine.**"

(App. p. 376, ll. 6-13).

However on cross-examination, she withdrew that and admitted that she was told about a problem with transportation by Ms. Maple.

> "Q: Okay. Now, when you met with her on the 4th, is that when you tried to set up the appointment on the 5th?
>
> A: Yes Sir.
>
> Q: Okay. Alright. **And it is your testimony Ms. Maple didn't tell you anything about she had problems with transportation?**
>
> A: **She did tell me she had problems with transportation, however, I asked her to sit in my office while I made the appointment.** And when I made the appointment, I asked Ms. Maple was that

time a good time for her and she **stated to me as long as her daughter didn't have to work, she thought she would be able to make it.**

Q: Okay. If her daughter didn't have to go to work?

A: And I advised her that if she needed to change the appointment, just to let me know."

App. p. 388, l. 20 - p. 389, l. 12).

It is admitted that Ms. Maple does not have a telephone and that the only contact phone she has is through her daughter or grandson's cell phone. (App. p. 361, ll. 2-23). Ms. Burr admitted that she was not able to talk to Ms. Maple but that Ms. Maple did in fact not work on the 5th but worked on the 6th and 7th. There is no question that Ms. Maple was scheduled to work on the 4th but only met with Mr. Burr and that is when Ms. Maple told her that she could not work and they scheduled an appointment with the doctor for the 5th, which was rescheduled for the 9th. She did not work the 5th but worked the 6th and 7th. Therefore, based on the undisputed testimony, Ms. Maple worked the 31st, the date of the accident, was scheduled to work but did not work the 1st (under doctor's statement); was off the 2nd and 3rd; was scheduled to work the 4th (meeting with Ms. Burr), the 5th (doctor's appointment), the 6th, and the 7th and did in fact work the 6th and 7th. (App. p. 337, l. 8 - p. 342, l. 17; p. 387, l. 25 - p. 400, l. 10).

It is agreed that when she met with the company doctor, Dr. Gaddy, on September 9th he gave her an out of work statement. (App. p. 251). It is agreed that on Friday the 12th and Monday the 15th Ms. Burr tried but was not able to get in touch with Ms. Maple personally but that Ms. Maple called on the 12th and left a note on the 15th and that as far as Ms. Maple knew she was to be off work until the 18th. (App. p. 383, l. 17 - p. 384, l. 4; p. 393, l. 23 - p. 394, l. 7; p. 397, ll. 11-15; pp. 257-258). When she went to the doctor on the 16th and he gave her a modified duty statement, she again took it to Ms. Burr's office that day and advised them that she would return to work on the 19th per the doctor's instructions. (App. p. 255). Neither Ms. Burr nor anyone for the employer offered modified duty to Ms. Maple at that time. Then on September 17th because Ms. Burr had a question concerning the original out-of-work statement from the Emergency Room Ms. Maple had given her, Ms. Burr requested a copy of the ER medical records from the insurance company Adjuster, who on the 17th forwarded her the records with one record (the same one that was put in to evidence by the Appellant) showing she was supposed to be off of work one day instead of returning to work on September 4th per the actual Out-of-Work Statement.

Then without contacting or talking to Ms. Maple, a lady who had worked for them for over 25 years, on

September 18th by letter in her paycheck Ms. Maple was notified that they were terminating her for allegedly falsifying records. (App. p. 402, l. 7 - p. 403, l. 2; p. 403, l. 12 - p. 404, l. 3).

In the opening statement of the case at the Hearing, the Hearing Commissioner confirmed that in the Pre-Hearing Conference it was agreed that, "I think she would be entitled to TTD from September 9th through September 18th when she was completely written out of work at that point in time; **and I think everybody is in agreement of that."** (App. p. 328, ll. 11-15.) The Commissioner then stated,

> "The period of time we are looking at **is from September 18th of '08 through January 13th of this year for TTD**; that is the period of time that she was on light duty by Dr. Gaddy, sedentary work actually, **but had been fired and was unable to work**." (App. p. 328, ll. 15-20).

The Out of Work Statement, which was allegedly falsified, covered from September 1st through September 4th, a period of time she was scheduled off work. The evidence relied on by the Defendants at hearing consisted of: (1) a hospital record, also put into evidence by Ms. Maple, showing a return to work after the 1st, contrary to the out of work statement in question; and (2) the opinion of Ms. Burr that the ER Out of Work Statement was altered. No chain of custody was entered.

Finally, not in the Pre-Hearing Briefs, in the Pre-Hearing Conference, at any time during the Hearing nor at the conclusion of the case was any request made to leave the Record open for depositions. (App. p. 244;, p. 324, l. 1 - p. 410, l. 7). After going off the Record, the Hearing Commissioner on her own Motion directed the Defendants to take the deposition of the doctor that had seen Ms. Maple in the Emergency Room. (App. p. 529).

The hearing was held on February 9, 2009. (App. p. 215). The deposition of the doctor was not taken until April 21, 2009, at which it is stipulated by the Petitioner that Dr. Ross testified that the handwritten note in question was not his handwriting and that it was common practice for the ER staff to sign those for the doctors. (App. p. 445, l. 3-13). After the doctor's deposition, the Defendants decided to take the deposition of one of the nurses involved, Ms. Starr Connor, and that deposition was not taken until June 1, 2009. It is stipulated by the Petitioner for purposes of the appeal that Ms. Connor testified it was her handwriting on the note; that it was general procedure in the ER to give one (1) day out of work and that according to the records that was what was to be given in this case; that the, "four" (4) on the Statement in question was not hers; and that she had no idea who changed it. Additionally, no request was made at any time for an expansion of time under the Rules

for the amount of time the Record would be left open before being closed. The Hearing Commissioner did not email her notes on her decision until October 13, 2009. (App. p. 535). The proposed Order was then submitted by Defense Counsel and the Commissioner did not issue her decision until December 18, 2009, over ten (10) months after the original hearing. (App. p. 167).

Ms. Maple had made a request after receiving the Commissioner's Notes for a de novo hearing or for the Commissioner to at least reopen the Record before issuing a final decision so that the parties could argue their positions and so that additional testimony could be taken based on the depositions that had been submitted which was not granted based on silence. (App. p. 259).

The only testimony and evidence that was presented was the testimony of Ms. Maple, Ms. Linda Burr, the exhibits placed in the Record, and the APA Submissions of the Claimant/Appellant and the Defendants/Respondents. Ms. Sherry Goodwin, Director of Nursing, was not called as a witness. Again, no motion at any time was made for an expansion of time for the submission of evidence and the depositions were directed to be taken by the Defendants by the Commissioner on her Motion. On appeal to the Full Commission, the Appellant was required to furnish the Hearing Transcript to the Commission, which was accidentally

not filed until the conclusion of oral arguments at the time of the hearing held on April 20, 2010. The three-member panel voted to affirm and by email dated May 3rd, simply stating "the Panel has considered the matter and find a **FULL AFFIMATION** of the Single Commissioner's Decision and Order," asked Defense Counsel to draft a proposed Order which was signed on June 6, 2010, which simply affirmed the Order of the Single Commissioner as written. (App. pp. 537; p. 212). From the decision denying the Petitioner temporary total disability benefits, this appeal followed to the Court of Appeals.

## ARGUMENTS

### I. THE COURT OF APPEALS MISAPPREHENDED THE CENTRAL ISSUE ON APPEAL AND THE COMMISSION ERRED AS A MATTER OF LAW BY FAILING TO MAKE FINDINGS OF FACT ON THE CENTRAL ISSUES FOR DECISION (I.E., THE PETITIONER'S RIGHT TO DISABILITY COMPENSATION AND FOR WHAT PERIODS OF TIME), WHICH ARE SUFFICIENTLY DEFINITE AND DETAILED ENOUGH TO ENABLE THE COURT TO PROPERLY DETERMINE WHETHER THE FINDINGS ARE SUPPORTED BY THE EVIDENCE AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED.

In its Decision, the Court of Appeals misapprehended the issue that was being raised on appeal and which had been presented to both the Hearing Commissioner and Full Commission for decision. In so doing, the Court of Appeals erred in its Remand Decision and based on the substantial evidence in the Record, should have reversed the Decision.

The issue that was submitted to the Commission was whether or not the Hearing Commissioner committed an error of

law by denying the Petitioner, "disability" compensation benefits on the basis that she was terminated for cause and/or for refusing suitable employment instead of making a determination as to whether or not she was, "disabled" within the meaning of the Act. (F.C. Brief, Arg. II, App. pp. 284-287). The Petitioner also argued to the Commission that under the undisputed facts concerning disability, the Commission should award benefits. The Commission made no Findings of Fact or Conclusions of Law on the central issue of disability nor on what the evidence was in the Record on that issue. (F.C. Order, App. pp. 190-212; specifically p. 210).

The issues that were presented to the Court of Appeals were first, did the Commission err by failing to make Findings of Fact and Conclusions of Law on the central issue of disability. (Ct. App. Brief, App. p. 101). Then second, having made the decision that the Commission failed in that regard, the Petitioner set out the law on disability and applied the law to the facts of this case to determine whether there were any disputed facts on, "disability" that would require remand versus reversal on that issue. Where there are disputed facts remand in proper, [see: Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (SC 1970)] but where the facts are undisputed, reversal is proper [see: Grayson v. Carter Rhoad Furniture, 312 S.C. 250, 439 S.E.2d 859 (SC App. 1993), reh. den., cert. gr., aff. as mod. 317 S.C. 306, 454

S.E.2d 320 (SC 1995), reh. den.] Herein lies the error in the Court of Appeals Remand, in that there is simply no evidence that Ms. Maple ever refused an offer of light duty, i.e., suitable employment.

Hearing Commissioner opening statement at the hearing on February 9, 2009:

> "I think she would be entitled to TTD from September 7th through September 18th when she was completely written out of work at that point in time; and I think everybody is in agreement of that. (App. p. 328, ll. 11-15). (Emp. add.).

The Commissioner then stated:

> "The period of time we are looking at is from September 18th of 08 through January 13th of this year for TTD; that is the period of time that she was on light duty by Dr. Gaddy, sedentary work actually, but had been fired and was unable to work." (App. p. 328, ll. 15-20). (Emp. add.).

On October 19, 2009 (10 months later), the Commissioner's notes for proposed Order made the following findings:

> "Please prepare an order denying the claimant's entitlement to TTD. I find the claimant or someone on her behalf falsified the work excuse. I find the claimant, by doing that, and by her subsequent behavior was refusing suitable employment. Furthermore, I find claimant's absence from work was not occasioned by her injury, and therefore, she is not entitled to TTD. I find the claimant could return to work on January 13, 2009." (App. p. 535).

The argument made to the Full Commission was:

> II. ASSUMING FOR THE PURPOSE OF ARGUMENT THAT THE CLAIMANT FALSIFIED THE OUT OF WORK STATEMENT, DID THE COMMISSIONER ERR BASED ON S.C. CODE §42-9-10 BY DENYING THE CLAIMANT TEMPORARY TOTAL DISABILITY BENEFITS AND MAKING A DECISION THAT IS NOT JUSITIFIED UNDER LAW AND THE FACTS. (App. p. 284).

The argument made to the Court of Appeals was:

> I. THE COMMISSION ERRED AS A MATTER OF LAW BY FAILING TO MAKE FINDINGS OF FACT ON THE CENTRAL ISSUES FOR DECISION (I.E., THE APPELLANT'S RIGHT TO DISABILITY COMPENSATION AND FOR WHAT PERIODS OF TIME), WHICH ARE SUFFICIENTLY DEFINITE AND DETAILED ENOUGH TO ENABLE THE COURT TO PROPERLY DETERMINE WHETHER THE FINDINGS ARE SUPPORTED BY THE EVIDENCE AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED. (App. p. 101).

However, in the Court of Appeals Opinion refiled June 27, 2012, the decision on this issue (I) is rephrased as:

> "As to whether the Appellate Panel erred in holding Maple refused an offer of employment, we remand for further findings." (App. p. 567).

In 1936, an injured worker's right to trial by jury was taken away by the passage of the Workers' Compensation Act which established an administrative process and procedure wherein the fact finding responsibility and the application of the law is merged into one entity, the Workers' Compensation Commission. Partly to ensure the integrity of the process and that decisions made are based on the evidence, way before the advent of the Administrative

Procedures Act, this Court set out two (2) basic principles that every decision of the Commission must adhere to. The first is that the decision must not be based on surmise, conjecture, or speculation but must be based on the evidence in the Record. Rudd v. Fairforest Finishing Co., 189 S.C. 188, 200 S.E.2d 727 (1939); Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965); 27 S.C.D.2d, Workers' Compensation §1409. The second is that while it is the sole responsibility of the Commission to determine the factual issues, that duty and responsibility entails and requires that the Commission must make findings of fact upon the essential factual issues that are, "sufficiently definite and detailed to enable the Appellate Court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied." Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 at 292 (1962); Gray v. Laurens Mill, et al., 231 S.C. 488, 99 S.E.2d 36 (1957).

These protections which are to ensure that we know the basis for decision and that it comes from the evidence and that it is not based on surmise, speculation and innuendo were specifically incorporated into the Act under now S.C. Code §42-17-40. Those protections have since been extended to every administrative decision through the Administrative Procedures Act, S.C. Code §1-23-350, which provides that the

findings of fact must contain and consist of at least, "a concise and explicit statement of the underlying facts supporting the findings."

Unlike a jury, the administrative decision maker must set out the "evidence" upon which he/she relies to make the decision.

It is also Black Letter Law that the Commission must make such findings on every essential factual issue presented for decision. Aristizabal v. I.J. Woodside - Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 (1977); Hill v. Jones, supra; Baldwin v. James River Corp., 204 S.C. 485, 405 S.E.2d 421 (S.C. App. 1991).

The Petitioner would submit that the Hearing Commissioner and the three-member panel which affirmed that decision failed in that responsibility as a matter of law which requires reversal based on the undisputed evidence concerning disability or at a minimum a reversal and remand for a de novo hearing under S.C. Code §1-23-380(5)(a, d, e, and f) if the Court finds there is disputed evidence on disability.

In this case, the Hearing Commissioner made the following findings, in pertinent part:

> "Please prepare an order denying the claimant's entitlement to TTD. I find the claimant or someone on her behalf falsified the work excuse. I find the claimant, by doing that, and by her subsequent behavior was refusing suitable employment. Furthermore, I find claimant's absence from

> work was not occasioned by her injury, and therefore, she is not entitled to TTD. I find the claimant could return to work on January 13, 2009."

These findings do not address and do not set out evidence on the essential legal issues before the Commissioner for decision: was Ms. Maple disabled after the 9th under S.C. Code §42-9-10.

The Defendants admitted Ms. Maple sustained an injury on August 31, 2008; that they had notice of the injury; and that they authorized and provided medical treatment for the injuries. The reason that Ms. Maple requested a hearing and that the case was before the Commission for decision was whether she was entitled to disability benefits due to her disability or incapacity to work as defined under S.C. Code §42-9-10 and S.C. Code §42-1-120. The findings simply do not address the evidence on this issue and further the Commissioner's findings are based on surmise and speculation and are not based on the reliable, probative and substantial evidence in the Record.

It is undisputed that: Ms. Maple had no car nor telephone, walked to work and rode home with a fellow employee and that she spoke with the Director of Nursing, Ms. Shirley Goodwin and told her she couldn't work on the fourth. (App. p. 337, ll. 3-7; p. 341, ll. 6-11; p. 358, ll. 1-9; p. 361, ll. 2-23). On the 4th, Ms. Maple met with Ms. Burr and due to her condition, Ms. Burr authorized and sent

her to a doctor. (App. p. 341, ll. 12-16; p. 376, ll. 1-5). When Ms. Maple was seen by the authorized doctor on September 9th, the doctor evaluated her and took her out of work until September 18th. (App. p. 251; p. 233). She took this Statement to the employer that same day and had a discussion with Ms. Burr again. (App. p. 258). On September 16th, the doctor saw her again and allowed her to return to sedentary work as of the 19th. (App. p. 344, l. 19 - p. 345, l. 22; p. 347, l. 18 - p. 349, l. 10). She took this note that day the 16th to her employer and advised she would return to work on the 19th at sedentary work per the doctor's directions. Neither on the 16th or any time after that has the employer ever offered or procured her any work. (App. p. 255; p. 348, l. 1 - p. 349, l. 14; p. 356, ll. 10-20). Ms. Maple testified she could not work on the 4th; that her doctor took her out of work from the 9th through the 18th; that she was willing to try to work on the 19th per her doctor's directions at sedentary work; that she had no money coming in after she was terminated; that at the time of the hearing she would be working if she could; and that she would try a light duty job if it was offered. (App. p. 354, l. 18 - p. 355, l. 13).

The Commission simply does not refer to any evidence under the legal standard applicable to a determination under S.C. Code §42-9-10 that would establish this lady is not

disabled under the Act. In fact, at the hearing the Commissioner stated that it was, "agreed" she was disabled from the 9th through the 18th. The question for decision was whether she was disabled after the 18th. There is simply no decision on her disability status by the Commission.

Further, in addition to the failure to address the essential legal issues presented for decision, disregarding Ms. Maple's testimony entirely, the reliable, probative and substantial evidence, that being from the company doctor, in the Record establishes she was disabled in the doctor's opinion after the 9th and no sedentary work was ever offered through the date of the hearing. (App. p. 412).

Due to the failure to address, "the essential issues" for decision either in the findings of fact or rulings of law, the decision should be reversed based on the undisputed evidence on disability, or at a minimum reversed and remanded for a de novo hearing based on the substantial right of the Petitioner to a decision after a full and fair hearing that is not the subject of surmise, conjecture or speculation.

Finally, while the application of the law on disability in a temporary total disability benefits situation is not necessary to a decision on this issue, i.e. whether the Commission decision should have been reversed by the Court of Appeals for failure to make detailed Findings and Conclusions

of Law as required by law and based on the undisputed substantial evidence in the Record as a matter of law, because of the Court's decision in Pollack v. Southern Wine and Spirits, 405 S.C. 9, 747 S.E.2d 430 (2013), the following argument is made: first this case is distinguishable from the Pollack case based on the facts of this case and second the Pollack case is wrong and should be overturned as infusing an additional element, "fault" into the determination of the issue of disability under the Act which is an element not contained within the statutory provisions of the Act.

First, Pollack is distinguishable from the facts of the case at bar. In Pollack, Mr. Pollack had been placed on light duty and light duty was made available. While on light duty Mr. Pollack was terminated for violating a company policy. The Commission denied his application for TTD benefits to be reinstated because the employer had accommodated his work restrictions under SC Code §42-9-260 until he was terminated. In this case, the employer never accommodated Ms. Maple's work restrictions. In addition, SC Code §42-9-260 is a stop payment statute which only comes into play where the employer provides light duty work and the employee refuses or fails to return to work in a light duty status. In actuality, the employer by offering light duty work is fulfilling the requirements of SC Code §42-9-190. Starting compensation and payment compensation is precatory

to both SC Code §42-9-260 and 190. For all of those reasons, Pollack does not apply to the undisputed facts in this case.

As to why the Pollack decision should be overturned or strictly limited to the facts of that case, it appears that the focus of the arguments made to the Court in Pollack were on SC Code §42-9-260 as there is no reference to any of the statutory provisions in the Act that provide for payment of weekly disability benefits nor is there reference to either of fundamental construction principles applied to the provisions of the Act. It is simply wrong to analyze any entitlement to benefits under or any requirements of any provision of the Act without starting the analysis by applying those fundamental principles.

The first fundamental principle that this Court has applied since the inception of the Act in 1936 is that the Workers' Compensation Act is a form of social legislation which was primarily created for the benefit, protection and welfare of working men and women and their families and it shall be given a liberal interpretation in favor of benefits to the injured worker to help achieve the beneficial purposes for which it was created including to prevent the injured worker and their families from becoming charges on society. This Court has specifically held that this is the "policy" of this Court. Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E. 646 (1938); Cokely v. Robert Lee, Inc., 197 S.C. 157, 14

S.E.2d 889 (1941).

The second fundamental principle is that of strict construction of the provisions of the Act. Since the Act creates a compensation system in derogation of common law rights, the provisions and terms of the Act as enacted by the General Assembly must be strictly construed. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

Applying these principles, current SC Code §42-9-10 provides for the payment of weekly compensation benefits during periods of total, "disability". Disability is defined under SC Code §42-1-120. Since 1936 where a worker either by agreement or is determined under SC Code §42-17-40 to be disabled within the meaning of the Act, the worker is entitled to weekly compensation during all periods of disability up to the 500 week cap or for life in certain cases as defined in the Act. That entitlement or lack of entitlement under the provisions of the Act is based on one issue and one issue alone; is the worker, "disabled" as defined under SC Code §42-1-120 and the decisions of this Court. See: Colvin v. E.I. Du Pont De Nemours & Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). The only way that, "disability" benefits may be stopped is where the defendants prove the, "disability" has ended; see: SC Code §42-17-20;

the worker refuses medical care (SC Code §42-15-60); or they comply with the provisions of SC Code §42-9-190. That section 42-9-190provides that where the employer procures employment for the worker, "suitable to his capacity" they may stop compensation because the worker is no longer, "disabled" under the Act. To this day, the Regulations still recite this fundamental principle that disability is presumed to continue until the employee returns or agrees to return to work. See for example, SCWCC Reg. 67-505(B).

SC Code §429-260 does not change anything in reference to the, "disability" status being the sole issue for that determination and it only comes into play when, "once temporary disability payments are commenced . . . ." SC Code §42-9-260(B). Then in accordance with SC Code §42-1-120 and §42-9-190 in reference to the worker's, "disability" status payments may be stopped where (B):

(1) the worker returned to work;

(2) the worker agrees he can return to work;

(3) employee is released to regular duty and employer offers work; and

(4) worker is released to limited duty and employer offers limited duty work (§42-9-190, suitable to capacity).

Therefore under the provisions of the Act the only basis for entitlement to benefits is the, "disability" of the worker and the only basis for stopping those benefits is

a change in that, "disability" status.

Finally, allowing the employer to stop, "disability" benefits based on a violation of a company policy inserts two additional elements into the basis for the entitlement to and determination of disability benefits under the Act: fault and speculation. Fault, except as specifically provided for in the Act, has no bearing on an employee's right to benefits. Zeigler v. SC Law Enforcement Div., 250 S.C. 326, 157 S.E.2d 598 (1967). Also the Commission's decision cannot be based on speculation and the, "motivation" behind the termination calls for speculation either pro or con. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967).

## II. THE CLAIMANT WAS DENIED DUE PROCESS OF LAW BASED ON THE SUA SPONTE DECISION OF THE HEARING COMMISSIONER AT THE CONCLUSION OF THE HEARING DIRECTING THE RESPONDENTS TO TAKE THE DEPOSITION OF THE DOCTOR IN THE EMERGENCY ROOM, WHERE NO SUCH REQUEST WAS MADE BY EITHER PARTY; WHERE IT CONCERNED AN ISSUE NOT RAISED BY THE PLEADINGS; AND WHERE IT IS CONTRARY TO THE AUTHORITY OF A COMMISSIONER AS A JUDGE UNDER THIS COURT'S DECISION IN SOUTHERN RAILWAY CO. v. COLTEX, INC., 285 S.C. 213, 329 S.E.2D 736 (1985).

From the Record:

> "At the hearing, Defendants were instructed to take the deposition of the nurse and/or doctor who wrote the out-of-work note dated August 31, 2008 to determine if the note had been altered and if so, by whom. The Record was left open until the depositions were submitted and a decision was then to be made." (App. p. 531).

Pursuant to the Rule of Law, a Commissioner shall base the Decision on the evidence that is submitted to the Commissioner at the time of the hearing (e.g., S.C. Code §1-23-320(i)). The Commissioner is a judicial officer and a fact-finder that is neutral and who shall consider the evidence that is presented by the parties, that the parties desire to be presented, and make a ruling based on the facts presented. Only where a motion is made by a party pursuant to Commission Rule 67-613(c) may the Commissioner adjourn the hearing to procure additional evidence. Otherwise, that Rule/Regulation like the general principle of law provides, "each party shall arrange and present all evidence at the hearing" that they want considered. (Emphasis added). The trial judge cannot ex mero motu leave the Record open and order depositions and then base a decision on evidence gained based on that decision and on an issue not raised by the Respondents. Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985).

The Petitioner would also ask that the Court consider that the Commissioner, who is an attorney, did not advise that she wanted a complete evidentiary presentation of all the evidence concerning custody of that handwritten statement which was in the control of the Defendants after Ms. Maple gave it to them. Had the defendants asked and had she given the Defendants the opportunity to establish a chain of

custody and to take all the depositions necessary to establish that, then the Petitioner would readily admit that Ms. Maple was not denied due process. Where a document is sought to be admitted, the chain of custody of that document must be established by the party seeking to admit it. SC Dept. of Social Services v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005); Tant v. Dan River, Inc., 286 S.C. 140, 332 S.E.2d 534 (S.C. App. 1985). See also the following cases where a Commissioner properly exercised a Commissioner's discretion where a party requested that the Record be left open for submission of additional evidence. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 333 S.E.2d 338 (S.C. App. 1985); Hallums v. Michelin Tire Corp., 308 S.C. 498, 419 S.E.2d 235 (A.C. App. 1992) reh. den., cert. den.; Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (S.C. App. 1996), cert. granted, cert. den. as improvidently granted, 326 S.C. 261, 486 S.E.2d 263. The Petitioner would simply submit that the Court of Appeals misapprehended that the Commissioner was not responding to a request by either party but was actually determining what evidence should be submitted. The Petitioner has absolutely no problem and agrees with the Court's citation of Burns v. Joyner, 164 S.C. 207, 213 S.E.2d 734 (1975), which stands for the proposition that a Commissioner has every right and has the responsibility to make sure that all the evidence is brought

out during the hearing as long as, as the Court of Appeals wrote in its decision,

> "while it would, of course be possible for the Commissioner to so overplay his role as to deny a party a fair hearing, the writer is of the opinion that that was not done in the instant case."

The Petitioner would submit that it is overstepping the role of the Commissioner for the Commissioner to determine what case is heard or what evidence is presented without at least a request by a party being made to present that evidence.

Further, due process requires that the parties be given notice of the issues to be considered at the hearing and to be given an opportunity to present evidence on the issues. See for example, Green v. Raybestos-Manhattan, Inc. 250 S.C. 58, 156 S.E.2d 318 (1967). The Petitioner would submit that based upon a review of the Record, including the Form 51, there was absolutely no notice of a defense based on falsification of documents. In the Defendants' Pre-Hearing Brief, the only defense that is raised as being a fact in controversy that can in any way constitute a semblance of such a defense is the defense that a refusal of suitable employment is a bar to benefits.

In this case, the Hearing Commissioner sua sponte proceeded to leave the Record open much longer than 30 days and in fact left it open so long to where her ruling was not made until almost a year later. Not only did the

Commissioner leave the Record open (without it being on the Record or an Order being issued) for the deposition of the doctor, but then after the doctor's deposition, proceeded to further leave it open for an additional deposition the submission of which took from April 21st until August 28th, 2009 when both depositions were submitted to the Commissioner for review; six (6) months after the hearing. She did not reopen the Record to address the taking of the additional deposition of the nurse nor did she direct that all people that could have touched this work excuse be examined nor did she reconvene the hearing, nor did she require that the Defendants establish a chain of custody.

The Commissioner simply without Motion of either party left the Record open for the Defendants to take these depositions but then did not grant the request of Petitioner to submit additional evidence which should have been granted under the due process concepts of fundamental fairness, the right to be heard and to cross-examine your accuser; the right of a worker to establish her right to benefits; and also the legal principle that a liberal construction of the Act shall be made in favor of benefits to the injured worker. Morgan v. JPS Automotives, supra; Hallums v. Michelin Tire Corp., supra. Also, leaving the Record open for more than 30 days clearly violates the Commission Regulations. SCWCC Reg. 67-613.

Finally, for the Hearing Commissioner to allow the Defendants to present additional evidence on her own motion is an error of law. Couch v. Greenville County, 249 S.C. 186, 153 S.E.2d 394 (1967). As noted, a Hearing Commissioner under S.C. Code §42-17-40 is required to be a neutral party and under the Code of Judicial Ethics is required to take a neutral position; to be fair to all litigants; to be a steward of justice and to properly weigh the evidence without any pre-disposition. In this case, the Hearing Commissioner clearly violated the Petitioner's due process rights by allowing the Defendants to continue to develop their case until there was sufficient evidence to rule against the Petitioner and by failing to give her the same opportunity to refute the additional evidence. This goes against a liberal construction of the Act in favor of benefits to the injured worker, the fundamental reason for the existence of the Workers' Compensation Act and it also violates the Petitioner's due process rights especially fundamental fairness, cross-examination, and the right to be heard.

III. THE COURT OF APPEALS ERRED BY NOT ADDRESSING THE CENTRAL ISSUE OF WHETHER THE COMMISSION ERRED UNDER S.C. CODE §42-9-10 BY DENYING THE PETITIONER'S REQUEST FOR TEMPORARY DISABILITY BENEFITS STARTING 9-9-08 BASED ON THE UNCONTRADICTED EVIDENCE INCLUDING THE AUTHORIZED DOCTOR'S WORK STATEMENT ISSUED THAT DATE TAKING THE PETITIONER OUT OF WORK UNTIL 9-18-08 AND MAKING A DECISION THAT IS NOT JUSTIFIED UNDER THE LAW AND THE FACTS.

The argument under Argument I concerning, "disability" is incorporated herein by reference. Hypothetically speaking, let's say a worker (the Petitioner in this case) is injured on the job and the authorized treating doctor takes the worker out of work from September 9th through the 18th. On the 16th, the worker is still under treatment but the doctor gives the worker a Work Statement allowing the worker to return to work at sedentary duty which worker takes to employer but through and including the 19th, sedentary work was not provided nor was it ever offered. On the 19th, the following was to or did happen:

1. The plant closes but the Human Resource Director ("H.R.") six (6) months later testifies they would have made light duty (L.D.) available but for that fact.

2. The worker had notified the H.R. before the injury he would be quitting the 19th. H.R. testifies six (6) months later sorry but for that fact L.D. would have been made available.

3. The worker before the injury had notified H.R. he would be retiring as of the 19th. H.R. six (6) months later

testifies but for that fact L.D. would have been made available.

4. Worker before injury notifies H.R. he would be returning to college. H.R. six (6) months later testifies but for that fact L.D. available.

5. Worker is placed in jail for assault on H.R. for accusing the worker of falsifying document. H.R. testifies but for that fact L.D. available.

In all of these cases the evidence at the hearing six (6) months later is that L.D. was never offered to the employee by employer or insurance carrier.

In all of these scenarios, the same determination is required to be made by the Commission under the Act which is, whether or not the Petitioner is disabled and entitled to, "disability" benefits under S.C. Code §42-9-10. The decision under that Statute is simply and solely whether or not the Petitioner is disabled to earn wages in the same or any other employment; i.e. whether the worker is disabled. The Act provides that where the worker is disabled from his/her work under the Act, the employer/carrier can only be relieved of the responsibility to pay compensation to the worker by offering or procuring the Petitioner work within his capacity. S.C. Code §42-9-190; S.C. Code §42-9-260; Commission Regs. 67-504 - 507; Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2nd 43 (1961); Last v. MSI

Construction, 305 S.C. 349, 409 S.E.2d 334 (1991). Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E2d 220 (1975). (Many of the above hypothetical scenarios are based directly on the factual basis of these decisions; specifically Hines and Last).

Assuming arguendo that the Court disregards the Petitioner's testimony in this case and disregards all the evidence except for the doctors' opinions and out-of-work statements, there is no question that Dr. Gaddy issued a statement on September 9th taking the Petitioner out of work until September 18th. At the hearing the Commissioner stated on the Record that the Petitioner was entitled to benefits for this period. There is absolutely no evidence, and the Petitioner wants to reiterate no evidence, in the Record that Ms. Maple ever knew during that time that she was supposed to return to work on a light duty basis. Then, on September 16th, it is unquestioned that Dr. Gaddy issued a statement that she could go back to work at light duty employment in a, "sedentary position only" and that such position was never offered. (App. p. 412; p. 349, ll. 1-14). S.C. Code §42-9-190 provides that while a Claimant is under medical care and suffering from a disability to do work that the employer may stop being responsible for disability benefits by offering or procuring work suitable to the Petitioner's residual temporary or permanent work capacity.

See also S.C. Code §42-9-260 to the same effect. There is **no** evidence that after September 16th the employer in this case offered Ms. Maple any employment. There is no question that through September 30th the Petitioner had not been released to full duty employment and had been specifically limited to sedentary work by her treating doctor and there is no evidence of any change in that status after that date. Since she was not able and available for full duty employment and since the Defendants chose not to offer her employment (whatever the reason) within her limited capacity, the Petitioner was entitled to temporary disability compensation until maximum medical improvement since the only evidence in the Record is that she continued to be disabled. Hendricks v. Pickens Co., 335 S.C. 405, 517 S.E.2d 698 (S.C. App. 1999), reh. den.

In addition, from September 30th through January 13, 2009, there is absolutely nothing in the Record to establish that the doctor changed her work duty status or again that the employer ever offered or procured her work within her residual capacity. The Respondents may have had their reasons for firing her but that does not meet the requirements of the Act. Therefore, under S.C. Code §42-9-10, SC Code §42-1-120 and S.C. Code §42-9-190, the Petitioner was entitled to temporary disability benefits. In addition, for the Commission to fail to award benefits to

this lady in this case is directly contrary to the Supreme Court's decision in Coleman v. Quality Concrete Products, supra. This Court and the Court of Appeals have repeatedly held that where the evidence is susceptible of but one reasonable inference, the question is one of law for the Commission. Young v. Hyman Motors, 199 S.C. 233, 19 S.E.2d 109 (1942); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C. App. 1995), reh. denied, appeal dismissed. The Petitioner would request that the Court, based on the undisputed evidence as a matter of law, order that she receive temporary disability benefits at least through January 13, 2009 and since there is absolutely nothing to establish that she actually was able to go back to work on January 13, 2009, that those benefits should be continuing, or at a minimum, should grant Ms. Maple a de novo hearing on benefits after January 13, 2009.

## CONCLUSION

For the reasons stated, Petitioner asks the Court to reverse the Decision of the Commission as to her entitlement to disability compensation based on the numerous errors of law and remand to the Commission for a hearing on when and if the disability has ended and as to whether she is at maximum medical improvement; or in the alternative, for a

remand for a de novo hearing.

Respectfully submitted,

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June 26th, 2014

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Opinion No. 2012-UP-302
(SC Ct. App. filed May 16, 2012;
Withdrawn, Substituted and Refiled June 27, 2012)

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Margaree Maple, Employee, .....Petitioner,

v.

Heritage Healthcare of Ridgeway,
Employer, and Phoenix Insurance
Company, Carrier, ..... Respondents.

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**PROOF OF SERVICE**

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I certify that I have had the **BRIEF OF PETITIONER** and **APPENDIX** served by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2014 addressed to its attorney of record, R. Daniel Addison, Esquire, Hedrick, Eatman, Gardner & Kincheloe, Post Office Box 11267, Columbia, South Carolina 29211.

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