

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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JUL 15 2014

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

SC Court of Appeals

72874

WCC File No. 0810152

Patricia Fore, Employee ..... Appellant,

v.

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

**APPELLANT'S PETITION FOR REHEARING**

The Appellant, by and through her undersigned attorney, hereby files this Petition for Rehearing. On November June 30, 2014, this Court issued an opinion affirming in part, reversing in part, and remanding the Decision and Order of the South Carolina Workers' Compensation Commission. Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90).

As grounds for granting this Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) *ex parte communication*; (2) prejudice to Appellant resulting from the communication and inclusion of the Smith letter in the record, (3) whether the Commission's credibility finding should be vacated; and (4) whether the Commission's finding that Fore "can work" is supported by substantial evidence and complies with the legal definition for permanent and total disability.

## ARGUMENT

**1. The Court adopted an unduly narrow definition of *ex parte* communication which overlooks the duty to cure *ex parte* communication received from a potential witness in a pending case.**

The Court held there was no *ex parte* communication in the instant case, relying on a narrow definition of *ex parte* communication as “prohibited communication between counsel and the court when opposing counsel is not present.” Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90). This same language was quoted by the South Carolina Supreme Court in a footnote in Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003) (*quoting* Black’s Law Dictionary 597 (7th Ed. 1999)).

Appellant respectfully submits that by using the narrowest possible definition, the Court overlooked the historical and practical reality that prejudicial *ex parte* communication is not limited to communication between a lawyer and a judge. 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 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 ). Cf. Brown v. Bi-Lo, Inc. (barring “‘*ex parte*’ methods of communication between an insurance carrier, employer, or their representatives and the claimant’s health care provider.”).

The fact remains that a Director of the Commission received an *ex parte* communication with a potential witness in this case. The Director than took *affirmative steps* to ensure that the identity of that witness and the substance of his allegations were conveyed *solely* to the Respondents.

Respondents then used that information to surreptitiously manufacture a “character” defense against Appellant; a defense with bogus allegations of “a fraud investigation ongoing by the A.G.’s office in this claim” as its lynchpin.

Regarding Director Smith’s indirect communication with Respondents, the Court held: “Furthermore, contrary to Fore’s version of the facts, Smith *merely suggested* that the carrier be made aware of McGowan’s allegation and did not instruct the Attorney General to convey this information to Chartis. Finally, in making the suggestion, Smith was advising the Attorney General’s Office of a course of action that it had a right to follow and *never expressed a desire that the Attorney General take any action* on the Commission’s behalf.” Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90)(emphasis added). Respectfully, Smith’s letter explicitly conveys the desire and intent that his letter be forwarded to the Carrier. Smith wrote:

A carrier is not an authorized agency under the provisions of § 38-55-530; therefore, *I don’t believe I can alert the carrier* to the alleged fraud. But *I suggest the carrier needs to know an allegation of fraud has been made* so it can conduct an investigation, should it deem an investigation is warranted. The following is the carrier contact information that *should be notified* of the allegation of claimant fraud: [R. p. 382] (emphasis added).

This passage conveys much more than idle suggestion; it is pregnant with meaning. The letter was not sent out of mere courtesy nor to complete a ministerial task set out in a statute. It was designed to make an end run around an act explicitly prohibited by the statute, to wit: *ex parte* communication about allegations of fraud from the Commission to an insurance carrier. This point was specifically acknowledged by the Appellate Panel at oral argument. As the Commission’s chairman acknowledged at oral argument, the procedure has been changed. [R. page 241, lines 19-24].

The next sentence is equally telling: “I haven’t attached a copy of the claim file since the carrier would have all of that.” [R. P. 382]. In so stating, Smith must have known the AG would not conduct any sort of investigation nor turn the file over to SLED. If he seriously believed there was actionable fraud, he would have sent the claim file with the letter. He didn’t need to send the file because he knew and intended that the letter would be forwarded to the carrier – who already “would have all of that.” [R. P. 382].

The Court then cites to the statute that provides immunity to designated employees of *insurance companies* who share information with designated employees of other insurance companies. See S.C. Code Ann. § 38-55-580(D)(2005). This section is not applicable, as the *ex parte* communication was conveyed from the Commission to the Attorney General to the insurer. As Smith himself observed in his letter, 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 improper. 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.”).

This is particularly so when the communication is prohibited by both the Administrative Procedures Act and the Judicial Canons. The APA is explicit on this point:

members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case *shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party* . . . except upon notice and opportunity for all parties to participate.

See S.C. Code Ann. § 1-23-360 (1985)(emphasis added); Rule 501, Canon 3B(7), SCACR.

For the foregoing reasons and the reason previously argued, Appellant requests the Court reconsider the full nature of the communication in this case, and find the communication from Smith to the AG to Chartis meets the definition of *ex parte* communication prohibited by Section 1-23-360 and Canon 3B(7). The analysis should then go forward on whether the presumption of prejudice can be overcome and whether Appellant is entitled to a new trial either before an impartial tribunal or with instructions from the Court.

**2. A new trial should be ordered because the Appellate Panel's findings on credibility were affected by the same error of law made by the Single Commissioner.**

The Court held the Single Commissioner made an error of law by refusing “to exclude from the record an exhibit that Respondents readily admitted was evidence of an ongoing fraud investigation.”<sup>1</sup> Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90). However, the Court held the Appellate Panel did not commit the same error – even though the panel affirmed the admission into evidence of the Smith

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<sup>1</sup>Respectfully, there is and never was an ongoing fraud investigation. Respondents claimed there was an ongoing fraud investigation as a justification to give some probative value to the Smith letter. This argument was effectively abandoned on the appeal, where Respondents acknowledge “Insurance fraud was **not** an allegation in this case.” [Brief of Respondents, page 17 (emphasis in original)].

letter. The Court relied on the panel's statement that it "does not rely on any information contained in the letter from the Commission to the Attorney General." Id.

Respectfully, this bell cannot be unrung. The Appellate Panel made findings identical to those of the Single Commission on the same basis: "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."<sup>2</sup> In re D.D., 713 S.E.2d 440, 310 Ga.App. 329 (Ga.App. 2011)(emphasis added).

The significance here is that the credibility determination cannot stand – not when the trier of fact made the determination with the Smith letter still part of the evidence. See 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

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<sup>2</sup>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.").

decision.” ).

The entire order should be vacated with the case remanded for a *de novo* hearing. A remand for disability to be redecided on the same record (even excluding the Smith letter and adding Tony Owen’s testimony) is insufficient to cure the prejudice. This is particularly so because Fore was unable to conduct discovery due to the injection of the “fraud investigation” days before the scheduled hearing. In effect, it endorses an unwarranted credibility finding tainted by the false allegations of insurance fraud. Therefore, Appellant requests that the Appellate Panel’s Decision and Order be vacated in its entirety, with the case remanded for a *de novo* hearing.

**3. The finding that Fore “can work” is legal error unsupported by substantial evidence in the record.**

The Court held:

We acknowledge there may have been substantial evidence to support a finding that Fore was capable of working and suffered only a partial disability; however, Fore’s testimony about her condition, the work restrictions imposed by Dr. Wolgin, and the vocational assessment prepared by Glen Adams would have been substantial evidence supporting a different finding.

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The Court went on to state that “Fore’s credibility, then, was an important factor . . .” Id.

Appellant asks the Court to vacate the Appellate Panel’s finding on credibility, as argued above. Appellant further asks the Court to reverse the Commission’s finding on disability. It is understood that the case is being remanded for a redetermination of Fore’s benefits. However, if the credibility finding remains in place – as appears to be the case – then the decision below is virtually preordained.

The finding that Fore “can work” is an error of law. The test for 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.” See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961).

In this case, there is no substantial evidence that Fore is capable of sustained employment – other than services for which no reasonably stable market exists. Fore’s failed work attempt as a bail bondsman is not substantial evidence. Fore deserves accolades for trying to work after her surgery; not condemnation. See Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935)(“The conduct of the plaintiff is highly commendable, as he showed that he was doing all he could to minimize the liability of the defendant. If the fact that the insured undertook to do his regular work, even when his final recovery was doubtful, would preclude recovery, it would encourage less scrupulous people to refuse to work so long as they could draw disability compensation.”).


The partial disability award rests on speculation engendered by the improper credibility finding. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing because lay testimony was not only contrary to expert testimony but also rested solely on speculation, “thus, there is no evidence in the record supporting the commissioner’s order.”).

For these reasons, and the reasons previously argued, Appellant requests that the Court reverse the partial disability award outright, and hold Fore has proven permanent and total disability as a matter of law. Alternatively, Fore requests the Court vacate the credibility finding and remand with instructions to apply the proper test for permanent and total disability.

CONCLUSION

For the foregoing reasons, Appellant moves for reconsideration. Appellant requests the Court enter a finding that Fore has proven permanent and total disability as a matter of law. Alternatively, Appellant requests that a new trial be granted.

Respectfully Submitted.



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**PROOF OF SERVICE**

I certify that I am paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing** 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 **July 15, 2014**, addressed as follows:

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July 15, 2014



STEPHEN B. SAMUELS  
ATTORNEY AT LAW

July 15, 2014

Jenny Abbott Kitchings, Clerk of Court  
The South Carolina Court of Appeals  
Post Office Box 11629  
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RE: Patricia Fore v. Griffco of Wampee, Inc.  
Appellate Case No.: 2012-212939

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of \$25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to Jim Lichty, Weston Adams and Helen Hiser, we are serving a copy of the **Petition for Rehearing** upon counsel for the Respondents as indicated by the enclosed Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/aro

Enclosures

cc w/encl.: James H. Lichty, Esquire  
Peter P. Leventis, Esquire  
Weston Adams, III, Esquire  
Helen F. Hiser, Esquire  
Ms. Patricia Fore

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