IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee,.....Appellant,

v.

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

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

MCANGUS GOUDELOCK & COURIE, LLC
Weston Adams, III
James H. Lichty
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

Attorneys for Respondents Griffco of Wampee, Inc. and Chartis Claims, Inc.

On June 30, 2014, this Court issued its opinion affirming in part and reversing in part the decision of the South Carolina Workers' Compensation Commission. Patricia Fore v. Griffco of Wampee, Inc., Op. No. 5242 (Ct. App. filed June 30, 2014). Specifically, this Court ruled that a letter by the Director of the Commission's Compliance Division ("Letter") notifying the South Carolina Attorney General's Insurance Fraud Division of Claimant's suspected "false statement or misrepresentation" as mandated under S.C. Code Ann. § 35-55-570(a) and suggesting that the carrier should be alerted to this allegation did not constitute improper *ex parte* communication between the Commission and Respondents. Even so, this Court held that the Commission erred in including the Letter to the Attorney General's office as part of the record of evidence, and also erred in excluding the proffered testimony of Claimant's witness Tony Owens. This Court remanded the matter in order for the Commission to re-determine Claimant's benefits with full consideration of the testimony of Tony Owens, and to remove the Letter from the record. On July 15, 2014 Appellant filed a Petition for Rehearing. This Return follows.

ARGUMENTS

Pursuant to Rule 221(a), SCACR, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." The petitioner bears the burden of demonstrating that the court misapprehended or overlooked fact or law. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). However, the purpose of a petition for rehearing is not to have the case tried in this Court a second time. Id. Apparently not satisfied with this Court's remand for redetermination of benefits based upon a modified and supplemented record, Claimant

impermissibly seeks to merely reargue his case in an effort to win an entirely new hearing before a Single Commissioner and/or have this Court make factual findings of its own.

1. This Court did not overlook or misapprehend Claimant's argument concerning *ex parte* communication.

Claimant argued before this Court that the Commission engaged in prohibited *ex parte* communication by virtue of its Compliance Division of the South Carolina Workers' Compensation Commission receiving allegations of possible insurance fraud from Claimant's former employer, and fulfilling its duty under law to notify the Attorney General's Office of this allegation. (R. 381-383). As part of that communication, the Compliance Division suggested that the Attorney General's Office alert the Carrier to this allegation. (R. 382). The Attorney General's Office, on its own volition, forwarded this information to the Carrier, and requested that the Carrier inform the Attorney General's Office of any findings of insurance fraud. Essentially, Claimant asked this Court to conclude that a letter from the Commission's investigatory unit[1] to the Attorney General's Office, who in turn sent the letter to the Respondent, constitutes impermissible *ex parte* communication between the Commission and Respondent. This Court properly rejected Claimant's attenuated notion of *ex parte* communication.

Now, Claimant complains that this Court overlooked her contention that *ex parte* communication occurred when her former employer contacted the Compliance Division, even though this issue was previously argued. To the contrary, this Court recognized in its findings that the Commission is comprised of an adjudicative function and an investigative function. The existence of these functions within a single agency is not

[1] Pursuant to S.C. Code Regs. 67-202(A)(5), the Compliance Division is "responsible for investigation and, if necessary, requests prosecution of an employer who refuses or neglects to comply with the insurance provisions of this Chapter and the Act."

prohibited so long as the same individual within an agency is not performing both functions. Babcock Center, Inc. v. Office of Audits, 286 S.C. 398, 402, 334 S.E.2d 112, 114 (1985). Under S.C. Code Ann. § 1-23-360, *ex parte* communication between an agency adjudicator and any person in connection with a contested case is prohibited except on notice to all parties. See Ross v. Medical Univ., 317 S.C. 377, 383, 453 S.E.2d 880, 884 (1994) (holding that vice-president was assigned to render a decision, making S.C. Code Ann. § 1-23-360 applicable). Mr. Smith, Director of the Compliance Division of the Commission, does not serve in an adjudicative role. Consequently, the allegation of potential insurance fraud communicated to Mr. Smith by a potential witness in a contested case proceeding is not *ex parte* communication.

Because Mr. Smith is not an adjudicator, the fact that Respondents ultimately received Mr. Smith's communication via the Attorney General's Office really makes no difference in terms of whether *ex parte* communication occurred. Claimant's attempt to frame this chain of communication as a surreptitious web of indirect communication intended to sandbag Appellant rests upon a the mistaken assertion that, as an employee of the Commission, Mr. Smith is automatically deemed to serve an adjudicative role, thus subjecting him to limitations upon *ex parte* communication with a potential witness in a contested case. This Court is of course aware of Babcock Center and Ross. There is no misapprehension here, and no fact or law was overlooked.

Appellant's citation to In re English, 367 S.C. 297, 625 S.E.2d 919 (2006) and In re Beckham, 365 S.C. 637, 620 S.E.2d 69 (2005) in support of her proposition that *ex parte* communication is not limited to communication between a lawyer and a judge was already raised to this Court, and in any event, completely misses the point. English and

Beckham both involved disciplinary proceedings against magistrates, who, among other things, were disciplined for *ex parte* communication with law enforcement about traffic citations. See In re English, 367 S.C. 297, 303, 625 S.E.2d 919, 922 (2006) (reprimanding magistrate for talking to highway patrol trooper concerning traffic citation issued to an employee); In re Beckham, 365 S.C. 637, 649, 620 S.E.2d 69, 75 (2005) (reprimanding magistrate for talking to highway patrol concerning traffic citation to relative). Here, the Director of the Compliance Division is not an adjudicator and did not elicit *ex parte* communication.

Further, Appellant argues this Court misapprehended the applicability of S.C. Code Ann. § 38-55-580(D) as obligating the Compliance Division to report potential insurance fraud.[2] A petition for rehearing does not provide Appellant the opportunity to raise new arguments to this Court. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). In any event, Appellant is mistaken in asserting that S.C. Code Ann. § 38-55-580 is inapplicable to the Commission. The Commission and the Attorney General's Office are both an "authorized agency" under the Insurance Fraud and Reporting Immunity Act. S.C. Code Ann. § 38-55-530(A). As an "authorized agency," the Commission must notify and share information with the Insurance Fraud Division of the Attorney General of any suspected insurance fraud. S.C. Code Ann. § 38-55-570(A) and (B). Under S.C. Code Ann. § 38-55-580(A), an "authorized agency" is conditionally immune from any tort liability arising out of communications with other authorized agencies concerning alleged insurance fraud. Although this Court may have inadvertently cited to subsection (D) of this statute, it is undeniable that S.C. Code Ann. §

[2] Claimant's arguments concerning the powers of the Attorney General are simply not relevant to this appeal. In any event, this argument was not raised below or to this Court previously.

38-55-580(A) applies to the Commission. At most, Claimant makes a point that has no consequence to her arguments concerning *ex parte* communication, and thus, may only constitute harmless error. Eadie v. H.A. Sack Co., 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996).

2. This Court properly upheld the Commission's credibility determination and there is no reason to vacate and rehear this case de novo.

"The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact." Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). Claimant takes issue with this Court's acceptance of the Appellate Panel's unequivocal statement that it did not rely on the Letter from the Commission to the Attorney General in making its finding that Claimant was not credible. Essentially, Claimant is implying that the Commission's statement cannot be believed. Agency adjudicators are presumed to act with honesty and integrity. C.f. Kizer v. Dorchester County Vocational Education Bd. of Trustees, 287 S.C. 545, 552, 340 S.E.2d 144, 148 (1986) *citing to* Withrow v. Larkin, 421 U.S. 35, 47 (1975). "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Hall, 371 S.C. 69, 79, 636 S.E.2d 876, 882 (Ct. App. 2006). (emphasis added). This Court should reject Claimant's suggestion that the Commission did rely on the Letter from the Commission to the Attorney General in making its findings of fact.

Undercutting Claimant's argument is the presence of substantial evidence supporting the Commission's credibility determination. The Commission found that Claimant reported to a vocational consultant, Glen Adams, that she only worked at ABC Bail Bonding for twelve hours during January 2011; however, her self-reporting was

contradicted by the testimony of her employer who stated she worked for him from August 2010 to January 2011, averaging about 30 hours per week. (R. 39). Claimant testified at her deposition that, following her departure from ABC Bail Bonding, she was not working at A1 Bail Bonds, but conceded during the hearing before the Single Commissioner that she had in fact been working for A1 Bail Bonds. (R.38). Claimant also failed to disclose her subsequent work for A1 Bail Bonding to Glen Adams. (R. 39). The Commission found that, during her deposition, Claimant denied receiving further education or certification after the injury, but admitted upon cross examination during the hearing that she received bail bondsman and accounting certification. (R.38). Although Claimant testified that she could not bend or lift, the Commission found that video surveillance footage shows her "squatting bending and lifting in a manner well-exceeding her self-reported limitations." (R. 38). A report from Dr. Wolgin dated September 30, 2010 states that Claimant reported she was working in an office setting three hours per day, three days per week when in fact she was working, at a minimum, twenty hours per week. (R. 312) (R. 146). Further, Claimant admitted that she had been performing work that was not sedentary office work. (R. 149, line 22 – 150, line 16).

Given these facts in the record, it simply is hyperbole for Claimant to assert that the Letter was "critical" to the Commission's finding on her credibility. Even taking the Letter out of consideration, ample evidence demonstrates her lack of truthful reporting concerning the extent of her educational and work history, as well as her physical abilities. Not only does this lack of forthrightness undermine Claimant's credibility, but it also gives reason to assign less weight to the medical and vocational evidence in this case. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 161, 519 S.E.2d 102, 106 (1999)

(holding that when expert opinions are based upon mere deductions from claimant's self-reporting, the Commission may draw its own findings of fact). The Commission's findings more than substantiate its determination that Claimant was not credible.

Claimant's citation to S.C. Dep't of Social Serv. v. Lisa C., 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) for her proposition that it is error for a court to make credibility determinations based upon inadmissible evidence is of no help to her for the simple reason that the Commission did not rely on the Letter in making its findings. Aside from this obvious distinction, in Lisa C., the court held that the sum of errors in admitting testimony from multiple witnesses warranted reversal. Id. at 419, 654. Here, the Commission had before it competent substantial evidence, aside from the Letter, to find that Claimant was not credible.

Moreover, "the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). If there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-493, 541 S.E.2d 526, 528 (2001). It is not within the purview of this Court to review the Commission's determination of Claimant's credibility, or to remand for the Commission to vacate the Commission's Decision.

Even if this Court had concluded that there was *ex parte* communication, Claimant's contention that such a ruling would compel vacatur of the entire proceeding below does not reflect the law in this State. Here, "although *ex parte* contacts are strongly disfavored, prejudice must be shown to obtain a reversal on this ground." Bakala

v. Bakala, 352 S.C. 612, 623, 576 S.E.2d 156, 162 (2003). Claimant cites to Ellis v. Proctor and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993) in support her demand that the Commission's credibility determination "cannot stand;" however, in Ellis, the court found evidence of judicial prejudice arising from *ex parte* communication because there was no evidence that supported the judge's finding of fact. 315 S.C. at 285, 433 S.E.2d at 857. Here, there was ample evidence to support the Commission's findings. Claimant's citation to the Georgia Court of Appeals case, In the Interest of D.D., offers nothing useful to Claimant by virtue of a different rule of law in Georgia pertaining to *ex parte* communication with a judge. 713 S.E.2d 440, 444 (Ga. Ct. App. 2011). There, the court stated that *ex parte* communication is presumptively harmful error, which is not the rule in this State.[3] Id.; Bakala v. Bakala, 352 S.C. 612, 623, 576 S.E.2d 156, 162 (2003).

Claimant's Petition does not raise an issue that this Court misapprehended or overlooked. These same issues were thoroughly argued before this Court, and this Court entered a well-reasoned decision fully protective of Claimant's right to a fair hearing.

3. Claimant has failed to show that this Court overlooked or misapprehended its decision to remand for a determination of benefits only.

Claimant asserts that the Commission's statement as part of its Finding of Fact No. 21 (R. 39) that Claimant "can work" is an error of law because merely being able to work is not sufficient to meet the test for total permanent disability under S.C. Code Ann. § 42-9-10. Although Claimant requested total permanent disability, the Commission awarded permanent partial disability instead. On appeal to this Court, Claimant argued

[3] The other Georgia cases Claimant cites to state the same rule. See Hargis v. State, 735 S.E.2d 91, 97 (Ga. App. 2012) (stating that "ex parte communications are presumed to have been in error."); Arnau v. Arnau, 429 S.E.2d 116, 117 (1993) (same).

she was entitled to total disability under S.C. Code Ann. § 42-9-10; however, this Court affirmed the Commission's determination of partial disability. Claimant's Petition merely rehashes her arguments already made and rejected by this Court.

What Claimant fails to acknowledge is that Finding of Fact No. 21 was based upon considering all of the evidence with the exception of the Letter from the Commission's Compliance Division to the Attorney General. (R. 39, 40). The evidence does not support total disability. Following her injury, Claimant worked for bail bonding companies, and described herself as "self employed and loving it." (R. 38-39). Claimant became a certified bail bondsman. (R. 38). She also earned a certificate in accounting. (R. 349). Claimant was shown on a surveillance camera "squatting, bending, and lifting in a manner well-exceeding her self-reported work limitations." (R. 38). Her vocational assessment by Mr. Adams was conducted by telephone, thus depriving Mr. Adams the ability to observe Claimant. (R. 347). Additionally, Claimant failed to disclose that she worked for A1 Bail Bonding following her departure from ABC Bail Bonds. (R. 349-350). Under these facts, Claimant cannot show her "inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Stephenson v. Rice Servs., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996). "Loss of earning capacity is the criterion." Shealy v. Algernon Blair Inc., 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967). "There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity." Id.

The Commission based its rejection of total permanent disability upon evidence that, "considering the record as a whole, would allow reasonable minds to reach the same

conclusion the administrative agency reached in order to justify its action." Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679, 681-82 (Ct. App. 2002). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 216, 217 (1981). "Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive." Etheridge, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002). In keeping with these rules, this Court properly affirmed the Commission's award of permanent partial disability.[4]

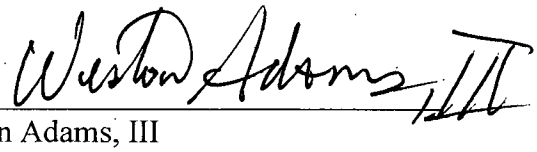
[4] Claimant once again raises Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012) to support her argument that the Commission's determination of partial disability is only based on speculation. Respondents' recitation of facts above, as well as in their Brief, debunks this claim. Further, Claimant repeats her argument under Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E.796 (1935) that she should be commended for working after her surgery, instead of having that fact held against her. Mann is inapplicable because it involved a claim against an accidental insurance policy and not a workers' compensation claim. Furthermore, the plaintiff in Mann proved he attempted but was unable to return to his regular work. 176 S.C. at 204, 179 S.E. at 798 (the evidence showed "plaintiff was never able to do his work after the accident, but only parts of it, and that the permanency of his disability became so apparent that he was finally discharged"). Here, Claimant failed to prove she was unable to continue working or, in fact, that she was not actively working at the time of the Hearing.

CONCLUSION

For all the reasons stated herein, this Court should deny Claimant's Petition for Rehearing.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



Weston Adams, III
James H. Lichty
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

Attorneys for Respondents

July 24, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee,.....Appellant,

v.

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

PROOF OF SERVICE

I certify that on the 24th day of August 2014, I served the **Respondents' Return to Appellant's Petition for Rehearing** on Patricia Fore by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record:

Stephen B. Samuels, Esq.
Samuels Law Firm, LLC
1527 Blanding Street
P.O. Box 50349
Columbia, SC 29250

Peter P. Leventis, Esq.
McKay, Cauthen, Settana & Stubley, PA
1303 Blanding Street
Columbia, SC 29201

Myra A. Rutland

Myra Rutland
Legal Assistant to Weston Adams, III
McAngus, Goudelock & Courie LLC
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300
Attorneys for Respondent s

mgc

Reply To
WESTON ADAMS, III
Direct Dial: (803) 227-2322
wadams@mgclaw.com
COLUMBIA

July 24, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Patricia Fore, Employee, Appellant v.Griffco of Wampee, Inc. Employer, and Chartis Claims, Inc., Carrier
Our File No.: 2094.08282
Appellate Case No. 2012-212939

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of Respondents' Return in opposition to Appellant's Petition for Rehearing in the above-captioned matter. Please return a file-stamped copy to my runner. By copy of this letter, I am hereby serving this Return upon Appellant.

If you have any questions, please contact me.

Very truly yours,

Weston Adams, III

Enclosures

cc: Stephen B. Samuels, Esquire
Peter P. Leventis, Esquire