

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

173336

Trial Court Case No. 1306305

Clarence Winfrey, Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, Defendants/Respondents.

NOTICE OF APPEAL

RECEIVED

AUG 25 2014

SC Court of Appeals

Appellant Clarence Winfrey appeals the Decision of the Appellate Panel of the South Carolina Workers' Compensation Commission filed July 25, 2014 which affirmed the Form 15(III) Hearing Commissioner's Decision with amendments. Appellant received notice of entry of the Appellate Panel Order (the final Agency Decision which is attached) according to an unsigned "Affidavit of Service" by email on July 25, 2014.

Pursuant to SC Code §42-17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

1. That the Commission erred as a matter of law by not reversing the Decision of the Hearing Commissioner pursuant to

S.C. Code of Laws §42-17-40, based on its review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That the Commission and the Hearing Commissioner erred as a matter of law by shifting the burden of proof at a Form 15 hearing to require the Claimant to prove that the Defendants did not conduct a Good Faith Investigation.

3. That the Commission and the Hearing Commissioner erred as a matter of law concerning the shifting of the burden of proof as set forth in #2 above wherein SC Code §42-9-260 and Commission Reg. 67-504(C) and 67-612(B)(4), all provide that the employer and the insurance carrier are the moving parties at the subsequent hearing held in a Form 15 situation wherein benefits are stopped without a hearing and as the moving parties have the burden of proof to prove that they have complied with the Act and by not applying the law established by the Court of Appeals in the case of Martin v. Rapid City Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) which held that the employer and its insurance carrier have the burden of proof to prove that they have met one of the conditions under the Act wherein the Court specifically held:

"However, the statute is explicit that even under a Form 15, an employer can only terminate or suspend temporary compensation **if one of the specified conditions is met.**" (Emphasis added).

4. That the Commission and the Hearing Commissioner erred as a matter of law where the Record is uncontroverted that the Defendants failed to comply with the requirements of SC Code §42-9-260 which provides that, "upon making the first payment, the employer immediately shall notify the Commission, in accordance with a form prescribed by the Commission, that payment of compensation has begun." This is a mandatory provision and the Commission erred by failing to find that the Defendants could not take the benefit of the remainder of the Statute for having failed to comply with the Statute, which would allow them to stop payment of benefits without a hearing under the other provisions of that Statute.

5. That the Commission and the Hearing Commissioner not only erred by shifting the burden of proof to the Claimant but where the Record is uncontroverted that the Claimant's first notice that the Defendants were alleging they were entitled to stop benefits based on a good faith investigation was on September 13, 2013, by then holding and refusing to allow any evidence on behalf of the Claimant subsequent to that date into the Record therein placing the Claimant in a paradoxical situation of being required to prove that the Defendants did not conduct a Good Faith Investigation but at the same time being

denied the right to take the deposition of the adjuster after that date with no ruling until the hearing; being denied the file by the Defendants of the adjuster until after the Form 15 hearing; and being denied the right to submit any evidence after that date that would establish that he had sustained a compensable injury by accident which would rebut/contradict any evidence in the Record to the contrary.

6. That the Commission and the Hearing Commissioner erred as a matter of law by admitting into evidence and considering both the Defendants' Pre-Hearing Brief and their APA Submissions which were not only not submitted 15 days or more prior to the hearing in accordance with the Commission Regulations, but were not even timely served 10 days before the hearing as a non-moving party and were only served 9 and 8 days respectively prior to the date of the hearing, which is uncontroverted in the Record. The Commissioner abused his discretion in admitting these documents into the Record and then relying on those documents to rule against the Claimant.

7. That the Commission and the Hearing Commissioner erred as a matter of law by first finding that there was a stipulation and then setting forth the position of the Claimant that it was the position of the Claimant that the only issue before the Commission was whether the Defendants had properly terminated workers' compensation benefits, wherein to the contrary it was the position of the Claimant that the Defendants had the burden of proof to prove that they had stopped disability benefits

without a hearing under the alleged exception to the Act which allows them to do so; as claimed in this case that they had conducted a Good Faith Investigation.

8. That the Commission and the Hearing Commissioner erred as a matter of law by finding that the Defendants had properly stopped payment of benefits where the Defendants had failed to comply with the requirements of the Rule 67-504(A) by failing to comply with the provisions of that subsection which specifically require that, "shall" serve two copies of the Form 15 immediately on the Claimant according to Rule 67-211 with documentation attached as to the reason for termination or suspension. The Hearing Commissioner erred by failing to apply the law as dictated to the Commission by our Appellate Courts wherein the SC Court of Appeals has specifically held in the case of Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) that an employer and its insurance carrier may not stop temporary total disability benefits and shall be required to resume such benefits where it:

"Failed to follow the proper procedure for doing so as outlined in §42-9-260 and Reg. 67-504. Rapid Plumbing terminated the compensation on August 10, 2002 . . . and failed to attach the supporting documentation as required by §42-9-260. These deficiencies are not mere technicalities but are substantial deviations from the statutory procedure." (Emphasis added).

9. That the Commission and the Hearing Commissioner erred as a matter of law by not assessing the mandatory 25% penalty and ordering reinstatement where the Defendants had failed to comply

with the statute at least admittedly in one regard, that being that they failed to file the mandatory form with the Commission at the time that benefits were started. In Rapid City the Court of Appeals held that the provisions of §42-9-260(G) which provides that the failure to comply with that section (doesn't specify in which regard but generally specifies in any regard) is mandatory as far as the imposition of the 25% penalty and the reinstatement of benefits. The Court of Appeals specifically stated, "the language of §42-9-260(G) is mandatory."

10. That the Commission and the Hearing Commissioner erred as a matter of law by considering evidence irrelevant and immaterial to the singular issue at a Form 15 hearing before the Commission by considering the Motion to Quash the deposition of the adjuster, the Motion to Compel Deposition for cause, the Motion For Continuance, the Summons and Complaint, and a Temporary Restraining Order, all of which were immaterial and irrelevant to the issue before the Hearing Commissioner on a Form 15(III) hearing under SC Code §42-9-260.

11. That the Commission erred as a matter of law by affirming Hearing Commissioner Order Finding of Fact No. 6 and specifically by finding as a fact in violation of the statute that, "a determination was based on the denial of the claim following an investigation." There is no documentation attached to the Form 15 in violation of the Statute to establish that an investigation was conducted and the statute specifically provides

that not only must an investigation be conducted, but a, "good faith" investigation must be conducted.

12. That while the Hearing Commissioner erred as a matter of law in making Findings of Fact Nos. 4-9 in that they refer to statements contained in various forms on file with the Commission as being in evidence and are not based on either testimony, stipulations or documentary evidence submitted pursuant to the Administrative Procedures Act, the Commission specifically erred by affirming his finding in Finding of Fact No. 8 finding that the Form 15, section 2, documented that the reason for termination was the employee failed to meet the burden of proof of compensable injury under the Workers' Compensation Act. This Finding of Fact by the Commissioner is not based on evidence in the Record.

13. That the Commission and the Hearing Commissioner erred as a matter of law in affirming and by making Finding of Fact No. 9 and specifically:

A. That the Claimant alleged that he was not properly served with a Form 15 because he was only served with 1 copy wherein the statute specifically provides that the Defendants are required to serve the Claimant with 2 copies. The Commissioner then goes on to make a factual conclusion that the Claimant was in no way, "prejudiced" which is not supported by the law or any evidence in the Record as the Defendants again failed in this regard in their compliance with both the statute and the

Commission Regulations and stopped benefits without hearing in violation of due process.

B. By making the conclusory statement that the Defendants' failure to comply with the statute by not only not providing the Claimant with 2 copies of the Form 15 but also by not setting forth a separate attachment as to the grounds was not improper, where such failures of compliance are an undisputed violation of the law. This statement violates one of the fundamental principles of the law as dictated by our Appellate Courts in reference to strict construction of the wording of the Act and the Defendants' requirement to "strictly" meet the requirements of the Act.

14. That the Commission and the Hearing Commissioner erred as a matter of law by affirming and making Finding of Fact No. 10 which is a violation of law and an error of law in that it shifts the burden of proof to the Claimant and provides that the Claimant not only has the burden to prove that the Defendants did not conduct a Good Faith Investigation but makes the blanket factual assumption which is based on surmise, speculation and innuendo that the Claimant did not put up evidence that would, "indicate that the Defendants acted in anything other than good faith during the investigation". There is simply no evidence and this is an error of law because whether or not the Defendants acted in good faith during the investigation is not a requirement under the Act. The requirement is whether or not they conducted a good faith investigation and this is speculation, innuendo and

surmise and an abuse of discretion by the Commissioner since it also reaches the factual conclusion that an investigation was performed. The Hearing Commissioner further erred as a matter of law, abused his discretion and subjected his decision to caprice by making the statement that, "this is based on the evidence or lack thereof submitted by the Claimant at the hearing."

15. That the Commission and the Hearing Commissioner erred as a matter of law by affirming and making the Hearing Commissioner's Finding of Fact No. 11, which in many ways is not a Finding of Fact, but by specifically making the following statements contained within that Finding that:

A. The Commissioner states that the Claimant is alleging, "a medically complex condition". This is surmise, speculation and innuendo and a blanket assumption made by the Commissioner that is not supported by any evidence in the Record;

B. Making the statement that it is an "alleged" shock. There is absolutely no evidence in the Record that the Defendants in any way challenged the fact that the Claimant suffered an electrical shock and electrocution on May 22, 2013; and

C. Making the statement that a causal relationship between the Claimant's electrical shock and his current medical condition is best determined by review of the medical expert medical reports to which the Defendants had access by operation of §42-15-95. There is absolutely no evidence, and this was a

hotly contested issue at the hearing, as to when or how the Defendants received any of the belated medical records that they were allowed to put into evidence (only based on the discretionary decision of the Commissioner). There was simply no testimonial or documentary evidence submitted into the Record that would establish whether or not those records were received before September 13, 2013.

16. That the Commission and the Hearing Commissioner erred by affirming and making a Finding of Fact that is not supported by any facts and evidence that the Defendants' refusal to continue benefits and the reason for stopping benefits was a determination as to whether or not his heart condition was causally related to the alleged electrical shock. The only, and the Claimant would reiterate the only, evidence in the Record as to a causal relationship is that set forth in the statement of the insurance carrier's own assigned rehab nurse wherein she specifically refers to the Claimant's treatment as being directly related to his electrical shock. That in fact is the uncontradicted evidence and the Commissioner's statement in that regard is speculation, surmise and innuendo and is the subject of being capricious and an abuse of discretion.

17. That the Commission and the Hearing Commissioner erred as a matter of law in affirming and by making the Hearing Commissioner's Conclusion of Law 2, subparagraph c, holding as a matter of law that the Defendants do not have to establish that they conducted a Good Faith Investigation but only that they have

to have, "represented to the Commission" that they had conducted such an investigation; and by shifting the burden of proof and requiring that, "the Claimant did not provide any evidence that the Defendants conducted their investigation in anything other than good faith", thus placing the burden of proof on the Claimant to prove that the Defendants did not conduct a Good Faith Investigation where they did not put in one iota of evidence that they had conducted a Good Faith Investigation or in any way met their burden of proof or even that of a prima facie case.

18. That the Commission and the Hearing Commissioner erred by holding as a matter of law that the Defendants' investigation, "revealed a good faith belief" that the Claimant had failed to meet his burden of proof. There is absolutely no evidentiary support of an investigation by the Defendants nor that this is what such investigation revealed. Under subsection (e) the Commissioner further erred by shifting the burden of proof to the Claimant where the benefits had been started on the basis that a prima facie case had been established that the Claimant had suffered a compensable injury. The Hearing Commissioner erred in a Form 15 hearing, which only comes about after the Defendants have started benefits on the basis that a compensable injury has occurred, by citing to law under SC Code §42-1-160 as to the Claimant's burden of proof where it is denied that a compensable injury has occurred.

19. That the Commission and the Hearing Commissioner erred as a matter of law by finding as a Conclusion of Law that, "therefore, a belief of Defendants formed following a good faith investigation that Claimant had not met his burden of proving compensability is adequate grounds for denial of the claim by the Defendants." The error being among many that the Defendants put up no substantial evidence to meet their burden of proof that they conducted a, "Good Faith Investigation" or that they in fact conducted any investigation as to what factually that investigation was, or the facts that substantiated that the Claimant had not met his burden of proof on compensability. That Finding or actually that Conclusion of Law is and makes the Commission Decision based on surmise, speculation and innuendo and the subject of caprice, prejudice and the subject of an abuse of discretion. The Commission failed in their oath of office by not complying with the dictates of the law as dictated by the Legislature, the Commission in its Regulations and under the decisions of the SC Appellate Courts. There is simply no evidence put into the Record to support this conclusion of law and this is an error of law under the law which the Commission is sworn by oath to uphold. It also violates the fundamental principles of the Act, which is that the Act shall be liberally construed in favor of benefits to the injured worker.

20. That the Court and the Hearing Commissioner erred as a matter of law by making Hearing Commissioner Order Conclusion of Law No. 3 which improperly states the position of the Claimant

stated on the Record repeatedly, in his Pre-Hearing Brief and at the Hearing, and in the unrecorded Pre-Hearing Motion Conference.

21. That the Court and the Hearing Commissioner erred as a matter of law in making Hearing Commissioner Order Conclusion of Law No. 4 for all the reasons as set forth hereinabove and in addition, by making the statement that it is, "possible" for the Defendants to have drawn a conclusion in good faith based on the Claimant's medical records that he suffered from pre-existing medical conditions unrelated to his employment that could be contributing to his current symptoms that would justify in denying the claim." There is no medical evidence to this effect nor is there any evidence to that effect, nor is there any testimony nor documentary evidence to that effect and in addition, assuming that the Claimant is correct that the Defendants have the burden of proof, they have a burden of proof to establish by a preponderance of the evidence that they conducted a good faith investigation and the basis for denial based on that good faith investigation, none of which is met in this conclusion or case.

22. That the Commission erred in affirming and the Hearing Commissioner erred as a matter of law by delaying a decision from November 13, 2013 until December 5, 2013, a period of 22 days where the singular issue before the Commissioner was whether or not the Defendants had established that they conducted a Good Faith Investigation and had denied benefits based on that investigation. The statute contemplates a quick determination as

to whether or not the Defendants properly stopped benefits on one of the limited bases as provided for under the Act, wherein in this case the Commissioner not only delayed the Decision for over 22 days but also did not issue the Decision until after a decision on all Motions that had been filed before the Commission.

23. That the Commission by affirming and the Hearing Commissioner erred as a matter of law where the Hearing Commissioner stated that the purpose of the Hearing was to determine whether or not the Claimant was entitled to a reinstatement of benefits by holding, without notice prior to that hearing, an off the Record hearing on filed motions that took over an hour and ruling on all motions before even reaching the only issue of which the parties had notice on the date of the hearing.

24. That the Commission by affirming and the Hearing Commissioner erred as a matter of law in an ancillary and interlocutory Order concerning motions issued by:

A. Denying the right of the Claimant to take the deposition of the adjuster and in that regard, also by not making a Finding that the Defendants had failed to obtain an Order in reference to the Deposition that had been properly and timely set prior to the time that the Deposition was to take place; and

B. By not hearing a Motion to Quash a Subpoena issued for the adjuster's file prior to the date of the hearing on the Form 15(III) hearing where such Subpoena had been issued for the

production of the adjuster's file back in September to be produced before the end of September and the hearing was not held on the Motion to Quash prior to the production time nor was it held until the date of the hearing on the Form 15(III).

25. That the Commission erred in affirming and the Hearing Commissioner erred by making as a matter of law in his preliminary and interlocutory Order all of legal bases set out and all conclusions of law as to the Findings of Fact and Conclusions of Law made that would justify the Commissioner's refusal to grant the Claimant the right to take the adjuster's deposition and to quash the Subpoena for that Deposition. That Decision and the hearing on that not being held until the date of the hearing on the Form 15 (III) was prejudicial to the Claimant and in violation of his rights to due process of law in that it failed to give him "an adequate" opportunity to be heard especially in light of the Commissioner's decision in his Order that the Claimant had the duty and responsibility and burden of proof to prove that the Defendants did not, and the Claimant would emphasize did not, conduct a Good Faith Investigation.

26. That the Commission erred as a matter of law under the provisions of the Administrative Procedures Act and the Worker's Compensation Act by allowing a party to draft the three Commissioner consensus Decision representing the final decision of the Commission and by not making its own detailed Findings of Fact and Conclusions of Law as is required by law.

27. That the Full Commission erred as a matter of law by issuing an Order drafted by Defense Counsel with a Statement of the Case which contains evidence outside of the Record, misstatements of the Record, assumptions from the Record and statements that constitute surmise, speculation, and innuendo and reference to an action filed in the Circuit Court which establishes that the Commission considered information outside of the Record.

28. That the Full Commission erred as a matter of law by adding Finding of Fact #7 specifically including but not limited to as a basis that said finding:

A. Was not requested or addressed to any issue raised;

B. Consists of no evidence in the Record establishing possession of Records, knowledge of Defendants or evidence supporting a good faith denial; and

C. Is the subject of surmise, speculation and innuendo.

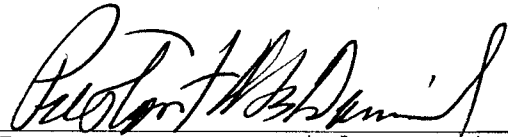
29. That the Full Commission erred as a matter of law by adding Finding of Fact #8 specifically including but not limited to that said Finding:

A. Is not a statement of fact but is an unsupported, inaccurate conclusion of law;

B. Is a statement of law non-supported by any case law and statutory law; and

C. Exceeds the authority of the Commission as fact-finder.

Respectfully submitted,



Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211
Attorney for Appellant

August 22, 2014

Other Counsel of Record:

Brett H. Bayne, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211
803-779-2300
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Trial Court Case No. 1306305

Clarence Winfrey, Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the **NOTICE OF APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on August 22, 2014 addressed to: Ms. Amy Bracy, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 **AND** also serving a copy upon Brett H. Bayne, Esquire, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

Dated: August 22, 2014



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

RECEIVED

AUG 25 2014

SC Court of Appeals

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Telephone (803) 771-7211

Matthew Robertson

Facsimile (803) 252-0709

August 22, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

**RE: Clarence Winfrey, Appellant, v. Archway Services,
Inc., Employer, and American Fire & Casualty
Insurance Co., Carrier, Respondents.
Trial Court Case No. 1306305**

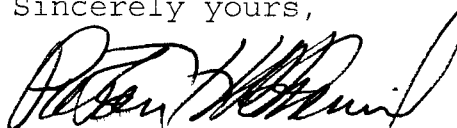
Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above-referenced matter. Also, enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents;
2. A copy of the Order which is to be challenged on appeal; and
3. Our Filing fee in the amount of \$100.00.

Please file the original documents and return the clocked-in copies to me via the enclosed self-addressed, stamped envelope. By copy of this letter. I am serving Counsel of Record and the SC Workers' Compensation Commission with the above-referenced Proof of Service and Notice of Appeal.

Sincerely yours,



Preston F. McDaniel

RECEIVED

PFM/kth
Enclosures

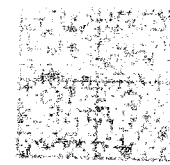
AUG 25 2014

cc: Brett H. Bayne, Esquire
Ms. Amy Bracy, SC Workers' Compensation Commission

SC Court of Appeals

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

Priority Mail
Certification



UNITED STATES POSTAGE

RECEIVED

AUG 28 2014

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211