THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Withdrawn, Substituted and Refiled June 27, 2012)

Margaree Maple, Employee, ...Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case 2

Arguments 6

I. THE COURT OF APPEALS MISAPPREHENDED THE CENTRAL ISSUES 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 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 6

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) 12

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 APPELLANT'S REQUEST FOR TEMPORARY TOTAL 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 UNTIL 9-18-08 AND MAKING A DECISION THAT IS NOT JUSTIFIED UNDER THE LAW AND THE FACTS 17

IV. THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE COMMISISON APPELLATE PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFT ITS ORDER AND NOT REQUIRING THE PANEL TO MAKE ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW 21

Conclusion 25

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 27, 2012.

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?

VI. The Court of Appeals should have found that the Commission Appellate Panel erred in violation of its statutory review/decision obligation by allowing Defense Counsel to draft its Order and not requiring the Panel to make its own Findings of Fact and Conclusions of Law addressing the issues raised for review as required by law?

STATEMENT OF THE CASE

This case involved an appeal from the decision of the South Carolina Workers' Compensation Commission which was commenced by the Appellant, 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 served on the Adjuster, as the assigned managing agent, and upon the insurance company at its designated address for service of process. (R. p. 47). 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. (R. p. 51). The Appellant then filed her Pre-Hearing Brief and Administrative Procedures Act proposed submissions on January 23, 2009 (R. p. 53). The Defendants timely filed a Pre-Hearing Brief and Administrative Procedures Act submissions on January 28, 2009 (R. p. 78).

A hearing was held before the Hearing Commissioner 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." (R. p. 162, 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. (R. p. 49; p. 245, ll. 5-7; p. 254, ll. 3-8). After letters concerning the status to the Commissioner (R. pp. 364-365), the deposition of Dr. Ross lead to the deposition of Ms. Starr Connor, RN, taken on June 1, 2009 (R. p. 319). The Defendants then by letter almost three (3) months later filed the depositions with the Hearing Commissioner on August 28, 2009 (R. p. 366). 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 (R. p. 370). 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 (R. p. 370; p. 97; p.

1). A Request for Review was made by the Appellant, 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. (R. p. 100).

An Appellant's Brief was filed with the Full Commission on March 17, 2010. A Hearing Notice was received on March 23, 2010 setting the matter for hearing on April 20, 2010 and the Defendants filed a responsive brief on April 1, 2010. (R. p. 104; p. 106; p. 127; p. 129). A hearing was held before a three-member panel of the South Carolina Workers' Compensation Commission on April 20, 2010. (R. p. 248). Subsequently 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 (R. p. 372). The Order was prepared and submitted by Defense Counsel and was issued by the Appellate Panel on June 16, 2010 (R. p. 24). From that Decision, a timely Notice of Intent to Appeal was filed with the Court of Appeals on July 7, 2010 (R. p. 157).

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). 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. The Court of Appeal's Opinion addressed three (3) different arguments made by the Claimant/Appellant 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 single commissioner and Appellate Panel erred in adopting a proposed order." (Emphasis added).

This Petition for a Writ of Certiorari follows.

[NOTE: By email dated July 13, 2012, the Workers' Compensation Commission Judicial Director forwarded a document entitled "Request for a Proposed Decision and Order" directing Respondents' Counsel to draft an Order for the, "South Carolina Workers' Compensation Full Commission Appellate Panel". The Appellant will move to supplement the Record before the Court in the Petition as to the issues presented due to this action by the Commission.]

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 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.

The Petitioner would submit as to argument (1) in the Decision of the Court of Appeals that the Court overlooked or misapprehended the issue that was being raised and that was presented to both the Single Commissioner and Full Commission for decision. The Petitioner would submit that the issue that was submitted was whether or not the Single Commissioner committed an error of law by denying the Claimant disability compensation benefits on the basis that she was terminated for cause instead of a determination as to whether or not she was, "disabled" within the meaning of the Act. In addition to the defense that the Claimant had altered a medical excuse for which she was terminated which justified them not paying disability benefits, the Defendants never argued that the Claimant did not accept an offer of employment, but instead argued that she did not keep in touch with them so that she could know about an offer of light duty employment. Thus the singular legal issue before the Commissioner was whether or not the Claimant was entitled to temporary disability compensation benefits under the Act which was not addressed.

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, 255 S.C. 219, 178 S.E.2d 142 (1970); Baldwin v. James River Corp., 204 S.C. 485, 405 S.E.2d 421 (S.C. App. 1991).

The Appellant 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 or a reversal and remand for a de

novo hearing under S.C. Code §1-23-380(5)(a, d, e, and f).

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 not based on the reliable, probative and substantial evidence in the Record.

It is undisputed that Ms. Maple has no car or 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. (R. p. 171, ll. 3-7; p. 175, ll. 6-11; p. 192, ll. 1-9; p. 195, 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. (R. p. 175, ll. 12-16; p. 210, 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. (R. p. 85; p. 67). She took this Statement to the employer that same day and had a discussion with Ms. Burr again. (R. p. 92). On September 16th, the doctor saw her again and allowed her to return to sedentary work as of the 19th. (R. p. 178, l. 19 - p. 179, l. 22; p. 181, l. 18 - p. 182, l. 10). She took this note that day 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 anytime after has the employer offered or procured her any work. (R. p. 89; p. 182, l. 1 - p. 183, l. 14; p. 190, 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. (R. p. 188, l. 18 - p. 189, 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.

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 Appellant to a decision after a full and fair

hearing that is not the subject of surmise, conjecture or speculation.

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).

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 Claimant/Appellant 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 she given the Defendants the opportunity to establish a chain of custody and to take all the depositions necessary to establish that, then the Claimant/Appellant 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 Claimant/Appellant 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 Claimant/Appellant 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 Claimant/Appellant 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 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. 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 Appellant 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, 321 S.C. 201, 467 S.E.2d 457, (S.C. App. 1996); Hallums v. Michelin Tire Corp., 308 S.C. 498, 419 S.E.2d 235 (S.C. App. 1992). 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 Appellant's due process rights by allowing the Defendants to continue to develop their case until there was sufficient evidence to rule against the Appellant 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 Appellant's due process rights especially fundamental fairness 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 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 UNTIL 9-18-08 AND MAKING A DECISION THAT IS NOT JUSTIFIED UNDER THE LAW AND THE FACTS.

Hypothetically speaking, let's say a worker (the Appellant 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 for 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 decision is required to be made by the Commission under the Act which is, whether or not the claimant is entitled to disability benefits under S.C. Code §42-9-10. The decision under that Statute is simply whether or not the claimant 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 claimant 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 scenarios are based directly on the factual basis of these decisions; specifically Hines and Last).

Assuming arguendo the Court disregards the Appellant'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 Claimant out of work until September 18th. In fact, at hearing the Commissioner stated the Claimant's entitlement to benefits for this period on the Record. 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. Also, 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 and that such position was never offered. 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 Claimant'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 Claimant 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 within her limited capacity, the Claimant 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, §42-1-120 and S.C. Code §42-9-190, the Claimant 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, 245 S.C. 625, 142 S.E.2d 43 (1965). 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 Courts rather than one for the Workers' Compensation 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 Claimant 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.

IV. THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE COMMISSION APPELLATE PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFT ITS ORDER AND NOT REQUIRING THE PANEL TO MAKE ITS OWN FINDING OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW.

Appellant's Counsel knows of and would submit there is no federal, state or local administrative or judicial appellate review tribunal, such as this Court, where the consensus decision of a multiple member panel charged with

reviewing legal and factual decisions affecting the rights of parties is drafted by a party for the panel/tribunal; and especially where no specific findings of facts and conclusions of law on each issue raised for review is made by the panel.

The Claimant/Appellant has no problem with nor questions the time-honored tradition of a singular judge or commissioner requesting that the prevailing party present a proposed Order for the Judge's or Commissioner's consideration and if the Court or Commissioner feels that the Order is in accordance with his or her decision in the case to adopt that Order as written. **However**, the issue that was presented in this case and with which Claimant's Counsel has great concern is that numerous legal issues were appealed to the Full Commission and the three-member panel of the Full Commission asked a party to write its **consensus decision** addressing all of those legal and factual issues that had been presented to the Commission for decision. The law requires that the Full Commission write its Order and it abdicated that responsibility and gave it to the prevailing party to write its consensus, again consensus, order. A review of that Order and a review of the Form 30, Request for Commission Review, will clearly establish that the Order of the Full Commission did not address all of the legal and

factual issues that were presented for review by the Full Commission.

Without addressing any of the specific factual and legal issues raised on appeal (see Argument I as to findings of fact and conclusions of law), the Commission asked Defense Counsel to draft the Appellate Panel Order (R. p. 372) but made no specific factual or legal conclusions in that form request. S.C. Code §1-23-340, 350 and §42-17-40 and 50, all require the Commission to make their own, "Findings of Fact and Conclusions of Law separately stated", on each issue before it for decision. S.C. Code §1-23-340 provides specifically that, the proposal for Decision, "shall contain a statement of the reasons therefore and of each issue of fact or law necessary to the proposed Decision, **prepared by the person who conducted the hearing or one who has read the Record.**" (Emphasis added). **The Commission** is the **fact-finding body** and **its decisions**, if supported, are binding on appeal. Walker v. City of Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966); Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (S.C. App. 1991).

In addition to the statutory requirements, the Commission's own Regulations, Reg. 67-709(E)(2) require the Commission Appellate Panel to record its findings on appeal on vote sheets:

> "The Commissioners together shall agree upon a modification if any and **record their Findings of Fact and Conclusions of Law on a vote sheet.**" (Emphasis added).

In addition to the requirements set out in the statutes and the Commission's own Regulations, this Court held in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962) (as reaffirmed on numerous occasions in its subsequent decisions) that the,

> **"Duty to determine factual issues is solely on the Commission** and the Courts have no authority to determine such issues except in jurisdictional matters, and such duty requires that not only must Findings of Fact be made upon essential factual issues but they must be sufficiently definite and detailed to enable the Appellate Court properly to determine **whether the Findings of Fact are supported by the evidence and that the law has been properly applied to them.**" (Emphasis added).

Here again, the Court has specifically held that it is the responsibility of the Commission to make **its** Findings of Fact and Conclusions of Law and to set those out in the Record in its Orders.

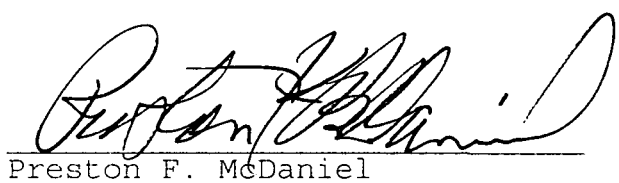
Since the Hearing Commissioner did not make a specific finding on the central disability issue and the Commission did not fulfill its review responsibility by at least making its own specific finding addressing that issue and on all substantive and procedural issues raised for review, it is now surmise as to what the basis was for the decisions of

both the Hearing Commissioner and the Commission Panel. They did not specifically set out the basis for their decision on each issue and reversal is required because the basis is speculative.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,



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July 27, 2012

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July 27, 2012

HAND DELIVERED
The Honorable Daniel E. Shearouse
Clerk of Court
SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Margaree Maple v. Heritage Healthcare of Ridgeway and Phoenix Insurance Company
Court of Appeals Tracking No.: 2010166786

Dear Mr. Shearouse:

Please find attached the original and seven (7) copies of my Petition for a Writ of Certiorari and the unbound original and two (2) copies of the Appendix for filing with the Court in regards to the above referenced matter, along with the required filing fee. I would appreciate your returning the clocked-in copies to the courier.

By copy of this letter, I am serving the Court of Appeals and Counsel for Defense with a copy of same.

I hope this is sufficient for filing with the Court; however if you require anything further, please do not hesitate to contact me.

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: R. Daniel Addison, Esquire
S.C. Court of Appeals

Check #8065
$100.00

COA# 2010-166786

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Margaree Maple, Employee, ...Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the **PETITION FOR WRIT OF CERTORARI** and **APPENDIX** by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2012, addressed to its attorney of record, R. Daniel Addison, Esquire, Hedrick, Eatman, Gardner & Kincheloe, Post Office Box 11267, Columbia, South Carolina 29211 **AND** SC Court of Appeals, Post Office Box 11629, Columbia, South Carolina 29211.

Dated: July 27, 2012

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

Attorney for Petitioner

The Supreme Court of South Carolina

Preston F. McDaniel

07/30/2012

RECEIPT #65017

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	8065
Check/Money Order Date:	07/27/2012
Comments:	Margaree Maple v. Heritage Healthcare of Ridgeway, et al