

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

S.C. Supreme Court

WCC File No. 0810152

Opinion No. 5242 (S.C. Ct. App. filed June 30, 2014)

Patricia Fore, Employee, Petitioner

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 25, 2014.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding there was no improper *ex parte* communication when the Workers' Compensation Commission conveyed information from a material witness in a case pending before the Commission through the South Carolina Attorney General's office to a party.
2. Whether the Court of Appeals erred in holding there was no presumption of prejudice nor prejudice in fact when "because of the nature of the communication, [Petitioner] was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working."
3. Whether the Commission erred in denying Petitioner's motion for recusal, and this Court's determination of the appropriate procedural remedy should a motion to recuse be granted.
4. Whether the Court of Appeals erred in affirming the Commission's credibility finding and failing to order a trial de novo when the findings were influenced by the improper communication and the inclusion of the Smith letter in the record.
5. Whether the Appellate Panel applied an incorrect standard for determining permanent and total disability, to wit "I believe she can work," such that a new trial de novo should be granted.

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission.

Petitioner Patricia Fore suffered a work related injury on August 1, 2008. Following a hearing in 2009, Fore began receiving medical treatment and weekly temporary total disability payments.

As treatment for her injury, Fore underwent a lumbar fusion at L4-L5 and L5-S1 on May 19, 2010. In late August 2010, her surgeon, Dr. Wolgin, advised her to attempt to go back to work on

restricted duty. This was also discussed with the Carrier's nurse case manager. [R. page 308]. Following her doctor's advice, Fore went to work part time as a clerk for ABC Bail Bonds in late August 2010. She averaged about 12 hours per week. She tried working for about 4 ½ months, but was not able to tolerate it, despite her employer allowing her to go home when her pain tolerance was reached. She quit "because the pain was just – it was too much; I couldn't handle it." She further explained:

Up and down so much out of the office chairs, just getting up from that lower chair up into standing up, it was just killing my back. So, having to climb in and out of bed all hours of the night, it – it was killing me. I was just eating Vicodin like they were candy. [R. page 115, lines 16-24].

Fore last worked for ABC on January 21, 2011. In her work journal, she wrote, "I gave Bill the phone, the charger, hurting too bad work in the office anymore." [R. page 367]. Her earnings for ABC from late August through January 21, 2011 totaled \$1,244.00.

Fore kept Dr. Wolgin and the nurse case manager apprised of her work attempt. Dr. Wolgin put Fore at MMI on February 14, 2011. He assigned a 36% whole person impairment rating. He wrote she is "unable to return to work until further notice." [R. page 328]. He gave her specific restrictions: "sit or stand only for about 15 or 20 minutes at a time and unless employment is able to be found within those restrictions, functionally she is not able to participate in the workplace and will remain so until her condition changes or further notice." [R. page 327].

Sometime in February 2011, Fore was approached by long-time friend Tony Owens. Owens operates A1 Bail Bonding – a competitor to ABC Bail Bonding. Owens asked Fore if he could use her name and license because she is well known in the community. ABC got a lot of bonds because people knew her. Owens bought some letters reading "A-1 Bail Bonds" to put on the back window

of Fore's truck for advertising. Fore lives on the same street as the courthouse.

Fore agreed to help Owens. She transferred her license to A1. To make the transfer effective, she did one bond in February 2011. [R. page 368].

In July, 2011, Owens developed serious health problems. He asked Fore if she could help him out during his period of infirmity. Fore agreed to do a few bonds until Owens could locate and train an actual employee. Fore did this for free to help out her friend.

Fore did 5 bonds in July; 12 bonds in August; and one bond in September. [R. pages 374-376]. In August, Owens hired Mary Weaver to be his bondsman. Fore arranged for Weaver to get licensed as a bondsman and then to work for Tony Owens. Fore would have taken the job herself had she been able – and “would have stayed with Steve [McGowan] if I could have physically done it.” [R. page 122, line 4-page 35, one 21].

Also in July 2011, Steve McGowan, Fore's former employer at ABC, called Garry Smith, the Director of the Commission's Compliance Division. McGowan allegedly reported to Smith that Fore was working for his competitor, A1 Bonding, and “getting paid off the books.” McGowan's grievance was primarily against his small town competitor, A1 Bonding: “Because she is getting paid off the books, her employer is avoiding paying premium. So ultimately, my overhead is higher than A1 Bonding's because my insurance costs are higher.” [R. pages 381-383].

On July 18, 2011, Smith wrote a letter on Commission letterhead to the Insurance Fraud Division of the Office of the Attorney General. In the letter, Smith detailed his conversation with McGowan, along with other information he developed as part of his investigation. He then specifically instructed the Attorney General to forward his letter to the Carrier “so it can conduct an investigation” – while simultaneously acknowledging “I don't believe I can alert the carrier to the

alleged fraud.” [R. pages 381-383].

The Attorney General’s office complied with Smith’s instructions and forwarded his letter to the Carrier on July 20, 2011.¹ [R. pages 380, 384]. Upon receipt of the letter, the Carrier apparently contacted McGowan and enlisted his help in putting Fore under surveillance.

McGowan began harassing Fore. The harassment became so bad that Fore ultimately took out a restraining order against McGowan. [R. pages 377-379]. The Carrier conducted surveillance of Fore at the courthouse obtaining the restraining order on September 7, 2011.

Fore filed a Form 50 (Claimant’s Request for Hearing) on June 27, 2011. [R. page 48]. Respondents filed a Form 51 (Employer’s Answer to Request for Hearing) on July 27, 2011. [R. page 50]

Fore served her Form 58 (Pre-hearing Brief) and Notice of Witnesses on Appellant on September 12, 2011. [R. pages 51-56].

Respondents served their Form 58 (Pre-hearing Brief) and Notice of Witnesses on Appellant on September 19, 2011. [R. pages 57-60]. It was received on September 20, 2011, by Appellant’s attorney. Included in the exhibits were two the letters previously unknown to Fore: one from Garry Smith, the Director of the Commission’s Compliance Division, to the Insurance Fraud Division of the Attorney General; and a second transmitting the Smith letter to the Carrier.

In response to the previously unknown allegations of insurance fraud, Fore served an Amended Form 58 (Pre-hearing Brief) and Notice of Witnesses on September 12, 2011. [R. page 61-64]. Fore specifically listed Tony Owens as a rebuttal witness.

¹Fore objected to both Smith’s letter and the AG’s letter being introduced into evidence. The Single Commissioner excluded the AG’s letter but admitted Smith’s letter. The AG’s letter was sealed and made part of the record as a proffer.

The case was tried before Commissioner Bryan Lyndon on September 27, 2011. The primary issue was the extent of Fore's disability. Respondents introduced the Smith letter at the hearing as substantive evidence of an "ongoing fraud investigation" over Claimant's objection. Fore then moved to have the Commissioner recuse himself and the rest of the Commission. Fore requested that the Commissioner either transfer the case to the circuit court or appoint a former commissioner to hear the case. The motion was denied. [R. page 93, line 22-page 99, line 20].

The case went forward on the merits. After Fore testified, Appellant called Tony Owens. The Single Commissioner sustained Respondents objection to allowing the witness to testify on the grounds he was not listed on the Claimant's original pre-hearing brief and that listing him on an amended pre-hearing brief was untimely. Fore then proffered the testimony of the witness. [R. page 184-208].

On January 18, 2012, the single commissioner issued an order finding Fore's injury resulted in a forty percent disability to the back. The single commissioner noted he made this finding "[a]fter considering all of the evidence." He also stated: "I did not find her a credible witness and believe she can work."

Fore timely appealed this Decision and Order to the Appellate Panel on February 1, 2012.

Oral arguments were heard by Appellate Panel A on June 18, 2012. Arguments were scheduled to begin at 4:00 p.m. However, Appellate Panel A was running ahead of schedule and called the case ahead of time. Oral arguments commenced at 3:54 p.m. [R. page 209]. Fore's lead attorney, Stephen Samuels, was currently appearing in a 3:30 p.m. oral argument before Panel B. Despite the inability of Fore's lead counsel to appear, the Panel began oral argument with Mr. Samuels not present. He arrived during the Respondent's argument – after his co-counsel had made

the Appellant's argument. Mr. Samuels argued the Reply, but was handicapped by the inability to hear or participate in the initial appellant's argument.

On August 27, 2012, the Appellate Panel issued its Appellate Panel Decision and Order in which it affirmed with modifications the Decision and Order of the Single Commissioner. The Appellate Panel added additional findings of fact and conclusions of law addressing the allegations of *ex parte* communication. [R. pages 32-45].

Fore appealed to the Court of Appeals. The court issued its opinion on June 20, 2014. The court remanded "to the Commission for a redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony." The court further held the Smith letter did not constitute *ex parte* communication. Additionally, the court held Fore suffered no prejudice from the admission of the Smith letter because the Appellate Panel added factual findings that the Smith letter had not been relied on by the panel.

ARGUMENT

1. The Court of Appeals 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 of Appeals 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)).

Petitioner respectfully submits that by using the narrowest possible definition, the Court of

Appeals overlooked the historical and practical reality that prejudicial *ex parte* communication is not limited to communication between a lawyer and a judge. *Ex parte* communication by the court with law enforcement, family members, jurors, parties and potential witnesses is equally improper – and considered equally prejudicial. 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.”). “*Ex parte* communications are inherently improper and are anathema to quasi-judicial proceedings.” Jennings v. Dade County, 589 So.2d 1337 (Fla.App. 3 Dist. 1991).

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 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 of Appeals 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 at 90, 97 (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, 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. He didn't need to send the file because the purpose of the letter was to communicate with Respondents.

The Court of Appeals then cites to the statute providing immunity to designated employees of *insurance companies* who share information with 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, 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. The right of the parties to a fair trial before an impartial tribunal is paramount. Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997)("Partiality exists where, among others, an adjudicator has *ex parte* information as a result of prior investigation or has developed, by prior involvement in the case, a 'will to win.'"). No state agency should inject the weight of state authority into a private civil 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.

The Commission was put in an untenable position by the passage of § 42-9-440 and § 38-55-510 et seq. Requiring the adjudicative body to “report all cases of suspected false statement or misrepresentation” and then requiring it to try the same cases is a fundamental conflict of interest, invasion of the independence of the tribunal, and denial of due process to the injured party. The violations occurred as an inevitable result of the Commission’s attempt to balance these mutually exclusive duties. Nonetheless, the violation did occur and did deprive Fore of her right to procedural due process. Certiorari should be granted so the Court can resolve this tension.

For the foregoing reasons and the reason previously argued, Petitioner requests the Court grant the writ of certiorari to consider 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 Cannon 3B(7). The analysis should then go forward on whether the presumption of prejudice can be overcome and whether Petitioner 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 of Appeals 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.”² 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

²Respectfully, 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)].

commit the same error – even though the panel affirmed the admission into evidence of the Smith 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.”³ 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

³In 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.”).

trial judge that the *ex parte* communication “if consulted at all, had no bearing on the trial court’s decision.”). As this Court has stated:

The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against “prejudicial” *ex parte* communications, but against *ex parte* communications. Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

A remand for disability to be redecided on the same record (even excluding the Smith letter and adding Tony Owen’s testimony) with all other findings in place is insufficient to cure the prejudice. As the Court of Appeals noted, “because of the nature of the communication, Fore was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working.” Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90, 97). In effect, it endorses an unwarranted credibility finding tainted by the false allegations of insurance fraud. Therefore, Petitioner 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 of Appeals 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.

Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C.Ct.App. filed June 30, 2014)(Shearouse Adv.Sh. No. 26 at 90). The court went on to state that “Fore’s credibility, then, was an important factor . . .”

Id.

Petitioner asks the Court to vacate the Appellate Panel's finding on credibility, as argued above. Petitioner 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, Petitioner requests that the Petition for writ of certiorari be granted. Petitioner requests 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 and the reasons previously raised in the Briefs and Petition for Rehearing, Petitioner asks this Court to grant the Petition for Writ of Certiorari

Respectfully Submitted.



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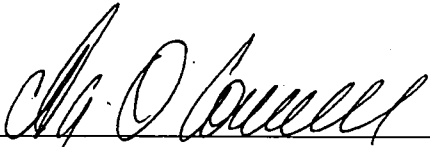
PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Petition for a Writ of Certiorari** and **Appendix** 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 **September 24, 2014**, addressed as follows:

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September 24, 2014