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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

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

Patricia Fore, Petitioner

v.

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

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Patricia Fore, Employee, Appellant,

v.

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

Appellate Case No. 2012-212939

Appeal From The Workers' Compensation Commission

Opinion No. 5242

Heard February 5, 2014 – Filed June 30, 2014

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

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THOMAS, J.: This is a workers' compensation case. The single commissioner awarded Patricia Fore compensation based on his finding that Fore's work-related injury resulted in a forty percent disability to the back. Fore appealed to the appellate panel, which affirmed the award. Fore now appeals to this court. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In 2005, Fore began working as a meat cutter in a Griffin IGA in Myrtle Beach. Her responsibilities included unloading trucks, rotating and cleaning coolers, and carrying items weighing forty to eighty pounds.

On February 21, 2008, Fore was injured when she bumped into some machinery while carrying about sixty pounds of meat. After March 31, 2008, Fore ceased working at IGA and moved to Leesburg, Georgia, with her husband.

After a hearing on August 12, 2009, a single commissioner found Fore suffered compensable injuries to her back and right hip and her back injury affected her right leg. Fore's employer, Griffco of Wampee, Inc., and its carrier, Chartis Claims, Inc. (collectively Respondents), were ordered to assume responsibility for all causally related treatment and to pay Fore temporary total disability commencing on March 31, 2008, Fore's final day of employment at IGA.

On May 19, 2010, Fore underwent a lumbar fusion. The surgery was not successful, resulting in a non-union and failed back syndrome. In August 2010, Dr. Wolgin, Fore's treating physician, after consulting with Fore's case manager, referred Fore to therapy and allowed her to perform sedentary work with restrictions regarding weightlifting and movement.

Fore commenced part-time work as a clerk for ABC Bail Bonds (ABC). In September, Fore told Dr. Wolgin she was working only three hours per day and three days per week in an "office setting"; however, she actually worked twenty or more hours per week for ABC. She also performed courier services for a towing service owned by Steve McGowan, the owner of ABC. McGowan paid Fore eight dollars per hour in cash for her work, and Fore never completed a time card in her own name.

By October 2010, Fore completed a month of physical therapy; however, her condition did not improve, and she reported increased pain in her hip and back from sleeping in a bed. As a result of these circumstances, Dr. Wolgin wrote a work slip in which he stated Fore was unable to work until further notice.

Fore left ABC on January 21, 2011, maintaining she could not perform her duties because of excessive pain from having to alternate between sitting and standing positions. McGowan, however, alleged Fore wanted to work more hours and even went to Atlanta to obtain her certification as a bail bond agent. According to McGowan, Fore increased her hours, eventually working thirty to thirty-five hours

per week, and told him she was leaving ABC because she needed to earn more money to pay for her child's daycare.

Dr. Wolgin suggested additional surgery, but Fore declined this option for several reasons: her chance of improvement was only fifty percent, her prior surgery had been painful, and she was busy caring for a young child. After consulting both Fore and her attorney, Dr. Wolgin closed Fore's case on February 14, 2011, and declared she reached maximum medical improvement on that date. Dr. Wolgin also assigned Fore a thirty-six percent whole person impairment rating.

Sometime in February 2011, Fore was approached by Tony Owens, a longtime friend and the operator of A-1 Bail Bonding (A-1), one of ABC's competitors. Owens requested Fore's permission to use her name and license because she was well known in the community. Fore transferred her license to A-1 and completed one bond herself for A-1 to make the transfer effective. Fore also allowed Owens, at his expense, to place advertising for A-1 on the back window of her truck. The advertising included a telephone number for A-1 that could be called any time of the day.

In July 2011, Owens developed serious health problems and was unable to work. Fore claimed that because of Owens's difficulties, she agreed to complete a few bonds for A-1 without compensation until Owens could train someone else for the work. Fore was responsible for obtaining five bonds in July 2011, twelve bonds in August 2011, and one bond in September 2011. She maintained her only physical exertion in obtaining the bonds was to travel to the courthouse to sign for them. Eventually, Owens hired someone to do the work that Fore had been doing, and Fore assisted that person to obtain the necessary credentials.

On July 6, 2011, McGowan called the South Carolina Workers' Compensation Commission (the Commission) to report that Fore was committing insurance fraud by working for A-1 and being paid "off the books." According to notes taken by Garry Smith, the Director of the Commission's Compliance Division, McGowan accused Fore of obtaining and serving bonds, which included traveling to the lockup in Leesburg to get her clients released. McGowan also alleged Fore took her niece with her, and he surmised the niece was initialing the release sheets as a subterfuge.

Smith included this information in a letter he wrote on July 18, 2011, to the Insurance Fraud Division of the Office of the South Carolina Attorney General. This letter was written on Commission letterhead and detailed Smith's conversation

with McGowan. It also included notes about A-1 taken by an investigator for the Commission. Although acknowledging Chartis Claims, the carrier, was not an "authorized agency" entitled to receive information about the alleged fraud from the Commission, Smith wrote: "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."

On July 20, 2011, an assistant deputy attorney general forwarded Smith's letter to Chartis for review and appropriate action along with a cover letter requesting Chartis to inform the South Carolina Attorney General's Office of any findings concerning insurance fraud. Neither Fore nor her attorney received copies of either the cover letter or Smith's letter.

On August 30, 2011, McGowan took video footage of Fore sitting with a client at the jail in Lee County, Georgia. This event prompted Fore to obtain a restraining order against McGowan.

The record on appeal also includes surveillance footage obtained on September 7 and 8, 2011. This footage shows (1) an A-1 sign near Fore's residence, (2) Fore entering, driving, and exiting an SUV without any noticeable difficulty, and (3) Fore squatting down numerous times to pick up merchandise from a low shelf in a department store. The record also includes a copy of Fore's Facebook page dated September 19, 2011, in which Fore gave her occupation as a "Professional Bondsman." She also described herself "Self Employed and Loving It!" and indicated her services were available.

On September 12, 2011, Vocational Consultant Glen Adams performed a vocational assessment on Fore based on Fore's medical records, work history, and statements she made during a telephone interview. In his report, Adams stated that based on Fore's limited sitting and standing tolerances, he considered Fore to be "totally vocationally disabled" as a result of the injuries she sustained while working at IGA. Adams also found there was no reasonably stable labor market compatible with Fore's vocational profile and resulting residual physical capacities.

On June 27, 2011, Fore filed a request for hearing with the Commission, in which she asked for a lump sum award to be prorated over her lifetime. Fore asserted she was totally and permanently disabled from her injury or, in the alternative, she had sustained a greater than fifty percent loss of use of her back, which would entitle her to a partial disability award based on five hundred weeks. On July 27, 2011, Respondents filed their answer to Fore's request. They admitted Fore was entitled

to temporary total disability from the time she left her employment at IGA through the date she reached maximum medical improvement, but denied her 2008 injury caused a permanent and total disability.

On September 12, 2011, Fore served her Pre-hearing Brief and Notice of Witnesses. Respondents served their Pre-hearing Brief and Notice of Witnesses on September 19, 2011, including in their list of exhibits "[c]orrespondence from the S.C. Attorney General's Office." The following day, Fore served an amended Pre-hearing Brief and Notice of Witnesses, in which she added Owens, who was not listed on her earlier notice.

The single commissioner heard the matter on September 27, 2011. When the hearing began, Fore objected to Respondents' first exhibit, which contained both Smith's July 18, 2011 letter and the July 20, 2011 letter from the Attorney General's Office to Chartis. Fore argued this evidence was inadmissible as an *ex parte* communication and hearsay. She also contended the letters were inadmissible evidence of a pending criminal prosecution. In addition to asking the single commissioner to exclude the evidence, she requested that the entire South Carolina Workers' Compensation Commission be recused from adjudicating her case and that a circuit court judge or other impartial referee, such as a former commissioner, be appointed to hear the matter. The single commissioner removed the letter from the Attorney General's Office from the record, but overruled Fore's objection to Smith's letter. He also denied Fore's request to appoint someone outside the Commission to hear her case.

The hearing then proceeded on the merits. When Fore called Owens to testify as a rebuttal witness on her behalf, Respondents objected, arguing that Owens was not named in Fore's original Pre-hearing Brief and Notice of Witnesses and that Fore's amended documents, which included Owens as a witness, were untimely. The single commissioner allowed Fore to proffer Owens as a witness, but left the hearing room when Owens testified.

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 he did not find Fore to be a credible witness and stated he believed she could work.

Based on his finding that Fore suffered a forty percent permanent partial disability to the back, the single commissioner granted Respondents a credit for overpayment of temporary total benefits from February 14, 2011, the date Fore reached MMI.

Fore appealed to the appellate panel, which affirmed the single commissioner's order, modifying it only to include additional findings of fact and conclusions of law that addressed Fore's allegations of *ex parte* communication. Fore now appeals to this court.

ISSUES ON APPEAL¹

- I. Did the single commissioner and appellate panel err in failing to recuse themselves on the ground that the Commission engaged in improper *ex parte* contact with Respondents by instructing the Attorney General's Office to forward Smith's letter to Respondents without notifying Fore?
- II. Should the single commissioner have excluded Smith's letter because it (1) constituted an *ex parte* communication, (2) contained inadmissible hearsay, (3) was more prejudicial than probative, and (4) denied Fore the opportunity to conduct meaningful discovery to rebut Respondents' evidence against her?
- III. Should Fore have been allowed to call Owens as a rebuttal witness in response to the testimony of Steve McGowan?

STANDARD OF REVIEW

Under the South Carolina Administrative Procedures Act, an appellate court can reverse or modify a decision of the South Carolina Workers' Compensation Commission "where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011).

LAW/ANALYSIS

¹ Fore has also raised challenges to the decision to base Fore's final award on a finding that her injury resulted in a forty percent disability to her back and to an alleged procedural irregularity during the hearing before the appellate panel. We decline to address these questions in view of our disposition of the other issues Fore has raised in her appeal. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

I. Allegation of *Ex Parte* Communication and Recusal of the Commission

Fore first argues the Commission engaged in *ex parte* communication with McGowan and Chartis and, as result of these interactions, deprived her of a fair trial. She further maintains that all sitting commissioners should have been disqualified from hearing the matter because of the alleged *ex parte* communication. We disagree.

"[E]*x parte* communication is defined as 'prohibited communication between counsel and the court when opposing counsel is not present.'" *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)). The Code of Judicial Conduct prohibits a judge from initiating, permitting, or considering *ex parte* communications unless the judge takes certain precautions, including but not limited to notifying the other parties of the substance of the *ex parte* communication and giving them the opportunity to respond. Rule 501, SCACR, Canon 3(B)(7)(a)(ii).

According to Fore, the *ex parte* communication occurred when Smith, in his capacity as Director of the Compliance Division of the Commission, sent the information he received from McGowan to the South Carolina Attorney General's Office and included "explicit instructions to forward it to a party in this case." However, in contacting the Fraud Division of the Office of the South Carolina Attorney General about McGowan's accusations against Fore, Smith was only discharging duties required of the Commission by statute. *See* S.C. Code Ann. § 38-55-570(A) (2002) (requiring "any . . . authorized agency having reason to believe that another has made a false statement or misrepresentation" to "notify the Insurance Fraud Division of the Office of the Attorney General of the knowledge or belief and provide any additional information within his possession relative thereto"). 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. *See* S.C. Code Ann. § 38-55-580(D) (2002) (providing immunity for "persons identified as designated employees whose responsibilities include the investigation and disposition of claims related to suspected fraudulent insurance acts" when they share information about such acts with properly designated employees of "the same or other insurers whose responsibilities include the investigation and disposition of claims related to fraudulent insurance acts").

We therefore hold that Fore has not established that any *ex parte* communication occurred between Respondents and the Commission. Furthermore, because Fore's assertion of *ex parte* communication is the only ground she advanced to support her argument that the Commission should have recused itself from hearing her claim, we need not address her argument that an independent hearing officer not currently affiliated with the Commission should have been appointed to decide this matter.²

II. Inclusion of Smith's Letter in the Record

Fore also contends that Smith's letter should have been removed from the record before the single commissioner because it was an *ex parte* communication, contained inadmissible hearsay, was more prejudicial than probative, and was presented in such a way as to deprive Fore of the opportunity to conduct meaningful discovery. Although we have held the letter was not an *ex parte* communication, we agree with Fore that the letter should have been removed from the record because it contained hearsay and was unduly prejudicial to her. Furthermore, 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.

When Fore objected to Smith's letter, Respondents' attorney argued the letter was "simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim." The single commissioner agreed and denied Fore's motion to remove the letter from the record, stating the letter was "in the commission file" and had "been made a part of the record or will be made a part of the record."

The inclusion of Smith's letter among the materials before the single commissioner, however, whether this occurred before or during the hearing, was in violation of sections 38-55-510 through -590 of the South Carolina Code (2002), otherwise known as the Omnibus Insurance Fraud and Reporting Immunity Act. As to the availability of information about fraudulent insurance claims under investigation, the Act provides:

² In any event, we found no authority to support Fore's argument that recusal of the Commission would have been the only appropriate remedy if she had established that the Commission engaged in *ex parte* communication with Chartis, and Fore has not cited any binding precedent to support her position.

Except as otherwise provided by law, any information furnished pursuant to this section *is privileged and shall not be part of any public record*. Any information or evidence furnished to an authorized agency pursuant to this section is not subject to subpoena or subpoena duces tecum in any civil or criminal proceeding unless, after reasonable notice to any person, insurer, or authorized agency which has an interest in the information and after a subsequent hearing, a court of competent jurisdiction determines that the public interest and any ongoing investigation will not be jeopardized by obedience of the subpoena or subpoena duces tecum.

S.C. Code Ann. § 38-55-570(D) (2002) (emphasis added). Therefore, although Smith's letter may have been part of the Commission's file, it should have been segregated from those portions of the file that could be viewed by members of the public.

We also agree with Fore that this letter was hearsay evidence of an as-yet unproven allegation that she had committed insurance fraud. Furthermore, without a final determination of the truth of this allegation, we hold the prejudice to Fore from admitting the letter exceeded any probative value to be gained from its inclusion in the record. *Cf. S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008) (finding that testimony that law enforcement had probable cause to proceed with a criminal investigation against a parent was prejudicial because the evidence suggested the parent was guilty of sexual misconduct toward his child). Moreover, because the letter was most likely not accessible to Fore or any other member of the public and Fore was thus unaware of the letter until only eight days before her hearing, she was deprived of the opportunity to conduct meaningful discovery that may have enabled her to refute Respondent's allegations that her claims were spurious.

Considering all these circumstances, we hold the single commissioner should have granted Fore's request to remove Smith's letter from the record. 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's credibility, then, was an important factor, and the single commissioner expressly found Fore was not a credible

witness. Contrary to a statement in the appellate panel's order that there was no evidence that the single commissioner considered Smith's letter in determining Fore's award, the single commissioner himself indicated otherwise when, after denying Fore's motion on the ground that the letter was already an exhibit in the commission file, he stated in his order that (1) his findings of fact were "[b]ased upon the testimony and exhibits submitted" and (2) he found Fore had suffered only a forty percent permanent partial disability to the back "[a]fter considering all of the evidence."

We therefore agree with Fore that the single commissioner's order was affected by an error of law because of the single commissioner's refusal to exclude from the record an exhibit that Respondents readily admitted was evidence of an ongoing fraud investigation. Nevertheless, "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." *Hamilton v. Martin Color-Fi, Inc.*, 405 S.C. 478, 487, 748 S.E.2d 76, 81 (Ct. App. 2013) (citing *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)). Here, although we disagree with the appellate panel's interpretation of the single commissioner's order, the appellate panel clearly stated in its own order that it "does not rely on any information contained in the letter from the Commission to the Attorney General." Considering this unequivocal statement along with Respondents' evidence that Fore was not permanently and totally disabled, we hold Fore failed to establish that her substantial rights were prejudiced as a result of either an error of law in the appellate panel's decision or clearly erroneous findings of fact by the appellate panel.

III. Testimony of Tony Owens

Fore further argues the single commissioner should not have refused to hear Owens's rebuttal testimony solely because he was not listed on her original Pre-hearing Brief and Notice of Witnesses and her attempt to amend these documents to include him was untimely. We agree.

State regulations require an attorney representing a party at a workers' compensation hearing to file and serve a Pre-hearing Brief (Form 58). 8 S.C. Code Ann. Regs. 67-611.B (2012). The attorney must "[f]ile a Form 58 and proof of service at least ten days before the hearing with the Hearing Commissioner's office identified on the hearing notice." 8 S.C. Code Ann. Regs. 67-611.B(1) (2012). The Form 58 must "give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case" *Id.* Furthermore, a party must "promptly supplement a response with respect to any question directly

addressed on the form and amend a response if the party obtains information upon the basis of which the party knows the response was incorrect when made"
Id.

Fore served her original Pre-hearing Brief and Notice of Witnesses on September 12, 2011, more than ten days before the hearing on September 27, 2011. On September 20, 2011, the day she received Respondents' Pre-hearing Brief and Notice of Witnesses, Fore immediately filed and served her Amended Pre-hearing Brief and Notice. Regulation 67-611, though expressly imposing a deadline for filing and serving the Pre-hearing Brief, also requires parties to supplement their responses when warranted. This regulation, however, does not impose a deadline for disclosure of new information when that information is provided in an effort to amend a prior response. Absent any express time constraint for amending a Pre-hearing Brief, we hold that Fore, in promptly supplementing her Pre-hearing Brief to include Owens as a witness, complied with Regulation 67-611 and that the single commissioner erred in refusing to allow Fore to call Owens as a rebuttal witness. *See Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 130 n.2, 623 S.E.2d 860, 864 n.2 (Ct. App. 2005) (recognizing "the informal nature of administrative proceedings before the Commission").

CONCLUSION

We hold the single commissioner should not have refused to hear Owens's rebuttal testimony and therefore remand this matter to the Commission for a redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony. We further hold the letter from Garry Smith to the Insurance Fraud Division of the Office of the South Carolina Attorney General was not an *ex parte* communication between Respondents and the Commission and Fore is therefore not entitled to have an independent tribunal appointed to determine her benefits. Although we hold that Fore did not show prejudice from the single commissioner's refusal to remove Smith's letter from the record, we agree with Fore that this refusal was error. In view of our decision to remand the matter to allow Fore to call Owens as a rebuttal witness, then, we also direct that on remand Garry Smith's letter be removed from the record. If Smith's letter remains in the Commission's file, it shall be segregated from the publicly available portions of the file as required by subsection 38-55-570(D) of the South Carolina Code (2002).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and PIEPER, JJ., concur.

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Patricia Fore, Employee Appellant,

v.

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

APPELLANT'S PETITION FOR REHEARING

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

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

ARGUMENT

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

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

Appellant respectfully submits that by using the narrowest possible definition, the Court overlooked the historical and practical reality that prejudicial *ex parte* communication is not limited to communication between a lawyer and a judge. See In re Newberry County Magistrate English, 625 S.E.2d 919, 367 S.C. 297 (2006)(violation of Canon 3B(7) in traffic ticket case where magistrate committed “judicial misconduct to have had an *ex parte* communication with the charging trooper and to even suggest the trooper ‘help’ the employee”); In re Beckham, 620 S.E.2d 69, 365 S.C. 637 (2005)(judicial misconduct for magistrate to convey message from defendant’s family member to law enforcement about pending case). Cf. Brown v. Bi-Lo, Inc. (barring “‘*ex parte*’ methods of communication between an insurance carrier, employer, or their representatives and the claimant’s health care provider.”).

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

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

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

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

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

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

The Court then cites to the statute that provides immunity to designated employees of *insurance companies* who share information with designated employees of other insurance companies. See S.C. Code Ann. § 38-55-580(D)(2005). This section is not applicable, as the *ex parte* communication was conveyed from the Commission to the Attorney General to the insurer. As Smith himself observed in his letter, the Workers’ Compensation Commission has no authority to “alert the carrier to the alleged fraud.” [R. page 381-383]. However, not only does the Commission lack such authority, neither does the Attorney General. The Attorney General “is empowered to . . . refer the matter for investigation to the State Law Enforcement Division who shall investigate thoroughly all claims or allegations . . .” S.C. Code Ann. § 38-55-560 (2007). The Attorney General is not allowed to delegate SLED’s investigative powers to a private party. See S.C. Code Ann. § 38-55-520 (2007)(“The purpose of this article is . . . require the investigation of alleged insurance fraud by State Law Enforcement Division.”). Turning over communication received from a potential witness in a pending case to an insurance company “so it can conduct an investigation” is improper. No state agency should inject the weight of state authority into a private matter without explicit statutory authority. Cf. In re Estate of Brown, Op. No. 27227 (S.C.Sup.Ct. filed February 27, 2013)(Shearouse Adv.Sh. No. 10 at 14)(Attorney General’s “influence over [dispute involving

individual's] estate has exceeded the statutory authority allowed in such matters.”).

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

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

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

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

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

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

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

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

Respectfully, this bell cannot be unrung. The Appellate Panel made findings identical to those of the Single Commission on the same basis: "I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. This finding demonstrates just how critical the *ex parte* communication was in tainting the outcome of this case. It shows the Commission's decision was based *entirely* on Fore's credibility – to the exclusion of the overwhelming medical and other evidence of her disability. See South Carolina Dept. of Social Services v. Lisa C., 669 S.E.2d 647, 380 S.C. 406 (Ct. App. 2008)(improper for the fact-finder to make a credibility determination based on inadmissible evidence). Harmful error exists when the trier of fact "directly and indirectly communicated" *ex parte* with an adverse party and "the evidence against [the aggrieved party] was *entirely based on a credibility determination* by the judge."² In re D.D., 713 S.E.2d 440, 310 Ga.App. 329 (Ga.App. 2011)(emphasis added).

The significance here is that the credibility determination cannot stand – not when the trier of fact made the determination with the Smith letter still part of the evidence. See Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993)(reversing despite finding by the trial judge that the *ex parte* communication "if consulted at all, had no bearing on the trial court's

²In candor to the Court, the Georgia Court of Appeals did not definitively find harmful error existed due to the *ex parte* communication. The court remanded for a determination of when the defendant learned of the *ex parte* communication and if he preserved the issue by objecting at the first opportunity. However, in a later opinion citing D.D., the same court reversed a criminal conviction based on the trial judge's refusal to recuse after receiving *ex parte* communication. Hargis v. State, 735 S.E.2d 91 (Ga. App. 2012). See, also Arnau v. Arnau, 429 S.E.2d 116 (1993)("the fact that *ex parte* communication is merely cumulative would not make the consideration of such evidence harmless error" because "[e]x parte communications are presumed to have been in error.").

decision.”).

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

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

The Court held:

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

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.

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

The finding that Fore “can work” is an error of law. The test for total disability is the

inability to perform services other than those that are “so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.” See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961).

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

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

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

CONCLUSION

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

Respectfully Submitted.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 15 2014

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

Patricia Fore, Employee Appellant,

v.


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

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **July 15, 2014**, addressed as follows:

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Columbia, South Carolina
July 15, 2014

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee, Appellant,

v.

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

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JUL 24 2014

SC Court of Appeals

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

ARGUMENTS

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

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

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

Claimant argued before this Court that the Commission engaged in prohibited *ex parte* communication by virtue of its Compliance Division of the South Carolina Workers' Compensation Commission receiving allegations of possible insurance fraud from Claimant's former employer, and fulfilling its duty under law to notify the Attorney General's Office of this allegation. (R. 381-383). As part of that communication, the Compliance Division suggested that the Attorney General's Office alert the Carrier to this allegation. (R. 382). The Attorney General's Office, on its own volition, forwarded this information to the Carrier, and requested that the Carrier inform the Attorney General's Office of any findings of insurance fraud. Essentially, Claimant asked this Court to conclude that a letter from the Commission's investigatory unit¹ to the Attorney General's Office, who in turn sent the letter to the Respondent, constitutes impermissible *ex parte* communication between the Commission and Respondent. This Court properly rejected Claimant's attenuated notion of *ex parte* communication.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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July 24, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee, Appellant,

v.

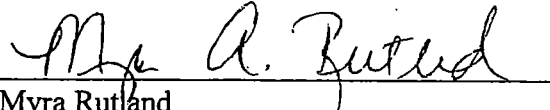
Griffco of Wampee, Inc., Employer, and
Chartis Claims, Inc., Carrier Respondents.

PROOF OF SERVICE

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

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JUL 24 2014

SC Court of Appeals

The South Carolina Court of Appeals

Patricia Fore, Employee, Appellant,

v.

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

Appellate Case No. 2012-212939

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

Paul W. Thomas J.

John O. Butler J.

Columbia, South Carolina

cc:

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FILED

8/25/14



Helen Faith Hiser, Esquire
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