

THE STATE OF SOUTH CAROLINA
In The 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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in denying Claimant's Motion for the Commission to recuse itself on the grounds that the Commission engaged in improper *ex parte* contact with Respondents in violation of the *Code of Judicial Conduct*, Canon 3 B (7) and S.C. Code Ann. § 1-23-360 (1985), by instructing the Attorney General's Office to forward a letter from the Commission's Compliance Director to the Respondents without copying the same to Appellant.
2. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to make specific findings for the refusal to recuse himself and the Commission, such refusal being an abuse of discretion mandating a new trial before an impartial and unbiased tribunal.
3. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in denying Appellant's Motion to exclude the *ex parte* letter from the Commission's Compliance Director on the ground that said letter:
 - A. Contained prejudicial *ex parte* communication between the Commission and a witness in a pending case;
 - B. Contained inadmissible hearsay;
 - C. Was more prejudicial than probative;
 - D. denied Appellant the opportunity to conduct meaningful discovery to rebut evidence Respondents were able to develop without Appellant's knowledge based on the improper *ex parte* communication between the Commission and Respondents; and
 - E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.
4. Whether Appellant was denied a fair trial due to:
 - A. the Commission's refusal to recuse itself or otherwise insulate the trial from the taint of "an ongoing insurance fraud investigation;"
 - B. the admission and reliance on an improper *ex parte* communication between the Commission and Respondents;
 - C. the improper *ex parte* communication itself which denied the Appellant the opportunity to conduct meaningful discovery to rebut evidence Respondents were able to develop without Appellant's knowledge based on the improper *ex parte* communication between the Commission and Respondents;

- D. allowing Respondents to improperly admit incompetent evidence of a potential criminal investigation initiated by the Commission, such evidence being unduly prejudicial, irrelevant, unsupported and offered for the improper purpose of intimidating and threatening Appellant; and
 - E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" which prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.
5. Whether the Single Commissioner erred as a matter of law in excluding the testimony of Tony Owens, as such testimony was essential to rebut the incredible and biased testimony of Steve McGowan – the witness whose identity was provided to the Respondents by a Director of the Commission in an improper *ex parte* communication.
 6. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to find Appellant sustained a loss of greater than 50% use of her back when the objective evidence of an undisputed 36% impairment rating, non-union of her surgery; and permanent out of work restrictions by the authorized treating physician mandate such a result.
 7. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to find Appellant is permanently and totally disabled under § 42-9-10 based on her failed work attempt; unrefuted expert vocational opinion of Glenn Adams opining she is totally and permanently disabled; her testimony about her inability to sustain gainful employment; and Dr. Wolgin's opinion that she is to remain out of work indefinitely.
 8. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in the finding wherein, "I do not find her a credible witness and believe she can work," such finding being tainted by inadmissible prejudicial evidence.
 9. Whether the Appellate Panel denied due process to Claimant by beginning oral argument before the scheduled time without one of Fore's attorneys being present as that attorney was appearing before a second Appellate Panel.
 10. Whether the Appellate Panel erred in finding there was no *ex parte* communication in this case?

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission filed by the Employee, Patricia Fore. The case arises out of a work-related injury suffered by Fore on August 21, 2008 on her job with the Employer. The Employer and Carrier are the Respondents.

Fore filed a Form 50 (Claimant's Request for Hearing) on May 13, 2009. [R. page 46]. The case was tried on August 12, 2009 before Commissioner Andrea Roche. On October 13, 2009, Commissioner Roche issued a Decision and Order directing Respondents to provide medical treatment and pay temporary total disability compensation to Fore. [R. pages 1-15]. No appeal was taken and benefits were provided

Fore was placed at maximum medical improvement (MMI) by her doctor on February 14, 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 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.

The case was tried before Commissioner Bryan Lyndon on September 27, 2011. The primary issue was the extent of Fore's disability. Fore contended she was permanently and totally disabled – both under § 42-9-10 and § 42-9-30 (21)(50% loss of use of the back). Fore further contended that even if she were not totally disabled, she had certainly lost more than 50% loss of use of the back, such that any partial disability award should be based on 500 weeks.

Respondents claimed disability should be awarded under § 42-9-30. Respondents additionally requested credit for any wages paid during the disability period. Appellant agreed Respondents were entitled to this credit. Credit was taken in the amount of \$1,244.00.

The case was marred with the surprise revelation that the Director of the Commission's Compliance Division had received communication from a material witness (Steve McGowan) in the case. Instead of advising both parties of this communication, he first conducted an investigation. He then forwarded the evidence *ex parte* to the Respondents via the Attorney General's office. [R. pages 380-384]. Respondents used the *ex parte* communication to allege that Fore was the target of an "ongoing fraud investigation" without Fore being able to challenge the falsity of the allegation or present rebuttal evidence.

Respondents introduced the Director's 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 based on Rule 501, Canon 3B(7) of the Code of Judicial Conduct. 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 summarily 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, Commissioner Lyndon issued a Decision and Order ruling:

IT IS HEREBY ORDERED that the greater weight of evidence supports a finding that Claimant suffered an admitted injury by accident to the back. Claimant's injury resulted in a forty percent (40%) disability to the back.

IT IS HEREBY ORDERED that the greater weight of evidence supports a finding that the Defendants are entitled to credit for overpayment of temporary total benefits from the date of maximum medical improvement, February 14, 2011 at a rate of \$299.59 and credit for any wages earned while paying benefits during the prior disability period.

IT IS HEREBY ORDERED that Defendants shall furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.

AND IT IS SO ORDERED.

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].

This appeal followed.

STATEMENT OF THE FACTS

Patricia Fore, the Claimant, had been employed as a meat cutter in a Myrtle Beach grocery store for two-and-a-half years. Fore injured herself on February 21, 2008 when she bumped into a meat saw while carrying approximately 60 pounds of meat. She last worked on March 30, 2008. In May 2008, Fore moved to Georgia because her husband had been transferred.

This case was originally denied (Respondents admitted it only as a minor medical-only hip injury). After a hearing, Commissioner Roche held Fore had suffered compensable injuries to "her back and right hip. Her back injury affects her right leg." Dr. Wolgin was designated her authorized treating physician. Fore was put on a running award of temporary total disability compensation. [R. pages 1-16].

Fore underwent a lumbar fusion at L4-L5 and L5-S1 on May 19, 2010. The surgery was not successful, leaving her with a non-union and failed back syndrome. Dr. Wolgin has recommended a revision, but at this stage, Fore is unwilling to proceed as there is only a 50% chance of improvement. [R. page 327].

In late August 2010, Dr. Wolgin advised Fore to attempt to go back to work. 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 this 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.¹ 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]. His claim of higher overhead is a lie as he admitted to committing tax fraud himself by not paying payroll taxes on Fore's earnings.² R. page 176, lines 5-17].

¹McGowan testified he called the Carrier, but denied having called the Commission. [R. page 175, line 21-page 176, line 4].

²Fore was not paid at all for the short time she helped out Tony Owens and A1 Bonding. At best McGowan was speculating about her being paid; at worst it was a deliberate fabrication.

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" – even while simultaneously acknowledging that "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, 2011.³ [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.

Since her failed work attempt with Steve McGowan and ABC Bail Bonding, Fore has not worked at all. She did help out Tony Owens by doing a total of 19 bonds for him over the course of 8 months. She also trained an employee for him. Fore received no pay and there is no evidence these *de minimus* activities constituted employment.

Tony Owens testified Fore was not physically able and capable of working as a bondsman.⁴

³Fore 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.

⁴The Single Commissioner sustained Respondents' motion to exclude the testimony of Owens on the grounds that he was not listed on the original pre-hearing brief. He was listed on the supplemental pre-hearing brief as a rebuttal witness. The supplemental brief was filed after Claimant learned of the Commission's *ex parte* communication with the Carrier and Steve McGowan. Owens' testimony was proffered. [R. page 154, line 3-page 158, line 5].

He stated, "If she was, we would probably could have saved the office, and she could have worked down there and saved that office for me." He would have hired her, "if she could have. But, she wasn't in the shape to do it either." [R. page 192, lines 16-24].

At the time of the hearing, Fore rated her pain as 6 of 10. It gets worse if she does a lot of up and down. Dr. Wolgin wrote she is "unable to return to work until further notice." [R. page 328]. He gave her specific restrictions to "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]. Dr. Wolgin further wrote, "I think enough time has gone by that would make her a surgical candidate if she wanted to do an open revision of the L4 through S1 fusion." [R. page 327].

Glen Adams performed a vocational assessment on Fore on September 7, 2011. Fore told Mr. Adams about her failed work attempt with ABC Bail Bonding. [R. page 349]. Adams noted that even if Fore could perform sedentary duties – which he noted "is not supported by Dr. Wolgin's work statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies." He opined she "is considered to be totally vocationally disabled."

ARGUMENT

1. Fore was denied a fair trial due to the Commission's ex parte communication with a witness and the Carrier.

This case raises troublesome issues about the fairness of the workers' compensation system and the neutrality of the hearing process. Patricia Fore was denied due process and a fair trial due to the Commission's *ex parte* communication with a witness and the Carrier. The inherent prejudice was compounded by the denial of Fore's motion to recuse and various evidentiary rulings. The final decision ignored the evidence, instead arising from passion and caprice engendered by bogus allegations of insurance fraud. The Appellate Panel compounded this error by finding there had been no *ex parte* communication despite the overwhelming evidence to the contrary. The members of the Appellate Panel appeared to be offended and incensed by the very suggestion – more so than concerned about the integrity of the hearing process and the rights of the litigants. This further shows that even the appeals process before the Appellate Panel was tainted.

"[A] fair trial in a fair tribunal is a basic requirement of due process, [and] [t]his applies to administrative agencies which adjudicate as well as to courts." Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). "*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). Although part of the executive branch, the Commission is in fact a quasi-court. Both the federal and state courts give the same weight to the Commission's decisions as they do to trial courts. See Hall v. Marion School Dist. No. 2, 860 F.Supp. 278 (D.S.C.1993); Crosby v. Prysmian Communications Cables and Systems USA, LLC, 723 S.E.2d 813, 397 S.C. 101 (Ct.App. 2011). The Commission's judicial function encompasses every aspect of a trial in a

traditional court:

The commission affords both the claimant and the employer a full and fair opportunity to litigate the issue. The parties are entitled to present witnesses and other evidence, make factual and legal arguments, and appeal a ruling they contend was made in error. The commission may not award benefits without actually litigating and directly determining the factual question of whether the claimant was injured in the course and scope of employment, and such a finding is necessary to support a judgment awarding benefits. Crosby.

Workers' compensation Commissioners are bound by the same Code of Judicial Conduct governing judges. S.C. Code Ann. § 42-3-250 (2005).

The specific issue in this case concerns Canon 3B(7) of the Code of Judicial Conduct. The Canon states:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* **A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:**

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(I) the judge reasonably believes that **no party will gain a procedural or tactical advantage as a result of the ex parte communication, and**

(ii) the judge makes provision promptly to **notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.**

Rule 501, Canon 3B(7), SCACR (emphasis added).

The Comments to the rule add, "A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff." Id.

The Workers' Compensation Commission is also subject to the Administrative Procedures Act (APA). See Lark v. Bi-Lo, Inc., 276 S.E.2d 304, 276 S.C. 130 (1981). The APA explicitly prohibits *ex parte* communication by members or employees of the agency with any party – even going so far as to criminalize a violation of this rule.⁵ The statute states:

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, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.
S.C. Code Ann. § 1-23-360 (1985).

Both the Canons of Judicial Conduct and the Administrative Procedures Act were violated by the Commission.⁶ Garry Smith, the Director of the Commission's Compliance Division, received *ex parte* communication from a potential material witness (Steve McGowan) in the case. Instead of advising both parties of this communication, he forwarded the evidence *ex parte* to the Carrier via the Attorney General's office. [R. pages 380-384]. Respondents used the *ex parte* communication to obtain additional evidence and prepare a witness without Fore being allowed to respond or present rebuttal evidence.

⁵The statute provides:
Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months." S.C. Code Ann. § 1-23-360 (1985).

⁶Appellant wishes to emphasize that there is no suggestion that the Commissioners or any other employees or officers of the Commission deliberately or intentionally violated the Judicial Canons. 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.

The Director in question is an employee of the Commission and would be considered a member of "the judge's staff." As such, the Commissioners were bound to make reasonable efforts to ensure that the Canon was not violated by him. It does not matter whether or not the *ex parte* communication was made in an effort to comply with S.C. Code Ann. § 42-9-440 (2008). The fact is the violation occurred and no steps were taken to cure it – to the manifest prejudice of Patricia Fore.

The first problem arose with the *ex parte* communication itself. It is fundamental that any communication to the court from a witness in a case must be immediately shared in the same manner at the same time with all the parties to the case. Rule 501, Canon 3B(7), SCACR. That didn't happen. Instead, the Commission made its own *ex parte* communication when it sent the substance of the communication to the Attorney General with explicit instructions to forward it to a party in this case. This alone is extremely prejudicial to Fore.

The second problem arose with the conduct of the hearing. Counsel for Respondents attached the two letters as exhibits to his pre-hearing brief. [R. pages 380-384]. This was the first notice Fore had that the Commission had engaged in *ex parte* contact with the Carrier or that "insurance fraud" was even an allegation in the case.⁷ Neither the Commission nor Respondents had ever raised the issue to Fore nor had they previously disclosed surveillance video or communication with Steve McGowan.

⁷Fore went to work for ABC Bonding on the advice of her doctor with the participation of the Carrier's nurse case manager, Cathy Nelson. She was released to work with restrictions on August 27, 2010. [R. pages 306, 308]. Her work efforts were documented by Dr. Wolgin on September 30, 2010, where he noted, "She is able to continue with her work which is 3 hours per day 3 days per week helping in an office setting." [R. pages 312]. As Fore *never* concealed her attempt to work from her doctor and the Carrier's nurse, *there is no evidence of insurance fraud.*

In an attempt to rebut the allegations that might be made by McGowan, Fore filed an amended pre-hearing brief listing Tony Owens as a rebuttal witness. The amended brief was filed and served on September 20, 2011 (one day after receiving Respondents' pre-hearing brief and seven days before the hearing). [R. pages 61-64].

Fore made several motions at the hearing. She first moved for the Commission to recuse itself from hearing the case. She requested that the case be transferred to circuit court or that an impartial referee (such as a former commissioner) be appointed as a deputy commissioner to hear the case. The motion was made on the grounds that a Director of the Commission had engaged in "*ex parte* contact with one of the parties, and that the party is then able to use that to build a case and to further pursue a fraud investigation against [Clamant]." [R. page 96, line 23-page 97, line 10].

Fore also moved to exclude both the letter from Garry Smith to the Attorney General and the transmittal letter from the Attorney General's office forwarding Smith's letter to the Carrier. The Commissioner excluded the transmittal letter, but admitted Smith's letter. The motion was made on prejudice, relevance and hearsay grounds. [R. page 93, line 22-page 97, line 10; page 99, lines 13-17].

Counsel for Respondents argued, "I do not feel that it can in any way be construed as a threat of criminal prosecution being alleged by the Defense. It is simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim, and it is properly admissible."⁸ [R. page 98,

⁸Evidence of a criminal investigation of any kind is *absolutely inadmissible* in any tribunal. The Rules of Evidence allow admission of an *actual conviction* of certain crimes; never mere allegations – and certainly not on as flimsy a pretense as this case. Rule 404; Rule 609, SCRE.

Furthermore, the basis of the Commissioner's ruling appears to be that he found Fore not credible. The only possible relevance of an ongoing fraud investigation would be to attack the witness's character and credibility. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App.

line 24-page 99, line 4].

The Commissioner responded with his ruling: "I do agree with [Respondents' counsel]. It's in the Commission file. It's been made a part of the record or will be made a part of the record. So I deny the motion to remove or have this case heard by someone other than myself." [R. page 99, lines 7-11]. The Commissioner's ruling is prejudicial in two aspects. First, his agreement with Respondents' counsel that an ongoing fraud investigation is admissible – and therefore probative – is a plain error of law. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009)("[Admission of prior bad acts] is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404."). Second, it is improper for the trier of fact to rely on materials outside the record. Part of the Commissioner's reasoning for admitting the Smith letter was that "It's in the Commission file." [R. page 99, lines 7-11]. The Smith letter was kept in the segregated portion of the file for Commission use only. A party has the ability to view the public portion of the file; not the segregated portion. As such, the Commissioner's ruling on this ground effectively meant he was relying on extraneous material. It would be improper for the Commission to ever rely on documents within its file which were unknown or unavailable to the parties. State v. Harris, 530 S.E.2d 626, 340 S.C. 59 (2000)(court must determine whether extraneous material received by the trier of fact is prejudicial; trier of fact "must rely solely on . . . the evidence presented in court for the facts."). Yet, if the Commission has a practice of sending *ex-parte* letters with allegations of fraud to insurance carriers via the Attorney General's Office, these letters must exist within the Commission's file in other cases.

2009)("[Admission of prior bad acts] is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404."). Cf. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006)(reversing verdict where court improperly admitted evidence of prior convictions).

The Single Commissioner had the opportunity to mitigate the prejudice by recusing the Commission and by excluding evidence arising out of the *ex parte* communication from any future hearings. Instead, he heard the case, allowed Respondents to fully develop the prejudicial aspects of the unfounded fraud allegations, and excluded the testimony of Fore's rebuttal witness (Tony Owens). These rulings only compounded the prejudice. See Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996) ("Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.").

The Appellate Panel could have cured the prejudice by either reversing the Single Commissioner on the issue of permanent and total disability (as called for by the evidence) or by granting the motions made below and vacating the Single Commissioner's Decision and Order. It did neither. Instead, the Appellate Panel made additional findings of fact and conclusions of law to justify the *ex parte* communication and the handling of the matter at the trial level.

The Appellate Panel made three specific rulings:

1. there is substantial evidence and a legal basis for a finding no *ex parte* communication exists in this case.
2. The Commission did not ever send [the Smith letter] to either party[, t]hus, there could be no argument that the Commissioner allowed any *ex parte* communication to take place.
3. we find neither the South Carolina Statutory Code nor the Judicial Cannons require the Commission to notify either party to a claim when it reports suspected fraud to the Attorney General's Office.

[R. pages 42-44].

These rulings are legal error. The Appellate Panel adopted a narrow definition of *ex parte*

communication as “prohibited communication between counsel and the court when opposing counsel is not present.” [R. page 42]. If the Commission were correct, not only would the Smith letter be permitted, but a Commissioner could even conduct *ex parte* communication directly with a witness about the substance of his testimony.

As to the Commission’s claim that it “did not ever send” the Smith letter to either party, this is belied by the text of the letter itself. The Commission plainly intended that the letter be read and acted on by the Carrier – without the knowledge of the opposing party. Smith explicitly instructed the Attorney General to forward his letter to the Carrier “so it can conduct an investigation” – even while simultaneously acknowledging that “I don’t believe I can alert the carrier to the alleged fraud.” [R. pages 381-383].

The Appellate Panel’s legal conclusion that it has no duty to notify either party when it reports suspected fraud to the Attorney General’s office is simply wrong. The Judicial Canon permits even the most innocent *ex parte* communication only when “the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.” Rule 501, Canon 3B(7), SCACR.

The Appellate Panel’s rulings on these points go to the crux of the problem in the instant case. The Commission, by virtue of taking on the role of reporting “suspected fraud” to insurance carriers to “conduct an investigation,” has impermissibly involved itself in an investigative and prosecutive role. There is no statutory authority for the Commission to investigate and police suspected fraud. This role fundamentally conflicts with the Commission’s sole function as an impartial tribunal for adjudicating disputes between employees and employers arising out of work-related accidents.

This case makes everyone uncomfortable. The undersigned attorneys regularly practice before the Commission. Raising issues about the integrity and ethics of the Commission's procedures to that body is not something taken lightly. However, the rights of the parties to a fair trial is paramount. As our Supreme Court observed, members of administrative bodies are subject to "the inevitable human tendency to develop a will to win." Garris v. Governing Bd. of South Carolina Reinsurance Facility, 511 S.E.2d 48, 333 S.C. 432 (1998). The added findings evince the fact that the issues in this case made the panel uncomfortable, such that their rulings were not impartial. "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.'" Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997).

Appellant was further prejudiced by events at the oral argument itself. Oral arguments were heard by Appellate Panel A on June 18, 2012. Arguments were scheduled to begin at 4:00 p.m. [Notice of Hearing]. 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 another courtroom for 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. Due process requires notice and the opportunity to be heard. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 505 S.E.2d 598, 332 S.C. 551 (Ct. App. 1998).

There are no South Carolina reported cases identical to the instant situation. The few extant

cases all deal with *ex parte* communication between a lawyer and the judge concerning legal arguments and preparation of proposed orders after the trial of the case. The Supreme Court has repeatedly emphasized “the Bench and Bar are cautioned to strictly observe the Canons governing judicial and attorney conduct with regard to *ex parte* contacts as they relate to maintaining the appearance of propriety and to comply with both the letter and the spirit of Opinion No. 2-1988 of the Advisory Committee on Standards of Judicial Conduct.” Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

Burgess dealt with *ex parte* communication between a lawyer and a judge regarding a proposed order. The Court ultimately determined that the *ex parte* communication did not influence the judge’s decision. However, the Supreme Court added:

It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. 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. Id.

A few months after Burgess was decided, the Supreme Court reached a contrary opinion in Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993). In Ellis, the defense attorney sent the trial judge an 8-page memorandum of law without serving it on opposing counsel. The plaintiff learned of the memorandum during the pendency of her appeal. The Supreme Court remanded the case to the trial judge to make findings as to whether the *ex parte* memorandum affected the decision. The trial judge found the *ex parte* memorandum “if consulted at all, had no bearing on the trial court's decision.” Id.

Notwithstanding the trial judge’s conclusion, the Supreme Court reversed and remanded for

a new trial, holding "While we accord great weight to the trial judge's assurance of his own impartiality, we find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. Accordingly, we find evidence of judicial prejudice in this case."

Id. This reasoning is consistent with other decisions which hold an *ex parte* communication raises a rebuttable presumption of prejudice. See, e.g., Blaker v. Planning and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989).

In PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (1982), the United States Court of Appeals set forth the following criteria for determining the prejudicial effect of an *ex parte* communication:

... a court must consider whether, as a result of improper *ex parte* communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant; the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communication were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

As noted above, the prejudice in this case is manifest. Not only were Respondents allowed to introduce patently prejudicial and legally inadmissible "evidence" to taint the entire case (and ambush Fore to boot), but Fore was denied the opportunity to present a rebuttal witness.

Furthermore, the result in this case was obviously tainted by the improper characterization of this case as an "insurance fraud" matter. A failed back surgery case with an undisputed 36% whole person impairment rating and the surgeon writing the patient "out of work until further notice" after a failed work attempt is as clear cut a permanent total disability case as one will ever see. See

e.g., McCollum v. Singer Co., 386 S.E.2d 471, 300 S.C. 103 (Ct. App. 1989)(“While claimant's ability to drive, walk and shop may effectively establish that he is not helpless, they do nothing to dissuade our view that there is substantial evidence, medical and otherwise, to establish this claimant's total and permanent disability.”). This is shown by the Commissioner's comments during an unguarded moment in the hearing:

I didn't have any idea – this seemed like such a – I worked the case up, and we're on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we're in. If I had known that, you know, you should have asked for three hours or somebody, but you didn't. That's why I don't want to put the [rebuttal] witness up, but if he wants to proffer the testimony, that's fine. I'll leave the room while he testified. [R. page 157, lines 5-16].

This case must be reversed. If the Appellate Panel had been able to make an unbiased analysis of the evidence and disregard the improper and prejudicial effect of the *ex parte* contact, then it would have found Fore has proven that she is permanently and totally disabled. This Court could find Fore is permanently and totally disabled as a matter of law. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when “The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]”). The only other viable alternative for this Court is to vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

2. Fore proved she is permanently and totally disabled.

The Single Commissioner awarded Fore 40% to the back for partial permanent disability. He also allowed Respondents credit for overpayment back to the date of MMI (32.2857 weeks). As

such, her disability award equated to 29.2% to the back – less than even her 36% impairment rating. The Appellate Panel affirmed. Such a ruling is manifestly arbitrary, capricious and unfair given the evidence of the case.

Fore had previously worked as a meat cutter in a grocery store where she regularly lifted up to 100 pounds (she was lifting 60 pounds of meat when she was injured). She underwent a two-level fusion with hardware at L4/5 and L5/S1. The fusion did not heal resulting in a nonunion. Dr. Wolgin described the nonunion as shown on the CT scan: “there appears to be a lucency throughout the whole fusion mass that indicates a nonunion at that level. Also, the posterolateral fusion while growing a significant amount of bone does not appear to have solid connections.” [R. page 327].

Dr. Wolgin placed Fore at MMI on February 14, 2011. He assigned a 36% whole person impairment rating (which Respondents agreed is accurate). He recommended open revision of the surgery in the future, but noted Fore was not able to consider the revision as a valid option at this time because the first surgery was “very painful” and because of the social demands of taking care of a toddler. [R. page 327]. Fore was further concerned that the odds of a successful result of another surgery were only 50/50. [R. page 109, lines 14-22].

As to work, Dr. Wolgin had recommended in August 2010 that Fore “could do limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weightlifting limit. [R. page 308]. Acting on her doctor’s advice, Fore began working part-time as a bail bondsman for Steve McGowan and ABC Bonding. Her work activities were documented in her medical records – copies of which were faxed to the Carrier’s nurse case manager, Cathy Nelson. [R. page 312].

Fore continued her part-time work until sometime around January 21, 2011. Fore quit the

job "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].

In her work journal, she documented her schedule and her worsening difficulties. On November 30, 2010, she wrote, "Call Dr. Wolgin. Get stronger pain killers. To [sic] much work." On December 1, 2010, she wrote, "Don't want me to get addicted. Painful today." On December 3, 2010, she wrote "Hardly could get out of bed." December 6, 2010 she noted working only a half day and "Hurts to [sic] bad." Two days later, she "Talked to Steve & Bill about less hours on phone." [R. pages 365-366].

On January 21, 2011, 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.

Her increasing difficulty with working coincided with Dr. Wolgin ultimately taking her entirely out of work. In fact, Fore attempted to work for a month or two even after Dr. Wolgin formally took her back out of work on October 26, 2010. [R. page 317]. Dr. Wolgin ultimately 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].

Dr. Wolgin's opinion was confirmed by the vocational expert, Glen Adams. Fore told Mr. Adams about her failed work attempt with ABC Bail Bonding. [R. page 349]. Adams noted that

even if Fore could perform sedentary duties – which he noted “is not supported by Dr. Wolgin's work statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies.” He opined she “is considered to be **totally vocationally disabled** as a result of injuries sustained on February 24, 2008 while working for Griffin IGA. No reasonably stable market exists that is compatible with Mrs. Fore's vocational profile and resulting physical activities.” [R. page 357 (emphasis in original)].

The out of work statement came from the authorized treating physician, Dr. Wolgin. Respondents presented no evidence to refute his opinions or those of Glen Adams. As such, the evidence of Fore's total and permanent disability is all one way.

Despite this overwhelming one-sided evidence, the Single Commissioner found “After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work.” [R. page 29, Finding of Fact 21]. This finding is plainly arbitrary, capricious and contrary to the evidence. Considering the impairment rating and “no work” statements by the authorized treating physician went unchallenged, a finding of less than 50% disability (and barely more than the impairment rating) seems to impute some sort of credibility finding onto the physician without an evidentiary foundation. As argued elsewhere in this brief, the only explanation is that the Commissioner was substantially influenced by the improper *ex parte* communication and the erroneous admission of the spurious allegations of insurance fraud.

It defies common sense to hold a failed work attempt against an injured worker. 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 evidence is overwhelming that Fore was forced quit the job at ABC because it increased her pain beyond the point where she could function. Dr. Wolgin’s records are replete with references to her increasing difficulties from the work attempt – such that he took her completely out of work. Fore’s testimony and the contemporaneous notes in her work journal are totally consistent with Dr. Wolgin’s records.

The testimony of her disgruntled former employer, Steve McGowan, simply has no bearing on these case – even if it were credible, which it patently is not. McGowan was blatantly hostile, uncooperative, and disruptive on cross-examination. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”).

McGowan knew little of her medical condition. He didn’t know – or more likely refused to acknowledge – that she “had major back problems.” The most he was willing to admit was “She’s stiff every now and then” and that on one occasion “she said, ‘My back is hurting today.’” [R. page 172, line 9-page 173, line 3].

McGowan claimed Fore quit the job at ABC because “she needed to make more money . . .” [R. page 167, line 8]. This makes zero sense. If Fore needed to make *more* money, she would either have increased her hours or taken another job that paid better. She did neither.

Instead, Fore went completely out of work. It is true that in July and August she helped out her friend Tony Owens by processing several bonds for him when he became incapacitated for health reasons. However, this was not a real job and she never got paid a dime. Moreover, she did it for a short time – only until Owens could hire and train an actual employee. 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 124, line 21]. Owens himself testified she was not physically able and capable of working as bondsman. He stated, “If she was, we would probably could have saved the office, and she could have worked down there and saved that office for me.” He would have hired her, “if she could have. But, she wasn’t in the shape to do it either.” [R. page 192, lines 16-24].

In August, Owens hired Mary Weaver to be his bondsman. Weaver’s duties were well beyond anything Fore did. Fore did no more than go to the jail and actually bond someone out. Tony Owens testified, that Weaver was “doing more than Patricia was doing. . . . She’s responsible for taking down all the information, writing up the whole contract on the bond, getting all the information for it, bonding them out, and following up with the people. And if they don’t show up, she’s got to go get them herself. . . . She’s a full employee.” [R. page 197, line 25-page 198, line 11].

A. Permanent and Total Disability under § 42-9-10.

The evidence is overwhelming that Fore is permanently and totally disabled under S.C. Code Ann. § 42-9-10 (2007). The legal 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). The test applied by the Single Commissioner (“I think she can work.”) is not the law.

Our supreme court laid down the essential premise over fifty years ago:

“Total disability” in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. * * * An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955).

The mere fact Fore helped out Tony Owens by signing 19 bonds over eight months does not disqualify her from receiving total and permanent disability benefits. See Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability). This cannot be considered evidence that she can work a proper job – not when her doctor wrote her out during the failed work attempt; and not when both Fore and Tony Owens testified she is unable to do the full job required of a bail bondsman. Moreover, even during the four-month period when she worked for Steve McGowan before Dr. Wolgin took her entirely out of work, Fore only earned \$1,244.00. See Colvin v. E.I. Du Pont De Nemours Company, 227 S.C. 465, 88 S.E.2d 581 (1955)(“Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial.”). To use this failed work attempt against her “would punish an employee for merely exploring the chance of overcoming an unanticipated injury by exploring other possible career options.” Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012).

The Appellate Panel found as a fact that Fore’s treating doctor, Dr. Wolgin, assigned a “36% impairment rating with restrictions of ‘unable to return to work.’” [R. page 37, Finding of Fact 5].

Dr. Wolgin's work restrictions constitute the sole medical evidence of work capacity in the record.

Any possible question about Fore's employability in the open job market was dispelled by the report of vocational expert Glen Adams. He opined, "No reasonably stable market exists that is compatible with Mrs. Fore's vocational profile and resulting physical activities." [R. page 357]. See Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003)(claimant's age and transferable skills are proper factors to consider in determining if a reasonably stable employment market exists). His opinion directly addresses the proper legal standard for cases such as this.

Respondents presented no evidence to contradict the expert opinions of Dr. Wolgin and Glenn Adams. Indeed, Respondents' counsel conceded that the impairment rating was correct.

The evidence shows Fore meets the test for total disability under § 42-9-10. Therefore, the Appellate Panel should be reversed. The Court should issue an Order finding Fore is permanently and totally disabled as a matter of law, is entitled to a lump sum award of 90% of the commutable value of the remainder of 500 weeks allocated pursuant to James v. Anne's, and is to receive lifetime medical treatment.

B. Permanent and Total Disability under § 42-9-30 (21).

The evidence also shows that Fore has suffered a loss of use of her back greater than 50%. As such, she should be presumed to be permanently and totally disabled. See S.C. Code Ann. § 42-9-30 (21) (2007).

Dr. Wolgin assigned a 36% whole person impairment rating as a consequence of Fore's failed two-level fusion. Respondents admitted that the impairment rating is accurate.

Impairment ratings are a starting point for the analysis, but it is well-established that

impairment is a different concept than disability or loss of use. A disability award does not directly correlate with medical impairment.⁹ The disability award is an appraisal of the injured worker's "present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment." Beard, Poteat, Lamar, Sumwalt, *The Law of Workers' Compensation Insurance in South Carolina* (3rd ed. 2003), § 11-24. There are numerous examples showing that disability awards generally exceed the impairment ratings. See, e.g. Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(substantial evidence supported an award for a 50 per cent loss of use of the back even though the medical testimony "established, at most, a 30 [per cent] impairment rating."); Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966)(50% loss of use of arm upheld even though medical experts testified to 10% and 20% impairment); Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% permanent partial *disability* to leg affirmed even though treating physician assigned 35% *impairment* rating to foot); Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)(30% loss of use of back with 10% impairment rating with no surgery and medium duty restrictions)*reversed on other grounds*, 732 S.E.2d 500, 399 S.C. 381 (2012); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating); Solomon v. W.B. Easton, Inc., 307 S.C.

⁹The AMA explains this distinction in the manual physicians use for determining permanent impairment:

The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the *Guides* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides* criteria or ratings to make direct estimates of work disability. Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.) at 9.

518, 415 S.E.2d 841 (Ct.App. 1992)(affirming award of 15% to back when treating physician assigned 5% impairment rating); Cropf v. Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986)(affirming Commission's award of 30% to the back where highest impairment rating was 15% to the neck).

These cases show that a 36% *whole person* impairment rating with the added complications of a non-union and less than sedentary work restrictions plainly equates to more than 50% loss of use of the back. It was reversible error for the Single Commissioner to limit his award to 40% loss of use of the back (or 29.2% considering the improvidently granted credit).

The statute provides that an injured worker suffering "fifty percent or more loss of use of the back shall be presumed to have suffered total and permanent disability . . ." S.C. Code Ann. § 42-9-30 (21) (2007). As such, Fore is deemed to be permanently and totally disabled.

The above presumption can be rebutted on a showing by the Respondents that the employee is able to work under the same tests set applicable to § 42-9-10. The burden of proof is on Respondents. Respondents failed to present any evidence to rebut the opinions of Dr. Wolgin and Glen Adams or the testimony of Fore and Tony Owens. The testimony of Steve McGowan is insufficient as a matter of law since McGowan admitted he knows little if anything about Fore's medical condition and limitations.¹⁰ [R. page 172, line 9-page 173, line 3]. He did not know that Dr. Wolgin "was allowing her and recommending that she try to work." [R. page 175, lines 5-7]. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of

¹⁰Even if Respondents were able to rebut the presumption of total disability, an award based on 500 weeks would be far more equitable and appropriate. At the time of the hearing, 182 weeks had already been paid.

disability).

As such, the Appellate Panel should have issued an Order finding Fore is deemed permanently and totally disabled due to fifty percent or more loss of use of her back, is entitled to a lump sum award of 90% of the commutable value of the remainder of 500 weeks allocated pursuant to James v. Anne's, 701 S.E.2d 730, 390 S.C. 188 (2010) and is to receive lifetime medical treatment. This Court should reverse and hold Fore is permanently and totally disabled as a matter of law.

3. The finding on Fore's credibility must be vacated because it is based on inadmissible evidence of an "ongoing fraud investigation."

The Commission made a finding concerning Fore that "I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. This finding is a direct result of bias engendered by the improper admission of evidence of an "ongoing fraud investigation" – which itself arose out of the improper *ex parte* communication.

Although the general rule is that the Appellate Panel is the sole judge of the credibility of the witnesses, this rule is subject to the same limitations as any finding of fact. It must be based on *properly admitted* evidence; not speculation, bias or prejudice – nor inadmissible evidence. This Court has the authority to rule on the credibility of a witness when either the Commission gives no explanation for its finding or the finding is based on speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability); Cranford v. Hutchinson Const., 731 S.E.2d 303, 399 S.C. 65 (Ct. App. 2012)(holding the nature and timing of a visit to a doctor did not discredit the credibility of the medical evidence). See, also Stallcup v.

Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”).

In analyzing credibility, the Commission must look at the totality of the evidence. Respondents’ attack on Fore’s credibility was based on the spurious allegation that she was committing insurance fraud based on Steve McGowan’s *ex parte* statement to Garry Smith that “she’s working and getting a check.” [R. pages 381-383]. Respondents characterized this as “simply evidence that *there is a fraud investigation ongoing by the A.G.’s office* in this claim, and it is properly admissible. [R. page 99, lines 2-4 (emphasis added)]. As argued previously, the admission of this evidence was reversible error.

The reality is that Fore never hid anything from anybody. Her doctor told her to try to work. She kept Dr. Wolgin and the Carrier’s nurse case manager apprised of her attempts to work at ABC Bonding. [R. pages 308, 312]. She told the vocational assessor of her failed work attempt when he interviewed her on September 7, 2011. She informed the Commissioner of her failed work attempt in her pre-hearing brief (which was filed before Fore ever knew of the fraud allegations and the Commission’s *ex parte* communication with the Carrier). At the hearing, she stipulated that “a credit should be given toward those wages that may have been earned during the disability period.” [R. page 103, lines 4-6]. She provided all the records she had regarding her work schedule and pay with ABC. [R. pages 358-367]. In short, she made no attempt to defraud anyone.¹¹

¹¹At the hearing, Fore admitted she had answered “no” to a question in her deposition where she was “asked if you had earned any money since some point in time.” [R. page 125, line 23-page 126, line 10]. She clarified that she had earned money from Steve McGowan. The

As to the assistance she provided to Tony Owens, she was exceptionally forthcoming about that as well. She never once denied she had helped him out. She produced the official records from the jail proving the number of bonds she actually did for Owens and when she did them. [R. pages 368-376]. She even brought Mr. Owens to the hearing so he could testify to the arrangement. Although not considered by the Single Commissioner, Owens was respectful, cooperative and forthcoming during his testimony. [R. pages 186-207].

Finally, one cannot overlook what she actually did – which was to find work supposedly within her restrictions and to attempt it even after her doctor took her back out of work. 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.”). These are the acts of a credible person – the kind of hard working individual the workers’ compensation system is designed to protect. She should not be punished because her former employer has a personal grievance with his competitor.

The credibility findings in the Order should be reversed or vacated.

4. Fore is entitled to lifetime medical treatment.

As to additional medical treatment, the Single Commissioner ordered “that Defendants shall furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.” [R. page 30]. Fore requires ongoing medical treatment to lessen her period of disability. As she is permanently and totally disabled, she should receive causally related treatment for life.

deposition transcript itself is not in evidence.

S.C. Code Ann. § 42-15-60 (2007). Even if she were not totally disabled, the evidence shows she requires additional ongoing treatment which will tend to lessen her period of disability.

Dr. Wolgin has recommended open revision of Fore's L4/5 L5/S1 fusion. He has also recommended a dorsal column stimulator, along with ongoing prescriptions of Vicodin and Ambien. [R. pages 321, 327]. He stated, "Since the patient may benefit from surgery, I recommend that she keep open the option for future care . . ." [R. page 327].

These treatment recommendations go well beyond furnishing of prosthetic devices. As such, the Court should reverse the Appellate Panel and order additional medical treatment be provided.

5. The Single Commissioner committed reversible error in excluding the rebuttal testimony of Tony Owens.

Fore attempted to call Tony Owens as a rebuttal witness in response to the testimony of Steve McGowan. The Single Commissioner excluded the rebuttal testimony – apparently because the hearing was taking longer than he had anticipated. He stated:

I didn't have any idea – this seemed like such a – I worked the case up, and we're on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we're in. If I had known that, you know, you should have asked for three hours or somebody, but you didn't. That's why I don't want to put the [rebuttal] witness up, but if he wants to proffer the testimony, that's fine. I'll leave the room while he testified. [R. page 157, lines 5-16].

Owens was not listed on Fore's original pre-hearing brief as Fore had no way of knowing a rebuttal witness would be necessary. The first time Fore ever knew that Respondents had received *ex parte* communication from the Commission was when her lawyer was served with Respondents' pre-hearing brief. The brief listed Steve McGowan as a witness and contained the two *ex parte* letters. [R. pages 57-58].

Respondents brief was received by Fore's attorney on September 20, 2011. She filed and

served an amended pre-hearing brief later that same day listing Tony Owens. [R. page 61]. Fore acted with due diligence by identifying and advising Respondents of her rebuttal witness on the very same day she learned his testimony might be needed. Owens' testimony was proffered. [R. page 154, line 3-page 158, line 5].

"[The rules of discovery] were adopted to require litigants to disclose the essential elements of their case, so that the outcome of trial would be the result of a full examination of all relevant facts and issues rather than the efforts of one side to surprise the other through the introduction of unexpected testimony." McGaha v. Mosley, 322 S.E.2d 461, 283 S.C. 268 (Ct. App. 1984). Fore did all she could do within the rules to overcome the unfair surprise created by the Smith letter. Her only avenue to respond – since her motions were overruled – was to find and call a rebuttal witness. This she did. The Commissioner was required to allow Owens to testify, given the fact Respondents had been developing new issues and witnesses since their receipt of the Smith letter.

It is a clear abuse of discretion for a Commissioner to exclude a properly noticed and available witness when that witness is crucial to the decision. See Morgan v. JPS Automotives, 467 S.E.2d 457, 321 S.C. 201 (Ct. App. 1996). Cf. Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App. 1985)(when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice). "Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party." Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996).

Unfortunately, it appears that the case had already been decided by the improper injection of the so-called ongoing fraud investigation, such that nothing Tony Owens could say would eliminate the unfair prejudice created by the *ex parte* communication. Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 498, 494 S.E.2d 630, 636-7 (1997) (finding commissioner erred by admitting irrelevant testimony, but then refusing to continue hearing to elicit relevant testimony; commissioner allowed attorneys to proffer their evidence, but refused to consider it).

Owens' testimony was relevant. Owens was able to explain how it came about that Fore did five bonds for him in July 2011 and 12 in August – and why she only did one bond in March 2011. He further explained that he did not pay her and she was not his employee. He explained that she only helped him during a period of his own ill health and only until he could hire an actual employee. His testimony was critical to Fore's disability claim as Owens testified that he would have hired her but she was unable to perform the regular duties of a bail bondsman. Lastly, Owen's testimony was critical in giving perspective to McGowan's testimony and showing the underlying reasons for McGowan's obvious bias and lack of credibility.

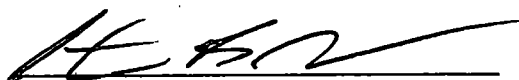
As such, it was error for the Commission to exclude Owens' testimony. If the Court does not outright reverse and find Fore totally and permanently disabled, the Court should find Fore was deprived of a fair trial by the improper and prejudicial exclusion of the witness's testimony. The case should be remanded for a *de novo* trial before a circuit court judge or a deputy Commissioner unfamiliar with the case who will not be exposed to the spurious fraud allegations.

CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order of the Appellate Panel as unsupported by substantial evidence. The Court should hold Fore has proven that she is

permanently and totally disabled as a matter of law. She should be awarded the balance of the remaining weeks in a lump sum allocated per James along with lifetime medical treatment. Alternatively, the Court should vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or direct the Commission appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

Respectfully Submitted,



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Columbia, South Carolina
August 5, 2013

THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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63 COURT REPORT

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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
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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION CORRECTLY DETERMINED THERE WAS NO *EX PARTE* COMMUNICATION IN THIS CASE?
- II. THE COMMISSION PROPERLY DETERMINED THAT CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED?
- III. WHETHER THE COMMISSION'S CREDIBILITY DETERMINATION WAS PROPER?
- IV. WHETHER THE COMMISSION PROPERLY DETERMINED CLAIMANT IS NOT ENTITLED TO ONGOING MEDICAL TREATMENT?
- V. WHETHER THE COMMISSION PROPERLY EXCLUDED THE TESTIMONY OF TONY OWENS?

STATEMENT OF THE CASE

Appellant/Claimant Patricia Fore sustained a work-related injury to her lower back on February 21, 2008, when she "bumped into a meat saw while carrying approximately 60 pounds of meat." (Commission Order, dated October 13, 2009, R. 10) ("2009 Order").¹ At the time of her accident, Claimant was working for Griffco of Wampee, Inc., which carried workers compensation coverage through Commerce & Industry Insurance Company, c/o Chartis Claims, Inc. ("Carrier") (collectively "Respondents").

After some initial treatment, Claimant began treating with Dr. Mark A. Wolgin and Orthopaedic Associates in Albany, Georgia. (R. 272-329) (R. 107, line 24 – 108, line 1).² On April 17, 2009, Dr. Wolgin opined that Claimant's "problem was due to her back, not due to her hip." (R. 272). Based on her continued complaints, Dr. Wolgin recommended consideration of a one or two level fusion surgery. (R. 273). Dr. Wolgin ordered additional MRI imaging, (R. 274), and recommended that Claimant undergo a two-level transforaminal lumbar interbody fusion, to which Claimant agreed. (R. 277). During this time, Claimant was not working but, instead was receiving Temporary Total Disability ("TTD") payments from Respondents. (2009 Order, R. 11-12, 14).

Claimant underwent an L4-5, L5-S1 transforaminal lumbar interbody fusion on May 19, 2010, (R. 289-291), after which she noted some improvement of her leg complaints. (R. 293, 295). However, she continued to be written out of work during recovery from the surgery. (R. 298, 304-305). On August 27, 2010, Dr. Wolgin noted gradual improvement and advised

¹ In 2009, the South Carolina Workers' Compensation Commission ("Commission") found that "Claimant suffered compensable injuries to her back and right hip. Her back injury affects her right leg." (2009 Order, R. 11).

² Claimant moved to Georgia following her February 2008 injury. (R. 107, lines 12-14). At the time of the hearing, Claimant was 46 years old, married, with two dependent children. She had obtained her G.E.D. as well as an Associates' Degree in Business Management. (R. 105, line 16 – 106, line 7).

Claimant that, "she could do limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weightlifting limit." (R. 308) (R. 109, line 23 – 110, line 1).

Claimant testified that she attempted to do light-duty work with Steve McGowan at ABC Express Bail Bonds ("ABC Bail Bonds") during the summer of 2010 and worked 20 or more hours per week, (R. 110, line 11 – 111, line, 6), despite Dr. Wolgin's recommendation that she only work three hours a day, three days a week. (R. 146, lines 5-23). Claimant purportedly listed the days and hours she worked for ABC Bail Bonds on a calendar. (R. 111, line 20 – 115, line 1). Mr. McGowan, owner of ABC Bail Bonds, testified that he employed Claimant for about six months. (R. 159, lines 5-16). Although Claimant initially just worked on computers, Mr. McGowan explained that she wanted to work more and more hours. (R. 162, line 20 – 164, line 6). She went to Atlanta to receive her certification as a bail bondsman in late-August 2010. (R. 163, line 22 – 165, line 17) (R. 139, line 13 – 140, line 5).³ She began working about 10 hours a week but eventually was working 30-35 hours per week, and sometimes over 40 if she worked on a weekend. (R. 168, lines 5-14). Claimant testified that, during the time she worked for ABC Bail Bonds, she also worked for ASAP Towing, Steve McGowan's other business. (R. 143, lines 3-15) (*see also* R. 388-392). Although Claimant testified she worked twenty hours a week for ABC Bail Bonds during September 2010, (R. 146, lines 5-8), Dr. Wolgin's September 30, 2010, medical notes indicate, "she is able to continue with her work which is three hours per day three days a week." (R. 312).

As of October 19, 2010, Claimant had been through a month of physical therapy with little benefit and reported an increase in her hip and back pain due to sleeping in a bed. Repeat

³ Mr. McGowan also indicated that he paid her under the table and under her husband's name because she requested it that way. (R. 167, lines 16-24).

injections completely relieved the hip pain and partially relieved the back. (R. 315). Seven days later a prescription note from Dr. Wolgin was prepared, writing her back out of work. (R. 317). On November 23, 2010, Dr. Wolgin's notes reflect Claimant reported slow improvement, increased walking ability, and little to no leg pain or numbness. (R. 318). Nonetheless, Claimant testified that, by November 30, 2010, her pain was aggravated by the several months of work and that she requested additional medications from Dr. Wolgin, which were denied. (R. 115, lines 2-24).⁴ According to Dr. Wolgin's notes, sometime prior to December 21, 2010, Claimant began taking care of a 3-year old and began engaging in frequent bending, lifting, and twisting. (R. 321).

Claimant stopped working for ABC Bail Bonds on January 21, 2011 because she said she was "hurting too bad." (R. 116, line 25 – 117, line 3). Mr. McGowan stated that, although he knew Claimant had back pain and stiffness "every now and then," (R. 172, lines 9-15), Claimant left his employment because she wanted more money. (R. 165, lines 18-20) (R. 166, line 20 – 167, line 11).

A CT scan on February 9, 2011 showed no evidence of hardware failure but did show evidence of non-union in places. (R. 323-326) (R. 108, line 25 – 109, line 4).⁵ As of February 14, 2011, Claimant stated that she felt about the same in the right buttocks area, but did report relief of her prior leg complaints. She told Dr. Wolgin that, because the prior surgery had been painful and because she was taking care of a toddler, she did not wish to undergo additional surgery.⁶ Dr. Wolgin noted that, "the patient feels that she would like to go ahead and close her

⁴ Note that Dr. Wolgin refilled Claimant's prescriptions in November and December, 2010, and stated on both occasions she continued to be written out of work until further notice. (R. 318, 321).

⁵ Claimant testified that the surgery did resolve the sciatic nerve pain. (R. 108, lines 6-7).

⁶ Although Claimant alleges she suffered from "failed back syndrome," and that the second surgery was estimated to have only a 50% chance of success, (App. Br. pp. 6-7), Dr. Wolgin's final medical report reflects neither of these alleged findings. (R. 327). The only evidence of the "fifty/fifty" chance of success of a second surgery came from Claimant herself, (R. 109, lines 14-19), who is not a trained medical professional. Furthermore, Dr. Wolgin simply

case.” (R. 327). Claimant was placed at Maximum Medical Improvement (“MMI”) and released from care with a 36% impairment rating using the AMA Guides, 5th Edition. Claimant reported that she continued to care for a toddler full time. Dr. Wolgin continued to write Claimant out of work “until further notice.” (R. 117, lines 4-15) (R. 327-329).

Mr. McGowan testified that, after she quit working for him, he observed Claimant working for another bail bond company, performing duties at the jailhouse bonding an individual from jail. (R. 168, line 15 – 169, line 18). Claimant testified that she was approached by Tony Owens with A-1 Bail Bonds, a competitor to her prior employer, about changing her license to its business, placing advertising on her truck, and using her name for marketing purposes. She alleged that she completed one bond in February 2011 to change the license but did no other work and received no payment. She alleged that she helped Mr. Owens because he had problems with his back and heart. According to her testimony, Claimant entered bonds and advertised for A-1 Bail Bonds without compensation.

Q: So, the help that you are giving Tony for free is the same thing you were getting paid for at ABC bonds, correct?

A: Correct.

(R. 138, lines 6-9). Claimant testified she began doing more bonds in July, August, and September 2011, and eventually was reported by her former employer. (R. 117, line 16 – 123, line 11) (R. 124, line 22 – 125, line 10). Claimant explained that she arranged for Mary Weaver to work at A-1 Bail Bonds so that she would not have to get up at all hours of the night. (R. 123, line 15 – 124, line 14).

Although Claimant testified that she was not employed, (R. 123, lines 21-22), she admitted on cross-examination that she performed the same work for A-1 Bail Bonds *for free* as

said Claimant “felt” she was not able to consider a second surgery because the first surgery was painful and because she was taking care of a toddler. (R. 327).

she had been paid by ABC Bail Bonds to perform. (R. 137, line 17 – 138, line 9). In fact, the work she was doing for A-1 Bail Bonds for free was the same work Mary Weaver was being paid for. (R. 149, lines 5-25). She also admitted at the hearing that, although she stated in her deposition that she had not earned any money since her back surgery, that was not true. (R. 125, line 19 – 126, line 10). She also testified regarding an entry on her Facebook page indicating she was “Self Employed and Loving It!” as a bondsman and “bond you out of jail if you need me call me.” (R. 126, lines 11-24) (R. 393).

Claimant testified she took a stalking order out against her former employer, Mr. McGowan, because she was aware he was investigating the work she was doing for his competitor. (R. 128, line 18 – 131, line 1). On cross-examination, she admitted that the order prohibited her from contacting Mr. McGowan as well. (R. 150, lines 17-25).

Claimant admitted that, at her deposition, her response to whether she was working was “no” but at the Hearing she answered the same question “yes.” (R. 142, lines 9-12). Claimant was asked why she had not admitted she was working for A-1 Bail Bonds when her deposition was taken in August 2011. (R. 138, line 10 – 139, line 12). Her response was that, although she had performed numerous bonds between February and September 2011, she did not consider it “work.” (R. 139, lines 3-7).

She also testified at her deposition that she had no further education or certification since a prior deposition. However, she admitted at the Hearing that she received certification as a bail bondsman in August 2010, and also admitted that she received a diploma in accounting in 2010 that she did not previously report. (R. 139, line 13 – 142, line 16).

Although Claimant testified that she could not “get up and down, bend over, come up and down or do any kind of side twisting up and down,” repetitively, (R. 144, lines 1-16), she

attempted to explain away the fact that surveillance footage showed her squatting down to pick things off the lower shelf in a Wal-Mart store by saying it depended on the weight of the item she was picking up. (R. 144, line 17 – 145, line 22). Claimant would not confirm or deny that she could repetitively bend based on footage of her bending to pick up items from the bottom shelf at Wal-Mart. Eventually, she admitted she could pick up light things. (R. 144, line 17 – 146, line 4). In fact, Claimant admitted that she could work as long as there was not repetitive bending and twisting involved. (R. 144, lines 1-5) (R. 145, line 23 – 146, line 1).

Claimant filed a Form 50 seeking compensation for injury to her right hip, back and right leg. She claimed permanent and total disability and sought lifetime medical treatment and an award paid in lump sum with James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010) language. On her Form 50, Claimant alleged she had not worked since the February 2008 accident. (R. 48).

Respondents filed a Form 51, acknowledging the February 2008 accident and injury to Claimant's hip and back but denying any other injury. Respondents asserted Claimant was at MMI and denied that she was permanently and totally disabled. (R. 50).

Claimant's Attorney referred her to Glen Adams for a vocational assessment on September 12, 2011. (R. 347-357). Mr. Adams' notes reflect that she told him, "[s]he can get on the floor, but getting back up is a problem. She has to use furniture to get back up." (R. 349). Mr. Adams' report reflects that she only told him she had worked for ABC Bail Bonds in January 2011, "entering bonds into the computer." She also told him she only "worked a day or two per week. She worked two hours per day up to 4-5 hours in a day. She believes she was averaging about 12 hours per week." (R. 349). Based in large part on her statements to him, Mr. Adams found Claimant totally disabled. (R. 357). However, she admitted at the Hearing that

she did not accurately report to Mr. Adams how much she was working. (R. 147, lines 4 – 148, line 24).

In her Pre-Hearing Brief to the Commission, Claimant admitted she had “attempted to work as a clerk for ABC Bail Bonds in late 2010,” but stated that she only “averaged about 12 hours per week.” (R. 52). She alleged she was permanently and totally disabled as a result of injury to two body parts under S.C. Ann. § 42-9-10, or based on greater than fifty percent disability to the back under S.C. Code Ann. § 42-9-30, that she was entitled to additional medical treatment and sought a lump sum payment and lifetime proration. (R. 51-54). Respondents again denied that Claimant was entitled to permanent and total disability, but maintained she had reached MMI and that they were entitled to a credit for overpayment of benefits for the periods when she was employed. Respondents questioned Claimant’s credibility and noticed her former employer, Mr. McGowan, and presented various exhibits related to her work for ABC Bail Bonds and A-1 Bail Bonds, as well as correspondence and a surveillance video. (R. 57-60) (R. 65-67).

The case was heard by Single Commissioner G. Bryan Lyndon on September 27, 2011. Claimant objected to Respondents’ Exhibit No. 1, which consisted of two letters. The first was a July 20, 2011 letter from the Assistant Deputy Attorney General’s office to the Special Investigative Unit of the Carrier, and the second was a July 18, 2011 letter from Mr. Gary Smith, the Director of the Compliance Division of the Commission, to the Attorney General’s Insurance Fraud Division. Claimant argued that, as a result of these two letters being in the file, the entire Commission had to recuse itself from hearing this case. The Single Commissioner excluded the July 20, 2011 letter but denied the rest of Claimant’s motion. (R. 93, line 22 – 99, line 20) (R.

381-383).⁷ Claimant requested to call Tony Lee Owens. Respondents' objection to this testimony based on late notice was granted and the testimony was taken as Proffered Testimony outside of the presence of the Commission and is not part of the record. (R. 154, line 3 – 156, line 22). Respondents asserted, among other things, that Claimant could work, very possibly was still working and requested the Single Commissioner to make a credibility determination. (R. 103, line 15 – 104, line 20).

The Single Commissioner noted the numerous discrepancies in Claimant's testimony regarding her work and self-reported physical limitations. (Single Commissioner Decision and Order, January 18, 2012, R. 27-28). After considering all of the evidence in the record, the Single Commissioner found Claimant was not a credible witness but awarded her 40% Permanent Partial Disability to her back, pursuant to S.C. Code Ann. § 42-90-30, as well as lifetime replacement of any hardware. (*Id.*, R. 28-29). The Single Commissioner also awarded Respondents credit for all wages paid to Claimant during the disability period and for TTD paid following the determination Claimant was at MMI on February 14, 2011. (*Id.*, R. 29).

Claimant filed a Form 30 request for Commission review raising 17 issues. Respondents filed a Brief,⁸ and the Full Commission heard argument on June 18, 2012 and issued its decision on August 27, 2012 affirming the Single Commissioner, and modifying the order to address Claimant's allegations regarding *ex parte* contact, whether the Commission relied on the correspondence to and from the Attorney General's office, and Claimant's request that the entire Commission recuse itself and whether Claimant received a fair and impartial hearing. (Decision & Order of the Full Commission, August 27, 2012, R. 40-45) ("Commission Decision").

⁷ Claimant also objected to both a surveillance video of Claimant and an accompanying written report. The Commissioner excluded the written report, but included the surveillance videos in the record. (R. 385) (R. 396) (R. 99, line 22 – 101, line 18).

⁸ Respondents' Brief to the South Carolina Workers' Compensation Commission, dated April 26, 2012. (R. 68-89).

Claimant timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act “mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case.” Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, 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. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

The Full Commission is the ultimate fact finder in workers’ compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts’ purview to reverse findings of the Full Commission which are supported by

substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). The Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

ARGUMENTS

I. The Commission correctly determined there was no *ex parte* communication in this case.

A number of Claimant's arguments rely on her allegation that an impermissible *ex parte* contact occurred in this case. (See Appellant's Statement of Issues on Appeal, Nos. 1, 2, 3, 4, 5, and 10). Although she characterizes the alleged *ex parte* contact in various ways, the Commission correctly held that there was no *ex parte* contact. This finding disposes of those arguments that are dependent on or assume the presence of an impermissible *ex parte* contact.

Claimant bases her allegations of *ex parte* contact on the following facts: On July 6, 2011, Mr. McGowan called the Commission to report that insurance fraud was being committed by Claimant and her new employer, A-1 Bail Bonds.⁹ On July 18, 2011, Mr. Gary Smith, Director of the Commission's Compliance Division, forwarded the information to the Attorney General's Insurance Fraud Division, pursuant to Section 38-55-570. (R. 381-383 ("July 18

⁹ Claimant makes much of the fact that, at the hearing, Mr. McGowan could not recall exactly who he called. (App. Br. p. 8 n.1). This is not particularly relevant as Exhibit 1 clearly states that Mr. McGowan called the Commission. Furthermore, if Mr. McGowan had just called A.I.G., as opposed to the Commission, it is highly unlikely that Claimant would be raising any allegations of *ex parte* contact.

Letter”)). Mr. Smith suggested that the workers’ compensation carrier might need to know about the fraud allegation so that it could conduct its own investigation, and provided the Attorney General’s office with contact information for the Carrier. Whether the information was forwarded to the Carrier was entirely up to the Attorney General’s office. (R. 381-383).¹⁰ At the time he called the Commission, Mr. McGowan was not designated as a witness in this case but later was identified on Respondents’ Form 58 Pre-Hearing Brief.

According to Black’s Law Dictionary, *ex 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). At no time did Respondents or Respondents’ counsel communicate with the Commission without copying Claimant’s counsel. Instead, the communications complained of here consisted of: 1) a communication between a non-party and a non-adjudicative arm of the Commission, the Compliance Division; 2) a communication between the Commission’s Compliance Division and the Attorney General’s office; and 3) a communication between the Attorney General’s office and the Carrier. None of these communications involved the hearing Commissioners or their staff, and none constitute an *ex parte* contact.

First, Claimant alleges that “Garry Smith, the Director of the Commission’s Compliance Division, received *ex parte* communication from a potential material witness (Steve McGowan) in the case.” (App. Br. p. 13). This is not an *ex parte* contact for the simple reason that Mr. McGowan is not and never has been a party in this case.¹¹ Nor had he been designated as a witness: Mr. McGowan’s July 6, 2011 contact with the Commission was made unbeknownst to

¹⁰ As noted previously, upon Claimant’s motion, the July 20 letter from the Attorney General’s office to the Carrier was stricken from the record. (R. 93, line 22 – 94, line 21).

¹¹ Although, Claimant’s counsel admitted at the hearing before the Full Commission that “[t]he problem is not the communication between the Commission and Mr. McGowan,” (R. 236, lines 24-25) (R. 243, lines 22-24), she seems to have reversed her position on appeal.

Respondents, and Respondents had had no prior contact whatsoever with him. Finally, Mr. McGowan's contact with the Commission was to the Compliance Division, not with any of the hearing Commissioners.

Second, Claimant alleges an improper *ex parte* communication occurred when Mr. Smith sent the July 18 Letter to the Attorney General's Insurance Fraud Division. (App. Br. p. 13, n.6). This is clearly not *ex parte* communication because it is not between a Commissioner and a party, but rather between the head of the Commission's Compliance Division and the Attorney General's office, which is not and has never been, a party to this case. Mr. Smith forwarded the information only to the Attorney General's Insurance Fraud Division as is required by S.C. Code Ann. §§ 38-55-570(A) and 42-9-440. As is stated in the July 18 Letter, neither Mr. Smith nor anyone else at the Commission forwarded this information directly to the Carrier. Furthermore, contrary to Claimant's allegations, neither Section 38-55-570(A) nor Section 42-9-440 require the Commission to inform *either* party of a report of fraud. Therefore, Claimant's assertion that the communication between Mr. Smith and Attorney General was improper is just plain incorrect.

Finally, Claimant suggests that the July 20, 2011 letter from the Assistant Deputy Attorney General, Heather Weiss, to the Special Investigative Unit for the Carrier constituted an impermissible *ex parte* communication. (App. Br. p. 13). This theory is based, in part, on Claimant's assertion that Mr. Smith "instructed" the Attorney General's office to forward the July 18 Letter to the carrier, and that the Attorney General's office complied with those "instructions." (App. Br. p. 9). This communication does not constitute an *ex parte* contact, as the Attorney General's office is neither an adjudicator in this proceeding, nor is it answerable to or required to take "instruction" from the Commission. See (R. 240, line 20 – 241, line 1).

Claimant has produced no evidence otherwise, and thus her assertions that the Commission sent the communication to Respondents "via the Attorney General's office," are entirely inaccurate and unsupported. (R. 245, lines 12-13).¹²

Claimant alleges unfair prejudice in that she was not notified of the Attorney General's investigation at the same time the Carrier was notified. This is immaterial to an analysis of *ex parte* communication because, as noted above, the Attorney General's office is not the judicial body determining Claimant's claim. The Attorney General forwarded the complaint to the Carrier as it is entitled to do under S.C. Code Ann. § 38-55-570(B) (allowing the Attorney General to request investigative materials from an insurer). Naturally, the Attorney General would want to contact an insurer to assist with its investigation into a fraud complaint. Conversely, it would be against the Attorney General's interest to notify a claimant of an investigation before it begins and there is no requirement compelling the Attorney General to do so.

Tellingly, Claimant admits that there are no other South Carolina cases dealing with these same facts. This is because all of the relevant cases deal with an *ex parte* contact by a party/participant and the adjudicator. In fact, Section 1-23-360, on which Claimant relies, specifically only applies to "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," or, in other words, adjudicators. Section 1-23-360 provides that a Commission adjudicator "shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in

¹² Furthermore, it is entirely logical to read this portion of the July 18 Letter as recognizing the Attorney General's interest in engaging the assistance of the Carrier in performing its fraud investigation, and advising the Attorney General of the Commission's limitation in that respect. In fact, the July 18 Letter is careful to not overstep the bounds of proper communication. Baseless allegations otherwise should be carefully weighed before impugning the good faith of the Commission and its various Divisions.

connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate." S.C. Code Ann. § 1-23-360.

Regardless of how Claimant attempts to twist the facts of this case, the bottom line is that no hearing Commissioner (or their staff) had any *ex parte* communication with any party, their counsel, or witness, designated or otherwise. Although Claimant attempts to argue that Mr. Smith was part of the hearing Commissioners' "staff" and thereby subject to the prohibition discussed in Canon 3B(7), Rule 501, SCACR, the head of the Commission's Compliance Division is hardly part of the hearing Commissioners' staff. (R. 235, lines 16-19) (R. 237, lines 12-14) (R. 239, lines 4-6) (R. 245, line 22 – 246, line 1). The Commission has an "administrative" department and a "judicial" department. See S.C. Code Ann. §§ 42-1-90, 42-3-10.¹³ The Compliance Division is part of the administrative department of the Commission, not the judicial department. S.C. Code Ann. § 42-3-90. As noted above, two of the communications complained of here were between the Director of the Compliance Division (part of the administrative side of the Commission, not the adjudicative side), on the one hand, and Mr. McGowan and the Attorney General's office, on the other. Thus, even if the July 6 call and/or the July 18 Letter could somehow be construed as "indirect" communications between the Commission and a potential witness or the Carrier, which Respondents dispute, neither involved anyone who is part of the adjudicative side of the Commission. Furthermore, there is no evidence that the Single Commissioner, or anyone else in the Commission's adjudicative department, had any knowledge of any of these communications prior to the Hearing.

¹³ Hence, Claimant's claim that the Commission's sole function is to adjudicate workers compensation disputes, (App. Br. p. 18), is also inaccurate. Instead, the administrative department of the Commission is further divided into three divisions: (1) the Division of Coverage and Compliance, (2) the Division of Claims and Statistics, and (3) the Division of Medical Services. S.C. Code Ann. § 42-3-10. Furthermore, there is no absolute bar to an agency, particularly two separate sections of an agency, performing both investigative and adjudicative functions. See, for example, *Winthrow v. Larkin*, 421 U.S.35, 95 S. Ct. 1456 (1975) (holding that simply because an administrative agency both investigates and adjudicates a claim does not prove, absent more, either *ex parte* contact or unfair hearing process).

Although Claimant accuses the Commission of defining *ex parte* communications narrowly, even the cases cited by Claimant employ a definition of *ex parte* contact that is consistent with that applied by the Commission in this case. See Ellis v. Procter & Gamble Distr. Co., 315 S.C. 283, 433 S.E.2d 856 (1993) (submission of legal memorandum by one party to the judge without copying opposing counsel was impermissible *ex parte* contact); Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993) (analyzing numerous interactions between the judge and counsel for a party was impermissible *ex parte* contact); PATCO v. Federal Labor Rel. Auth., 685 F.2d 547, 562-63 (D.C. Cir. 1982) (evaluating contacts under a section of the Civil Service Reform Act, which prohibits *ex parte* communications “‘relevant to the merits of the proceeding’ between an ‘interested person’ and an agency decisionmaker”); Blaker v. Planning & Zoning Comm’n, 212 Conn. 471, 562 A.2d 1093 (Conn. 1989) (party’s submission of additional evidence to zoning commission, after the close of public hearings and without providing other parties notice, was an improper *ex parte* contact); Jennings v. Dade County, 589 So.2d 1337, 1991 Fla. App. LEXIS 7720 (Fla. Ct. App. 1991) (finding impermissible *ex parte* contact between a lobbyist for one party and members of the county commission making land use determination). Furthermore, the Commission took its definition straight from Black’s Law Dictionary and Brown v. Bi-Lo, which remains good law.

Although Claimant cites Blaker for the proposition that any *ex parte* contact creates a presumption of prejudice, she cites no South Carolina case to this effect.¹⁴ In fact, Burgess appears to apply an opposite position, refusing to adopt a rule that all orders resulting from an *ex parte* contact are invalid “absent a finding of partiality or prejudice in [the] record.” 311 S.C. at 331, 428 S.E.2d at 884; see also Ellis, 315 S.C. at 285, 433 S.E.2d at 857 (finding evidence of

¹⁴ Note that in Jennings, the Florida appellate court advised that the occurrence of an *ex parte* contact in a “quasi-judicial proceeding does not mandate automatic reversal” but, instead, held that the complaining party also must prove prejudice. 589 So.2d at 1341, 199 Fla. App. LEXIS 7720 *8.

judicial prejudice where the record did “not support the trial judge’s factual finding on the merits”). In any event, there was no *ex parte* contact by any party or any witness in this case with any hearing Commissioner or their staff. Furthermore, even if Claimant had somehow proven an *ex parte* contact had occurred, which Respondents deny, she cannot prove it was prejudicial because the Commission’s Decision is entirely supported by other evidence in the record.

Claimant’s due process rights and entitlement to a fair tribunal have not been violated. Claimant cites Winthrow v. Larkin, 421 U.S.35, 95 S. Ct. 1456 (1975) for the proposition that due process requires a fair tribunal, a precept that applies equally to administrative agencies that adjudicate as well as courts. What Claimant fails to note is that Winthrow examined the issue of administrative agencies that both investigate a claim and then later adjudicate the same claim, and concluded such *ex parte* investigation did not necessarily taint the adjudicative process or raise due process concerns. 421 U.S. at 48-49, 95 S. Ct. at 1465. In fact, the United States Supreme Court explained that:

The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”

421 U.S. at 55, 95 S. Ct. at 1468.

Respondents do not dispute that Commissioners of the South Carolina Workers’ Compensation Commission act in a quasi-judicial capacity when they adjudicate workers’ compensation claims.¹⁵ However, Respondents assert that Claimant has failed to prove any *ex*

¹⁵ The two cases cited by Claimant for this point, Hall v. Marion Sch. Dist. No. 2, 860 F. Supp. 278 (D.S.C. 1993), and Crosby v. Prysmian Commc’ns Cables & Sys. USA, LLC, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012), deal with issues of wrongful termination and the preclusive effects of Commission decisions for purposes of res judicata and collateral estoppel and, therefore, do not speak to the substantive issues in this case.

parte communication occurred in the first instance, or that she was unfairly prejudiced in any way by the contact she claims was *ex parte*.

Claimant mistakenly alleges that she was unfairly prejudiced because she did not learn until she received Respondents' Pre-Hearing Brief that "'insurance fraud' was even an allegation in this case." (App. Br. p. 14). Insurance fraud was **not** an allegation in this case. The only mentions of "fraud" in the record are the July 18, 2011 letter, which is part of the Commission's file, and when Claimant's counsel cross-examined Mr. McGowan. (R. 173, line 14 – 175, line 23). Thus, contrary to Claimant's assertions, (App. Br. p. 17), Respondents did not "fully develop" any aspects of the fraud allegations.

Claimant's credibility, however, was a central issue in this case. Where there is a dispute in the facts as presented by opposing sides, "the issue of credibility of the witnesses necessarily must play an important role in a determination of the facts." Klutts Resort Realty, Inc. v. Down-Round Dev. Corp., 268 S.C. 80, 91, 232 S.E.2d 20, 25-26 (1977). Claimant's credibility was attacked, not on the basis of the fraud investigation but, rather, on the basis of her inconsistent statements, her patently unbelievable fabrications, and surveillance videos. (R. 137, line 21 – 151, line 1). Even if (but without conceding) as Claimant argues, admission of the July 18 Letter was impermissible character or "prior bad acts" evidence, it was harmless error at most. "Error is harmless where it could not reasonably have affected the result of the trial." State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). In other words, where the record contains ample competent evidence to support the Commission's credibility determination, the admission of the July 18 Letter, even if it was improper (which Respondents do not concede), does not warrant overturning the decision below. Here, the record is replete with evidence that supports the Commission's credibility determination. For example, the Commission noted Claimant first

denied but later admitted she had earned money after her back surgery; she testified that she was doing the same work for A-1 Bail Bonds for free that she had done for ABC Bail Bonds, which job she had just quit because of severe back pain; she said she was not working for A-1 Bail Bonds but both her vehicle and her Facebook profile advertised her bail bond profession; she testified at her deposition that she had received no training after her injury but later admitted she had taken classes to become a bondsman, as well as in accounting; and that she reported physical limitations that were demonstrably contradicted by surveillance footage of her “squatting, bending and lifting in a manner well-exceeding her self-reported limitations.” (Commission Decision, R. 37-39).

The fact that she did not learn of a potential witness (Mr. McGowan) or evidence (the surveillance tape and the letters) until Respondents’ Pre-Hearing Brief does not demonstrate Claimant was treated unfairly before the Commission – informing the opposing side of the evidence and witnesses a party plans to present is precisely the purpose of filing pre-hearing briefs. Section 67-611(B) requires, among other things, that through its Form 58 Pre-Hearing Brief each party, “give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements including video recordings and/or transcribed audio recordings have been taken from one of the witnesses including the claimant and indicate who has possession of same.” S.C. Code Reg. § 67-611(B). That is precisely what Respondents did here. Furthermore, Claimant knew Respondents were challenging her entitlement to permanent and total disability. (R. 50).

Claimant argues that the Single Commissioner somehow impermissibly relied on extraneous material or documents that were “unknown or unavailable to the parties.” (App. Br. p. 16). First, to the extent Claimant is referring to the July 18 Letter, Claimant admitted before

the Full Commission that there was no factual finding, conclusion of law or ruling in the Single Commission Decision that relied in any way on that letter. (R. 247, lines 11-22).¹⁶ Second, the July 18 Letter was identified in Respondents' Pre-Hearing Brief and accepted into the record by the Single Commissioner. Thus, the Commission did not rely in any way on extraneous or non-record material.

Because there was no *ex parte* contact, the Commission did not err by refusing to recuse itself. From time to time, it is expected that the Workers' Compensation Commission will receive reports of fraudulent activity. By law, the Commission must have some function to process these complaints to the Attorney General's office. Mr. Smith's department handles this function and complied with the applicable statutes. "It must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something." Smith v. Barnwell County, 384 S.C. 520, 524, 682 S.E.2d 828, 830 (2009). To accept Claimant's argument would mean that every single time a fraud complaint is lodged with the Commission, the entire Commission would have to recuse itself from any proceedings involving the referenced claimant. This would be an absurd result, and clearly not intended by the legislature. It is well-settled that, "[c]ourts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-343, 713 S.E.2d 278, 283 (2011), *citing* Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

¹⁶ Claimant's reliance on State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) in this respect is misplaced. First, in Harris, a juror reviewed definitions from Black's Law Dictionary that had not been admitted into the record. Here, the July 18 Letter was not outside of the record but, instead, was admitted into the record. Second, in Harris, the Supreme Court instructed that, "[a] mistrial should only be granted when absolutely necessary. [citation omitted] In order to receive a mistrial, the defendant must show error and resulting prejudice." 340 S.C. at 63, 530 S.E.2d at 628. As noted both above and below, Claimant has not and cannot show any prejudice resulting from the inclusion of the July 18 Letter because the Commission's substantive decision does not rely on the letter and its credibility determination is supported by other substantial and credible evidence in the record.

Even if there had been *ex parte* contact, which Respondents do not concede, the Commission was able to hear and fairly adjudicate this claim. Claimant's allegations that she was not afforded a fair hearing are unfounded and miss the mark. For instance, the ruling in Garris v. Governing Bd. of S.C. Reinsur. Fac., 333 S.C. 432, 511 S.E.2d 48 (1998), was based on the fact that the ultimate adjudicators were "intimately involved in the investigative and prosecutorial processes," such that they formed opinions as to what the final outcome should be, before the actual hearing took place. 333 S.C. at 445, 511 S.E.2d at 55. However, the Court reiterated that "[t]he fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process." 333 S.C. at 443, 511 S.E.2d at 54. In any event, in the instant case there is no evidence whatsoever that any hearing Commissioner at any level participated in the investigation or prosecution of insurance fraud. The quote lifted from Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) addresses the situation where an adjudicator, "by prior involvement with [the] case, ... has obtained *ex parte* information or had a 'will to win.'" 328 S.C. at 69, 492 S.E.2d at 72. Here, there is no evidence whatsoever that either the Hearing Commissioner or any of the Appellate Panel Commissioners participated in any investigation or prosecution of Claimant, or formed any kind of preconceived "will to win." Contrary to Claimant's suggestions, the Full Commission's added findings of fact do not evidence discomfort or partiality. They simply reflect the current state of the law and a rejection of Claimant's fabricated theories of *ex parte* contact. Claimant's attempt to turn this into something that it is not should be roundly rejected.

Because there was no *ex parte* contact, there was no need to exclude the July 18 Letter from the record. Although Claimant argues that evidence of the fraud investigation was barred

by Rules 404 and 609, SCRE, the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission. *See* S.C. Code Ann. § 1-23-330(1) (except in proceedings before the Workers' Compensation Commission, rules of evidence apply in contested matters before an agency); *see also* Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) (explaining that “great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts”), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1941). Furthermore, the July 18 Letter was not presented as either character evidence or for impeachment purposes. (R. 99, lines 2-4 (July 18 Letter was simply evidence of a fraud investigation)). Instead, Claimant demonstrated her own character through her repeated attempts to hide the truth. She was impeached by own testimony.

Finally, Claimant argues that her due process rights were abused because her lead counsel was unavailable to make her direct argument on appeal to the Full Commission. (App. Br. p. 19). This argument is unavailing because she had competent counsel present who made her direct argument. In addition, Mr. Samuels was afforded additional and abundant time in rebuttal to make any points he deemed necessary. (R. 233, line 7 – 250, line 19). Thus, Claimant was denied no due process rights – she had ample opportunity to argue her case. Furthermore, Counsel for Claimant must have known he had back-to-back arguments scheduled for June 18, 2012 and could have moved to postpone oral argument in this case, *see* S.C. Code Reg. § 67-708, but failed to do so.

Because there has been no *ex parte* contact in this case, and because Claimant has not been deprived of her due process rights, this Court should affirm the Commission Decision and dismiss her appeal.

II. The Commission properly determined that Claimant is not permanently and totally disabled.

The claimant bears the burden of proving entitlement to benefits under the Act. Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998). Here, Claimant simply failed to meet her burden of proving she was entitled to an award for permanent and total disability under either Section 42-9-10 or 42-9-30. S.C. Code Ann. §§ 42-9-10 & 42-9-30.

- A. Claimant is not entitled to permanent and total disability under Section 42-9-30 because the Commission properly held the loss of use of her back was less than 50%.

Claimant argues that she is entitled to permanent and total disability under Section 42-9-30 because the evidence supports a higher disability rating than that awarded by the Commission. However, the Commission's finding that she suffered only a 40% permanent partial disability to her back is supported by substantial evidence in the record and should be upheld. On review, an appellate court's review of a disability finding "is limited to a determination of whether the commission's findings, inferences, conclusion, or decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520-521, 415 S.E.2d 841, 843 (Ct. App. 1992).

Dr. Wolgin gave Claimant a 36% impairment rating to the whole body. (R. 327). This is the only probative medical evidence of her level of impairment. Notably, the Commission's 40% disability rating is higher than Dr. Wolgin's impairment rating.

Claimant argues that she has suffered a greater than 50% loss of the use of her back. (App. Br. p. 31). However, the factfinder in this case – the Commission – specifically found only a 40% loss of use of her back. This finding, in turn, was based on all of the evidence in the record. The Commission found, based on the testimony and exhibits submitted to the

Commission, and after considering all of the evidence, that Claimant suffered 40% permanent partial disability to her back. (Commission Decision, R. 37-39, 44).¹⁷

Claimant focuses on Dr. Wolgin's out of work statements and Mr. Adams' vocational report, and argues that they require a higher disability award. Both Dr. Wolgin's and Mr. Adams' opinions regarding her ability to work, however, were based on false information supplied to them by Claimant herself and are, therefore, of doubtful probative value. Claimant admits that she worked for ABC Bail Bonds from late August 2010 until late January 2011. (App. Br. p. 7). Testimony in the record supports a finding that she worked upwards of 40 hours a week, and sometimes even more. (R. 168, lines 5-14) (146, lines 5-10). Tellingly, during part of the time she was working steadily for ABC Bail Bonds, Dr. Wolgin's notes state that Claimant is written out of work until further notice. (R. 317, 319, and 322). Dr. Wolgin reported that Claimant told him only that she was working three hours per day, three days per week "helping in an office setting." (R. 312). Thus, it is clear that Claimant was not accurately reporting her activities and capabilities to Dr. Wolgin. Furthermore, it is clear that not even Claimant relied on the out of work notes, since she continued to work even when she was "written out of work."

Claimant also lied to Glen Adams during her September 7, 2011 vocational assessment. She reported to Mr. Adams that she worked for only a couple of months, worked a day or two per week (2-5 hours per day), and at some point averaged 12 hours per week. (R. 349). As noted above, Claimant's own testimony demonstrates that she worked almost double what she reported to Mr. Adams. According to her former employer, Claimant actually worked significantly more hours per week. (R. 168, lines 5-14). Thus, the statements in Dr. Wolgin's

¹⁷ Because the Commission did not find Claimant suffered a greater than 50% disability to her back, no presumption of total and permanent disability arose in this case and her arguments regarding the same (including any shifting of the burden of proof to Respondents), (App. Br. pp. 31-32), are irrelevant and should be dismissed.

and Mr. Adams' reports regarding Claimant's ability to work simply are not probative, since they rely on misinformation fed to them by Claimant.¹⁸

Because the only medical impairment rating in the record is a total body impairment of only 36% and, as noted above, Dr. Wolgin's statements regarding Claimant's capacity for employment were based on misinformation, any greater disability would have to be based on Claimant's testimony regarding her condition and limitations which, in turn, depended entirely on her credibility. There is a plethora of evidence in this record demonstrating that Claimant was not a credible witness.¹⁹ As noted above, and as found by the Commission, Claimant has lied repeatedly about her functional capacity and work history. The greater weight and preponderance of the evidence shows that, following surgery, Claimant returned to work for ABC Bail Bonds and has continued to work for subsequent employers. (Commission Decision, R. 37-39).

Claimant admitted that she could work, "as long as I don't have to get up and down, bend over, come up and down or do any kind of side twisting up and down ... if I've got to bend down and come off the floor with something and use that lower back to bring that weight up, it don't work." (R. 144, lines 1-5). However, she informed Dr. Wolgin on December 21, 2010 that she was taking care of a 3-year-old, which required her to bend, lift, and twist frequently. (R. 321).

¹⁸ The Commission's finding that Claimant was not entitled to a greater disability rating does not "impute some sort of credibility finding" onto Dr. Wolgin, as is suggested by Claimant. (App. Br. p. 25). Instead, the Commission's determination recognizes that Dr. Wolgin's "no work" notes and his statement regarding her work capabilities were based on false information that Claimant was reporting to him, juxtaposed against the overwhelming evidence that she continued to work. The same is true for Mr. Adams' conclusions regarding Claimant's ability to work.

¹⁹ Although Claimant attempts to bolster her case by attacking Mr. McGowan's credibility, (App. Br. p. 26), the Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson, 395 S.C. at 455, 718 S.E.2d at 758. The only witness the Commission found lacked credibility was Claimant herself, and her invitation to this Court to find otherwise should be rejected. Furthermore, Mr. McGowan did not testify to Claimant's medical condition but to her work history with ABC Bail Bonds and what he observed after she voluntarily quit working for him. Thus, Claimant's criticism that he did not know about her "medical condition and limitations," (App. Br. p. 31), is irrelevant. Furthermore, any combativeness on Mr. McGowan's part was elicited by questions from Claimant's counsel. (R. 173, lines 9-10 (accusing witness of taking illegal drugs)) (R. 174, lines 14-15 (accusing witness of being an accomplice to insurance fraud)) (R. 176, lines 12-13 (accusing witness of tax fraud)) (R. 177, lines 17-18 (badgering witness)) (R. 178, lines 15-17 (badgering witness)).

Surveillance footage of the Claimant also reveals Claimant repetitively squatting to pick up items from a shelf at Wal-Mart. (R. 144, line 17 – 145, line 25) (R. 385) (R. 396).

Additional evidence supports the finding that Claimant is not permanently and totally disabled. Respondents obtained surveillance footage which shows Claimant driving a vehicle reading “A-1 Bail Bonds” to Lee County Magistrate Court on September 7, 2011 while conducting business. (R. 385) (R. 396). Photographic evidence (R. 386) confirms that Claimant had a decal on the back of her personal vehicle advertising “A-1 Bail Bonds 756-1500 24HRS!!” On September 8, 2011, Claimant was observed shopping at Wal-Mart and squatting repetitively to look at items on low shelves. (R. 396). Claimant’s Facebook page from September 19, 2011 also notes her as “Self Employed and Loving It!” She lists herself as a professional bondsman and notes “bond you out of jail if you need me call me.” (R. 126, lines 11-24) (R. 393).

Pointedly, at her deposition, Claimant claimed that she had not worked since her prior deposition in 2009, but at the Hearing she admitted that that was a false response. (R. 142, lines 9-12). She also testified at her deposition that she had no further education or certification since the date of injury; however, at the Hearing she admitted both that she received certification as a bail bondsman in August 2010, and that she received a diploma in accounting in 2010. (R. 139, line 13 – 140, line 25) (R. 142, lines 9-16) (R. 387).

Claimant would have this Court believe a fairly incredible version of events: that despite being written out of work for part of the time by Dr. Wolgin, she worked for ABC Bail Bonds and ASAP Towing for six months before quitting because the work was too hard and she was in too much pain to continue. Then, in spite of all of the intense pain from ABC Bail Bonds job, she immediately started working for A-1 Bail Bonds and volunteered to perform the exact same work for *free*. (R. 117, line 16 – 120, line 5). Despite the pain she alleged she was in, she was

doing a job for free that she helped hire and train Mary Weaver to do for pay. (R. 123, line 15 – 124, line 14). Claimant put a large decal across the back of her personal vehicle promoting her new employer. (R. 386). Her Facebook page promotes her employment as a bail bondsman. (R. 126, lines 11-24) (R. 393).²⁰ Nonetheless, she now claims that she was just trying to help a friend with back problems and with a failing business and truly is permanently and totally disabled.

This argument makes no sense on many levels. First, if the pain was so severe she had to quit ABC Bail Bonds, she would not likely seek immediate work for another company doing the exact same job. Second, if she did fight through the pain to work for another company, it is completely illogical and unbelievable that she would do this work for free. Third, Claimant actively advertised her services on the back of her personal car and on her Facebook page. Fourth, she helped recruit and train another individual to do the same job for A-1 Bail Bond for pay that she alleges she was doing for free. Fifth, she was observed performing bonds for A-1 Bail Bond. (R. 168, line 15 – 170, line 18).

The Commission did not buy her fabrications and neither should this Court.

The fact that the Commission did not believe Claimant's concocted story does not mean its Decision is based on any alleged *ex parte* communication or that it is not supported by substantial evidence in the record, as Claimant argues. Claimant opines that, "It defies common sense to hold a failed work attempt against an injured worker." (App. Br. p. 25). That is not what occurred here; instead, Claimant is being held accountable for attempting to claim permanent and total disability award when she was lying about her ability to work. In addition, Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935), relied on by Claimant for this

²⁰ Claimant claims that she simply spent a lot of time on Facebook playing games in order to pass the hours. If that was the case, she admits that she frequently visited her Facebook page which would have given her ample and repeated opportunity to correct her claim to be "self-employed and loving it!" (R. 126, lines 11-24) (R. 393).

point, 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.

Although Claimant cites various cases for the proposition that an impairment rating is not necessarily the same as a disability award, which Respondents do not dispute, the Commission did not mechanically adopt Dr. Wolgin's impairment rating as Claimant's disability award. Instead, the Commission awarded a slightly higher disability award than Claimant's impairment rating. (R. 327) (Commission Decision, R. 41, 44). Furthermore, simply because the Commission has made disability awards that are higher than a claimant's impairment rating in other cases with other facts, (App. Br. pp. 30-31), does not mean the facts in this case warrant a higher disability rating than 40%. For example, in Linen v. Ruscon Constr. Co., 286 S.C. 67, 69, 332 S.E.2d 211, 212 (1985), Lyles v. Quantum Chem. Co., 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993), and Cropf v. Pantry, Inc., 289 S.C. 106, 108, 344 S.E.2d 879, 880 (Ct. App. 1986), the appellate court upheld the Commission's factual determination regarding claimant's disability award based, at least in part, on the credible testimony of the claimant. Here, in contrast, Claimant asks this Court to overturn the Commission and find her permanently and totally disabled, despite the fact that such a finding rests on her credibility as a witness, and she was not credible.

Claimant's suggestion that the Commission Decision was based on "rank speculation" is unavailing. The case she points to, Hutson v. South Carolina State Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012), addressed a situation where the Commission based its determination that the claimant was not permanently and totally disabled solely on the claimant's statements that he was interested in opening and running a restaurant, even though he admittedly had never run a restaurant previously and did not know what all it entailed. The single commissioner noted that, had the claimant not made that statement, he "would have found him to be Permanently and Totally disabled under 42-9-10." 399 S.C. at 385-386, 732 S.E.2d at 501-502. The Court did not make its own credibility determination; instead, it found that the Commission's decision, supported only by the claimant's hopes of running a restaurant, was based on "rank speculation" that did not support the decision. 399 S.C. at 389, 732 S.E.2d at 504.

Finally, Claimant argues that, in reality, she was awarded only a 29.2% disability rating because of the credit allowed to Respondents for TTD paid from the time she reached MMI, February 14, 2011, to the date of the hearing, September 27, 2011. (App. Br. pp. 22, 31). When a claimant reaches MMI, she is no longer entitled to temporary total benefits. Curiel v. Environmental Mgmt Servs., 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (explaining that, "the date of maximum medical improvement signals the end of entitlement to temporary total benefits"). Furthermore, the credit to Respondents was based, part, on the fact that the Court found she was working during this time. (Commission Decision, R. 39-40). In order to reach any other conclusion, this Court would have to overturn both the Commission's credibility and factual determinations, not to mention buy into Claimant's fabricated and unbelievable story about volunteering to do for free a job that she claims she could not stand to do for pay. Claimant told Dr. Wolgin she wanted to "go ahead and close her case," which is why Dr. Wolgin

declared her at MMI on that date. She cannot now complain that, despite the fact she is at MMI, she should have continued to receive TTD.

B. Claimant is not entitled to permanent and total disability under Section 42-9-10.

Claimant asserts she is entitled to permanent and total disability under Section 42-9-10. In fact, Claimant is fortunate that the Commission awarded her disability for a scheduled member under Section 42-9-30 because, under Section 42-9-10, she would have had to have proven disability. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 105-107, 580 S.E.2d 100, 102-103 (2003) (explaining that, under Section 42-9-10, a claimant must prove loss of earning capacity, whereas under Section 42-9-30, loss of earning capacity is presumed). Under Section 42-9-10, Claimant would have had to prove her loss of earning capacity. "Disability in compensation cases is to be measured by loss of earning capacity." Wynn v. Peoples Nat. Gas Co., 238 S.C. 1, 11, 118 S.E.2d 812, 817 (1961). Here, Claimant did not prove that she had suffered a loss of wages and lied repeatedly not only about her ability to work but also about her actual employment.

Claimant asserts that the Commission applied an incorrect test and simply concluded, "I think she can work." (App. Br. p. 27). What she fails to acknowledge is that Finding of Fact No. 18 summarizes the preceding Findings of Fact, and concludes "Based on [Mr. McGowan's] testimony and the Claimant's I find Claimant did work for A1 Bail Bonding and provided an inaccurate account to her vocational assessor regarding the length of time she was employed with ABC, the amount she was paid per hour, and the amount of hours she was able to work." (Commission Decision, R. 39).

In her Brief, Claimant relies on Colvin v. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955) for the proposition that, because she did not make very much money working

for ABC Bail Bonds, she was able to prove she is totally disabled. First, the precise amount of money she made working for ABC Bail Bonds was unknown, as she was paid in cash per her request. (R. 138, lines 13-22) (R. 167, lines 16-23). Her wages were estimated at the low end of what the evidence supported, (*see* R. 112, line 24 – 113, line 25), as she worked up to 35 and even over 40 hours per week sometimes. (R. 168, lines 5-14) (R. 146, lines 5-10). Second, Claimant's situation is substantially different from that of the claimant in Colvin, who had limited education and was unskilled. In contrast, Claimant had earned her G.E.D. as well as an Associates' Degree in Business Management. (R. 105, line 16 – 106, line 7). She also was a certified bail bondsman. (R. 163, line 22 – 165, line 17) (R. 139, line 13 – 140, line 5). Her situation is similarly distinguishable from that of the claimants in Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003) (although the claimant had one year of college education and had worked one year as a bank teller, that experience was over 30 years prior to his injury; the fact that he had worked for Smurfit-Stone for 35 years performing heavy labor was significant); McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989) (the claimant was a fifty year old man with a seventh grade education who had worked for Singer for nearly 30 years performing hard physical labor); and Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) (competent and substantial evidence proved that the claimant, who suffered from PTSD, could only function within an extremely narrow niche in the labor market and that he was "basically unemployable" even prior to his back injury).

Simply put, Claimant failed to carry her burden of proving she is unable to work. As noted above, all of the evidence in the case that she alleges supports a finding of permanent and total disability rested on her credibility (her testimony, as well as the conclusions by Dr.

Wolgin²¹ and Mr. Adams that she was unable to work). She clearly lied to Dr. Wolgin about how much she was working and what physical functions she could perform. She also misinformed Mr. Adams during her phone interview with him regarding how much she had worked and what she could do. Given the Commission's determination that she was not credible, other evidence, including Dr. Wolgin's and Mr. Adams' conclusions that were based on her statements to them, lost any probative weight. In short, there simply is no credible evidence in the record that she is unable to work. The Commission did not apply an incorrect test – it simply did not believe her unbelievable protestations that she could not and was not working.

This Court should rule that the Commission's disability award is supported by substantial evidence and dismiss Claimant's challenge to this finding.

III. The Commission's credibility determination was proper.

Claimant asserts that the Commission's credibility determination was the result of bias resulting from allegations of a fraud investigation, and arising out of the alleged *ex parte* communication. As noted above, there was no *ex parte* communication. Furthermore, the fraud investigation was not a main issue in this case. There is no mention of fraud or the fraud investigation in the Commission's findings of facts or conclusions of law. At oral argument, Claimant's counsel conceded the same. (R. 247, lines 11-22).

Furthermore, although Claimant cites Hutson for the proposition that this Court can make credibility determinations, (App. Br. p. 32), that is not what Hutson holds. As noted above, in Hutson, the Court held that a speculative statement by a claimant that he planned to run a restaurant, absent more, was insufficient to support a finding that he was not permanently and

²¹ As noted above, the fact that Dr. Wolgin wrote Claimant out of work on February 14, 2011 loses its significance when viewed in context. Dr. Wolgin had been writing Claimant out of work during months when she was admittedly working. (R. 318, 321(out of work notes from Dr. Wolgin for November and December 2010)) (R. 116, line 25 – 117, line 3 (Claimant did not quit working for ABC Bail Bonds until January 2011)).

totally disabled, particularly where the single commissioner identified that statement as the sole reason for his decision. The Court did not find the claimant's testimony lacked credibility but, instead, found that it was speculative. 399 S.C. at 385-386 & 389 732 S.E.2d at 501-502 & 504. The finding in Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012), does not advance Claimant's argument in this case either. In Cranford, this Court's statement regarding a doctor's medical report was in response to an argument made on appeal by the employer, and was not in any way commenting on a credibility determination made by the Commission. In fact, in Cranford, this Court acknowledged the conflicting evidence in the record and, explaining that the Commission has the discretion to weigh the conflicting evidence, deferred to the Commission's factual findings. 399 S.C. at 80, 731 S.E.2d at 311.

Finally, Claimant cites dicta from a dissent in a North Carolina case from 1940, Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (N.C. 1940), for support of her arguments regarding the Commission's credibility determination. Even allowing for the fact that this is dicta in a dissent, a major distinction between this case and Stallcup is that, in Stallcup, the facts were not in dispute. 217 N.C. 307, 7 S.E.2d at 552. Here, the facts are sharply in dispute and the Commission's findings are supported by substantial evidence in the record. Our courts have long held that, "[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive," and "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; *see also* Watt v. Piedmont Automotive, 384 S.C. 203, 211-12, 681 S.E.2d 615, 619-20 (Ct. App. 2009) (this Court held that it could not question the credibility determination of the Commission even where other testimony in the record conflicted with the employer's version of events).

Claimant's attempt to create error where there is none should be rejected. As noted above, none of the Commission's findings regarding Claimant's credibility were based on the fraud investigation. Claimant's protestation that she "never hid anything from anybody," (App. Br. p. 33), is belied by the record in this case. Some lies even she cannot attempt to cover at this point. (See App. Br. p. 34, n.11 (acknowledging that she lied during her deposition about whether she "had earned any money since some point in time")) (R. 138, line 6 – 139, line 12) (R. 142, lines 9-12). She was not "exceptionally forthcoming" about the work she performed for Mr. Owens. Instead, when backed into a corner, she concocted the illogical argument that she did not consider what she did for him "work" because he allegedly did not pay her – even though it was precisely the same work she had done for ABC Bail Bonds for pay. (R. 138, line 25 – 139, line 12) (R. 149, lines 5-25) (R. 153, lines 2-10).

Claimant suggests this Court should look at what she actually did. Respondents concur. The record demonstrates that she repeatedly lied until she was backed into a corner, at which point she either admitted her deception or concocted an implausible story. She worked for ABC Bail Bonds but requested to be paid "under the table," (R. 138, lines 10-22), which conveniently resulted in no record of how much she worked and/or how much she made. (See R. 112, line 24 – 113, line 25). She quit that job, ostensibly because she was in so much pain she could not continue, and then turned around and began doing the exact same job for free, just to help out a friend. (R. 153, lines 2-10). And this is during the time when she had a young child at home to care for as well, (R. 327), making her tale even more unbelievable. Other credible testimony in the record indicates she was working during this time. (R. 168, line 15 – 169, line 6).

This Court should uphold the Commission's determination that Claimant was not a credible witness.

IV. The Commission properly determined Claimant is not entitled to ongoing medical treatment.

Claimant objects to the fact that, with respect to ongoing medical care, the Commission only ordered Respondents to “furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.” (Commission Decision, R. 44-45).

Claimant argues she is entitled to ongoing medical treatment based on Dr. Wolgin’s notes. However, on December 21, 2010, Dr. Wolgin merely mentioned, “we also discussed dorsal column stimulator as a treatment option.” There was no recommendation. At that point, he was waiting to see the results of a lumbar CT scan, which was scheduled for the following month. (R. 321). In February 2011, Dr. Wolgin mentioned she might be “a surgical candidate if she wanted to do an open revision of the L4 through S1 fusion,” but did not recommend any future surgery to a reasonable degree of medical certainty. He also noted she simply felt she was “not able to consider surgery as a valid option at this time and she chose to go ahead with closing her case.” Although he suggested she might want to consider “future care,” she was to return to him only on an “as-needed basis.” (R. 327).

At the hearing, Claimant did not testify that she was seeking any additional medical treatment. In fact, the only testimony was that she did not want to undergo a second surgery. (R. 109, line 14-22).

The Commission exercises broad discretion under S.C. Code Ann. § 42-15-60 to order appropriate medical treatment, or to deny it where the facts do not warrant. The Commission appropriately included only lifetime repair and replacement of Claimant’s hardware from the fusion surgery. The record supports the Commission’s finding and should be upheld.

V. The Commission properly excluded the testimony of Tony Owens.

The Commission has wide latitude in deciding what evidence should be admitted and what evidence should be excluded. See McGaha v. Mosley, 283 S.C. 268, 275-276, 322 S.E.2d 461, 465-466 (Ct. App. 1984) (instructing that the admission of testimony is “within the sound discretion of the trial judge and his decision will not be disturbed on appeal absent a showing of abuse of discretion”); cf. Brown v. La France Indus., 286 S.C. 319, 325, 333 S.E.2d 348, 351 (Ct. App. 1985) (single commissioner “enjoys considerable latitude and discretion in these matters”). Within its discretion, the court in McGaha allowed a rebuttal witness to testify who had not been previously noticed. 283 S.C. at 276, 322 S.E.2d at 466. Here, Claimant called her late-noticed witness, Mr. Owens, as part of her direct case, immediately at the close of her testimony. (R. 153, line 11 – 155, line 15). The Commission properly granted Respondents’ motion to exclude Mr. Owens’ testimony because he had not been timely identified as a witness.

Claimant relies on Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997). The holding in Smith v. SDCMH, however, was limited to “the particular circumstances of this case...” 329 S.C. at 497, 494 S.E.2d at 636. Several key distinctions between the instant case and Smith v. SDCMH render it inapplicable here. First, in Smith, there was no indication that any of the witnesses who were not allowed to testify had not been properly and timely noticed. Thus, there was absolutely no justification for the exclusion of the witnesses. Second, in Smith v. SDCMH, after two hours of testimony, the single commissioner simply and arbitrarily refused to allow any additional witnesses to testify. He merely stated that much of the testimony that had been elicited had been “irrelevant or immaterial...” Id. Third, because the claimant himself apparently had not yet testified, the

single commissioner then proceeded to question the claimant but did not allow either the claimant's counsel or defense counsel to ask any questions. Id. Finally, the medical evidence the single commissioner did rely on was over two years old at the time of the hearing. Smith v. SDCMH, 329 S.C. at 499, 494 S.E.2d at 637. Here, by way of contrast, the only witness who was excluded was not timely noticed, with no good excuse as to why he had not been timely noticed.²² All of the properly noticed witnesses were allowed to fully and completely testify, and there was no indication that the evidence put forth at the hearing was irrelevant or immaterial. In addition, Claimant was allowed to testify fully, with proper direct, cross and re-direct examination by counsel for both sides. Finally, the testimony and evidence in this case was recent, and not out of date.

Regulation 67-611 binds each party to notify the opposing party of "witnesses concerning the facts of the case" at least ten days before the hearing. S.C. Code Reg. § 67-611. This regulation does not provide the Commission with discretion to waive the ten-day notice requirement for witnesses. See Gadson v. Mikasa Corp., 368 S.C. 214, 226-227, 628 S.E.2d 262, 269 (Ct. App. 2006) (and noting that, "[r]egulations authorized by the legislature have the force of law"). Claimant admits that she did not notify Respondents of her intention to have Mr. Owens testify until seven days prior to the Hearing. (R. 155, lines 12-15).

Claimant argues that this regulation should not apply because Mr. Owens would have been in response to Mr. McGowan's testimony. First, although Claimant insists that Mr. Owens was a rebuttal witness, (App. Br. p. 36), Mr. Owens was offered as part of Claimant's direct case.

²² Claimant's excuse that she did not know she would need to bolster her own credibility reveals the weak link in her argument. As noted above, the claimant always bears the burden of proving she is entitled to workers compensation benefits and should be prepared to submit all her evidence in her case in chief. S.C. Code Reg. § 67-613 ("[e]ach party shall arrange and present all evidence at the hearing").

(R. 154, line 12 – 156, line 16).²³ This is not rebuttal testimony. Second, it is important to note that the Respondents' Form 58 was timely filed and the Claimant had ample opportunity to withdraw her Form 50 if she was not prepared to proceed with the Hearing pursuant to S.C. Code Reg. § 67-609.

Furthermore, Claimant could have made a Motion to Postpone the Hearing in order to take deposition testimony of Mr. McGowan if she believed there were compelling reasons to postpone the Hearing. S.C. Code Reg. § 67-613. Claimant failed to take this action. Alternatively at the Hearing, Claimant could have made a motion to take this testimony prior to the commencement of the Hearing but chose not to. Even if a pre-hearing motion were denied, Claimant still could have withdrawn her Form 50 just before the Hearing commenced under S.C. Code Reg. § 67-609 and Spruill v. Richland County Sch. Dist. 2, 363 S.C. 61, 609 S.E.2d 524 (2005).

Claimant relies on Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996) for the proposition that it is error to exclude a properly noticed witness. However, her reliance on Morgan is entirely misplaced because the issue here is that Mr. Owens was **not** properly and timely noticed. Furthermore, what Claimant fails to note is that the claimant in Morgan filed a petition to adjourn the hearing so that additional, relevant evidence could be procured. 321 S.C. at 203-204, 467 S.C.2d at 459. That is precisely what Claimant could have, but did not do here.

As noted above, the Commission's Regulations do not grant the Commission the discretion to waive the notice requirement and proceed with a Hearing with improperly noticed

²³ Regardless of whether Claimant believed she could "anticipate" Mr. McGowan's testimony, the fact is that she offered Mr. Owens' testimony as part of her direct case. Furthermore, regardless of the Hearing Commissioner's comments regarding time, the fact is that his decision is upheld by the fact that Mr. Owens was a late-noticed witness offered in Claimant's case-in-chief and was, therefore, properly excluded.

witnesses. Despite multiple opportunities, Claimant did not withdraw her Form 50 Request for Hearing; therefore, Claimant does not now have the right to include this testimony in the record.

Claimant's inaction is not the fault of the Respondents. Despite this, she argues that she should be allowed to introduce improperly noticed testimony of her witness. Admission of this testimony would have unfairly prejudiced Respondents, who did not have an opportunity to properly investigate or depose Mr. Owens in advance of the Hearing. Furthermore, to the extent Claimant attempts to justify her late designation of Mr. Owens on the existence of an *ex parte* communication, (App. Br. p. 35-36), her argument fails because there was no *ex parte* communication.

In the end, however, even if Mr. Owens had been allowed to testify, his testimony would not have changed the outcome of this case. Even Claimant appears to admit that now. (App. Br. p. 37). The Commission's credibility determination was based on a myriad of considerations, such as her lying about not having worked at all since her back surgery, and later admitting she had; Claimant's statement that she had not obtained any additional education, training or certificates since her surgery and her later admitting that she had; and Claimant's insistence that she could not bend, stoop, or pick things off the floor, which was belied by surveillance tape of her doing exactly that; Claimant's incredible and concocted story about quitting one job because it was too painful and then immediately performing the same job for a friend for free. Nothing Mr. Owens could have said would affect the Commission's credibility determination based on these facts. Therefore, it is absurd to think that, having Mr. Owens join in her incredible story about how she worked for him for free, doing the same work she had previously done for pay but could not longer do because of extreme pain, would have changed the Commission's decision.

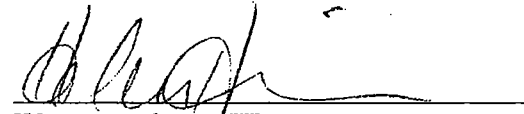
The Commission's decision to exclude the proffered testimony of Mr. Owens was proper and should be upheld.

CONCLUSION

For all the reasons stated herein, this Court should uphold the Commission Decision in its entirety and dismiss Claimant's appeal. In the alternative, in the event this Court finds any reversible error in the Commission Decision, which Respondents deny, this case should be remanded to the Commission, and not to the circuit court or a former or deputy commissioner, for resolution of any remanded issues.

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August 30, 2013

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.

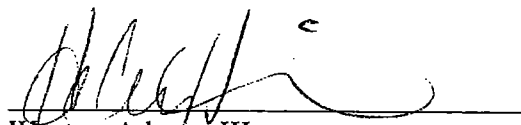
Griffco of Wampee, Inc., Employer, and
Chartis Claims, Inc., Carrier. Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent CNA Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

August 30, 2013

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APPEAL FROM SOUTH CAROLINA
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v.

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

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SC Court of Appeals

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ARGUMENT

1. Fore was denied a fair trial due to the Commission's *ex parte* communication with a witness and the Carrier [In reply to Respondents' arguments at pages 10-22].

Respondents primary argument is to overlook the prejudicial impact of the improper *ex parte* communication by arguing "the Commission correctly held that there was no *ex parte* contact." [Brief of Respondents, page 10]. The record not only shows there was *ex parte* contact between a material witness and the Commission, but that the Commission improperly engaged in *ex parte* communicated with the Respondents regarding that witness. The Commission's unbridled zeal to assist the Carrier in this case¹ violated the APA, violated Canon 3B7, and caused manifest prejudice to the rights of the Appellant.

This is a civil matter between two private parties. It is fundamental to our system of justice that no court – nor the Commission acting as a quasi-court – is ever permitted to secretly provide behind-the-scenes information from a material witness to one party and not the other. When a tribunal receives unsolicited evidence from a potential witness in a case, the tribunal has a duty to cure the harm by sharing the information with all parties. See Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) ("When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties."). The failure to do so mandates reversal – even more so when the harm is compounded by affirmatively engaging in *ex parte* communication to expressly give one party an advantage over the

¹Director Smith specifically instructed the Attorney General to forward his letter to the Carrier "so it can conduct an investigation" – even while simultaneously acknowledging that "I don't believe I can alert the carrier to the alleged fraud." [R. page 382].

other in “conduct[ing] an investigation.” [R. pages 381-383].

A. The communication in this matter fits within the definition of *ex parte* communication.

Respondents argue at length that there was no *ex parte* contact because “*ex parte* communication is defined as ‘prohibited communication between counsel and the court when opposing counsel is present.’” [Brief of Respondents, page 11 (quoting Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003))]. The referenced quote is from a footnote in which the court observes that the narrow black-letter definition of *ex-parte* communication used in legal dictionaries is used much more broadly in workers’ compensation. In Brown, the court specifically endorsed the term to bar “‘*ex parte*’ methods of communication between an insurance carrier, employer, or their representatives and the claimant’s health care provider.” Id.

Although Brown is the leading South Carolina case defining *ex parte* communication broadly, other cases and other jurisdictions share the same concerns – most particularly when the communication is prejudicial (or has the appearance of being prejudicial) to the opposing party. 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 Cummings, 292 P.3d 187 (Alaska 2013)(judge “violated Canon 3B(7) by engaging in ‘*ex parte* communication that had the appearance of aiding the prosecution’ and ‘by giving the prosecution relevant case law that may have not been available to the defense.’”). The Nebraska Supreme Court condemned *ex parte* communication in no uncertain terms, stating: “[Canon 3B(7)] indicates that an *ex parte* communication occurs when a judge communicates with *any person*

concerning a pending or impending proceeding without notice to an adverse party.” State v. Lotter, 586 N.W.2d 591, 610 (Neb. 1998)(emphasis added).

Respondents contend the chain of communication between witness Steve McGowan to Director Smith to Deputy Attorney General Weiss to the Carrier cannot be considered *ex parte* contact because none of this “communication was between counsel and the court.” [Brief of Respondents, page 11]. This Court should reject any attempt to segregate these individual communications. The analysis commands an examination of the totality of the circumstances. See 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).

First, Respondents contend the communication from McGowan to Director Smith “is not an *ex parte* contact for the simple reasons that Mr. McGowan is not and never has been a party in this case.” [Brief of Respondents, pages 11-12]. In fact, this is an *ex parte* contact – for it involves a potential witness in a civil case contacting the adjudicative body concerning the facts of a pending case. See Arnau v. Arnau, 429 S.E.2d 116 (Ga.App. 1993)(new trial granted where trial judge conducted *ex parte* meeting with witness). It is no different than a potential witness contacting a clerk of court, a judge’s administrative assistant, or a judge’s law clerk.

As the Commission did not solicit the communication, there is no fault attached to the Commission for taking the initial phone call.² However, the mere fact the communication was initiated by the witness does not permit the Commission to forward the communication to one party

²Strictly speaking, the phone call was solicited by the Commission, for it had a link on its website inviting members of the public to call in and report suspected fraud. Such inquiries were routinely turned over to insurance carriers via the same back-door method used in this case. As the Commission’s chairman acknowledged at oral argument, that procedure has been changed. [R. page 241, lines 19-24].

and not the other. Rule 3B(7) explicitly requires that provision be made “promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.” Rule 501, Canon 3B(7), SCACR.

Respondents argue that Gary Smith is not part of the hearing Commissioners’ staff. The argument appears to be that only the individual Commissioner and his administrative assistants are subject to the prohibition on *ex parte* contact. The Appellate Panel appears to have relied on the second paragraph of the statute subjecting the commissioners to the Code of Judicial Conduct. This paragraph merely sets forth the requirement that “the commissioners and their administrative assistants must attend a workshop of at least three continuing education hours concerning ethics and the Administrative Procedures Act.” S.C. Code Ann. § 42-3-250 (2007). Requiring ethics training for the individuals who run the Commission (and their assistants) can hardly be construed as giving everyone else at the Commission free reign to send material evidence to parties with pending cases. Cf. People v. Kangas, 113 N.W.2d 865 (Mich. 1962)(“[W]e . . . caution trial judges that bailiffs, sheriffs, and other court personnel should be warned about practices involving associations with jurors both in and out of the courtroom which might create the opportunity to influence their decisions.”).

The statute confirms that Smith is part of the hearing Commissioners’ staff. The Workers’ Compensation Commission consists of seven members appointed by the Governor – one of whom is designated as the chairman of the Commission. See S.C. Code Ann. § 42-3-20 (2007). “The chairman is the chief executive officer of the commission and shall execute the policies established by the *commission in its capacity as the governing body of the judicial and administrative departments*.” S.C. Code Ann. § 42-3-25 (2007)(emphasis added). The Director of the Compliance

Division is supervised by and responsible to the Commissioners. See, also S.C. Code Ann. § 42-3-80, 90 (2007)(establishing that division directors “shall perform such functions and duties as may be assigned . . . by the director of the administrative department subject to the provisions of § 42-3-25.”). The letter sent by Gary Smith was not an isolated, random occurrence. It was part of a deliberate policy promulgated by the chairman of the Commission. [R. page 241, lines 19-24].

Respondents further argue that any communication by or from Smith does not implicate the adjudicative side of the Commission because the Director of the Compliance Division works on the administrative side. [Brief of Respondents, page 14]. The administrative side of the Commission is akin to court administration in the state judicial system. Just as the State Constitution provides that the Chief Justice is the “administrative head of the unified judicial system,” Title 42 provides that the Chairman is the administrative head of the Workers’ Compensation Commission. S.C. Const. Art. V, § 4.

The fact Smith was the Director of the Compliance Division does not give him authority to violate the prohibitions on *ex parte* communication. See S.C. Code Ann. § 1-23-360 (2007)(prohibiting *ex parte* communication by “*members or employees* of an agency assigned to render a decision . . .” (emphasis added)). There is never a circumstance where an employee of an agency or court personnel can engage in *ex parte* communication about the merits of a case with one of the parties. Therefore, this Court should find as a matter of law that the Smith letter was a prohibited *ex parte* communication between the Commission and Respondents.

B. The actions taken by the Commission in this case violated the ethical rules and statute barring *ex parte* communication.

Respondents absurdly mischaracterize the issue by arguing “To accept Claimant’s argument

would mean that every single time a fraud complaint is lodged with the Commission, the entire Commission would have to recuse itself from any proceedings involving the referenced claimant.”³ Appellant is arguing no such thing. The argument is simply that the Commission must comply with the Code of Judicial Conduct and the APA. When it receives *ex parte* communication about a pending case from a witness, party or attorney in a case, it must cure the potential prejudice by immediately disclosing the *ex parte* communication to all parties. Only when the Commission fails to disclose the *ex parte* communication – or worse, conveys it to only one party as was done here – must the Commission recuse itself. It may be that only a single commissioner need be recused, but when the prejudice is as pervasive as it is here – resulting from an affirmative policy to deliberately assist insurance carriers in investigating cases – it is more than reasonable for the entire Commission to be recused. Cf. S.C. Code Ann. § 42-17-40 (B) (2007) (providing that the entire Commission is prohibited from hearing any case involving a commissioner, a member of a commissioner’s household, or any employee of the commission).

Respondents further argue that section 1-23-360 applies only to “adjudicators.” [Brief of Respondents, pages 13-14]. Presumably the argument is that only the actual commissioners are adjudicators. This argument is untenable. The statute explicitly refers to “members or employees of an agency assigned to render a decision . . .” S.C. Code Ann. § 1-23-360 (2007). Here, the “agency assigned to render a decision” is the Workers’ Compensation Commission. The prohibition on *ex parte* communication applies equally to members (the actual commissioners) and employees (everyone else).

³Respondents’ statement ignores the fact that the anti-fraud statute applies equally to “any applicant, policyholder, claimant, medical provider, vocational rehabilitation provider, attorney, agent, insurer, fund, or advisory organization.” S.C. Code Ann. § 38-55-530 (2007).

The section is the APA's analogue to Judicial Canon 3B(7). It includes the same exceptions for internal communications within the agency. "The exception embodied in Canon 3B(7)(C) was designed to give a judge some flexibility in supervising judicial employees in the performance of their duties. For example, a judge must necessarily engage in *ex parte* communications with a law clerk in order to advise the law clerk on how to draft a disposition or research an issue. **It was not intended to permit a judge to circumvent other provisions of the Canons or become an advocate for one of the parties. Thus a judge could not, under the auspices of communicating with court personnel, instruct a law clerk to independently gather evidence in support of a party's position.**" In re Fine, 13 P.3d 400, 409-410 (Nev. 2000)(*ex parte* communication with witnesses warranted removal of judge from office).

The procedure established by the Commission for surreptitiously conveying *ex parte* fraud allegations to insurance companies via the Attorney General's office is *exactly* the type of abuse and unfairness the APA and Judicial Canons seek to prevent. It is a patent abuse of the State's authority which fundamentally undermines the judicial process. For the rule of law to reign supreme, both courts and administrative agencies must not only be fair – but must also scrupulously avoid any appearances of unfairness. Providing investigative support to a private litigant is a fundamental violation of this principle; even more so when the Commission's director acknowledges the violation within the prohibited communication by admitting: "I don't believe I can alert the carrier to the alleged fraud." [R. pages 381-383].

C. The actions of the Commission and the Respondents regarding the *ex parte* communication resulted in substantial prejudice to the Appellant.

Respondents allege there was no prejudice in this case because "Insurance fraud was **not** an

allegation in this case.” [Brief of Respondents, page 17 (emphasis in original)]. On this one point the parties can agree: *there is absolutely no evidence nor even an allegation that Patricia Fore engaged in insurance fraud.*⁴

However, that begs the question, as there was no allegation of insurance fraud, why then did Respondents introduce the Smith letter in the first place? The answer is self-evident; Respondents wanted to give the Commission (and this Court) the false impression that Fore had committed fraud. Indeed, counsel admitted this at the hearing when he stated: “It is simply evidence that there is a fraud investigation ongoing by the A.G.’s office in this claim, and it is properly admissible.”⁵ [R. page 99, lines 2-5]. To suggest “the July 18 Letter was not presented as either character evidence or for impeachment purposes” is, frankly, astoundingly disingenuous. [Brief of Respondents, page 21].

This argument was highly improper. Not only would evidence of an ongoing fraud investigation by the attorney general be inadmissible, *there never was any such fraud investigation.* Rule 404; Rule 609, SCRE. See, also S.C. Code Ann. § 38-55-570 (D) (2007)(“... any information furnished pursuant to this section is privileged and shall not be part of any public record.”). The sole action taken by the attorney general’s office was to transmit the Smith letter to the Carrier – as duly

⁴Fore went to work for ABC Bonding on the advice of her doctor with the participation of the Carrier’s nurse case manager, Cathy Nelson. She was released to work with restrictions on August 27, 2010. [R. page 306, 308]. Her work efforts were documented by Dr. Wolgin on September 30, 2010, where he noted, “She is able to continue with her work which is 3 hours per day 3 days per week helping in an office setting.” [R. page 312]. As Fore *never* concealed her attempt to work from her doctor and the Carrier’s nurse, *there is no evidence of insurance fraud.*

⁵The Rules of Evidence allow admission of an *actual conviction* of certain crimes; never mere allegations – and certainly not when counsel later concedes “Insurance fraud was not an allegation in this case.” [Brief of Respondents, page 17]. Rule 404; Rule 609, SCRE.

instructed by the Commission.⁶ The AG made no investigation itself nor did it turn the case over to SLED for investigation. This was simply an attempt by counsel to taint the proceedings with improper, unsubstantiated and unduly prejudicial allegations – an effort which, sadly, was successful.⁷

⁶The Smith letter openly admitted that 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 a serious misuse of authority. 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.")

⁷This is not to suggest that it was improper of counsel to argue that Fore had worked for Steve McGowan and provided assistance, albeit unpaid, to Tony Owens as evidence that she "has been able to earn occasional wages or perform certain kinds of gainful work . . ." Colvin v. E.I. Du Pont De Nemours Company, 227 S.C. 465, 88 S.E.2d 581 (1955). These facts – openly testified to by Fore on direct examination – were properly before the Commission. The line requiring candor to the court was crossed when Respondents intentionally introduced patently inadmissible evidence to mislead the Commission into believing "that there is a fraud investigation ongoing by the A.G.'s office in this claim." [R. page 99, lines 2-5]. This was improper because, "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the *lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.*" Rule 3.3, Comment 2, SCACR (emphasis added). See, also Rule 3.4, SCACR ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . , or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . ."); Rule 4.5, SCACR ("A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.").

The protestations of Respondents that no prejudice resulted from the *ex parte* communication – and, indeed, the protestations of the Appellate Panel in trying to justify its own role – cannot survive even superficial scrutiny. As our Supreme Court 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).

See, also 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 decision.”).

The existence of *ex parte* communication raises a rebuttable presumption of prejudice. See, e.g., Ellis; Blaker v. Planning and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989). Once there has been a showing of improper *ex parte* communication, the burden of showing that the communication was harmless shifts to the party seeking to uphold the decision below. The presumption may be rebutted by evidence that (1) the *ex parte* evidence or testimony was not received by the Commission or (2) was not considered by it and, therefore, did not affect the Commission’s final decision. It is undisputed the Smith letter was received by the Commission, so the only remaining avenue is whether Respondents can prove the improper *ex parte* communication was not considered in the Commission’s final decision. This they cannot do.

The Appellate Panel found: “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.”⁸ In re D.D., 713 S.E.2d 440, 310 Ga.App. 329 (Ga.App. 2011)(emphasis added).

The findings added by the Appellate Panel that the *ex parte* communication played no part in the ultimate decision are simply not believable. Respondents contend this point was conceded at oral argument. [Brief of Respondents, page 31]. This is not quite accurate. The panel asked this question: “Can you point me to a Finding of Fact, Conclusion of Law or in the order section of [the Single Commissioner’s order] that Commissioner Lyndon relied upon the communication in his making this decision?” Fore’s counsel candidly replied: “No, don’t believe there was.” [R. page 247, lines 11-22]. Admitting that there is nothing in the order itself – as counsel is required to do – does not equate to a concession that the *ex parte* communication and supposed “fraud investigation” had no influence on the Commissioners. Counsel’s attempt at oral argument “to explain to Commissioner Williams’ question that I answered ‘no’ to on specific Finds of Fact – ” was cut short by the Panel. [R. page 250, lines 1-19].

⁸In 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.”).

The prejudice is readily apparent when one compares the totality of the evidence with the ultimate decision – particularly the findings on credibility, but also the patently punitive disability award and denial of future medical treatment. This is further confirmed by the Single Commissioner’s expression of surprise when presented with the evidence of the supposed “fraud investigation.” Commissioner Lyndon stated on the record: “I didn’t have any idea – this seemed like such a – I worked the case up, and we’re on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we’re in.” [R. page 157, lines 5-16]. The Commissioners receive the Form 58 and Notice of APA submissions at the same time as the parties serve them. The actual exhibits – including the Smith letter – were submitted at the hearing itself. 25A S.C. Reg. 67-611; 67-612 (2007).

Commissioner Lyndon would have seen the 36-percent whole person impairment rating from Fore’s treating surgeon on the Form 58’s submitted by both sides. This is an exceptionally high impairment rating – one which historically has always resulted in the injured worker being deemed permanently and totally disabled.⁹ See Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating). The impairment rating was coupled with the additional facts that (1) Respondents did not retain a vocational expert to rebut the expert opinion of Glenn Adams, and (2) Respondents had not requested a hearing to terminate temporary compensation even though Fore had been placed at MMI a full seven months before the hearing. [R. pages 51-67]. The obvious inference is that Commissioner Lyndon “worked the case up” and logically presumed this would be a simple, straightforward case of total disability – virtually a pro forma hearing. Instead, as he himself stated,

⁹Respondents did not dispute the accuracy of the impairment rating.

the hearing devolved into a "tangled mess." [R. page 157, lines 5-16].

The "tangled mess" comment was made as Fore's attorney was discussing calling Tony Owens to rebut Steve McGowan's expected testimony. It is clear that the Commissioner's irritation was a direct by-product of the fraud allegations raised in the Smith letter.

Respondents further contend Fore was not prejudiced because she was given notice that Respondents intended to introduce the Smith letter and call Steve McGowan as a witness. There is no prejudice from the mere fact McGowan testified – had his appearance and testimony not already been tainted by improper *ex parte* communication and the introduction of the Smith letter. McGowan's testimony would not have been a problem had he been discovered by Respondents in the normal course of discovery or even if he had called the insurance carrier rather than the Commission. It became a problem because McGowan was called after Respondents had already tainted the proceeding with unsupported allegations of insurance fraud (despite their self-serving denial of this and the equally specious explanation that it was merely evidence of an ongoing investigation). McGowan's testimony took place after the *ex parte* communication had already been improperly admitted into evidence. The Smith letter gave his testimony an unwarranted and prejudicial imprimatur of legitimacy by its association with a non-existent fraud investigation by the Attorney General.

The definitive prejudice occurred when the Single Commissioner refused to allow Fore to call a witness to rebut the spurious allegations made by McGowan. Tony Owens was an absolutely critical rebuttal witness. Only he could confirm that (1) Fore's assistance to him was temporary and unpaid; (2) he asked her to assist him due to health problems; (3) the assistance included training an employee (Mary Weaver) since she herself was unable to do the work; and (4) that he would have

hired her as an employee had she been able to do the work involved. See Orlando v. Boyd, 466 S.E.2d 353, 320 S.C. 509 (1996)(trial judge abused his discretion in excluding crucial witness when there is no evidence of misconduct in naming witness outside scheduling order deadline) Perhaps even more importantly, Owens was able to explain the basis of McGowan's grudge against Fore. [R. page 194, lines 1-18]. After she left his employment, McGowan harassed Fore to the point she had to take out a restraining order against him. [R. page 128, line 131-page 42, line 1; pages 377-378].

Even more importantly – in a decision based *entirely* on credibility – Owens was the one neutral witness with no personal stake in the result. As Fore's nemesis, McGowan had a demonstrated bias against her – a bias he demonstrated by making spurious allegations with no basis in fact or personal knowledge in his call to Gary Smith,¹⁰ and by being outwardly rude and nonresponsive during cross-examination. [R. page 173, lines 1-3]. Indeed, the Georgia Magistrate heard the case against McGowan and found his "conduct to be such as to justify the belief that the safety of persons in the county or their property or peace are in danger of being injured or disturbed

¹⁰For example, McGowan told Gary Smith: "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]. Yet, on cross-examination he admitted to committing tax fraud by not paying taxes on Fore's wages. [R. page 176, lines 5-17].

He also told Smith that Fore "takes her niece with her, probably as a cover to confuse the issue as to who is actually picking up the prisoner. The niece probably initials the release sheet for Patricia." [R. page 381-383] This was also patently false. Fore took Mary Weaver with her as part of training Weaver to be Owens' employee. Weaver did not sign for any bonds until August 15, 2011 when she became licensed. [R. page 375]. Fore herself signed the one bond on February 5, 2011, to transfer her license to Tony Owens and A1 Bonding. Thereafter, every other bond was signed by Owens until July 2011 when his health failed and Fore began helping him out. She personally signed for a total of 18 bonds from July through September 2011. [R. pages 368-376].

thereby . . .” [R. page 379].

The exclusion of a crucial witness is fundamentally prejudicial. See Orlando v. Boyd, 466 S.E.2d 353, 320 S.C. 509 (1996)(reversing grant of summary judgment after trial judge erroneously excluded crucial witness); Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003)(trial court abused its discretion in excluding an expert witness when there was no disobedience of any court order and no prejudice to the opposing party other than necessity of further discovery). Our system “is designed to promote decisions on the merits after a full and fair hearing . . .” Barnette.

This Court should find that Fore was prejudiced by the *ex parte* communication. The Court should vacate the Order of the Appellate Panel. The case should be remanded for a *de novo* hearing before an impartial tribunal such as the Horry County Court of Common Pleas or a deputy commissioner appointed by the Court. If the case is to be tried before the Commission, then the hearing Commissioner should have no prior knowledge of the case and all extraneous material – specifically the Smith letter – must be removed or segregated from the Commission’s file.

2. Fore proved she is permanently and totally disabled (in reply to Respondent’s argument at pages 22-31).

Respondents essentially make two arguments as to how the Commission could have been correct in failing to find Fore permanently and totally disabled. They disregard the medical and vocational evidence, and they argue since she attempted to work, she must not be disabled. These arguments essentially boil down to an attack on her credibility – thereby implicitly confirming their real motivation in introducing the Smith letter as “simply evidence that there is a fraud investigation ongoing by the A.G.’s office in this claim . . .” [R. page 99, lines 2-4].

A. Permanent and Total Disability under § 42-9-10 [in reply to Respondents' argument at pages 29-31].

Respondents sidestep the legal issue presented by the Commission's misapplication of the proper test for determining permanent and total disability. The test applied by the Appellate Panel ("I think she can work.") is not the law and commands automatic remand, if not outright reversal. Not surprisingly, Respondents never even mention the correct legal test – a test met by Fore. See, e.g., Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961)(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.").

Perhaps the best way to analyze this is to look at the facts – rather than focusing on the unsubstantiated allegations of fraud made by Respondents and Steve McGowan. If one puts aside these irrelevant and prejudicial insinuations (as the Commission should have), the chain of events is fairly simple to discern.

Fore injured her back, hip and leg in a work-related accident on February 21, 2008. Following her accident, she became unable to work and moved to her hometown of Leesburg, Georgia. Leesburg has a population of around 5-10,000 people. [R. page 107, lines 14-21].

Due to her injury, Fore underwent back surgery on May 6, 2010. The surgery was not successful, leaving Fore with a non-union of the fusion at L5-S1. [R. page 327].

On August 27, 2010, her surgeon allowed her to "limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weight lifting limit." [R. page 308]. Around that time in late August, Fore began working for Steve McGowan at ABC Bonding. Both her doctor and the workers' compensation nurse, Cathy Nelson, were aware of this.

Fore worked for ABC Bonding until January 21, 2011. The parties dispute the reason she stopped working for ABC. Fore testified she had to quit "because the pain was just – it was too much; I couldn't handle it." [R. page 115, lines 16-24]. Steve McGowan claimed: "She basically said she needed to make more money to pay for the daycare, because she wasn't making enough hours to pay for her child's daycare, and she needed to go away." [R. page 167, lines 8-11]. As to each of those statements, there is an obvious way to test them.

In the journal she was keeping at the time, Fore wrote, "I gave Bill the phone, the charger, hurting too bad work in the office anymore." [R. page 367]. This also matches up with her next visit to Dr. Wolgin on February 14, 2011, when he wrote she is "unable to return to work until further notice." [R. page 328]. The contemporaneous evidence thus supports a finding that Fore quit the job at ABC Bonding because of her medical condition.

If McGowan's allegation were true, Fore would have quit working at ABC and immediately taken a higher paying job elsewhere. The documentary evidence shows she did not. Even if one assumes Fore took a paying job at A1 Bonding (despite the complete lack of evidence for this proposition), Tony Owens testified he paid his employee, Mary Weaver, a commission of 30% of each bond. [R. page 191, lines 1-12]. The official records from the Lee County Jail Facility show Fore did one bond on February 5, 2011. After that, she did no bonds until July 7, 2011 when Owens became ill and needed her help. Between those dates, Tony Owens signed for every single bond done by A1. [R. pages 368-374]. These records confirm that Fore could not have and did not leave ABC for a higher-paying job.

In any case, Fore candidly stated that she helped out Tony Owens from July through September 2011. She did a total of 5 bonds in July; 12 bonds in August; and one bond in

September. [R. pages 368-376]. She also helped train Mary Weaver to do the job.

Whether or not Fore got paid for the bonds she did for A1 is not really material. Anything she might have earned was minimal. The question is whether these *de minimus* activities prove she is not disabled in light of Dr. Wolgin taking her entirely out of work, along with Tony Owens' testimony that he could not hire her permanently because she was physically unable to do the work the job required.¹¹ [R. page 192, lines 16-24].

The case law is clear that retaining some ability to do minimal work-type activities does not prevent a finding of permanent and total disability. "Total disability does not require complete helplessness; rather the inability to perform common labor is considered total disability for one who is not qualified by training or experience for any other employment." Eaddy v. Smurfit-Stone Container Corp., 584 S.E.2d 390, 355 S.C. 154 (Ct. App. 2003). "Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996). "[A]lthough earning capacity may be the sole measure for determining the extent of [a claimant's] disability . . . the mere fact of employment is not always indicative of earning capacity." Id.

As the case law, particularly Stephenson, confirms that the mere fact Fore did some minimal work-type activities for A1 is not indicative of her earning capacity, the question is whether she proved the inability to perform services other than those that are "so limited in quality, dependability,

¹¹Fore's pre-injury occupation was the very heavy job of meat cutter in a grocery store. She described her attempt to work as a bail bondsman as "literally the easiest thing I've ever done." [R. page 128, line 17]. In the small town of Leesburg, Georgia, the only two bail bonding companies are ABC and A1. Even if she could work as a bail bondsman, there is no reasonably stable market for such work in her locality.

or quantity that a reasonable stable market for them does not exist.” Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). This she has done. The unrefuted opinion of the vocational expert is that even if Fore could perform sedentary duties – which he noted “is not supported by Dr. Wolgin’s work statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies.” He opined she “is considered to be totally vocationally disabled.” [R. pages 356-357].

This is the evidence that proves total disability under the correct legal test. The Commission did not apply the proper test. This alone requires a remand. Even had the Commission applied the correct test, any finding other than permanent and total disability is unsupported by substantial evidence. Therefore, the Court should either reverse outright or remand for a *de novo* hearing with instructions to apply the correct law.

B. Permanent and Total Disability under § 42-9-30 (21) [in reply to Respondents’ argument at pages 22-29].

As to the claim for total disability under the medical model, Respondents frame virtually their entire argument as another attack on Fore’s credibility. However, under the medical model, it is the medical evidence that controls.

Dr. Wolgin assigned a 36% whole person impairment rating to Fore for her back injury and failed back surgery. [R. page 327]. The rating alone supports a finding deeming Fore totally disabled under the medical mode. See S.C. Code Ann. § 42-9-30 (21) (2007); Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(claimant deemed totally disabled due to 50% loss of use of the back despite impairment ratings of 15% and 20-30%).

However, in Fore’s case, there is the additional evidence of a non-union of the fusion, along

with the unrefuted opinion of her surgeon stating she is "unable to return to work until further notice." [R. page 328]. Dr. Wolgin gave her specific restrictions to "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]. Vocational Expert Glenn Adams confirmed there are no such jobs within these restrictions. [R. pages 356-357].

Respondents presented no evidence to rebut the medical and vocational evidence. Instead, they speculate that Dr. Wolgin and Mr. Adams must have relied on false statements by Fore. This truly is speculation. Dr. Wolgin performed surgery on Fore. He took a CT scan of her back because he was concerned about the non-union; a concern which was validated. Dr. Wolgin based his opinions and work restrictions on the medicine. He has literally looked inside her back and he knows, better than anyone else, its condition. There is zero evidence disputing his opinions. Cf. Walker v. Bowen, 876 F.2d 1097, 1099 (4th Cir.1989)(requiring a social security disability claimant to show objective medical evidence of some condition that could reasonably be expected to produce the pain alleged, not objective medical evidence of the pain itself).

Similarly, Glenn Adams based his opinion on matching up Fore's qualifications with her physical abilities (as determined by Dr. Wolgin). [R. page 347-357]. Her report to him of her failed work attempt is mentioned, but is of little consequence to his opinion. Adams' opinion is likewise unrefuted.

The evidence conclusively compels a finding that Fore is deemed permanently and totally disabled due to 50% loss of use of her back. Therefore, the Court should reverse.

3. The finding on Fore's credibility must be vacated because it is based on inadmissible evidence of an "ongoing fraud investigation." [in reply to Respondents' argument at pages 31-34].

The Commission's ruling was based entirely on a credibility finding, to wit: "After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. Notwithstanding the protestations of Respondents and the bolstering of the decision by the Appellate Panel, the credibility finding was tainted by patently prejudicial inadmissible evidence. It is simply impossible to separate out the prejudicial effect of the Smith letter. Indeed, the reference in the finding to "considering all of the evidence" definitively proves the Smith letter played a key role in the result. 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).

The inclusion of the credibility finding and the "she can work" finding in the same sentence shows that the two are intertwined. This is simply improper. A finding of disability must be based on all the evidence – medical, vocational, documentary and testimonial. The evidence must be applied to the proper legal standard. Letting the decision devolve to a black and white credibility determination simply allows the Commission to punish people it doesn't like and reward those it does. See Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974) ("[A]dministrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained.").

As to the specific arguments made by Respondents, they do not address the issue actually appealed – which is that the Commission's credibility determination must be vacated because it was

based on inadmissible evidence. Respondents argue the Smith letter had no bearing on the credibility finding, instead arguing Fore “lied until she was backed into a corner.” [Brief of Respondents, page 33]. It should be noted that the sole credibility finding actually made by the Single Commissioner himself is the conclusory finding: “I did not find her a credible witness and believe she can work.” Other findings relied on by Respondents were added by Respondents’ attorney to bolster their theory of the case when counsel drafted the proposed order. There is nothing inherently improper about counsel bolstering an order for appeal nor does it invalidate the order as the order was signed by the Commissioners as written. Nonetheless, the Court should be aware that these additional credibility findings did not originate from the Commissioner who heard the case.

Despite Respondents’ protests to the contrary, Fore was exceptionally forthcoming about the help she gave to Tony Owens and her work for Steve McGowan. She testified at length about this on direct examination. She produced the *original* notebook in which she contemporaneously recorded her work hours, along with her pain complaints and doctors appointments. [R. page 135, lines 5-7; R. pages 358-367]. She produced the official documents from the Lee County Jail confirming that she had actually signed 18 bonds for Tony Owens. [R. page 368-376].

The only “blip” in her testimony was an inconsistent statement in her deposition, where she said “no” when asked if she had earned money since her accident. [R. page 125, line 23-page 126, line10]. However, she admitted this inconsistency on direct and further explained it on cross-examination. It is perfectly reasonable for a person to consider volunteer assistance to a friend to not be work - and she never denied she helped out Tony Owens; even going so far as to bring written proof of the help she provided. As to work for Steve McGowan, it appears he was the one who insisted on paying her in cash – as evidenced by his admission that he paid no taxes on her wages.

And again, there was no reason for her to cover up working for Steve McGowan because *she knew everyone already knew about it*. She had told her doctor, the carrier's rehab nurse, and her vocational counselor.

No matter how much Respondents repeat the allegations that all of the above is evidence of a lack of credibility, it cannot erase the prejudicial effect of the inadmissible Smith letter. The credibility finding by the Commission was tainted by inadmissible evidence and must be reversed as a matter of law.

4. The Single Commissioner committed reversible error in excluding the rebuttal testimony of Tony Owens [in reply to Respondents' argument at pages 35-39].

Fore attempted to call Tony Owens as a rebuttal witness in response to the testimony of Steve McGowan. The Single Commissioner excluded the rebuttal testimony on the grounds Owens was not timely listed as a witness. Respondents argue the "Commission's Regulations do not grant the Commission the discretion to waive the notice requirement and proceed with a Hearing with improperly noticed witnesses." [Brief of Respondents, page 38]. This argument is patently untenable. As do trial judges, the Commissioners have discretionary authority concerning the calling of late witnesses and rebuttal witnesses. In this case, the Commissioner abused his discretion.

Respondents' brief was received by Fore's attorney on September 20, 2011. Fore's attorney filed and served an Amended Pre-Hearing Brief the same day – September 20, 2011 – listing Tony Owens as an additional witness. [R. page 61]. This was seven days before the hearing.¹² Tony Owens was listed specifically because of the unexpected naming of Steve McGowan as a defense

¹²Respondents themselves filed and served their own "Amended Pre-Hearing Brief and Supplemental Notice of Witnesses" on September 23, 2011. The Brief identified a new witness: Bill Moore." [R. page 65]. This was 4 days before the hearing.

witness.

The regulations cited by Respondents require the parties to file and serve the Form 58 “at least 10 days before the hearing.” Overlooked by Respondents is the additional “duty to promptly supplement a response with respect to any question directly addressed on the form . . .” 25A Reg. 67-611 (2007). This includes naming additional witnesses – which is something both parties did.

If witnesses are called to testify who were not named within the 10 day deadline for filing the original form 58, then the Commissioner must exercise discretion on whether to allow the witness to testify. In the instant case, the Commissioner failed to exercise discretion. Instead, he summarily refused to allow Owens to testify because “I had no clue that we were going to get in this tangled mess that we’re in. If I had known that, you know, you should have asked for three hours or somebody, but you didn’t. That’s why I don’t want to put the witness up, but if he wants to proffer the testimony, that’s fine. I’ll leave the room while he testified.” [R. page 157, lines 5-16]. This was plainly an arbitrary and capricious ruling – if for no other reason than leaving the room during the proffered testimony saved no time at all.

The exercise of discretion requires the Commissioner to several factors. “Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.” Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996). Here, the Commissioner considered none of these factors. The failure to do so is an abuse of discretion.

Had the factors been considered, the proper ruling would have been to permit the testimony. Owens was a rebuttal witness to Steve McGowan’s testimony. See Brandi v. Brandi, 396 S.E.2d 124,

302 S.C. 353 (Ct. App. 1990)(where party is allowed to call witness previously unknown to opposing party, opposing party “should have the opportunity to call rebuttal witnesses if deemed necessary.”). He testified to Fore’s physical condition and inability to actually work as a bail bondsman; to the reasons she helped him out for free; to the short duration of the help (until Mary Weaver was trained); to the pay Weaver received and the fact he did not pay Fore; and to the character, credibility and motivation of Steve McGowan in harassing Fore and appearing at the hearing. All of this testimony had a direct bearing on the material issues.

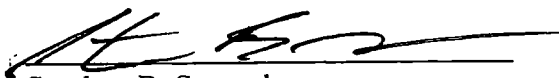
As to the reasons for the failure to identify the witness, Fore had no way of knowing McGowan would be a witness nor did she know – or have any reason to suspect – that Respondents would introduce “evidence that there is a fraud investigation ongoing by the A.G.’s office in this claim . . .” [R. page 99, lines 2-5]. Upon learning of this, her attorney immediately filed a supplemental Pre-Hearing Brief naming Tony Owens. Respondents suffered no prejudice from this as Respondent’s counsel “has had the opportunity to speak with Mr. Owens, and Mr. Owens had cooperated with him as far as speaking to him on the telephone.” [R. page 155, lines 5-10].

This analysis proves the Single Commissioner abused his discretion in refusing to hear testimony from Tony Owens. As such, the Commission’s order must be vacated and the case remanded for a *de novo* hearing.

CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order of the Appellate Panel as unsupported by substantial evidence. The Court should hold Fore has proven that she is permanently and totally disabled as a matter of law. She should be awarded the balance of the remaining weeks in a lump sum allocated per James along with lifetime medical treatment. Alternatively, the Court should vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or direct the Commission appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

Respectfully Submitted,



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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

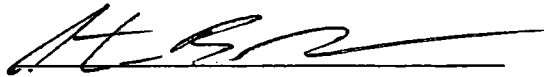
Patricia Fore, Employee Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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