IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

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

Patricia Fore, Employee,..... Petitioner,

v.

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

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Respondents Griffco of Wampee, Inc. and Chartis Claims, Inc. hereby oppose Petitioner/Claimant Patricia Fore's ("Claimant") Petition for a Writ of Certiorari ("Petition"). Despite her attempts to stretch the facts and law in order to expand the definition of impermissible *ex parte* contacts and/or to argue she is entitled to increased disability benefits and/or a *de novo* hearing, Claimant has raised no issue that warrants this Court's review. Claimant does not present any novel question of law, nor does she raise any legitimate constitutional issue. The unanimous Court of Appeals' decision does not conflict with other decisions of this Court. In addition, her third argument and possibly her second argument are not ripe for this Court's review in light of the Court of Appeals' remand for the consideration of Tony Owens's testimony.

STATEMENT OF THE CASE

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"). 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").

Claimant was treated by Dr. Mark A. Wolgin and Orthopaedic Associates in Albany, Georgia. (R. 272-329) (R. 107, line 24 – 108, line 1).[1] Claimant underwent a two-level transforaminal lumbar interbody fusion on May 19, 2010. (R. 289-291). Claimant was written out of work while she recovered from the surgery. (R. 298, 304-305). On August 27, 2010, Dr. Wolgin advised Claimant that, "she could do limited work if available, mainly sedentary work

[1] 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).

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. Despite Dr. Wolgin's recommendation that she only work three hours a day, three days a week, (R. 146, lines 5-23), Claimant admitted that she worked 20 or more hours per week for ABC Bail Bonds. (R. 110, line 11 – 111, line, 6). 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 traveled to Atlanta to obtain her certification as a bail bondsman in late-August 2010. (R. 163, line 22 – 165, line 17) (R. 139, line 13 – 140, line 5). Eventually, Claimant was working 30-35 hours per week, and sometimes over 40 hours 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). Mr. McGowan testified that he paid Claimant "under the table" and under her husband's name because she requested to be paid that way. (R. 167, lines 16-24). Although Claimant testified she worked twenty hours or more per week for ABC Bail Bonds, (R. 110, line 11 – 111, line, 6), Dr. Wolgin's September 30, 2010, medical notes indicate he believed she was working only "three hours per day three days a week." (R. 312).

Claimant testified that, by November 30, 2010, her pain was aggravated by the several months of work with ABC Bail Bonds. (R. 115, lines 2-24). Dr. Wolgin stated in November and December, 2010 that she continued to be written out of work until further notice. (R. 318,

321). According to Dr. Wolgin's notes, sometime prior to December 21, 2010, Claimant began taking care of a 3-year old, which involved frequent bending, lifting, and twisting. (R. 321).

Claimant testified that she stopped working for ABC Bail Bonds on January 21, 2011 because she was "hurting too bad." (R. 116, line 25 – 117, line 3). Mr. McGowan testified that Claimant left his employment because she wanted more money. (R. 165, lines 18-20) (R. 166, line 20 – 167, line 11).

Dr. Wolgin released Claimant from his care on February 14, 2011, and stated she was at Maximum Medical Improvement ("MMI") with a 36% impairment rating. 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 explained that she had been 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 testified that she helped Mr. Owens because she thought her former employer was "trying to destroy Tony," and because Mr. Owens had health problems. (R. 119, line 17 – 120, line 5) (R. 149, lines 13-17). According to her testimony, Claimant entered bonds and advertised for A-1 Bail Bonds without any 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 she had been paid by ABC Bail Bonds to perform. (R. 137, line 17 – 138, line 9) (R. 385 (Surveillance Video)). 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 admitted that an entry on her Facebook page indicates 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 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 was reciprocal in that it 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 obtained no further education or certification since a prior deposition. However, she admitted at the Hearing that she had received certification as a bail bondsman in August 2010, and 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), surveillance footage, (R. 396), showed her squatting down to pick things off the lower shelf in a Wal-Mart store. (R. 144, line 17 – 145, line 22). Claimant 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 no repetitive bending and twisting involved. (R. 144, lines 1-5) (R. 145, line 23 – 146, line 1).

Claimant's counsel referred her to Glen Adams for a vocational assessment on September 12, 2011. The assessment was conducted over the phone. (R. 347). Mr. Adams' notes reflect that Claimant 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." Claimant told Mr. Adams that she had only worked for ABC Bail Bonds in January 2011, "entering bonds into the computer," only working "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). Claimant admitted at the Hearing that she did not accurately report to Mr. Adams how much she actually was working. (R. 147, lines 4 – 148, line 24).

Claimant filed a Form 50 seeking permanent and total disability and lifetime medical treatment. On her Form 50, Claimant alleged she had not worked since the February 2008

accident. (R. 48). Respondents filed a Form 51, denying that Claimant that she was permanently and totally disabled. (R. 50).

The case was heard by Hearing 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. Garry Smith, the Director of the Compliance Division of the Commission, to the Attorney General's Insurance Fraud Division ("July 18 Letter"). The Hearing Commissioner excluded the July 20, 2011 letter but included the July 18 Letter. (R. 93, line 22 – 99, line 20) (R. 381-383). Claimant's request to call Tony Lee Owens as a rebuttal witness was denied and his testimony was taken as Proffered Testimony outside of the presence of the Commission. (R. 154, line 3 – 156, line 22). The Hearing Commissioner, who found Claimant lacked credibility, awarded her 40% Permanent Partial Disability to her back pursuant to S.C. Code Ann. § 42-90-30. (R. 28-29). (Hearing Commissioner Decision and Order, January 18, 2012, R. 27-28).

Claimant appealed to the Full Commission, which affirmed the Hearing Commissioner. (Decision & Order of the Full Commission, August 27, 2012, R32-45) ("Commission Decision"). The Commission held that there was no ex parte communication in this case and specifically stated that it did "not rely on any information contained in the letter from the Commission to the Attorney General in affirming with amendment, the award of the Single Commission." (R. 40).

Claimant timely appealed to the Court of Appeals which heard oral argument and affirmed the Commission in part and reversed in part. The Court of Appeals held that the Hearing Commissioner should have allowed Tony Owens to testify as a rebuttal witness and

remanded to the Commission "for a redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony. Id. at 44, 2014 S.C. App. LEXIS 163 **20-21.

Claimant is now petitioning this Court for review.

ARGUMENTS

I. The Court of Appeals correctly determined there was no *ex parte* communication in this case.

Claimant's main argument relies on her allegation that an impermissible *ex parte* contact occurred in this case. Although she struggles alternately to characterize the facts of this case in a manner that would bring them within the accepted definition of *ex parte* communications, and to expand the definition of *ex parte* communications to meet the facts of this case, she ultimately fails on both fronts. The Commission and the Court of Appeals correctly held that no *ex parte* communication occurred in this case.

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. On July 18, 2011, Mr. Garry 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). 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). The Assistant Deputy Attorney General's office sent a July 20, 2011 letter to the Special Investigative Unit of the Carrier.[2] At

[2] 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).

the time he called the Commission, Mr. McGowan was not designated as a witness in this case but later was identified as a witness on Respondents' Form 58 Pre-Hearing Brief.[3]

Relying on Black's Law Dictionary, this Court has defined *ex parte* communication as "prohibited communication between counsel and the court when opposing counsel is not present." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003), *quoting* Black's Law Dictionary 597 (7th ed. 1999).[4] At no time did Respondents or Respondents' counsel communicate with the Commission without copying or including Claimant's counsel.

Although Claimant accuses the Court of Appeals of "using the narrowest possible definition" of *ex parte* communications, the cases cited by Claimant employ a definition of *ex parte* contact that is consistent with the definition applied by the Court of Appeals in this case. *See* In re Newberry County Magistrate English, 367 S.C. 297, 303, 625 S.E.2d 919, 922 (2006) (judicial reprimand for *ex parte* communication between presiding judge and "the charging trooper and to even suggest the trooper 'help' the employee"); In re Newberry County Magistrate Beckham, 365 S.C. 367, 641, 620 S.E.2d 69, 71 (2005) (judicial reprimand for *ex parte* communication between presiding judge and a defendant's attorney "without giving the State an opportunity to be heard");[5] and, Jennings v. Dade County, 589 So.2d 1337, 1991 Fla. App.

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[3] Without any basis in fact or proof in the record, Claimant asserts that, "[u]pon receipt of the letter, the Carrier **apparently** contacted McGowan and enlisted his help in putting Fore under surveillance." (Pet. p. 6) (emphasis added). The surveillance video at R. 385 was undertaken by Mr. McGowan at his own behest, and the video surveillance included in the Record at R. 396 was part of the Carrier's independent surveillance and investigation of her claim.

[4] Despite Claimant's attempts to expand the definition of *ex parte* communication, the definition in Brown v. Bi-Lo, remains good law. There, this Court clarified that, although the parties used the term *ex parte* to describe the communication between "an insurance carrier, employer, or their representatives and the claimant's health care provider," that type of communication did not constitute an *ex parte* communication. 354 S.C. at 440 n.3, 581 S.E.2d at 838 n.3. This Court distinguished the exchange of medical information between the caregiver and the employer from *ex parte* communications, defined as a communication "between counsel and the court when opposing counsel is not present." Id., 581 S.E.2d at 838 n.3.

[5] Claimant points to the discussion in Beckham regarding the Magistrate's conveyance of information from a defendant's family member to law enforcement regarding a pending case as an example of *ex parte* communication; however, while that conduct constituted judicial misconduct, it was not analyzed as an *ex*

LEXIS 7720 (Fla. Ct. App. 1991) (finding *ex parte* contact between a lobbyist for one party and members of the county commission making land use determination). In all of these cases, the communication was between the decision-maker and an interested party or its representative. Here, in contrast, there was no communication with the decision-maker.

Even if the definition of *ex parte* communication includes communications between a witness or a potential witness and the decision-maker, (Pet. p. 9), no such communication occurred here. 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 a non-adjudicative arm of the Commission, the 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 do not, either standing alone or considered together, constitute an *ex parte* contact.

First, Claimant alleges that "a Director of the Commission received an *ex parte* communication with a potential witness in this case." (Pet. p. 9). 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 now is attempting to reverse her position on appeal. Courts routinely reject parties' attempts to make arguments on appeal that are inconsistent with the positions they took below. *See, e.g.*, King v. Daniel Int'l Corp., 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also* Vaughan v. Kalyvas, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the

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parte communication. 365 S.C. at 644-650, 620 S.E.2d at 72-76.

appellant to assert a position on appeal that was contrary to the position taken below). This Court should reject her attempt to reverse her position on appeal.

In addition, this is not an *ex parte* contact for the simple reason that McGowan's contact with the Commission was to the Compliance Division, not with any of the Hearing Commissioners. Thus, there was no contact by Respondents (or a party aligned with Respondents, a witness, or even a potential witness) with any member or staff of the adjudicative branch of the Commission.

Second, Claimant alleges that, Mr. Smith, the Director of the Commission's Compliance Division "th[e]n took *affirmative steps* to ensure that the identity of that witness and the substance of his allegations were conveyed *solely* to the Respondents." (Pet. p. 9). Again, her suggestion that Mr. Smith was intentionally attempting to communicate with the Carrier via the Attorney General's office conflicts with statements her counsel made to the Commission. *See* (R. 223, lines 15-17 (Claimant's counsel arguing to the Commission that the communication was not a "willful act or an intentional act")) (R. 241, lines 16-18 (arguing that no one other than Mr. McGowan was "deliberately trying to do any harm to anybody")). She should be barred from arguing the opposite position on appeal. King, 278 S.C. at 354, 296 S.E.2d at 337; Vaughan, 288 S.C. at 362, 342 S.E.2d at 619.

Calling Mr. Smith's letter to the Attorney General's office an "indirect communication with Respondents," (Pet. p. 9), Claimant attempts to obfuscate the fact that the July 18 Letter was a communication from one state agency to another state agency. This clearly is not an *ex parte* communication because it is not between a Hearing Commissioner and a party or a witness, 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. Therefore, Claimant's assertion that the communication between Mr. Smith and Attorney General was improper is just plain incorrect.

Finally, the July 20, 2011 letter from the Assistant Deputy Attorney General, Heather Weiss, to the Special Investigative Unit for the Carrier did not constitute an impermissible *ex parte* communication. Claimant's attempt to "merge" the communication between the Commission's Compliance Division to the Attorney General's office with the communication between the Attorney General's office and the Carrier reveals the weakness in her theory of *ex parte* communication, which should be rejected. Claimant's theory is based entirely on the erroneous 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." (Pet. pp. 9-11). 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). Thus, Claimant's assertions that the Director indirectly communicated with the Carrier via the Attorney General's office are both inaccurate and unsupported. Claimant's hyperbole and insinuations of sinister motive on the part of Mr. Smith are likewise unsupported and uncalled for.[6]

Contrary to Claimant's bald assertion that Mr. Smith's letter "was designed to make an end run around an act explicitly prohibited" by statute and that "[t]his point was specifically acknowledged by the Appellate Panel at oral argument," (Pet. p.10), no such acknowledgment was made. Instead, the referenced passage reads as follows:

> **Mr. Samuels:** You know, again, we're not saying that anybody was deliberately trying to do any harm to anybody, other than, of course, Steve McGowan. But

[6] Such baseless allegations attacking the motives of the Director of the Commission's Compliance Division should be carefully weighed before impugning the good faith of the Commission and its various Divisions.

that procedure that the Commission had – and I understand it's been followed in other cases and ... I believe – I don't know this for a fact, but I believe that procedure has been changed.

Commissioner Beck: It has, but it's still a nonparty facilitating this whole loop.

(R. 241, lines 16-25).

The Attorney General's July 20 communication with the Carrier does not constitute an *ex parte* communication because, as noted above, the Attorney General's office is not the judicial body determining Claimant's claim. Claimant offers no support for her allegations of overreach by the Attorney General's office, (Pet. pp. 10-11),[7] which should be dismissed.

Appellant mistakenly asserts that the Court of Appeals erred by referencing S.C. Code Ann. § 38-55-580. Although the Court of Appeals may have inadvertently cited to subsection (D) of this statute, it is undeniable that S.C. Code Ann. § 38-55-580(A) applies to the Commission. Thus, to the extent this reference was in error, it is harmless error and of no consequence. Eadie v. H.A. Sack Co., 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996) (error is harmless where it has no prejudicial effect).

Section 1-23-360 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. 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, or potential witness. Although Claimant argued below and implies to this Court that Mr. Smith was part of the adjudicative arm of the Commission, she is incorrect. The Commission has an "administrative" department and a

[7] There simply is no evidence that the Attorney General's office turned the investigation over to the Carrier rather than to SLED.

"judicial" department. *See* S.C. Code Ann. §§ 42-1-90, 42-3-10.[8] The Compliance Division is part of the administrative department of the Commission, not the judicial department. S.C. Code Ann. § 42-3-90. The head of the Commission's Compliance Division is neither a Hearing Commissioner, nor is he part of the Commission's adjudicative branch. (R. 235, lines 16-19) (R. 237, lines 12-14) (R. 239, lines 4-6) (R. 245, line 22 – 246, line 1).

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. 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).

Claimant's due process rights and entitlement to a fair tribunal have not been violated. In Withrow v. Larkin, 421 U.S. 35 (1975), the United States Supreme Court 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. In fact, the United States Supreme Court explained that:

[8] 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.

> The mere exposure to evidence presented in nonadvesary 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; *see also* Garris v. Governing Bd. of S.C. Reins. Fac., 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998) (explaining 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"). The quote Claimant lifts 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."

Furthermore, even if Claimant could prove an *ex parte* contact took place, which she cannot, she has not demonstrated any prejudice resulting from the alleged *ex parte* communication. Without citing any South Carolina authority whatsoever, Claimant assumes and asserts that she is entitled to a "presumption of prejudice" that needs to be "overcome." (Pet. p. 12). However, this Court "has refused to adopt a per se rule automatically reversing rulings which result from ex parte communications." Ross, 328 S.C. at 73, 492 S.E.2d at 74; *see also* Burgess v. Stern, 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993) (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").[9]

[9] The quote lifted from Burgess on which Claimant relies, (Pet. p. 14), was this Court's explanation of the importance of maintaining the "appearance of propriety," and does not constitute this Court's ruling on a

Claimant's reliance on Georgia case law, Hargis v. State, 735 S.E.2d 91 (Ga. Ct. App. 2012),[10] In re D.D., 713 S.E.2d 440 (Ga. Ct. App. 2011), and Arnau v. Arnau, 429 S.E.2d 116 (Ga. Ct. App. 1993), is misplaced. Furthermore, in each of these cases, the protestant proved an *ex parte* contact between the decision-maker and a witness or counsel, which Claimant has not and cannot prove here.

In Burgess, this Court found no prejudice where the factual findings were supported by the record. 311 S.C. at 331, 428 S.E.2d at 884. Conversely, in Ellis v. Procter & Gamble Distr. Co., 315 S.C. 283, 433 S.E.2d 856 (1993), this Court found evidence of judicial prejudice where the trial judge's "factual findings [were] not supported by the record." 315 S.C. at 285, 433 S.E.2d at 857. In this case, even if Claimant had somehow proven an *ex parte* contact had occurred, which Respondents deny, she cannot meet her burden of proving it was prejudicial.[11] As is discussed in detail below, both the Commission's credibility determination and disability rating are supported by substantial, even overwhelming evidence.

In the end, there is no "tension" that this Court must resolve. Neither the Commission nor the Court of Appeals bought into Claimant's attempt to blur the distinction between the Commission's adjudicative division and its Compliance Division, or to characterize communications between state agencies as surreptitious *ex parte* communications. Neither

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presumption of prejudice. Instead, as noted, this Court refused to adopt a per se ruling.

[10] Respondents note that the Georgia Court of Appeals' decision in Hargis was overturned on preservation grounds. In addition, although not condoning the *ex parte* communication, the Georgia Supreme Court found significant the fact "that Hargis failed to adduce any evidence in the trial court that the trial judge considered the ex parte communication in any way or that he otherwise was prejudiced by it." State v. Hargis, 756 S.E.2d 529, 535 n.11 (Ga. 2014).

[11] South Carolina Dept. of Social Servs. v. Lisa C, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008), cited by Claimant does not advance her case. Lisa C is a child sexual abuse case where the Court of Appeals was asked to evaluate the admissibility of certain out of court statements made by a minor child pursuant to S.C. Code Ann. § 19-1-180. Up front, the Court of Appeals emphasized that "this case involves the interpretation of a very specific statute dealing with the introduction of a child's hearsay statements in the context of a DSS intervention action. Any conclusions should be strictly ascribed to the application of this statute and should not be extrapolated with respect to the admission or exclusion of hearsay statements in the criminal context." 380 S.C. at 409 n.1, 669 S.E.2d at 649 n.1.

should this Court. Claimant's attempts to fabricate a definition of *ex parte* communication fit to the facts of this case and/or distort the facts of this case to fit the accepted definition of *ex parte* communication ultimately fail. As a result, there simply is no reason for this Court to grant her Petition for review of the Court of Appeals' Opinion on this issue.

II. The Commission's credibility determination was proper.

First, this issue may not be ripe for this Court's review. The Court of Appeals remanded this matter to the Commission "for a redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony." Fore v. Griffco, 762 S.E.2d at 44, 2014 S.C. App. LEXIS 163 **21. Claimant argued below that Mr. Owens's testimony was necessary in order to buttress her claims of disability and how she worked for him for "free." *See, e.g.*, (R. 213, line 22 – 214, line 22 (arguing to the Appellate Panel that their excluded "rebuttal" witness should have been allowed to testify to counter the "taint" that the July 18 Letter created regarding her credibility and her disability rating)) (R. 217, line 25 – 218, line 24 (arguing that Mr. Owens's testimony could have addressed questions regarding Claimant's credibility)) (R. 223, line 24 – 224, line 8 (same)) (App. Brief, p. 37) (App. Reply Br., p. 25). Thus, to extent the Commission revisits its credibility determination on remand, which Respondents do not concede has been remanded, this issue is not ripe for this Court's review. Bone v. U.S. Food Serv., 399 S.C. 566, 576-77, 733 S.E.2d 200, 205 (2012).

In addition, Claimant takes issue with the Court of Appeals' acceptance of the Commission's unequivocal statement that it did not rely on the Letter from the Commission to the Attorney General in making its finding that Claimant was not credible. Essentially, Claimant is implying that the Commission's statement cannot be believed. "The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single

commissioner's findings of fact." Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). "The findings of an administrative agency are **presumed correct** and will be set aside only if unsupported by substantial evidence." Hall, 371 S.C. 69, 79, 636 S.E.2d 876, 882 (emphasis added).

The Commission specifically stated that it did not consider the July 18 Letter. Despite Claimant's disparagement of the Commission's statement, (Pet. pp. 12-13), Hearing Commissioners are considered to be individuals of integrity. Kizer v. Dorchester County Voc. Ed. Bd. of Trustees, 287 S.C. 545, 552, 340 S.E.2d 144, 148 (1986), *citing* Withrow, 421 U.S. at 47, 55. Thus, the presumption is that the Commission's statement regarding the July 18 Letter is true and correct, notwithstanding Claimant's unsupported allegations that she was not afforded a fair hearing.

Here, the record is replete with evidence that supports the Commission's credibility determination.[12] For example, 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 her 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 admitted that she worked for ABC Bail Bonds from late August 2010 until late January 2011. 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

[12] To the extent Claimant argues that there is evidence in the record that supports her version of events, it is of no import, since it is the Commission's role to resolve conflicting evidence. Anderson, 343 S.C. at 492-93, 541 S.E2d at 528.

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.

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 the amount of hours that she reported to Mr. Adams.

In addition, 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 the intense pain she claims she was suffering from the ABC Bail Bonds job, she immediately started working for A-1 Bail Bonds and volunteered to perform the exact same work she had been **paid** for, now 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 placed 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).[13] Nonetheless, she now claims that she was just trying to help a friend with a failing

[13] Claimant claimed below that she spent a lot of time on Facebook playing games in order to pass the hours. If that was the case, she admittedly visited her Facebook page frequently, which would have given her ample and repeated opportunities to correct her claim to be "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).

business and back problems, even though she herself allegedly is truly 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) (R. 385).

The Commission specifically recited the substantial evidence on which it relied to reach its conclusion that Claimant was not credible. *See* Findings of Fact Nos. 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, and 19. (Commission Decision, R. 37-39). This certainly constitutes substantial and even abundant evidence that Claimant's testimony was not credible. Thus, even if the "bell" had been "rung," as Claimant alleges, the overwhelming evidence of Claimant's lack of veracity and the Commission's statement that it did not consider the July 18 Letter negate her arguments that she should be given the opportunity to retry her case and hope for a better outcome the second time around.

Claimant mistakenly asserts that Respondents used the information contained in the Attorney General's July 20, 2011 letter "to surreptitiously manufacture a 'character' defense with bogus allegations of 'a fraud investigation ongoing by the A.G.'s office in this claim' as its lynchpin." (Pet. p. 9). Quite frankly, Respondents did not need to "manufacture" anything. As noted above, Claimant was impeached by her own testimony and by videotaped evidence of her

performing the very work and movements she claimed to not be able to perform. Furthermore, insurance fraud was **not** an allegation in this case.[14] 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 otherwise, the fraud investigation did not form even a minor, let alone a significant or "lynchpin" part of Respondents' attack on Claimant's credibility. Instead, Claimant demonstrated her own character through her repeated attempts to hide the truth. She was impeached by her own testimony and videotape evidence that directly conflicted with her claims of disability.

Finally, Claimant's argument that the remand for consideration of her disability without a redetermination of her credibility "is insufficient to cure the prejudice," (Pet. p. 14), is also misplaced. First, as noted above, the Commission did not rely on the July 18 Letter in making its credibility determination. Thus, any prejudice engendered by the Hearing Commissioner's inclusion of the July 18 Letter and consideration of it along with all of the other evidence was cured when this case was reviewed by the Commission which, as noted, specifically did not rely on the July 18 Letter. *See* Ross, 328 S.C. at 67, 492 S.E.2d at 71 (any lack of opportunity to respond or failure to provide all procedural safeguards during initial hearing may be cured by providing later procedural remedy). Second, even if the July 18 Letter constitutes inadmissible hearsay, there was abundant and overwhelming evidence in the record of her lack of credibility. Finally, even if Claimant had proven she was denied due process below,[15] which Respondents

[14] Contrary to Claimant's protestations otherwise, (Pet. p. 12 n.2), at the time Respondents' counsel submitted the July 18 Letter to the Hearing Commissioner in 2001, it was Respondents' understanding that the Attorney General's office was conducting a fraud investigation. There is no inconsistency between that statement and Respondents' consistent position that this case does not involve or depend in any way on allegations of insurance fraud.

[15] To the extent Claimant continues to assert that she was treated unfairly or denied due process because her

deny, the alleged procedural shortcomings will be resolved when the Commission reviews this case with the July 18 Letter removed and with "full consideration ... given to Owens's testimony," pursuant to the Court of Appeals' remand. Fore v. Griffco, 762 S.E.2d at 44, 2014 S.C. App. LEXIS 163 **21. Claimant's bare assertions that this process is not adequate are insufficient to warrant this Court's review of what is a fact-based credibility determination.

Claimant has raised no legitimate reason why this Court should review the Commission's credibility determination.

III. There is no reason for this Court to order a new trial to determine Claimant's disability award.

First, to the extent Claimant is challenging the substance of the Commission's disability award, her appeal of that issue is not ripe for appeal. The Court of Appeals remanded this matter to the Commission "for a redetermination of Fore's benefits with the directive that full consideration be given to Owens's testimony." Fore v. Griffco, 762 S.E.2d at 44, 2014 S.C. App. LEXIS 163 **21. As noted previously, Claimant argued below that Mr. Owens's testimony was necessary in order to buttress her claims of disability and how she worked for him for "free." *See* (R. 213, line 22 – 214, line 22 (arguing to the Appellate Panel that their excluded "rebuttal" witness should have been allowed to testify to counter the "taint" that the July 18 Letter created regarding her credibility and her disability rating)) (R. 217, line 25 – 218, line 24 (arguing that Mr. Owens's testimony could have addressed questions regarding Claimant's credibility)) (R. 221, line 12 – 222, line 7 (arguing that the proffered testimony of Tony Owens

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lead counsel was unavailable to make her direct argument on appeal to the Full Commission, (Pet. pp. 7-8), this argument is unavailing. She had competent counsel present who made her direct argument to the Commission. In addition, her lead counsel, Mr. Samuels, who arrived in the courtroom before Respondents' counsel began argument, (R. 221, line 25), 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.

should have been allowed in order to address the issue of Claimant's disability)) (R. 223, line 24 – 224, line 8 (same)) (App. Br. p. 37) (App. Reply Br. p. 25). Thus, until the Commission renders a decision concerning Claimant's disability after consideration of Mr. Owens's testimony, this issue is not ripe for this Court's review. Bone, 399 S.C. at 576-77, 733 S.E.2d at 205.

Furthermore, the Commission's finding that Claimant "can work" does not constitute an error of law precisely because Claimant admitted twice under oath that she could work:

> Q: Okay. Now would you admit that you are capable of working now?
>
> A: 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, yeah.

(R. 144, lines 1-5).

> Q: But on an intermittent basis, you feel that you are capable of performing a job such as bail bonding?
>
> A: If I don't have to get up and down so much or if I have to climb in and out of bed.

(R. 145, line 23 – 146, line 1). In addition, despite claiming she could not "bend down and come off the floor with something and use that lower back to bring that weight up," (R. 144, lines 14-16), 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). Surveillance footage of the Claimant reveals Claimant conducting bail bond business. (R. 385). Additional surveillance footage shows Claimant driving a vehicle reading "A-1 Bail Bonds" to Lee County Magistrate Court on September 7, 2011 while conducting business. (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) (R. 144, line 17 –

145, line 25). Claimant's Facebook page from September 19, 2011 proclaims that she is "Self Employed and Loving It!" She lists herself as a professional bondsman and states: "bond you out of jail if you need me call me." (R. 126, lines 11-24) (R. 393).

The fact that the Commission did not believe Claimant's fairly unbelievable version of events does not mean its Decision is "tainted" by either the alleged *ex parte* communication or the presence of the July 18 Letter in the file, as Claimant argues. In fact, the only evidence she pointed to below that supported her claim of total disability was based on admittedly false information. Specifically, the statements in Dr. Wolgin's and Mr. Adams' reports regarding Claimant's ability to work simply are not probative, since they are based on misinformation fed to them by Claimant.

Claimant suggests she deserves "accolades" for trying (but failing) to work after her surgery. (Pet. p. 15). 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. Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935), relied on by Claimant for this point, is inapplicable, because that case 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 before the Hearing Commissioner.

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 Hearing Commissioner in Hutson 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. This Court held 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. Here, by way of contrast, the Commission Decision is supported by Claimant's own admission that she can work. (R. 144, lines 1-5) (R. 145, line 23 – 146, line 1).

The record in this case demonstrates that Claimant 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 that, not only was she capable or working, she actually was working during this time. (R. 168, line 15 – 169, line 6).

This Court should uphold the Commission's determination that Claimant could work. The evidence in this case, including Claimant's own admission that she could work,

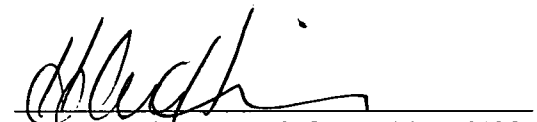
overwhelmingly supports that conclusion and rebuts her assertion that her case warrants this Court's review.

CONCLUSION

For all the reasons stated herein,[16] including that there has been no *ex parte* contact in this case, that Claimant has not been deprived of any due process rights, that the Commission did not commit an error of law in determining she was able to work, and that certain issues are not ripe for further appellate review, this Court should deny her Petition in its entirety.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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October 29, 2014

[16] Claimant asserts her Petition should be granted for the reasons set forth in her Briefs and Petition for Rehearing before the Court of Appeals. To the extent this Court considers Claimant's Briefs and Petition for Rehearing in determining whether to grant or deny her Petition, Respondents also refer this Court to their Final Brief of Respondents and Respondents' Return to Appellant's Petition for Rehearing.

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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

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

Patricia Fore, Employee,..... Petitioner,

v.

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

PROOF OF SERVICE

I certify that on the 29th day of October 2014, I served the **Respondents' Return in Opposition to Petition for a Writ of Certiorari** on Patricia Fore by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record:

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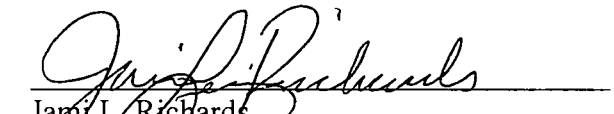

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