THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

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

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S.C. Supreme Court

Patricia Fore, Employee, ... Petitioner

v.

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

BRIEF OF PETITIONER

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2. Whether the Court of Appeals erred in holding there was no presumption of prejudice nor prejudice in fact when "because of the nature of the communication, [Petitioner] was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working."

3. Whether the Commission erred in denying Petitioner's motion for recusal, and this Court's determination of the appropriate procedural remedy should a motion to recuse be granted.

4. Whether the Court of Appeals erred in affirming the Commission's credibility finding and failing to order a trial de novo when the findings were influenced by the improper communication and the inclusion of the Smith letter in the record.

5. Whether the Appellate Panel applied an incorrect standard for determining permanent and total disability, to wit "I believe she can work," such that either Fore should be found permanently and totally disabled as a matter of law or a new trial de novo should be granted.

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 Petitioner on September 12, 2011. [R. pages 51-56].

Respondents served their Form 58 (Pre-hearing Brief) and Notice of Witnesses on Petitioner on September 19, 2011. [R. pages 57-60]. It was received on September 20, 2011, by Petitioner'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. Petitioner 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, Petitioner 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 Petitioner's argument. Mr. Samuels argued the Reply, but was handicapped by the inability to hear or participate in the initial appellant's argument.

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

Fore timely filed her Notice of Appeal in the South Carolina Court of Appeals. The court issued its opinion on June 20, 2014. The court remanded "to the Commission for a redetermination of Fore's benefits with the directive that full consideration be given to [Tony] Owens's testimony." The court further held the Smith letter did not constitute *ex parte* communication. Additionally, the court held Fore suffered no prejudice from the admission of the Smith letter because the Appellate Panel added factual findings that the Smith letter had not been relied on by the panel in affirming the Single Commissioner's credibility finding. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014).

Fore's Petition for Rehearing was denied by the Court of Appeals on August 25, 2014.

This Court granted Fore's Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

Petitioner, Patricia Fore, 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 Andrea 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. Although Dr. Wolgin recommended a revision, Fore was unwilling to under go additional surgery as there was only a 50% chance of improvement. [R. page 327].

In late August 2010, Dr. Wolgin advised Fore to attempt to go back to work on sedentary duty. This was also discussed with the Carrier's nurse case manager. [R. page 308]. Following her doctor's advice, Fore went to work part time as a clerk for ABC Bail Bonds in late August 2010. She averaged about 12 hours per week. She tried 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

placed 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 Fore. 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 trained 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 untrue as he admitted to not paying payroll taxes on Fore's earnings.[2] R. page 176, lines 5-17].

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

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

[2]Fore 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.

[3]Fore 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.

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] 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].

A vocational expert, Glen Adams, performed a vocational assessment on Fore on September

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[4]The 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]. The Court of Appeals reversed this ruling, holding Owens' testimony must be considered on remand. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014)

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, arising instead 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. At oral argument, the members of the Appellate Panel appeared to be offended by the suggestion of improper *ex parte* communication on the part of the Commission – 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.[5]

Regarding these issues, the Court of Appeals held:

Fore has not established that any *ex parte* communication occurred between

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[5]Petitioner 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 Respondents' argument – after his co-counsel had made the Petitioner'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).

> Respondents and the Commission. Furthermore, because Fore's assertion of *ex parte* communication is the only ground she advanced to support her argument that the Commission should have recused itself from hearing her claim, we need not address her argument that an independent hearing officer not currently affiliated with the Commission should have been appointed to decide this matter. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014).

Petitioner respectfully submits that by using the narrowest possible definition, the Court of Appeals overlooked the historical and practical reality that prejudicial *ex parte* communication is not limited to communication between a lawyer and a judge. The Court of Appeals further found that even if there had been *ex parte* communication, Petitioner failed to prove prejudice. Respectfully, both holdings are erroneous and should be reversed. A new trial before an impartial tribunal should be granted.

A. The Commission is prohibited from engaging in *ex parte* communication.

The Court of Appeals held there was no *ex parte* communication in the instant case, relying on a narrow definition of *ex parte* communication as "prohibited communication between counsel and the court when opposing counsel is not present." Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014). This same language was quoted by the South Carolina Supreme Court in a footnote in Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003) (*quoting* Black's Law Dictionary 597 (7th Ed. 1999)).

Ex parte communication by the court with law enforcement, family members, jurors, parties and potential witnesses is equally improper – and considered equally prejudicial. See In re Newberry County Magistrate English, 625 S.E.2d 919, 367 S.C. 297 (2006)(violation of Canon 3B(7) in traffic ticket case where magistrate committed "judicial misconduct to have had an *ex parte* communication with the charging trooper and to even suggest the trooper 'help' the employee"); In

re Beckham, 620 S.E.2d 69, 365 S.C. 637 (2005)(judicial misconduct for magistrate to convey message from defendant's family member to law enforcement about pending case); Cf. Brown v. Bi-Lo, Inc. (barring "'*ex parte*' methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider.").

"[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.[6] 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.

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[6]The 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).

S.C. Code Ann. § 1-23-360 (1985).

Both the Canons of Judicial Conduct and the Administrative Procedures Act were violated by the Commission.[7]

B. The Smith letter constituted *ex parte* communication.

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]. Regarding Director Smith's indirect communication with Respondents, the Court of Appeals held:

> Furthermore, contrary to Fore's version of the facts, Smith *merely suggested* that the carrier be made aware of McGowan's allegation and did not instruct the Attorney General to convey this information to Chartis. Finally, in making the suggestion, Smith was advising the Attorney General's Office of a course of action that it had a right to follow and *never expressed a desire that the Attorney General take any action* on the Commission's behalf.

Fore at 90, 97 (emphasis added).

The fact remains that a Director of the Commission received an *ex parte* communication with a potential witness in this case. The Director than took *affirmative steps* to ensure that the identity of that witness and the substance of his allegations were conveyed *solely* to the Respondents. Respondents then used that information to surreptitiously manufacture a "character" defense with bogus allegations of "a fraud investigation ongoing by the A.G.'s office in this claim" as its lynchpin.

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[7]Petitioner wishes to emphasize that there is no suggestion that the Commissioners or any other employees or officers of the Commission deliberately violated the Judicial Canons. The Commission was compelled to create a mechanism to comply with the legislative mandate of 42-9-440 and § 38-55-510 et seq. Unfortunately, the procedure conflicted with the prohibitions on *ex parte* communication.

Respectfully, Smith's letter explicitly conveys the intent and expectation that his letter be forwarded to the Carrier. Smith wrote:

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

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

The next sentence is equally telling: "I haven't attached a copy of the claim file since the carrier would have all of that." [R. P. 382]. In so stating, Smith must have known the AG would not conduct any sort of investigation nor turn the file over to SLED. He didn't need to send the file because the purpose of the letter was to communicate with Respondents.

It would be patently improper for a judge or a member of the judge's staff to do what was done here by the Commission. Rule 501, Canon 3B(7), SCACR (provision be made "promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond."). Similarly, it would be equally improper for a clerk of court or a member of the clerk's staff to receive communication from a witness and forward it *ex parte* to one of the parties to a pending case.

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

The distinction Respondents wish to draw between the judicial and administrative departments of the Commission is meaningless.[8] The statute specifically prohibits *ex parte* communication by "***members or employees*** of an ***agency assigned to render a decision*** . . ." (emphasis added)). S.C. Code Ann. § 1-23-360 (2007). It applies to *all* employees of the "agency assigned to render a decision," not the particular member or employee who actually hears the case. Under Respondents' theory, only a commissioner (or judge) is prohibited from communicating *ex parte* with parties and witnesses. A clerk, secretary, bailiff, court reporter or other administrative employee could freely to communicate *ex parte* with anyone for any purpose – up to and including sending statements from material witnesses to litigants. 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."). This absurd result would defeat the

[8]The very reason the Single Commissioner admitted the Smith Letter into the record of the hearing was because it was *already part of the Commission's file.* As such, even though the letter was written by a Director of the Coverage and Compliance Division – nominally part of the administrative department – it was available to the Commissioner to consider in adjudicating the case.

entire principle prohibiting *ex parte* communication.

As the Nevada Supreme Court noted, "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)(emphasis added)(*ex parte* communication with witnesses warranted removal of judge from office).

After holding the Smith letter did not constitute *ex parte* communication, the Court of Appeals then cites to the statute providing immunity to designated employees of *insurance companies* who share information with other insurance companies. See S.C. Code Ann. § 38-55-580(D)(2005). This section is not applicable, as the *ex parte* communication was conveyed from the Commission to the Attorney General to the insurer. As Smith himself observed, the Workers' Compensation Commission has no authority to "alert the carrier to the alleged fraud." [R. page 381-383]. However, not only does the Commission lack such authority, neither does the Attorney General. The Attorney General "is empowered to . . . refer the matter for investigation to the State Law Enforcement Division who shall investigate thoroughly all claims or allegations . . ." S.C. Code Ann. § 38-55-560 (2007). The Attorney General is not allowed to delegate SLED's investigative powers to a private party. See S.C. Code Ann. § 38-55-520 (2007)("The purpose of this article is to . . . require the investigation of alleged insurance fraud by State Law Enforcement Division.").

Turning over communication received from a potential witness in a pending case to an insurance company "so it can conduct an investigation" is improper. The right of the parties to a fair trial before an impartial tribunal is paramount. Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997)("Partiality exists where, among others, an adjudicator has *ex parte* information as a result of prior investigation or has developed, by prior involvement in the case, a 'will to win.'"). No state agency should inject the weight of state authority into a private civil matter without explicit statutory authority. Cf. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013)(Attorney General's "influence over [dispute involving individual's] estate has exceeded the statutory authority allowed in such matters.").

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

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

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

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

C. The *ex parte* communication was prejudicial to Fore.

Regarding admission of the Smith letter, the Court of Appeals held:

> We also agree with Fore that this letter was hearsay evidence of an as-yet unproven allegation that she had committed insurance fraud. Furthermore, without a final determination of the truth of this allegation, we hold the prejudice to Fore from admitting the letter exceeded any probative value to be gained from its inclusion in the record.

Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37, 43 (Ct. App. 2014).

The court then went on to hold that, despite the admission of the letter, "Fore did not show prejudice from the single commissioner's refusal to remove Smith's letter from the record . . ." Id. at 44. Respectfully, this was error. Not only was the *ex parte* communication improper, Petitioner met her burden of showing prejudice – with or without a presumption of *ex parte* communication being inherently prejudicial.[9] Respondents *entire case* turned on creating prejudice against Patricia Fore – prejudice sufficiently damaging to undermine her credibility to the point that the overwhelming material evidence of her disability could be disregarded. In short, it turned on Respondents ability to introduce "evidence of an ongoing fraud investigation."[10] Id.

The Single Commissioner's ruling is prejudicial in two aspects. First, his agreement with Respondents' counsel that an ongoing fraud investigation is admissible – and therefore probative –

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[9]The uncertainty surrounding whether *ex parte* communication creates a presumption of prejudice, along with how the prejudice can be remedied, demonstrate the importance of this case.

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

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 *all* 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.

The remedy proposed by the Court of Appeals is inadequate. The court ordered such letters "segregated from the publicly available portions of the file." Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37, 43 (Ct. App. 2014). The problem here is that such *ex parte* letters will still be sent out to insurance carriers via the Attorney General's office. Insurance carriers will still be given an unfair advantage in discovery. See Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)("The entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.'"). And, the commissioners will still be able to rely on such letters unbeknownst to the opposing party, because the letters will

still be "in the Commission file." A better remedy would be to simply prohibit such *ex parte* communication. If the Commission turns a case over to the Attorney General for a fraud investigation, then it should do so openly and on the record. Secret communication has no place in our judicial system.

There are no other 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. This 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 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 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 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 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 (C.A.D.C. 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 benefitted 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.

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.

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. See S.C. Code Ann. § 38-55-560 (B) (2007)(providing authority for SLED to investigate allegations of fraud and for attorney general to prosecute violations). Cf. Rule 501, Canon 3B(7), SCACR ("Commentary: A judge must not independently investigate facts in a case and must consider only the evidence presented.") 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 of the Commission's procedures is not something taken lightly. However, the right of the parties to a fair trial is paramount. As this Court has 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).

The result in this case was palpably 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 Single 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 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). Cf. 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. A new trial should be ordered because the Appellate Panel's findings on credibility were affected by the same error of law made by the Single Commissioner.

The Court of Appeals held admission of the Smith letter by the Single Commissioner was error. However, the court held the Appellate Panel did not commit the same error – even though the panel affirmed the admission into evidence of the Smith letter. The court relied on the panel's statement that it "does not rely on any information contained in the letter from the Commission to the Attorney General." Id.

At trial, 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."[11] [R.

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[11]Evidence 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. 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

page 98, line 24-page 99, line 4].

The Single 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 Appellate Panel affirmed this ruling.

Respectfully, this bell cannot be unrung. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012)(violation of due process curable only by new trial where Commission used a "hybrid manner" to reconstruct testimony after court reporter's recoding equipment malfunctioned); see also Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (1997)(remanding for taking of additional evidence when 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). The Appellate Panel made findings identical to those of the Single Commission on the same basis: "I did not find her a credible witness and believe she can work." [R. page 39, Finding of Fact 21]. This finding demonstrates just how central 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 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); 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

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152 (2006)(reversing verdict where court improperly admitted evidence of prior convictions).

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."[12] In re D.D., 713 S.E.2d 440 (Ga. App. 2011)(emphasis added). Cf. Cousins v. Macedonia Baptist Church, 662 S.E.2d 533 (Ga. 2008)("in initiating out-of-court contacts with the involved banks and other witnesses, on whose various hearsay statements he apparently relied in making his findings, the judge also failed to heed this Court's admonition that 'judges must scrupulously avoid ex parte communications.'").

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

> The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" *ex parte*

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[12]In 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), *reversed on other grounds*, State v. Hargis, 756 S.E.2d 529, 535 n.11 (Ga. 2014). See, also Arnau v. Arnau, 429 S.E.2d 116 (Ga. App. 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 Georgia Supreme Court reversed Hargis on issue preservation grounds, specifically finding the defendant failed to move for recusal immediately upon learning of the *ex parte* communication. In the instant case, Petitioner moved for recusal at the beginning of the hearing before any evidence was presented. [R. page 96, line 23-page 97, line 10]. As such, this case is ripe for determination on the merits by this Court.

communications, but against *ex parte* communications. Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

A remand for disability to be redecided on the same record (even excluding the Smith letter and adding Tony Owen's testimony) with all other findings in place is insufficient to cure the prejudice. As the Court of Appeals noted, "because of the nature of the communication, Fore was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working." Fore v. Griffco of Wampee, Inc.,409 S.C. 360, 762 S.E.2d 37, 43 (Ct. App. 2014). In effect, it endorses an unwarranted credibility finding tainted by the false allegations of insurance fraud. Therefore, Petitioner requests that the Appellate Panel's Decision and Order be vacated in its entirety, with the case remanded for a *de novo* hearing before an impartial trier of fact.

3. 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.

Regarding this ruling, the Court of Appeals stated:

> We acknowledge there may have been substantial evidence to support a finding that Fore was capable of working and suffered only a partial disability; however, Fore's testimony about her condition, the work restrictions imposed by Dr. Wolgin, and the vocational assessment prepared by Glen Adams would have been substantial evidence supporting a different finding. Fore's credibility, then, was an important factor, and the single commissioner expressly found Fore was not a credible witness.

Fore v. Griffco of Wampee, Inc.,409 S.C. 360, 762 S.E.2d 37, 43 (Ct. App. 2014)

There is no substantial evidence Fore "was capable of working and suffered only a partial disability." Respondents presented neither medical nor vocational evidence that Fore could work after her failed work attempt with Steve McGowan, nor what her earnings would be even if she could work. See McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986)(holding that an administrative decision is not supported by substantial evidence where the ALJ acknowledges only the evidence favorable to the decision and disregards contrary evidence). The only way Respondents could disprove Fore's positive evidence of disability without evidence of their own was by attacking her credibility with "evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim."[13] [R. page 98, line 24-page 99, line 4]. Merely showing that she had tried and failed to work as a bail bondsman for a few months, later helped out a friend by doing some bonds while training a replacement bail bondsman, and had shopped at Wal-Mart would not be enough. It had to be something ugly enough to turn the trier of fact irrevocably against her at a personal emotional level. A supposed insurance fraud investigation with the imprimatur of the Commission itself and the Attorney General fit the bill – despite being patently inadmissible in any tribunal.

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

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[13]Fore 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.*

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 an 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. 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).

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]. Considering that 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. See Freeman v. Schweiker, 681 F.2d 727 (11th Cir. 1982)("we are convinced that the ALJ improperly substituted his judgment of the claimant's condition for that of the medical and vocational experts [when he]engaged in what has been condemned as 'sit and squirm' jurisprudence."); Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding); 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). Cf. Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."). 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 Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500, 504 (2012)(error for commission to rely on an employee's goals and aspirations of returning to the workforce over concrete evidence of disability because it "would punish an employee for merely exploring the chance of overcoming an unanticipated injury by exploring other possible career options."); 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 confirms 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.

This 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. 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 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.[14] 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

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[14]The 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.

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. 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.[15] [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 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 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.

4. Fore is entitled to lifetime medical treatment.

As to additional medical treatment, the Commission 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. 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

[15]Even 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.

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.

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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ATTORNEYS FOR PETITIONER

Columbia, South Carolina
March 15, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

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

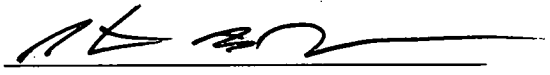
Patricia Fore, Employee ..... Petitioner,

v.

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

CERTIFICATE OF COUNSEL

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



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Columbia, South Carolina
March 15, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Lower Court Case No. 0810152
Appellate Case No. 2014-002039

Patricia Fore, Employee, ... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I, Katherine Carter, the undersigned paralegal to Stephen B. Samuels have caused a copy of the **BRIEF OF PETITIONER**, to be served, via first class mail and addressed to the attorneys for Respondents as indicated below:

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Katherine Carter

March 16, 2015

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
ATTORNEY AT LAW

March 16, 2015

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
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RE: Patricia Fore v. Griffco of Wampee, Inc. And Chartis Claims, Inc.
Appellate Case No.: 2014-002039

Dear Mr. Shearouse:

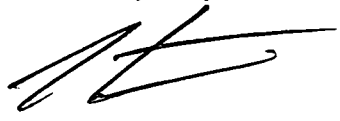
Enclosed for filing please find the original and fifteen (15) copies of our **Brief of Petitioner** in the above-referenced appeal. We have also enclosed thirteen (13) additional copies of the **Appendix**. Please date stamp the extra copies of the Brief for our file and return it to our courier.

By copy of this letter and enclosure to Weston Adams and Helen Hiser, we are serving a copy of our **Brief of Petitioner** upon counsel for the Respondents as indicated by the attached Proof of Service.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration.

With kindest regards, I am

Yours very truly,



Stephen B. Samuels

SBS/krc
Enclosure(s)

cc: Weston Adams, III, Esquire
Helen F. Hiser, Esquire
Peter P. Leventis, Esquire