

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.

RESPONDENTS' BRIEF

MCANGUS GOUDELOCK & COURIE, LLC
Weston Adams, III
James H. Lichty
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, SC 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

*Attorneys for Respondents Griffco of Wampee, Inc.
and Chartis Claims, Inc.*

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION CORRECTLY DETERMINED THERE WAS NO *EX PARTE* COMMUNICATION IN THIS CASE?
- II. WHETHER THE COMMISSION'S CREDIBILITY DETERMINATION WAS PROPER?
- III. WHETHER THE COMMISSION'S AWARD IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE IS ANY REASON FOR THIS COURT TO ORDER A NEW TRIAL TO DETERMINE CLAIMANT'S DISABILITY AWARD?
- IV. WHETHER PETITIONER'S FOURTH ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, IS MERITLESS?

STATEMENT OF THE CASE¹

Petitioner Patricia Fore (“Claimant”) 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”). Respondents provided medical treatment and compensation.

Claimant’s treating physician found she was at Maximum Medical Improvement (“MMI”) on February 14, 2011. He assigned her a 36 whole-person impairment rating. (R. 327).

On June 27, 2011, 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 is permanently and totally disabled. (R. 50).

The hearing was set for September 27, 2011. Claimant filed her Form 58 Pre-Hearing Brief with the Commission on September 12, 2011. (R. 51-56). Respondents filed their Form 58 Pre-Hearing Brief, along with numbered exhibits, with the Commission on September 19, 2011.

¹ Respondents note that, in her Statement of the Case, Claimant raises a number of contested issues and arguments, in violation of Rule 208(b)(1)(C), SCACR (the statement of the case “shall not contain contested matters ...”). For example, Claimant asserts that the “case was marred with the surprise revelation that the Director of the Commission’s Compliance Division had received communication from a material witness,” and refers to certain communications as *ex parte*. (Pet. Br. p. 3). These are issues directly in dispute and should be stricken from her Statement of the Case and/or, at a minimum, disregarded by this Court.

(R. 57-60). Some time thereafter,² Claimant filed an Amended Form 58 Pre-Hearing Brief, naming Tony Owens as a witness for the first time. (R. 61-64).

The case was heard by Hearing Commissioner G. Bryan Lyndon on September 27, 2011. At the hearing, Claimant objected to Respondents' APA 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, Director of the Compliance Division of the Commission, to the Attorney General's Insurance Fraud Division ("Smith Letter"). The Hearing Commissioner excluded the July 20, 2011 letter but included the Smith 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; however, his testimony was proffered outside of the presence of the Hearing Commissioner. (R. 154, line 3 – 156, line 22).

Noting various discrepancies in her testimony, surveillance evidence, her Facebook page, and the testimony of other witnesses, the Hearing Commissioner found Claimant lacked credibility and that she had, in fact, been working. Nonetheless, he awarded her 40% Permanent Partial Disability to her back pursuant to S.C. Code Ann. § 42-90-30. Respondents were awarded a credit for wages paid to Claimant during the disability period and a credit for temporary total disability benefits paid after she had reached MMI. The only medical treatment awarded was lifetime replacement of hardware. (R. 26-29). (Hearing Commissioner Decision and Order, January 18, 2012, R. 27-28).

² Although Claimant asserts she filed and served her amended Form 58 Pre-Hearing Brief on September 12, 2011, (Pet. Br. pp. 2-3), that is the date she filed her original Form 58 Pre-Hearing Brief, (R. 51-56), and is prior to the date that Respondents filed their Form 58 Pre-Hearing Brief naming Steve McGowan as a potential witness. (R. 57-60). The copy of Claimant's amended Form 58 Pre-Hearing Brief in the Record is undated, (R. 61-64); however, Commissioner Lyndon noted at the hearing that the certificate of service was dated September 20, seven days before the scheduled hearing. (R. 155, lines 12-13).

Claimant appealed to the Full Commission. Claimant's 17 separately stated issues on appeal from the Hearing Commissioner Decision are set forth in the body of the Commission Decision. (Decision & Order of the Full Commission, August 27, 2012, R. 32-45) ("Commission Decision") (*see* R. 33-36). After hearing the parties, the Commission affirmed the Hearing Commissioner Decision, with amendment. With respect to her credibility, the Commission found, among other things, that:

- "Claimant stated she had earned money in spite of denying this in her deposition,"
- "She was helping Tony but denied that she received any pay. This was for the same job she did prior for which she did receive pay. Claimant stated that she said she was not working in her deposition in May 2011, because she did not consider what she was doing work."
- "A surveillance photograph from September 2011 shows Claimant's vehicle with an advertisement on the back window promoting A-1 Bail Bonds with a 24 hour contact number."
- Her "Facebook profile showed that her employer was 'Self Employed and Loving it!' as a Professional Bondsman in Leesburg, Georgia," and stated "bond you out of jail if you need me call me."
- She "stated she could work as long as she did not have to bend over or do lifting."
- There was "conflicting testimony as to what Claimant said she was working and what reports indicated she could work."
- "Surveillance footage also showed Claimant squatting, bending, and lifting in a manner well-exceeding her self-reported limitations."
- She "stated she recruited a person to work for Tony who was paid. Claimant stated she did the same job but got no pay. She stated she did this because she felt sorry for Tony."
- "Mr. McGowan stated Claimant is currently working for another company and he took a video of Claimant in the jail house with a file in her hand bailing out someone."
- Mr. McGowan testified that Claimant left his employment "because she needed more hours and he paid her \$8.00 per hour up to 30 to 40 hours per week. She averaged about 30 hours."
- "Claimant did work for A1 Bail Bonding and provided an inaccurate account to her vocational assessor regarding the length of time she was employed with ABC, the amount she was paid per hour, and the amount of hours she was able to work."

- “Claimant failed to disclose her second job with A1 Bail Bonding to her vocational assessor and at her deposition.”
- That Claimant was not credible and the Commission “believe[d] she can work.”

(R. 38-39).

Addressing Claimant’s arguments regarding a purported *ex parte* communication, the Commission pointed out that “the complained of communication in this claim was from the Commission to the Attorney General’s Office.” As a result, there was no *ex parte* communication in this case because “[t]he Commission did not ever send this correspondence to either party.” (R. 42-43). The Commission pointed out that, while the Commission is required to report all cases of suspected false statement or misrepresentation to the Insurance Fraud Division of the Office of the Attorney General for investigation and prosecution pursuant to S.C. Code Ann. § 42-9-440, it is not required to notify any party to a workers’ compensation claim of an allegation of fraud. (R. 43-44). The Commission stated unequivocally 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. In particular, the Court of Appeals held that no *ex parte* communication had taken place and that, therefore, there was no need for the Court to consider her argument that the Commission should have recused itself from hearing her case. (Appx. 7-8). The Court of Appeals held that the Smith letter should have been removed from the record because it contained hearsay, was unduly prejudicial and in violation of Sections 38-55-570(D) of the Omnibus Insurance Fraud and Reporting Immunity Act regarding privacy. The Court noted that, although the Hearing Commissioner specifically relied on all of the testimony and exhibits submitted, including the Smith Letter, the Full Commission “clearly

stated in its own order that it ‘does not rely on any information contained in the letter from the Commission to the Attorney General.’” Giving credence to the Full Commission’s “unequivocal statement” and the evidence in the record that Claimant was not permanently and totally disabled, the Court of Appeals held that she failed to prove she had been prejudiced by any error of law in the Commission’s decision or clearly erroneous findings of fact by the Commission. (Appx. 8-10). Finally, the Court of Appeals agreed with Claimant that the Hearing Commissioner should have allowed Tony Owens to testify as a rebuttal witness. The Court of Appeals remanded to the Commission “for a redetermination of Fore’s benefits with the directive that full consideration be given to Owens’s testimony,” and directing that the Smith letter be removed from the public file. (Appx. 10-11).

Claimant petitioned this Court for review, which was granted on February 4, 2015.

STATEMENT OF FACTS

Claimant was treated for her February 21, 2008 injury by Dr. Mark A. Wolgin and Orthopaedic Associates in Albany, Georgia. (R. 272-329) (R. 107, line 24 – 108, line 1).³ 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 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),

³ At the time of the hearing, Claimant was 46 years old, married, with two dependent children. She had obtained her G.E.D. as well as an Associates’ Degree in Business Management. (R. 105, line 16 – 106, line 7).

Claimant admitted that she worked 20 or more hours per week for ABC Bail Bonds, (R. 110, line 11 – 111, line, 6), more than twice the amount recommended by Dr. Wolgin. 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 described Claimant's duties as going to the jail to write the bond, filling out paperwork, collecting money, and going "into the field to track down people who had skipped on their bond hearing." (R. 164, line 7 – 165, line 11). 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).⁴ 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,

⁴ Because of this, there are no records of what she was paid by ABC Bail Bonds, just as there are no records of what she was paid by A-1 Bail Bonds. (*See* R. 112-113) (R. 151, line 15 – 152, line 3).

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 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).⁵ Dr. Wolgin reported that there was "no evidence of hardware loosening at the L4 through S1 fusion," but that "there appears to be a lucency throughout the whole fusion mass that indicates a nonunion" at the 5-1 level. (R. 327). Dr. Wolgin noted that Claimant was choosing to close her case at that time. (Id.). Dr. Wolgin stated that Claimant felt "for several reasons, one of which is that the initial surgery was very painful and the other is that due to the social demands on her to take care of a toddler, that she is not able to consider surgery as a valid option at this time ..." (Id.). There is no evidence that Dr. Wolgin ever stated that the suggested open revision surgery had "only a 50% chance of improvement." (Id.).

Mr. McGowan testified that, after she quit working for him, he observed Claimant working for another bail bond company, performing duties at the jailhouse and bonding an individual from jail. Claimant explained that she had been approached by Tony Owens with A-1

⁵ Claimant asserts that, at the time of the September 27, 2011 hearing, she rated her pain a 6 out of 10 and indicated that "it gets worse if she does a lot of up and down." (Pet. Br. p. 9). Claimant cites Dr. Wolgin's February 2011 medical records at R. 327-328, implying that these comments are contained in Dr. Wolgin's medical notes. This is misleading, as Dr. Wolgin's notes from February 2011 indicate that her pain level is a 5 out of 10 and says nothing about up and down. (R. 327-329). Instead, Claimant, whose testimony was found to lack credibility, asserted at the hearing that her pain level was "probably about a six" and got worse if she did "a lot of up and down." (R. 128, lines 9-12).

Bail Bonds, a competitor to her prior employer, about changing her license to his 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 that that 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 for which Mary Weaver was being paid. (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 had received a diploma in accounting in 2010 that she failed to 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).

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.

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. (R. 381-383). The Assistant Deputy Attorney General's office sent a July 20, 2011 letter to the Special Investigative Unit of the Carrier.⁶ At 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.⁷

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).

⁶ Contrary to Claimant's assertion that the July 20 letter from the Attorney General's office to the Carrier was sealed and proffered, (Pet. Br. p. 8 n.3), that letter was sealed and stricken from the record. (R. 93, line 22 – 94, line 21).

⁷ 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. Br. p. 8) (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.

STANDARD OF REVIEW

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

The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001).

The Full Commission is the ultimate fact finder in workers’ compensation cases. 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.” Id., 371 S.C. at 79, 636 S.E.2d at 882 (emphasis added). It is not within the appellate courts’ purview to reverse findings of the Full Commission which are supported by

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

ARGUMENT

Claimant would have this Court put on blinders and, from that limited and skewed viewpoint, substitute itself as the factfinder in this workers’ compensation case. 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 presented no valid reason why this Court should overturn the Court of Appeals’ decision in this case. Her Brief is rife with mischaracterizations, misdirection, contradictions and preservation problems. Claimant’s third and fourth arguments, as well as 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. In addition, part of her third and all of her fourth arguments should be dismissed because they were not part of her Petition for a Writ of Certiorari and, therefore, are not properly before this Court. Her fourth argument also is not preserved for appellate review and should be summarily dismissed.

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

A. Claimant failed to prove any *ex parte* communication took place in this case.

Claimant's main argument relies on her erroneous 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. 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:

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.

(R. 382). Whether the information was forwarded to the Carrier was entirely up to the Attorney General's office. The Assistant Deputy Attorney General's office sent a July 20, 2011 letter to

the Special Investigative Unit of the Carrier.⁸ At 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.

Relying on Black's Law Dictionary, this Court defines *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). At no time did Respondents or Respondents' counsel communicate with the Commission, or visa-versa, without copying or including Claimant's counsel. Despite Claimant's attempts to expand the definition of *ex parte* communication, the definition in Brown v. Bi-Lo, remains good law.

Although Claimant accuses the Commission and 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 Commission and 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 for even suggesting "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");⁹ In re Fine, 13 P.3d 400, 409 (Nev. 2000) (finding *ex parte* communications between family court judge and court-

⁸ As noted above, the July 20 letter from the Attorney General's office to the Carrier was sealed and stricken from the record. (R. 93, line 22 – 94, line 21).

⁹ 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 parte* communication. 365 S.C. at 644-650, 620 S.E.2d at 72-76.

appointed experts impermissible where the judge “was developing testimony and evidence to be used by her in reaching a decision”); PATCO v. Federal Labor Rel. Auth., 685 F.2d 547, 562-63 (D.C. Cir. 1982) (evaluating contacts under a section of the Civil Service Reform Act that prohibits *ex parte* communications “‘relevant to the merits of the proceeding’ between an ‘interested person’ and an agency decisionmaker”); Blaker v. Planning & Zoning Comm’n, 212 Conn. 471, 562 A.2d 1093 (Conn. 1989) (party’s submission of additional evidence to zoning commission, after the close of public hearings and without providing other parties notice, was an improper *ex parte* contact); and, Jennings v. Dade County, 589 So.2d 1337, 1991 Fla. App. 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 every one of these cases, the communication was between the decision-maker and an interested party or its representative. Here, in contrast, there was no communication between an interested party or its representative and the decision-maker.

Even if the definition of *ex parte* communication includes communications between a witness or a potential witness and the decision-maker, (*see* Pet. Br. pp. 12, 15), 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 material witness (Steve McGowan) in this case.” (Pet. Br. p. 159). 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), he now is attempting to reverse that 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 appellant to assert a position on appeal that is contrary to the position taken below). This Court should reject Claimant’s attempt to reverse her position on appeal.

In addition, this is not an *ex parte* contact for the simple reason that Mr. 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. Respondents have never disputed that Commissioners of the South Carolina Workers’ Compensation Commission act in a quasi-judicial capacity when they adjudicate workers’ compensation claims.¹⁰ That acknowledgement, however, does nothing to advance Claimant’s case.

¹⁰ The two cases cited by Claimant for this point, *Hall v. Marion Sch. Dist. No. 2*, 860 F. Supp. 278 (D.S.C. 1993), and *Crosby v. Prysmian Commc’ns Cables & Sys. USA, LLC*, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012), deal with issues of wrongful termination and the preclusive effects of Commission decisions for purposes of res judicata and collateral estoppel and, therefore, do not speak to the substantive issues in this case.

Second, Claimant alleges that, Mr. Smith, the Director of the Commission's Compliance Division, "than [sic] took *affirmative steps* to ensure that the identity of that witness and the substance of his allegations were conveyed *solely* to the Respondents." Claimant accuses Mr. Smith of "explicitly convey[ing] the intent and expectation that his letter be forwarded to the Carrier," that his actions were taken, not "out of mere courtesy nor to complete a ministerial task set out in a statute," but instead were "designed to make an end run around an act explicitly prohibited by statute." (Pet. Br. pp. 15-16). Again, Claimant's 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")). Her accusations even run counter to other statements in her Brief that the passage of Sections 42-9-440 and 38-55-510 put the Commission "in an untenable position" which caused the "violations" to occur "as an inevitable result of the Commission's attempt to balance these mutually exclusive duties." (Pet. Br. pp. 15 n.7, 19). Either Claimant is accusing Mr. Smith of intentionally "attempting to make an end run around an act explicitly prohibited by statute," (Pet. Br. p. 16), or she is conceding the Commission was simply following its statutory duty, but she cannot argue both. Claimant's contradictory accusations should be dismissed summarily by this Court. King, 278 S.C. at 354, 296 S.E.2d at 337; Vaughan, 288 S.C. at 362, 342 S.E.2d at 619.

Furthermore, Claimant's speculations that Mr. Smith "must have known the AG would not conduct any sort of investigation nor turn the file over to SLED," and that his purpose in sending a letter to the Attorney General's office was to communicate with Respondents is not

supported by any evidence. Despite Claimant's attempt at colorful characterization of events and motives, the facts are that the Smith Letter was a communication from one state agency to another state agency. This clearly was not an *ex parte* communication because it was 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 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 both untenable and 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.¹¹ Claimant's theory is based entirely on the erroneous assertion that Mr. Smith "instructed" the Attorney General's office to forward the Smith Letter to the carrier, and that the Attorney General's office obediently and automatically complied with those "instructions." (Pet. pp. 9-11). The Attorney General's office is neither an adjudicator in this proceeding, nor is it answerable to or required to take "instruction" from the

¹¹ For example, Claimant argues that 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," finding it "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." (Pet. Br. p. 16). What Claimant consistently and intentionally fails to recognize is that: 1) Mr. McGowan was not a witness or even a potential witness at the time he contacted the Compliance Division; 2) neither the Commission's Compliance Division nor the Attorney General's office is part of the Commission's judicial staff; and, 3) Mr. Smith did not send anything *ex parte* to any person associated with the adjudicative arm of the Commission.

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 unsupportable. Claimant’s hyperbole and insinuations of sinister motive on the part of Mr. Smith are likewise unsupported and uncalled for.¹²

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. Br. p. 16), 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 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, no one in the Attorney General’s office was part of the quasi-judicial body determining Claimant’s claim. In addition, Claimant offers no support for her allegations of overreach by the Attorney General’s office, (Pet. pp. 16, 18, 19),¹³ which should be dismissed.

Neither Rule 501, Canon 3B(7), SCACR, nor Section 1-23-360 was violated in this case, despite Claimant’s accusations of judicial impropriety. Judicial Canon 3B(7) applies to judges,

¹² 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.

¹³ There simply is no evidence that the Attorney General’s office delegated or turned the investigation over to the Carrier instead of to SLED. In addition, Sections 38-55-570(B)&(C) authorize the Attorney General’s Insurance Fraud Division to obtain information from other authorized agencies, insurers or any other person.

law clerks or other personnel on the judge's staff. The head of the Commission's Compliance Division simply is not a judge, law clerk or part of the hearing Commissioners' staff. (R. 235, lines 16-19) (R. 237, lines 12-14) (R. 239, lines 4-6) (R. 245, line 22 – 246, line 1).¹⁴ The Commission has an "administrative" department and a "judicial" department. *See* S.C. Code Ann. §§ 42-1-90, 42-3-10. The Compliance Division is part of the administrative department of the Commission, not the judicial department. S.C. Code Ann. § 42-3-90. As noted above, two of the communications complained of here were between the Director of the Compliance Division (part of the administrative side of the Commission, not the adjudicative side), on the one hand, and Mr. McGowan and the Attorney General's office, on the other. Thus, even if the July 6 call and/or the Smith Letter could somehow be construed as "indirect" communications between the Commission and a potential witness or the Carrier, which Respondents dispute, neither involved anyone who is part of the adjudicative side of the Commission. Furthermore, there is no evidence that the Hearing Commissioner, or anyone else in the Commission's adjudicative department, had any knowledge of any of these communications prior to the Hearing.

Claimant's claim that the Commission's sole function is to adjudicate workers compensation disputes, (Pet. Br. p. 25), is mistaken. Instead, as explained above, the Commission has two major departments, one administrative and the other judicial. 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. There is no absolute bar to an agency,

¹⁴ As a result, Claimant's reliance on the statement in *In re Fine*, 13 P.3d at 409-410, that "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," (Pet. Br. p. 18), is completely misplaced. Furthermore, despite numerous allegations and inaccuracies, she has not and cannot claim that any of the Hearing Commissioners **instructed** Mr. Smith to send a letter to the Attorney General or to anyone else.

particularly two separate sections of an agency, performing both investigative and adjudicative functions. *See, for example, Winthrow v. Larkin*, 421 U.S.35, 95 S. Ct. 1456 (1975) (holding that simply because an administrative agency both investigates and adjudicates a claim does not prove, absent more, either *ex parte* contact or unfair hearing process).

Tellingly, Claimant admits that there are no other South Carolina cases dealing with these same facts. (Pet. Br. p. 22). This is because all of the relevant cases deal with an *ex parte* contact by a party/participant and the adjudicator or adjudicative staff. Section 1-23-360 specifically applies only to the members or employees of an agency who are “assigned to render a decision or to make findings of fact and conclusions of law in a contested case,” or, in other words, adjudicators, their law clerks and their staff. 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 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). Claimant’s attempt to blur the organizational lines at the Commission, describing Mr. Smith as “nominally part of the administrative department,” (Pet. Br. p. 17 n.8), has no basis in law or fact, and should be rejected.

The phrase “assigned to render a decision or to make findings of fact and conclusions of law in a contested case,” modifies the words “member of employees” of an agency, and not the word “agency” itself. Case law supports this interpretation of section 1-23-360. In Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997), this provision was applied

to the actual body (and its staff) that was assigned to make the decision regarding Dr. Ross's termination, but not to the entire faculty and staff of MUSC. There, the Supreme Court explained that, because the "Committee members were employees of MUSC assigned to render a decision," they were prohibited by § 1-23-360 from communication ex parte with any party or party's counsel about any issue of fact or law." 328 S.C. at 72, 492 S.E.2d at 74; *see also Id.* at 74, 492 S.E.2d at 74 (Section 1-23-360 also applied to Vice-President Newberry because he was "an employee of MUSC assigned to render a decision ...").

Under Claimant's interpretation, if any arm of an administrative agency performs a quasi-judicial role, all employees of the entire agency or commission are prohibited from communicating with any person or party regarding any issue of fact, or with any party or a party's representative regarding any issue of law. (Pet. Br. pp. 14-15, 17). That interpretation produces absurd results and, therefore, cannot be what the General Assembly intended. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-343, 713 S.E.2d 278, 283 (2011) (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"). For example, Claimant's interpretation of 1-23-360 would have prevented any faculty or staff of MUSC, who were not part of the committee or connected to the review process in any way, from discussing Dr. Ross in any capacity whatsoever. Such a result is patently absurd and should be rejected.

To be clear, Respondents are not arguing, as Claimant suggests, that the rule only applies to the commissioner or judge deciding a case, and not to the adjudicator's clerk, staff, bailiff, and other court personnel. However, as explained above, the Compliance Division is not part of the judicial department but, instead, is one of three branches of the administrative department of the

Commission. *See* S.C. Code Ann. §§ 42-1-90, 42-3-10. Claimant’s attempts to argue that this separation of function is meaningless or non-existent, and/or that the Director of the Compliance Division of the Commission is part of the Hearing Commissioners’ staff, should be rejected by this Court just as it was rejected by the Commission. (*See* R. 235, lines 16-19) (R. 237, lines 12-14) (R. 239, lines 4-6) (R. 245, line 22 – 246, line 1).

If Respondents had not included the Smith Letter in their APAs filed with the Hearing Commissioner, contrary to Claimant’s assertions otherwise, that letter would not have been “available to the Commissioner to consider in adjudicating the case.” (Pet. Br. p. 17). The Hearing Commissioner stated that the Smith Letter was “in the Commission file. It’s been made a part of the record or will be made a part of the record.” (R. 99, lines 7-9). Thus, it was because the Smith Letter was part of the record that the Hearing Commissioner considered it when he decided this case.

Claimant’s statements in this regard are also contradictory. On page 17 of her Brief, she states that the Smith Letter was available to the Hearing Commissioner because it was in the Commission file, but on page 21, she argues incongruously that the same letter would not have been available to the Commissioner because it was not part of the record. As is the case with Claimant’s other contradictory statements, this assertion should be dismissed summarily by this Court. King, 278 S.C. at 354, 296 S.E.2d at 337; Vaughan, 288 S.C. at 362, 342 S.E.2d at 619.

Claimant’s mischaracterization of the Commission’s ruling as merely a justification of *ex parte* communications must be rejected. In particular, her rewording of the Commission’s resolution of her arguments that an *ex parte* communication took place is both disingenuous and misleading. After careful analysis,¹⁵ the Commission found that there was no evidence of any *ex*

¹⁵ There is no validity whatsoever to Claimant’s assertion that, at oral argument before the Full Commission, “the members of the Appellate Panel appeared to be offended by the suggestion of improper

parte communication. The Commission clearly stated that it did not rely on any information contained in the Smith Letter. The Commission correctly and properly pointed out that nothing in Sections 38-55-530, 38-55-570 or 42-9-440 or the Judicial Code requires the Commission to notify a party when allegations of insurance fraud are reported to the Attorney General's office. (R. 40-44). Claimant's proposed cure – that every time the Commission forwards allegations of insurance fraud to the Attorney General's office, all parties, even including the party being investigated, be notified – is nonsensical. Whereas it is understandable that the Attorney General would want to contact an insurer so that the insurer could provide it with files and information that might be of assistance in the Attorney General's investigation into a fraud complaint, it would defeat the purpose of the Attorney General's investigation to notify a claimant of an investigation before it begins. Furthermore, there simply is no requirement compelling either the Commission's Compliance Division or the Attorney General to do so.

Claimant misquotes Remmer v. United States, 347 U.S. 227 (1954), which simply does not contain the statement she attributes to it on p. 17 of her Brief. Unlike the case before this Court, Remmer involved improper communications with a juror during a criminal trial. What's more, even in context of a criminal trial, the "presumed prejudice language of Remmer is no longer good law; all that is required is a hearing at which the **defendant** is given the opportunity to establish that the improper contact caused actual prejudice." Schneider v. Rivard, 2013 U.S.

ex parte communication on the part of the Commission," which purportedly demonstrated "that even the appeals process before the Appellate Panel was tainted." (Pet. Br. p. 11). This is pure speculation without any basis in fact or reality. Respondents note that Claimant does not and cannot cite any particular passage in the oral argument before the Full Commission that demonstrates offense – to be sure, probing questioning is not an indication of improper offense at a particular suggestion or argument. (R. 209-251). In addition, Claimant's assertion that the Commission's "added findings evince the fact that the issues in this case made the [Appellate Panel] uncomfortable, such that their rulings were not impartial," (Pet. Br. p. 25), is both speculative and wrong. The added findings simply and completely responded to Claimant's argument regarding *ex parte* contact and evince neither discomfort nor impartiality.

Dist. LEXIS 102045 *13 (E.D. Mich. Apr. 12, 2013) (emphasis added), *citing* Smith v. Phillips, 455 U.S. 209, 217 (1982) (explaining that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation ... Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrence and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case”). Here, and as is explained in more detail below/above, Claimant has had repeated opportunities to attempt to show prejudice but has failed to do so at every turn.

Because there was no *ex parte* contact, the Commission did not err in 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 process by which it conveys these reports to the Attorney General’s office. Mr. Smith’s department handles this function and complied with the applicable statutes in this case. 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.

Claimant’s ominous speculation that the Commission has a practice of sending *ex parte* letters with allegations of fraud to insurance carriers via the Attorney General’s Office, (Pet. Br. pp. 21-22), is nothing more than that – unsupported speculation intended to inflate the importance of her claims. Claimant argues that the Court of Appeals’ remedy is inadequate. While Claimant’s purported concern that other claimants in other cases may suffer some harm,¹⁶

¹⁶ Claimant’s reliance on Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) is misplaced. Samples involved defense counsel’s willing failure to reveal the existence of a videotape of the plaintiff for two and a half years, despite having been served with the standard interrogatories. Here, Claimant has not and cannot allege that Respondents failed to comply with discovery rules.

her speculation and conjecture does nothing to advance her own claim. Here, the Court of Appeals properly accepted as true the Commission's statement that it did not consider the Smith Letter in reaching its decision.

Claimant's due process rights and entitlement to a fair tribunal have not been violated. In Winthrow, 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:

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

421 U.S. at 55; *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"); Babcock Center, Inc. v. Office of Audits, 286 S.C. 398, 402, 334 S.E.2d 112, 113-14 (1985) (explaining that a "presumption, the burden of which is upon the complainant to overcome, exists that members of such panels are unbiased").

The quote Claimant lifts from Ross 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 69-70, 492 S.E.2d at 72-73. Even if Claimant could prove an *ex parte* communication had taken place, which she cannot, there simply is no evidence here that anyone at the Commission had "a will to win." Furthermore, "where there is an adequate appeal

process, bias on part of initial decisionmaker is not denial of procedural due process.” 328 S.C. at 70, 492 S.E.2d at 72-73. Respondents would submit that appellate review by the Full Commission, which specifically stated it did not consider the Smith Letter in making its decision, (R. 40), and further review by the Court of Appeals, both of which found no prejudicial *ex parte* contact, (Appx. pp. 8, 10), competently serve that function in this case. 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.”

Finally, Claimant mistakenly asserts that the Court of Appeals erred by referencing S.C. Code Ann. § 38-55-580(D). The Court of Appeals merely stated that Mr. Smith “was advising the Attorney General’s office of a course of action that it had a right to follow.” (Appx. p. 7). Even if the Court of Appeals 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).

B. Any alleged *ex parte* communication in this case was not prejudicial to Claimant.

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. First, 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. Br. p. 23). Although Claimant cites a Connecticut case, Blaker, for the proposition that any *ex parte* contact creates a presumption of prejudice, she cites no South Carolina case to this effect. In fact, 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”);¹⁷ *cf.* Ellis v. Procter & Gamble Distr. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (finding evidence of judicial prejudice where the record did “not support the trial judge’s factual finding on the merits”); *see also* Rushen v. Spain, 464 U.S. 114, 117-18 (1983) (“emphatically” rejecting the argument that *ex parte* communications between a trial judge and a juror in a criminal trial “can never be harmless error”). Even PATCO, from which Claimant quotes extensively, explains that “[u]nder the case law in this Circuit, improper ex parte communications, even when undisclosed during agency proceedings, do not necessarily void an agency decision. Rather, agency proceedings that have been blemished by ex parte communications have been held to be *voidable*.” 685 F.2d at 564.

Even if this Court were to apply the “test” set forth in PATCO under the federal “Sunshine Act,” 5 U.S.C. § 557(d), which Respondents do not concede is appropriate in this context, there is no reason for this Court to remand. First, neither Mr. Smith nor the Attorney General’s office “benefitted” from any alleged *ex parte* communication; the Commission unambiguously held that the Smith Letter did not influence its ultimate decision; Claimant’s counsel was made aware of the existence of the Smith Letter when he was served with

¹⁷ Thus, contrary to Claimant’s assertions, (Pet. Br. p. 20 n.9), there is no uncertainty regarding whether the mere existence of an *ex parte* communication creates a presumption of prejudice or, for that matter, how any prejudice that is proven should be remedied in a particular case. The quote lifted from Burgess on which Claimant relies, (Pet. Br. pp. 29-30), was this Court’s explanation of the importance of maintaining the “appearance of propriety,” and does not constitute a ruling on a presumption of prejudice.

Respondents' APAs and had an opportunity to respond; there is no useful purpose for this Court to remand for new proceedings.¹⁸

Claimant's argument that she was unable to present a rebuttal witness rings hollow in face of the Court of Appeals' remand for consideration of Tony Owens's testimony. It is somewhat bizarre that Claimant continues to argue that she was prejudiced by the exclusion of Tony Owens's testimony, (Pet. Br. p. 24), when the Court of Appeals remanded to the Commission for consideration of that testimony and revision of her award, if warranted. (Appx. p. 11). In fact, as Respondents' argued at the Petition level, the Court of Appeals' remand for consideration of Tony Owens's testimony renders this entire appeal unripe for this Court's consideration. Bone v. U.S. Food Serv., 399 S.C. 566, 576-77, 733 S.E.2d 200, 205 (2012). Claimant's substantive discussion of Tony Owens's proffered testimony in her Brief, (Pet. Br. pp. 9, 36, 37, 40), emphasizes the fact that this appeal is premature, as the Commission has not had an opportunity to weigh and consider that evidence.

Claimant's reliance on Georgia case law, including In re D.D., 713 S.E.2d 440 (Ga. Ct. App. 2011), Hargis v. State, 735 S.E.2d 91 (Ga. Ct. App. 2012),¹⁹ and Arnau v. Arnau, 429 S.E.2d 116 (Ga. Ct. App. 1993), is misplaced for the very reason that in Georgia, unlike South Carolina, *ex parte* communications are presumed to be prejudicial. In re D.D., 713 S.E.2d at 443; Hargis, 735 S.E.2d at 95; Arnau, 429 S.E.2d at 117. 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. Cousins v. Macedonia Baptist Church of

¹⁸ As the Court of Appeals for the District of Columbia Circuit opined in PATCO, surely Claimant "cannot argue that fairness requires two opportunities to respond rather than one." 685 F.2d at 568.

¹⁹ Respondents note that, in overturning the Georgia Court of Appeals' decision in Hargis on preservation grounds, the Georgia Supreme Court, although not condoning the *ex parte* communication, 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).

Atlanta, 662 S.E.2d 533 (Ga. 2008) involved improper conduct of an injunction hearing. Although the parties were present and prepared to offer witnesses and evidence, the judge single-handedly conducted the entire hearing, soliciting opinions from unidentified church members in the audience who were not under oath, calling both the attorneys and the bank that had refinanced a mortgage on the church, and essentially cross-examining Mr. Cousins without allowing his counsel to participate. In essence, “by attempting to himself procure evidence and elicit testimony in the case, the trial judge stepped beyond the role of arbiter and into that of advocate.” 662 S.E.2d at 536. No such improprieties occurred in the instant case.

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, this Court found evidence of judicial prejudice precisely because the trial judge’s “factual findings [were] not supported by the record.” 315 S.C. at 285, 433 S.E.2d at 857. In the case presently before this Court, even if Claimant had somehow proven an *ex parte* contact had occurred, which Respondents do not concede, she cannot meet her burden of proving it was prejudicial. As is discussed in greater detail below, both the Commission’s credibility determination and disability rating are supported by substantial, and even overwhelming evidence.

Neither Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) nor South Carolina Dept. of Social Servs. v. Lisa C, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008), advances Claimant’s case. In Cranford, there was no question or evidence that the claimant was reporting false information to his physicians and, in any event, this Court upheld the Commission’s resolution of the conflicting evidence before it. 399 S.C. at 80, 731 S.E.2d at 311. 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.

Claimant unwittingly reveals her true position in asserting that the only way the Commission could prove it was unbiased and that the alleged *ex parte* communication was not prejudicial to her was to rule in her favor. (Pet. Br. p. 26). In other words, because she did not obtain the ruling she desired, her substantive and due process rights must have been violated. Her rendition of the evidence in this case narrowly focuses only on the evidence that supports her case and studiously ignores the substantial evidence that supports the Commission Decision.

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 department and the Compliance Division, or to characterize communications between state agencies as surreptitious *ex parte* communications. Neither 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 must be rejected. As a result, this Court should affirm the Court of Appeals’ Opinion that no *ex parte* communication took place and that Claimant did not demonstrate she was prejudiced by the way her claim was decided by the Commission.

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." (Appx. p. 11). Claimant argued below that Mr. Owens's testimony was necessary in order to buttress her credibility. *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 Smith 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)). Thus, to extent the Commission revisits its credibility determination on remand, which Respondents do not necessarily concede has been remanded, this issue is not ripe for this Court's review. Bone, 399 S.C. at 576-77, 733 S.E.2d at 205.

Even if this issue is properly before this Court, the Commission's credibility finding is supported by substantial evidence and should be upheld. Claimant takes issue with the Court of Appeals' acceptance of the Commission's unequivocal statement that it did not rely on the Smith Letter in reaching the conclusion that Claimant was not credible. Essentially, Claimant is implying that the Commission's statement cannot be believed. Despite Claimant's disparagement of the Commission's statement and impartiality, (Pet. Br. pp. 11, 26-30), 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 Smith Letter is true and correct, notwithstanding Claimant's unsupported allegations that she was not afforded a fair hearing.

Where there is a dispute over the facts as presented by opposing sides, “the issue of credibility of the witnesses necessarily must play an important role in a determination of the facts.” Klutts Resort Realty, Inc. v. Down-Round Dev. Corp., 268 S.C. 80, 91, 232 S.E.2d 20, 25-26 (1977). The Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson, 395 S.C. at 455, 718 S.E.2d at 758. Here, the record is replete with evidence that supports the Commission’s credibility determination.²⁰ 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 40 hours a week, and sometimes even more. (R. 168, lines 5-14) (146, lines 5-10). Tellingly, during part of the time she was working steadily for ABC Bail Bonds, Dr. Wolgin’s notes state that Claimant is written out of work until further notice. (R. 317, 319, and 322). Dr. Wolgin reported that Claimant told him that she was working only 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 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

²⁰ 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.E.2d at 528.

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. As she asserts, she "was forced [to] quite the job at ABC because it increased her pain beyond the point where she could function." (Pet. Br. p. 35). 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).²¹ Nonetheless, she now claims that she was just trying to help a friend with a failing business and health problems, at the same time claiming she herself 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

²¹ 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), if in fact those statements were not true.

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 with the Smith Letter in the record, the overwhelming evidence of Claimant’s lack of veracity and the Commission’s statement that it did not consider the Smith Letter negate her arguments that she should be granted the opportunity to retry her case and hope for a better outcome the second time around.

Because the record in this case is replete with evidence of Claimant’s lack of credibility, even if (but without conceding), admission of the Smith Letter was impermissible character or “prior bad acts” evidence,²² it was harmless error at most. “Error is harmless where it could not reasonably have affected the result of the trial.” State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006).²³ In other words, where the record contains ample competent evidence to

²² In relying on criminal cases and Rule 404, SCRE, Claimant fails to recognize “that the South Carolina Rules of Evidence do not apply in proceedings before the Workers’ Compensation Commission.” Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000); *see also* S.C. Code Ann. § 1-23-330(1) (same).

²³ Claimant’s reliance on State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) in this respect is misplaced. First, in Harris, a juror reviewed definitions from Black’s Law Dictionary that had not been admitted into the record. Here, the July 18 Letter was not outside of the record but, instead, was admitted into the record. Second, in Harris, the Supreme Court instructed that, “[a] mistrial should only be granted when absolutely necessary. [citation omitted] In order to receive a mistrial, the defendant must show error and resulting prejudice.” 340 S.C. at 63, 530 S.E.2d at 628. As noted both above and below, Claimant has not and cannot show any prejudice resulting from the inclusion of the Smith Letter because the Commission’s substantive decision does not rely on the letter and its credibility determination is supported by other substantial and credible evidence in the record

support the Commission's credibility determination, the admission of the Smith Letter, even if it was improper, does not warrant overturning the decision below.

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." (See Pet. Br. pp. 15, 20, 24, 26, 27 n.11, 31). 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, nor did Respondents "fully develop the prejudicial aspects of ... unfounded fraud allegations," (Pet. Br. pp. 20, 24, 31, 34-35), in this case.²⁴ The only mentions of "fraud" in the record are the Smith 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 the "lynchpin" 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 by videotape evidence that directly conflicts with her claims of disability.

Claimant's argument that the remand for consideration of her disability on the same record, even with the Smith Letter removed and with full consideration of Tony Owens's testimony will be insufficient, (Pet. Br. p. 30), is simply wrong. First, as noted above, the Commission did not rely on the Smith Letter in making its credibility determination. Thus, any

²⁴ Contrary to Claimant's protestations otherwise, (Pet. Br. p. 20 n.10), at the time Respondents' counsel submitted the Smith 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.

prejudice engendered by the Hearing Commissioner's inclusion of the Smith 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 Smith 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 Smith 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,²⁵ which Respondents deny, the alleged procedural shortcomings will be resolved when the Commission reviews this case with the Smith Letter removed and with "full consideration ... given to Owens's testimony," pursuant to the Courts of Appeal' remand. (Appx. p. 11). Claimant's bare assertions that this process is not adequate are insufficient to overcome the fact that she has not and cannot prove prejudice from the alleged *ex parte* communication, particularly in light of the overwhelming evidence of her lack of credibility.

This Court should uphold the Commission's credibility determination as supported by reliable, probative and substantial evidence in the record.

²⁵ To the extent Claimant continues to assert that she was treated unfairly or denied due process because her lead counsel was unavailable to make her direct argument on appeal to the Full Commission, (Pet. Br. pp. 4-5, 11 n.5), 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 adequate 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 knew ahead of time that 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. Furthermore, "[t]o prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process," *Ogburn-Matthew v. Loblolly Partners*, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998), which Claimant patently cannot do here.

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." (Appx. p. 11). 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 Smith 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 should have been allowed in order to address the issue of Claimant's disability)) (R. 223, line 24 – 224, line 8 (same)). 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.

Second, this issue is not properly before this Court. Claimant's Petition for a Writ of Certiorari only raised the issue of whether the Commission committed legal error by applying the wrong standard to determine her degree of disability. (Pet. pp. 3, 14-15). She did not raise, and thus this Court did not agree to hear, various factual challenges included in her Brief, including her specific arguments under Sections 42-9-10²⁶ and 42-9-30. (Pet. Br. pp. 30-41). This

²⁶ Claimant asserts she is entitled to permanent and total disability under Section 42-9-10. In fact, Claimant is fortunate that the Commission awarded her disability for a scheduled member under Section 42-9-30 because, under Section 42-9-10, she would have had to have proven an inability to earn wages.

includes, but is not limited to, her creative but completely baseless argument that her disability rating was really 29.2% to the back, due to the credit allowed Respondents for overpayment. (Pet. Br. pp. 30, 40).²⁷

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.

Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 105-107, 580 S.E.2d 100, 102-103 (2003) (explaining that, under Section 42-9-10, a claimant must prove loss of earning capacity, whereas under Section 42-9-30, loss of earning capacity is presumed). Here, Claimant did not prove that she had suffered a loss of wages and lied repeatedly not only about her ability to work but also about her actual employment.

²⁷ Although Claimant suggests the credit allowed to Respondents was "improvidently granted," (Pet. Br. p. 40), she did not challenge this part of the Hearing Commissioner Decision which is now the law of the case. Brunson, 367 S.C. at 165-66, 623 S.E.2d at 872 ("[t]he findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission").

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 far-fetched version of events does not mean its Decision is based on legal error. In fact, the only evidence Claimant pointed to below that supported her claim of total disability was based on admittedly false information. Specifically, the statements contained 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. In fact, Claimant continues to mischaracterize the record, citing Dr. Wolgin’s records as support for her assertion that the reason she did not want to attempt a second surgery was because it only had a 50% chance of success. (Pet. Br. p. 6, 32). In fact, Dr. Wolgin never stated any such thing. (R. 327).

Claimant’s reliance on Freeman v. Schweiker, 681 F.2d 727 (11th Cir. 1982) is yet another attempt at misdirection. First, Freeman involved the Social Security statute and regulations, which contain different measures and requirements of proof than does the South Carolina Workers’ Compensation Act.²⁸ Second, there were no allegations that the medical providers or vocational evaluators had been provided false information about Mr. Freeman’s activities or abilities, as is the case here. Not only does this lack of forthrightness undermine Claimant’s credibility, but it also gives reason to assign less weight to the medical and vocational

²⁸ See Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843 (Ct. App. 1992) (awards and records of Social Security Administration not relied on in workers’ compensation proceedings).

evidence in this case. *See Sharpe*, 336 S.C. at 161, 519 S.E.2d at 106 (holding that when expert opinions are based upon mere deductions from claimant's self-reporting, the Commission may draw its own findings of fact). Finally, Claimant's critique of so-called "sit and squirm jurisprudence" is taken completely out of context because neither the Hearing Commissioner nor the Commission criticized or relied in any way on Claimant's appearance at the hearing. Instead, her lack of credibility was demonstrated by the numerous instances of lying, her false reports of what she was capable of doing and was in fact doing to both her doctor and the vocational expert, and the unbelievable story she offered up to cover her work for Tony Owens.

Claimant admits that she worked for ABC Bail Bonds from late August 2010 until late January 2011. (Pet. Br. p. 6). Testimony in the record supports a finding that she worked 40 hours a week and sometimes even more. (R. 168, lines 5-14) (146, lines 5-10). As explained in more detail above, the statements in Dr. Wolgin's and Mr. Adams' reports regarding Claimant's ability to work simply are not probative, since they rely on misinformation fed to them by Claimant. Contrary to Claimant's suggestion, the Commission's finding that Claimant was not entitled to a greater disability rating does not constitute a "medical opinion" by the Commissioners. (Pet. Br. p. 34). Instead, the Commission's determination recognizes that Dr. Wolgin's "no work" notes and his statement regarding her work capabilities were based on false information that Claimant was reporting to him, juxtaposed against the overwhelming evidence that she continued to work.

Because the only medical impairment rating in the record is a total body impairment of only 36% and, as noted above, Dr. Wolgin's statements regarding Claimant's capacity for employment were based on misinformation, any greater disability would have to be based on Claimant's testimony regarding her condition and limitations which, in turn, depended entirely

on her credibility. There is a plethora of evidence in this record demonstrating that Claimant was not credible. As noted above, and as found by the Commission, Claimant has lied repeatedly about her functional capacity and work history. The greater weight and preponderance of the evidence shows that, following surgery, Claimant returned to work for ABC Bail Bonds and has continued to work for subsequent employers. (Commission Decision, R. 37-39).

Although Claimant attempts to bolster her case by attacking Mr. McGowan's credibility, (Pet. Br. pp. 35-36), the Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson, 395 S.C. at 455, 718 S.E.2d at 758. The only witness the Commission found lacked credibility was Claimant. Furthermore, Mr. McGowan did not testify to Claimant's medical condition but to her work history with ABC Bail Bonds and what he observed after she voluntarily quit working for him. Thus, Claimant's criticism that he did not know about her "medical condition," (Pet. Br. p. 36), is irrelevant. Furthermore, any combativeness on Mr. McGowan's part was elicited by inappropriately hostile questioning from Claimant's counsel. (R. 173, lines 9-10 (accusing witness of taking illegal drugs)) (R. 174, lines 14-15 (accusing witness of being an accomplice to insurance fraud)) (R. 176, lines 12-13 (accusing witness of tax fraud)) (R. 177, lines 17-18 (badgering witness)) (R. 178, lines 15-17 (badgering witness)).

Claimant suggests she deserves "accolades" for trying (but failing) to work after her surgery. (Pet. Br. p. 35). That is not what occurred here. Instead, the Commission rejected Claimant's fantastical story about how she was in too much pain to work for pay but then was able to do the same job for free. 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 punishes her for a failed work attempt, (Pet. Br. pp. 35, 38), is nonsensical. 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 had aspirations to open and run a restaurant, even though he admittedly had never run a restaurant previously and did not know what it entailed. The hearing commissioner noted that, had the claimant not made that statement, he “would have found him to be Permanently and Totally disabled under 42-9-10.” 399 S.C. at 385-386, 732 S.E.2d at 501-502. 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), and substantial evidence that she was working. (R. 385, 386, 393, 396).²⁹

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

²⁹ Thus, Claimant’s suggestion that this Court can find her totally and permanently disabled as a matter of law is plainly incorrect and should be rejected, given the conflicting evidence on this issue.

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).

Although Claimant cites various cases for the proposition that an impairment rating is not necessarily the same as a disability award, which Respondents do not dispute, the Commission did not mechanically adopt Dr. Wolgin's impairment rating as Claimant's disability award. Instead, the Commission awarded a slightly higher disability award than Claimant's impairment rating. (R. 327) (Commission Decision, R. 41, 44).

Furthermore, simply because the Commission has made disability awards that are higher than a claimant's impairment rating in other cases with other facts, (Pet. Br. pp. 39-40), does not mean the facts in this case warrant a higher disability rating than 40%. For example, in Linen v. Ruscon Constr. Co., 286 S.C. 67, 69, 332 S.E.2d 211, 212 (1985), Lyles v. Quantum Chem. Co., 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993), Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520-521, 415 S.E.2d 841, 843 (Ct. App. 1992), and Cropf v. Pantry, Inc., 289 S.C. 106, 108, 344 S.E.2d 879, 880 (Ct. App. 1986), the appellate court upheld the Commission's factual determination regarding claimant's disability award.³⁰ There was no indication in any of those cases that the claimant lacked credibility. Here, in contrast, Claimant asks this Court to overturn the Commission and find her permanently and totally disabled, despite the fact that the Commission's finding rests on substantial evidence as well as her lack of credibility. It is

³⁰ Respondents also point out that, at least in Solomon, this Court rejected the claimant's arguments that his disability award should be higher than the Commission's award. 307 S.C. at 520, 415 S.E.2d at 843.

beyond dispute that an appellate court's review of a disability award "is limited to a determination of whether the commission's findings, inferences, conclusion, or decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Solomon, 307 S.C. at 520-521, 415 S.E.2d at 843.

In Bundrick v. Powell's Garage & Wreckage Serv., 248 S.C. 496, 151 S.E.2d 437 (1966), the two medical experts testified to 15% and 20% disability. However the Commission, based on the claimant's testimony "and observation" of the claimant at the hearing, awarded 50% disability. Explaining that "the extent of loss of use of the claimant's arm was not so technically complicated as to require for its determination medical testimony alone,"³¹ this Court also advised that the award could not "rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it," and remanded to the Commission for further proceedings consistent with its opinion. 248 S.C. 503, 151 S.E.2d at 441.

The issue on appeal in Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005) was whether the claimant's injury was restricted to his foot or encompassed his right lower extremity and not, as Claimant suggests, the specific disability rating. Furthermore, although one doctor stated the claimant's impairment rating to be 35% to the foot, another physician rated his lower extremity to be 62% impaired, 364 S.C. at 129, 611 S.E.2d at 530, which was far closer to the Commission's award and which also mirrors the difference in impairment rating and disability award in this case.

³¹ Respondents note that "the back [is] a much more complicated area of the body," which requires "a higher degree of expertise ..." See McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984). Here, as explained above, Dr. Wolgin's estimation of Claimant's degree of impairment was tainted by the false information she provided to him regarding her work abilities and physical activity level.

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

The Commission did not err in relying on Claimant’s statements that she could work. The evidence in this case, including Claimant’s own admission, overwhelmingly supports that conclusion, and this Court should uphold the Commission’s determination that Claimant could work.

IV. Petitioner’s Fourth Argument is not properly before this Court and, in any event, is meritless.

First, Claimant’s argument that she is entitled to ongoing medical treatment should be dismissed summarily because it is not preserved. Claimant did not raise any issue regarding future medical care in her Petition for Rehearing. (Appx. pp. 13-21). Doe v. Orangeburg County Sch. Dist. No. 2, 335 S.C. 556, 561, 518 S.E.2d 259, 261 (1999) (issue not raised in appellant’s petition for rehearing to the Court of Appeals not preserved for further review). In

addition, because this issue was not included Claimant's Petition for a Writ of Certiorari, this Court has not agreed to hear it. It is, therefore, neither preserved nor properly before this Court.

Furthermore, Claimant cites no authority in support of her truncated argument on this issue. A cursory and unsupported argument is deemed abandoned on appeal. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

However, even if this Court considers the substance of her argument, it should be dismissed. Claimant argues that she "requires ongoing medical treatment to lessen her period of disability." However, Dr. Wolgin closed her case and placed her at MMI at her specific request. (R. 327). Contrary to misleading statements in her Brief, Dr. Wolgin did not recommend the open revision surgery, but only that she keep that option open. Although Dr. Wolgin suggested that she might benefit from surgery, he also stated, "I feel the patient does not need to proceed with surgery." (R. 327). As to the suggestion of a spinal cord stimulator, Dr. Wolgin's notes simply indicate that he discussed this as a treatment option on December 10, 2010. (R. 321). On both occasions, he noted Claimant's "[h]istory of diabetes, smoking and overweight." (R. 321, 327). Although he suggested she might want to consider "future care," she was to return to him on an "as-needed basis" only. (R. 327). At the hearing, Claimant did not testify that she was seeking any additional medical treatment. In fact, her only testimony on the issue of future medical treatment was that she did not want to undergo a second surgery. (R. 109, line 14-22).

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

CONCLUSION

For all the reasons stated herein, including that there has been no *ex parte* contact in this case, that Claimant has not demonstrated any prejudice from any alleged *ex parte* communication; that Claimant has not been deprived of any due process rights; that the Commission's credibility determination is proper and supported by substantial evidence; that the Commission did not commit an error of law in determining she was able to work; and that certain issues are not ripe and/or preserved for further appellate review and/or properly before the Court, this Court should deny her Petition and affirm the Court of Appeals.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



Weston Adams, III, S.C. Bar No.: 64291
James H. Lichty, S.C. Bar No.: 69867
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

Attorneys for Respondents

April 2, 2015

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of Griffco of Wampee, Inc. and Chartis Claims, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 2, 2015

McANGUS GOUDELOCK & COURIE, L.L.C.



Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
*Attorneys for Respondents Griffco of Wampee, Inc. and
Chartis Claims, Inc.*

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


PROOF OF SERVICE

I certify that on the 2nd day of April 2015, I served the **Respondents' Brief** on Patricia Fore by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record:

Stephen B. Samuels, Esq.
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201

Peter P. Leventis, Esq.
McKay, Cauthen, Settana & Stuble, PA
1303 Blanding Street
Columbia, SC 29201

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Jani L. Richards
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for Respondents



Reply To

HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

April 2, 2015

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Patricia Fore v. Griffco of Wampee, Inc. and Commerce & Industry
Insurance Company c/o Chartis Claims, Inc.
Date of Accident: February 24, 2008
WCC File No.: 0810152
Our File No.: 2094.08282
Case Tracking No.: 2014-002039

Dear Mr. Shearouse:

Enclosed for filing please find the original and 15 copies of Respondents' Brief in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service. Please file these documents and return clocked in copies in the enclosed, self-addressed stamped envelope.

If you have any questions, please contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC


Helen F. Hiser

Enclosures

cc: Stephen B. Samuels, Esquire
Peter P. Leventis, Esquire

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735 JOHNNIE DODDS BLVD, SUITE
200
POST OFFICE BOX 650007
MT. PLEASANT, SC 29465

843.576.2900 PHONE
843.534.0605 FAX
WWW.MGCLAW.COM