

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

S.C. Supreme Court

WCC File No. 0810152

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

Patricia Fore, Employee, Petitioner

v.

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

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

- A. The Smith letter constituted ex parte communication with a party regarding a material witness, thus creating a presumption of prejudice to the opposing party [in Reply to Respondents' arguments at pages 13-27].

Respondents begin their argument by urging the Court to accept the unduly narrow definition of *ex parte* communication adopted by the Commission and the Court of Appeals. See Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014)(limiting the definition of *ex parte* communication as “prohibited communication between counsel and the court when opposing counsel is not present.”). This argument should be rejected, both on the facts of this case and as a matter of public policy. The prohibitions on *ex parte* communication set forth in the Judicial Canons and the Administrative Procedures Act are not mere technicalities. These prohibitions are fundamental to due process and the administration of justice – in our courts and in our administrative agencies. See Jennings v. Dade County, 589 So.2d 1337 (Fla.App. 3 Dist. 1991)(“*Ex parte* communications are inherently improper and are anathema to quasi-judicial proceedings.”).

Respondents first contend there was no *ex parte* communication at all because the Smith letter was not sent directly to the Carrier. It would take an “unusual finesse of reasoning” to accept, as Respondents argue, that Smith’s letter merely “suggest[ing] that the workers’ compensation carrier *might need to know* about the fraud allegation” did not constitute *ex parte* communication with the Carrier. [Brief of Respondents, page 13 (emphasis added)]. Indeed, Smith did not “suggest” that the carrier “might need to know about the fraud allegation.” His actual language was much

more emphatic than the reworded version in Respondents' Brief. After acknowledging that he could not "alert the carrier" himself – he wrote: "But I suggest the carrier *needs to know* an allegation of fraud has been made . . ." [R. P. 382 (emphasis added)].

Smith plainly intended and expected that the McGowan allegation be forwarded to the Carrier – which is exactly what the Attorney General's office did – in a transmittal letter which illustrates that the Attorney General viewed this as a commonplace ministerial duty. [R. pages 380, 384]. The prohibition on *ex parte* communication is not limited to **direct** communication. The APA specifically states:

members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, **directly or indirectly**, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

S.C. Code Ann. § 1-23-360 (1985)(emphasis added).

The Judicial Canons also prohibit indirect *ex parte* communication. See Rule 501, Canon 3B(7), SCACR ("A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . .").

Respondents then argue "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." [Brief of Respondents, page 15]. Essentially, Respondents argue that because Smith himself is not a Commissioner and because his job is within the Administrative Department, he is excused from compliance with the APA and Judicial Canons. Following this line of reasoning, any court or agency employee (except judges, commissioners and law clerks) would be free to

disclose any and all material information in a pending case *ex parte* to any one party without consequences.¹ Such an obviously absurd result cannot have been the intent of the drafters of the APA and the Judicial Canons. See *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-343, 713 S.E.2d 278, 283 (2011)(“Courts 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 plan legislative intention”). Indeed, Respondents themselves distance themselves from their own argument, stating “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.” [Brief of Respondents, page 15].

The hair-splitting argument Respondents raise is to argue that the Commission’s Compliance Division (where the Smith letter originated) has no judicial responsibilities such that its Director would not be considered the equivalent of “other court personnel.” This argument should fail as the

¹Respondents argue that applying the prohibitions on *ex parte* communication about the facts and law of a case to other employees of the court or agency would be absurd. They use the example of a peer review process by a credentialing committee at MUSC, stating that “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.” [Brief of Respondents, page 22]. The Court should reject this argument as it is more straw man than *reductio ad absurdum*. The prohibition does not apply to casual conversation – attorneys appearing before this Court are not prohibited from greeting the bailiffs as they enter the courthouse. The prohibition applies to material information about the facts and law of a pending case. When an *ex parte* communication takes place that relates to an aspect of the trial, the trial judge “generally should disclose the communication to counsel for all parties.” *Rushen v. Spain*, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983). Cf. Rule 501, Canon 3B(7), SCACR (“Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized provided: (I) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.”)

Act confirms that the Compliance Director is part of the hearing Commissioners' staff. The Workers' Compensation Commission consists of seven members appointed by the Governor – one of whom is designated as the chairman of the Commission. See S.C. Code Ann. § 42-3-20 (2007). “The chairman is the chief executive officer of the commission and shall execute the policies established by the *commission in its capacity as the governing body of the judicial and administrative departments.*” S.C. Code Ann. § 42-3-25 (2007)(emphasis added). The Director of the Compliance Division is supervised by and responsible to the Commissioners. See, also S.C. Code Ann. § 42-3-80, 90 (2007)(establishing that division directors “shall perform such functions and duties as may be assigned . . . by the director of the administrative department subject to the provisions of § 42-3-25.”). The letter sent by Director Smith was not an isolated, random occurrence. It was part of a deliberate policy promulgated by the Commission.² [R. page 241, lines 19-24]. The Comments to the rule add, “A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge’s staff.” Rule 501, Canon 3B(7), SCACR.

Respondents further argue that any communication by or from Smith does not implicate the adjudicative side of the Commission because the Director of the Compliance Division works on the

²In many points in their brief, Respondents use such phrases as “baseless allegations attacking the motives . . . impugning the good faith of the Commission . . .” [Brief of Respondents, page 19, footnote 12]. Petitioner wishes to again emphasize that there is no suggestion that the Commissioners or any other employees or officers of the Commission deliberately violated the Judicial Canons. The Legislature compelled the Commission to create a mechanism to comply with § 42-9-440 and § 38-55-510 et seq. The Commission clearly struggled with the sometimes mutually exclusive obligations of reporting misrepresentations with the prohibitions on *ex parte* communication. The course ultimately decided upon – the procedure followed in the Smith letter – created unintended consequences. To their credit, the Commissioners changed the procedure.

administrative side. The administrative side of the Commission is akin to the clerk of court's office in the state judicial system. Just as the State Constitution provides that the Chief Justice is the "administrative head of the unified judicial system," Title 42 provides that the Chairman is the administrative head of the Workers' Compensation Commission. S.C. Const. Art. V, § 4.

The mere fact the Director of the Compliance Division does not personally adjudicate cases, does not give the Compliance Division license to violate the prohibitions on *ex parte* communication. See S.C. Code Ann. § 1-23-360 (2007)(prohibiting *ex parte* communication by "members or employees of an agency assigned to render a decision . . ." (emphasis added)). The prohibition applies to "hearing officers, court clerks exercising important discretionary functions, and similar officers." Modern Ethics § 11.3 at 604, *quoted in* Weiss, Jack M., *It Depends on the Meaning of Ex Parte, Litigation*, Volume 29 No. 2 (Winter 2003) at 3. There is never a circumstance where an employee of an agency or court personnel can engage in *ex parte* communication about the merits of a case with one of the parties. And certainly not to assist one party to "conduct an investigation" of the opposing party. [R. pages 381-383]. See, e.g. People v. Kangas, 113 N.W.2d 865 (Mich. 1962)("[W]e . . . caution trial judges that bailiffs, sheriffs, and other court personnel should be warned about practices involving associations with jurors both in and out of the courtroom which might create the opportunity to influence their decisions."); State v. Bourgeois, 945 P.2d 1120 (Wash. 1997)("The bailiff is in a sense the 'alter-ego' of the judge, and is therefore bound by the same constraints.").

Respondents argue: "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.”³ [Brief of Respondents, page 24]. Respondents’ rationale is that “it would defeat the purpose of the Attorney General’s investigation to notify a claimant of an investigation before it begins.” [Brief of Respondents, page 24]. Respondents’ argument is disturbing. The objective is to find the truth – not to win at all costs. We need to be mindful, not only of the letter of our ethical obligations, but also of the spirit and intent underlying them.

The “Omnibus Insurance Fraud and Reporting Immunity Act” is not limited to workers’ compensation claimants. It applies to any “False statement or misrepresentation” made by “any natural person, company, corporation, unincorporated association, partnership, professional corporation, or other legal entity and includes any applicant, policyholder, claimant, medical providers, vocational rehabilitation provider, attorney, agent, insurer, fund, or advisory organization.” S.C. Code Ann. § 38-55-530; § 38-55-550 (2007). In short, the shoe can be on the other foot. Employers and insurance companies – and the people who work for them – face the same scrutiny. And deserve the same protections against injection of unfair and unsupported allegations into the adjudicatory process.

The cure is to give all parties equal due process. It begins with opening up the process to ensure that all parties have notice and the opportunity to rebut any allegations against them. The

³At the time Smith sent his letter, there was no investigation – only an allegation by a disgruntled bail bondsman with a grudge against his former employee for helping his competition. If Fore was ever investigated by SLED for insurance fraud, she never heard of any such investigation nor is there any evidence of an investigation by SLED in this case. Respondents claim at trial that there was an ongoing fraud investigation was an attempt to give some probative value to the Smith letter. This argument was effectively abandoned on the appeal, where Respondents acknowledge “Insurance fraud was **not** an allegation in this case.” [Brief of Respondents to the Court of Appeals, page 17 (emphasis in original)].

Commission can comply with the fraud reporting statute two ways. First, when it receives unsolicited communication from any person, it “should disclose the communication to counsel for all parties.” Rushen v. Spain, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983); Rule 501, Canon 3B(7), SCACR . Second, if a Commissioner reasonably believes that a witness or party testifying in a hearing has made a “false statement or misrepresentation,” the Commissioner can use his or her discretion to order the case referred to the Attorney General.⁴

This Court should find as a matter of law that the Smith letter was a prohibited *ex parte* communication between the Commission and Respondents. The decisions below should be reversed and a trial de novo should be granted before an impartial tribunal with appropriate safeguards.

B. The actions of the Commission and the Respondents regarding the *ex parte* communication resulted in substantial prejudice to the Appellant [in Reply to Respondents’ arguments at pages 27-31].

The existence of *ex parte* communication raises a rebuttable presumption of prejudice. See, e.g., Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); Blaker v. Planning

⁴The Omnibus Fraud act states “The Workers’ Compensation Commission *may* refer such cases as provided in Section 42-9-440.” S.C. Code Ann. § 38-55-570 (C)(2007)(emphasis added). While the first part of Section 42-9-440 states “The commission shall report all cases of suspected false statement or misrepresentation,” to goes on to state “if warranted . . .” S.C. Code Ann. § 42-9-440 (2007). The use of the words “may” and “if warranted” in the two statutes evince an intent of the Legislature for the Commission to make appropriate findings of fact justifying the referral to the Attorney General. As a criminal referral from an adjudicatory body is a serious matter with Constitutional implications, the Legislature needed to ensure the Commission exercised due diligence and judicial discretion to avoid arbitrary and capricious accusations.

As an example of how this plays out in practice, the Commission included a finding in one case that a subcontractor had forged a certificate of insurance, finding “I find this defense to be a fabrication.” The Commissioner ruled “IT IS FURTHER ORDERED that this case shall be forwarded to the Office of the Attorney General for investigation under the Omnibus Insurance Fraud and Reporting Immunity Act.” Branham v. Advanced Metal Roofing, et al., WCC File Number 1002279 (filed January 21, 2011).

and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989). Once there has been prima facie proof of improper *ex parte* communication, the burden of showing that the communication was harmless shifts to the party seeking to uphold the decision below. The presumption may be rebutted by evidence that (1) the *ex parte* evidence or testimony was not received by the Commission or (2) was not considered by it and, therefore, did not affect the Commission's final decision. See Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993)(reversing despite finding by the trial judge that the *ex parte* communication "if consulted at all, had no bearing on the trial court's decision."). It is undisputed the Smith letter was received – indeed created – by the Commission, so the only remaining avenue is whether Respondents can prove the improper *ex parte* communication was not considered in the Commission's final decision. This they cannot do.

Respondents argue that there is no presumption of prejudice arising out of improper *ex parte* communication under South Carolina law. [Brief of Respondents, pages 27-28]. Petitioner acknowledges that this precise question has not been answered by this Court.

The parties differ as to whether a presumption of prejudice exists or even should exist. Petitioner relies on the United States Supreme Court for the proposition that "When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties." Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Remmer is somewhat akin to the instant case, as it began with unsolicited communication by a third party (although unlike the instant case, the third party was not a witness). A juror reported to the trial judge that an unnamed third party suggested to the juror that he could profit by returning a defense verdict. 347 U.S. at 228, 74 S.Ct. 450. The trial judge ordered the FBI

to investigate. The investigation ultimately revealed “that the statement to the juror was made in jest.” Id. The judge reviewed the FBI report with the prosecutor, but did not disclose the incident to defense counsel. The defendant learned of the incident and the *ex parte* communication with the prosecutor after the trial. He moved for a new trial and requested a hearing “to determine the circumstances surrounding the incident and its effect on the jury.” Id. The trial judge denied the motion without holding a hearing.

The United States Supreme Court vacated the judgment and remanded for a hearing on the incident. The Court stated: “any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons deemed *presumptively prejudicial.*” Renner, 347 U.S. at 229-230, 74 S.Ct. 450 (emphasis added).

The essential rule from Renner is that (1) *ex parte* communication is presumptively prejudicial; and (2) a hearing must be held to determine if the presumption of prejudice can be overcome. Id.

Respondents cite to an unreported decision from a federal district court magistrate for the proposition that 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.” [Brief of Respondents, page s 24-25, *quoting Schneider v. Rivard*, 2013 U.S. Dist. LEXIS 102045 * 13 (E.D. Mich. Apr. 12, 2013)(emphasis added by Respondents).

The magistrate judge was incorrect. The 4th Circuit Court of Appeals discussed Renner at length only last year in Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014). The Barnes court acknowledged “With respect to the presumption of prejudice, we have recently observed, ‘there is a split among the circuits regarding whether the Remmer presumption has survived intact following’

the Supreme Court's decisions in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), and United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Barnes at 242 (citation omitted).

The 4th Circuit analyzed these cases and its own case law in the 60 years since Renner had been decided. The court concluded: "Indeed, Remmer and its progeny clearly established that a presumption of prejudice must be applied, and that a hearing must be held, when a defendant presents a genuine allegation of communication or contact between a third party and a juror concerning the matter pending before the jury." Barnes v. Joyner, 751 F.3d 229, 246 (4th Cir. 2014).

Petitioner recognizes that Remmer and Barnes are federal court cases involving criminal convictions by juries. As such, they are persuasive authority. And to be sure, there are different levels of due process accorded to criminal trials versus administrative hearings. Nevertheless, the essential foundations remain the same. "[A] fair trial in a fair tribunal is a basic requirement of due process, [and] [t]his applies to administrative agencies which adjudicate as well as to courts." Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). The prohibitions on *ex parte* communication apply to the Workers Compensation Commission. So should the rule that *ex parte* communication is presumptively prejudicial.

The presumption of prejudice should be particularly strong when the *ex parte* communication is initiated by the tribunal. "If an *ex parte* communication is invited or initiated by the judge, no prejudice needs to be shown . . ." O'Connor v. Leapley, 488 N.W.2d 421, 423 (S.D. 1992). See, also In re Newberry County Magistrate English, 625 S.E.2d 919, 367 S.C. 297 (2006) (violation of Canon 3B(7) in traffic ticket case where magistrate committed "judicial misconduct to have had an

ex parte communication with the charging trooper and to even suggest the trooper ‘help’ the employee”); In re Beckham, 620 S.E.2d 69, 365 S.C. 637 (2005)(judicial misconduct for magistrate to convey message from defendant’s family member to law enforcement about pending case). Although the original communication in this case did not technically arise within the Commission – it began with the phone call from McGowan to the Commission – the prohibitions on *ex parte* communication were violated when Smith conducted his own investigation and then forwarded the results of his investigation to the Carrier. As such, the presumption of prejudice should apply here.

However, even without a presumption of prejudice, Fore proved she was prejudiced. Respondents suggest that Fore’s argument of prejudice “rings hollow” and “is somewhat bizarre” in the “face of the Court of Appeals’ remand for consideration of Tony Owens’s testimony.” [Brief of Respondents, page 29]. It is indeed encouraging that the Court of Appeals recognized that it was prejudicial error for the Commission to exclude Fore’s rebuttal witness. Unfortunately, a remand is but a half measure.

The Court of Appeals held “the single commissioner should not have refused to hear Owens’s rebuttal testimony and therefore remand this matter to the Commission for a redetermination of Fore’s benefits with the directive that full consideration be given to Owens’s testimony.” Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014). Respectfully, the proper remedy would have been to vacate. The essential problem with a remand limited to Fore’s benefits is that all other findings remain in place – most particularly the finding that Fore “is not credible and I believe she can work.” As the Court of Appeals noted, “because of the nature of the communication, Fore was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working.” Id. In effect, it

endorses an unwarranted credibility finding tainted by the false allegations of insurance fraud.

“According to Professor Charles Wolfram, ‘[t]he purpose of the prohibition . . . is to prevent the communicating side from gaining an unfair advantage in the litigation.’” Weiss, Jack M., *It Depends on the Meaning of Ex Parte, Litigation*, Volume 29 No. 2 (Winter 2003) at 3, *quoting* Modern Legal Ethics § 11.3, at 604 (1986). Weiss further writes: “The vice is not just that ex parte communications undermine the reliability of the adversary process; they cast doubt on the impartiality of the judge and, as Allison puts it, may thereby undermine ‘institutional legitimacy.’” *Id.*, *quoting*

Allison, “Combinations of Decision-Making Functions, ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis,” 1993 *Utah L. Rev.* 1135, 1197 (1993). Weiss adds: “The American Law Institute (ALI) stresses that an ‘ex parte communication also threatens to embarrass the parties’ relationship with the judicial officer, requiring the officer either improperly to acquiesce in the conduct or to make a censorious response.” *Id.*, *quoting* Restatement of the Law Governing Lawyers § 113, cmt. b (ALI 2000).

Respondents protest that “Claimant unwittingly reveals her true position in asserting that the only way the Commission could prove it was unbiased and the alleged ex parte communication was not prejudicial was to rule in her favor.” [Brief of Respondents, page 31]. Respondents miss the point. The ruling must be based on the evidence – not speculation; not prejudice; not in an unearned discovery advantage; not on a credibility finding tainted by inadmissible and unduly prejudicial allegations of a nonexistent investigation of insurance fraud.

Fore put forth unrefuted evidence of her disability.⁵ After her unsuccessful attempt to work as a bail bondsman, her doctor kept her out of work indefinitely. The vocational expert opined she was permanently and totally disabled. Although excluded by the Commission, Tony Owens testified that he would have hired her, but as she was unable to do the job, he hired the person Fore trained. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(total disability can be proven by (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) “diligent efforts to secure employment.”). Respondents presented neither medical nor vocational evidence to rebut Fore’s proof.

At the Court of Appeals, Respondents alleged there was no prejudice in this case because “Insurance fraud was **not** an allegation in this case.” [Brief of Respondents to the Court of Appeals, page 17 (emphasis in original)]. On this one point the parties can agree: *there is absolutely no evidence nor even an allegation that Patricia Fore engaged in insurance fraud.*⁶

However, that begs the question, as there was no allegation of insurance fraud, why then did Respondents introduce the Smith letter in the first place? The answer is self-evident; Respondents wanted to give the Commission (and this Court) the false impression that Fore had committed fraud. Indeed, trial counsel admitted this at the hearing when he stated: “It is simply evidence that there is

⁵The evidence of permanent and total disability is discussed in detail in Petitioner’s Brief at pages 30-41.

⁶Fore went to work for ABC Bonding on the advice of her doctor with the participation of the Carrier’s nurse case manager, Cathy Nelson. She was released to work with restrictions on August 27, 2010. [R. page 306, 308]. Her work efforts were documented by Dr. Wolgin on September 30, 2010, where he noted, “She is able to continue with her work which is 3 hours per day 3 days per week helping in an office setting.” [R. page 312]. As Fore *never* concealed her attempt to work from her doctor and the Carrier’s nurse, *there is no evidence of insurance fraud.*

a fraud investigation ongoing by the A.G.'s office in this claim, and it is properly admissible.”⁷ [R. page 99, lines 2-5]. To suggest “the July 18 Letter was not presented as either character evidence or for impeachment purposes” is, frankly, astoundingly disingenuous. [Brief of Respondents to the Court of Appeals, page 21].

This argument was highly improper. Not only would evidence of an ongoing fraud investigation by the attorney general be inadmissible, *there never was any such fraud investigation*. Rule 404; Rule 609, SCRE. See, also S.C. Code Ann. § 38-55-570 (D) (2007)(“... any information furnished pursuant to this section is privileged and shall not be part of any public record.”). The sole action taken by the Attorney General’s office was to transmit the Smith letter to the Carrier – as duly instructed by the Commission. The Attorney General made no investigation itself nor did it turn the case over to SLED for investigation. This was simply an attempt by counsel to taint the proceedings with improper, unsubstantiated and unduly prejudicial allegations – an effort which, sadly, was successful.

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

The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against “prejudicial” *ex parte* communications, but against *ex parte* communications. Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

⁷The Rules of Evidence allow admission of an *actual conviction* of certain crimes; never mere allegations – and certainly not when counsel later concedes “Insurance fraud was not an allegation in this case.” [Brief of Respondents to the Court of Appeals, page 17]. Rule 404; Rule 609, SCRE.

See, also Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993)(reversing despite finding by the trial judge that the *ex parte* communication “if consulted at all, had no bearing on the trial court's decision.”).

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

Commissioner Lyndon would have seen the 36-percent whole person impairment rating from Fore’s treating surgeon on the Form 58's submitted by both sides. This is an exceptionally high impairment rating – one which historically has always resulted in the injured worker being deemed permanently and totally disabled.⁸ See Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating). The impairment rating was coupled with the additional facts that (1) Respondents did not retain a vocational expert to rebut the expert opinion of Glenn Adams, and (2) Respondents had not requested a hearing to terminate temporary compensation even though Fore had been placed at MMI

⁸Respondents did not dispute the accuracy of the impairment rating.

a full seven months before the hearing. [R. pages 51-67]. The obvious inference is that Commissioner Lyndon “worked the case up” and logically presumed this would be a simple, straightforward case of total disability – virtually a pro forma hearing. Instead, as he himself stated, the hearing devolved into a “tangled mess.” [R. page 157, lines 5-16].

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

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

2. A new trial should be ordered because the Appellate Panel’s findings on credibility were affected by the same error of law made by the Single Commissioner [In Reply to Respondents’ Argument at pages 32-45].

A new trial is necessary because the procedural defects in this case were not wholly remedied by the Court of Appeals’ limited remand. The Court of Appeals remanded because they saw the main error below as the exclusion of a rebuttal witness – not as a case tainted by *ex parte* communication. This is not a cure because, as Respondents put it, due process requires that “any lack of opportunity to respond or failure to provide all procedural safeguards during initial hearing may be cured by providing later procedural remedy.” [Brief of Respondents, page 37]. A remand where the result is preordained is not a remedy. Asking a tribunal to reconsider the award of benefits

to a person it already believes is not credible and can work must end in the same result. A new trial allows the trier of fact to take a fresh look at the evidence – evidence which may be new and more complete, for as the Court of Appeals noted, “because of the nature of the communication, Fore was deprived of sufficient opportunity to investigate the evidence Respondents presented to support their position that she was capable of working.” Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37, 43 (Ct. App. 2014).

The Commission’s ruling was based entirely on a faulty credibility finding, to wit: “After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work.” [R. page 39, Finding of Fact 21]. Notwithstanding the protestations of Respondents and the bolstering of the decision by the Appellate Panel, the credibility finding was tainted by patently prejudicial inadmissible evidence. It is simply impossible to separate out the prejudicial effect of the Smith letter. Indeed, the reference in the finding to “considering all of the evidence” definitively proves the Smith letter played a key role in the result. See South Carolina Dept. of Social Services v. Lisa C., 669 S.E.2d 647, 380 S.C. 406 (Ct. App. 2008)(improper for the fact-finder to make a credibility determination based on inadmissible evidence).

The inclusion of the credibility finding and the “she can work” finding in the same sentence shows that the two are intertwined. This is simply improper. A finding of disability must be based on all the evidence – medical, vocational, documentary and testimonial. The evidence must be applied to the proper legal standard. Letting the decision devolve to a black and white credibility determination simply allows the adjudicator to punish people it doesn’t like and reward those it does. See Breeden v. Weinberger, 493 F.2d 1002, 1010 (4th Cir.1974) (“[A]dministrative findings based

on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained.”).

As to the specific arguments made by Respondents, they dodge the issue actually appealed – which is that the Commission’s credibility determination must be vacated because it was based on inadmissible evidence. Respondents argue the Smith letter had no bearing on the credibility finding, instead arguing that the admission of the letter was harmless error.

The admission of the letter – indeed the entire process giving rise to Respondents’ fraud allegations at trial – was patently prejudicial error. Respondents ask this Court to uphold the Commission’s credibility determinations. Yet, to do so would violate their own argument that “procedural shortcomings will be resolved when the Commission reviews this case with the Smith Letter removed and with ‘full consideration . . . given to Owens’ testimony,’ pursuant to the Court of Appeals’ remand. [Brief of Respondents, page 37].

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

The only “blip” in her testimony was an inconsistent statement in her deposition, where she said “no” when asked if she had earned money since her accident. [R. page 125, line 23-page 126, line10]. However, she admitted this inconsistency on direct and further explained it on cross-

examination. It is perfectly reasonable for a person to consider volunteer assistance to a friend to not be work - and she never denied she helped out Tony Owens; even going so far as to bring written proof of the help she provided. As to work for Steve McGowan, it appears he was the one who insisted on paying her in cash – as evidenced by his admission that he paid no taxes on her wages. [R. page 176, lines 5-17]. And again, there was no reason for her to cover up working for Steve McGowan because *she knew everyone already knew about it*. She had told her doctor, the carrier’s rehab nurse, and her vocational counselor.

Respondents contend Fore’s “argument makes no sense on many levels.” [Brief of Respondents, page 34]. They logically state “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.” [Brief of Respondents, page 34]. It would be a good question – if it were not based on a false premise. Fore did not seek immediate employment. She did one bond for A1 in February 2011 to keep her license active – hoping that if her condition improved, it might be useful some day. She did no other bonds until July 2011 when Tony Owens developed health problems – until her replacement, Mary Weaver, could take over. If she were quitting ABC in February for a better paying job, she would have been doing multiple bonds immediately.

Doing all this for free is entirely logical behavior – for people who value their friendships in the community. It may seem counterintuitive, yet is very human. Fore had already tried to work and was unable. She valued her friendship with Tony Owens, so she helped him through his personal crisis as much as she could. When later “confronted” with evidence she was “working” for Owens as a bail bondsman, she produced contemporaneous evidence to show otherwise – the jail log of her *de minimus* activities, her personal journal, and Tony Owens himself. [R. page 368-376].

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

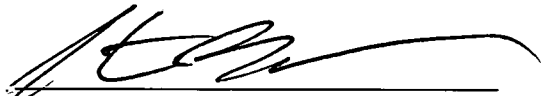
3. Preservation issue regarding lifetime medical treatment [In Reply to Respondents' Argument at pages 46-47].

Petitioner acknowledges that Respondents are correct that a separate and distinct claim for lifetime medical treatment is not preserved as it was not raised in the Petition for Rehearing nor the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order of the Appellate Panel as unsupported by substantial evidence. The Court should hold Fore has proven that she is permanently and totally disabled as a matter of law. Alternatively, the Court should vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or direct the Commission appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

Respectfully Submitted,



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Columbia, South Carolina
April 23, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

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

Patricia Fore, Employee Petitioner,

v.

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

CERTIFICATE OF COUNSEL

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



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Columbia, South Carolina
April 23, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. Supreme Court

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

Patricia Fore, Employee, Petitioner,

v.

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

PROOF OF SERVICE

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

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Angi O'Connell

April 23, 2015



STEPHEN B. SAMUELS
ATTORNEY AT LAW

April 23, 2015

RECEIVED

APR 23 2015

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Patricia Fore v. Griffco of Wampee, Inc. And Chartis Claims, Inc.
Appellate Case No.: 2014-002039

Dear Mr. Shearouse:

Enclosed for filing please find the original and fifteen (15) copies of **Reply Brief of Petitioner**. Also enclosed is the Proof of Service showing service upon the attorneys for the Respondents. Please have your staff file the original and copies, and return a clocked copy to my office with my courier.

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

With kindest regards, I am

Yours very truly,

A handwritten signature in black ink, appearing to be "SBS", written over a horizontal line.

Stephen B. Samuels

SBS/aro

Enclosure(s)

cc w/enc.: Weston Adams, III, Esquire
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