THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 22, 2013, the Claimant's (Appellant here) left hand came in contact with a 240-480 volt line resulting in a severe electrical shock entering his left hand and running throughout his arm, left shoulder, neck and upper left quadrant of his chest with immediate, continual and worsening pain in those areas thereafter. After the injury which had been immediately reported that day, May 22nd, on May 27th the Claimant went to the Minute Clinic for that severe pain. On May 28, 2013, the Appellant went from Doctor's Care to a cardiologist and from there via ambulance to the Emergency Room across the street where he was hospitalized. (R., p. 169). The insurance carrier accepted the claim, medical care was authorized and thereafter Temporary Total Disability benefits were started. On June 5, 2013, a Notice of Representation and formal claim (hereinafter forms referred to as "WCC Form #") was filed with the SC Workers' Compensation Commission by Counsel for the Appellant. (R. pp. 34-36). After confirmation of coverage, on June 12, 2013, the South Carolina Workers' Compensation Commission wrote the Defendants, attaching the WCC Form 50 claim that had been filed with the Commission, informing them that they had not properly filed a First Report of Injury. (R., pp. 611-612).

The appropriate forms including the First Report of Injury and the forms noting the starting of benefits and the payment of medical care were not properly filed with the Commission and on July 23, 2013, the Defendants paid a $200.00 fine to the SC Workers' Compensation Commission for the failure to file the proper forms. (R., p. 613). Benefits were continued throughout the summer including the authorization and payment of all medical care and temporary total weekly disability benefits at the rate of $426.69 per week. On September 15, 2013 (less than 150 days after the accepted injury) the workers' compensation insurance carrier's adjuster by letter with one copy of a WCC Form 15(II) attached, notified the Appellant through his attorney that they had stopped payment of benefits. (R., pp. 37-38). The WCC Form 15(II) stopped payment without a hearing on the basis that, "based on a good faith investigation, the claim is denied". No required explanation for the stop payment without a hearing was attached, however a WCC Form 19 Status Report and Compensation Receipt Notice was attached. (R., p. 39).

On September 18, 2013 via email and US Mail to the adjuster and Defense Counsel and via hand delivery to the Commission, a WCC Form 15(III) Request for Hearing to Reinstate Benefits concerning the stop payment of temporary

total disability benefits and medical care was served and filed with the Commission. (R., pp. 40-42). On September 18, 2013, a Notice of Deposition of the adjuster, as Managing Agent for the insurance carrier, along with a Subpoena for the production of a complete copy of the adjuster's file was served by personal service on Defense Counsel setting the deposition for October 2, 2013. (R., pp. 43-46). By separate cover letter dated September 23, 2013, the WCC Form 15(III) Request for Hearing was again served via hand delivery at the SC Workers' Compensation Commission and via email and US Mail on both the adjuster and the attorney for the Defendants. (R., pp. 614-621).

On September 27, 2013, a Motion to Quash the Subpoena for the adjuster and for the production of the adjuster's file was filed via US Mail with the Commission. (R., pp. 47-56).

Also on September 27, 2013, a Hearing Notice was served on the parties via email for a hearing to be held on November 13, 2013 with the subject being, "**To Determine If Claimant's Temporary Compensation Was Legally Terminated.**" (R., p. 57).

On October 7, 2013, a Reply to Defendants' Motion to Quash was filed by the Claimant. (R., pp. 58-64). On October 11, 2013, a Notice of Deposition was served by

regular mail setting the Claimant's deposition ten (10) days later on October 21, 2013. (R., pp. 65-67). On October 21, 2013, a Motion for Continuance and/or Postponement of the Scheduled Hearing was filed by the Defendants with the Commission because of a Declaratory Judgment Action filed by the Claimant challenging the constitutionality of SC Code §42-9-260 as to the subsections applicable to stopping benefits without a hearing and because the Claimant did not attend the deposition on October 21, 2013. (R., pp. 68-137). Also, by Motion of that same date, the Defendants filed a separate Motion to Compel the deposition of the Claimant. (R., pp. 138-146). (On October 29, 2013, the deposition of the Claimant was rescheduled by agreement and was taken on November 1, 2013.) (R., pp. 58-64).

On October 30, 2013, the Claimant filed his Pre-Hearing Brief and APA Submissions. (R., pp. 150-183). On October 31, 2013, the Claimant filed a Reply to the Motion for Continuance and/or Postponement of a Scheduled Hearing and also filed a Reply to the Motion to Compel Deposition of the Claimant and for Sanctions, Costs, Fees and/or Other Relief Deemed Appropriate by the Commission. (R., pp. 184-191; pp. 192-208).

By letter/service by mail dated November 4, 2013 for the November 13, 2013 hearing (due 15 days before hearing),

the Defendants filed late their Pre-Hearing Brief and Notice of Witnesses and written medical reports (due 15 days before hearing) with the Commission and Claimant's Counsel. (R., pp. 209-265). On November 5, 2013, the Defendants also filed late an Amended Pre-Hearing Brief and Supplemental Notice of Witnesses and Written Medical Reports (due 15 days before hearing) for the November 13, 2013 hearing. (R., pp. 266-272). On November 7, 2013, the Claimant filed Objections to the Defendant's belated Pre-Hearing Brief and APA Submissions and belated Supplemental and Amended Pre-Hearing Brief and APA Submissions. (R., pp. 622-624).

The hearing was held on November 13, 2013; which started, according to the Record at 3:50 p.m., although scheduled for 1:45 p.m. (R., p. 57, 375). Prior to going on the Record, the Hearing Commissioner held an off-the-Record conference approximately two hours long in which he notified the parties that he would decide the Motions and verbally decided the Motions which was confirmed by written Order subsequent thereto. He also made numerous rulings on evidence and on the submission of the Defendants' Pre-Hearing Brief and APA Submissions which appears in the subsequent Orders issued on both the Motions and on the Form 15(III) Hearing. (R., pp. 1-6; 375-383).

After the hearing on November 27, 2013, some fourteen (14) days later, Counsel for the Claimant filed a Request as to the status of the Commissioner's Order on the Form 15(III) Hearing with a copy to Counsel for the Defendants. (R., pp. 625-626). A responsive letter was filed by the Defendants with the Commissioner on December 3, 2013 and on December 5, 2013, Counsel for the Claimant filed a responsive letter objecting to certain statements and non-evidentiary facts made in the Defendants' December 3rd letter and requested a conference on the Record. (R., pp. 627-628; p. 629).

On December 5, 2013, the Hearing Commissioner issued two Orders: one Order being, "Order on Parties' Motions"; and the other being the Decision and Order on the Form 15(III) Hearing held on November 13, 2013. (R., pp. 1-6; pp. 7-15). A Form 30 Request for Commission Review was filed as to both Orders on December 18, 2013. (R., pp. 273-292). After briefing, with the Claimant/ Appellant's Brief being filed on February 28, 2014 and the Defendants' responsive Brief being filed on March 14, 2014, a hearing was held on the Request for Review on May 19, 2014. (R., pp. 293-319; pp. 320-338; pp. 583-610). A request for Proposed Order was forwarded to Counsel for the Defendants

on June 6, 2014. (R., pp. 630-631). The proposed Order was subsequently submitted and the Full Commission Order was issued on July 25, 2014. (R., pp. 16-33). The Claimant/ Appellant filed a timely Notice of Intent to Appeal with a detailed attached Grounds for the Appeal and/or Errors of Law for presentation to this Court on August 25, 2014. (R., pp. 339-356). This Appeal follows and is one of three Appeals from three separate Orders issued by the SC Workers' Compensation Commission: this appeal being from the two Orders issued by Commissioner Beck based on the Form 15 (III) Hearing and the other two Appeals being one by the Defendants/Appellants from the Decision of Commissioner Susan Barden awarding the Claimant reinstatement of temporary total disability benefits and medical care as causally related to the accident; and the other Appeal being by the Claimant as an Appellant from the Decision of the Full Commission modifying and reversing Commissioner Barden's Decision on one issue: that being the Full Commission denied the Claimant any entitlement to and from ever claiming any benefits for medical care or otherwise to the head and/or brain resulting from the injury. After filing, Mediation was attempted under the Pilot Program of this Court which resulted in an impasse, the rescheduling of the Briefing of these matters and this

Appeal is now before the Court for Decision. The Declaratory Judgment Action as to the constitutionality of SC Code §42-9-260(B), (1-6) is still pending in Circuit Court.

STATEMENT OF FACTS

This was a WCC Form 15(III) hearing. Following the accident on May 22, 2013 compensation benefits and medical care were started and authorized. SC Code §42-9-260(A) specifically provides that, "upon making the first payment, the employer **immediately shall notify the Commission, in accordance with a form prescribed by the Commission**, that payment of compensation has begun." The Defendants while having started benefits did not comply with the Statute by filing the required form and notification and the Commission fined the Defendants for non-compliance for not filing a Form 12A or initial Form 15(I) which was admitted. (R., pp. 611-612; p. 613). On September 15th, one hundred and eighteen (118) days after the accident, the Claimant's attorney (Appellant in this Court) received one copy of a Form 15(III) terminating benefits on the basis that: "based on a Good Faith Investigation, the claim is denied." No required proof of service was attached. (R., pp. 37-39). [See: SCWCC Form 15; Rule 67-201(B)(1) and 504(A)]. Pursuant to the requirements of the Regulations there was

no attached documentation as to the Good Faith Investigation that was alleged to have been performed and/or the results of that investigation. [See: SCWCC Reg. 67-504(A)]. The only additional information contained on the form as to the basis being that was supposedly found during the alleged Good Faith Investigation states the reason denied: "employee failed to meet the burden of a compensable injury under the South Carolina Workers' Compensation Act." (R., pp. 37-39).

On September 18th and 21st Mr. Winfrey filed and served a Form 15(III) Request for Hearing with the Commission and the Defendants. (R., pp. 40-42).

In an effort to determine whether a Good Faith Investigation was conducted and the results of that alleged Investigation, which lead to a termination of benefits without a hearing, the Claimant subpoenaed the adjuster as the, "Managing Agent", to a deposition and subpoenaed the adjuster's file requesting any and all records maintained by the adjuster and/or the employer in reference to the claim. (R., p. 43). While a Motion to Quash was filed, no Order was issued quashing the Subpoena prior to the date set for the deposition on October 2, 2013 and the adjuster failed to appear at the time for the deposition even though the Defendants were placed on notice that the deposition

would go forward barring an Order quashing the Subpoena as to both the adjuster and the adjuster's file. A Reply was filed to the Motion to Quash on October 7, 2013. The Defendants also filed Motions for Continuance/Postponement, to compel Deposition and for sanctions.

A Hearing Notice was issued on Friday, September 27th via email at 4:46 o'clock p.m. setting a hearing for November 13, 2013 at 1:45 o'clock p.m., listing as its, "Subject: To determine if Claimant's temporary compensation was legally terminated." For the hearing set for November 13th, the Defendants as the moving party were required to file their APA Submissions fifteen (15) days prior to the scheduled hearing on or before October 30th (Note: the employer/carrier are deemed to be the moving party in all hearings under Reg. 67-504(C). (R., pp. 381, ll. 21-22.) The Defendants, not only did not file their Pre-Hearing Brief and APA Submissions on October 30th, they did not even file them ten (10) days before the hearing as is required for a responding party, and first filed a Pre-Hearing Brief dated and being served on November 4, 2013, nine (9) days before the hearing, and subsequently filed an Amended Pre-Hearing Brief and Supplemental APAs on November 5th, 2013; eight (8) days before the hearing. (R., pp. 209-265; pp. 266-272).

On November 7, 2013, the Claimant filed a formal objection to the consideration of the Pre-Hearing Brief and APA Submissions of the Defendants and placed objections to various documents that would be submitted to the Commissioner. (R., pp. 622-624).

At the time for hearing, the Commissioner held a lengthy, over two (2) hour off-the-Record Pre-Hearing Conference. During that Conference, the Commissioner advised that while not on the Hearing Notice, he was going to proceed with all of the Motions, heard those Motions, and then entered Decisions from the Bench on those Motions, which are reflected in the Order not issued until December 5, 2013. (R., pp. 1-6). In addition during the Pre-Hearing Conference that was not recorded the Commissioner made numerous decisions on evidence. The Claimant stated his position that under the Statute the Defendants are the moving party and have the burden of proof to establish the Grounds upon which they allege they stopped benefits. The Claimant moved and argued to exclude the Defendants' APA Submissions and Pre-Hearing Brief on the basis of their failure to comply with the Act. The Claimant also reiterated his argument made in his Pre-Hearing Brief that because the Defendants had failed to file the Form 15(I) as required by the Statute when benefits were started, they

were barred from taking the benefit of the provisions of SC Code §42-9-260. Counsel further argued that because of their failure to comply with the Statute in that regard which is mandatory as to the filing of that form, and because they failed to file two (2) copies of the Form 15(II) on the Claimant and failed to attach, "documentation attached as to the reason for termination or suspension"; that the Defendants had completely failed to comply with the Statute and could not stop benefits and pursuant to the mandatory provisions of the Act under SC Code §42-9-260(G), the Defendants had to pay the 25% penalty and had to reinstate benefits withheld in violation of the Code Section which specifically provides that, "the penalty and payment of benefits **is mandatory for non-compliance with any part** of the Section". The Commissioner ruled that in his discretion he was going to admit the belatedly filed APAs and Pre-Hearing Brief; consider testimony from any witnesses that the Defendants wanted to put up; but would consider only any APA Submissions prior to, up to, and including the date that the Defendants gave verbal notice of their decision to stop benefits on September 15th. However, the Commissioner also ruled that the same restriction on evidence applied to the Claimant and the Commissioner would not consider any evidence from the

Claimant or any of the APAs from either party that were dated after September 15th. (R., p. 1-6; pp. 7-15).

However, the Record only reflects that the position of the parties was set out during the Pre-Hearing Conference (R., p. 381, ll. 10-12) and that the parties agreed that the sole purpose of the hearing was to determine whether or not the Defendants properly stopped the Claimant's benefits under SC Code §42-9-260. (R., p. 381, ll. 12-16). (The Claimant would request that the Court note that Decisions were also made on the Motions that had been filed which the Commissioner heard and decided in an unrecorded Pre-Hearing Conference; R., p. 1-6). Twenty-two (22) days after the hearing on December 5th, the Commissioner filed two (2) separate Orders, one addressing the Motions and one denying the Claimant's entitlement to have benefits reinstated. The Commissioner denied reinstatement on the basis that the Defendants had alleged and asserted to the Commissioner that they had conducted a Good Faith Investigation; that the Claimant bears the burden of proof to prove that the Defendants did not conduct a Good Faith Investigation; and specifically held that it is only necessary that the Defendants had, "represented to the Commission they conducted a Good Faith Investigation of the claim" . . . and that, "the Claimant did not provide any evidence that

Defendants conducted their investigation in anything other than good faith" and that therefore, "**a belief** of Defendants formed following a Good Faith Investigation that Appellant had not met his burden of proving compensability is adequate grounds for denial of the claim by the Defendants." (Emp. add.) (R., pp. 7-15). From that Decision and the Decision on the Motions, this appeal follows.

ARGUMENTS

I. WHERE THE RESPONDENTS ARE THE MOVING PARTY UNDER SC CODE §42-9-260, THE COMMISSION ERRED AS A MATTER OF LAW BY HOLDING THAT THE DEFENDANTS/RESPONDENTS DO NOT HAVE THE BURDEN OF PROOF TO PROVE THAT THEY CONDUCTED A GOOD FAITH INVESTIGATION ALLOWING THEM TO STOP BENEFITS WITHOUT A HEARING AND BY SHIFTING THE BURDEN OF PROOF TO THE APPELLANT TO PROVE THAT THE DEFENDANTS/RESPONDENTS DID, "NOT" CONDUCT A GOOD FAITH INVESTIGATION?

The Commissioner found both as a fact and as a ruling of law that the Defendants/Respondents (hereinafter "Respondents"), "represented to the Commission" that they had conducted a Good Faith Investigation and further that they, "represented" that the reasons for the denial was a, "good faith belief", based on their Investigation that the Appellant had not met his burden of establishing compensable injury. The Commissioner then went on to find that the Appellant, "did not provide any evidence," that the Respondents **had not** conducted a Good Faith Investigation and that the Respondents', "good faith

belief" that the Appellant had not met his burden of proof of proving compensability was adequate grounds to deny the claim. Since the Respondents are the moving party under the Statute and the Commission Regulations, the Commission erred by shifting the burden of proof from the Respondents to the Appellant.

First, the Respondents as the moving party have the burden of proof under SC Code §42-9-260 and under the Commission Regulations implementing the Statute. SC Code §42-9-260(B) provides specifically in pertinent part that,

> "once temporary disability benefits are commenced, the payments may be terminated . . . **if:**"

one of the six (6) enumerated conditions is established, that is to say proved, and one of those is that a Good Faith Investigation conducted by the Employer reveals a grounds for denial. "If" is defined in Webster's Dictionary as a word, "used to say that something must happen before another thing can happen". The Statute creates a condition precedent meaning that to be able to stop temporary disability benefits without a hearing they can do that "if" they meet one of the conditions precedent; such as establishing a Good Faith Investigation was conducted. "Plain English for Drafting Statutes and Rules", Chapter 13, §(C) Conditions and Exceptions (1)(a) "If" p.

121, Matthew Bender 2012. The fact that the Respondents have the burden of proof of proving a Good Faith Investigation to be entitled to the benefits of the statute of stopping benefits without a hearing is made clear by the Commission's Regulations. Regulation 67-504(A) specifically requires that the Respondents/Insurance Carrier attach documentation setting forth, "the reason for termination" and Regulation 67-612(B)(4) specifically states that the Insurance Carrier is the moving party in a WCC Form 15(III) hearing, "the Carrier shall be deemed **the moving party** in all hearings scheduled pursuant to a request under R. 67-504(C)".

> The moving party has the burden of going forward as well as the burden of persuasion in an administrative hearing." 73A CJS, Public Administrative Law and Procedure §240, "Burden of Proof".

The party claiming the benefit of a Statute has the burden of proof and this burden is one of persuasion by a preponderance of the evidence, Pike v. SCDOT, 343 S.C. 224, 540 S.E.2d 87 (2000); Trial Handbook for South Carolina Lawyers, 5th Ed. (2012-2013) Burden of Proof, §9.3 and §9.4, "Statutory Allocation of Burden of Proof"; Sutherland Statutes and Statutory Construction, 7th Ed. (2014), Intrinsic Aids, §47.11 "Exceptions"; (one who claims the benefit of an exception has the burden of proof proving

they come within the limited class for whose benefit the exception was established). Therefore under both the Statute and the Commission's Regulations, the Respondents had the burden of proof to prove the condition precedent by a preponderance of the evidence which is to prove the Good Faith Investigation they had conducted which would allow them to obtain the benefit of the Statute to be able to stop benefits without a hearing. Therefore, where the Respondents had started benefits, they could only stop those benefits under specifically listed statutory exceptions and they have the burden of proof (i.e., submit evidence) to prove the exception applies. This was the specific holding of this Court in the case of Martin v. Rapid City Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App 2006) wherein the Court held:

> "However, the statute is explicit that even under a Form 15 an employer can only terminate or suspend temporary compensation **if one of the specified conditions is met**." (Emphasis added).

Therefore, the Commission erred as a matter of law by shifting the burden of proof to the Appellant to prove that the Respondents did not conduct a Good Faith Investigation. The Respondents in this case did not submit any testimonial evidence or documentary evidence to prove that they had

conducted a Good Faith Investigation prior to stopping benefits.

II. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT ORDERING REINSTATEMENT OF BENEFITS WHERE THE RESPONDENTS FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS OF SC CODE §42-9-260.

Our Workers' Compensation Act is an exclusive compensatory scheme in derogation of common law rights and as such, the Courts must strictly construe its terms. Cox v. BellSouth Telecommunications, Inc., 356 S.C. 468, 589 S.E.2d 766, reh. den., cert. den. (SC App 2003). The term "shall" in a Statute is mandatory. Wigfall v. Tideland's Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 111 (2006).

In this case, it is agreed that following the accident the Respondents started benefits but that they failed to file required forms including a WCC Form 15 placing the Commission on notice that benefits had been started and that they were fined and paid the fine for that failure of compliance.

It is further undisputed that the Respondents did not serve the Appellant with two copies of the WCC Form 15 or any supporting documentation as required by Commission Regulation 67-504 setting forth the reason for termination.

SC Code §42-9-260 is mandatory: where there is a, "failure to comply with this section" such failure, "**shall**"

result in a 25% penalty in addition to the amount of benefits withheld.

SC Code §42-9-260(A) is also mandatory in the requirement that:

> "Upon making the first payment, the Employer **immediately shall notify the Commission, in accordance with a form prescribed by the Commission,** that payment of compensation has begun." (emphasis added).

This again is a mandatory requirement. Under SC Code §42-3-30 the Commission has the authority to promulgate Regulations necessary to implement the provisions of the Title and pursuant to that authority in reference to stopping payment during the first one hundred and fifty (150) days, the Commission has adopted Reg. 67-504 which requires under Subsection A that the Employer's representative

> "**shall** file the Form 15 **immediately** with the Claims Department and **shall serve two copies** of the Form 15 immediately upon **the Claimant** according to Reg. 67-211 with documentation attached as to the reason for termination or suspension."

As noted above, the Respondents did not file the mandatory notice form with the Commission when benefits were started; the Respondents did not serve the Appellant with two copies of the Form 15(III); and they did not attach an Affidavit

of Service or supporting documents which is also required by the Regulations.

Our Supreme Court and this Court have repeatedly held that where the provisions of the Act are mandatory, failure to comply with the provisions bars a party from taking the benefit of the Statute. Because workers' compensation Statutes provide an exclusive compensatory system in derogation of common law rights, the Commission and the Courts must strictly construe the requirements of the Statute and leave it to the Legislature to amend or define any ambiguities. Callahan v. Beaufort County School District, 375 S.C. 92, 651 S.E.2d 311 (2007). In Callahan, the Supreme Court citing other Court of Appeals and Supreme Court decisions found that the provision of SC Code §42-1-560 requiring that the claimant, "**shall**" file an S-2 Form notifying the Insurance Carrier/Employer and the Commission that a third-party action had been filed was mandatory and failure to comply with that mandatory requirement resulted in an election of remedies and the claimant not being able to take the benefit of SC Code §42-1-560 and being barred from receiving any further benefits under the Act.

Likewise, SC Code §42-9-260, Subsection (G), provides that where there is a failure to comply with that Code Section in any way the provisions of Subsection (G) are

mandatory that benefits wrongfully withheld are to be paid to the claimant and that a 25% penalty shall be imposed. The same requirement for strict compliance with the Act apply to both the defendants and the claimant in a worker's compensation case because as the Court noted, the workers' compensation Statute is in derogation of common law rights and as such it must be strictly construed and strictly complied with. Cox, supra. Since the Respondents admittedly did not comply with the Statute, they cannot claim the benefit of the Statute and the mandatory penalty provisions of the Statute must be imposed.

The Court further stated in Callahan that the Circuit Court in that case could not enter into an equity type analysis by excusing compliance and like that decision the Commission did not have the authority to do anything less than that which is required by the Statute. In this case, the Hearing Commissioner thought that it was sufficient that the Respondents were fined for not filing the form in accordance with the Act but that is not the penalty that is called for under the Statute. The penalty under the Statute is again reinstatement of benefits and a penalty of 25% on all benefits withheld and that penalty shall and must be imposed by the Commission in accordance with law. In addition to a liberal construction, a claimant is

supposed to be entitled to "swift and sure compensation" under the Act. Mendenhall v. Anderson Hardwood Floors, LLC, 401 S.C. 558, 738 S.E.2d 251 (2013).

III. THE COMMISSION ABUSED ITS DISCRETION BY CONSIDERING THE LATE FILED PRE-HEARING BRIEF AND THE LATE FILED APA SUBMISSIONS OF THE RESPONDENTS.

The Appellant would submit that the Commissioner abused his discretion in that the written evidence in the Respondents' APA Submissions should not have been admitted nor considered because of the clear-cut violation of the provisions of R. 67-612(B)(1)(4), (E) and (J), the Administrative Procedures Act and due process.

An abuse of discretion occurs where the ruling is based on an error of law or where the ruling is grounded upon factual findings but is without evidentiary support. Further, where there is an exercise of discretion, the reviewing Court must consider whether or not the exercise of that discretion is prejudicial to a party. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011).

In this case by Statute and Regulation, the Respondents are the moving party and not only do they have the burden of proof as the moving party, but Regulation 67-612(B) requires them to, and that they **"shall"**, file their APA Submissions at least fifteen (15) days before the hearing. In addition, Rule 67-611 requires that all

parties and each attorney representing a party "**shall**" file a WCC Form 58 (Pre-Hearing Brief) with Proof of Service, "at least ten (10) days before the hearing with the Hearing Commissioner's office identified on the Hearing Notice." Rule 67-611 also requires that the attorneys "**shall**" serve the opposing party in accordance with the other Rules of the Commission. There is no question that the Rule not only requires compliance with the dictates of the Rule, but also with the dictates of the Administrative Procedures Act (APA) concerning the submission of written evidence. SC Code §1-23-320.

The Hearing Commissioner ruled that he had the discretion to admit this written hearsay evidence into the Record and while the exclusion of such evidence under Rule 67-612 is not mandatory, the Commissioner can only exercise his discretion in accordance with Regulations, specifically R. 67-611, R. 67-612(E) and (J), the APA and due process.

Further, the provisions of R. 67-611(B) in reference to the filing of a Pre-Hearing Brief are mandatory wherein the Rule provides that the Pre-Hearing Brief shall be filed with the Commission ten (10) days before the hearing. There is absolutely no discretion for the Commissioner to accept a late filed Pre-Hearing Brief which sets out the issues of fact and law for a decision by the Commission;

the position of the parties; and a notification of witnesses and the evidence that will be submitted and as to whether or not that evidence will be submitted in written form or by deposition. Again, the Commissioner has no discretion in the submission of the Pre-Hearing Brief. The only thing the Commissioner may do is that pursuant to Rule 67-611, if good cause is shown, the Commissioner may postpone the hearing or may mandatorily assess a fine against the attorney of up to $100.00. The Commissioner did not request a showing of good cause nor was any good cause shown for the late filing and therefore the Commissioner had no discretion to accept the Pre-Hearing Brief and the evidence that was submitted under it.

Next, barring the submission of these late filed APA Submissions and Pre-Hearing Brief, there is a complete and utter failure of any evidentiary support for the Respondents' stop payment of benefits. Therefore their admission was clearly and "substantially" prejudicial to the Appellant and their admission constituted an abuse of discretion as their submission is controlled by an error of law on behalf of the Commissioner.

The Commissioner admitted and reviewed this evidence and found based on its submission alone, that the Respondents could have formed a good faith belief that the

Appellant had failed to prove his claim of a compensable injury. Thus, the submission of this evidence was not only highly prejudicial to the Appellant because it formed the only basis for the Commissioner to reach his conclusion, but since there was absolutely no other evidence presented to substantiate a basis for forming that good faith belief had this evidence not been submitted there would have been absolutely no other evidence in the Record of a Good Faith Investigation. Therefore the admission under the guise of the discretion of the Commissioner is clearly an abuse of discretion prejudicial to the Appellant.

IV. THE COMMISSION ERRED BY EXCLUDING EVIDENCE FROM THE APPELLANT AFTER SEPTEMBER 15, 2013 WHICH DENIED HIM DUE PROCESS OF LAW.

It is uncontested that the Appellant's first notice that the Respondents were stopping payment of his compensation and medical care benefits was by letter dated September 12th which he received on September 15th. At the hearing, the Hearing Commissioner not only excluded all evidence from the Respondents after September 15th but he excluded all evidence from the Appellant after September 15th. Assuming arguendo that the Hearing Commissioner was correct in ruling that the Appellant had the burden of proof to prove that the Respondents, did not conduct a Good Faith Investigation, this foreclosed the Appellant from presenting

any evidence whatsoever on that issue. This is especially true where the Respondents' Motion to quash the deposition of the adjuster was not heard until and then was granted on the day of the Hearing; and where the Respondents while being required to produce the adjuster's file, which again was not ruled on until the day of the hearing, were only required to produce it long after the hearing. Thus the Appellant had no knowledge of what the Respondents did or did not know or did or did not do to conduct a Good Faith Investigation prior to September 15th on which they allegedly based their investigation; i.e., no way of proving anything even if that was arguendo his burden.

Further, the Commission found that based on a review of the medical records, the Respondents could have formed a, "good faith belief", that there was sufficient evidence to deny the claim. By excluding all evidence after September 15th, the Commission excluded all the opinions issued after September 15th from the treating doctors to the contrary. Thus the Commissioner denied the Claimant the right to confront and cross-examine the adjuster; the right to review the adjuster's file pursuant to a Subpoena which would have required its production almost two (2) months before the hearing and denied him the right to put in favorable evidence tending to prove the lack of a Good Faith

Investigation obtained after he was notified this was the alleged basis for stopping his benefits. This denied the Appellant due process of law. The Appellant is entitled under due process to the disclosure of evidence, to have a meaningful opportunity to be heard, and to confront and examine and cross-examine witnesses in a meaningful way. The Commissioner's Rulings and his exclusionary ruling denied him that right including the right to submit evidence to disprove any such belief; assuming arguendo that was his burden, which it was not. Brown v. SC State Bd. of Education, 301 S.C. 326, 391 S.E.2d 866 (1990), (where important decisions turn on questions of fact due process requires cross-examination of adverse witnesses and the disclosure of evidence to an individual so he has the opportunity to show it is not true); Smith v. SC Dept. of Mental Health, 329 S.C. 485, 494 S.E.2e 630 (SC App. 1997) (where important decisions turn on questions of fact due process at least requires the opportunity to present favorable witnesses). For this reason, the Decision must be reversed.

V. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW BY HOLDING AN UNRECORDED PRE-HEARING CONFERENCE, OVER TWO HOURS IN LENGTH DURING WHICH HE MADE SUBSTANTIVE DECISIONS ON MOTIONS THAT WERE NOT PROPERLY NOTICED FOR HEARING AND DURING WHICH THE PARTIES' STATED AND ARGUED THEIR POSITIONS ON THE ISSUES BEFORE THE HEARING COMMISSIONER.

The Hearing Commissioner held a two (2) hour long Pre-Hearing Conference of which there is absolutely no Record. During this conference he made numerous decisions on Motions that had been filed and also during which the Appellant and the Respondents extensively argued their positions as to the issue before the Commissioner. There is no Record as to the arguments made and/or as to what was considered. None of this is in the Record but yet the Commissioner in his Order recites the position of the Appellant on various issues that are key to the Decision in this case. It was, is, and will always be the Appellant's position that the Respondents have the burden of proof in a Form 15(III) hearing but yet this is nowhere specifically reflected in the Record and is belittled in the Commissioner's statement of the Appellant's position in his Order. If the Respondents raise issue preservation; see pp. 25-27 of Hearing Transcript. (R., pp. 399, l. 1 - p. 401, l. 5).

Further, it is ironic and the Appellant would submit that it is prejudicial and that the Commissioner went

outside of the Record in his Order; in his entire Statement of the Case; that he made stipulations not made (see Stipulation #5, R., p. 8); and wherein he made the Findings specifically not only that the Appellant had the burden of proof, but that the Appellant had to prove that the Respondents did not conduct a Good Faith Investigation and had to dispel a, "belief" or a basis for that "belief" by the Respondents when they did not testify!,?).

Further, in the Motions, which were not noticed to be heard at this hearing and which are outside of the issues before the Commissioner, and which were decided off the Record, is a Complaint filed in a Declaratory Judgment Action in the Circuit Court, not a matter before the Commission, in which the Appellant was requesting as part of the relief sought that the Circuit Court make a decision on the law as to the Respondents having the burden of proof under the Statute and Regulations to prove that they had conducted a Good Faith Investigation. The Finding and holding of the Commissioner in this case that the Appellant has the burden of proof, which is contrary to the Statute or Regulations, is indicative that the Commissioner went outside of the Record and wrote an Order clearly contradictory to the Appellant's position; that is contrary to the dictates to the Statute; and is in fact a ruling on

the law not supported by any previous Decision by the SC Court of Appeals or Supreme Court.

SC Code §42-3-170 provides that a Commission hearing, "shall be steno-graphically reported." SC Code §42-17-40 requires that a "record of the proceedings" is to be made and "must" be filed with the "rulings of law". The Commission had the responsibility to record the proceeding in reference to the motions, rulings on evidence, and the position of the parties and it was error to make a decision based on information and evidence not in the Record. Weaver v. South Carolina Coastal Council, 309 S.C. 368, 423 S.E.2d 340 (1992).

VI. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW IN HIS ANCILLARY ORDER CONCERNING THE MOTIONS THAT HAD BEEN FILED.

In that Order:

A. The Commissioner denied the right of the Appellant to take the deposition of the adjuster, as a managing agent, which is clearly contrary to our Rules and case law. See for example: Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (SC App 1996). Also the Commissioner erred by not making a Finding that the Respondents had failed to obtain an Order on the Motion, in reference to the Deposition that had been properly and

timely set, prior to the time that the Deposition was to take place.

Next, the Commissioner denied the Claimant's right to take the adjuster's deposition on the basis of it being only a SCRCP Rule 30(b)(6) deposition whereas the Subpoena was for a deposition of the, "managing agent". Again, the Order refers to positions not in the Record and does not cite any other reason other than Rule 30(b)(6). A review of the Subpoena will establish it was in complete compliance with the Statute and Court Rules for a party deponent. (R., p. 54).

Depositions in a workers' compensation claim are conducted pursuant to the Circuit Court Rules and no Order of Protection was ever granted especially not prior to the time of the deposition and the refusal to appear delayed the Appellant's discovery and denied him the right of confrontation and cross-examination. SC Code §42-3-160; SCRCP Rule 26(c) and (d) and Rule 45(a)(2) and (c), (d) and (e). The adjuster was the managing agent who notified and served the Appellant with the basis for denial. Thus the Order denying the Appellant the right to examine the adjuster denied him due process of law. Brown v. SC State Bd. of Education, supra.

B. The Commissioner by not hearing a Motion to Quash a Subpoena issued for the adjuster's file prior to the date of the hearing on the Form 15(III), where such Subpoena had been issued for the production of the adjuster's file back in September to be produced before the end of September and after denying the Motion to Quash on the date of the hearing on the Form 15(III) by not requiring its production at the hearing, denied the Appellant due process of law. Therefore, the Hearing Commissioner erred as a matter of law in his preliminary and interlocutory Order on these specific issues; as to all of the legal bases and conclusions of law on these specific issues; as to all Findings of Fact and Conclusions of Law made that would justify the Commissioner's refusal to grant the Appellant the right to take the adjuster's deposition and quashing the Subpoena for that Deposition; and by denying the Motion to produce the adjuster's file but only requiring its production after the hearing.

Further, that Decision and the hearing on that issue not being held until the date of the hearing on the Form 15(III) was prejudicial to the Appellant and was in violation of his rights to due process of law in that it denied him the discovery, the production of evidence, the right of cross-examination and failed to give him "an

adequate" opportunity to be heard at a meaningful time, and in a meaningful way; especially in light of the Commissioner's decision in his Order that the Appellant had the duty and responsibility and burden of proof to prove that the Respondents did not, and the Appellant would emphasize prove they did not, conduct a Good Faith Investigation.

VII. THE COMMISSION ERRED AS A MATTER OF LAW BY AFFIRMING FINDING OF FACT #2 THAT THE APPELLANT SUFFERED A MYOCARDIAL INFARCTION, "ON MAY 28, 2013".

This Finding of Fact was not an issue that was before the Hearing Commissioner for decision and is irrelevant to any issue that was before the Commissioner. This Finding is also contradictory to the other Findings, Rulings of Law and Order of the Commissioner wherein he found and held that the Appellant had filed for a determination of compensability due to the Respondents denial of the claim and all factual decisions on compensability would be made at a subsequent compensability hearing where that issue would be addressed.

Further, this Finding is not based on the evidence and is a Finding made on the basis of surmise, speculation and innuendo. The Commissioner could only surmise this Finding from the medical records because there is absolutely no statement in the medical records that this is in fact true

as to when the myocardial infarction occurred. The evidence only establishes that this is simply the date that the Appellant was admitted to the hospital. This Finding of Fact should be stricken because it was irrelevant and immaterial to the issues before the Commissioner and would be highly prejudicial to the Appellant and would have invaded the province of the Commissioner who would be assigned to make the decision on compensability and would thus deny the Appellant due process of law.

VIII. THE COMMISSION ERRED AS A MATTER OF LAW BY MAKING A FINDING OF FACT THAT IS NOT SUPPORTED BY THE EVIDENCE THAT AN INVESTIGATION WAS CONDUCTED AS FOUND IN FINDING OF FACTS #6 AND #10 AND BY MAKING FINDINGS IN FINDINGS OF FACT #4 THROUGH #11 WHICH ARE NOT SUPPORTED BY THE TESTIMONY, STIPULATIONS OR DOCUMENTARY EVIDENCE IN THE RECORD.

The Commissioner found as a fact that an investigation was conducted. (R., pp. 11-12). The Respondents put up no testimonial evidence concerning an investigation being conducted. The only testimonial evidence submitted was that of the Appellant who testified that he had not been contacted. R., pp. 394-395). There is no evidence in the documentary evidence submitted that the insurance company had contacted the employer concerning compensability nor is there any documentary evidence that an investigation was conducted. The medical records that were placed in the

Record are simply that: medical records without any statement on causal relationship. There is no statement nor is there any evidence that these records were even considered by the Respondents as part of any investigation. There is simply no evidence that an investigation was actually conducted or as to what was considered during that investigation that allowed them to form a, "good faith belief" that they had grounds to deny the claim assuming that alone was their burden. While it is the Appellant's position that the Respondents had the burden of proof to prove that they had conducted a Good Faith Investigation and what that investigation was and what it uncovered that lead to the denial of benefits, there is no question that the Respondents at least had to put up evidence that established the basis for forming a good faith, "belief". It was surmise, speculation and conjecture for the Commissioner to find that an investigation was conducted when there is simply no evidence of that.

The Commissioner also made other findings that are listed as Conclusions of Law from Forms in the file which are not evidence such as, "the Claimant fails to meet the burden of a compensable injury". (R., pp. 7-15). In this case, the Commission file, like in every other case, was made a part of the Record except for self-serving

declarations and unstipulated medicals. Any statements on these forms are self-serving declarations and they are not evidence. The Commission decision must not be based upon surmise, speculation or conjecture and must be based on evidence in the Record. Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). There is simply no evidence to support the Commission's decision and where there is no evidence, the decision will be reversed as a matter of law. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (SC App. 1994); Pack v. SC D.O.T., 381 S.C. 526, 673 S.E.2d 461 (SC App. 2009).

Specifically as to Finding of Fact No. 9, the Hearing Commissioner erred in making this Finding:

A. Where the Appellant alleged that he was not properly served with a Form 15(II) because he was only served with 1 copy of the Form 15(II) wherein the Regulation specifically requires the Respondents to serve the Appellant with two (2) copies and where;

B. The Respondents' also did not attach a separate attachment setting out the grounds by concluding not based on evidence in the Record or any legal basis that the Appellant was not "prejudiced" and that these were excusable non-compliance with the Act. This determination

and Finding and application of the law is contrary to the legal standard to be applied to the Act as dictated by our Appellate Courts that require "strict" compliance with the requirements of the Act. Cox, supra. It is also a discretionary decision whereas the Statute does not allow for such discretion.

The Hearing Commissioner erred by making Finding of Fact No. 10 which shifts the burden of proof to the Appellant and provides that the Appellant not only has the burden to prove that the Respondents did not conduct a Good Faith Investigation but did not put up evidence that would, "indicate that the Defendants acted in anything other than good faith during the investigation". This was an error not only because it shifts the burden of proof but also because whether or not the Respondents acted in good faith, "during the investigation" is not a requirement under the Act. The requirement is whether or not they conducted a good faith investigation. Further, it reaches the factual conclusion not based on evidence that an investigation was performed. The capriciousness of this Finding is further supported by the statement in the Finding that, "this is based on the evidence **or lack thereof** submitted by the Claimant at the hearing."

Finding #11 in many ways is not a Finding of Fact, but

specifically the following statements contained within the Finding constitute errors of law and fact:

A. The Commissioner states that the Appellant is alleging, "a medically complex condition". Not only is this not a medically complex case as defined in SC Code §42-1-160(E) but that issue was not before him. The sole issue was whether or not the Defendants had conducted a Good Faith Investigation and the grounds for denial it established. This is surmise, speculation and innuendo and a blanket assumption made by the Commissioner that is not supported by the Record nor any evidence in the Record or under the law.

B. Making the statement that there was an "alleged" shock where there is absolutely no evidence in the Record that the Respondents in any way challenged the fact that the Appellant suffered an electrical shock injury on May 22, 2013.

C. By making the statement and finding that a causal relationship between the Appellant's electrical shock and his current medical condition is best, "determined by review of the medical expert medical reports to which the Respondents had access by operation of §42-15-95". There is absolutely no evidence and this was a hotly contested issue at the hearing as to when the Respondents received

any of the belated medical records that they were allowed to put into evidence (based on the discretionary decision of the Commissioner) and there was simply no testimonial or documentary evidence submitted into the Record that would establish whether or not those records were received by the Respondents before September 13, 2013 nor is there any medical opinion stated in the records that the Appellant's injuries were not caused by the electrical shock.

IX. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW BY DELAYING A DECISION FROM NOVEMBER 13, 2013 UNTIL DECEMBER 5, 2013.

The Respondents had stopped this man's (who was admittedly severely injured and disabled) only means of living and had cut off his medical care. This is a drastic measure allowed under SC Code §42-9-260 in only certain specific exceptions in the Act and the Act provides for a quick hearing on that issue alone. November 13, 2013 to December 5, 2013, is a period of twenty-two (22) days where the singular issue before the Commissioner was whether or not the Respondents had established that they conducted a Good Faith Investigation and had denied benefits based on that investigation. The Statute contemplates a quick determination as to whether or not the Respondents properly stopped benefits on one of the limited bases as provided for under the Act. A claimant is entitled to swift and sure

benefits under the Act. The Commission's Order twenty-two (22) days later violated all of the fundamental purposes of the Act. Mendenhall v. Anderson Hardwood Floors, LLC, supra; Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

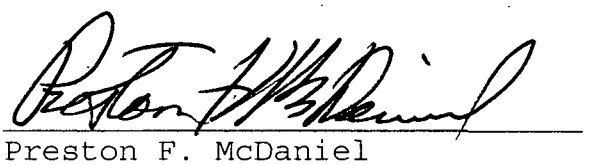
CONCLUSION

For all the forgoing reasons, the Decision of the Commission should be reversed, the Respondents found to have failed to establish that they had conducted a Good Faith Investigation and failed to comply with the Statute and this matter remanded to the Commission with directions for the Commission to award the Appellant the past due benefits in addition to the 25% mandatory penalty and for such other and further relief as applies under the Act.

Further, since the Respondents failed to stop payment in accordance with the Act, an Order that the injury is deemed and declared to be admitted, accepted and compensable and that the Appellant is entitled to all benefits under the Act until he reaches maximum medical improvement and further Order of the Commission. Further, since all hearings and Orders by the Commission were taken after and subject to this improper stop payment and Order, those Orders should be declared void ab initio and no further action or decision should be made as to the issues

raised in appeal from those Orders.

Respectfully submitted,



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October 27, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

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

Dated: 10/27, 2015

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on 10/29, 2015 addressed to: Brett H. Bayne, Esquire, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

Dated: 10/29, 2015

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