

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS COMPENSATION COMMISSION

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Appellant Case No. 2014-001816

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**RECEIVED**

OCT 29 2015

SC Court of Appeals

Clarence Winfrey ..... Employee, Appellant,

v.

Archway Services Inc  
.....Employer,

and

American Fire & Casualty Insurance Company.....Carrier,  
Respondents,

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**RESPONDENTS' FINAL BRIEF**

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**STATEMENT OF ISSUES RAISED BY APPELLANT**

- I. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST BENEFITS FOR THE HEAD AND BRAIN WHERE THE ISSUES BEFORE THE HEARING COMMISSIONER WERE WHETHER THE CLAIMANT HAD SUSTAINED COMPENSABLE INJURY BY ACCIDENT AND WHETHER HE WAS ENTITLED TO REINSTATEMENT OF WEEKLY COMPENSATION BENEFITS AND TO MEDICAL BENEFITS FOR ALL CAUSALLY RELATED INJURIES AND CONDITIONS STEMMING FROM THE ACCIDENT AND WHERE THE COMMISSION FOUND COMPENSABLE INJURY BY ACCIDENT, FOUND THAT THE CLAIMANT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT AND REINSTATED ALL BENEFITS.
  
- II. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST MEDICAL AND/OR COMPENSATION BENEFITS FOR INJURY TO THE BRAIN AND/OR HEAD WHERE THE CLAIMANT IS REQUIRED TO LIST ALL POSSIBLY AFFECTED BODY PARTS ON HIS REQUEST FOR HEARING AND WHERE THE DEFENDANTS GAVE NO NOTICE OF THIS DEFENSE.
  
- III. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW FROM CONSIDERING THE ISSUES AND DENYING THE CLAIMANT ON A PERMANENT BASIS ANY BENEFITS, MEDICAL OR COMPENSATION, RELATED TO INJURY TO THE HEAD AND/OR BRAIN WHERE THE CLAIMANT HAD REMOVED SUCH FROM CONSIDERATION AT THE TIME OF THE HEARING.
  
- IV. WHETHER THE FULL COMMISSION PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFT ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW AND BY ISSUING AN ORDER THAT WENT BEYOND ITS DIRECTION AND BY ISSUING AN ORDER WRITTEN BY DEFENSE COUNSEL THAT DELETED AND/OR SUBSTANTIALLY MODIFIED UNRELATED BUT SUBSTANTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE HEARING COMMISSIONER.

## STATEMENT OF THE CASE

This claim arises out of an alleged accident on May 22, 2013. On that date, Claimant contends he was momentarily shocked by a rotisserie oven he was working on. Following the accident, Claimant continued to work for the remainder of the day and the following day. Claimant had scheduled time off after May 23, 2013. Claimant suffered a myocardial infarction on or around May 28, 2013. On May 28, 2013—six days after the accident—Claimant presented to Doctor's Care and Lexington Medical Center with severe three vessel coronary disease, an occluded coronary artery, and an acute myocardial infarction caused by a plaque rupture which caused an acute ventricular septal defect. At Doctor's Care, Claimant reported he was having no chest pressure and had started sweating that morning (on May 28th). At Lexington Medical Center, Claimant indicated he was not having chest pain but had been sweating. Following the diagnosis, Claimant underwent surgery to repair the ventricular septal defect caused by the plaque rupture and subsequent myocardial infarction. The medical records in the case revealed that Claimant has a distinct family history of coronary disease with his father passing away at a similar age from coronary disease and a myocardial infarction. Further, the medical records indicated that Claimant was a 35 year pack-a-day smoker and drank a case of beer per week. Based on all of the medical records available to Carrier, this claim was ultimately denied on September 13, 2013.

Immediately following the denial of benefits, Claimant filed a Form 15, Section III requesting a hearing as well as a Summons and Complaint in Richland County Circuit Court alleging a bad faith denial of benefits, alleging that S.C. Code Ann. § 42-9-260 is unconstitutional, seeking a temporary restraining order to stop Respondents from denying

the claim, and seeking an Order from Judge Lee finding the claim compensable and awarding benefits. The Summons and Complaint was filed on or around September 27, 2013. Judge Lee issued and then rescinded the temporary restraining order sought by Claimant on or around October 1, 2013. Judge Benjamin conducted a lengthy hearing on the merits of the Complaint but has not yet rendered a decision as to whether S.C. Code Ann. § 42-9-260 is unconstitutional. After the temporary restraining order was rescinded, the Commission set Appellant's Form 15, Section III for a hearing before Commissioner Beck. In addition, Respondents filed several motions with the Commission including a Motion to Quash the deposition of the adjuster, a Motion to Quash discovery of the adjuster's claim file, and a Motion to Postpone the Hearing.

A hearing on all of the motions and on Appellant's Form 15, Section III was set on September 30, 2013 for November 11, 2013. Prior to the hearing, Commissioner Beck conducted a standard pre-hearing conference as well as a Motions Hearing wherein Commissioner Beck ruled on all outstanding issues raised by the motions including Respondents' Motion to Postpone. Each of these motions affected the ability to conduct the Form 15 hearing and were necessary to have prior to the hearing. Specifically, Respondents' Motion to Postpone alleged the Commission did not have jurisdiction to hear the claim because Appellant had asserted the statute (42-9-260) by which the hearing was scheduled was unconstitutional and Appellant could not claim or exercise the benefits of the statute while simultaneously arguing it was unconstitutional for Respondents to also act pursuant to the statute. Commissioner Beck warned Appellant of the risk of proceeding based on the jurisdictional issues raised by Respondents. Commissioner Beck gave Appellant the opportunity to postpone the Form 15 hearing in

order to spend time preparing for each of the motions that were timely served. Appellant turned down that opportunity. At the hearing, all parties agreed that the only issue for Commissioner Beck was to determine whether or not Respondents had conducted a good faith investigation. In order to make that determination, Commissioner Beck limited the review of evidence to only those documents produced prior to the date of denial – September 13, 2013. Following the hearing, Commissioner Beck issued a Decision and Order on December 5, 2013 finding that Respondents had conducted a good faith investigation. The Full Commission conducted a review hearing on May 19, 2014. The Full Commission issued its Decision and Order on July 25, 2014. That Decision and Order is the subject of this appeal.

By way of further background, on October 22, 2013, after the Form 15 hearing was set by the Commission but before that hearing was held, Appellant filed a Form 50 requesting a hearing on compensability for alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. A hearing notice for the Form 50 hearing was sent by the Commission on December 6, 2013 with explicit instructions that the hearing would be to determine compensability of Appellant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. The Form 50 hearing was held before the Single Commissioner on January 13, 2014. Following the hearing, the Single Commissioner issued a Decision and Order on February 27, 2014. The Full Commission conducted a review hearing on May 19, 2014. The Full Commission issued its Decision and Order on July 25, 2014. That Decision and Order is also on appeal by both parties in a companion action.

Prior to the briefing on this appeal, the parties entered into the voluntary pilot mediation program in an attempt to resolve this matter. Due to certain issues with obtaining records and opinions, as well as scheduling issues, this mediation did not occur until May 1, 2015. Unfortunately, the parties reached an impasse and this matter is now back before this Court on the original appeals.

## CONSTITUTIONAL ESTOPPEL/JURISDICTIONAL ISSUES

At the outset, Respondents assert that the Commission lacked subject matter jurisdiction to conduct any hearing on any part of the claim underlying this appeal and this court should vacate all Decisions and Orders in this case and remand the case to the Commission with instructions to hold the case until the Circuit Court has issued a ruling on Appellant's lawsuit alleging S.C. Code Ann § 42-9-260 is unconstitutional.

Commissioner Beck ultimately denied Respondents motion related to this issue on the basis that the Act requires a hearing be set within 60 days. However, the Act states that a moving party may postpone the hearing. As Appellant has vigorously argued in his briefs, Respondents were the moving party in this matter. When a hearing is set pursuant to S.C. Code Ann. § 42-9-260, the requirement to hold the hearing within sixty days is waived pursuant to S.C. Code Ann. Reg. 67-613(B)(3). That regulation states the hearing will be postponed until the following month and if the commissioner cannot hear the case by the following month, the case will be returned to the Judicial Department for reassignment. Because of the underlying declaratory judgment action filed by Appellant, the Commission did not have jurisdiction to hear this matter and should have complied with S.C. Code Ann. Reg. 67-613(B)(3) by returning the case to the Judicial Department and indefinitely postponing the hearing until the circuit court could make a decision on Appellant's Complaint.

Appellant has alleged an injury by accident during the course and scope of his employment due to electrical shock on May 22, 2013. Respondents denied the claim on or about September 16, 2013 following a good faith investigation pursuant to S.C. Code Ann. § 42-9-260(B)(3). Appellant responded to the denial of benefits by filing a

Summons and Complaint on September 27, 2013 in the South Carolina Circuit Court alleging:

- a. A bad faith denial of benefits;
- b. That S.C. Code Ann. § 42-9-260 is unconstitutional and requesting a Declaratory Judgment to that effect; and
- c. Moving for a temporary restraining order to force Respondents to pay benefits outside of the jurisdiction of the South Carolina Workers' Compensation Commission.

Appellant improperly sought and obtained a temporary restraining order from Judge Alison Renee Lee on October 1, 2013 ordering Respondents to pay temporary compensation benefits and provide medical care to Appellant. Respondents filed a Motion to Dismiss and a Brief in Support of the Motion to Dismiss the temporary restraining order and the underlying Summons and Complaint with Judge Lee on or about October 2, 2013. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013 and dismissed the temporary restraining order on October 9, 2013 stating “[t]he Commission has the sole authority to reinstate benefits if appropriate.” However, Judge Lee did not dismiss the Declaratory Judgment action against Respondents finding that legal challenges to a statute are “...properly raised for the first time...in a declaratory judgment action before the circuit court.” Respondents filed an Answer and Counterclaim with the South Carolina Circuit Court on October 21, 2013.

Appellant has specifically alleged that “...the provisions of S.C. Code Ann. § 42-9-260...(A) violated the [Appellant’s] right to due process of law...(B) that the provisions of §42-9-260 are in direct conflict with provisions of the Administrative

Procedures Act concerning notice and hearing...and (C) denies the [Appellant] equal protection of the laws by creating an irrational classification...” Appellant has also stated “...pursuant to S.C. Code §42-9-260 the constitutionality of which is the basis of the Declaratory Judgment Relief requested.” In addition, Appellant presented to the Circuit Court a signed Verification asserting that the allegations and issues raised in the Complaint are true, accurate, and with merit. Appellant also filed a Motion for a New Trial with the South Carolina Circuit Court asking for a “...preliminary or prima facie determination that [S.C. Code Ann. § 42-9-260] is unconstitutional...”

Appellant simultaneously requested a hearing before this Commission pursuant to S.C. Code Ann. § 42-9-260—the very statute he seeks to invalidate as unconstitutional in the ongoing companion Circuit Court case. It strains belief that on one hand Appellant has argued at length to the Circuit Court that S.C. Code Ann. § 42-9-260 is unconstitutional and on the other hand demands relief from the Commission under the same statute. This inapposite position must be resolved before the Commission can entertain Appellant’s allegations related to the workers’ compensation claim—including a hearing on the denial of benefits. Further, if the Circuit Court finds S.C. Code Ann. § 42-9-260 unconstitutional—as Appellant demands—the South Carolina Workers’ Compensation Commission would have no guidance under the law to conduct a hearing for the suspension or termination of benefits<sup>1</sup>. Additionally, if the Circuit Court finds S.C. Code Ann. § 42-9-260 unconstitutional—as Appellant demands—the underlying purpose

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<sup>1</sup> Incidentally, Defendants would also have no guidance under the law on how to pay, terminate, and/or suspend benefits.

of the scheduled hearing before the South Carolina Workers' Compensation Commission, specifically to rule on the denial of benefits pursuant to S.C. Code Ann. § 42-9-260, would be rendered unconstitutional.

Respondents contend that the Commission may only conduct the 42-9-260 hearing (or any other hearing) in this claim once the Circuit Court has ruled on the constitutionality of S.C. Code Ann. § 42-9-260 pursuant to Appellant's demand. Pursuant to S.C. Code Ann. Reg. 67-613(B)(1)(e), any hearing in this matter was premature pursuant to S.C. Code Ann. § 42-9-260 where the underlying constitutionality issues raised by Appellant and under consideration by the Circuit Court have not yet been adjudicated.

Constitutional Estoppel is a principle which holds that a party cannot avail himself of the provisions of a statute while also reversing his position and contending the law under which he sought to avail himself is invalid. Typically this issue arises when a party proceeds with an action, loses, and then asserts the law the party sought recovery under is unconstitutional. However, Respondents contend this principle is a two-way street, so to speak. Specifically, constitutional estoppel should prevent a party from seeking the protections and/or benefits under the same statute the party asserts is unconstitutional.

It is an elementary rule of constitutional law that **one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'** *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) *citing* *United States v. City and County of San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940). While the majority of these cases deal with regulatory

authorities and federal statutes, the principles are the same—you cannot simultaneously obtain benefits under a statute while arguing the same statute it is unconstitutional. Because the constitutionality of 42-9-260, as challenged by Appellant, is grossly material to the underlying proceedings, the Commission did not have jurisdiction, and Appellant did not have standing, to conduct a hearing before the Commission prior to an adjudication of the merits before the Circuit Court.

Therefore, for the foregoing reasons, this court should rule any hearing before the Commission should have been postponed until such time as the Circuit Court could rule on the constitutionality of S.C. Code Ann. § 42-9-260 pursuant to Appellant’s demands. Only after the Circuit Court has ruled on the constitutionality of S.C. Code Ann. § 42-9-260—as demanded by Appellant—would any issue raised by Appellant before the Commission be ripe for a hearing before the Commission. In other words, Appellant’s choice to vigorously pursue a claim that the Act is unconstitutional strips the Commission of jurisdiction over compensability until such time as the Circuit Court can rule on the matter. Therefore, this court must vacate all prior Orders and remand this matter to the Commission with instructions to hold the case until such time as the Circuit Court rules on Appellant’s Declaratory Judgment.

#### **LEGAL ARGUMENT ON APPELLANT’S ISSUES RAISED ON APPEAL**

##### **I. THE FULL COMMISSION DID NOT ERR BY DENYING COMPENSABILITY AND/OR BENEFITS FOR CLAIMANT’S ALLEGED, BUT UNPROVEN, HEAD AND/OR BRAIN INJURY BECAUSE CLAIMANT FAILED TO PRESENT ANY EVIDENCE OF A CAUSALLY RELATED HEAD AND/OR BRAIN INJURY.**

Appellant filed a Form 50 on October 21, 2013 alleging injuries to his “heart, left hand/arm/shoulder, neck, head (brain), chest.” (R. p. 46). Thereafter, Respondents filed a

Form 51 on or about November 19, 2013 denying every alleged injury and stated that “Appellant has failed to meet his burden of proving that he sustained a compensable injury or illness pursuant to the Act.” (R. p. 51). This matter was set for a hearing on January 13, 2013 by a Notice of Hearing issued on December 6, 2013. (R. p. 54). That Notice of Hearing specifically stated that the purpose of the hearing was to “determine issues as set forth on Forms 50 and 51.” *Id.* Appellant’s Pre-Hearing Brief filed on December 23, 2013 clearly states that the types of injury and body parts to be determined at the January 13, 2013 hearing are “heart, left hand/arm/shoulder, neck, head (brain), chest.” (R. p. 55).

At the hearing held on January 13, 2013, the Single Commissioner states “The purpose of today’s hearing is to determine issues raised in Forms 50 and 51.” (R. p. 396, line 17-19). The Single Commissioner then asked if either party had “...any further objection to APAs, jurisdiction<sup>2</sup>, venue, or any other items?” (R. p. 400, line 8-9). Appellant’s counsel replied “None from the Claimant.” (R. p. 400, line 11). The Single Commissioner then set out the basis for the hearing in her recitation of the issues. During this portion of the hearing, the Single Commissioner stated “[Appellant] also contends that he suffered a head and possibly a brain injury...” (R. p. 401, line 4-5). The Single Commissioner notes that Appellant conceded his head and/or brain allegations had not been thoroughly evaluated but makes no notation that Claimant has withdrawn those issues from the Form 50 or 58 or for consideration at the hearing. This is reflected where the Single Commissioner later states “So he seeks a finding of compensability of not only

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<sup>2</sup> Defendants objected to jurisdiction in the prior portion of the transcript and as set out above in the jurisdictional section of this brief. The Commissioner’s request for “further” objections sets out that the objection to jurisdiction was properly made and preserved.

the neck and left shoulder...but he also believes and contends and would contend that the medical evidence supports his finding by more than a greater weight of the evidence standard...he also injured his heart and his head.” (R. p. 401, line 9-18). This clarification from the Single Commissioner following her acknowledgement of scant evidence in the record of a head and/or brain injury clearly reflects Appellant was still pursuing a finding of a compensable injury to his head (and/or brain as set out in the Forms 50 and 58). The Single Commissioner went on to set out Respondents position by stating “...[Respondents] dispute that there is any credible medical evidence which establishes a relationship between the shock of May 22, 2013 and any heart or brain injury.” (R. p. 403, line 21-24). There is not one statement made by Appellant’s counsel in the Single Commissioner Hearing transcript withdrawing or limiting the scope of the hearing to exclude the alleged and/or brain injury. It is clear that the issue of the alleged head and/or brain injury compensability was properly before the Single Commissioner.

Therefore, the inquiry turns to whether Appellant submitted any evidence sufficient to support a finding of compensable injury by accident to his head and/or brain. Not only did Appellant not present sufficient evidence of the alleged head and/or brain injury—he presented no evidence of an alleged head and/or brain injury. He did not present one record from a neurologist, neuropsychologist, psychiatrist, psychologist, etc. He did not present one piece of documentary medical evidence supporting a finding of an alleged head and/or brain injury. It is, in fact, undisputed that the record is bare as it relates to the alleged head and/or brain injury.

There is no question that Appellant alleged a head and/or brain injury on his Form 50. There is no question that the Notice of Hearing indicated that all issues on the Form

50 would be determined at the hearing. There is no question that Appellant had sufficient notice of this hearing and what was contained on his own Form 50. There is no question that Appellant filed a Pre-Hearing brief indicating that he was seeking compensation for a brain injury. There is no question that Respondents filed a Pre-Hearing Brief denying compensability of all injuries alleged in this claim. There is no question that Appellant did not withdraw his allegations related to a brain injury prior to or at the hearing. And, likewise, there is no question that Appellant did not present any evidence at the hearing to substantiate his alleged head and/or brain injury.

The Single Commissioner, in Finding of Fact #14, explicitly found that Appellant failed to present any evidence that he sustained or may have sustained a head or brain injury. (R. p. 16). However, the Single Commissioner indicated that benefits would only be denied “at this juncture.” The Full Commission determined this was improper. Appellant raised the issue of suffering a head and/or brain injury in every single one of his filings. Appellant chose to proceed at the hearing on his Form 50 without modification. Therefore, pursuant to the Act, Appellant had the absolute burden of proving the right to compensation for each and every injury alleged on the Form 50. If Appellant failed to present evidence, as he did in this claim, then his right to compensation for the alleged injury for which he failed to present evidence should be denied. To leave the claim open for possibly unlimited future hearings to determine compensability of presently alleged body parts is grossly prejudicial to Respondents.

Therefore, for the foregoing reasons, the Full Commission did not err when it modified the Single Commissioner’s Decision and Order by removing the phrase “at this this point” and “at this juncture.” Because Claimant failed to present any evidence of a

brain injury, the proper course of action was a complete denial of any alleged head and/or brain injury.

**II. THE FULL COMMISSION DID NOT ERR BY DENYING COMPENSABILITY AND/OR BENEFITS FOR CLAIMANT'S ALLEGED, BUT UNPROVEN, HEAD AND/OR BRAIN INJURY ON THE BASIS THAT DEFENDANTS ALLEGEDLY DID NOT PROVIDE NOTICE OF A DEFENSE.**

As this exception deals nearly directly with the prior exception, the arguments raised therein are incorporated by reference. The premise of this exception, that the Commission erred in denying compensability for an alleged head and/or brain injury, is grounded solely in the theory that Respondents did not assert a denial or defense to the brain injury. This is simply not the case.

Respondent's Form 51 clearly sets out a denial of all body parts alleged by Appellant. (R. p. 51). As noted throughout, Appellant's Form 50 stated he was alleging injuries to his "heart, left hand/arm/shoulder, neck, head (brain), chest." (R. p. 46). Respondents' Form 51 filed on or about November 19, 2013 stated "Claimant has failed to meet his burden of proving that he sustained a compensable injury or illness pursuant to the Act." (R. p. 51).

Further, the Single Commissioner noted in the record that "...it is the position of the [Respondents] that except for the neck and the shoulder, benefits under the act should be denied." (R. p. 403, line 18-20). The Single Commissioner went on to set out Respondents position further by stating "...[Respondents] dispute that there is any credible medical evidence which establishes a relationship between the shock of May 22, 2013 and any heart or brain injury." (R. p. 403, line 21-24).

The record is clear that Respondents' did provide notice of a defense to the compensability of any alleged head and/or brain injury. Therefore, the Commission did not err by considering Respondents' defense to the alleged head and/or brain injury.

**III. THE FULL COMMISSION DID NOT ERR AS A MATTER OF LAW BY DENYING COMPENSABILITY AND/OR BENEFITS FOR CLAIMANT'S ALLEGED, BUT UNPROVEN, HEAD AND/OR BRAIN INJURY ON THE BASIS THAT CLAIMANT ALLEGEDLY REMOVED THE HEAD AND/OR BRAIN INJURY FROM CONSIDERATION BEFORE THE COMMISSION.**

As this exception deals nearly directly with the prior exception, the arguments raised therein are incorporated by reference. The premise of this exception, that the Commission erred in denying compensability for an alleged head and/or brain injury, is grounded solely in Appellant's theory that he somehow withdrew the alleged head and/or brain injury at the Single Commissioner Hearing. The record is quite clear this did not occur. At the risk of repetition, the excerpts from the Single Commissioner Hearing are set out below.

At the hearing held on January 13, 2013, the Single Commissioner states "The purpose of today's hearing is to determine issues raised in Forms 50 and 51." (R. p. 396, line 17-19). The Single Commissioner then asked if either party had "...any further objection to APAs, jurisdiction<sup>3</sup>, venue, or any other items?" (R. p. 400, line 8-9). Appellant's counsel replied "None from the Claimant." (R. p. 400, line 11). The Single Commissioner then set out the basis for the hearing in her recitation of the issues. During this portion of the hearing, the Single Commissioner stated "[Appellant] also contends that he suffered a head and possibly a brain injury..." (R. p. 401, line 4-5). The Single

Commissioner notes that Appellant conceded his head and/or brain allegations had not been thoroughly evaluated but makes no notation that Claimant has withdrawn those issues from the Form 50 or 58 or for consideration at the hearing. This is reflected where the Single Commissioner later states “So he seeks a finding of compensability of not only the neck and left shoulder...but he also believes and contends and would contend that the medical evidence supports his finding by more than a greater weight of the evidence standard...he also injured his heart and his head.” (R. p. 401, line 9-18). This clarification from the Single Commissioner following her acknowledgement of scant evidence in the record of a head and/or brain injury clearly reflects Appellant was still pursuing a finding of a compensable injury to his head (and/or brain as set out in the Forms 50 and 58). The Single Commissioner went on to set out Respondents position by stating “...[Respondents] dispute that there is any credible medical evidence which establishes a relationship between the shock of May 22, 2013 and any heart or brain injury.” (R. p. 403, line 21-24).

The Single Commissioner Hearing transcript does not contain one statement from Appellant’s counsel withdrawing or limiting the scope of the hearing to exclude the alleged and/or brain injury. It is clear that the issue of the alleged head and/or brain injury compensability was properly before the Single Commissioner. Therefore, the Commission did not err in denying compensability for the alleged head and/or brain injury because Appellant did not withdraw the alleged head and/or brain injury from consideration.

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<sup>3</sup> Defendants objected to jurisdiction in the prior portion of the transcript and as set out above in the jurisdictional section of this brief. The Commissioner’s request for “further” objections sets out that the objection to jurisdiction

**IV. THE FULL COMMISSION DID NOT ERR IN ISSUING A DECISION AND ORDER FOLLOWING THE FULL COMMISSION HEARING.**

Appellant apparently objects to the method by which the Full Commission prepared and issued its final Decision and Order in this case. The objection centers solely on the fact that Respondents' counsel was asked to draft a proposed order for the Full Commission to review<sup>4</sup>. Appellant's counsel now improperly seeks to challenge the very thought process and method by which the Full Commission ultimately prepared and rendered its final Decision and Order. In a nutshell, Appellant asks this court to find the Commission did not actually make any findings of fact or conclusions of law and instead chose to blindly a proposed order without review or analysis of the findings setout therein.

It appears that Appellant's counsel confuses a draft proposed order submitted for consideration by a party and a final Decision and Order of the Full Commission. There is no rule, regulation, or case law prohibiting the Commission from requesting proposed orders from a party (or the parties). Nor is there any rule, regulation, or case law prohibiting the Commission from adopting a submitted proposed order from a party. Further it is clear the Full Commission has the authority to add, delete, or modify any findings of fact or conclusions of law based on the evidence presented<sup>5</sup>. If the Commission adopts a proposed order, it becomes the full and final Full Commission

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<sup>4</sup> Interestingly, the Single Commissioner asked Appellant's counsel to draft the Single Commissioner Decision and Order. Appellant's counsel did not object to that process.


<sup>5</sup> Appellant spends a good portion of his brief asserting that modification, removal, and/or addition of findings of fact within the proposed order constitutes error. It does not. The order was a proposed order and the Commission had the ability, authority, and wisdom to remove, add, or delete any findings it wanted in accordance with the evidence presented. Appellant's brief functionally argues Respondents' counsel tricked or deceived the

Decision and Order for the case. The Commission certainly has the discretion to review proposed orders, make changes if needed, and/or adopt the proposed order if it reflects the decision made by the Commission.

Here, the Full Commission requested a proposed order from Respondent's counsel. The proposed order was timely submitted in accordance with the request by the Full Commission. Appellant's counsel objected to several matter in the proposed order. The Full Commission considered those objections, evaluated the proposed order prepared by Respondent's counsel, reviewed the evidence and transcripts, and adopted as its own and issued the Full Commission Decision and Order now before this court. There is no evidence to suggest the Full Commission Decision and Order issued by the three member panel is anything but a full reflection of the findings of fact and conclusions of law they made following the Full Commission Hearing. Therefore, the Full Commission did not err by issuing its own Decision and Order in this matter.

Respectfully submitted,

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Commission which implies the Commission is incapable of reading a proposed order and rendering its own Decision and Order. That clearly not the case.

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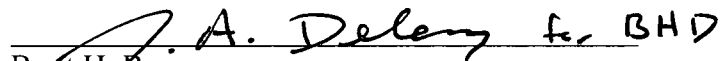
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CERTIFICATE OF COUNSEL

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

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American Fire & Casualty Insurance Company c/o  
Liberty Mutual Group, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the Final Brief on the attorney of record for Clarence Winfrey, by depositing a copy of it in the United States Mail, postage prepaid, on the 29th day of October, 2015 addressed to his attorney of record, Preston F. McDaniel, Esquire, The McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201 and at preston@pfmcdlaw.com.

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