

THE STATE OF SOUTH CAROLINA  
In The South Carolina Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Honorable Roger L. Couch, Circuit Court Judge

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Case No.: 2008-CP-42-3202

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Claude Potter, Employee, ..... Appellant

v.

Spartanburg School District 7, Employer, and  
S.C. School Boards Self Insurance Trust Fund,  
Carrier, ..... Respondents

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PETITION FOR WRIT OF CERTIORARI

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OTHER COUNSEL OF RECORD:

David Wilson  
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**RECEIVED**

MAR 16 2012

S.C. Supreme Court

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CERTIFICATE OF COUNSEL

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I hereby certify as Counsel for Petitioner that a Petition for Rehearing was made on September 28, 2011. An Order Denying Petition for Rehearing was issued by the South Carolina Court of Appeals on October 20, 2011, but the request for an en banc hearing was not addressed.

A substituted Order was refiled by the Court of Appeals on December 21, 2011 and an Order denying Petition for Rehearing was also filed on December 21, 2011. A Petition for Reharing was made on January 3, 2012. An Order Denying Petition for Rehearing was filed on January 26, 2012 but the request for an en banc hearing was not addressed. On February 16, 2012, a letter from the Court of Appeals notified the parties that the Request for a Rehearing En Banc was denied.

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MAR 16 2012

S.C. Supreme Court



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Spartanburg, South Carolina

March 15, 2012

QUESTION PRESENTED FOR REVIEW

IN LIGHT OF THE ORDER OF THE COURT OF APPEALS, SHOULD THIS CASE BE REMANDED TO THE WORKERS' COMPENSATION COMMISSION TO WEIGH THE EVIDENCE IN THE RECORD?

## STATEMENT OF THE CASE

The Claimant Claude Potter suffered compensable work related injuries on December 19, 2003 when he fell from a roof. Pursuant to a Consent Order dated April 26, 2006, the Respondent agreed to refer the Claimant to Dr. David Tollison for evaluation and treatment for depression related to pain. ( R. 27 ). The Respondent filed a Form 21 on September 27, 2007. ( R. 35 ). The Respondent requested to pay compensation in an amount to be determined by the Commission. The Respondent filed a Form 58 on November 19, 2007 which denied that the Claimant sustained any compensable brain injury or emotional injury and denied that the Claimant was permanently and totally disabled. ( R. 34 ). The Claimant filed a Form 58 on November 21, 2007 which alleged injuries to the brain, leg, shoulder, back and emotional. ( R. 33 ). Also in controversy was medical treatment, temporary compensation, date of maximum medical improvement and whether the Claimant suffered permanent and total disability.

On December 4, 2007 the hearing was held in Spartanburg, South Carolina. A Decision and Order was issued by Commissioner David Huffstetler on January 8, 2008. ( R. 16 ). The Order found that the Claimant had sustained permanent partial disability of 30% to the right leg and the Respondent was ordered to pay all causally related medical expenses for treatment of the right leg injury. The Order made findings that the Claimant was not disabled from his job by reason of his injuries and that he did not suffer any physical brain damage causally related to the accident. The Claimant filed a Form 30 ( Request for Commission Review ) on January 15, 2008 with 19 grounds for review. ( R. 29 ). The Appellate Panel issued an Order on May 30, 2008. ( R. 8 ). Two commissioners affirmed with amendments. One Commissioner wrote a dissenting opinion which would reverse the denial of the physical brain injury and psychological injury.

(R. pp. 14-15). That commissioner voted to remand for a determination of permanent disability. The Appellant filed a Notice of Intent to Appeal in the Court of Common Pleas on June 12, 2008 with 18 exceptions. The hearing was held before Judge Roger L. Couch on June 29, 2009. Judge Couch issued his Order on August 14, 2009, certified on August 20, 2009, which affirmed the Findings of Fact and Conclusions of Law from the Appellate Panel Decision and Order. ( R. 1 ). The Notice of Appeal was timely filed on September 11, 2009.

On September 14, 2011, the South Carolina Court of Appeals filed its Order which affirmed the Circuit Court. On September 28, 2011 the Appellant filed a Petition for Rehearing, along with a Supporting Memorandum. The Appellant requested a rehearing en banc. The Respondents filed their response and Appellant filed a reply. The Court of Appeals issued an Order Denying Petition for Rehearing on October 20, 2011. After a reminder of the request for an en banc hearing, the decision was held in abeyance.

On December 21, 2011 the Court of Appeals issued an Order which withdrew and substituted a new Order. The Order was refiled on December 21, 2011. Also on December 21, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing.

On January 3, 2012, the Appellant filed another Petition for Rehearing, along with a Memorandum in Support of Petition for Rehearing. The Court of Appeals issued an Order Denying Petition for Rehearing on January 26, 2012. The Request for a Rehearing En Banc was not addressed. After notification, the case was again held in abeyance. On February 16, 2012, a letter from the Court of Appeals notified the parties that the Request for a Rehearing En Banc was denied. Time limits were set to start with the date of that letter.

## STATEMENT OF FACTS

The Claimant Claude Potter suffered compensable injuries while working for this employer on December 19, 2003. His ladder slipped and he fell approximately 12 to 14 feet, landing on an asphalt surface. (R. p. 53, lines 2-16). The Claimant was 62 years of age at the time of the accident. (R. p. 50, lines 18-19.)

The Claimant was evaluated by Dr. Randolph Waid on June 11, 2005. (R. pp. 97-99). The evaluation lasted for a full day. In the Summary, Dr. Waid found that the Claimant sustained a traumatic brain injury as a result of this accident. (R. 97). Testing highlighted difficulties with working memory and slowed processing speed. (R. 97). Dr. Waid found that the Claimant was experiencing a decreased capacity to sustain his attention and/or concentration and had significant difficulties with multitasking. (R. 97).

Dr. Waid assessed a cognitive disorder secondary to the residuals of a traumatic brain injury and a mood disorder, depressed type, secondary to the sequelae of a traumatic brain injury and a personality change, labile type secondary to residual injury affecting the frontal lobes of the brain. (R. 98). Dr. Waid recommended a referral to a neuropsychiatrist to assist with continuing sleep disturbance and mood lability. Dr. Waid also recommended therapeutic intervention. (R. 98).

After Dr. Waid's evaluation, and prior to the scheduled hearing, the Defendant entered the Consent Order. (R. pp. 27-28). The Consent Order agreed to provide treatment by Dr. David Tollison. (R. 27).

In the meantime, the Claimant had been seen again by Dr. Thomas Collings. (R. pp. 98-100). Dr. Collings recommended psychological treatment for depression related to the injury.

(R. 100).

Dr. Tollison noted lapses of memory. He also mentioned more difficulty in regard to maintaining concentration (R. 101). In the assessment, Dr. Tollison diagnosed adjustment disorder with mixed depressive and anxiety features. ( R. 102). Following the initial evaluation of June 29, 2006, the Claimant returned for counseling sessions until March 14, 2007. (R. pp. 101-114 ).

Dr. Tollison stated his opinions at the time of the release on March 14, 2007.

Dr. Tollison stated that Mr. Potter suffers a Class 2 ( mild) psychological impairment in activities of daily living, a Class 2 impairment in social functioning, a Class 3 ( moderate ) psychological impairment in concentration/persistents/pace and a Class 3 impairment in adaptation to stressful conditions. ( AMA Guides, Fifth Edition ). ( R. 113 ). Dr. Tollison stated that these impairments are related to the work injury. (R. 113 ). In the Clinical Status, Dr. Tollison mentioned that the impatience and irritability could be symptomatic of cognitive disorder, symptomatic of frustration and adjustment disorder, or a combination of both. (R. 113 ). He found the Claimant at psychological MMI on that date. ( R. 113 ).

The Claimant was seen by Dr. Samuel Seastrunk on May 10, 2005 for an independent medical evaluation. Dr. Seastrunk recommended that the Claimant undergo testing for various skills especially cognitive. (R. 141 ). Dr. Seastrunk assessed permanent partial disability ratings of 25% to the right lower extremity, 5% to the right upper extremity and 17% to the lumbar spine. (R. 141 ).

A letter was submitted from Dr. Randolph Waid dated September 24, 2007. ( R. 144 ).

Dr. Waid stated that the previous neuropsychological evaluation revealed that the Claimant was

experiencing a decreased capacity to sustain attention/concentration with slow mental/information processing speed and disruptive difficulties with multitasking. There was evidence of mild executive dysfunction. There were noted difficulties with irritability, charged emotions and anger related adjustment problems. ( R. 144 ). Dr. Waid stated that Mr. Potter's injuries were consistent with a traumatic brain injury with residual deficits that are consistent with permanent physical injury to the brain. Dr. Waid's opinion was that Mr. Potter suffered permanent physical brain injury as a result of the fall from a building on December 19, 2003 ( R. 144 ).

The Claimant was seen by Dr. William Stewart for a Vocational Evaluation on October 2, 2007. (R. pp 145-149). Dr. Stewart concluded that Mr. Potter has not been job ready or placeable since he last worked as best he could in the light duty work status. ( R. 148 ). Dr. Stewart's opinion was that the prognosis for successful vocational rehabilitation to some kind of light alternative work or job was quite poor ( R. 148 ). Dr. Stewart stated that because of the length of time that the Claimant has been disabled and that he will likely continue to have his current level of symptoms, it is unlikely his vocational prognosis will change. Dr. Stewart does not believe a reasonably stable market exists for the types of services that Mr. Potter is capable of performing. ( R. 149 ).

The Claimant/Appellant argues that the interpretation of the evidence by the Court of Appeals leads to a decision which is in conflict with prior decisions by the Supreme Court.

#### ARGUMENT

In light of the Order of the Court of Appeals, this case should be remanded to the Workers' Compensation Commission.

In the case of Lark v. Bi/Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981) the court stated that South Carolina Code Section 1-23-380 governs the standard of judicial review of awards of the Workers' Compensation Commission. South Carolina Code Section 1-23-380 (A)(5) states that the court may reverse or modify the decision of the agency if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are either " ( e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or, (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Also, according to Goff v. Mills, 279 S.C. 382, 308 S.E. 2d 778 (1983), judicial review and reversal of the Workers' Compensation Commissions' decisions are permitted under Section 1-23-380 where administrative findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

In Finding of Fact #12, the Appellate Panel of the Workers' Compensation Commission affirmed the single commissioner in finding that Dr. Randolph Waid's opinion concerning alleged brain damage is beyond his expertise. ( R. p. 11 ). That Order cites the case of McLeod v. Piggly Wiggly Company, 280 S.C. 466, 471, 313 S.E. 2d 38 , 41 (Ct. App. 1984 ) in support of this finding. ( R. 11 ). Dr. Waid is a licensed clinical neuropsychologist. ( R. 144 ). The case of Means v. Gates, 348 S.C. 161, 558 S.E. 2d 921 (Ct. App. 2001 ) discussed the specific qualifications of Dr. Randolph Waid as an expert. In that Order, the Court of Appeals described the background of Dr. Waid as having a bachelor's degree in general psychology, a master's degree in psychology and a doctorate in clinical psychology. Means, 923 -924. The Court of Appeals agreed that the exclusion of Dr. Waid's testimony constituted an abuse of discretion and

remanded for a new trial. Means, 925.

The Substituted Order of the Court of Appeals stated, “ The commissioner then noted that Dr. Waid is a clinical psychologist, not a neurosurgeon or medical doctor, and stated ‘ greater weight is given to the opinion of the treating physician ‘ with respect to Potter’s ‘ injuries and body parts involved.’” Potter, p. 3-4.

Consequently, the Appellant’s objection is that the single commissioner and the Appellate Panel have given no weight at all to the opinion of Dr. Waid. Even though the Court of Appeals has not held that Dr. Waid lacks expertise and is unqualified in the area of brain injury, the single commissioner and the Appellate Panel made their decisions based upon that finding. In other words, the finding that Dr. Waid is unqualified is tantamount to their giving his opinion no weight at all.

The Court of Appeals stated, “ Dr. Waid’s opinion, as a clinical psychologist, was reviewed and given lesser weight due to the Appellate Panel’s evaluation of Waid’s opinion concerning alleged brain damage based on his expertise presented to the Appellate Panel.” Potter, p. 5.

The above statement illustrates the Appellant’s argument. The point is that the Appellate Panel gave no weight at all to the appointment of Dr. Waid, rather than the “lesser” weight as ascribed by the Court of Appeals. It can be safely assumed that the Appellate Panel gave no weight to Dr. Waid’s opinion because of Finding of Fact #12, which makes the incorrect finding that Dr. Waid’s “ opinion concerning alleged brain damage is beyond his area of expertise.” (R.P. 11).

The Court of Appeals went on to state that Tiller v. National Healthcare, 334 S.C. 333,

513 S.E. 2d 843 (1999) allows Dr. Waid's opinion to be taken into consideration by the Appellate Panel as it weighs and considers all the evidence, both lay and expert, when determining whether causation has been established." Potter, p. 5. The Appellant agrees with this concept. The problem is that the Appellate Panel gave no consideration at all to the opinion of Dr. Waid:

The Court of Appeals then stated " while medical testimony is entitled to great respect, the Appellate Panel may disregard it if the record contains other competent evidence. Id. Nor is the Appellate Panel bound by the opinion of medical experts. Sanders v. Mead Westvaco Corp., 371 S.C. 284, 292, 638 S.E. 2d 66, 71 ( Ct. App. 2006 )." Potter, p. 5.

Again, these statements illustrate the point being made by the Appellant. There was no opportunity for the Appellate Panel to consider Dr. Waid's opinion as being competent evidence because they were working under the misconception and incorrect finding that his opinion was beyond his area of expertise.

Finally, the Court of Appeals wrote that the Appellate Panel was presented with medical evidence from four sources, including Dr. Waid. The Court of Appeals then wrote that the Appellate Panel properly considered all four of them. The court also wrote that the Appellate Panel committed no error of law by relying on McLeod in its assessment of Dr. Waid's credibility and the weight to afford his opinion, as it made its factual findings regarding physical brain damage. The court went on to state " it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone. Id. ( "Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E. 2d 52, 57 ( 1957 )." Potter, p. 5.

The problem again is that because the Appellate Panel considered Dr. Waid's opinion to be outside the area of his expertise, they gave his opinion no weight at all. There would have been no balancing of findings or weighing of testimony conducted by the Appellate Panel.

For these reasons, the Appellant requests that this case be remanded to the Appellate Panel of the Workers' Compensation Commission.

### CONCLUSION

In conclusion, the administrative findings by the Appellate Panel of the Workers' Compensation Commission were clearly erroneous in view of Finding of Fact #12 which found that Dr. Randolph Waid's opinion concerning alleged brain damage is beyond his area of expertise. Such finding resulted in the Appellate Panel giving no consideration at all to Dr. Waid's opinion, rather than considering and weighing the evidence as they should have done. The decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court. Therefore, the Appellant petitions the Supreme Court for a Writ of Certiorari. The Appellant submits that the case should be remanded to the Appellate Panel of the Workers' Compensation Commission to make proper findings.

Respectfully submitted,



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**COUNSEL FOR APPELLANT**

March 14, 2012

THE STATE OF SOUTH CAROLINA  
In The South Carolina Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Honorable Roger L. Couch, Circuit Court Judge

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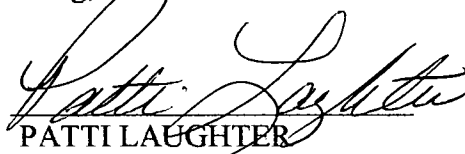
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PROOF OF SERVICE

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The undersigned hereby certifies that she is employed in the offices of Andrew N. Poliakoff, 152 Magnolia Street, Spartanburg, South Carolina, and is a person of such age and discretion as to be competent to serve papers.

That on Thursday, March 15, 2012, she mailed the Petition for Writ of Certiorari, along with the "Certificate Of Counsel" in the above action by placing said copy in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, by depositing said envelope and contents in the U.S. Mail at Spartanburg, South Carolina.

  
PATTI LAUGHTER

**David A. Wilson**

**Michael A. Farry**

Horton Drawdy Ward & Jenkins, P.A.

P.O. Box 10167

Greenville, South Carolina 29603

**ATTORNEYS FOR RESPONDENTS**

The Honorable Jenny Kitching

South Carolina Court of Appeals

P.O. Box 11629

Columbia, South Carolina 29211

# Andrew N. Poliakoff

ATTORNEY AT LAW

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March 15, 2012

The Honorable Dan Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: Claude Potter vs. Spartanburg County School District #7  
C.A. No.: 08-CP-42-3202 - 8-14-09

Dear Mr. Shearouse:

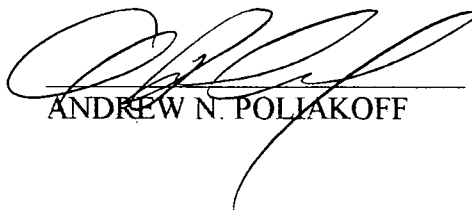
Today I am filing with your office an original and seven copies of the Petition for Writ of Certiorari and Proof of Service, along with two copies of the Appendix, one of which is unbound.

I have attached a check for filing in the amount of \$150.00.

A copy of the Petition and Proof of Service has been served on the opposing counsel and filed with the Clerk of the Court of Appeals.

With best regards, I am

Yours very truly,



ANDREW N. POLIAKOFF

ANP/pl  
Enclosure

cc: Jenny Kitching, S.C. Court of Appeals  
Michael Farry, Esq.  
David Wilson, Esq.

check # 5246  
\$150.00 returned  
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S.C. Supreme Court

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ANDREW N. POLIAKOFF  
ATTORNEY-AT-LAW

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DATE 3-15-12

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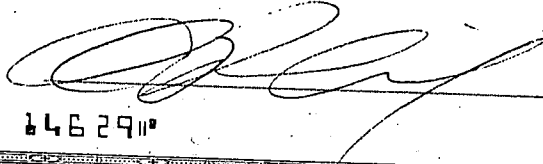
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FOR

CLAUDE POTTER-FILING FEE



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