THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1414226
Appellate Case No.: 2016-000595

Laurent W. Britton, Decedent/Employee,
and Marsha P. Britton, Claimant, ... Respondents,

v.

Charleston County, Employer, and
SC Association of Counties, SIF, Carrier, ... Appellants.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Decedent, Laurent W. Britton, suffered a fatal heart attack while working as the Radio Communications Manager for Charleston County on September 9, 2014. The Employer, filed a claim for death benefits on behalf of his wife and sole dependent, the Claimant, Marsha P. Britton. By letter addressed to Kurt W. Taylor, County Administrator, dated September 23, 2014, the Carrier, SC Association of Counties SIF, denied the claim. (Claimant's APA Exhibits G and M). On December 1, 2014, the Respondents filed a Form 52, Notice of Claim and Request for Hearing, Death Case, alleging the Decedent suffered a fatal heart attack arising out of and in the course of his employment with Charleston County on September 9, 2014. (Form 52, dated 12/2/14). On December 23, 2014, the Appellants filed a Form 53, Employer's Answer to Request for Hearing, Death Case, denying the claim. (Form 53 dated 12/23/14). Mandatory mediation was held on February 24, 2015, but failed to resolve the claim.

The claim was heard before Commissioner Susan S. Barden on June 19, 2015, in St. George, South Carolina. The Claimant, Marsha Britton, testified on her own behalf. Charleston County Coroner, Rae Wooten, and Charleston County EMS Medical Director, Dr. Ralph Shealy, also testified on behalf of the Respondents. Charleston County Director of Radio and Communications, William Tunick, and the current Charleston County Radio Communications Manager, Martin Kratz, who had been a technician under the Decedent, testified on behalf of the Appellants. (Tr. of Hearing held on 6/19/15). Charleston County Sheriff, Al Cannon, and the Decedent's long-time family physician, Dr. William Wilson, testified by deposition. (Deposition of Sheriff A. Cannon dated 4/23/15; Dep. of Dr. Wilson dated 3/6/15). All of the witnesses, including Appellants' witnesses, testified that the conditions of the Decedent's employment on the night he suffered his fatal heart attack were unusual and extraordinary. (Decision and Order of Hearing Commissioner, p. 6, Finding of Fact 18, p. 12; Decision and Order of Appellate Panel,

Finding of Fact 18, p. 16). Documentary evidence was submitted by both the parties under the Administrative Procedures Act. (Decision and Order of Hearing Commissioner, pp. 2 – 4).

On August 17, 2015, Commissioner Barden issued her Order finding and ruling the Decedent's heart attack was compensable and ordering the Appellants to pay the Respondent five-hundred (500) weeks of compensation in a commuted lump sum at the compensation rate of Seven Hundred and Fifty-Two and 16/100ths ($752.16) and funeral benefits pursuant to S.C. Code Anno., § 42-9-290 and W.C.C. Regulations 67-1605(E)(5) and 67-1606 (A)(1)(2). (Decision and Order of Hearing Commission, p. 15).

The Appellants filed a Form 30, Request for Commission Review, on August 27, 2015. This matter was heard before an Appellate Panel of the Commission on November 17, 2015. By Decision and Order filed on January 12, 2016, Commissioner Melody L. James, sitting as Chair, and Commissioners Gene McCaskill and Aisha Taylor unanimously affirmed the Order of the Hearing Commissioner. (Appellate Panel Decision and Order dated January 12, 2016).

On January 20, 2016, the Appellants filed a Motion for Rehearing by the Full Commission. The motion was considered by the Full Commission at Judicial Conference. By Judicial Conference Decision and Order filed on February 22, 2016, and signed by Commissioner T. Scott Beck, Chairman, the Commissioners unanimously voted to deny the Appellants' Motion for Rehearing.

On March 18, 2016 the Appellants filed Notice of Appeal and this appeal follows.

FACTS

The Respondent agrees the evidence was "essentially undisputed" but vigorously disputes what facts need to be included in the Statement of the Facts to properly consider the questions presented. (Initial Brief of Appellants, p. 4). The Respondents submit it is the facts left out of the

Appellants' Statement of the Facts that establish the conditions of the Decedent's employment on the night he suffered his fatal heart attack were unusual and extraordinary. It is the facts left out that establish the conditions that night involved great mental stress and worry, emotional involvement, and long hours as the Decedent managed the county radio system during an active shooter incident. An active shooter incident in which one police officer was shot and killed and another shot and seriously injured by a shooter who had barricaded himself in an apartment. The Decedent monitored the radio communications as over 100 law enforcement officers, SWAT team members, EMS technicians, and fire department first respondents put themselves in harm's way responding to the scene. The danger to their safety continued throughout the night into the early hours of the following morning. Tragically, the Decedent became the third victim of the events that night when the prolonged emotional stress and strain caused him to suffer a fatal heart attack in the early morning hours. The Director of Communications, William Tunnick, told the media the following morning, "Mr. Britton was an extremely dedicated employee [who] always gave 110 percent to support public safety communications... At any time day or night Larry would support a major public safety incident in the county." (Tr., p. 131). Unfortunately, the conditions of his employment the night of his fatal heart attack were not like other public safety incidents he had experienced. The conditions were unusually and extraordinarily stressful not just for the Decedent, but for all first responders involved.

The active shooter incident began on September 8, 2014 at 7:23 p.m. when courtesy Deputies Alexander and Johnson reported a disturbance at an apartment complex in the West Ashley area of Charleston County with the suspect refusing to exit his apartment, unit 197-G. At 7:30 p.m. on duty Deputies Ackerman, Matuskovic, and Harris arrived at the scene to offer back up. (Claimant's APA, p. 80). At 7:36 p.m. another call came over the radio reporting "shots fired,

officers down." (Claimant's APA, p. 82). Deputies Matuskovic and Ackerman had been shot by the suspect firing through the walls of his apartment. (Dep. Sheriff A. Cannon, p. 41; Defendant's APA, p. 276). Other officers that responded to the scene bravely removed the wounded officers from in front of the apartment and got them to EMS for transport to the hospital. (Claimant's APA, pp. 83 – 84). Over 100 police officers, SWAT teams, EMS, and fire department first responders descended on scene in response to the "shots fired, officers down" call. (Tr., p. 42; Defendant's APA, p. 277; Claimant's APA, p. 107).

The Decedent, who had already worked a full day, was attending a Fraternal Order of Police banquet when he was notified about the shootings. (Tr., p. 149). At 8:11 he called his technician, John Kratz, and informed him about the officers having been shot. (Tr., p. 151). He asked Kratz to contact the Sheriff's Office liaison to find out what radio equipment they would need to respond to the shootings. (Tr., p. 151 – 152). The Decedent and Kratz agreed to meet at the radio communications office to gather the needed equipment. They planned to load the equipment into a County van which Kratz would take to the scene while the Decedent manned the radio communications center. (Tr. p. 152). At 8:36 p.m., the Decedent called his Director of Communications, William Tunnick, to discuss the developing situation. The Director testified:

> He called. He was – **sounded very stressed** because, obviously, it's a very sad occurrence when a police officer gets shot and killed, and he felt – so he and he had to go to the radio shop, that Martin was going to go to the scene itself, he was going to the radio shop to help manage the incident, the com incident and – but he – at that time he told me he felt – **he thought that the person – that the police officer that was killed was a friend of his, a good friend of his.** It was not known who was down at that point, but through word of mouth, I guess, he had thought that this was someone that he knew very well. He was mistaken when the name of the officer was released.

(Emphasis added). (Tr., pp. 120 – 121).

Deputy Matuskovic had been transported to the MUSC Trauma Center where he was pronounced dead at 8:37 p.m. (Dep. Sheriff A. Cannon, p. 41; Def. AOA, p. 273). Deputy Ackerman was also transported to the Trauma Center and was undergoing surgery. (Claimant's APA, p. 84). Dr. Ralph Shealy, who had over 34 years experience as an emergency room physician, the medical director for Charleston County EMS, a volunteer reserve deputy, and a member of the Charleston County Sheriff's Office SWAT team, best described the mental stress and worry all the first responders experienced that night:

> Ma'am, I've responded to major disasters all over the world, and I quit counting after 4,000 EMS and rescue calls to which I have responded. This was an entirely different experience because in the safety community we're like brothers and sisters... And – Well, I knew I had to go and do what I could, and I had visions of one of our officers down bleeding to death before I could get there. And I did everything in my human power to get there as fast as I could get there for them. And it's different. We take care of the public. We take care of other people because we have a love and desire and passion to serve the public. But this was family. These were people to whom we had a commitment that we took care of them; they took care of us. We could not function without them. They depended upon us for their support when they were in trouble....

(Tr. pp. 72- 74). Dr. Shealy explained the reason for continuing emotional stress that night:

> A: ...And you need to understand there were two elements to it. One element was that we knew that – knew that there were officers that were already shot, but we also know that – knew that there were other officer who were engaged with an assailant with deadly intent, that they were gonna be confronted with having to bring that person into custody, that since this man had already shot two officers that the likelihood was high that he was willing to shoot more. Once we realized – once I was on the scene and had some idea of what the setting was like, I realized that the SWAT – I have been a rostered member of the Charleston County Sheriff's Office SWAT team for 20 years, caring, being on the scene to support and protect SWAT operators for the Charleston County Sheriff's Office. And I've been a sworn law enforcement officer for over a decade. I was aware that there was imminent danger of a serious gunfight in which the officers would be at many kinds of disadvantages and that we might see more dead cops that night. And so the sense of urgency about it was not only the despair that there were cops that were shot, but also the certain knowledge that more – that more people could die before this incident was over. And that's different that the normal

> response, and it's different because, first, they're family that's already been lost and, second, there's family who still could yet die if the system did, if they were not fortunate and if this did not work advantageously for them so they could apprehend the shooter and go home safely. And that was very much uncertain well into the night. It was uncertain until it was discovered that the shooter was dead. And that's what was different about it.
>
> Q: So, the thought that a lot of this ended once the officer was shot, that was not the end of this evening?
>
> A: Oh, no, far from it. Far from it. We knew that this man was armed. He was - he had proved that he was willing to shoot officers and had the intent to continue to do so...

(Tr., pp. 74 – 76).

Dr. Shealy was not the only witness who described the conditions that night as being unusual and extraordinary. Charleston County Sheriff A. Cannon in a letter dated February 6, 2015 wrote, "The circumstances under which Mr. Britton was called on to perform his duties were extremely rare and extraordinarily stressful and traumatic. This assessment is based on having commanded law enforcement agencies for over thirty (30) years and having dealt during that time with all manner of tragic situations and disasters." (Claimant's APA, pp. 107- 108). Sheriff Cannon explained why the events that night affected all the first responders differently from other "emergencies":

> Go back to that emergency definition. Some emergency situations differ in terms of the – elements of – the emotional elements, the apprehension that folks may have about how a situation has evolved. It's difficult. Sometimes we are able to -- to handle most of what we do because we don't have a direct or emotional involvement in it. There are some cases in which we are unable to maintain that kind of distance, and certainly has an impact beyond the normal, quote, unquote, emergency situations."

(Dep. Sheriff A. Cannon, p. 51 – 52). The Claimant echoed the Sheriff and testified, "I worked at a police department when a police officer was killed, and it's very hard when somebody you work with and know is shot and killed in the line of duty." (Tr., p. 18). She continued, "No, it

wasn't a normal emergency. First responders care about the people that are on the street that get hurt in wrecks and things like that, but there's no – nothing personal about it. But when – when it's another officer or another fireman, then it brings it into their family sort of and just makes it harder to deal with, much more stressful." (Tr., p. 19). Charleston County Coroner, Rae Wooten, testified, "In my experience, hearing that you have an officer down not only elicits certain concerns about people that are co-workers and other first responders, but for me that – that causes me immediately to think that we have a very volatile, more volatile and unpredictable situation than is ever typical in other emergencies..." (Tr., p. 41 – 42; p. 63). When asked on cross examination if it was a normal emergency that night, the Director of Communications, William Tunnick, simply testified, "No." (Tr., p. 141). The communications technician, John Kratz, readily agreed the events that night were unusual and extraordinary. (Tr., p. 165). As the Hearing Commissioner specifically found, every single witness testified that the circumstances surrounding the shooting were unusual and/or not typical and extraordinary when compared to other emergencies. (Commissioner Barden Order dated 8/17/15, p. 6).

The emotional stress and worry continued into the early morning hours. At 1:25 a.m,, the Decedent, locked alone in the radio control room, called 911 to report he was experiencing chest pains and shortness of breath. (Defendant's APA, pp. 249 – 252). EMS responded and transported him to MUSC where he was pronounced dead at 3:02 a.m. Dr. Wilson, the Decedent's 23 year family physician, concluded to a reasonable degree of medical certainty, "due to the unexpected strain and overexertion on September 8 and 9, 2014, Chief Larry Britton died of a sudden acute myocardial infarction while providing law enforcement support under unusual and extraordinary conditions of employment." (Dep. William Wilson, M.D., dated 3/6/15; Claimant's APA, p. 79). Although acknowledging a family history of heart disease, the Hearing Commission specifically

noted there was no medical evidence the Decedent had any prior episodes of chest pain, heart disease, or other complaints regarding his heart. (Commissioner Barden Order, Finding of Fact 5, p. 10; Finding of Fact 17, p. 12). Dr. Shealy and Coronor Wooten both agreed with Dr. Wilson's opinion. (Tr., p. 47, pp. 77 – 78). As also specifically noted by the Hearing Commissioner, the Appellants offered no medical evidence challenging Dr. Wilson's opinion on causation. (Commissioner Barden Order, Finding of Fact 15, p. 12).

ARGUMENT

I. THE COMMISSIONS DECISION IS NOT AFFECTED BY AN ERROR OF LAW AND SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

S.C. Code Anno., § 42-17-60, 1976, of the Workers' Compensation Act, provides, "[t]he award of the commission ... is conclusive and binding as to all questions of fact. However, either party to the dispute ... may appeal from the decision of the commission ... for errors of law under the same terms and conditions as govern appeals in ordinary civil actions." S.C. Code Anno., § 1-23-380, 1976, of the Administrative Procedures Act, governs appeals from administrative agencies and provides:

> **The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.** The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative,

and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphasis added). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (S.C. 1981).

These statutes mandate that the decision of the Commission, as the fact finder, must be affirmed if the factual findings are supported by substantial evidence on the whole record unless it is affected by an error of law. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). "Substantial evidence" is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion reached by the. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

The Appellants cannot and do not argue the decision of Commission is not supported by substantial evidence. As found by the Hearing Commissioner, whose decision was unanimously affirmed by the Appellate Panel, every single witness testified the conditions of the Decedent's employment the night he suffered his fatal heart attack were unusual and extraordinary. The conditions were emotionally stressful not just for the Decedent, but for all first responders that night. The Appellants cannot and do not argue medical causation having failed to offer any medical evidence challenging the opinion of the Decedent's long-time family physician at the hearing. The Appellants are left trying to get around the substantial evidence rule by arguing the Commission's decision was affected by an error of law.

A. The Commission did not commit an error of law by considering the circumstances surrounding the active shooter incident the Decedent responded to on the night of his fatal heart attack.

This case involves a heart attack suffered by an employee at work while performing his assigned duties. The standard for compensability in such cases has long been established.[1] A heart attack is compensable when it is induced by unexpected strain or overexertion in the performance of the duties of the employment **or by unusual and extraordinary conditions of the employment.** (Emphasis added). McWhorter v. S.C. Dept. of Insurance, 252 S.C. 90, 165 S.E.2d 365 (1969); Walker v. Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966); Walsh v. U.S. Rubber Co., 238 S.C. 411, 120 S.E.2d 685 (1961); Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1960); Kearse v. S.C. Wildlife Resources Dept., 236 S.C. 540, 115 S.E.2d 183 (1960). While unexpected strain is often discussed in the context of physical exertion, it also encompasses emotional stress or mental strain resulting from great emotional involvement, lack of sleep, time pressure, and worry. McWhorter, *supra.* 356 S.E.2d at 368 – 369. In determining whether the conditions of the employment were unusual or extraordinary, the question is whether they were unusual when compared to the employee's normal employment. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) *citing* Larson's Workers' Compensation Law, § 44.05(4)(d)(1).

The Appellants argue the Commission committed an error of law because the Decedent's job description said he had to be available 24/7 to manage radio communications during all different kinds of emergencies and, therefore, the

[1] The Appellants' citing Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1985) argue the legal standard for heart attacks and mental/mental injuries are the same. (Initial Brief of Appellant, p. 10). It is noted the Legislature codified the standard applicable to mental/mental injuries in S.C. Code Anno., § 42-1-160(B), as amended 7/1/07. *See*: Bentley v. Spartanburg County, 398 S.C. 418, 730 S.E.2d 296 (2012).

Commission erred in in failing to find what he was doing on the night of his fatal heart attack was not unusual or extraordinary. The phrase "unusual or excessive strain" is not so limited in its meaning as to include only work of an entirely different character than that customarily done. Walsh v. United States Rubber Co., 238 S.C. 441, 120 S.E.2d 685 (1961). The right to compensation is not affected by the fact that the employee was performing work of the same general type as that in which he was regularly engaged when he suffers a heart attack. McWhorter, *supra.* 356 S.E.2d at 367 *citing* Sweatt v. Marlboro Cotton Mills, 206 S.C. 476, 334 S.E.2d 762 (1945); Ricker v. Village Management Corporation, 231 S.C. 47, 97 S.E.2d 83 (1957); *see also*: S.C. Second Injury Fund v. Liberty Mutual, 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003).

The Appellants would have this Court consider the conditions of the Decedent's employment on the night of his fatal heart attack in question in a vacuum. They begin by citing Bentley, *supra.* 535 S.E.2d at 442, for the proposition "the only issue is whether the employment conditions were extraordinary and unusual with respect the [employee's particular job]. (Initial Brief of Appellants, p. 10). From this one sentence in Bentley, *supra.*, they reason the "seminal test," therefore, is not whether the active shooter incident occurring that night was unusual or extraordinary, but whether what the Decedent was doing locked by himself in the radio control room was unusual or extraordinary for a Radio Communications Manager. Apparently, the Appellants would have this Court believe the Decedent, who returned to work from a Fraternal Order of Police banquet after having already worked a full day

because of the active shooting incident, would not have been listened to the radio communications about the active shooter incident while performing his duties as the Radio Communications Manager. They want the Court to forget or ignore he sounded stressed when he spoke to his Director early that night because he thought a close friend had been one of the officers shot. They want the Court to forget or ignore the Decedent spent his entire career as a first responder, maybe knew the officers that had been shot, and certainly knew many of the first responders who remained in harm's way throughout the long hours of uncertainty that night.

The Appellants argue, but what he was doing was his normal job in the ordinary way and, therefore, the Commission committed an error of law finding the conditions of his employment were unusual and extraordinary that night. The Appellants rely on an incomplete statement of the legal standard applied in heart attack cases. The complete standard is, "[i]f a heart attack occurs as a consequence of the ordinary exertion that is required in the performance of employment duties in the ordinary and usual manner, **and without any outward untoward event**, it is not compensable." (Emphasis added). Fulmer v. S.C. Elec. & Gas Co., 306 S.C. 34, 410 S.E.2d 25 (Ct. App. 1991); Jennings v. Chambers Development Co., 335, S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). Just as the events that night were not limited to the initial shootings of Deputy Matuskovic and Ackerman at 7:36 p.m., the emotional stress and strain felt by the whole first responder family was not limited to the apartment complex in West Ashley. It was felt by the entire first responder family. If an active shooter incident, with one police officer fatally shot and killed, and

another seriously wounded, by a shooter barricaded in an apartment resulting in an emotionally charged and uncertain standoff long into the night does not constitute an "outward untoward event," then the Respondents submit nothing ever will.[2] It constituted a combination of stressful events that were unusually and extraordinarily stressful to the Decedent and all first responders that night.

B. The Commission did not commit an error of law by considering it had been over 10 years since a police officer had been shot in the line of duty.

The Appellants' argue the Commission committed an error of law by improperly "focusing" on the infrequency of the events that occurred that night. The Respondents would note that the Hearing Commissioner's Order, unanimously affirmed by the Appellate Panel, contains twenty-two (22) findings of fact and twenty-seven (27) conclusions of law and only one finding of fact mentions the frequency of a deputy sheriff being shot. (Hearing Commissioner Order, Finding of Fact 12, p. 11; Appellate Panel Order, Finding of Fact 12, p. 15). One single finding hardly counts as improperly focusing on this one fact. Thankfully, active shooter incidents, especially ones directed at police officers, are rare occurrences. Sheriff A. Cannon testified it had 8 to 10 years since a deputy had been shot in the line of duty. (Dep. Sheriff A. Cannon, p. 69).

While the Appellants' quote one line from the Bentley, *supra.*, decision in support of their argument the Commission is prohibited from considering frequency,

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[2] **Outward** *adj* 1: moving, directed, or turned toward the outside or away from a center 2: situatd on the outside: EXTERIOR... **Untoward** *adj* 1: difficult to guide, manqage, or work with: UNRULY, INTRACTABLE 2a: marked by trouble or unhappiness : UNLUCKY b. not favorable: ADVERSE. Webster's New Collegiate Dictionary, (1977).

curiously they left out the footnote that immediately followed the quote. Footnote 6 in the Supreme Court's decision did not prohibit the Commission from considering frequency of the occurrence, it defined "unusual and extraordinary" as:

> Black's Law Dictionary defines "extraordinary" as "out of the ordinary, exceeding the usual, average, or normal measure or degree; beyond or out of the common order, method, or rule; not usual, regular or of a customary kind; remarkable; **uncommon; rare;** employed for an exception purpose or on a special occasion." Black's Law Dictionary 586 (6th ed. 1990). "Unusual" is defined as "**uncommon, not usual, or rare.**"

(Emphasis added). Id., 730 S.E.2d at 301. While the Appellants appreciates the Supreme Court was reluctant to quantify just how infrequent an occurrence would have to be to be considered unusual or extraordinary, they would note once in 8 to 10 years is significantly more unusual and extraordinary than the once a year in Bentley, *supra.*, and the Courts have long considered the frequency with which similar events may have occurred in upholding the Commission's finding the conditions of the employment were unusual or extraordinary. Powell v. Vulcan Materials Co., *supra.;* S. C. Second Injury Fund v. Liberty Mutual Insurance Company in re: Etheredge, *supra.*

C. The Commission did not commit an error of law by failing to consider the Decedent's job description.

The Appellants argue the Commission committed an error of law by failing to consider the Decedent's job description. This argument is without merit. The Hearing Commission in her Order that was unanimously affirmed by the Appellate Panel specifically referred to the Decedent's job description entered into evidence as

Defendant's APA. 17 in Findings of Fact 6. (Hearing Commission Order, Finding of Fact 6, p. 10; Appellate Panel Order, Finding of Fact 6, p. 14).

D. The Commission did not commit an error of law by failing to make specific findings sufficient to enable judicial review.

The Appellants next argue that the Commission committed an error of law by failing to make sufficient findings of fact to enable judicial review. This argument is also without merit. The Appellants cite the Administrative Procedures Act that "[a] final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Anno., § 1-23-350, 1977. The Appellants would then have this Court ignore everything in the Hearing Commissioner's Order, her five (5) pages reviewing the testimony, her twenty-two (22) findings of fact and twenty-seven (27) conclusions of law all separately stated, all unanimously affirmed by the Appellate Panel, except for Finding of Fact 18 and then find the Commission failed to make sufficient findings of fact. Unlike the decisions in Able Communications, Inc. v. SCPSC, 290 S.C. 409, 351 S.E.2d 151 (1986); Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007), in which the administrative decision literally was just set forth in the statutory language, the Hearing Commissioner's Order in this case made pages of detailed findings of fact, all cited to the record, in reaching her Finding of Fact 1, "... Decedent-Employee died of a work-related heart attack/injury on September 9, 2014, as a result of extraordinary and unusual conditions of employment." The Respondents would note that "extraordinary and unusual" has never been part of the statutory language

for compensability in heart attack claims. The Hearing Commissioner's finding was further supported by the following additional specific facts:

- "The Employer requested that the claim be found compensable" (Finding of Fact 2);
- "[Appellants] presented no competing medical causation opinion evidence – including from a cardiologist or other2ise -- to refute the medical causation opinion submitted by the Claimant" (Finding of Fact 2);
- "There were no medical records in evidence documenting any prior episodes of chest pain, heart disease, or other complaint regarding the Decedent-Employee's heart" (Finding of Fact 5);
- The Decedent was a "critical link" for emergencies requiring radio communication needs (Findings of Fact 6 and 7);
- "On the day of the alleged accident, after working his regular shift of 7:30 a.m. to 3:30 or 4:30 p.m., Decedent-Employee had to return to work in the communications building to manage the communications for a 'very complex emergency situation'" (Finding of Fact 8);
- The Decedent Employee worked from approximately 7:30 p.m. until 1:30 a.m. when [he] called EMS because of experiencing chest pain and shortness of breath while performing his emergency job duties" (Finding of Fact 8);
- "The nature of the emergency on the date of the alleged accident involved two deputy sheriffs (and other officers) in a 9-hour standoff with an armed and intoxicated suspect who was 'shooting through the walls' of an apartment, such that two deputy sheriffs were taking fire from the perpetrator. Both deputies were shot by the perpetrator, and one of the deputies died of his wounds." (Finding of Fact 9);
- "Away in an office from the actual scene of the crime, the Decedent-Employee was required to monitor/coordinate

the communications of multiple law enforcement entitles" (Finding of Fact 10);

- "Carrier did not present any testimony to refute the testimony of Wooten and Shealy, who testified that a 9-hour standoff were officers were down (a) is atypical, (b) was not a normal emergency, (c) was not a "routine" emergency, (d) was 'entirely different' than ordinary emergencies, and (e) was more unusual *vis a vis* other emergencies. In fact, Defendants' witness (Tunnick and Kratz) also testified that the standoff/shootings were not a normal emergency. Sheriff Cannon ... testified that the standoff/shootings were 'unique' and 'extraordinary' within the definition of 'emergency'" (Finding of Fact 11);

- "The last time a deputy was shot in Charleston county was 8 – 10 years prior to the date of the incident in issue" (Finding of Fact 12);

- "According to Claimant, it was not typical, not a 'regular occurrence,' and 'not usual' for Decedent-Employee to work at the office after hours" (Finding of Fact 13);

- "After consideration of all the evidence, what is left are (a) the fact that every single witness testified that the circumstances regarding the standoff/shootings were unusual and/or not typical; not a single witness testified to the contrary; (b) Claimant's causation state, which is th only causation statement in evidence; (c) Claimant had no prior treatment for or complaints of heart issues; and (d) the Claimant's burden of proof is a preponderance of the evidence, rather than a clear and convincing or other heightened standard." (Finding of Fact 18).

(Hearing Commissioner's Order, pp. 10- 12; Appellate Panel Decision, pp. 13 – 16).

Nobody disputes that the Decedent's job was to "be available 24/7 for emergencies" but, as this case illustrates, not all emergencies are the same. In Bentley, *supra.*, the Supreme Court began by discussing in Shealy, *supra.*, it was the combination of conditions he faced as undercover narcotics officer, a job was

inherently dangerous and stressful, that were nevertheless found to be usual and extraordinary. Bentley, *supra.*, does not do away with, it reaffirms that, "[a]lthough stress may be inherent in a given job, a combination of stressful events may still be unusual and extraordinary and, therefore, compensable." Doe v. S.C. Department of Disabilities, 377 S.C. 346, 660 S.E.2d 260 (2008). The Supreme Court went on in Bentley, *supra*,, however, and distinguished Shealy, *supra.*, by stating, "**[n]o such aggravating combination is present** in this case where admittedly Appellant's mental injuries result **solely** from the shooting of a suspect who threatened him..." (Emphasis added). Bentley, *supra.* 730 S.E.2d at 302. Shooting a threatening suspect is something Officer Bentley was trained to do and admitted he knew he might have to do in the line of duty. The Supreme Court held doing what was an essential part of his job as a police officer, even though it happens only rarely, was not unusual or extraordinary. It is respectfully submitted if Officer Bentley had accidentally shot an innocent bystander or a fellow police officer, the result would have been different because that would have constituted a combination of factors in addition to simple lawfully firing his gun in self-defense. Unlike the facts in Bentley, *supra.*, there was a combination of events and circumstances that made the conditions of the Decedent's employment unusual and extraordinary the night he suffered his fatal heart attack. A combination of factors including the long hours he worked that day, the emotional strain thinking one of the officers that had been shot was a close friend, the time pressures getting the equipment together and loaded into the van that would needed by the first responders at the scene, the prolonged emotional stress felt not just by

the Decedent but by all first responders, while he was locked alone in the radio room listening to the radio communications worrying about other friends in the first responder family being shot and maybe killed as the standoff stretched into the early morning hours. The Court should rule that the Decision of the Commission is not affected by an error of law, is supported by substantial evidence, and must be affirmed.

II. APPLYING THE HEART ATTACK STANDARD URGED BY THE APPELLANT WOULD CONSTITUTE REVERSIBLE ERROR.

The Appellants argue that, if this Court would just apply the correct heart attack standard they urge, then it would have to find the conditions of the Decedent's employment were not unusual and extraordinary on the night he suffered his fatal heart attack. The Appellants argue this Court should apply their alleged correct heart attack standard in a vacuum considering only the Decedent's job description and what he was doing locked in the radio communications room that night. They would not allow this Court to consider the active shooter incident that was occurring. The Respondents submit this would not constitute applying the "correct heart attack standard," it would be committing reversible error.

Since the Appellants want this Court to apply the mental/mental injury standard to this heart attack case, the Respondents would remind them of the holding in Doe v. Dept. of Disabilities, *supra.* In that case, a licensed practical nurse worked in a community home for emotionally disturbed patients. She was trained and had to deal with aggressive patients in her employment. As a result of downsizing, however, the population mix in her community home changed from one consisting of passive

patients to a mix of passive and aggressive patients resulting in a dramatic increase in the level of violence in the community home leading to the nurse requiring psychiatric care and being hospitalized for severe depression. The Commission found changes in the types of patients assigned, changes in the level of patient care required, and having to deal with aggressive patients were all usual and normal conditions of the nurses employment and denied the claim. The Circuit Court reversed the Commission on the ground the substantial established the mix of passive and aggressive patients was unusual and extraordinary when compared to the nurse's normal working conditions. The Court of Appeals reversed the Circuit Court on the grounds the Commission's findings were supported by substantial evidence. Doe v. Dept. of Disabilities, 364 S.C. 411, 615 S.E.2d 785 (S.C. App. 2005). The Supreme Court granted certiorari and reversed the Court of Appeals concluding the change in the patient mix caused the home becoming "more chaotic" and led to a "significant increase" in violent behavior that was unusual and extraordinary. The Supreme Court did not dispute nurses are trained and have to deal with aggressive patients, that patients are sometimes moved from one facility to another, or that the level of care patients require can change but nevertheless ruled the new mix of passive and aggressive patients was unusual and extraordinary when compared to the normal conditions of the particular nurse's employment. Id., 660 S.E.2d 262. In a concurring opinion, Chief Justice Toal pointed out the "fatal flaw" in the Court of Appeals' reasoning:

> The reasoning of the single commissioner shares a fatal flaw with that employed by the court of appeals in reinstating the single

> commissioner's decision. In my view, that fatal flaw is the focus on the ordinary aspects of Petitioner's employment to the exclusion of an examination of the extraordinary, and the consequent use of those ordinary aspects to support the conclusion that Petitioner's injury is not compensable.
>
> * * *
>
> In my view, both the single commissioner and the court of appeals failed to consider whether the changed conditions of Petitioner's employment were, for her, unusual or extraordinary, and similarly failed to evaluate how the changed conditions affected Petitioner. I believe this was error under *Stokes* [410 S.E.2d 248 (S.C. 1991)], and based on this error of law, I would reverse.

Id., 660 S.E.2d at 163. Not considering the outward untoward events that were occurring the night the Decedent suffered his fatal heart attack would not be applying the "correct heart attack standard," it would be a fatal flaw requiring reversal.

III. SINCE ALL THREE MEMBERS OF THE APPELLATE PANEL UNANIMOUSLY VOTED TO DENY APPELLANTS' MOTION TO RECONSIDER, THE OTHER MEMBERS OF THE COMMISSION ALSO UNANIMOUSLY VOTING TO DENY THE MOTION WAS HARMLESS AND DID NOT PREJUDICE THE APPELLANT'S SUBSTANTIAL RIGHTS.

In 2015, the Supreme Court established the procedural right to seek rehearing following review of a Hearing Commissioner's decision by an Appellate Panel. Rhame v. Charleston County School District, 412 S.C. 273, 772 S.E.2d 159 (2015). The Supreme Court reasoned a "timely motion for rehearing falls squarely within the remedies envisioned" in S.C. Code Anno., § 1-23-380, 2008. Id. 412 S.C. at 277. Unfortunately the Supreme Court did not offer any guidance how such motions should be heard.

The Appellants filed a Motion for Rehearing **By the Full Commission** on January 20, 2016. (Emphasis added). The motion was considered by the full Commission at a Judicial Conference. In addition to Commissioners James,

McCaskill and Taylor, who comprised the Appellate Panel that unanimously affirmed the Hearing Commissioner's Order, the Hearing Commissioner, Commissioner Barden, and Commissioners Beck, Chairman, Wilkerson and Campbell unanimously voted to deny the motion.

The Appellants now boldly argue that the full Commission deciding their motion as they requested violated their right to due process of law. They first attempt to support this argument by citing W.C.C. Regulation 67-709 which is applicable to review hearing, not motions for a rehearing. Forgetting they requested full Commissioner review, they next cite to language in Rhame, *supra.*, that says a rehearing should be heard before the Appellate Panel that heard the original request for review. Rhame, *supra.* 412 S.C. at 281. The Respondents would note the members of the Appellate Panel that heard the Appellant's request for a rehearing unanimously voted to deny the motion. Undaunted, the Appellants argue judicial misconduct under S.C. App. Ct. Rule 501, Code of Judicial Conduct, Canon 3, which prohibits a Hearing Commissioner from even participating in consideration of the motion for rehearing because of concern the Commissioner would advocate in favor of the party already ruled for. Never mind, it seems self-evident that the Commissioners who served on the Appellate Panel who ruled in favor of the Respondents would obviously suffer from the same impediment to serving. The Appellants offer no evidence any Commissioner acted with bias for prejudice. Finally, the Appellants go all in and raise the stakes to a constitutional violation by arguing the actions of the Commission constituted a fundamental violation of Article 1,

Section 22 of the South Carolina Constitution because they were deprived of their right to due process and right to have their motion for rehearing heard in a meaningful way before a legally constituted and impartial tribunal. While no one denies, "[a] fair trial in a fair tribunal is a basic requirement of due process, and this applies to administrative agencies which adjudicate as well as to courts," Garris v. Gov. Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998) *citing* Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.ED.2d 712, 723 (1975),but "[t]he fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or **even performed by the same person within an agency,** does not, without more, constitute a violation of due process." Id. 333 S.C. at 443-44. (Emphasis added). "Agency officials . . . who adjudicate a matter are presumed to be honest, fair, and unbiased." Id., 333 S.C.at 444; *see also:* City of Alma v. United States, 744 F. Supp. 1546, 1561 (S.D.Ga. 1990).

The Appellants motion was duly heard and unanimously denied by the full Commission just as they requested. Since all three members of the Appellate Panel that unanimously voted to affirm the Hearing Commissioner also unanimously voted to deny Appellants' motion, any error is clearly harmless. The Appellants have presented no evidence to support their argument any Commissioner acted with bias or prejudice or that their substantial rights have been prejudiced by the procedure they requested that was followed by the commission.

CONCLUSION

For the foregoing reasons the Respondents respectfully pray that the Decision and Order of the Appellate Panel be affirmed.

Respectfully submitted,

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