THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1414226

Court of Appeals 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.

FINAL BRIEF OF APPELLANTS

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2. DID THE SCWCC ERR IN IMPLICITLY FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT THE DECEDENT'S HEART ATTACK WAS COMPENSABLE UNDER SECTION 42-1-160; SAID ERROR BEING THE DECISION OF THE COMMISSION VIOLATES SECTION 1-23-350 OF THE ADMINISTRATIVE PROCEDURES ACT ("APA") REQUIRING SPECIFIC FINDINGS AND CONCLUSIONS?

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STATEMENT OF THE CASE

This is an appeal of a workers' compensation case wherein the Appellate Panel of the South Carolina Workers' Compensation Commission found that the Decedent, Laurent Britton, suffered a compensable heart attack on or about September 9, 2014, resulting in his death.

This matter came before the Hearing Commissioner pursuant to a Form 52 Hearing Request filed on behalf of the Respondent and the Appellants' Form 53 Answer. The Decedent's widow and claimant, Marsha P. Britton, alleged that the decedent died on September 9, 2014, as the result of a compensable heart attack arising out of and in the course of his employment as the Radio Communications Manager for Charleston County. As such, she sought death benefits under the Act.

The Appellants denied that the Decedent's heart attack was compensable under the Act based upon the fact that the Respondent failed to satisfy the heightened, statutorily-mandated, standards for a heart attack claim.

The matter was heard by Commissioner Susan S. Barden on June 19, 2015, in St. George, South Carolina. At the hearing, the Respondent testified on her own behalf. The Respondent also presented testimony at the hearing from Charleston County Coroner Rae Wooten and Charleston County EMS Medical Director Ralph Shealy. The Appellants presented testimony at the hearing from William Tunick, Director of Radio and Telecom for Charleston County Government, and Martin Kratz, current Radio Communications Manager for Charleston County Government and formerly the Radio Communications Technician being supervised by the Decedent at the time in question. Both parties

submitted documents pursuant to the APA and the deposition testimony of Charleston County Sheriff Al Cannon and Dr. William Wilson.

Commissioner Barden issued a Decision and Order dated August 17, 2015, wherein she found the claim compensable and ordered the Appellants to pay compensation in accordance with the Act. Thereafter, the Appellants timely filed their Form 30 Request for Full Commission Review on August 27, 2015. The Appellate Panel, consisting of Commissioners Melody L. James, Gene McCaskill, and Aisha Taylor, heard the appeal on November 17, 2015. In a Decision and Order dated January 12, 2016, the Appellate Panel affirmed the Hearing Commissioner's decision to award benefits to the claimant. Thereafter, a Motion to Reconsider was filed by the Appellants on January 20, 2016. In an Order filed by Commissioner T. Scott Beck on February 22, 2016, the Motion for Rehearing was denied. The Appellants note Commissioner Beck was not a member of the Appellate Panel which heard the Full Commission Review.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. *See Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). In workers' compensation cases, the Full Commission or Appellate Panel is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of this Court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981).

However, an appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the [Appellate Panel] are affected by error of law, clearly

erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Gray v. Club Grp., Ltd.,* 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. §1–23–380(A) (6) (d), (e) (Supp.1997). Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Appellate Panel reached. *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996).

STATEMENT OF THE FACTS

The facts of the case are essentially undisputed. Charleston County hired the Decedent, Laurent Britton, in 2006 for the position of Radio Communications Technician. The Decedent was subsequently promoted to Radio Communications Manager for the Charleston County Radio Communications Department, the job he was performing when he died. The published job description specifically stated that a requirement of the job was to be available twenty-four hours a day, seven days a week (24/7), for emergencies. (R. p. 339). This requirement was identified as being one of the five fundamental functions of the position, consisting of ten (10%) percent of the job. (R. p. 340). The job required the Manager to deploy the mobile communications van under various emergency situations where special radio communication needs existed and, moreover, required the ability to function and work in an "austere environment." (R. p. 343). The job description further set forth specific physical requirements of the position and the specific computer hardware and software and other equipment utilized in the position. (R. pp. 338-340). According to William Tunick, Decedent's supervisor, and Martin Kratz, "24/7" emergency response was

a known and disclosed component of the job for which the Decedent was trained (R. pp. 126, ll. 16-20, 144, ll. 7-12, 146, ll. 1-10).

Tunick testified that the Charleston County Radio Communications Department is charged with the responsibility of building out, supporting, managing and operating the public safety radio network. The network includes sixteen (16) communication towers throughout the County designed to support approximately six thousand (6,000) first responders in Charleston County including all municipal police departments, the Charleston County Sheriff's Office and Charleston County EMS. (R. p. 102, ll. 8-22). The Radio Communications Department is also responsible for providing and servicing radio communication equipment for various Charleston County agencies. (R. p. 102, ll. 8-22). In connection with emergency response activities, the Radio Communications Department's responsibilities are two-fold: (1) transporting necessary supplies and equipment to the emergency scene; and (2) monitoring the system to ensure that the capacity is not being exceeded. The latter task involves monitoring of computers at the Radio Communications Department's office/shop located on Headquarters Drive in North Charleston. (R. p. 130, ll. 2-10). The Radio Communications Department does not include the consolidated dispatch or 911 service (R. pp. 119-122, 127-130).

Prior to becoming employed with Charleston County, the Decedent worked for the St. Johns Fire Department where he eventually became a Battalion Chief. (R. p. 92, ll. 18-24). He subsequently served as the Fire Chief for the City of Isle of Palms. (R. p. 92, l. 25-p. 93, l. 1). In addition thereto, he was a licensed constable and a member of the Charleston County Fire and Rescue Squad. (R. p. 93, l. 23-p. 94, l. 6). He was also a member of the Federal Emergency Management Agency's (FEMA) Disaster Medical Assistance Team (DMAT). (R. p. 95, ll. 1-6). By all accounts, he was thoroughly trained and qualified in

the field of emergency response and emergency response credentials were a favorable factor in his initial hiring and a very favorable factor in his subsequent promotion. (R. p. 123, ll. 1-17).

The Decedent's performance evaluation reports contained in Charleston County's personnel records make repeated reference to the Decedent being the first to offer availability on weekends, evenings, or any time radio communications resources were needed. (R. pp. 289-330). The Decedent was also noted to be extremely reliable and to respond quickly when a major incident occurred in Charleston County which required emergency communications. (R. pp. 289-330). Tunick confirmed the Decedent frequently worked past allocated time during the evenings and on weekends. (R. p. 136, ll. 22-24). Tunick also testified that the Decedent was called out for emergency responses approximately twice a year or eighteen times total over his approximate nine years of employment with Charleston County. (R. p. 140, ll. 15-17).

Tunick also testified to specific examples of emergency response situations that the Decedent had to respond to over the years. By way of example, the Decedent was involved in the emergency response to an incident known as the Windy Fire approximately three or four years earlier wherein the Decedent was performing emergency responsibilities for one full day and into the second day. (R. p. 141, l. 17-p. 142, p. 11). The Decedent was also involved with a plane crash in Awendaw, as well as a winter ice storm where the Decedent worked for thirty-six (36) straight hours as part of the emergency response team. (R. p. 142, l. 12-p. 143, l. 22).

On Monday, September 8, 2014, the Decedent worked his normal hours from 7:30 a.m. to approximately 3:30 or 4:00 p.m. According to Kratz, it was a routine shift during which a weekly staff meeting occurred. Kratz testified that the Decedent was planning to

attend a Fraternal Order of Police (FOP) dinner that evening in Hanahan. (R. p. 148, l. 3-p. 149, ll. 11). According to the Decedent's Outlook work calendar, the FOP dinner was scheduled to begin at 6:00 p.m. and conclude at 9:00 p.m. (R. p. 277).

At 7:23 p.m., Charleston County Consolidated Dispatch reported an assault with a small weapon incident occurring at the Garden Apartments in the West Ashley region of Charleston (R. p. 281). Various law enforcement agencies, including Charleston County Sheriff's deputies, responded to this dispatch. At some point between 7:30 p.m. and 8:00 p.m., an exchange of gunfire occurred between a then-unknown assailant, who was in one of the apartments, and police officers. (R. p. 456, ll. 8-12). This exchange of gunfire involved Charleston County Sheriff's Deputies Michael Ackerman and Joseph Matuskovic, who were wounded during the exchange. (R. p. 456, l. 25-p. 457, l. 1). Both were removed from the scene and transported to MUSC via ambulance. (R. p. 459, ll. 8-15). Deputy Matuskovic died from his wounds and was pronounced dead at 8:37 p.m. (R. p. 459, ll. 19-23).

According to Sheriff Cannon, Coroner Wooten, Dr. Shealy, and Martin Kratz, no additional gunfire was ever exchanged between any law enforcement officials and the assailant. (R. p. 461, ll. 5-14). Rather, a lengthy standoff ensued at the apartment complex, involving multiple law enforcement agencies and emergency response agencies. Around 4:00 a.m., on September 9, 2014, law enforcement entered the apartment where the assailant was located; upon entering the apartment, they found the assailant dead from the earlier gunfire exchange. (R. p. 461, l. 15-p.463, l. 16).

Regarding the Decedent, Martin Kratz testified that after the Decedent left work at his normal time on September 8, 2014, he had no further communication with him until approximately 8:11 p.m. (R. p. 149, l. 12-p. 151, l. 15). Kratz testified that the Decedent

called him from the FOP dinner in Hanahan. The Decedent instructed Kratz to contact the Sheriff's office liaison to determine what was needed from the Radio Communications Department with respect to the shooting/standoff. (R. p. 150, l. 24-p. 151, l. 1). Kratz spoke with the Decedent again via phone at 8:27 p.m. to report on his contact with the Sheriff's office liaison; at that time, the Decedent instructed Kratz to meet him at the Radio Communications Department's office (R. p. 151, ll. 11-15; pp. 280-288). At 8:36 p.m., while in route to the Radio Communications Department's office, the Decedent again called Tunick. (R. p. 131, ll. 17-20; pp. 280-288).

Kratz estimated that it took him approximately twenty (20) minutes to drive from his home in Mt. Pleasant to the Radio Communications Department's office in North Charleston. He estimated that it would have taken the Decedent approximately ten (10) minutes to drive from the FOP dinner in Hanahan to the Radio Communications Department's office (R. p. 149, ll. 7-11, p. 152, ll. 11-14). According to Kratz, upon his arrival at the Radio Communications Department office, the Decedent was upstairs in the equipment room monitoring the radio system. (R. p. 152, ll. 17-20). Monitoring this radio system was one of the functions of the Department during an emergency event. According to Kratz, he and the Decedent discussed various equipment that needed to be transported to the emergency scene. (R. p. 153, ll. 2-7). Kratz loaded the materials into the Radio Communication Department's vehicle and drove to the command post at the incident site. While Kratz drove to the command post, the Decedent remained in the equipment room monitoring the radio system during this time. (R. p. 153, ll. 15-24). Over the next several hours, Kratz and the Decedent exchanged several telephone calls and text messages. (R. p. 155, ll. 21-25; pp. 280-288). Kratz and Tunick both testified that during the standoff, there was no congestion on the radio system and there was no breakdown in the radio system

being monitored at the Radio Communications Department by the Decedent. (R. p. 134, ll. 9-14; p. 154, ll. 22-24).

Around 1:25 a.m., a 9-1-1 call was received from the Decedent wherein he reported multiple physical complaints, including shortness of breath and chest pain (R. pp. 334-337). Kratz received a call from the second in command at the Sheriff's Department advising him that the Decedent was on the phone with 9-1-1 and that EMS was in route to the Radio Communications Department's office. (R. p. 156, ll. 10-13). Kratz left the Garden Apartments and returned to the Radio Communications Department's office in North Charleston. Kratz and the first responders arrived at the Radio Communications Department's office at approximately the same time. Because the doors were locked, Kratz opened the office door and went upstairs where the Decedent was located. (R. p. 157, ll. 22-23). EMS transported the Decedent to MUSC where he subsequently died of an apparent heart attack around 3:05 a.m. (R. 156, l. 24-p. 159, l. 11; pp. 334-337, 372-418). This workers' compensation claim followed.

ARGUMENT

I. THE SCWCC COMMITTED AN ERROR OF LAW IN FINDING THE DECEDENT'S HEART ATTACK COMPENSABLE UNDER THE ACT.

It is well established that a claimant may recover workers' compensation benefits if he sustains an "injury by accident" arising out of and in the course and scope of his employment." S.C. Code §42-1-160 (2006). Further, the general rule is that a stress-related injury or heart attack is compensable under §42-1-160 if it is induced by unexpected strain or overexertion in the performance of the duties of a claimant's employment or by unusual or extraordinary conditions of employment. *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 464, 405 S.E.2d 407, 409 (1991); *Raley v. City of Camden*, 222 S.C. 303, 311-12, 72 S.E.2d 572, 575 (1952); *Jennings v. Chambers Dev.*

Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999).[1] However, stress and heart attacks arising out of and in the course of employment are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations. *Id.*

In assessing what constitutes "unusual and extraordinary" conditions of employment, a court must look at the particular job duties applicable to the employee specifically and his particular employment, and not merely that of an objective example of employment in general. *Shealy v. Aiken County*, 341 S.C. 448, 456, 535 S.E.2d 438, 442 (2000). In determining whether particular facts and circumstances are unusual and extraordinary in comparison to the normal conditions of a particular employment, the analysis does not concern the frequency with which such particular events and circumstances occur; rather, whether such is a standard or necessary condition of the particular employment. *See Bentley v. Spartanburg County*, 398 S.C. 418; 730 S.E.2d 296 (2012) ("the only issue is whether the employment condition was extraordinary and unusual with respect to the Appellant's profession as a deputy sheriff") *citing Shealy*, 341 S.C. at 456, 535 S.E.2d at 442.[2]

Moreover, the facts and circumstances amounting to "unusual and extraordinary" are often extreme and severe in nature and represent a drastic departure from the employee's ordinary work conditions. *See Shealy,* 341 S.C. at 455, 535 S.E.2d at 442 (finding the combination of death threats, gun incidents with violent drug dealers, high tension confrontations, fear of being uncovered, and loss of security as a police officer constituted

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[1] This is a separate and distinct burden from establishing medical causation necessary to satisfy the "arising out of" requirement for compensability. See Larson's Workers' Compensation Law §46.03[1] (2002).

[2] While some of the cases cited herein involve mental-mental injuries, the analysis of the "unusual and extraordinary" conditions of employment standard is the same as that of the "heart attack standard" for compensability. See Powell v. Vulcan Materials, Co., 299 S.C. 325, 384 S.E.2d 725 (1989) (recognizing same standard is used for both).

unusual or extraordinary conditions of employment when they occur over several months); *Stokes v. First Nat'l. Bank,* 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991) (concluding that the extreme prolonged increase in employee's work hours, combined with additional job responsibilities, constituted unusual and extraordinary conditions of employment); *Powell v. Vulcan Materials, Co.*, 299 S.C. 325, 384 S.E.2d 725 (1989) (holding that an intense verbal exchange between the employee and the supervisor constituted unusual and extraordinary condition of employee's work); *Bridges v. Housing Auth., City of Charleston,* 278 S.C. 342, 295 S.E.2d 872 (1982) (holding there was no showing of unusual or extraordinary conditions of employment where security patrolman engaged in an investigation of the type included in his duties during normal working hours and in his regular patrol area); *Fulmer v. S.C. Elec. & Gas Co.,* 306 S.C. 34, 410 S.E.2d 25 (Ct. App. 1991) (holding automobile mechanic's heart attack as a result of being unable to get a needed part from the parts handler was not compensable because it was not unusual or extraordinary for the mechanic to have difficulty in obtaining parts); *DeBruhl v. Kershaw County Sheriff's Dep't,* 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990) (holding there was no showing of unusual or extraordinary conditions of employment where the investigation of a night fatality was not unusual or unexpected for the Sheriff of Kershaw County).

Furthermore, once the proper application of the standard of law is conducted, the APA requires the Appellate Panel to make findings of fact which "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. §1-23-350 (1976, as amended). The Appellate Panel is required to not only make findings of fact upon the essential factual issues but further, such findings must be sufficiently definite and detailed to enable an appellate court to properly determine whether the findings of fact are supported by substantial evidence

and whether the law has been properly applied to those findings. *See Hill v. Jones*, 255 S.C. 219, 178 S.E.2d 142 (1970) and S.C. Code Ann. §§1-23-350 and 380 (1976, as amended). However, a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues in dispute. See *Able Communications, Inc. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

A. THE APPELLATE PANEL DID NOT PROPERLY APPLY THE REQUIRED HEART ATTACK STANDARD.

The Appellate Panel's failure to properly apply the required heightened heart attack standard in this matter can be established by simply reviewing Finding of Fact 18 in the Decision and Order, whereby the Panel found that "[a]fter consideration of all the evidence, what is left is (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." The seminal test is not whether the standoff/shooting was atypical, unusual or extraordinary. However, the proper test under §42-1-160, as confirmed and mandated by *Bentley*, is whether the conditions of the Decedent's employment from approximately 8:30 p.m. to 1:30 a.m. on the night in question were unusual and extraordinary for a Radio Communications Manager. *See Bentley*, 398 S.C. at 427, 730 S.E.2d at 301 (§42-1-160 refers to conditions of employment and not the frequency of an event occurring in the course of employment). This test or analysis was never conducted or addressed at all by the Appellate Panel.

This issue, whether an accident is compensable when the material facts are not in dispute, has been addressed by our Supreme Court in *Grant v. Grant Textiles*, where like in the case at bar there were essentially no disputed material facts. *Grant*, 372 S.C. 196, 641 S.E.2d 869 (2007). The Court noted that "where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Id.* (citing *Douglas*

v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965)). Importantly, while the appellate courts are required to give deference to the Appellate Panel regarding questions of fact, this deference does not prevent the courts from overturning the Panel's decision when it is legally incorrect. *Id.* at 202, 641 S.E.2d at 872.

In this instance, the Appellate Panel focused almost exclusively on the unfortunate fact that two officers were shot in an exchange of gunfire with a suspect, an event the Decedent was neither present for nor participated in by way of radio. In fact, the Decedent was not even at work when the actual shooting of the officers occurred. Essentially, the Panel found that because this event (standoff preceded by shooting of officers) was atypical in terms of frequency, the conditions of the Radio Communications Manager's employment several miles away was unusual and extraordinary. As was the case in *Grant*, though the facts are not necessarily in dispute, the conclusion of the Appellate Panel can only be reached by a misapplication of the standard of law and by violating the holding of the Supreme Court in *Bentley*. The error of law is further evidenced, as will be discussed in Part B below, by the Panel's failure to provide any finding of fact, whatsoever, outlining whether the actual conditions of the Decedent's employment on the night in question were unusual and extraordinary.

Accordingly, the Appellants maintain this error of law requires the reversal of the Decision and Order of the Appellate Panel and a reapplication of the facts under the authority of §42-1-160 and *Bentley*.

B. THE APPELLATE PANEL FAILED TO MAKE SUFFICIENTLY DEFINITE AND DETAILED FINDINGS OF FACT.

The APA mandates 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 Ann. §1-23-350. Our Supreme Court addressed this issue in both *Able* and *Grant* and reversed the Agency in each case for the issuance of a conclusory order. In *Able*, the Public Service Commission (PSC) was requested to approve a rate base for a telephone cooperative. The issue before the PSC was whether the rate was "just and reasonable." S.C. Code Ann. §58-11-20 (1976). Without setting forth any findings of fact to support its conclusion of reasonableness, the PSC found "proposed rates were fair and reasonable," which the Supreme Court noted was nothing more than the statutory language recited. *Id.* at 410, 351 S.E.2d at 152. The Court reversed the Order and held that the "recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." *Id.* at 411, 351 S.E.2d at 152.

Likewise, in *Grant* our Supreme Court addressed the conclusory findings of the Appellate Panel which were not supported by any findings of fact. The Court noted that "because the [Appellate Panel's] order was founded on the statutory language of the Workers' Compensation Act, the APA required the [Appellate Panel] to clearly set forth the underlying facts upon which it relied to support its conclusion." *Grant*, 372 S.C. at 203, 641 S.E.2d at 872. The Court continued by noting that simply restating the statutory language at issue, with little else, did not comply with the requirements of the APA. *Id.*

In this case, Appellants maintain the violation of the APA by the Appellate Panel is actually more egregious than those made in either *Able* or *Grant*. Specifically, the Appellate Panel unequivocally failed to provide a single finding of fact or conclusion of law as to the seminal issue in this matter – whether the conditions of the Decedent's employment on the night in question were unusual and extraordinary. Not only is there no *definite and detailed* finding of fact as to this seminal issue, as is required by the Supreme Court in *Hill*, *Able*

and *Grant*, and by codification in §1-23-350, there is no finding of fact as to the seminal issue at all. Importantly, implicit findings of fact are not sufficient. *Able Communications, Inc.*, 290 S.C. at 411, 351 S.E.2d at 152. Since the Appellate Panel indisputably failed to make a finding of fact that the conditions of the claimant's employment were unusual and extraordinary, and failed to issue a conclusion of law that the claimant satisfied the statutory "heart attack" standard under §42-1-160, this Court cannot determine whether the findings of fact are supported by substantial evidence or whether the law was properly applied to those findings. This inexplicable omission by the Appellate Panel requires this Court to vacate the Order and remand the matter to the Commission.

II. APPLYING THE CORRECT HEART ATTACK STANDARD, THE CONDITIONS OF THE DECEDENT'S EMPLOYMENT WERE NOT UNUSUAL AND EXTRAORDINARY.

Analyzing the proper application of the "heart attack standard" as outlined in §42-1-160 and as expounded on in *Bentley*, the only question before the Court is whether the conditions of the Decedent's employment as the Radio Communications Manager on the date in question were unusual and extraordinary. Since this seminal legal issue was not addressed by the Appellate Panel below, the Appellants will address the issue herein.

A. DECEDENT'S JOB DESCRIPTION WAS NOT EVEN CONSIDERED BY THE APPELLATE PANEL.

In *Bentley*, the Supreme Court noted that in addressing the unusual and extraordinary standard the "issue this Court must decide is whether or not using deadly force, which may result in fatalities, is a standard or necessary condition of a deputy sheriff's job, not how frequently the use of deadly force results in fatalities." *Bentley*, 398 S.C. at 430, 730 S.E.2d at 303. Given the decision of the Appellate Panel in the

matter at bar only focuses on the atypical and infrequent nature of the events on September 8, 2014, analyzing and applying *Bentley* is paramount. The parties in *Bentley* essentially conceded the requirement of a deputy sheriff to actually use deadly force was rare, occurring once per year on average. *Id.* at 430, 730 S.E.2d at 302. However, the Court focused on Bentley's testimony that the use of deadly force would sometimes be required; the evidence that deputies are required to attend annual training and instruction on the use of deadly force; and the County Sheriff's testimony that all deputies are aware of the possibility of having to use deadly force. *Id.* at 429, 730 S.E.2d at 302. Applying these facts the Court held the use of deadly force was not unusual and extraordinary, but was a *standard and necessary condition* of a deputy's job. *Id.* at 431, 730 S.E.2d at 303.

By comparison, the facts in our case reveal that the conditions of the Decedent's employment on the night in question were standard and necessary conditions of a Radio Communication Manager's job. An essential and most important piece of evidence, aside from any testimony, is the Decedent's actual job description. It cannot be understated that this description outlines and envisions the exact conditions of employment faced by the Decedent on the night in question. The description required, as one of the five (5) most important and fundamental functions of the job, for the Decedent to "be available 24/7 for emergencies." (R. pp. 339-343). On the night in question, the Decedent returned to work around approximately 8:30 p.m. after working earlier in the day from 7:30 a.m. to 3:30 or 4:00 p.m. Appellants assert this condition of overtime employment was anticipated or expected, and as such was not unusual and extraordinary.

Moreover, in outlining the Essential Duties and Responsibilities of the job, the description provides the Decedent had the daily "responsibility to see that the mobile communications van is deployed under various emergency situations where special radio communications needs exist." (R. pp. 339-343). The Decedent was also required to "balance and prioritize the radio communication needs of the many emergency response agencies" and spend considerable time "meeting special needs of emergency response organizations in the midst of an emergency event." (R. pp. 339-343). Under the "Abilities" section of the description, a prerequisite was the "ability to properly manage Radio Communications staff and coordinate well with other staff members and emergency response agencies is required." (R. pp. 339-343). These requirements from the job description are identical to Finding of Fact 10 of the Appellate Panel, which the Panel seemingly and implicitly used to support their award of benefits. It is inconceivable, however, that these responsibilities could be daily in nature and require considerable time of the Decedent but simultaneously be unusual and extraordinary. It seems more likely the Appellate Panel simply overlooked or ignored the facts contained in this document.

Finally, and a point apparently also overlooked or ignored by the Appellate Panel, is the County's summary of the Decedent's work environment: "Normally work in office but occasionally deploys to field for emergencies and major events. Must be able to deploy 24/7 and function in an austere environment." (R. pp. 339-343). Austere is defined as somber or grave. (Merriam-Webster, n.d. Web. 6 June 2016) (Emphasis added). Under this description, however, even deploying to the field and performing the functions of his job in a somber or grave environment would not have been deemed unusual

and extraordinary; the Decedent in this case did not even have to deploy, but rather performed his job via radio communication miles from the austere environment.

If the Appellate Panel had properly considered the Decedent's job description, it would have discovered that the Decedent had the daily responsibility to be available at all times for various emergencies and major events, coordinate the radio communications with the many emergency response agencies during such emergencies and major events, and function in somber or grave work environments. This description of Decedent's normal job duties is exactly the conditions of the Decedent's employment on the night of September 8, 2014, and the morning of September 9, 2014.

The factual parallel between *Bentley* and the claim at bar is indisputable and critically important. Unfortunately, none of these facts were considered or even mentioned in the rendering of the Appellate Panel's decision, an assertion confirmed by Finding of Fact 18, "after consideration of all the evidence, what is left is (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." In actuality, the only evidence considered was the testimony of the witnesses, and the only focus was on the tragic shooting of two police officers. An actual comparison of the evening to the job description and actual job duties of the Decedent never occurred, yielding an error of law and an improper, arbitrary and capricious decision. *See* §1-23-380 of the South Carolina Code (1976, as amended); *Schwartz v. Mt. Vernon-Woodberry Mills, Inc.*, 206 S.C. 227, 240, 33 S.E.2d 517, 522 (1945)).

B. THE APPELLATE PANEL COMPLETELY DISREGARDED ANY WITNESS TESTIMONY WHICH CORROBORATED THE JOB DESCRIPTION FROM CHARLESTON COUNTY.

In addition to a complete disregard of the Decedent's job description, the Appellate Panel failed to consider the entirety of witness testimony, instead simply and improperly focusing on testimony supporting a finding that the event, the shooting/standoff, was unusual and extraordinary. The Appellate Panel completely ignored the testimony which explains the actual duties and conditions of the claimant's employment on the night in question. For example, the Appellate Panel ignored uncontradicted testimony of Sheriff Cannon that emergency events involve the threat for loss of life, serious injury or significant property damage; that emergency response is a core function of Charleston County's government and radio communications are an essential component to this function; that there were no radio communication problems on the night in question; and all emergencies inherently produce an increased level of alertness, energy and stress. (R. pp. 89-91, 96, 112).

Moreover, the Appellate Panel ignored the similar testimony of Coroner Wooten, who testified that emergencies involve loss of life, threat to life, injury to property, and do not always occur during normal business hours but rather at all times during the day; and emergencies inherently involve increased stress and anxiety, which is a standard and necessary condition of a job involving emergency response, such as a Radio Communications Manager. (R. pp. 96-111). Likewise, Dr. Shealy testified that emergency response is a core function of the County government and the Decedent's role within the function was critical; and that the Decedent was highly trained and qualified in the field of emergency response from the most minor to the most severe. (R. p. 113, l. 17-p. 118, l. 7). This testimony was also disregarded by the Appellate Panel.

The Appellate Panel further ignored testimony of William Tunick that emergency response was a principal function of the Decedent's job as Radio Communications Manager

requiring him to be available 24/7 and that this availability is a standard and necessary condition of the job; that there was no congestion or breakdown of the radio system on the night in question; and that the Decedent was thoroughly trained to fulfill the job responsibilities he had on the night in question. (R. p. 124, l. 5-p. 125, l. 9, p. 134, ll. 9-p. 135, l. 25, p. 138, ll. 16-23).

Finally, the Appellate Panel failed to consider the testimony of Martin Kratz that availability 24/7 for emergency response is a known and disclosed component of the job as Charleston County Radio Communications Manager; that there was no congestion of the radio communications system that night; that although the underlying event for which the Radio Communications Department was participating on the night in question was not normal, the Manager's response to the event, while performing his job, was normal. (R. pp. 146, ll. 7-13, p. 154, ll. 22-24, p. 160, ll. 1-14).

Accordingly, taking the uncontradicted testimony of these witnesses in conjunction with the detailed job description of the Decedent, the only reasonable conclusion is that the conditions of the Decedent's employment on the night in question were the usual, ordinary, standard and necessary conditions of a Radio Communication Manager's job and, therefore, could not rise to the level of unusual and extraordinary under §42-1-160.

III. ORDER DENYING THE PETITION FOR REHEARING VIOLATED APPELLANTS' RIGHT TO DUE PROCESS AND VIOLATED REGULATION 67-709 OF THE ACT.

The selection of the Full Commission Appellate Panel in a workers' compensation claim on appeal is governed by Regulation 67-709, which provides in relevant part:

> A. Commission review may be conducted by a three or six member review panel either of *which excludes the original Hearing Commissioner.* An order of a three member review panel has the same force and effect as a six member review panel and is the final decision of the Commission.

B. The Commission's Chair with approval of the majority of the other Commissioners shall assign cases to a three member panel according to the following subsections:

> (2) If the Hearing Commissioner does not request a six member review, the Commission's Chair may assign the review to a three member panel.
>
> (3) The Commission's Chair may appoint by random selection two review panels and exclude, on a rotating basis, one Commissioner from the panels each month. The Commission's Chair may assign a case for review as in B (2) above to a three member panel that excludes the original Hearing Commissioner.

S.C. Regulation 67-709. Commissioners James, McCaskill and Taylor were selected to serve on the Appellate Panel in this matter.

Prior to 2015, the procedure to appeal beyond the decision of the Appellate Panel was governed by § 42-17-60, and provided for a direct appeal to this Court. S.C. Code Ann. § 42-17-60 (1976, as amended). While § 42-17-60 remains the law, the Supreme Court has recently established the procedural right for a party to move before the Full Commission Appellate Panel for reconsideration of an Order prior to appealing to this Court. *Rhame v. Charleston County School District*, 412 S.C. 273, 772 S.E.2d 159 (2015) (As credibility and factual determinations are ultimately made by the Appellate Panel, and not the single Commissioner, Motions for Rehearing are properly made to the Appellate Panel). This procedural right was exercised by the Appellants in the matter at bar.

Moreover, Motions for Rehearing are governed by SCRCP Rule 59, which mandates the Motion be disposed of by the trial judge, and as established in *Rhame*, the proper adjudicative body to hear Rule 59(e) Motions in workers' compensation claims is the Appellate Panel. SCRCP Rule 59(e) and (f); *Rhame*, 412 S.C. 273, 772 S.E.2d 159. It is axiomatic that a Motion for Rehearing be reviewed only by the members of the Appellate

Panel that were originally assigned to review the case and that actually heard the oral arguments of counsel during the Hearing before the Appellate Panel.

In the present case, there is no question that pursuant to SCRCP Rule 59 and *Rhame*, the only body that could properly rule on the Motion for Rehearing was the aforementioned three-member Panel. However, on February 22, 2016, in a Bench Order issued by Commissioner Beck, with concurrences by Commissioners Barden, Wilkerson, and Campbell, as well as those Commissioners on the Appellate Panel, the Motion for Rehearing was summarily denied. The Appellants maintain this Order violates not only Regulation 67-709, but also and more importantly the Appellants' fundamental right to procedural due process.

The Commission violated Regulation 67-709 in issuing the Order denying the Motion for Rehearing, as the drafting Commissioner and three of the concurring Commissioners were not members of the appointed Appellate Panel, did not hear the arguments of counsel, and presumably did not review the evidence submitted by the parties. In fact, one of the concurring Commissioners, Commissioner Barden, was actually the original Hearing Commissioner. Importantly, "[r]egulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); *see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." *Murphy*, 396 S.C. at 639–40, 723 S.E.2d at 195 (quoting *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002)). The plain language of Regulation 67-709 confirms the original Hearing Commissioner is

barred from participating in any way in further review of his or her decision. The reason this Regulation prohibits the Hearing Commissioner, who originally heard and ruled on the merits of the claim, from participating in further review of his or her own decision, is to protect the fundamental fairness of the party appealing the Commissioner's decision. A Hearing Commissioner may not participate in a panel review because in defending his or her decision, the Commissioner implicitly advocates to the panel for the party with which the Commissioner ruled. S.C. App. Ct. Rule 501, Code of Judicial Conduct, Canon 3; *see also* S.C. Code Ann. § 42-3-250 (2005) (Workers' Compensation Commissioners are bound by the same Code of Judicial Conduct governing judges); *Garris v. Governing Bd. of South Carolina Reinsurance Facility,* 333 S.C. 432, 511 S.E.2d 48 (1998) (the Supreme Court observed that members of administrative bodies are subject to "the inevitable human tendency to develop a will to win").

Additionally, the actions of the Commission constitute a fundamental violation of Article 1, Section 22 of the South Carolina Constitution, which provides for the following rights regarding procedures before administrative bodies:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

Judicial review of a Workers' Compensation proceeding is therefore a constitutional right in South Carolina. The rights and protections provided under Article I, Section 22 are equivalent to those afforded by the Due Process Clause of the state and federal Constitutions. *S.C. Coastal Conservation League v. S.C. Dep't. of Health and Environmental Control,* 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before

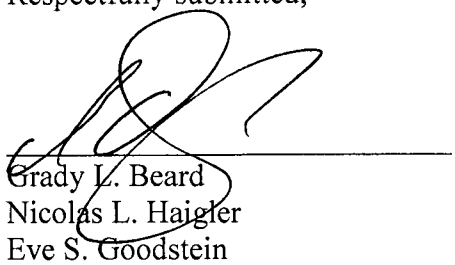
a legally constituted impartial tribunal. *South Carolina Dep't of Health and Envtl. Control v. Armstrong*, 293 S.C. 209, 359 S.E.2d 302 (Ct. App. 1987); *South Carolina Dep't of Social Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 846 (1995); *Cameron & Barkley Co. v. South Carolina Procurement Review Panel*, 317 S.C. 437, 454 S.E.2d 892 (1995); *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

Appellants were deprived of their right to Due Process in that they were denied the opportunity to have their Motion for Rehearing heard in a meaningful way before a legally constituted and impartial tribunal. As such, this matter must be remanded to the Commission to allow the Motion for Rehearing to be properly considered and ruled on by the original three-member Appellate Panel in accordance with Regulation 67-709 and *Rhame*.

CONCLUSION

Based upon the foregoing, the Appellants respectfully request the Court of Appeals to reverse the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel based upon an error of law. The Appellants further request the Court to hold that Decedent did not sustain a compensable heart attack by accident under §42-1-160 or, in the alternative, remand the claim to the South Carolina Workers' Compensation Commission to reconsider the compensability of the claim under the proper standard, required by §42-1-160 and *Bentley*. Further, the Appellants request the Court to acknowledge and rule that the Appellate Panel failed to make sufficient findings of fact and conclusions of law to allow a proper review by the Court. Finally, the Appellants request the Court to confirm that the Full Commission violated the Appellants due process by the Full Commission's improper handling of the Appellants' Motion for Rehearing request.

Respectfully submitted,



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