THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1202545

Scott Ledford, Employee, ... Appellant,

v.

Department of Public Safety, Employer, and
State Accident Fund, Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

RECEIVED
NOV 22 2016
SC Court of Appeals

E. Hood Temple
HATFIELD TEMPLE, L.L.P.
170 Courthouse Square
Post Office Box 1170
Florence, South Carolina 29503-1770
(843) 662-5000

and

J. Kevin Holmes
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE APPELLATE PANEL COMMIT AN ERROR OF LAW IN FAILING TO RULE THAT THE HEARING COMMISSIONER SHOULD HAVE RECUSED HERSELF?

2. DID THE APPELLATE PANEL COMMIT AN ERROR OF LAW IN FAILING TO RULE THE HEARING COMMISSIONER DID NOT HAVE AUTHORITY TO OVERRULE COMMISSIONER ROCHE'S UNAPPEALED FINDINGS OF FACT AND RULINGS OF LAW IN THE CHANGE OF CONDITION CLAIM IN W.C.C. FILE NO.: 1009581?

3. WHETHER THE APPELLATE PANEL'S ADOPTED FINDINGS OF FACT INSINUATING THE APPELLANT IS A LIAR WHO SHOULD BE PROSECUTED FOR INSURANCE FRAUD BECAUSE HE OWNS AND OPERATES A LAWN CARE BUSINESS SHOULD BE REVERSERVED BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND BASED ON SPECULATION?

STATEMENT OF THE CASE

The Appellant suffered an admitted injury by accident arising out of and in the course of his employment as a South Carolina Highway patrolman on July 15, 2010. (AR, Vol. I, pp. 263 – 271). This claim was settled on a Form 16 for a 25% scheduled loss of the back on September 29, 2011. (AR, Vol. I, p. 263).

The Appellant suffered a second admitted injury by accident arising out of and in the course of his employment as a South Carolina Highway patrolman on March 10, 2012. It was unclear whether the Appellant's neck and back pain following his second admitted accident was the result of his prior accident, his new accident, or a combination of the two. The Appellant filed for a change of condition in W.C.C. File No. 1008581 and a new claim for his second accident. (AR, Vol. I, pp. 273 – 274). The Appellant filed a motion to consolidate both claims. The motion to consolidate was granted by interim Order filed on October 8, 2012. (AR, Vol. I, p. 108).

The consolidated claims were heard before Commissioner Roche on January 15, 2013. Commissioner Roche issued her Order finding the Appellant had not suffered a change of condition injury but was entitled to ongoing medical treatment for his right leg, and for the aggravation of his neck and low conditions that pre-existed his 2010 accident caused by his 2012 accident. (AR, Vol. I, pp. 109 – 119). No appeal was taken from Commissioner Roche's Order.

The Appellant's claim for his 2012 accident was heard before Commissioner Barden on August 15, 2014. (AR, Vol. I, p. 139). A month after the hearing, on September 16, 2014, Commission Barden requested a telephone conference with the

attorneys. Based on comments made by Commissioner Barden during the telephone conference, the Appellant filed a motion to recuse Commissioner Barden and reassign the claim to a new commissioner on October 10, 2014. (AR, Vol. I, pp. 232 – 259). Commissioner Barden issued her Order denying recusal on November 3, 2014. (AR, Vol. I, pp. 97 – 107). The Appellant filed a Form 30 seeking review of Commissioner Barden's Order denying recusal on November 14, 2014. (AR, Vol. I, pp. 231). The Respondents elected not to submit a brief in response to the recusal motion. The Commission in conference, Commissioner Barden participating, ruled the Appellant's request for review was interlocutory on December 15, 2014. (AR, Vol. I, p. 96). The Commission in conference, Commissioner Barden participating, dismissed the Appellant's request for review as moot on December 16, 2014. (AR, Vol. I, p. 95).

Commissioner Barden issued her Order on December 17, 2014. (AR, Vol. I, pp. 56 – 94). The Appellant filed a Form 30 seeking Appellate Panel review of Commissioner Barden's Order on December 29, 2014. (AR, Vol. I, pp. 221 - 230).

The request for review was heard by an Appellate Panel of the Commission on March 17, 2015. The Appellate Panel issued its decision affirming in part and reversing in part on January 21, 2016. (AR, Vol. I, pp. 2 – 55). The Appellant filed a Motion for a rehearing on February 1, 2016. (AR, Vol. I, pp. 212 – 220). The Appellate Panel denied the motion for a rehearing on February 22, 2016. (AR, Vol. I, p. 1).

The Appellant filed a Notice of Appeal to this Honorable Court on March 21, 2016 and this appeal follows.

FACTS

The Appellant is forty years old. (AR, Vol. I, p. 157). He is a devoted husband who has been faithfully married for fourteen years and is the proud father of three children. (AR, Vol. I, p. 158). He does not smoke or drink. (AR, Vol. I, p. 162). He attends the First Baptist Church in Myrtle Beach. (AR, Vol. I, p. 158). Growing up all the Appellant ever wanted to be was a law enforcement officer. He studied criminal justice for two years before joining the South Carolina Highway Patrol. (AR, Vol. I, p. 158 – 160 , 163). The Appellant proudly served as a patrolman for 17 years. He earned the rank of lance corporal and was selected to be a member of the prestigious ACE team which provides motorcycle escorts for visiting dignitaries. (AR, Vol. I, p. 159). To supplement his law enforcement salary and so his wife could be a stay at home mom, he owned and operated two small businesses, a lawn care company and a fishing and hunting guide service. (AR, Vol. I, p. 164 – 168). Before Commissioner Barden called him a liar who should be prosecuted for insurance fraud, the Appellant's good name and reputation were beyond reproach.

The Appellant suffered two admitted accidents arising out of and in the course of his employment as a highway patrolman. The first admitted accident occurred on July 15, 2010 when he volunteered to be tazed during a training demonstration. The muscle contractions produced by electric shock were so severe he suffered compression fractures of his T6 through T9 vertebra. (AR, Vol. I, p. 169). Following physical therapy and a Functional Capacity Evaluation (FCE) the Appellant was released to return to full duty by the authorized treating physician, Dr. William Mills, on January 27, 2011. (AR, Vol. I, p. 1780). The Appellant saw Dr. Barbara Sarb, a

neurologist, on August 16, 2011. Dr. Sarb also reported the Appellant's neck, back, and radicular symptoms following his 2010 taser injury had resolved but she assigned a 5% permanent impairment because of pre-existing degenerative changes. (AR, Vol. I, p. 51). The parties settled the 2010 taser claim on a Form 16 for a 25% scheduled loss of the spine on September 29, 2011. (AR, Vol. I, pp. 145 – 146; 262).

The second admitted accident occurred on March 10, 2012 when the Appellant was involved in a motorcycle accident pursuing a motorist. (AR, Vol. I, pp. 172 – 173). Following the motorcycle accident the Appellant suffered neck and lumbar spine pain and right leg and foot pain. The Appellant was treated by Dr. Mills for his neck and lower back pain and was treated by Dr. Mills' partner, Dr. Ross Taylor, for his right leg injury. (AR, Vol. I, pp. 307 – 313; 336 – 345). MRI's taken on April 17, 2012 revealed spinal cord stenosis at the C5-C6, C6-C7 levels with impingement of the cervical cord, a posterior disc bulge effacing the cord at T8-T9 and, to a lesser extent, at T9-T10, and a mild to moderate circumferential disc bulge at L4-L5 with mild effacing of the tecal sac and mild central spinal cord stenosis. (AR, Vol. I, 307 – 308). Dr. Mills, the authorized treating physician for both accidents, testified by deposition on August 23, 2012 that the Appellant's neck and back pain following his motorcycle accident was a change in condition from his prior taser accident contributed to by the motorcycle accident. (R, Vol. II, p. 553). Dr. Mills again testified by deposition on December 3, 2012 that the motorcycle accident exacerbated his prior taser injury. (R., Vol. II, p. 606). The Appellant's attorney prudently filed claims for both a change of condition and for a new accident but moved to consolidate the claims to avoid the

possibility of inconsistent rulings. An interim Order granting consolidation was filed on October 8, 2012. (AR, Vol. I, p. 108). The physicians who treated or evaluated the Appellant assigned permanent impairment ratings to his cervical spine of between 13% to 15% and to his lumbar spine of between 5% and 10%, in addition to the impairment rating he had previously received to his thoracic spine following the 2010 taser injury. (AR, Vol. I, pp. 456 – 462, 519 – 524).[1] All of the physicians agreed the Appellant would probably require future cervical and/or lumbar fusion surgery in the future. (AR, Vol. I, pp. 456 – 462, 519 – 524).

Based on the combined effects of the Appellant's two admitted injuries, the State Disability Board determined the Appellant was unable to return to duty as a police officer and granted him disability retirement benefits on July 7, 2012. (R., Vol. II, p. 512).

The consolidated claims were heard before Commissioner Roche on January 15, 2013.[2] Commissioner Roche issued her Order on May 2, 2013 finding the Appellant's suffered temporary radicular-parasthesia symptoms following his 2010 taser accident which had completely resolved. (AR, Vol. I, pp. 115 – 116). Commissioner Roche ruled the Appellant had not suffered a change of condition of

---

[1] It is important to understand that under the Workers' Compensation Act, the combined losses from his two admitted injuries, his prior award of 25% loss of use of his spine for his thoracic injury together with his 18% to 25% percent medical impairment ratings to his cervical and lumbar spine, put him within percentage points of a statutory presumption of total and permanent disability, without regard to his future earning capacity, under § 42-9-30(21), S.C. Code Anno., as amended.

[2] One of the reasons Commissioner Barden accuses the Appellant of insurance fraud is because she claims he denied he suffered a cervical spine injury as a result of his 2010 taser. It is noted the Respondents denied the Appellant had sustained injuries to his cervical spine as a result of his 2010 taser accident and, therefore, denied there had been a change of condition since the Form 16 was signed. (AR, Vol. I, p. 111).

his 2010 taser accident but was entitled to ongoing medical treatment for his right leg and for the aggravation of his neck and low back pre-existing conditions caused by his 2012 motorcycle accident. (AR, Vol. I, pp. 117 – 119). No appeal was taken from Commissioner Roche's Order.

The Appellant's 2012 motorcycle accident permanency claim was heard before Commissioner Barden on August 15, 2014. A month after the hearing, on September 16, 2014, Commissioner Barden requested a telephone conference with the attorneys. (AR, Vol. I, p. 248, pp. 245 – 247). During the telephone conference Commissioner Barden indicated she believed the Appellant had lied about not having neck pain following his prior accident and commented, "while he may be a former member of the South Carolina Highway Patrol ACE Team, he was not a member of the 'Truth Team.'" (AR, Vol. I, pp. 245 – 247). Commissioner Barden further commented the Appellant's tax returns prepared by his certified public accountant were "creative accounting." (AR, Vol. I, pp. 245 – 247, pp. 258 – 259). Commissioner Barden stated she "did not believe anything the [Appellant] said except his name and age." (AR, Vol. I, pp. 245 – 247). Commissioner Barden said she had an "obligation" to report the Appellant to the Attorney General for prosecution based on her belief he committed perjury but, if the parties were able to settle the claim, then she would not have to report him. (AR, Vol. I, pp. 245 – 247). Commissioner Barden further said she "realized" the Respondent would make a "minimal offer" following the conference call but again stated, if the offer was not accepted she would have a duty to report the Appellant to the Attorney General for prosecution. (AR, Vol. I, pp. 245 – 247).

Appellant's counsel was shocked and immediately dictated a memorandum to document what had been said during the telephone conference. (AR, Vol. I, p. 248). He hired Robert Hill, Esquire, at his own expense, to research the law on perjury and judicial ethics. He discussed the matter with his partner, with a criminal defense attorney, and with other attorneys who practice workers' compensation law. And, he ordered a transcript of the hearing held before Commissioner Roche so he could compare the Appellant's testimony given in the two hearings. Appellant's counsel received a draft motion to recuse Commissioner Barden prepared by Mr. Hill on September 30, 2014 and they discussed the need to prepare supporting affidavits, exhibits, and a memorandum to be attached to the motion to recuse if that was the course of action chosen by the Appellant. After discussing the situation with his counsel, the Appellant requested that the motion to recuse be filed. The motion to recuse, supporting documents, and memorandum of law was filed on October 10, 2014. (AR, Vol. I, pp. 249 – 253).

Without a hearing, Commissioner Barden issued her Order denying the motion to recuse on November 3, 2014. (AR, Vol. I, pp. 97 – 107). In her Order Commissioner Barden suggests she had only reached "tentative findings" and that she merely pointed out that a settlement would "make unnecessary the promulgation of a written decision on the merits." (AR, Vol. I, pp. 99 – 99). She states she "assured [Appellant's Counsel] that her findings were in no way a reflection on him or his abilities." (AR, Vol. I, p. 99). In finding of fact 10 of her Order, however, she states, "... the [Appellant] alleges that the undersigned must disqualify herself on the ground that

she 'threaten[ed] criminal proceedings unless the case settles.' This is a false statement of fact and a frivolous allegation. The undersigned made no such proclamation, either expressly or impliedly. Counsel for the [Appellant] has made such statement with the knowledge that it is false, or, at best, a reckless disregard for its truth or falsity. The undersigned will not consider a frivolous and materially false statement as reasonable grounds for disqualification." (AR, Vol. I, p. 101).

Although Commissioner Barden calls the allegation that she improperly threatened to refer the Appellant to the Attorney General's Office to be prosecuted for insurance fraud unless he accepted a settlement false and frivolous, she admits the substance of allegation in her Order. (AR, Vol. I pp. 101 – 102, Findings of Fact 10 – 14). Settling his claim would have required the Appellant to forfeit his right to have his claim determined, not just by Commissioner Barden, but by this Appellate Panel and the Appellate Courts in due course. The Attorney General having discretion whether to prosecute is irrelevant, the threat of criminal prosecution can be devastating to a person's reputation and cause severe mental anxiety and stress.

The Appellant urges this Court to use caution accepting the Hearing Commissioner's review of the evidence and findings in her Order filed on December 17, 2014 because they are neither fair nor impartial. (AR, Vol. I, pp. 56 – 94). Rather, they indicate a bias and prejudice against the Appellant, a career officer with the South Carolina Highway Patrol, who suffered two admitted, career-ending injuries in the line of duty. Commissioner Barden splits hairs over matters of little or no significant in light of the objective radiographic evidence of ruptured discs in the

Appellant's cervical and lumbar spine. She places inordinate weight on such trivial matters as what tense the Appellant spoke in when testifying. For example, she accuses the Appellant is lying about following his doctor's restrictions because he testified in the "present tense," if he exceeds his doctor's restrictions, he suffers increased pain. Apparently, speaking in the present tense somehow not only proved he was lying about following his doctor's restrictions, it proved he continued to perform physical labor in his landscaping business. (AR, Vol. I, p. 85, Finding No. 47). It is not just the Appellant, but his lawyer who is called an unethical liar, his CPA who is called either a liar or incompetent, and his doctors who must all be incompetent because they were all fooled by the Appellant. Until Commissioner Barden called the Appellant a liar who should be prosecuted for insurance fraud, the Appellant's good name, his reputation, and his record with the South Carolina Highway Patrol were unblemished and beyond reproach. After two admitted injuries that ended his law enforcement career, according to Commissioner Barden, he should be referred for criminal prosecution, receive nothing for the MRI demonstrated ruptured discs in his cervical and lumbar spine, and ordered to pay the State $18,932.80. Commissioner Barden's permanency rating was neither fair nor impartial. It was shocking.

ARGUMENT

1. THE APPELLATE PANEL COMMITTED AN ERROR OF LAW IN FAILING TO RULE COMMISSIONER BARDEN SHOULD HAVE RECUSED HERSELF.

The improper conduct the Appellant alleges required recusal never involved any claim Commissioner Barden or member of her family had any personal prejudice against the Appellant, any relationship with the State Fund, any knowledge of the facts of case, or any financial interest in the outcome of the case. The alleged improper conduct was neither fanciful, conclusory, nor conjectural, it was very specific and supported by the sworn affidavit of the Appellant's attorney, an Officer of the Court.

Commissioner Barden is bound by the Code of Judicial Conduct. § 42-3-250, S.C. Code Anno., as amended April 15, 2005; Rule 501, SCACR. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2 (A), Rule 501, SCACR. "A judge's judicial duties include all the duties of the judge's office prescribed by law." Canon 3(A), Rule 501, SCACR. "A Judge shall dispose of all judicial matters promptly, efficiently, and fairly." Canon 3(B)(8), Rule 501. The commentary to the rule states, "A judge should encourage and seek to facilitate settlement, **but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.**" (Emphasis added). Canon 3(B)(8), Rule 501.

The Appellant Panel in Appellate Panel Finding of Fact No. 1 found "...there is no evidence to support that the Hearing Commissioner '*threatened* criminal proceedings' unless the case settled." (AR, Vol. I, pp. 30 – 31). It is respectfully submitted the only evidence in the record establishes that is exactly what did happen. Commissioner Barden admits there was a telephone conference after the hearing to

discuss her "tentative findings" and some what she wants to euphemistically call "inconsistencies" in the Appellant's testimony. (AR, Vol. I, p. 98). Commissioner Barden clearly threatened to report the Appellant to the Attorney General's Office for prosecution. (AR, Vol. I, p. 101). If not to threaten prosecution, what reason did Commissioner Barden have for mentioning her statutory duty to report insurance fraud to the Attorney General's Office? Commissioner clearly indicated she would not refer the Appellant for prosecution if he settled his case. (AR, Vol. I, p. 99). If not to say a settlement for a minimal amount would avoid prosecution, why would Commissioner Barden feel it necessary to remind the parties "of their right to enter into a settlement agreement under § 42-9-390, which would make unnecessary the promulgation of a written decision on the merits."

It really does not matter what contrived spin Commissioner Barden tries to put on what was said, what matters is how the Appellant understood what was reported to him she had said. The Appellant understood what she said was a threat to report him to the Attorney General's Office for criminal prosecution unless he settled his case on unfavorable terms.

Commissioner Barden had the statutory duty to report suspected false statements or misrepresentations made with the intent of obtaining an undeserved economic benefit in an insurance transaction. § 38-55-530(D) and § 42-9-440, S.C. Code Anno., as amended April 15, 2005. Nothing in the statutes, however, gives Commissioner Barden the right to threaten to report the Appellant to the Attorney's General's Office for criminal prosecution **unless he settled his claim.** Commissioner

Barden knows full well settling his claim would cause the Appellant to forfeit his legal right to have his claim fairly and impartially adjudicated not just Commissioner Barden, but by the Appellate Panel and the Appellate Courts in due course if need be. It would cause the Appellant to forfeit his right to come back for a change of condition under § 42-17-90, S.C. Code Anno., as amended July 1, 2007.

Offering not to comply with a statutory duty constitutes a violation of the Code of Judicial Conduct which requires judges to comply with the law and perform the duties prescribed to the judge's office by law. It caused the Appellant, a sixteen year law enforcement officer, to reasonably question Commissioner Barden's integrity, fairness and impartiality. The misuse of her judicial authority in this manner raised reasonable questions about Commissioner Barden's ability to exercise her authority consistent with the statutes she claims to be enforcing, creates an appearance of impropriety, and undermined the Appellant's confidence in Commissioner Barden's integrity and impartiality.

The Appellant moved to recuse Commissioner Barden based on specific and verified information provided to him by his attorney, an Officer of the Court. Cannon 3(E) of the Code of Judicial Conduct, Rule 501, SCACR, governs disqualification of judges and provides, "A judge **shall** disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." (Emphasis added). The Commentary states, "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply." Under Canon 3(E)(1)(a), a judge should

disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned. Roche v. Young Bros., Inc., 332 S.C. 75, 504 S.E.2d 311 (1998). The Appellant had reasonable grounds to question Commissioner Barden's impartiality based on the information he was provided.

The Appellant as the party seeking disqualification must show some evidence of impartiality. Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). The only evidence in the record is the Appellant's Motion to Recuse and memorandum of law, the Affidavits of his attorney and certified public accountant, and the memorandum of what was said during the telephone conference. (AR, Vol. I, pp. 249 – 259). Many of Commissioner Barden's findings are also affected by error of law, unsupported by substantial evidence, and based on speculation as set forth below also demonstrating impartiality. Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2d 856, 857 (1993).

Commissioner Barden's suggestion the Appellant's attorney falsified the allegation "for mere tactical advantage" is neither supported by any evidence in the record nor does it make any sense. Why would Appellant's attorney, or any attorney for that matter, make up false allegations of judicial misconduct and subject himself to disciplinary proceedings when there was an obvious a witness, Respondents' counsel, who was a party to the telephone conference in which the improper statements were made? No lawyer in his or her right mind, knowing full well what acrimony will entail, would challenge the impartiality of a judge unless compelled to do so to protect the rights of his or her client. The only "advantage" Appellant's

attorney obtained was the very real expense of having to hire associate appellate counsel and an ethics professor to research perjury and judicial ethics so protect his client's rights.

The Appellant respectfully requests that Commissioner Barden's denial of Appellant's motion for recusal be reversed and his claim remanded to be heard *de novo* before a new hearing Commissioner.

2. THE APPELLATE PANEL COMMITTED AN ERROR OF LAW IN FAILING TO RULE THE HEARING COMMISSIONER DID NOT HAVE AUTHORITY TO OVERRULE COMMISSIONER ROCHE'S UNAPPEALED FINDINGS OF FACT AND RULINGS OF LAW IN THE CHANGE OF CONDITION CLAIM IN W.C.C. FILE NO.: 1009581.

The Appellant sustained an admitted injury by accident on July 15, 2010 when he volunteered to be tazed during a training demonstration. The parties settled the 2010 taser claim on a Form 16 for a 25% permanent impairment of the spine on September 29, 2011. The Appellant sustained a second admitted injury by accident on March 10, 2012 when he was involved in a motorcycle accident. It was unclear whether the Appellant's neck and back pain following his motorcycle accident was the result of a change of condition from his 2010 taser injury, the 2012 motorcycle accident, or both. The Appellant's attorney prudently filed claims for both a change of condition and for a new accident but moved to consolidate the claims to avoid the possibility of inconsistent rulings. An interim Order granting consolidation was filed on October 8, 2012. (AR, Vol. I, p. 108).

On January 15, 2013 the consolidated claims were heard before Commissioner Roche. On May 2, 2013 Commissioner Roche issued her Order ruling that the

Appellant had not suffered a change of condition but was entitled to ongoing medical care and treatment for his right leg and for the aggravation of his pre-existing neck and low back conditions. No appeal was taken from Commissioner Roche's Order.

The failure to appeal findings of fact and rulings of law duly made by a jurisdictional commissioner make those facts and rulings the "law of the case." *See*: Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005); Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (findings of fact not within the scope of an exception in a prior appeal become the law of the case). The reversal of the findings and rulings of a jurisdictional commissioner is reserved for the Appellate panel under § 42-17-60, S.C. Code Anno., 1976 as amended.

One judge, or commissioner for that matter, does not have the authority to overrule another. *See*: Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986); Samonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008). The purpose of this rule is to prevent exactly the kind of injustice inconsistent rulings can have that is manifest in this case.

Although Commissioner Barden professes it was necessary for her "review" Commissioner Roche's Order because of the claim for a credit, what she did was repeatedly misinterpret it and, in fact, she reversed it. Commissioner Roche began her Order by noting the Appellant returned to "full-time, full duty" work on January 27, 2011 after his 2010 taser accident. (AR, Vol. I, p. 109). Commissioner Roche specifically noted the Respondents denied the Claimant had suffered injuries to his lumbar spine and cervical spine in his 2010 taser accident. (AR, Vol. I, p. 111). In

reviewing the evidence, Commissioner Roche specifically noted that the report from Dr. Sarb "showed no complaints of radicular symptoms either with the arms or legs." (AR, Vol. I, p. 114). Commissioner Roche did not find the Appellant complained of neck pain to Dr. Sarb. (AR, Vol. I, p. 115). Dr. Sarb's records do not refulect the Appellant complained to her about neck pain. (AR, Vol. I, pp. 321 – 325). Commissioner Roche noted Dr. Sarb's 5% impairment rating was based on cervical degenerative changes "and resolved radicular-parasthesia symptoms." (AR, Vol. I, p. 115). Commissioner Roche further noted Dr. Mills, the authorized treating physician, testified in his second deposition to a reasonable degree of medical certainty the Appellant's cervical and lumbar problems were aggravated as a result of his motorcycle accident. (AR, Vol. I, p. 116). In finding of fact number 1, Commissioner Roche found, "[t]he [Appellant] did receive some treatment for his neck and low back as a result of the Taser accident. However, Physical Therapy reports of November 30, 2010 and the Functional Capacity Evaluation of January 25, 2011 show that the problems the [Appellant] suffered with his upper and right lower extremity had resolved. In addition, the [Appellant] returned to Dr. Barbara Sarb on August 16, 2011 and according to her report, the [Appellant] stated he had no additional neck or arm symptoms. Her report further shows that he was not having lower pain or radicular symptoms at that time well." In finding of fact number 3, Commissioner Roche found, "[t]he [Appellant], Scott Ledford, was an employee of the above named employer prior to March 20, 2012 on which date he did sustain an injury by accident to his right leg which also aggravated his pre-existing neck and back problems. This

finding is based upon the deposition of Dr. William Mills, an authorized treating physician who testified that the motorcycle accident aggravated the [Appellant's] pre-existing neck and back problems and that aggravation has caused the [Appellant] to need surgery." (AR, Vol. I, p. 117). In finding of fact number 6, Commissioner Roche found, "[a]s a result of the [Appellant's] accident of March 10, 2012, the [Appellant] suffered injuries to his right leg and aggravated pre-existing conditions in his neck and back. The Claimant is entitled to causally-related medical car authorized by the Carrier for his admitted injury and aggravation of pre-existing conditions until further order of this Commissioner." (AR, Vol. I, p. 118). In conclusions of law 3, 4, and 5, Commissioner Roche concluded the Appellant suffered an aggravation of his neck and low back for which he was entitled to medical care. (AR, Vol. I, pp. 118 – 119).

Commissioner Barden improperly reversed Commissioner Roche's unappealled findings of fact and rulings of law by attributing all of the Appellant's neck and back problems to his 2010 taser accident and by awarding him a 0% impairment to his neck and back as a result of his 2012 motorcycle accident. The two ruling are inconsistent and manifestly unjust to the Appellant. Commissioner Barden's findings misinterpreting and reversing Commissioner Roche's Order are affected by an error of law and constitute evidence of unfairness and impartiality.

3. THE APPELLATE PANEL'S ADOPTION OF THE HEARING COMMISSIONER'S FINDING OF FACT INSINUATING THE APPELLANT IS A LIAR WHO SHOULD BE PROSECUTED FOR INSURANCE FRAUD BECAUSE HE OWNS AND OPERATES A LAWN CARE BUISNESS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND BASED ON SPECULATION.

Commissioner Barden repeatedly calls the Appellant a "hustler." The Appellant never said he was a huster at all. He answered a question posed by his attorney that described the Appellant as a hustler, not in the derogatory sense intended by Commissioner Barden, but in the sense that he worked hard to operate two small businesses to supplement his income as a police officer so he could provide a better life for his wife and three small children. The Appellant is proud he operated two small businesses, a lawn care company and a hunting and fishing guide company for eighteen years. Commissioner Barden findings the Appellant's lawn business has remained successful and lucrative since his two admitted accidents because of the Appellant's labors is not supported by substantial evidence and is based on speculation.

Commissioner Barden does not mention the Appellant was forced to sell his boat and shut down his hunting and fishing guide company since his accidents. Commissioner Barden's reasoning his lawn care businesses remains successful and lucrative is hard to follow. Commissioner Barden apparently concludes the lawn care business must remain successful and lucrative because the Appellant testified it made it possible for him to provide his wife with "nicer things." Obviously, he was talking about before his accidents and before the profits plummeted to $688.00 in 2012 and $716.00 in 2013. Commissioner Barden simply ignores the Appellant's income tax returns prepared by his CPA and speculates, since the business had gross earnings of $334,906.00, the net earning must be based on creative accounting. It is noted Commission Barden never reviewed the Appellant's tax returns for the years

before his two admitted accidents and never gave the Appellant or his CPA an opportunity to explain basic accounting to her. Commissioner Barden admits she is "the worst of the bunch" when it comes to understanding accounting which is obvious when she says, "[w]hat deductions the [Appellant] takes on his income tax returns are of no concern" to her. (AR, Vol. I, p. 203, 90, finding of fact 62). Apparently, Commissioner Barden thinks taking deductions for employee salaries of $74,629.00, subcontractors fees of $53,844.00, fuel expenses of $25,793.00, taxes of $9,982.00, interest of $6,651.00, insurance of $8,476.00, legal and accounting expenses of $3,285.00, supply expense of $2,444.00, telephone expenses of $1,913.00, mileage expenses of $4,438.00, depreciation of $35,521.00, and utilities of $8,644.00 according to his tax returns prepared by a CPA in accordance with accepted accounting principles amounts to "creative accounting."

Not only does Commissioner Barden speculate the Appellant's lawn care business is successful and lucrative, she speculates it is successful and lucrative because of the Appellant's physical labor. In finding of fact 65 Commissioner Barden admits, "I have no concrete idea as to whether the [Appellant] is performing most of the work himself (as he "works a lot" and is "somewhat of a hustler"), I would **assume he is working** and don't trust his testimony about having employees who perform the physical labor." (Emphasis added). Apparently, Commissioner Barden does not understand that employee salaries of $74,629.00 and subcontractors fees of $53,844.00 would account for the labor performed.

Commissioner Barden finding the Appellant's lawn care business remained successful and lucrative because of the Appellant's labors is not supported by substantial evidence and is based on pure speculation giving further evidence that her decision was neither fair nor impartial.

CONCLUSION

The Appellant requests that the Appellate Panel's finding there was no evidence supporting that Commissioner Barden threatened to report the Appellant to the Attorney General's Office for prosecution unless he settled his claim on unfavorable terms be reversed. This Honorable Court should rule the Appellant had reasonable grounds to question Commissioner Barden's fairness and impartiality based on the detailed and verified information provided to him by an Officer of the Court that Commissioner Barden had threatened to report him to the Attorney General's Office for criminal prosecution unless he accept a grossly unfair settlement. If true, such conduct would clearly violate the very statute Commissioner Barden was charged with enforcing and violate the Code of Judicial Conduct. Whether true or not, once the Appellant was provided with detailed and verified information from an officer of the Court based upon which he questioned her impartiality, the Code of Judicial Conduct required that she disqualified herself to prevent the appearance of impropriety and to protect public confidence in the integrity of the judicial system. Furthermore, the Court should find that Commissioner Barden's permanency Order was affected by an error of law because it overruled the prior decision of Commissioner Roche resulting in two conflicting rulings and her findings concerning

the Appellant's lawn care company being successful and lucrative was unsupported by substantial evidence and based on speculation providing further evidence of bias against the Appellant. This Court should remand the Appellant's claim to the Commission for a new hearing *de novo* before another Commissioner.

Respectfully submitted,

HATFIELD TEMPLE, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

By: _____
E. Hood Temple

and

THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800

By: _____
J. Kevin Holmes

Florence, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1202545

Scott Ledford, Employee, ... Appellant,

v.

Department of Public Safety, Employer, and
State Accident Fund, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

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

J. Kevin Holmes
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for Appellant

November 17, 2016.

RECEIVED
NOV 22 2016
SC Court of Appeals