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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTYAIKEN COUNTY
The Honorable L. Casey Manning
Trial Court Case No. 2007-CP-40-00784

Appellate Case No. 2017-000087

Leroy Bolden, Respondent,

v.

Sun City Hilton Head Comm. Assoc., Employer / Appellant,

And

Liberty Mutual Insurance Company, Carrier / Appellant.

APPELLANTS' MEMORANDUM IN
SUPPORT OF ALLOWING APPEAL

Clarke W. McCants, III
Nance, McCants & Massey
Post Office Box 2881
Aiken, S.C. 29802
(803) 649-6200 Ext. 3
Attorney for the Appellants

STATEMENT OF THE CASE AND ARGUMENT

This is a workers compensation case involving a work-related accident which occurred in November 2000 while the Respondent Leroy Bolden was employed by the Appellant Sun City Hilton Head. The Appellant Liberty Mutual Insurance Company is the workers compensation insurance carrier for Sun City.

On the date of the accident involved here Mr. Bolden injured his lower back while performing maintenance work at Sun City's golf course in Hilton Head. Following this accident Mr. Bolden received compensation and benefits under the South Carolina Workers' Compensation Law ("the Act"), including medical treatment and payment of temporary total compensation. An outline of pertinent dates and events is set forth below.

1. At the point Mr. Bolden reached maximum medical improvement with respect to his injury and became entitled to an award of compensation for permanent disability, the Appellants filed a Form 21 requesting a hearing in this case. A hearing to consider that Form 21 was conducted before Commissioner Lisa D. Chavis on May 8, 2002.
2. On February 27, 2003 Commissioner Chavis issued her Decision and Order finding, among other things, that Mr. Bolden had reached maximum medical improvement with respect to the injury to his lower back and he was entitled to receive compensation for a 17% permanent partial disability to his lower back. (Exhibit "A" hereto).
3. Mr. Bolden requested Full Commission review of Commissioner Chavis' Decision and Order. (Exhibit "B"). Nowhere in his Request for Review did Mr. Bolden assert that any procedural irregularities occurred during the hearing held before Commissioner Chavis or that he did not otherwise receive a fair hearing. He argued only that the evidence presented at the hearing did not support her decision.
4. An Appellate Panel of the Commission considered Mr. Bolden's Request for Review. It conducted a hearing where Counsel for the Parties were allowed to present their respective oral arguments in this case. Following that hearing the Appellate Panel issued its Decision and Order affirming Commissioner Chavis' rulings. (Exhibit "C").

5. Mr. Bolden then filed a Petition for Judicial Review in the Circuit Court. (Exhibit "D"). As part of that Petition Mr. Bolden argued that the Commission had failed to properly evaluate the evidence presented in this case. In addition he argued that the Commission had not adequately set forth findings of fact and conclusions of law to support its decision. He did not assert that any procedural irregularities occurred during the proceedings before the Commission or that he did not receive a fair and full hearing.

6. A hearing was then held before the Honorable Perry M. Buckner, III to consider Mr. Bolden's Petition for Judicial Review. Following that hearing Judge Buckner issued his Order dated March 27, 2005 (Exhibit "E"), which specifically stated as follows:

IT IS HEREBY ORDERED that: (a) The Commission's November 19, 2003 Order is vacated; (b) this claim is remanded to the Commission for additional action consistent with this Order, as well as applicable Commission Regulations; and (c) all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanations of the rationale underlying its ultimate determination.

7. No part of Judge Buckner's Order sets forth that any procedural irregularities occurred during any hearings held before the Commission, or that Mr. Bolden did not have a full opportunity to present his case there.

8. This matter was then remanded to the Commission. Citing Judge Buckner's Order the Chairman of the Commission then remanded this matter to another Appellate Panel "to take such action and enter an Order consistent with the Court's directive". (Exhibit "F").

9. Mr. Bolden then filed a Notice of Motion and Motion for Rehearing Before Appellate Panel. (Exhibit "G"). As part of that Motion Mr. Bolden sought only an opportunity to rehear this matter before an Appellate Panel by way of oral argument.

10. The Appellants filed a Return to this Motion, expressing that while the Commission's regulations did not allow for additional oral argument, they had no objection to the same. (Exhibit "H").

11. The entire Commission considered this Motion and denied Mr. Bolden's request by way of its Order dated January 3, 2007. (Exhibit "I"). The Commission further ordered that this case be remanded to another Appellate Panel to issue an order consistent with Judge Buckner's Order.

12. An Appellate Panel considered this matter January 24, 2007. (Exhibit "J"). However, the Panel's decision, which again affirmed Commissioner Chavis' Decision and Order, was not issued until February 23, 2007 and by way of an EMAIL to Counsel for the Parties. As set forth in that EMAIL Counsel for the Appellants was directed to prepare a formal Decision and Order for the Appellate Panel's consideration.

13. In the meantime Mr. Bolden filed another Petition for Judicial Review, challenging the Commission's Order dated January 3, 2007 (Exhibit "K"). Again, nowhere in that Petition for Judicial Review does Mr. Bolden raise any procedural irregularities in the proceedings before the Commission or any claim that he did not receive a fair hearing.

14. The Honorable L. Casey Manning held a hearing for this Petition for Judicial Review in July 2007. On January 20, 2009 he issued his first ruling in this case. (Exhibit "L").

15. In his Order Judge Manning again remanded this case to the Commission. This Order, however, for the first time provided that Mr. Bolden is entitled to a de novo hearing before a Single Commissioner, where he is allowed to present additional evidence to support his position here.

16. The Appellants then asked Judge Manning to alter or amend his Order dated July 20, 2009. (Exhibit "M"). As part of their Motion the Appellants asserted that Mr. Bolden had never requested such relief as part of his initial Request for Commission Review of Commissioner Chavis' Decision and Order, his first Petition for Judicial Review heard by Judge Buckner or his second Petition for Judicial Review.

17. In fact it appears that Judge Manning sua sponte ordered that a de novo hearing be held in this case.

18. For an unknown reason Judge Manning did not rule on the Appellants' Motion to Alter or Amend until December 15, 2016, almost eight years after his initial ruling. (Exhibit "N").

19. The Appellants then filed a Notice of Appeal of Judge Manning's Order denying their Motion to Alter or Amend.

An appeal to the Circuit Court will not lie from an interlocutory order of the Workers Compensation Commission unless such order affects the merits or deprives the appellant of a substantial right. Green v. City of Columbia, 427 S.E. 685, 311 S.C. 78 (Ct. App. 1993).

Judge Manning's directive that a de novo hearing in this case clearly deprives the Appellants of a substantial right in this case. In particular, his directive now allows Mr. Bolden to retry his workers compensation case 15-years after the Appellants had the grounds and the right to file a Form 21 and ask for a final order in this case. Judge Manning's decision means that evidence, which did not exist at the time the Appellants' Form 21 was heard, may now be considered for purposes of evaluating Mr. Bolden's claim.

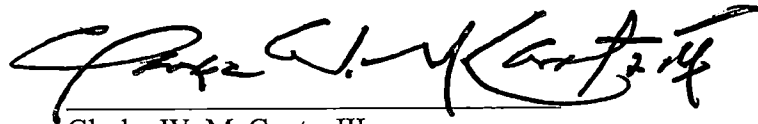
In addition, Mr. Bolden has failed to allege or show that there is any evidence demonstrating that the hearing held before Commissioner Chavis was conducted in an unfair manner, that he was deprived of an opportunity to present evidence on his behalf or there was otherwise any other procedural irregularity in the proceedings held before her. This Court has suggested that a de novo hearing in a workers' compensation case, or a "new trial", is appropriate only when a party is denied an opportunity to be heard or is otherwise denied a right of due process. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E. 2d 9 (Ct. App. 2012).

The Appellants will suffer great prejudice if this matter is remanded with instructions that a de novo hearing be held. Since the hearing held before Commissioner Chavis the South Carolina Second Injury Fund has been disbanded. See S.C. Code Ann. § 42-7-320 (1976). Years ago the Appellants had placed the Fund on notice of a potential claim for reimbursement in this matter in the event that the award issued by the Commission reached the threshold for such reimbursement. The Appellants have lost the opportunity for such reimbursement given the length of time this matter has been pending without finality.

As such, and while the Appellants disagree that this matter should be remanded to the Commission for a second time, they urge this Court to limit such a remand to a review of the

existing record by an Appellate Panel of the Commission, granting the Parties an opportunity to appear and present oral arguments in support of their respective positions in this case.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Clarke W. McCants, III". The signature is written in a cursive style with a horizontal line underneath it.

Clarke W. McCants, III
Nance, McCants & Massey
Post Office Box 2881
Aiken, S.C. 29802
(803) 649-6200 Ext. 3
Attorney for the Appellants

Dated: January 30, 2017

Exhibit "A"

STIPULATIONS

1. That the purpose of the Hearing was to determine all issues pursuant to the Hearing Notice and Form 21, and any other matters which may have timely come before the undersigned Commissioner.
2. That the Notice of the Hearing was timely and properly served upon all parties of interest.
3. That the Claimant's compensation rate is \$451.90 based upon an average weekly wage of \$677.82.
4. That venue in Beaufort County is proper.
5. That the Claimant sustained an injury to his lower back on November 7, 2000 as a result of an accident arising out of and in the course of his employment with the Employer.
6. That the South Carolina Workers' Compensation Commission has jurisdiction over this matter.

APA SUBMISSIONS Claimant

1. APA No. 1. DHEC Patient Care Form, 11/7/00, Page 1;
2. APA No. 2. Report from Hilton Head Hospital, 11/7/00, Page 2;
3. APA No. 3. Reports of Eugene A. Eline, Jr., D.O., Pages 3 - 18;
4. APA No. 4. Report of Donald R. Johnson, II, M.D., Pages 19 - 20;
5. APA No. 5: Reports of John W. Daniel, M.D., 4/11/01, Pages 21 - 23;
6. APA No. 6: Letter of Kim Bannister, 5/11/01, Page 24;
7. APA No. 7: Report of Dr. William W. Stewart, CRC, CVE, 9/1/01, Pages 25 -31;

Defendants

1. APA No. 1. Crosland Island Medical Center, 7/13/00 - 4/5/01; Pages 1 - 29;
2. APA No. 2. Advanced Rehabilitation Company, 7/18/00 - 5/04/01, Pages 30 - 144;
3. APA No. 3. Chatham Radiologist, P.A., 11/14/00, Pages 145 - 146;
4. APA No. 4. Eugene A. Eline, Jr., D.O., Orthopaedic & Spine Institute of the Low-County, 12/12/00 - 8/27/01, Pages 147 - 172;
5. APA No. 5. Donald R. Johnson, M.D., Carolina Spine Institute, 2/1/01, Pages 173 - 182;
6. APA No. 6. Beaufort Memorial Hospital, 4/11/01, Pages 183 - 185;
7. APA No. 7. A. Joseph Borelli, Jr., M.D., HealthSouth Diagnostic Center, 4/24/01, Pages 186 - 188;
8. APA No. 8. Videotapes of Claimant.

STATEMENT OF THE CASE

On November 7, 2000 the Claimant injured his lower back as a result of an accident arising out of and in the course of his employment with the Employer. Following this accident, the Defendants paid for certain medical treatment provided to the Claimant, and have also paid temporary total compensation to him.

This matter is now before the undersigned Commissioner to determine whether or not the Defendants may stop payment of temporary total compensation to the Claimant and, if so, to determine whether or not the Claimant is entitled to additional compensation and benefits as part of this matter.

The Defendants assert that the Claimant reached maximum medical improvement from his injury on May 8, 2001. The Defendants agree that the Claimant sustained some degree of

permanent partial disability to his lower back as a result of the injury in question, and ask that the Commission review this matter for purposes of issuing an award for such disability.

The Defendants further seek a credit for payment of temporary total compensation to the Claimant after the date of maximum medical improvement, and as against any additional compensation due to be paid to the Claimant as part of this case.

The Claimant contends that he has not reached maximum medical improvement from his injury, and that he is entitled to additional medical treatment as part of this case. In the event that the Commission determines that he has reached maximum medical improvement, the Claimant seeks compensation for a permanent and total disability.

BIOGRAPHICAL INFORMATION

Date of Birth: July, 17, 1954

Marital Status / Children: Married, one minor child

Education: High School Diploma, Technical School for auto/diesel/heavy equip. mechanics

Work History: Equipment operator/construction/mechanic's helper

EVIDENCE IN THE CASE

The Claimant testified that he injured his lower back on November 7, 2000 while performing maintenance for the Employer at its golf course in Hilton Head, South Carolina. The Claimant stated that he was attempting to locate an underground pipe with a metal rod and pulled his lower back.

The Claimant was treated for his injury by Eugene Eline, Jr., D.O., in Ridgeland. In his report dated December 12, 2000, Dr. Eline stated that the Claimant had sustained a lumbar sprain and strain as a result of the accident in question.

Dr. Eline undertook basically a conservative course of treatment for the Claimant, which included a series of lumbar epidural steroid injections. In his report dated May 8, 2001, Dr. Eline stated that the Claimant had reached maximum medical improvement with regard to his injury. He further stated that the Claimant had sustained a 10% permanent physical impairment to his spine as a result of his injury. Dr. Eline also recommended that the Claimant continue to take certain medical and return for follow-up care in order to maintain his status at maximum medical improvement.

In an additional report dated August 8, 2001, and provided in response to questions posed by Claimant's counsel, Dr. Eline stated that the Claimant should perform only sedentary work.

The Claimant was referred by his attorney to Donald R. Johnson, II, M.D., an orthopedic surgeon in Charleston with the Carolina Spine Institute, for an evaluation as part of this case. In his report dated February 1, 2001, Dr. Johnson stated that the Claimant suffered from degenerative disc disease at the L5-S1 level of his spine with a probable annular tear. Dr. Johnson also stated that the Claimant was not a surgical candidate and that he had reached the point of maximum medical improvement. He further opined that the Claimant had sustained a 10% permanent physical impairment to his spine as a result of the accident in question, and should have a lifting restriction of 25 pounds.

The Claimant was also referred by his attorney to Dr. Bill Stewart for a vocational evaluation as part of this matter. In his report dated September 1, 2001, Dr. Stewart stated that the Claimant was illiterate and not qualified for manual and physical work. Dr. Stewart also stated that the Claimant was a poor candidate for vocational retraining.

The Claimant also testified that he continues to experience pain in his lower back, and

which radiates into his right leg. He further stated that he is incapable of working.

Upon cross examination, the Claimant stated that he received his high school diploma and received certificates in auto mechanics and diesel mechanics from Beaufort Technical College and a technical college in New York respectively. He further admitted to wearing reading glasses, maintaining a savings account and reading the Beaufort County newspaper to look for employment. He also stated that he had in fact looked for work since he last worked for the Employer on May 11, 2001.

The Defendants offered a series of videotape recordings of the Claimant. Specific videotape footage of the Claimant taken on October 9, 2001 shows the Claimant jogging to his vehicle from a General Dollar Store, and videotape of the Claimant also shows him working on his car on January 19, 2002.

FINDINGS OF FACT

1. That the Claimant was an employee of the Employer on November 7, 2000 on that date he sustained an injury to his lower back a result of an accident arising out of and in the course of his employment; further, that this injury has caused the Claimant to experience pain in his right leg.

2. That the Claimant's compensation rate is \$451.90 based upon an average weekly wage of \$677.82.

3. That based upon the medical records and reports contained in the record for this matter, and other evidence presented at the hearing for this case, the Claimant reached maximum medical improvement from the injury to his lower back on February 1, 2002.

4. That the greater weight of the evidence contained in the record for this matter does not support a finding that the Claimant is permanently and totally disabled; further, in reaching this finding I have considered the testimony of the Claimant, the Claimant's medical records, the report of Dr. Stewart and the video evidence.

5. That the Claimant is capable of performing gainful employment.

6. That based upon the evidence presented as part of this matter the Claimant has sustained a 17% permanent partial disability to his lower back as a result of the accident involved in this case.

7. That the Claimant is entitled to that additional medical treatment recommended by Dr. Eline which would tend to lessen any disability sustained by the Claimant.

CONCLUSIONS OF LAW

1. That pursuant to S.C. Code Ann. § 42-9-10 (1976), and other applicable law and regulation, the Defendants are allowed to stop payment of temporary total compensation to the Claimant effective February 1, 2002; further that the Defendants are entitled to receive a credit for temporary compensation paid to the Claimant after April 5, 2002, the date a Form 21 was filed in this matter, and as against additional compensation due to be paid to the Claimant.

2. That pursuant to S.C. Code Ann. § 42-9-30 (1976), and other applicable law and regulation, the Claimant has sustained a 17% permanent partial disability to his back as a result of the accident in this matter, and shall be awarded benefits therefor.

3. That pursuant to S.C. Code Ann. § 42-15-60 (1976), and other applicable law and regulation, the Defendants shall be responsible for payment for that causally related and

authorized medical treatment received by the Claimant for the injury to his lower back, and until the date of maximum medical improvement; provided, however, that the Defendants shall be responsible for that future medical treatment recommended by Eugene A. Eline, Jr., D.O., which tends to lessen the Claimant's period of disability.

ORDER

IT IS THEREFORE ORDERED that the Defendants shall be allowed to stop payment of temporary total compensation to the Claimant effective February 1, 2002, and shall receive a credit for all temporary compensation paid to the Claimant after April 5, 2002 as against additional compensation due; and

IT IS FURTHER ORDERED that the Claimant shall receive compensation for a 17% permanent partial disability to his lower back; and

IT IS FURTHER ORDERED the Defendants shall be responsible for payment for that causally related and authorized medical treatment received by the Claimant for the injury to his lower back, and until the date of maximum medical improvement; provided, however, that the Defendants shall be responsible for that future medical treatment recommended by Eugene A. Eline, Jr., D.O., which tends to lessen the Claimant's period of disability.

SO ORDERED.

Lisa D. Chavis
Lisa D. Chavis
Commissioner

Dated: February 27, 2003
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date ANS
served this order in the above entitled action upon all Cwm III
parties to this cause by depositing a copy hereof,
postage paid, in the United States mail addressed to
the attorney or attorneys for said parties.
This 27th day of February, 2003
By Pauline Cheek
Administrative Assistant to the Commissioner

Exhibit "B"

South Carolina Workers' Compensation Commission

P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

CC File # 0019585
Carrier File # _____
Carrier Code # _____
Employer FEIN _____

Leroy Bolden 260-92-1480
Claimant's Name SSN
Rt. 5, 513-B, Ridgeland, SC 29936
Address City State Zip
() ()
Home Phone Work Phone

Sun City Hilton Head Comm. Assoc.
Employer's Name
15 Sgt. William Jasper Blvd., Bluffton, SC 29910
Address City State Zip
Liberty Mutual
Insurance Carrier

Andrew N. Safran, Esquire 803-256-6689
Preparer's Name Phone #

Request for Commission Review by claimant employer (check one) Date of injury: 11/7/00

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

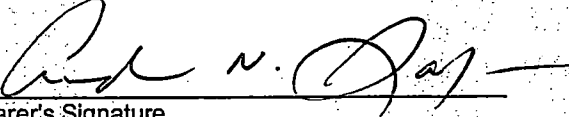
See attached.

(Check one) Oral argument is is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Clarke W. McCants, III,
Name

Esquire, Nance & McCants, Post Office Box 2881, Aiken, South Carolina 29802-2881
Address

on the 13th day of March, 2003 by first class mail; personal service; certified mail.

 Attorney for Employee/Claimant 3/12/03
Preparer's Signature Title Date

Check this box if you are not represented by an attorney.

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701 B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

- 1) Did the hearing commissioner err in failing to find Mr. Leroy Bolden had experienced a 50% (+) permanent disability to his back when the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly verifies this fact?
- 2) Did the hearing commissioner err in failing to find Mr. Leroy Bolden was illiterate when the only reasonable inference which may be gleaned from the evidence of record certainly verifies this fact?
- 3) Did the hearing commissioner err in failing to conclude Mr. Leroy Bolden possessed an I.Q. of 73 when the only reasonable inference which may be gleaned from the evidence contained in the hearing record unquestionably verifies this fact?
- 4) Did the hearing commissioner err in failing to find that Mr. Leroy Bolden's I.Q. "plac[ed]. . . him slightly above the mentally deficient (retarded) range" when the only reasonable inference which may be gleaned from the evidence contained in the hearing record absolutely verifies this fact?
- 5) Did the hearing commissioner err in failing to find Mr. Leroy Bolden's authorized treating physician (Dr. Eugene A. Eline, Jr.) confirmed he was only physically capable of sustaining sedentary work activities as a result of his compensable injury and its consequences when the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly verifies this fact?
- 6) Did the hearing commissioner err in failing to find the work restrictions assigned by his authorized treating physician were compatible with neither his level of intelligence, educational abilities nor work history when the only reasonable inference which may be gleaned from the evidence contained in the hearing record undoubtedly verifies this fact?
- 7) Did the hearing commissioner err in failing to find that the activities depicted in the surveillance videotapes generated by Defendants in May, 2001, October, 2001 and January, 2002 were consistent with the restrictions identified by his authorized treating physician when the only reasonable inference which may be gleaned from the evidence contained in the hearing record unquestionably verifies this fact?
- 8) Did the hearing commissioner err in finding Mr. Leroy Bolden was "capable of performing gainful employment" when this findings is inconsistent with the evidence of record, particularly the opinions expressed by Dr. William W. Stewart relative to Mr. Bolden's vocational prognosis and educational/intellectual levels, as well as the physical/functional restrictions imposed by Dr. Eline?
- 9) Did the hearing commissioner err in stating Mr. Leroy Bolden "maintain[ed]. . . a savings account" without further explaining he received assistance from family members in the handling of this account when failure to do so renders this statement misleading

and inconsistent with the only reasonable inference arising from the evidence contained in the hearing record?

10) Did the hearing commissioner err in stating Mr. Leroy Bolden "read. . . the Beaufort County Newspaper" without acknowledging the significant limitations Mr. Bolden encountered in attempting to read when failure to do so rendered this statement misleading and inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record?

11) Did the hearing commissioner err in stating Mr. Leroy Bolden wore "reading glasses" without further elaborating on the specific purpose of/fashion in which he used these glasses when failure to do so renders this statement misleading and inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record?

12) Did the hearing commissioner err in implying a videotape which purportedly depicted Mr. Bolden "working on his car on January 19, 2002" and "jogging to his vehicle" on October 9, 2001 indicated he was capable of sustaining gainful employment when the contents of this tape, in light of Mr. Bolden's uncontradicted testimony, indicate this activity: (a) was not inconsistent with his medical restrictions; (b) was performed rather infrequently; and (c) was hardly consistent with the sustainment of gainful employment?

13) Did the hearing commissioner err in finding Mr. Leroy Bolden had sustained only a 17% permanent partial disability to his back as a result of his compensable injury when this determination is wholly inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record and grossly understates his degree of residual disability?

14) Did the hearing commissioner err in failing to make specific findings as to the basis for her disability determination when this omission violates the provisions of S.C. Code Ann. Sections 1-23-350 (1976) and 42-17-40 (1976), which have been construed by our appellate courts to: (a) require specific, express factual findings; and (b) prohibit conclusory findings?

15) Did the hearing commissioner err in failing to identify any portion of the evidence (including the contents of the surveillance videotapes) which either established his ability to be gainfully employed or contradicted the opinions of Drs. Eline and Stewart when failure to do so: (a) is violative of Sections 1-23-350 and 42-17-40; and (b) leaves the rationale for her disability assessment to speculation?

16) Did the hearing commissioner err in concluding Mr. Leroy Bolden was only entitled to compensation equivalent to a 17% permanent partial disability/loss of use of his back per S.C. Code Ann. Section 42-9-30 (19)(1976, as amended) when this conclusion is inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record?

- 17) Did the hearing commissioner err in implying that Mr. Leroy Bolden only acknowledged receipt of a high school diploma or instruction in auto/diesel mechanic work "[u]pon cross-examination" when the only reasonable inference which may be gleaned from the evidence contained in the hearing record verifies that he confirmed these facts on direct examination?
- 18) Did the hearing commissioner err in failing to find Mr. Leroy Bolden's high school curriculum included a number of trade courses when the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly verifies this fact?
- 19) Did the hearing commissioner err in failing to find the training Mr. Leroy Bolden received at tech school was primarily hands on, with limited reading requirements, when the only reasonable inference which may be gleaned from the evidence contained in the hearing record establishes this fact?
- 20) Did the hearing commissioner err in failing to find that Mr. Bolden's work history was wholly inconsistent with the physical/functional restrictions assigned by his authorized treating physician (Dr. Eline) when the only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly confirm this fact?
- 21) Did the hearing commissioner err in stating that Dr. Donald R. Johnson, II indicated Mr. Bolden had achieved maximum medical improvement in 2001 when the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly establishes that Dr. Johnson's opinion was conditioned upon whether Mr. Bolden declined to undergo an epidural steroid injection (which he, in fact, proceeded to do)?
- 22) Did the hearing commissioner err in failing to find Mr. Bolden remains moderately symptomatic as a result of his compensable injury and its consequences when the only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly establishes this fact?
- 23) Did the hearing commissioner err in failing to find Mr. Leroy Bolden continues to encounter difficulty bending, lifting and performing certain activities of daily living when the only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly verifies this fact?
- 24) Did the hearing commissioner err in failing to find the events depicted on the surveillance videotapes obtained by Defendants were consistent with his medical restrictions when the only reasonable inference which may be gleaned from the evidence contained in the hearing record obviously verifies this fact?
- 25) Did the hearing commissioner err in failing to find Mr. Leroy Bolden engaged in the event depicted on the surveillance videotapes for very limited durations of time when

the only reasonable inference which may be gleaned from the evidence contained in the hearing record undoubtedly establishes this fact?

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Leroy Bolden,)
)
Employee,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual,)
)
Carrier)
)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE
WCC FILE NUMBER : 0019585

Roxanne M. Joyce, being first duly sworn, says that she is a legal assistant for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, that on the 13th day of March, 2003 she mailed the documents listed below to the persons listed below, by depositing in the United States mail with sufficient postage affixed thereto.

Documents: Form 30 with attachment.

To: HAND DELIVERED
The Honorable Herman B. Lightsey, Jr.
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

Clarke W. McCants, III, Esquire
Nance & McCants
Post Office Box 2881
Aiken, South Carolina 29802-2881

This 13th day of March, 2003.

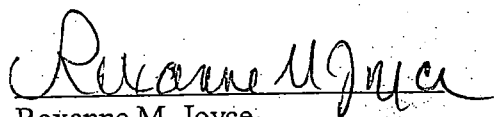

Roxanne M. Joyce
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Exhibit "C"

Appellate Panel
of the
South Carolina Workers' Compensation Commission



Order

WCC #0019585

Leroy Bolden, Employee, *Claimant*,
v.
Sun City Hilton Head, Employer, and Liberty Mutual Ins. Co., Carrier, *Defendants*

Full Affirmation

Appellate Panel Review held in Columbia, South Carolina, on October 28, 2003, per notices timely and properly served.

Claimant/appellant represented by Andrew Nathan Safran msa6631@aol.com
Defendants/respondent represented by Clarke W. McCants III mccants3rd@aol.com

Order filed:

November 19, 2003

Statement of Case

The parties were heard by Commissioner Lisa Denese Chavis on May 8, 2002, in Beaufort. On February 27, 2003, the commissioner issued an order:

Defendants shall be allowed to stop payment of temporary total compensation effective February 1, 2002, and shall receive a credit for all payments made after April 5, 2002, "as against additional compensation due."

Defendants shall pay the claimant for a 17% permanent partial disability to the back.

Defendants shall be responsible for causally related, authorized medical treatment through MMI and for future medical treatment as recommended by Dr. Eline and which tends to lessen the claimant's period of disability.

Within the statutory period, counsel for the claimant filed an application for review, setting forth grounds for appeal, copies of which were furnished to all interested parties prior to oral argument.

The appellant asserts that the commissioner erred by:

Failing to set forth adequate findings of fact and conclusions of law;

Finding and concluding that the claimant reached maximum medical improvement with regard to the lower back injury;

Determining that the claimant sustained a 17% permanent partial disability to his lower back; and

Finding the claimant is not permanently and totally disabled.

Pursuant to S.C. Code Ann. 42-17-50 (1985), we, the appellate panel, have reviewed the award, weighed the evidence and considered all issues raised on appeal. The panel may make its own Findings of Fact and reach its own Conclusions of Law.

After careful review in the instant case, the appellate panel of the South Carolina Workers' Compensation Commission has determined that:

The Findings of Fact and Conclusions of Law as established by the hearing commissioner are correct and, in order to comply with *Fox V. Newberry Cnty. Memorial Hosp.*, 319 S.C. 278 (1995) 461 S.E.2d 392, are adopted verbatim by the panel as though repeated herein.

Further, to support the hearing commissioner's decision, this panel adds:

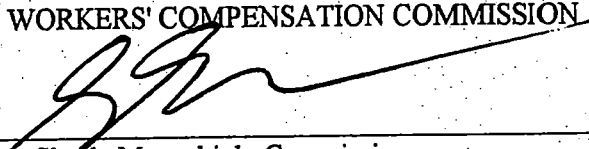
The videotape supports the decision of the hearing commissioner.

ORDER

The order of the single commissioner is hereby **AFFIRMED**. All Findings of Fact and Conclusions of Law are incorporated to become the final Decision and Order of the South Carolina Workers' Compensation Commission.¹

IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION


Sherry Shealy Martschink, Commissioner
For the Panel

Full Affirmation

Concur:

George N. Funderburk, Commissioner
Harry B. Gregory Jr., Commissioner

¹ All unchanged Findings of Fact and Conclusions of Law as contained in the single commissioner's order are specifically referenced and included in toto in the "order" portion of this decision so as to comply with the requirements of *Baldwin v. James River Corporation*, 304 SC 485, 405 SE2d4, as well as the Administrative Procedures Act of the State of South Carolina and Sections 42-17-40 and 1-23-350 of the South Carolina Code of Laws, as per *D. Shipley, South Carolina Administrative Law* at 5-109 (1983).

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy heretofore, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

2 of 2/appellate panel/ssm/0017785/lerdy boldenay of Nov 3, 2003

By Penny R. Henry
Administrative Assistant to the Commissioner

ANS
JSN
CWM

Exhibit "D"

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: _____

COUNTY OF BEAUFORT)

Leroy Bolden,)

Claimant/Petitioner,)

vs.)

Sun City Hilton Head Comm. Assoc.,)

PETITION FOR JUDICIAL REVIEW

Employer,)

and)

Liberty Mutual Insurance Company,)

Carrier/Respondents.)

Petitioner, Leroy Bolden, would respectfully show unto the Court:

- 1) On November 7, 2000, he sustained a compensable back injury while performing duties arising out of and within the course and scope of his employment with Sun City Hilton Head Community Association.
- 2) After initially receiving treatment at Hilton Head Hospital and through the company physician, he was referred to Dr. Eugene A. Eline, Jr., an orthopaedic surgeon, for further evaluation/treatment.
- 3) While treating Mr. Bolden through the use of conservative medical modalities, Dr. Eline noted: (a) complaints of low back and radiating right leg pain "with some numbness and tingling"; (b) the presence of "fairly significant lumbar paraspinal muscle tenderness and spasming"; (c) an inability to engage in repetitive bending, squatting, twisting or lifting activities; and (d) an antalgic gait.
- 4) In view of these symptoms, as well as the recommendations of an independent evaluator, Dr. Eline recommended the performance of an epidural injection, which was administered on April 11, 2001. However, when this procedure failed to provide any

appreciable relief and he manifested clinical evidence of discogenic pain (positive right straight leg raise response; "give way weakness of his right EHL and gastrosoleous as well as his tibialis anterior"), Dr. Eline obtained an updated MRI scan, which revealed "annular bulging [at L5-S1, which was]. . . abutting the S1 nerve root sleeves bilaterally."

5) Despite this finding, Dr. Eline did not believe he was a surgical candidate and recommended continued use of medication (Vioxx, Soma and Ultram) for symptom control. Additionally, this physician: (a) determined he had sustained a 10% whole body/spinal impairment "due to his residual lower back and right leg symptoms"; (b) recommended continued medication and reevaluation every three months in order to maintain his condition; and (c) ultimately concluded Mr. Bolden was "only capable of sustaining sedentary work activities as a result of his compensable back injury and its consequences. . . ."

6) In this regard, Dr. Eline similarly confirmed: (a) "while Mr. Bolden's pain threshold may be lower than that of other individuals, his lumbar pathology is certainly producing some level of pain, which limits his functional capacity to sedentary work"; and (b) the medical modalities he had recommended were "reasonable, medically necessary and geared toward lessening. . . [his] period of disability/maintaining his current, albeit compromised, level of function. . . ."

7) On June 1, 2001 and August 30, 2001, he was evaluated by Dr. William W. Stewart of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. On these dates, Dr. Stewart administered both I.Q. and educational testing, which established he: (a) had a full scale I.Q. of 73, which "place[d]. . . him

slightly above the mentally deficit (retarded) range"; and (b) possessed educational skills (reading and arithmetic) which were reflective of functional illiteracy.

8) In this regard, Dr. Stewart explained:

Clearly, from an intelligence standpoint, Mr. Bolden would have to be considered an individual who, **because of his low borderline intelligence, would have problems coping and dealing with his injuries, his inability to return to the job he considered a career (not just a job), and what he might be capable of doing in the future.**

It is important to remember that individuals who fall in this very limited range of intelligence have great difficulty both understanding and explaining their physical problems. This lack of sophistication is often misinterpreted, and, in fact, may be assumed to be evidence of symptom magnification/exaggeration. In view of this fact, it is not surprising that Dr. Eline originally suggested symptom magnification. However, he later verified Mr. Bolden's actual pathology was severe enough to limit him to no more than sedentary work, which represent severe work restriction.

9) After considering his work history ("heavy to very heavy from a physical/exertional demand standpoint; and . . . unskilled to low-semi skilled from a skill level standpoint"), in light of the restrictions identified by Dr. Eline, Dr. Stewart determined his "prognosis for successful vocational rehabilitation to some kind of lighter, alternative work or job is quite poor. . . ." Dr. Stewart likewise confirmed:

. . . When Mr. Bolden's physical limitations are considered in light of his illiteracy and borderline (retardation) intelligence level, it is highly unlikely he will be able to find and sustain employment. And, based on his age, work history and total illiteracy/low level of education, it is also concluded that he is not a realistic vocational rehabilitation candidate. Consequently, I do not believe a reasonably stable market exists for the types of services Mr. Bolden is physically, educationally and vocationally capable of performing.

10) In this connection, the evidence of record unequivocally indicates he: (a) has always required assistance in managing his money and paying bills (Hearing Transcript, p. 18); (b) has difficulty reading, to the extent he took an oral test to obtain his driver's license and requires help from family members to understand correspondence and complete job applications (See, Hearing Transcript, pp. 8 and 10; August 24, 2001 Deposition, pp. 13 and 23); (c) took primarily vocational/trade courses in school (Hearing Transcript, pp. 5 and 49); and (d) received assistance from tutors while training to become an automobile/diesel mechanic's helper (Hearing Transcript, p. 48).

11) The uncontradicted evidence likewise establishes he remains moderately symptomatic, to the extent he: (a) has difficulty sleeping (2 - 2.5 hours at a time); (b) takes between six and eight extra strength Tylenol on a daily basis; (c) does not engage in lifting weights exceeding twenty pounds; (d) encounters problems tying shoes and putting on socks; (e) notes increased low back and right leg symptoms with activity; (f) has substantially limited his maintenance of his own vehicle (now only checking belts/oil before trips, as opposed to changing oil, repairing vehicle, etc. (activities which are now performed by friends and relatives).

12) During his period of temporary disability, he was placed under video surveillance on various occasions. However, despite their repeated attempts, Respondents obtained no footage which was materially inconsistent with Dr. Eline's opinions relative to his work capacity.

13) By Order dated February 27, 2003, the hearing commissioner found: (a) the evidence did "not support a finding that. . . [he] is permanently and totally disabled"; (b) he was "capable of performing gainful employment"; and (c) his residual permanent disability

amounted to 17% of his back. **Significantly, while Respondents sought to include an adverse finding relative to his credibility, the hearing commissioner declined to do so.**

14) Pursuant to a Form 30 dated March 12, 2003, he appealed the hearing commissioner's determination to an Appellate Panel of the Full Commission, citing various grounds of error. Subsequently, by Order dated November 19, 2003, the Panel: (a) affirmed the hearing commissioner's determination in all respects; (b) added a single finding/conclusion to the effect that "[t]he videotape supports the decision of the hearing commissioner"; and (c) essentially declined to address his exceptions, including those which challenge the adequacy of the hearing commissioner's factual findings.

15) He hereby appeals the Appellate Panel's (Commission's) decision to the Richland County Court of Common Pleas pursuant to the provisions of S.C. Code Ann. Sections 1-23-380 (1976) and 42-17-60 (1976, as amended) based upon the following exceptions:

(a) The Commission erred in failing to enter specific findings as to its basis/rationale for limiting Mr. Bolden's degree of disability to only 17% because the absence of these findings violates the Administrative Procedures Act, as well as the South Carolina Supreme Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999);

(b) The Commission erred in failing to enter specific findings as to its basis/rationale for ignoring the opinions of Dr. William W. Stewart because the absence of these findings violates the Administrative Procedures Act, as well as the South Carolina Supreme

Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999);

(c) The Commission erred in failing to enter specific findings as to its basis/rationale for ignoring the opinions of Dr. Eugene A. Eline, Jr. relative to Mr. Bolden's capacity to sustain work activities because the absence of these findings violates the Administrative Procedures Act, as well as the South Carolina Supreme Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999);

(d) The Commission erred in failing to enter specific findings as to its basis/rationale for ignoring the undisputed presence and consequences of Mr. Bolden's functional illiteracy because the absence of these findings violates the Administrative Procedures Act, as well as the South Carolina Supreme Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999);

(e) The Commission erred in failing to find Mr. Bolden's authorized treating physician (Dr. Eline) confirmed he was only physically capable of sustaining sedentary

work activities due to the consequences of his compensable injury because the only reasonable inference which may be gleaned from the evidence contained in the hearing record unquestionably verifies this fact;

(f) The Commission erred in failing to find the work restrictions assigned by Dr. Eline were compatible with neither his level of intelligence, educational abilities nor work history because the only reasonable inference which may be gleaned from the evidence contained in the hearing record unquestionably verifies this fact;

(g) The Commission erred in failing to find Mr. Bolden was illiterate because the only reasonable inference which may be gleaned from the evidence of record certainly verifies this fact;

(h) The Commission erred in finding Mr. Bolden was "capable of performing gainful employment" because this finding is inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record, particularly the opinions expressed by Dr. Stewart relative to his vocational prognosis and educational/intellectual levels, as well as the physical/functional limitations identified by Dr. Eline;

(i) The Commission erred in failing to find Mr. Bolden possessed only an I.Q. of 73 because on the only reasonable inference which may be gleaned from the evidence contained in the hearing record unquestionably verifies this fact;

(j) The Commission erred in failing to find Mr. Bolden had experienced a 50% (+) permanent disability to his back because the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly verifies this fact;

(k) The Commission erred in stating Mr. Bolden "maintain[ed]. . . a savings account" without further explaining he received assistance from family members in handling this account because the failure to do so renders this statement misleading and wholly inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record;

(l) The Commission erred in stating Mr. Bolden "read. . . the Beaufort County Newspaper" without acknowledging the significant limitations he encountered in attempting to read because the failure to do so rendered this statement misleading and inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record;

(m) The Commission erred in finding Mr. Bolden had sustained only a 17% permanent partial disability to his back in this instance because this determination is wholly inconsistent with the only reasonable inference which may be gleaned from the evidence contained in the hearing record and grossly understates his degree of residual disability;

(n) The Commission erred in failing to identify any portion of the evidence (including the contents of the surveillance videotapes) which either established his ability to be gainfully employed or contradicted the opinions of Drs. Eline and Stewart because this omission violates the Administrative Procedures Act, as well as the South Carolina Supreme Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999);

(o) The Commission erred in failing to identify any portion of the evidence (including the contents of the surveillance videotapes) which either established his ability to be gainfully employed or contradicted the opinions of Drs. Eline and Stewart because this omission leaves the basis/rationale for its disability assessment to speculation;

(p) The Commission erred in failing to find Mr. Bolden's high school curriculum included a number of trade courses because the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly verifies this fact;

(q) The Commission erred in failing to find the training Mr. Bolden received at tech school was primarily "hands on", with limited reading requirements, because the only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly establishes this fact;

(r) The Commission erred in failing to find Mr. Bolden's work history was wholly inconsistent with the physical/functional restrictions assigned by Dr. Eline because the only reasonable inference which may be gleaned from the evidence contained in the hearing record obviously confirms this fact;

(s) The Commission erred in failing to find Mr. Bolden remains moderately symptomatic as a result of his compensable injury because the only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly establishes this fact;

(t) The Commission erred in failing to find Mr. Bolden continues to encounter difficulty bending, lifting and performing certain activities of daily living because the

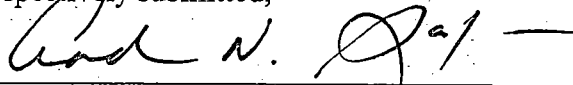
only reasonable inference which may be gleaned from the evidence contained in the hearing record certainly verifies this fact;

(u) The Commission erred in failing to find the events depicted on the surveillance videotapes obtained by Respondents were consistent with his medical restrictions because the only reasonable inference which may be gleaned from the evidence contained in the hearing record obviously verifies this fact;

(v) The Commission erred in failing to find Mr. Bolden engaged in the events depicted on the surveillance videotapes for very limited durations of time because the only reasonable inference which may be gleaned from the evidence contained in the hearing record undoubtedly establishes this fact; and

(w) The Commission erred in failing to enter specific findings as to its basis/rationale for concluding the videotape supported the hearing commissioner's decision because the absence of these findings violates the Administrative Procedures Act, as well as the South Carolina Supreme Court's rulings in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977); Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151 (1986) and Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863 (1999).

Respectively submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
Attorney for Claimant/Respondent.

December 16, 2003.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Leroy Bolden,)
)
Claimant/Petitioner,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual,)
)
Carrier/Respondents.)
)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

Roxanne M. Branham, being first duly sworn, says that she is a legal assistant for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, that on the 16th day of December, 2003 she mailed the documents listed below to the persons listed below, by depositing in the United States mail with sufficient postage affixed thereto.

Documents: Petition for Judicial Review

To: **HAND DELIVERED**
The Honorable Elizabeth M. Smith
Beaufort Count Clerk of Court
100 Ribaut Road
Beaufort, South Carolina 29901

Clarke W. McCants, III, Esquire
Nance & McCants
Post Office Box 2881
Aiken, South Carolina 29802-2881

The Honorable Herman B. Lightsey, Jr.
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

This 16th day of December, 2003.

Roxanne M. Branham
Roxanne M. Branham
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Exhibit "E"

FILE

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 03-CP-07-2318

05 APR - 7 AM 11:54
CLERK OF COURT
BEAUFORT, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Leroy Bolden,)
)
Claimant/Appellant,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual Insurance Company,)
)
Carrier/Respondents.)
_____)

ORDER

STATEMENT OF THE CASE

#1
PMB

This is an appeal from a November 19, 2003 Order of the South Carolina Workers' Compensation Commission (Commission), which (1) affirmed the hearing commissioner's determination that Appellant, Leroy Bolden, had sustained a 17% permanent partial disability to his back as a result of a compensable injury occurring on November 7, 2000; (2) adopted the factual findings contained in the hearing commissioner's February 27, 2002 Order; and (3) failed to address the issues raised by the various exceptions contained in Mr. Bolden's March 12, 2003 Form 30 Request for Commission Review.

Essentially, Appellant contends the Commission's Order violates S.C. Code Ann. §§ 1-23-350 and 42-17-40. The grounds for Appellant's argument are that the November 19, 2003, Order does not contain sufficiently detailed factual findings to enable this Court to properly review the Commission's determinations, that the Order fails to provide any explanation of the basis/rationale for its disability assessment, that the Order contains no analysis relative to the significance/impact of material evidence contained in the hearing record, and finally, that the Order does not adequately address the exceptions outlined in Appellant's Form 30.

This Court agrees, and I hereby vacate the Commission's Order of November 19, 2003, and remand the matter for further and sufficient findings of fact, consistent with this Order, as well as applicable Commission Regulations.

FACTS

#2
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The Appellant/Claimant, Mr. Bolden, has alleged as follows: On November 7, 2000, Bolden sustained a compensable back injury while serving as a heavy equipment operator/laborer for Co-Respondent, Sun City Hilton Head Community Association. This injury occurred when Mr. Bolden was pulling on a metal rod that was stuck in the ground, and the injury produced an immediate "burning" sensation in his lower back, which radiated into his legs (primarily the right).

Approximately one month after this injury, Bolden was directed by Sun City and its Carrier, Liberty Mutual Insurance Company, to Dr. Eugene A. Eline for further evaluation and/or treatment. During the next several months, Dr. Eline noted Bolden's complaints of low back and radiating right leg pain "with some numbness and tingling;" the presence of "fairly significant lumbar paraspinal muscle tenderness and spasming" (January 3, 2001); Bolden's inability to engage in repetitive bending, squatting, twisting or lifting activities; and an antalgic gait.

In light of these symptoms, Bolden sought a second opinion evaluation from Dr. Donald R. Johnson, II of Carolina Spine Institute. Dr. Johnson felt that a previously performed MRI scan evidenced an annular tear at L5-S1 and also recommended consideration of a selective injection at this level.

After reviewing Dr. Johnson's findings/recommendations, Dr. Eline concurred with both the diagnosis of an annular tear and recommendation for epidural injection, which was subsequently administered on April 11, 2001. However, when this procedure failed to provide any appreciable relief and Mr. Bolden manifested clinical evidence of discogenic pain (positive right straight leg raise response;

"give way weakness of his right EHL and gastrosoleous as well as his tibialis anterior"), Dr. Eline obtained an updated MRI scan, which revealed "annular bulging [at L5-S1, which was]. . . abutting the S1 nerve root sleeves bilaterally." See, April 24, 2001 report of Dr. A. Joseph Borelli, Jr. (Defendants' APA Submission No. 7).

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MB
Dr. Eline subsequently concluded that Bolden had reached maximum medical improvement as of May 8, 2001, and the Doctor recommended continued use of medication (Vioxx, Soma and Ultram) for symptom control. Additionally, Dr. Eline determined that Mr. Bolden had sustained a 10% whole body/spinal impairment "due to his residual lower back and right leg symptoms" and he confirmed that certain continued medical modalities were necessary in order to maintain the Appellant's condition.

While noting the possibility of symptom magnification, Dr. Eline further stated that Mr. Bolden was "most probably only capable of sustaining sedentary work activities as a result of his compensable back injury and its consequences" and "while Mr. Bolden's pain threshold may be lower than that of other individuals, his lumbar pathology is certainly producing some level of pain, which limits his functional capacity to sedentary work." See, August 27, 2001 questionnaire responses of Dr. Eline (Claimant's APA Submission No. 2).

In the summer of 2001, Bolden was also evaluated by Dr. William W. Stewart of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. In conjunction with these evaluations, Bolden underwent testing which confirmed he has a full scale I.Q. of 73, "slightly above the mentally deficient (retarded) range," and very limited educational skills. See, September 1, 2001 report of Dr. Stewart (Claimant's APA No. 1). The evaluator also concluded that the nature of Mr. Bolden's previous work history ("heavy to very heavy from a physical/exertional demand standpoint; and... unskilled to low semi-skilled from a skill level standpoint") was inconsistent with the

restrictions identified by Dr. Eline; that any suggestion of symptom magnification was likely the product of Bolden's lack of sophistication; that "Mr. Bolden's prognosis for successful vocational rehabilitation to some kind of lighter, alternative work or job is quite poor"; and that no reasonably stable market existed "for the types of services Mr. Bolden is physically, educationally and vocationally capable of performing."

Id.

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mb
Notwithstanding these opinions, Respondents maintained that Mr. Bolden's educational abilities exceeded the level established by standardized testing; that Bolden had previously engaged in activities (obtaining high school diploma, receiving mechanic certificates through technical schools, reviewing classified ads in newspaper, etc.), which were reflective of a higher level of literacy; that video footage obtained through extended surveillance of Mr. Bolden was indicative of an ability to perform gainful employment on a regular basis; and that Bolden was not a credible witness.

By Order dated February 27, 2002, the hearing commissioner found: (a) Mr. Bolden had sustained a 17% permanent partial disability to his back; (b) determined he was not entitled to receive a 50% (+) rating in view of her belief "the evidence... [did] not support a finding... [that he was] permanently and totally disabled"; and (c) awarded Bolden additional medical benefits. Shortly thereafter, Mr. Bolden raised numerous exceptions to this ruling by the filing of a Form 30. Subsequently, by Order dated November 19, 2003, an Appellate Panel of the Full Commission affirmed the hearing commissioner's Order in its entirety. This appeal followed.

LEGAL ANALYSIS

A. STANDARD OF REVIEW/NECESSITY OF SPECIFIC FACTUAL FINDINGS

S.C. Code Ann. §1-23-350 provides that the final decision of an administrative agency "shall include findings of fact... accompanied by a concise and explicit statement of the underlying facts supporting the finding." Section 42-17-40 similarly prescribes that the Commission's award include "findings of fact, rulings of law and other matters pertinent to the questions at issue..."

Additionally, S.C. Code Ann. § 1-23-380(6), which governs judicial review in this context, states in pertinent part:

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The court shall not substitute its judgment for that 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 violation of the provisions of the Administrative Code of Regulations;
- (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; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A review of the latter statute confirms that administrative agencies, including the Commission, "are afforded wide latitude in making decisions" and "the writing of orders without sufficient detail or analysis, coupled with this... deferential standard of review, can make their decisions as a practical matter unassailable on appeal." Heater of Seabrook, Inc. v. Public Service Commission of South Carolina, 503 S.E. 2d 739, 742 (1998). Recognizing this potential for "arbitrary or capricious" action on the part of the agency, our Supreme Court has "repeatedly emphasized the need for specificity in administrative orders."

Id.

In this context, the fact finding duty imposed by Sections 1-23-350 and 42-17-40 "requires not only... [that] findings of fact be made upon the essential factual issues, but that they... [also] be

sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings." Drake v. Raybestos-Manhattan, Inc., 127 S.E.2d 288, 292 (1962); Hill v. Jones, 178 S.E.2d 142, 144 (1970).

It is also axiomatic that if "a material fact is contested...[the Commission] must make a specific, express finding on it." Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 234 S.E.2d 21, 23 (1977). Furthermore, conclusory findings of fact are insufficient. Baldwin v. James River Corporation, 405 S.E.2d 421, 422 (Ct.App. 1991). A "recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues," Able Communications, Inc. v. South Carolina Public Service Commission, 351 S.E.2d 151, 152 (1986), and "implicit findings of fact are... [likewise] not sufficient." Brayboy v. Clark Heating Company, Inc., 409 S.E. 2d 767, 768 (1991).

B. ABSENCE OF ADEQUATE FACTUAL FINDINGS OR EXPLANATION OF RATIONALE UNDERLYING RULING

As previously noted, the record before the Court contains the following: (a) Dr. Eline's statement relative to Mr. Bolden's inability to sustain more than sedentary work activities; (b) Dr. Eline's acknowledgement that Bolden's lumbar pathology produces some level of pain which would limit Bolden in this fashion; (c) vocational evidence indicating Mr. Bolden's aptitude/abilities are inconsistent with this restriction; (d) video surveillance footage which purportedly reflects his work capacity; and (e) circumstantial evidence which Respondents believe is indicative of a greater vocational potential.

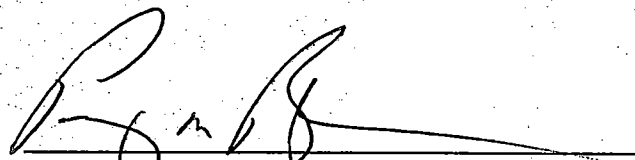
While our Appellate Courts have repeatedly sought to "require the administrative agency to make specific findings of fact and explain its rationale," the Commission's Order fails to adequately analyze/address any of this evidence, while effectively limiting its assessment of Mr. Bolden's residual

disability, a hotly contested issue, to the conclusory statement that he “has sustained a 17% permanent partial disability to his lower back.” Porter, 507 S.E. 2d at 338.

As a meaningful consideration of this evidence – including an appraisal of Mr. Bolden’s credibility, i.e., the weight afforded to his testimony – is essential to the resolution of the disputed issues, the absence of specific findings on the material facts makes it impossible for this Court to review the Commission’s ruling “since the reasons underlying the decision are left to speculation.” Able, 351 S.E. 2d 152; Kiawah Property Owners Group v. Public Service Commission of South Carolina, 525 S.E. 2d 863, 865 (1999).

An appellate court “will not accept an administrative agency’s decision at face value without requiring the agency to explain its reasoning.” Able, supra; Kiawah Property Owners Group, supra. As the Commission’s conclusory findings provide no explanation for its ruling, the November 19, 2003, Order is hereby vacated. Accordingly,

IT IS HEREBY ORDERED that: (a) the Commission’s November 19, 2003 Order is vacated; (b) this claim is remanded to the Commission for additional action consistent with this Order, as well as applicable Commission Regulations; and (c) all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanations of the rationale underlying its ultimate determination.



The Honorable Perry M. Buckner, III
Presiding Judge for the Beaufort County
Court of Common Pleas

Dated this 27th day of March, 2005
at Walterboro, South Carolina.

Exhibit "F"

FULL COMMISSION ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0019585

LEROY BOLDEN,

EMPLOYEE/CLAIMANT,

- V. -

SUN CITY HILTON HEAD COMM. ASSOC.,

EMPLOYER,

AND

LIBERTY MUTUAL INSURANCE COMPANY,

CARRIER,
DEFENDANTS.

ORDER

Claimant represented by Andrew N. Safran, Esquire, of Columbia, South Carolina.

Defendants represented by Clarke W. McCants, III, Esquire, of Aiken, South Carolina.

This matter came before the South Carolina Workers' Compensation Full Commission on December 18, 2006 on the Order of Remand of the Honorable Perry M. Buckner, III. Judge Buckner issued his Order dated March 27, 2005, holding:

IT IS HEREBY ORDERED that: (a) the Commission's November 19, 2003 Order is vacated; (b) this claim is remanded to the Commission for additional action consistent with this Order, as well as applicable Commission Regulations; and (c) all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanations of the rationale underlying its ultimate determination.

IT IS, THEREFORE, ORDERED this matter be, and hereby is, remanded to an Appellate Panel consisting of Commissioners George N. Funderburk, Chairman; David W. Huffstetler; and Andrea Pope Roche, to take such action and enter an Order consistent with the Court's directive.

AND IT IS SO ORDERED.



David W. Huffstetler, Chairman

Columbia, South Carolina

Jan 3, 2007

CONCURRING:

Commissioner Susan S. Barden
Commissioner George N. Funderburk
Commissioner G. Bryan Lyndon
Commissioner J. Alan Bass
Commissioner Andrea Pope Roche

(a:\0019585.fc.remmand)

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above-captioned action upon all parties to this cause by depositing a copy hereof, first class postage paid, or if indicated below by certified mail, return receipt requested, in the United States mail addressed to the attorney or attorneys for said parties.

This 3rd day of Jan, 2007

By MB
Marion Buraczynski, Paralegal

Andrew N. Safran, Esquire
P.O. Box 12089
Columbia, SC 29211

Clarke W. McCants, III, Esquire
P.O. Box 2881
Aiken, SC 29802

Exhibit "G"

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Leroy Bolden,)
)
Employee/Claimant,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual,)
)
Carrier/Defendants.)
_____)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 0019585

NOTICE OF MOTION AND
MOTION FOR REHEARING
BEFORE APPELLATE PANEL

TO: CLARKE W. MCCANTS, III, ESQUIRE, ATTORNEY FOR DEFENDANTS.

YOU WILL PLEASE TAKE NOTICE that Claimant, Leroy Bolden, by and through his undersigned counsel, hereby moves the South Carolina Workers' Compensation Commission for an Order: (a) scheduling this claim for rehearing before a newly constituted Appellate Panel in order to comply with the March 27, 2005 Order of the Honorable Perry M. Buckner, III; and (b) allowing submission of revised Memoranda, as well as additional oral argument to the new Appellate Panel.

In support of this Motion, Mr. Bolden would respectfully submit: (a) Judge Buckner determined "the absence of specific findings on the material facts make it impossible for this Court to review the Commission's ruling 'since the reasons underlying the decision are left to speculation'"; (b) he therefore remanded this claim to the Commission for additional action consistent with his Order, "as well as applicable Commission Regulations"; (c) a review of Commission Regulations 67-701, 67-704, 67-706 and 67-708 verify a right to oral argument before the Appellate Panel; (d) given the plain language of Regulation 67-706, oral argument is certainly warranted under the present circumstances (See, Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1986))

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Leroy Bolden,)
)
Employee/Claimant,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual,)
)
Carrier/Defendants.)
_____)

BEFORE THE
SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER: 0019585

CERTIFICATE OF SERVICE

Roxanne M. Branham, being first duly sworn, says that she is a legal assistant for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, that on the 13th day of September, 2006 she mailed the documents listed below to the persons listed below, by depositing in the United States mail with sufficient postage affixed thereto.

Documents: Notice of Motion and Motion for Rehearing Before Appellate Panel

To: Ms. Ashley Jacobs
Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

Clarke W. McCants, III, Esquire
Nance & McCants
Post Office Box 2881
Aiken, South Carolina 29802-2881

This 13th day of September, 2006.

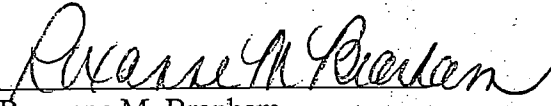

Roxanne M. Branham
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Exhibit "H"

SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Leroy Bolden,)
Claimant,)
vs.)
Sun City Hilton Head,)
Employer,)
and)
Liberty Mutual Insurance Co.)
Carrier,)
Defendants.)

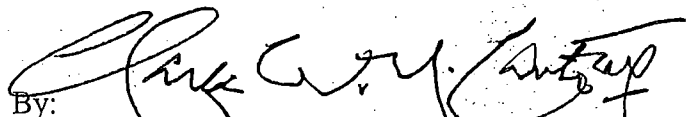
WCC File No: 0019585
Carrier File No: WC555-537705
Carrier Code No: 55
Employer FEIN:

RETURN TO MOTION

Comes now the Defendants in the above-referenced, filing their return to the Claimant's Motion, and respectfully showing to the Commission:

1. The Defendants affirmatively assert that the cited regulation does not specifically provide for the relief requested by the Claimant in this matter.
2. To the extent that the Commission determines that any additional oral argument may aid it in reaching a decision in this matter, the Defendants have no objection to participating in such additional oral arguments.

NANCE & McCANTS

By: 

Clarke W. McCants, III, Esquire
P. O. Box 2881
Aiken, SC 29802-2881
Counsel for Defendants

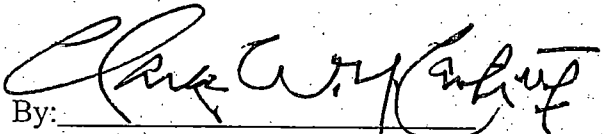
Dated: September 19, 2006

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY THAT I HAVE this date filed the attached document(s) with the South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202, and served a copy of said document(s) upon the following, by first class mail with sufficient postage affixed thereto to insure proper delivery:

Andrew N. Safran, Esquire
Andrew N. Safran, LLC
Post Office Box 12089
Columbia, SC 29211

NANCE & McCANTS

By: 

Clarke W. McCants, III, Esquire
P. O. Box 2881
Aiken, SC 29802
(803)649-6200

Dated: September 19, 2006

Exhibit "I"

FILE

**FULL COMMISSION ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0019585**

LEROY BOLDEN,

EMPLOYEE\CLAIMANT,

- V -

SUN CITY HILTON HEAD COMM. ASSOC.,

EMPLOYER,

AND

LIBERTY MUTUAL INSURANCE COMPANY,

CARRIER\DEFENDANTS.

ORDER

Claimant represented by Andrew N. Safran, Esquire, of Columbia, South Carolina.

Defendants represented by Clarke W. McCants, III, Esquire, of Aiken, South Carolina.

This matter came before the South Carolina Workers' Compensation Full Commission on December 18, 2006 on Claimant's Motion for Rehearing before Appellate Panel. The Commission has reviewed the Motion for Rehearing before Appellate Panel, the reply thereto, and the entire record in this matter. Based on this review, we enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This matter was heard on May 8, 2002, and an Order was issued on February 27, 2003.

2. On March 12, 2003, Claimant filed his Form 30.

3. The appeal was heard on October 28, 2003, and the Order affirming the Single Commissioner was issued on November 19, 2003.

4. Claimant appealed and the Honorable Perry M. Buckner, III, issued his Order, dated March 27, 2005. Judge Buckner ordered the Commission's Order of November 19, 2003 be vacated and remanded to the Commission for additional action consistent with the Order.

5. On September 14, 2006, the Claimant filed his Motion for Rehearing before Appellate Panel. The grounds for the Motion are as follows:

a) Claimant moves the Commission for an Order scheduling the claim for rehearing before a new Appellate Panel to comply with Judge Buckner's March 27, 2005 Order and allowing submission of revised Memoranda, as well as oral argument.

b) Claimant submits Judge Buckner determined "the absence of specific findings on the material facts make it impossible for this Court to review the Commission's ruling 'since the reasons underlying the decision are left to speculation.'"

c) Judge Buckner remanded this claim to the Commission for additional action consistent with his Order "as well as applicable Commission Regulations."

d) A review of Commission Regulations 67-701, 67-704, 67-706 and 67-708 verify a right to oral argument before the Appellate Panel.

e) Given the plain language of Regulation 67-706, oral argument is certainly warranted under the present circumstances.

f) The need for oral argument is clearly heightened by the absence of two of the three previous Panel members.

6. Defendants filed their Response on September 20, 2006.

Defendants responded as follows:

a) Defendants affirmatively assert the cited regulation does not specifically provide for the relief requested by the Claimant in this matter.

b) To the extent the Commission determines that any additional oral argument may aid it in reaching a decision in this matter, Defendants have no objection to participating in such additional oral arguments.

7. The Motion for Rehearing before Appellate Panel is dismissed. Judge Buckner remanded the matter to the Commission prior to the Motion being filed.

8. This matter is remanded to a new Appellate Panel by separate Order.

Based upon the findings of fact are the following:

CONCLUSIONS OF LAW

1. The Commission does not entertain motions on the merits of a case. See Regulation 67-215.

ORDER

IT IS, THEREFORE, ORDERED the Motion for Rehearing before Appellate Panel be, and hereby is, dismissed.

AND IT IS SO ORDERED.


David W. Huffstetler, Chairman

Columbia, South Carolina

Jan 3, 2007

CONCURRING:

Commissioner Andrea Pope Roche
Commissioner George N. Funderburk
Commissioner G. Bryan Lyndon
Commissioner Susan S. Barden
Commissioner J. Alan Bass

(a:\0019585.fc.rehearing)

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above-captioned action upon all parties to this cause by depositing a copy hereof, first class postage paid, or if indicated below by certified mail, return receipt requested, in the United States mail addressed to the attorney or attorneys for said parties.

This 3rd day of Jan, 2007

By MB
Marion Buraczynski, Paralegal

Andrew N. Safran, Esquire
P.O. Box 12089
Columbia, SC 29211

Clarke W. McCants, III, Esquire
P.O. Box 2881
Aiken, SC 29802

Exhibit "J"

Subj: **Leroy Bolden vs. Sun City Hilton Head Comm. Assoc. (WCC: 0019585)**
Date: 2/23/2007 12:52:53 P.M. Eastern Standard Time
From: BCheeseboro@wcc.sc.gov
To: MCCANTS3RD@AOL.COM
CC: msa6631@aol.com

FILE

February 23, 2007

HEARING DATE: Remand Hearing on 1/24/07
WCC FILE NO. 0019585

CLAIMANT: Leroy Bolden
EMPLOYER: Sun City Hilton Head Comm. Assoc.
CARRIER: Liberty Mutual Group

ATTORNEY(P): Andrew N. Safran
ATTORNEY(D): Clarke W. McCants III

DIRECTIVES

Attorney MCants: please draft the order consistent with the below findings:

**Please prepare a proposed order in this case affirming the findings of the Single Commissioner.
Please draw this order in conformance with the order from Judge Buckner.**

If you have any questions, please do not hesitate to call.

Andrea P. Roche, Commissioner
(803) 737-5678

Barbara D.B. Cheeseboro
SCWCC
(803) 737-5678

Exhibit "K"

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Leroy Bolden,)
)
 Claimant/Petitioner,)
)
 vs.)
)
 Sun City Hilton Head Comm. Assoc.,)
)
 Employer,)
)
 and)
)
 Liberty Mutual Insurance Company,)
)
 Carrier/Respondents.)
 _____)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: _____

PETITION FOR JUDICIAL REVIEW

200 FEB -2 PM 3:37
 BARBARA A. SCOTT
 S.C.C.C. & G.S.
 RICHLAND COUNTY
 FILED

Petitioner, Leroy Bolden, would respectfully show unto the Court:

- 1) On November 7, 2000, he sustained a compensable back injury while performing duties arising out of and within the course and scope of his employment with Sun City Hilton Head Community Association.
- 2) After initially receiving treatment at Hilton Head Hospital and through the company physician, he was referred to Dr. Eugene A. Eline, Jr., an orthopaedic surgeon, for further evaluation/treatment.
- 3) While treating Mr. Bolden through the use of conservative medical modalities, Dr. Eline noted: (a) complaints of low back and radiating right leg pain "with some numbness and tingling"; (b) the presence of "fairly significant lumbar paraspinal muscle tenderness and spasming"; (c) an inability to engage in repetitive bending, squatting, twisting or lifting activities; and (d) an antalgic gait.
- 4) In view of these symptoms, as well as the recommendations of an independent evaluator, Dr. Eline recommended the performance of an epidural injection, which was administered on April 11, 2001. However, when this procedure failed to provide any

appreciable relief and he manifested clinical evidence of discogenic pain (positive right straight leg raise response; "give way weakness of his right EHL and gastrosoleous as well as his tibialis anterior"), Dr. Eline obtained an updated MRI scan, which revealed "annular bulging [at L5-S1, which was] . . . abutting the S1 nerve root sleeves bilaterally."

5) Despite this finding, Dr. Eline did not believe he was a surgical candidate and recommended continued use of medication (Vioxx, Soma and Ultram) for symptom control. Additionally, this physician: (a) determined he had sustained a 10% whole body/spinal impairment "due to his residual lower back and right leg symptoms"; (b) recommended continued medication and reevaluation every three months in order to maintain his condition; and (c) ultimately concluded Mr. Bolden was "only capable of sustaining sedentary work activities as a result of his compensable back injury and its consequences. . . ."

6) In this regard, Dr. Eline similarly confirmed: (a) "while Mr. Bolden's pain threshold may be lower than that of other individuals, his lumbar pathology is certainly producing some level of pain, which limits his functional capacity to sedentary work"; and (b) the medical modalities he had recommended were "reasonable, medically necessary and geared toward lessening. . . [his] period of disability/maintaining his current, albeit compromised, level of function. . . ."

7) On June 1, 2001 and August 30, 2001, he was evaluated by Dr. William W. Stewart of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. On these dates, Dr. Stewart administered both I.Q. and educational testing, which established he: (a) had a full scale I.Q. of 73, which "place[d] . . . him

slightly above the mentally deficit (retarded) range"; and (b) possessed educational skills (reading and arithmetic) which were reflective of functional illiteracy.

8) In this regard, Dr. Stewart explained:

Clearly, from an intelligence standpoint, Mr. Bolden would have to be considered an individual who, because of his low borderline intelligence, would have problems coping and dealing with his injuries, his inability to return to the job he considered a career (not just a job), and what he might be capable of doing in the future.

It is important to remember that individuals who fall in this very limited range of intelligence have great difficulty both understanding and explaining their physical problems. This lack of sophistication is often misinterpreted, and, in fact, may be assumed to be evidence of symptom magnification/exaggeration. In view of this fact, it is not surprising that Dr. Eline originally suggested symptom magnification. However, he later verified Mr. Bolden's actual pathology was severe enough to limit him to no more than sedentary work, which represent severe work restriction.

9) After considering his work history ("heavy to very heavy from a physical/exertional demand standpoint; and . . . unskilled to low-semi skilled from a skill level standpoint"), in light of the restrictions identified by Dr. Eline, Dr. Stewart determined his "prognosis for successful vocational rehabilitation to some kind of lighter, alternative work or job is quite poor. . . ." Dr. Stewart likewise confirmed:

. . . When Mr. Bolden's physical limitations are considered in light of his illiteracy and borderline (retardation) intelligence level, it is highly unlikely he will be able to find and sustain employment. And, based on his age, work history and total illiteracy/low level of education, it is also concluded that he is not a realistic vocational rehabilitation candidate. Consequently, I do not believe a reasonably stable market exists for the types of services Mr. Bolden is physically, educationally and vocationally capable of performing.

10) In this connection, the evidence of record unequivocally indicates he: (a) has always required assistance in managing his money and paying bills (Hearing Transcript, p. 18); (b) has difficulty reading, to the extent he took an oral test to obtain his driver's license and requires help from family members to understand correspondence and complete job applications (See, Hearing Transcript, pp. 8 and 10; August 24, 2001 Deposition, pp. 13 and 23); (c) took primarily vocational/trade courses in school (Hearing Transcript, pp. 5 and 49); and (d) received assistance from tutors while training to become an automobile/diesel mechanic's helper (Hearing Transcript, p. 48).

11) The uncontradicted evidence likewise establishes he remains moderately symptomatic, to the extent he: (a) has difficulty sleeping (2 - 2.5 hours at a time); (b) takes between six and eight extra strength Tylenol on a daily basis; (c) does not engage in lifting weights exceeding twenty pounds; (d) encounters problems tying shoes and putting on socks; (e) notes increased low back and right leg symptoms with activity; (f) has substantially limited his maintenance of his own vehicle (now only checking belts/oil before trips, as opposed to changing oil, repairing vehicle, etc. (activities which are now performed by friends and relatives).

12) During his period of temporary disability, he was placed under video surveillance on various occasions. However, despite their repeated attempts, Respondents obtained no footage which was materially inconsistent with Dr. Eline's opinions relative to his work capacity.

13) By Order dated February 27, 2003, the hearing commissioner found: (a) the evidence did "not support a finding that. . . [he] is permanently and totally disabled"; (b) he was "capable of performing gainful employment"; and (c) his residual permanent disability

amounted to 17% of his back. **Significantly, while Respondents sought to include an adverse finding relative to his credibility, the hearing commissioner declined to do so.**

14) Pursuant to a Form 30 dated March 12, 2003, he appealed the hearing commissioner's determination to an Appellate Panel of the Full Commission, citing various grounds of error. Subsequently, by Order dated November 19, 2003, the Panel: (a) affirmed the hearing commissioner's determination in all respects; (b) added a single finding/conclusion to the effect that "[t]he videotape supports the decision of the hearing commissioner"; and (c) essentially declined to address his exceptions, including those which challenge the adequacy of the hearing commissioner's factual findings.

15) By Petition filed December 17, 2003, Mr. Bolden sought judicial review of the Commission's ruling. Among other things, he challenged: (a) the adequacy of the Commission's factual findings, maintaining the Order failed to provide any explanation of the basis/rationale for its disability assessment; (b) the absence of any analysis relative to the significance/impact of material evidence contained in the hearing record (medical limitations, educational/vocational deficits and credibility); and (c) its failure to address various issues raised by his Form 30.

16) Subsequently, by Order dated March 27, 2005 (filed April 7, 2005), the Honorable Perry M. Buckner, III vacated the November 19, 2003 Order and remanded Mr. Bolden's claim to the Commission for further action. In this regard, he: (a) specifically identified several evidentiary components which were particularly relevant to the assessment of Mr. Bolden's residual disability; (b) concluded "meaningful consideration of this evidence – including an appraisal of Mr. Bolden's credibility, i.e., the weight afforded to his testimony – is

essential to the resolution of the disputed issues”; (c) instructed the Commission to take “additional action consistent with this Order, as well as applicable Commission Regulations”; and (d) held that “all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanation of the rationale underlying. . . [the Commission’s] ultimate determination.”

17. Pending reassignment of this claim to a newly constituted Appellate Panel (due to the fact two of the three original members were no longer serving as Commissioners), Mr. Bolden, by Motion dated September 13, 2006, sought to submit revised legal memoranda, as well as additional oral argument to the Panel. In support of this Motion, he: (a) argued Commission Regulations 67-701, 67-704, 67-706 and 67-708 verified a right to oral argument before the Appellate Panel; (b) maintained the plain language of Regulation 67-706 (“Each party is permitted ten minutes for oral argument. The appellant is permitted three minutes for reply.”) entitled him to reargue his prior appeal (as enhanced by Judge Buckner’s Order); and (c) further submitted “the need for oral argument is clearly heightened by the absence of two of the three previous Panel members.”

18. By Orders dated January 3, 2007, the Commission: (a) designated an Appellate Panel, which included two new members; (b) dismissed his Motion; and (c) ruled the Motion, which was wholly consistent with Judge Buckner’s directive, addressed “the merits of . . . [the] case.”

19. In view of the Commission’s determination that this Motion affected the merits of this pending claim, as well as his understanding the January 3, 2007 Order deprives him of the oral argument mandated by Regulation 67-706, Mr. Bolden hereby appeals the

Commission's decision to the Richland County Court of Common Pleas pursuant to the provisions of S.C. Code Ann. Sections 1-23-380 (1976, as amended) and 42-17-60 (1976, as amended) based upon the following exceptions:

A. Mr. Bolden hereby reiterates Exceptions A – W, as outlined in his December 16, 2003 Petition for Judicial Review, as fully and effectively as if restated verbatim.

B. The Commission erred in failing to allow Mr. Bolden the opportunity to present additional oral argument in connection with Judge Buckner's remand because: (a) a review of its pertinent regulations, particularly 67-706, verifies his absolute right to oral argument in connection with proceedings before the Appellate Panel; and (b) Judge Buckner's Order specifically instructed that any action on remand be not only consistent with the contents of his Order, but also "applicable Commission regulations. . . ."

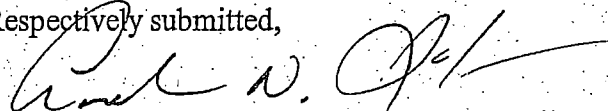
C. The Commission erred in failing to allow Mr. Bolden the opportunity to present additional oral argument in connection with Judge Buckner's remand because: (a) a review of its pertinent regulations, particularly 67-706, verifies his absolute right to oral argument in connection with proceedings before the Appellate Panel; and (b) our Supreme Court has held an administrative agency "must also follow its own regulations. . . in carrying out the legitimate purposes of the agency." Triske v. Department of Mental Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987).

D. The Commission erred in failing to allow Mr. Bolden the opportunity to present additional oral argument in connection with Judge Buckner's remand because: (a) a review of its pertinent regulations, particularly 67-706, verifies his absolute right to oral argument in connection with proceedings before the Appellate Panel; and (b) oral argument was

particularly important in the current context given the nature of issues requiring resolution, as well as the fact two of the three Panel members were totally unfamiliar with the merits of this claim.

E. The Commission erred in implicitly concluding Mr. Bolden's request for oral argument was somehow inconsistent with Judge Buckner's rulings because: (a) his Motion specifically referenced the particular nature of the Court's remand ("as well as applicable Commission regulations"); and (b) simply sought to take advantage of the procedural rights outlined in the applicable regulations.

Respectively submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
Attorney for Claimant/Respondent.

February 2, 2007

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO.: _____
 COUNTY OF BEAUFORT)
)
 Leroy Bolden,)
)
 Plaintiff,)
)
 vs.)
)
 Sun City Hilton Head Comm. Assoc., and)
 Liberty Mutual,)
)
 Defendants.)
 _____)

RICHLAND COUNTY
 FILED
 2007 FEB - 2 PM 3:37
 BARBARA A. SCOTT
 CLERK OF COURT

CERTIFICATE OF SERVICE

Roxanne M. Branham, being first duly sworn, says that she is a legal assistant for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, that on the 2nd day of February, 2007 she mailed the documents listed below to the persons listed below, by depositing in the United States mail with sufficient postage affixed thereto.

Documents: Petition for Judicial Review

To: **HAND DELIVERED**
 The Honorable Barbara A. Scott
 Richland County Clerk of Court
 1701 Main Street
 Columbia, South Carolina 29201

Clarke W. McCants, III, Esquire
 Nance & McCants
 Post Office Box 2881
 Aiken, South Carolina 29802-2881

This 2nd day of February, 2007.

Roxanne M. Branham
 Roxanne M. Branham
 Post Office Box 12089
 Columbia, South Carolina 29211
 (803) 256-6689

COUNTY OF RICHLAND

Leroy Bolden,

Plaintiff(s)

vs.

Sun City Hilton Head Comm. Assoc., and
Liberty Mutual Insurance Company,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2007 CP 400 0784

(Please Print)

Submitted By: Andrew N. Safran, Esquire
Address: Post Office Box 12089
Columbia, SC 29211

SC Bar #: 4811
Telephone #: (803) 256-6689
Fax #: (803) 799-1099
Other:
E-mail:

RICHLAND COUNTY
FILED
2007 FEB - 20 PM 3:37
BARBARA W. SCOTT
C.C. CLERK

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|--|---|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Slander/Libel (300) <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Other (399) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Sexual Predator (510) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Other (799) | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Driver's License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture (840) <input type="checkbox"/> Other (899) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input checked="" type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Administrative Law Judge (980) <input type="checkbox"/> Public Service Commission (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) | | | |

Submitting Party Signature: 

Date: 2/2/07

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCPP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Exhibit "L"

FILE

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Leroy Bolden,)
)
Claimant/Appellant,)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
)
Employer,)
)
and)
)
Liberty Mutual Insurance Company,)
)
Carrier/Respondents.)
)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 07-CP-40-984
784

ORDER

RICHLAND COUNTY
FILED
2009 JAN 21 AM 9:14
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATEMENT OF THE CASE

This is an appeal from the January 3, 2007 Order of the South Carolina Workers' Compensation Commission (Commission), which: (a) denied Appellant's, Leroy Bolden's, Motion for Rehearing, with oral argument, in compliance with the remand instructions contained in the Honorable Perry M. Buckner, III's April 7, 2005 Order; and (b) premised this denial on the fact Mr. Bolden's Motion was filed subsequent to Judge Buckner's April 7, 2005 Order, as well as its determination the requested relief involved "the merits of [this] . . . case."

Essentially, Mr. Bolden contends: (a) the Commission's refusal to afford additional oral argument is violative of the "applicable Commission regulations" referenced in Judge Buckner's Order; (b) its actions on remand, particularly an attempt to delegate an essential element of the Court's instructions (provide "thorough explanations of the rationale underlying its ultimate determination. . . including an appraisal of Mr. Bolden's credibility, i.e., the weight afforded to his testimony") to one of the litigants was wholly inconsistent with Judge Buckner's mandate that the Commission "explain. . . [the] reasoning" behind any decision on the merits of this claim; and (c) as the Commission had never previously

addressed the credibility issue, its failure to provide counsel with any rationale for the purported determination of this issue not only ignored Judge Buckner's rather emphatic ruling, but also inappropriately delegated the obligation to "determine. . . [a]ll questions arising under" the South Carolina Workers' Compensation Act imposed by S.C. Code Ann. Section 42-3-180 (1976, as amended). I agree, vacate the Commission's determinations and remand this case for further action in accordance with the terms of this Order.

FACTS

A. INJURY AND INITIAL MEDICAL TREATMENT

On November 7, 2000, Mr. Bolden sustained a compensable back injury while performing his job duties for Respondent, Sun City Hilton Head Community Association. After initially receiving treatment through a local hospital and the company physician, he was referred to Dr. Eugene A. Eline, Jr., an orthopaedic surgeon, for further evaluation.

B. DR. ELINE

While treating Mr. Bolden through the use of conservative medical modalities, Dr. Eline noted: (a) complaints of low back and radiating right leg pain "with some numbness and tingling"; (b) the presence of "fairly significant lumbar paraspinal muscle tenderness and spasming"; (c) an inability to engage in repetitive bending, squatting, twisting or lifting activities; and (d) an antalgic gait.

In view of these symptoms, as well as the recommendations of an independent evaluator, Dr. Eline recommended the performance of an epidural injection, which was administered on April 11, 2001. However, when this procedure failed to provide any appreciable relief and Mr. Bolden manifested clinical evidence of discogenic pain (positive right straight leg raise response; "give way weakness of his right EHL and gastrosoleous as well as his tibialis anterior"), Dr. Eline obtained an updated MRI scan,

which revealed "annular bulging [at L5-S1, which was] . . . abutting the S1 nerve root sleeves bilaterally."

Despite this finding, Dr. Eline did not believe Mr. Bolden was a surgical candidate and recommended continued use of medication (Vioxx, Soma and Ultram) for symptom control. Additionally, this physician: (a) determined he had sustained a 10% whole body/spinal impairment "due to his residual lower back and right leg symptoms"; (b) recommended continued medication and reevaluation every three months in order to maintain his condition; and (c) ultimately concluded Mr. Bolden was "only capable of sustaining sedentary work activities as a result of his compensable back injury and its consequences. . . ." In this regard, Dr. Eline similarly confirmed "while Mr. Bolden's pain threshold may be lower than that of other individuals, his lumbar pathology is certainly producing some level of pain, which limits his functional capacity to sedentary work. . . ."

C. VOCATIONAL EVIDENCE

On June 1, 2001 and August 30, 2001, Mr. Bolden was evaluated by Dr. William W. Stewart of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. On these dates, Dr. Stewart administered both I.Q. and educational testing, which established he: (a) had a full scale I.Q. of 73, which "place[d] . . . him slightly above the mentally deficient (retarded) range"; and (b) possessed educational skills (reading and arithmetic) which were reflective of functional illiteracy.

In this regard, Dr. Stewart explained:

Clearly, from an intelligence standpoint, Mr. Bolden would have to be considered an individual who, because of his low borderline intelligence, would have problems coping and dealing with his injuries, his inability to return to the job he considered a career (not just a job), and what he might be capable of doing in the future.

It is important to remember that individuals who fall in this very limited range of intelligence have great difficulty both understanding and explaining their physical problems. This lack of sophistication is often misinterpreted, and, in fact, may be assumed to be evidence of symptom magnification/exaggeration. In view of this fact, it is not surprising that Dr. Eline originally suggested symptom magnification. However, he later verified Mr. Bolden's actual pathology was severe enough to limit him to no more than sedentary work, which represent severe work restrictions.

After considering his work history ("heavy to very heavy from a physical/exertional demand standpoint; and. . . unskilled to low-semi skilled from a skill level standpoint"), in light of the restrictions identified by Dr. Eline, Dr. Stewart determined his "prognosis for successful vocational rehabilitation to some kind of lighter, alternative work or job is quite poor. . . ." Dr. Stewart likewise confirmed:

. . . When Mr. Bolden's physical limitations are considered in light of his illiteracy and borderline (retardation) intelligence level, it is highly unlikely he will be able to find and sustain employment. And, based on his age, work history and total illiteracy/low level of education, it is also concluded that he is not a realistic vocational rehabilitation candidate. Consequently, I do not believe a reasonably stable market exists for the types of services Mr. Bolden is physically, educationally and vocationally capable of performing.

D. INITIAL LITIGATION BEFORE COMMISSION

During a May 8, 2002 hearing before the single commissioner, Mr. Bolden testified that he: (a) had always required assistance in managing his money for paying bills (Hearing Transcript, p. 18); (b) encountered difficulty reading, to the extent he took an oral test to obtain his driver's license and required help from family members to understand correspondence and complete job applications (Hearing Transcript, pp. 8, 10); (c) took primarily vocational/trade courses in school (Hearing Transcript, pp. 5, 49); and (d) received assistance from tutors while training to become an automobile/diesel

mechanic's helper (Hearing Transcript, p. 48). He likewise described the various physical symptoms and functional limitations produced by his compensable back injury.

Conversely, Sun City Hilton Head and co-Respondent, Liberty Mutual Insurance Company, maintained: (a) Mr. Bolden's educational abilities exceeded the level established by standardized testing; (b) he had previously engaged in certain activities which were reflective of a higher level of literacy; (c) video surveillance footage was indicative of an ability to perform gainful employment on a regular basis; and (d) Mr. Bolden was not a credible witness.

By Order dated February 27, 2003, the hearing commissioner found: (a) the evidence did "not support a finding that. . . [Mr. Bolden] is permanently and totally disabled"; (b) his residual permanent disability amounted to 17% of his back; and (c) Mr. Bolden was entitled to additional medical benefits. However, she did not specifically assess the issue relative to his credibility.

Shortly thereafter, Mr. Bolden raised numerous exceptions to this ruling per Form 30 dated March 12, 2003. Subsequently, by Order dated November 19, 2003, an Appellate Panel of the Full Commission affirmed the hearing commissioner's Order in its entirety.

E. JUDGE BUCKNER'S ORDER

By Petition filed December 17, 2003, Mr. Bolden sought judicial review of the Commission's ruling. Among other things, he challenged: (a) the adequacy of the Commission's factual findings, maintaining the Order failed to provide any explanation of the basis/rationale for its disability assessment; (b) the absence of any analysis relative to the significance/impact of material evidence contained in the hearing record (medical limitations, educational/vocational deficits and credibility); and (c) its failure to address various issues raised by his Form 30.

Subsequently, by Order dated March 27, 2005 (filed April 7, 2005), Judge Buckner vacated the November 19, 2003 Order and remanded Mr. Bolden's claim to the Commission for further action. In this regard, he: (a) specifically identified several evidentiary components which were particularly relevant to the assessment of Mr. Bolden's residual disability; (b) concluded "meaningful consideration of this evidence – including an appraisal of Mr. Bolden's credibility, i.e., the weight afforded to his testimony – is essential to the resolution of the disputed issues"; (c) instructed the Commission to take "additional action consistent with this Order, as well as applicable Commission Regulations"; and (d) held that "all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanations of the rationale underlying . . . [the Commission's] ultimate determination."

F. COMMISSION ACTION ON REMAND

Pending reassignment of this claim to a newly constituted Appellate Panel (due to the fact two of the three original members were no longer serving as Commissioners), Mr. Bolden, by Motion dated September 13, 2006, sought to submit revised legal memoranda, as well as additional oral argument to the Panel. In support of this Motion, he: (a) argued Commission Regulations 67-701, 67-704, 67-706 and 67-708 verified a right to oral argument before the Appellate Panel; (b) maintained the plain language of Regulation 67-706 ("Each party is permitted ten minutes for oral argument. The appellant is permitted three minutes for reply.") entitled him to reargue his prior appeal (as enhanced by Judge Buckner's Order); and (c) further submitted "the need for oral argument is clearly heightened by the absence of two of the three previous Panel members."

By Orders dated January 3, 2007, the Commission: (a) designated an Appellate Panel, which included two new members; (b) dismissed his Motion; and (c) ruled the Motion, which was wholly consistent with Judge Buckner's directive, addressed "the merits of . . . [the] case." Additionally, despite

the perfection of this appeal, one of the Panel members forwarded defense counsel an e-mail which: (a) instructed him to prepare a proposed Order affirming the initial ruling; and (b) provided no indication of the rationale for this purported ruling, instead leaving it to counsel to address the issues identified by Judge Buckner.

LEGAL ANALYSIS

A. STANDARD OF REVIEW/NECESSITY OF SPECIFIC FACTUAL FINDING

S.C. Code Ann. Section 1-23-350 (1976, as amended) provides that the final decision of an administrative agency "shall include findings of fact. . . accompanied by a concise and explicit statement of the underlying facts supporting the finding." S. C. Code Ann. Section 42-17-40 similarly prescribes that the Commission's awards include "findings of fact, rulings of law and other matters pertinent to the questions at issue. . . ."

S.C. Code Ann. Section 1-23-380 (A)(5) (1976, as amended), which governs judicial review in this context, states in pertinent part:

The court shall not substitute its judgment for that 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)
- (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; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Additionally, it is axiomatic that where, as here, “a case that has been appealed and remanded by the [C]ourt to the [W]orkers’ [C]ompensation [C]ommission with specific directions, the [C]ommission must proceed in accordance with those directions.” Bobo v. Marshane Corporation, 302 S.C. 86, 394 S.E. 2d 2, 4 (Ct. App. 1990). As further confirmed by the Court of Appeals, the Circuit Court: (a) “limits the authority of the [C]ommission” when it imposes/outlines remand directives; and (b) technically maintains jurisdiction of the matter “while it awaits the [C]ommission’s compliance with the Order of remand.” (Id.).

As previously noted, Judge Buckner’s remand instructions specified: (a) “a meaningful consideration of [various portions of the evidence] – including an appraisal of Mr. Bolden’s credibility, i.e. the weight afforded to his testimony – is essential to the resolution of the disputed issues”; (b) all further rulings in this matter shall contain not only detailed factual findings, but also thorough explanations of the rationale underlying . . . [the Commission’s] ultimate determination”; and (c) the Commission was obliged to take “additional action consistent with this Order, as well as applicable Commission Regulations. . . .” (Emphasis added).

Significantly, a review of the pertinent Commission regulations reveals: (a) Regulation 67-701 (A)(4) indicates oral argument will be conducted upon the request of either party; (b) Regulation 67-706 establishes the amount of time afforded to each party for oral argument; (c) Regulations 67-701 (A)(4)(a) and 67-708 (C) identify the circumstances which give rise to waiver of the right to oral argument; and (d) Regulation 67-709 (E)(3) similarly addresses one of the limited exceptions (certification of issue to remaining Commissioners where “the Panel cannot agree on modifying the Hearing Commissioner’s decision”) to the general right of oral argument (explicitly stating “[o]ral argument is not permitted” in this context).

“The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation’s operation.” Byerly v. Conner, 307 S.C. 441, 415 S.E. 2d 796, 799 (1992). Additionally, where any question exists as to the intended effect of a regulation, our Appellate Courts have not hesitated to apply traditional rules of construction. See, Dorman v. Department of Health and Environmental Control, 350 S.C. 159, 565 S.E. 2d 119, 124-5 (Ct. App. 2002) (Applying rule that amendment is presumed to “make a change in the existing law”).

The plain and unambiguous language of the above-cited regulations clearly establishes: (a) a general right to oral argument in connection with the review hearings before the Full Commission/Appellate Panel; and (b) the Commission has delineated the particular exceptions to its standard procedure. However, assuming arguendo, a question existed as to the presence of this procedural requirement, application of the relevant rule of construction removes any doubt.

Specifically, “[a] well-established rule of statutory construction is ‘expressio unius est exclusio alterius’, which means that the enumeration of particular things excludes the idea of something else not mentioned.” Pennsylvania National Mutual Casualty Insurance Company v. Parker, 282 S.C. 546, 320 S.E. 2d 458, 463 (Ct. App. 1984). Essentially, this canon of construction recognizes “[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.” Hodges v. Rainey, 341 S.C. 79, 533 S.E. 2d 578, 582 (2000); Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E. 2d 651, 655 (2002).

Review of these particular regulations clearly confirms the Commission identified the circumstances where oral argument was either deemed to have been waived or “not permitted.” Given this fact, in light of the language of Regulations 67-701 and 67-706, it must be presumed the Commission:

(a) intended to establish a general right to oral argument; and (b) is required to receive this argument in conjunction with any review hearing unless prohibited by one of the specifically enumerated exceptions.

It is axiomatic that an administrative agency "must follow its own regulations." Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1986). As the Commission was required to afford Mr. Bolden oral argument per both Judge Buckner's Order and its own regulations, failure to do so constituted legal error.

Further, S.C. Code Ann. Section 1-23-320 (1976, as amended) provides that "all parties must be afforded an opportunity for hearing after notice of not less than thirty days" in contested cases. This statute similarly "afford[s] . . . all parties . . . [the o]ppportunity to respond and present evidence and argument on all issues involved."

While the e-mail correspondence from the new Appellate Panel references a January 24, 2007 hearing date, inspection of the record (including the Commission's claim file) reveals the respective parties were neither notified of this hearing nor allowed to "present evidence and argument. . . ." In this regard, I further conclude the adjudicative procedure utilized the Appellate Panel: (a) does not comply with Judge Buckner's explicit remand instructions; (b) violates the provisions of Section 1-23-320; and (c) likewise constitutes an "unlawful procedure", as well as an "error of law" within the meaning of Section 1-23-380.

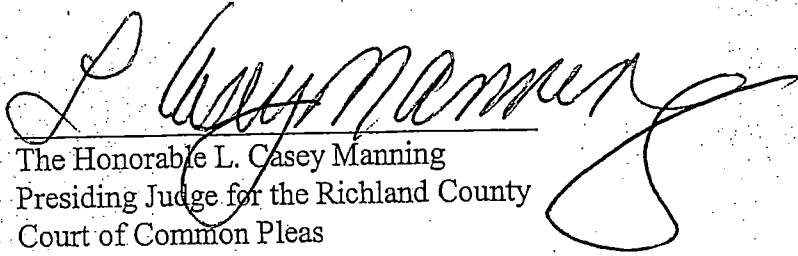
Although this Court recognizes the determination as to witness credibility is ultimately reserved for the Appellate Panel, inspection of the record firmly establishes: (a) the evidentiary hearing which spawned the current litigation took place more than 6.5 years ago; (b) neither the hearing commissioner nor the initial Appellate Panel (all of whom are no longer serving on the Commission) addressed the issue relative to Mr. Bolden's credibility; (c) the new Appellate Panel similarly sought to defer (an/or delegate)

this determination; and (d) the law of this case (i.e., Judge Buckner's Order) recognizes "a meaningful consideration of [the] . . . evidence – including an appraisal of Mr. Bolden's credibility. . . – is essential to the resolution of the disputed issues. . . ."

Given these circumstances, I conclude the interests of justice will be furthered by a remand procedure, which includes: (a) a *de novo* evidentiary hearing before a single commissioner; (b) entry of an Order containing detailed factual findings, which thoroughly explain "the rationale underlying. . . [any] determination"; and (c) a similarly detailed/analyzed assessment of the single commissioner's rulings in the event either party seeks review before the Appellate Panel.

ACCORDINGLY, IT IS HEREBY ORDERED that the Commission's January 3, 2007 ruling is vacated. **IT IS FURTHER ORDERED** that this matter shall be remanded to the Commission for the purposes of: (a) conducting a *de novo* evidentiary hearing before the single commissioner; (b) allowing consideration of the current record, as well as any additional evidence submitted by the respective parties, by the single commissioner; (c) entry of an Order by the single commissioner, which contains not only detailed factual findings, but also a thorough explanation of the rationale underlying any rulings; and (d) an Appellate Panel review, which complies with the previously referenced regulations, as well as all governing legal authorities, in the event of an appeal by either party.

IT IS SO ORDERED.


The Honorable L. Casey Manning
Presiding Judge for the Richland County
Court of Common Pleas

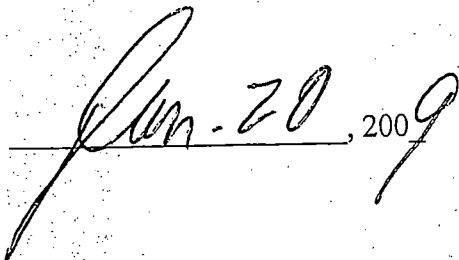

Jan. 20, 2009

Exhibit "M"

State of South Carolina)
)
County of Richland)
)
Leroy Bolden,)
Claimant/Petitioner)
)
vs.)
)
Sun City Hilton Head Comm. Assoc.,)
Employer,)
)
and)
)
Liberty Mutual Insurance Company,)
Carrier/Respondents,)

In the Court of Common Pleas
Civil Action No. 07-CP-40-784

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND**

PLEASE TAKE NOTICE that the Defendants, through the undersigned counsel, will move before the Court, at such time and place as is hereafter directed, notice of which will be given to you, for an order, pursuant to Rule 59(e), SCRCP, altering and/or amending its Order filed January 21, 2009. The undersigned received written notice of the entry of this Order on January 26, 2009.

As part of its Order this Court ruled that the Claimant is entitled to a de novo and entirely new hearing before a Single Commissioner and should be allowed to retry the issues in this case. This relief was never requested by the Claimant as part of his Request for Full Commission Review of the Single Commissioner's initial decision, his first Petition for Judicial Review heard by Judge Buckner or the Petition for Judicial Review heard by this Court.¹ In his Petition currently before this Court the Claimant has only requested that he be given another opportunity to present oral argument to the Full Commission on the issue of the adequacy of the Commission's existing findings of fact and conclusions of law for this case.

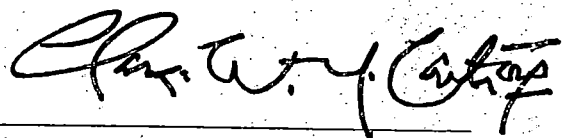
¹ Judge Buckner, in fact, remanded this matter to the Commission initially for the sole purpose of allowing the Commission to more thoroughly explain its ruling in this case, and not to conduct any additional evidentiary hearings.

As part of its Order for this matter this Court did not address the appropriateness of the Claimant's entitlement to such extraordinary relief or the Defendants' argument that any remand of this matter should be limited, at most, to additional oral argument before an Appellate Panel. This Court further has not given guidance to the Commission as to the whether or not any de novo hearing should be limited with regard to the presentation of testimony or other evidence.

For these reasons the Defendants would respectfully submit that the Order of this Court dated January 21, 2009 be altered and/or amended to provide that any hearing in this matter upon remand to the Commission should be limited to additional oral argument before an Appellate Panel of the Commission.

The Defendants would also respectfully request to have the opportunity to present oral argument to this Court on the issues presented in this Motion.

NANCE, MCCANTS & MASSEY

By: 

Clarke W. McCants, III
Post Office Box 2881
Aiken, South Carolina 29802
(803) 649-6200, ext. 21
Counsel for Employer/Carrier

February 4, 2009

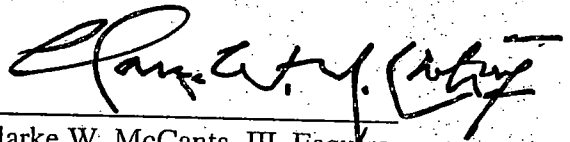
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE this date served a copy of the attached document(s) upon the following, by first class mail with sufficient postage affixed thereto to insure proper delivery:

Andrew N. Safran, Esquire
Andrew N. Safran, LLC
Post Office Box 12089
Columbia, SC 29211

NANCE, McCANTS & MASSEY

By: _____



Clarke W. McCants, III, Esquire
P. O. Box 2881
Aiken, SC 29802
(803)649-6200

Dated: February 4, 2009

Exhibit "N"

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Leroy Bolden,)
)
 Claimant/Appellant,)
)
 vs.)
)
 Sun City Hilton Head Comm. Assoc.,)
)
 Employer,)
)
 and)
)
 Liberty Mutual Insurance Company,)
)
 Carrier/Respondents.)
)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: 07-CP-40-984
 784

ORDER

RICHLAND COUNTY
 FILED
 2016 DEC 15 AM 11:30
 JENNIFER L. W. HARRIS
 CCH 2/FB

Pursuant to a Petition for Judicial Review filed February 2, 2007, Appellant, Leroy Bolden, sought relief from the South Carolina Workers' Compensation Commission's (Commission's) January 3, 2007 Order, maintaining this ruling violated the Honorable Perry M. Buckner, III's April 7, 2005 remand instructions in several respects. In conjunction with this appeal, Mr. Bolden submitted a July 11, 2007 "Memorandum in Support of Petition for Judicial Review", which: (a) analyzed the legal errors contained in the January 3, 2007 Order; (b) identified other portions of the appellate record, particularly a February 23, 2007 e-mail generated following his perfection of this appeal, that were similarly inconsistent with not only Judge Buckner's rulings, but also S.C. Code Ann. Section 1-23-320 (1976, as amended); and (c) prayed for alternative modes of relief, including "a *de novo* hearing before the single commissioner."

By Order dated January 20, 2009, this Court vacated the January 3, 2007 Order, while remanding this matter to the Commission for the purposes of:

(a) conducting a de novo evidentiary hearing before the single commissioner; (b) allowing consideration of the current record, as well as any additional evidence submitted by the respective parties, by the single commissioner; (c) entry of an Order by the single commissioner, which contains not only detailed factual findings, but also a thorough explanation of the rationale underlying any rulings; and (d) an Appellate Panel review, which complies with [regulations referenced within the body of the Order], as well as all governing legal authorities, in the event of an appeal by either party.

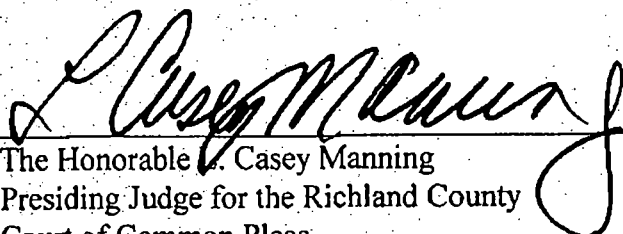
Subsequently, per Motion dated February 4, 2009, Respondents, Sun City Hilton Head Community Association and Liberty Mutual Insurance Company, requested the Court to amend its prior Order in accordance with the provisions of S.C.R.C.P. Rule 59 (e). Essentially, Respondents contend the Court's remand instructions: (a) exceed the scope of relief previously sought by Mr. Bolden; and (b) do not indicate "whether or not any *de novo* hearing should be limited with regard to the presentation of testimony or other evidence."

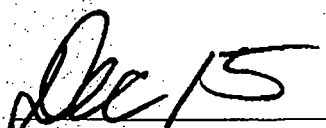
As previously noted, following entry of the January 3, 2007 Order, Mr. Bolden appropriately challenged the Commission's failure to afford him additional oral argument in accordance with Judge Buckner's ruling, which compelled compliance with all "applicable Commission Regulations", including those provisions governing oral argument. Additionally, upon discovering evidence confirming the Commission's attempted utilization of a "unlawful procedure" within the meaning of S.C. Code Ann. Section 1-23-380 (A) (5) (c) (1976, as amended), notwithstanding the divestiture of jurisdiction produced by the February 2, 2007 appeal, Mr. Bolden: (a) timely raised this issue to the Court; (b) sufficiently analyzed the invalidity of this procedure; and (c) amended his prayer for relief. (See, July 11, 2007 Claimant's/Appellant's Memorandum in Support of Petition for Judicial Review). I consequently conclude this Court's January 20, 2009 remand instructions are consistent with Mr. Bolden's alternative requests for relief.

Further inspection of this Court's Order reveals authorization for the single commissioner to consider "the current record, as well as any additional evidence submitted by the respective parties. . . ." In this regard, I conclude: (a) the current circumstances, especially the length of time which has transpired since the May 8, 2002 evidentiary hearing and the issues (including credibility) which must be addressed, warrant a *de novo* hearing before the single commissioner; and (b) this Court's January 20, 2009 Order adequately establishes the parameters relative to the introduction of evidence.

ACCORDINGLY, IT IS HEREBY ORDERED that: (a) Respondents' Motion to Alter/Amend is denied; and (b) this Court's January 20, 2009 ruling is wholly reaffirmed.

IT IS SO ORDERED.


The Honorable Casey Manning
Presiding Judge for the Richland County
Court of Common Pleas

 , 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY AIKEN COUNTY
The Honorable L. Casey Manning
Trial Court Case No. 2007-CP-40-00784

Appellate Case No. 2017-000087

RECEIVED
JAN 30 2017
SC Court of Appeals

Leroy Bolden, Respondent,

v.

Sun City Hilton Head Comm. Assoc., Employer / Appellant,

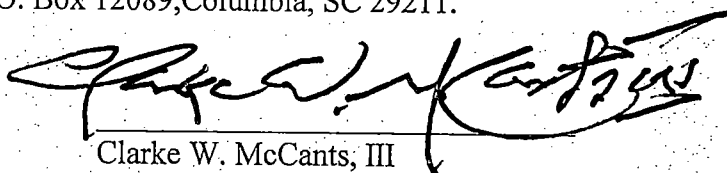
And

Liberty Mutual Insurance Company, Carrier / Appellant.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Memorandum in Support of Allowing Appeal on counsel for the Respondent, Andrew N. Safran, Esquire by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2017 addressed to Andrew N. Safran, Esquire, Andrew N. Safran, LLC, P. O. Box 12089, Columbia, SC 29211.

January 30, 2017



Clarke W. McCants, III
P. O. Box 2881
Aiken, SC 29802-2881
(803) 649-6200
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY AIKEN COUNTY
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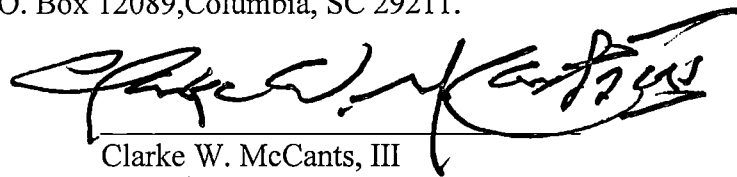
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MCCANTS3rd@aol.com

January 30, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court - S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RECEIVED

JAN 30 2017

SC Court of Appeals

In Re: Leroy Bolden v. Sun City Hilton Head Comm. Assoc.
Appellate Case No. 2017-000087

Dear Ms. Kitchings:

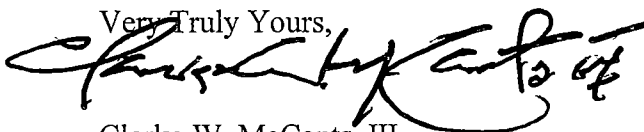
Pursuant to the Court's directive dated January 20, 2017 please file in the above-referenced matter the enclosed Appellants' Memorandum in Support of Allowing Appeal in this case.

Also enclosed is proof of service upon Counsel for the Respondent.

Thank you for your assistance in these regards.

With best regards, I am

Very Truly Yours,



Clarke W. McCants, III

CWM
Enclosure

cc: Andrew N. Safran, Esquire