THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison R. Lee, Circuit Court Judge

Appellate Case No. 2016-001031

Alvin L. Menie, ... Appellant,

v.

State Accident Fund, ...Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Claimant, Mr. Menie, filed a renewed request for hearing on May 12, 2011. (R. p. 59-60). The Defendants filed a responsive Form 51 alleging reasons for denial are: "Claimant did not sustain any compensable accidental injuries within the course and scope of his employment. Specifically, the Claimant's job duties did not rise to a level of unusual or extraordinary such that they caused his alleged injuries/condition". (R. p. 61). (Emp. add.). Numerous hearings were set and reset and this matter came to be heard on January 30, 2012 (R. p. 614). The Claimant timely filed his Pre-Hearing Brief/APA Submissions on January 13, 2012 and Defendants filed their Pre-Hearing Brief/APA Submissions on January 20, 2012. (R. p. 63-263; 264-451). Following the hearing held on January 30, 2012 the Commissioner issued his Request for Proposed Order on March 2, 2012 (R. p. 808) and filed his Decision denying benefits on April 11, 2012. (R. p. 1). A Form 30 Request for Commission Review was filed April 30, 2012 alleging eighteen (18) Grounds for Review which encompassed all issues on appeal. (R. p. 452). Claimant filed his Appellant's Brief, Defendants filed a responsive Brief and this matter was heard by the Full Commission on August 28, 2012. (R. p. 457; 486; 763). After a Request for a proposed Order from Defense Counsel affirming the Hearing Commissioner's Decision, with correction of a

Scrivener's error, the Full Commission Panel filed its Decision on November 29, 2012. (R. p. 21). A Petition and Notice of Appeal, alleging all eighteen (18) Grounds for Review presented to Full Commission plus additional legal errors raised as to the procedure/Order of the Full Commission, was filed December 12th, 2012. (R. p. 504).

After numerous hearings were set and reset by the Circuit Court, all of which had to be continued due to the failure of the Workers' Compensation Commission to forward the Record to the Circuit Court as required by Rule 75, SCRCP, "Record on Appeal to the Circuit Court: Transmittal", the Honorable James R. Barber, III, on April 14, 2014 issued his Order ordering: the SC Workers' Compensation Commission to forward the Record to the Court within seven (7) days of the date of the Order; the parties to follow up with the Clerk's office to confirm receipt; and that this matter was to be reset for hearing with no less than thirty (30) days' notice after receipt before a Non-Jury Term of Court. (R. p. 34-39). The matter was set and after Briefs from Appellant and Defendants, this matter was heard on June 20, 2014 by the Honorable Alison R. Lee. (R. p. 512; 547; 779). At the hearing, all issues of law and fact before the Commission as raised on appeal were argued; after which Judge Lee issued her Order on November 3, 2015 affirming the Decision of the Commission. (R. p. 40). After receipt of the Order, the

Appellant timely filed Motions pursuant to Rule 59(a)(e) and Rule 60(b) on December 3rd noting receipt of the Order of the Court by Appellant on November 23rd, and per the direction of the Court, a Memorandum in Support of Motions was filed on December 14th. After withdrawal of an Order dated 12-28-15 and review of the additional Memorandum of Law submitted, the Motion for New Trial and/or to Vacate and Remand were denied but the Court amended its Order finding the Commission had committed error of law in the admission of testimony from Mr. Adair finding, "Upon further review of the Record, the Court agrees with Menie that the Commission committed an error by admitting and relying upon Adair's testimony" but denied the Motion for New Trial or to reverse on the basis that the, "Court is not relying on Adair's testimony in finding that substantial evidence exists in the Record to support the Commission's Decision" and holding that the admission was harmless although the Commission Findings of Fact and Decision were specifically based in part upon Mr. Adair's testimony. (R. p. 52). Timely Notice of Intent to Appeal was filed and this matter is before this Court for Decision. (R. p. 582).

STATEMENT OF FACTS

The Perfect Storm. First, it is undisputed that in the Fall of 2002 there were three (3) auditors in the Auditing Department of the State Accident Fund to do all of the required auditing

work: Mr. Al Menie, Ms. Carla Johnson and Ms. Shaun Holmon. As of the last week of December 2002 both Ms. Carla Johnson and Ms. Shaun Holmon were no longer in the Auditing Department of the Fund leaving Mr. Menie alone to do all of the auditing work and other responsibilities of the Auditing Department. Ms. Holmon took a job with the State Retirement System as a Customer Service Manager and Ms. Johnson went out on sick leave due to a severe back problem requiring surgery. (See Transcript quotes hereinafter).

Second, it is undisputed that in December of 2002 the State Accident Fund advised all of its premium accounts that they would incur a huge rate increase which would average 24.7% effective January 1, 2003. This was the first rate increase in many years and was the largest increase in the history of the State Accident Fund. (R. p. 63; 633; 624, ll. 16-24; 639, l. 23 - 640, l. 18, 1).

Third, it is undisputed that the State Accident Fund was implementing a new computer system at that time and that the State Accident Fund was not using NCCI classifications codes but was using its own classification codes that had to be entered, checked and corrections made and then re-entered many times before they were usable and would work in the new system. (See Transcript quotes hereinafter). This problem greatly added to the workload of the auditors. [NCCI stands for National Council

of Compensation Insurers which publishes a set of classification codes used nationally to classify all jobs into categories. Jobs in a given category are rated at so much per $100 of salary to determine the premium owed. For example, carpenter rate, $10/$100; $30,000.00 annual salary = $3,000.00 premium.]

Ms. Holmon who testified for Mr. Menie testified that she had been with the State Accident Fund for fifteen (15) years before leaving to take a position with the Retirement System. At the time she left she was a premium auditor and had been in that position for years. (R. p. 625, ll. 3-21).

In reference to the duties of a premium auditor with the State Accident Fund in 2002 she testified:

> "Q: Tell me about how the team concept was supposed to work.
>
> A: Well, it was divided up into 3 or 4 teams. They were assigned accounts, perhaps based on a geographical location, and this particular team was responsible for those accounts from beginning to end as far as those employers, policy holders of the State Accident Fund. You had a group of adjusters, and they would adjust the claims. Had a safety rep, had the premium auditor responsible for the premium, and, you know, several assistants for the most part for the claims adjusters. The concept was set up based on these people, were solely responsible for these 200-plus accounts, any and everything as it related to their workers' comp premium with us, policy.
>
> Q: In reference to emails, mail, communications, questions that had to do with anything in reference to the auditing function, if it came

in from those accounts, who would handle that within the auditing department?

A: Only the premium auditor."

(R. p. 626, ll. 2-23). (Emp. add.)

As to the responsibilities of the auditors and the effect a change in the premium would have on a State or local agency she testified:

"Q: Tell me what an auditor for the State Accident Fund in 2002 under this team concept did we understand premium audits, that type of thing. I'm going to ask you something about scheduling in a minute. But first off, just tell me what all that entailed other than . . . including the audits, but what all it entailed.

A: Well, we generated their premium. The State Agencies were on an F-Y schedule; cities, counties, municipalities on a calendar. And so they received an estimate at the beginning of the policy period, and they received an audit at the end of the policy period, or after the policy period had expired. Of course, with those 200-plus accounts, whether you were discussing the base amount based on those class codes for that type of business, it was our responsibility to assign that, to defend it or justify it, as well as the experience modifier.* In the event that the employer questioned their experience modifier, as to why it was so high or whatever, it was our responsibility to explain that. Those usually consisted of meetings.

(R. p. 627, ll. 4-25).

*(Experience modifier also referred to as E-Mods).

. . .

Q: Tell me what would generally cause an auditor to go out and have a meeting with an account?

A: Well, I think the State -- most of the -- for the most part the State Agencies were the worst because you are talking about huge organizations with a lot of payroll - Department of Corrections, Mental Health, D.S.N. and so they could very well have a million-dollar base premium based on those class codes for that industry, but the experience modifier, the e-mod, took into account the frequency and severity of those claims. SO instead of that premium being for one year, 1,000,000, if they had a 2.0 e-mod it would double, or on occasion they would triple. And so, you were called out to that Agency, and they'd kind of blindside you because you would be under the impression that you were meeting with an H.R. person and when you walked into the room they would have a C.P.A., they'd have their Director and their Benefits Administrator, and you're actually just there to break this down to them to help them understand and justify the numbers. And the numbers weren't always justifiable. Now, hopefully we would hone in on that before we went out there. You could make corrections. But any time someone would challenge the validity of your class codes or your e-mod, you know, it was a problem. Sometime several meetings before conclusion.

Q: So, on a year-to-year basis if somebody's e-mod went up you could pretty well expect a call?

A: They more or less had to call just to keep their job in a lot of instances because, you know there are a couple of people -- especially a huge agency, you know. They've got Benefits Administrators, and for some of them that may be their only job. If it's a small organization, they might be doing workers' comp and a number of other things. You know, they have a Safety Rep who is, you know, responsible for decreasing those claims

as well. So, chances are if it -- you know, and especially if it dramatically increased from one year to the next, I mean, you would actually have to go out on occasion and show them every claim, and they would want to challenge, well, this should have been -- shouldn't have this reserve on it because it was closed, so it should only reflect what you paid on it. But if somebody -- you know, and every year was different as far as perhaps, the customers that would have those kinds of complaints or concerns for meetings because the mod would change every year. So, in a given year it was hard to say, you know, how many of those would occur. It just depended on the organization, the people that were in charge and, you know, based on their request.

Q: But would it be safe to say that anytime there was a significant change in the rate of any of the Agencies that would put an additional stress on those Agency personnel to -- because of the increase in the budget and the problems that it caused for their budgets; is that correct?

A: Oh, definitely. I had Greenville Sanitation tell me once that they were going to have to let somebody go just to pay their workers' compensation premium."

(R. p. 628, ll. 13-17, l. 24).

In a letter to their policy holders, senior premium auditor A.L. Menie wrote,

"Effective January 1, 2003 rates increased an average of 24.7 percent. This is the first base rate increase since 1996 . . . ."

(R. p. 63). (Emp. add.)

Ms. Holmon agreed that there had been no significant rate increases and that this was the largest rate increase to her

knowledge ever in the history of the Agency and that the 24.7% rate increase would generate all types of calls and questions from every Agency to determine whether or not their rate was going to increase and would cause them to argue about whether or not they should be reclassified. She testified generally concerning all the variations and things that would be on the accounts' minds and about which they would be calling as this could cause many people their jobs and cause Agencies to absolutely not be able to meet their budgets. (R. p. 633, ll. 13-23, l. 11).

Next, she also testified about the new computer system that was put in place in 2002:

> "Q: . . . There was a new computer system that came in, in 2002. Tell me what that did to -- did it just come off the ground smoothly or did you all have problems with it?
>
> A: Unfortunately, from what I recall I think we just got the wrong vendor. The other company didn't reach the bid process on time or something. But, you know, we -- the computer system that we got, at that time it had a lot of glitches, the premium piece. They -- you know, I think they had the claims piece down, that model. **But the premiums, it was a lot of work. It was a lot of -- there were a lot of glitches in the system** and the only way to ensure initially that these E-Mods were correct -- because everyone else in the State, they had -- normally they go through NCCI. So NCCI, they are generating those E-Mods. **Well, we generated our own E-Mods, and it was an unstable computer as far as this new program.** Like everything else, it had to iron out the kinks. We would actually have to test them

> because it took awhile before that system was fully functional."

(R. p. 638, l. 7 - 639, l. 4).

She went on to explain that data had to be reentered numerous times and that it generated a lot of additional meetings over the validity of E-Mods which placed even more work on the auditors because sometimes the E-Mods were doubling and tripling the premiums during this time period. (R. p. 639, l. 5 - l. 18).

Ms. Holmon then testified that Ms. Carla Johnson in the fall of 2002 was out a good bit due to her back injury and that this put additional stress on her and Mr. Menie. (R. p. 640, l. 19 - 642, l. 19). By December 31st Mr. Menie was the lone auditor as she had left for another job and Ms. Johnson was out for back surgery. (R. p. 624, ll. 11-21; 640, ll. 24-25).

She was then questioned about the evaluation of Mr. Menie conducted by Mr. Ross Gamble, Executive Deputy Director for the Agency. (R. p. 259-262). In the October 10, 2003 evaluation under "SUMMARY AND IMPROVEMENT PLAN", the Deputy Director noted:

> "Al is to be commended for the personal initiative he took during the late 2002 and early 2003 time when **he voluntarily took on extra duties while we were short two premium auditors to make sure that all policy transactions were completed on a timely basis.** During this same time, he continued to make every effort to delight all customers needing assistance."

Ms. Holmon testified Mr. Gamble also reviewed her job performance; that she had worked with Mr. Menie for many years; and that she agreed with the comment that Mr. Menie was diligent and highly customer focused. Further, based on her experience with Mr. Menie, her observations of him on a day-to-day basis, she would describe him as diligent, as an excellent employee, that he was very personable, and that he would definitely try his very best to make people happy. (R. p. 645, l. 1 - 646, l. 20). In reference to her/their normal and usual job duties as an auditor and the job duties to which Mr. Menie was exposed beginning January 2003 when the two auditors were out of the Auditing Department, Ms. Holmon testified:

"Q: Now, I think -- and I don't want to mischaracterize your testimony, but I think you said that you would describe your job as being as far as your workload, when you were there as an auditor, as being full; that you were able to get the job done, but it was a full workload?

A: Yes.

Q: Now, knowing those, your usual duties, and knowing your ordinary and common duties and ordinary -- your usual and ordinary duties and that you had a full workload to do those, if you had to do all of the duties -- **in your opinion as an auditor with the State Accident Fund, knowing what the job requires, knowing all that, and you all of a sudden had to do all of the duties of all three auditors in the entire Auditing Department, in your opinion would that be unusual and extraordinary to the normal conditions, your usual and ordinary occupation?**

* * *

A: **Yes.**

(R. p. 646, l. 21 - 647, l. 21).

Commissioner Lyndon then asked the witness:

> **"BY THE COMMISSIONER:**
>
> The reason I ask those questions, what has been objected to, he was asking -- he used exactly the definition of unusual and extraordinary conditions to employment. Was that unusual for -- and I'll note your objection, Mr. Haselden -- for a person to have to handle by himself or by herself?
>
> **BY THE WITNESS:**
>
> **600 accounts? Extremely unusual.** That is the kind of thing that, yeah, you might be able to get by with doing it for awhile, but you'd probably be looking for another job, which had something to do with me looking for another job."

(R. p. 650, ll. 8-20).

Finally, she testified that Mr. Ross Gamble, the Deputy Director, had come from Seibel's & Bruce and had experience in auditing and the experience modifiers. However, if he hired someone to come in and replace an auditor and even if they had experience in the area of auditing there would be a learning curve of having to learn the process at the State Accident Fund before they would be of a tremendous amount of benefit in helping to alleviate the workload (e.g., the State Accident Fund did not use the insurance industry standard NCCI Codes). Also, a new employee would require one of the auditors to take on the additional responsibilities to train the individual who was brought in. This fell on Mr. Menie in March 2003 as the only

auditor there when the new auditor was hired; Mr. Warren Farray. (R. p. 654; 657; 661-662).

Mr. Menie then testified and confirmed Ms. Holmon's testimony that in the fall of 2002 there were three (3) auditors in the Auditing Department and that the new computer system was giving them a lot of problems particularly with the experience modifiers,

> "The people that were doing it, the computer techs that were doing it from the IT Department, they would submit the experience modifiers to us, the three (3) auditors, and we were to verify all the data in there as being accurate and which we would find a problem that they didn't see and we would resubmit it back to them and tell them we can't use these experience modifiers because they are, you know, wrong."

This was a constant, repetitive problem requiring resubmission numerous times. (R. p. 671, l. 6 - 675, l. 2).

At R. p. 681, l. 12 - p. 685, l. 12, Mr. Menie described his work duties beginning on January 2, 2003 when he came back to work without the other two auditors and testified that he now had to answer questions from all of the state, local and county agencies; that he spent the first 2 ½ days alone trying to answer all of the questions on his voicemail which contained 25 voicemails before it was full and that it was constantly full; that he had to answer the telephone calls for all three (3) telephone lines, including all (800) calls and all direct calls;

that he had to review/address all correspondence concerning the rate increase; that instead of having 33 audits to do that month, he was now facing having to do 99 audits; that he spent 58% of his time according to his time records on the other auditors' caseload, 400 audits and agencies for which they were responsible, and that in his opinion, "**it was definitely an overload.**" He testified also that on March 3rd, the date that he had the heart condition (atrial fibrillation), wherein he had to be taken to Lexington Medical Center on an emergency basis, that he came in and a new auditor had been hired and reported that day for what was his first day, at which time Mr. Menie's only thought was that in addition to all of the other activities that he had to do that, "I've got this man to train and I've got to keep up with all of these other things as well, and then when I went home about 6:00 o'clock. . . ." He had the (AF) heart attack. (R. p. 681, l. 17 - 685, l. 15; 688, l. 7 - 690, l. 8).

He acknowledged that after filing a Form 12A the claim was assigned for internal investigation by Mr. Willie Hysmith and the State Accident Fund had sent him to Dr. Selman Watson, Ph.D. He had been given a copy of Dr. Selman Watson's report in which Dr. Watson stated that in his opinion he appeared to have suffered a cardiac arrhythmia from, "the accumulation of stress on the job", (R. p. 183) **but he did not know** that Dr. Selman Watson had also written a letter to Mr. Hysmith on July 30, 2003

and had not been told that Dr. Selman Watson in that letter stated the opinion that anxiety contributed to his heart condition last March which was likely from his work. Mr. Hysmith, as the assigned investigator, did advise Mr. Menie that the State Accident Fund had decided to accept the case and were willing to pay him all of his out-of-pocket expenses. (R. p. 690, l. 16 - 699, l. 8). (Emp. Added.)

Mr. Menie then testified as to whether the conditions to which he was exposed in January were unusual and extraordinary as compared to his normal job duties:

"Q: You were doing auditing for the State Accident Fund for a long time and you were aware of your regular and ordinary duties prior to January 1, 2003, were you not?

A: Yes, Sir.

Q: Able to do your job up until January 1, 2003?

A: Yes, Sir.

Q: Would you describe it as a full workload to do your job, the job that you were required of you to do the auditor's job, one job?

A: Yes, yes.

Q: As compared to your normal and usual daily activities, how would you describe the activities in January and February? Were they ordinary and usual, or were they extraordinary and unusual to your normal job duties?

* * *

A: **They -- yeah, they were extremely unusual and out of sequence of the previous months of - 02**

> **or -01 or so forth**. Like I say, I was a very conscientious person, and I kept my work up to date in '02 and previous years, but in '03 it was such a stress load on trying to get all this done and trying to accomplish by talking to each of these policyholders. I sympathized with them when their policy premium went up 300% that they felt they would have to dismiss someone to pay their premiums, I mean, that type of stuff kind gets to a person that has a sympathy feeling towards people under those conditions."

(R. p. 710, l. 3 - 711, l. 11).

Mr. Ross Gamble, Executive Deputy Director of the Agency, in addition to his comments in his performance evaluation report on Mr. Menie performed on October 10, 2003, in an interagency memorandum dated April 15, 2003 noting that Mr. Menie was going to be given a performance raise, (written six (6) weeks after the Claimant had his acute (AF) heart attack/condition requiring emergency hospitalization), stated:

> "We recognize that during the past year you have played and continue to play a key role in collecting the revenue and conducting premium audits. You helped keep these essential functions going **throughout a period of transition caused by staff turnover and other extraordinary circumstances.**"

Dr. Charles Hendricks, M.D. stated in a report under:

Question 1 that Mr. Menie had no prior problems with cardiac problems or high blood pressure prior to his hospital admission on March 7, 2003.

Question 2 that he acknowledged that during the March 2, 2003 hospitalization he and Mr. Menie had a discussion wherein Mr. Menie relayed to him in general terms that he was under a lot of job stress at work.

Under Questions 4 and 5 that he had reviewed the job description of Mr. Menie as an auditor as to his responsibilities and that he had specifically reviewed and discussed the changes in Mr. Menie's workload, hours, and job responsibilities that occurred between 2002 and 2003 and all of the various factors that changed including: Ms. Carla Johnson and Ms. Shaun Holmon leaving the Agency; that Mr. Menie had the responsibility of all auditing and other functions of the Auditing Department alone as of January 1; that a tremendous rate increase of 24.7% occurred that generated a tremendous amount of increase in calls and requests for information concerning the various activities under the responsibility of the auditors' job; and that he had considered the statement by the Deputy Director, Mr. Ross Gamble, wherein Mr. Gamble recognized that Mr. Menie had kept these activities going including these essential functions throughout the period of transition caused by staff turnover and other **"extraordinary circumstances".** (R. p. 76-81).

Dr. Hendricks understanding of these various changes that concurred in Mr. Menie's job responsibilities and the other

extraordinary conditions leading up to his first atrial fibrillation that occurred on March 3, 2003 and his opinions expressed were based upon that understanding.

In Question No. 7, it was his opinion stated to a reasonable degree of medical certainty that Mr. Menie's job responsibilities and workload, or as put by Mr. Gamble, the extraordinary job duties, responsibilities and workload of Mr. Menie's job, were the cause of both his high blood pressure and atrial fibrillation which occurred or developed on March 4, 2003. He also stated that among cardiologists specializing in the treatment of cardiovascular problems that two (2) of the known causes of atrial fibrillation are high blood pressure and physical and emotional stress and that it was impossible to tell which came first, the high blood pressure or the atrial fibrillation and as to which one caused which one, or if they occurred simultaneously. (R. p. 78-80).

In his opinion all of Mr. Menie's subsequent atrial fibrillations and his chronic condition of atrial fibrillation stemmed from the original physical and emotional stress placed on him by his job and that Mr. Menie would have to have ongoing medical treatment for his heart and high blood pressure and would need to be under the care of a board certified cardiologist for the remainder of his life. (R. p. 80).

He stated the opinion that Mr. Menie's condition was permanent and that under the AMA Guidelines for the Rating of Permanent Physical Impairment that Mr. Menie had a 30%-49% whole person permanent impairment and that he should be limited from and was not capable of any stressful, sustained or forceful activity (work) and that he was limited to sedentary work only. (R. p. 83).

Finally, Mr. Menie described the severe limitations that he has upon any type of activity due to his problems with his atrial fibrillation and the medical care that he is receiving from Dr. Hendricks.

The Defendants called two (2) witnesses, Mr. Gerald Allen Murphy and Mr. Kirk J. Adair; **neither of whom were involved with the auditing functions in 2002 or 2003.** The Defendants called no witnesses nor put up any evidence to rebut the evidence that the conditions to which Mr. Menie was exposed were unusual and extraordinary to the usual and ordinary conditions of his job.

Mr. Gerald Murphy testified he had been with the State Accident Fund since 1995 in Personnel Administration and in 2004 assumed the responsibilities of Manager of Administrative Services which included handling personnel recruitment and placement, leave and a performance management system.

His only testimony relevant to the time period of the alleged period of unusual and extraordinary conditions was that

Mr. Menie did not have any extraordinarily long hours during that time period; that Ms. Carla Johnson had actually returned to work in the middle of February and that Mr. Farray who started on March 3rd had experience. (R. p. 729, l. 20 - 733, l. 12). He testified further that after Mr. Menie retired in 2009 (five (5) years later) that they were able to reduce the auditing staff to two (2). He also testified Mr. Chris Bowles, an auditor hired later on by the State Accident Fund had recommended after the retirement of Mr. Menie in 2009 a reduction to two (2) auditors and that when Mr. Bowles later left the Agency, Mr. Farray, the remaining auditor, performed the auditing functions alone for approximately three (3) months. However, he admitted on cross-examination that at the end of that three (3) month period, again after 2009, Mr. Farray was found laying in a comatose state outside of the State Accident Fund, was rushed by EMS to the hospital and then died three (3) weeks later. (R. p. 744, l. 4 - 745, l. 8). He also acknowledged that Mr. Willie Highsmith had conducted the investigation internally along with Crawford & Co.

The admission of Mr. Kirk Adair's testimony, an auditor in 2010, was found to be an error of law by the Circuit Court as being irrelevant, immaterial, and too remote as to the time of the accident in 2003. However, Mr. Adair testified that he was a premium auditor with the State Accident Fund between 2010 and at

the time of the hearing in 2011 and was asked questions concerning the work as a premium auditor at the time of the hearing in 2011. His testimony was objected to as not being relevant or material since he was not a premium auditor during the time period of 2002 to 2003, which objection was overruled, and he was allowed to testify as to the position of the auditor with the State Accident Fund in 2011 (R. p. 754, ll. 16-20; 754, l. 21 - 756, l. 4). On cross-examination he admitted he did not have to enter the experience modifier information at all because: **the system was now, "automated"**. (R. p. 757, l. 22 - 758, l.4). He also admitted the State Accident Fund no longer uses it's "own classification system" and now used the NCCI model which was "in the computer" and the computer simply "automatically generates" the experience modifier. (R. p. 759, l. 15 - 760, l. 13). (Emp. add).

In the Decision of the Hearing Commissioner under Finding of Fact 14, Mr. Adair's testimony serves as the specific basis for the finding that the conditions of Mr. Menie's job as an auditor in 2003 were not unusual and extraordinary. (R. p. 17).

STANDARD OF REVIEW

In addition to the Standard of Review applicable under the APA, there are certain basic fundamental principles that apply to all claims under the Workers' Compensation Act and on the

legal precedents established by our Courts since the inception of the Act in 1936. The most fundamental of which is that:

> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial and a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away and such laws shall be **construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted**, and to avoid any incongruous or harsh results." Cokely v. Robert Lee Co., 197 SC. 157, 14 S.E.2d 889 (1941). (Emp. add.)

Our Appellate Courts have consistently applied that principle to whether or not a Claimant has sustained injury by accident under the Act. In Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000), the Supreme Court held that:

> "In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed towards the end of providing coverage rather than non-coverage in order to further the beneficial purposes for which it was designed. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 674 (Ct. App. 1991). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)." Shealy v. Aiken Cty., supra, at 442.

The Supreme Court went on to hold applying this principle in a case involving injury by accident based on unusual or extraordinary conditions of employment that:

> "This Court has never applied an objective standard of reasonable employment when considering whether a worker was exposed to unusual or extraordinary conditions in employment, but rather has compared the conditions to the workers' particular employment. For example, in Powell, this Court held that 'Powell's altercation with his supervisor was an unusual and extraordinary condition of his employment resulting in a compensable accidental injury'. Powell, 299 S.C. App. 328, 384 S.E.2d at 727 (emp. add). **All the factors considered by this Court in Powell were based upon the Claimant's particular employment, not as compared to objective examples of employment in general.**" Shealy v. Aiken County, 341 S.C. 448 at 458, 535 S.E.2d 438 at 443. (Emp. add.)

Further, under the Standard of Review established in the APA, a Court on appeal may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by error of law or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole Record. S.C. Code Ann. §1-23-380(5)(e) (Supp. 2013). In reference to the definition of substantial evidence, our Appellate Courts have held that substantial evidence is evidence that in viewing the Record as a whole would allow reasonable

(Webster Dictionary defines reasonable as being in accordance with reason) minds to reach the same conclusion that the Commission reached and that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

In addition to reversal based on a lack of substantial evidence or errors of law, under §1-23-380(5) the reviewing Court may also reverse or modify the decision of the Agency if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure(s); (d) is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(A)(5) (Supp. 2006). (Emp. add.).

ARGUMENTS

I. **THE COMMISSION ERRED AS A MATTER OF LAW BY FAILING TO AWARD THE CLAIMANT BENEFITS WHERE HE PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAD SUSTAINED INJURY BY ACCIDENT AS DEFINED UNDER S.C. CODE §42-1-160 AND WHERE THERE IS ABSOLUTELY NO SUBSTANTIAL EVIDENCE TO THE CONTRARY ON THE FUNDAMENTAL ISSUE FOR DECISION, I.E., INJURY BY ACCIDENT DUE TO "UNUSUAL OR EXTRAORDINARY" CONDITIONS OF EMPLOYMENT. THE COMMISSION'S DECISION TO THE CONTRARY IS BASED ON SURMISE, SPECULATION AND INNUENDO.**

The Circuit Court in its initial Decision filed November 3, 2015 sets out an excellent review of the law in reference to establishing under the Act that the Claimant has sustained injury by accident in reference to a heart attack or heart related condition wherein the Claimant must establish by a preponderance of the evidence that the heart attack or condition stemmed from unexpected strain or overexertion or as a result of unusual or extraordinary conditions in his employment. However, in the final analysis the Circuit Court made its Decision not to reverse based on a flawed application of the Decision of this Court in Watt v. Piedmont Automotive, 384 S.C. 203, 681 S.E.2d 615 (SC App. 2009) to the Record in this case. The Circuit Court in its Decision does not err in its legal analysis but errs in its application of the law to an undisputed facts case in reference to the central issue for decision which is whether the Claimant was exposed to unusual and extraordinary conditions in his employment. The Circuit Court in relying on Watt states specifically in reference to the Opinion that:

> "The Court of Appeals acknowledged **that there was conflicting evidence concerning whether Watt was working under unusual and extraordinary conditions in employment**; however, 'it was not the task of the Appellate Court to weigh the evidence as found by the Commission."
>
> J. Lee (11/3/15) Order, at p. 6 last paragraph, (R. p. 46).

Herein lies the flaw in the Court's analysis and reliance on Watt in that unlike the facts in Watt in this case there is no disputed or conflicting evidence as to whether or not the conditions of employment were unusual and extraordinary. Where the facts concerning the essential issue for decision are undisputed, the decision as to whether the Claimant sustained injury by accident is a question of law for the Court. Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (SC App. 1995).

The uncontroverted evidence put into the Record by the Appellant as detailed in the Statement of Facts is as follows:

1) The Appellant testified that the conditions of his employment to which he was exposed between January and March of 2003 were unusual and extraordinary to the usual and ordinary conditions of his employment.

2) His fellow co-worker and auditor who was one of the two other auditors in the Department up until the end of December 2002 testified identically the same, that is that the conditions to which Mr. Menie was exposed between January and

March 2003 based on her knowledge of the usual and ordinary conditions of employment of an auditor in the Auditing Department of the State Accident Fund (SAF) were unusual and extraordinary to those usual and ordinary conditions. In fact, she testified they were extremely extraordinary and unusual.

3) The Appellant put into the Record documentary evidence from the Deputy Director of the Agency that Mr. Menie was to be applauded for his work during this time and period of transition caused by "**staff turnover**" and, "**other extraordinary circumstances**".

4) His treating cardiologist, Dr. Charles Hendricks, M.D., testified to a reasonable degree of medical certainty based specifically on his knowledge of the facts and circumstances of the Appellant's employment that in his opinion the Appellant's heart condition was caused by the Appellant's working conditions.

5) The psychologist to whom the Defendants had sent Mr. Menie during investigation, Dr. Selman Watson, Ph.D., stated the opinion that in his opinion the problems that Mr. Menie was having with his heart were caused by an accumulation of the stress from his job.

6) Neither the testimony of Mr. Adair (whose testimony was excluded as an error of law as being too remote in time and place to be relevant as to the conditions of employment as an

auditor) nor that of Mr. Murphy constituted substantial evidence on that central issue. Mr. Murphy who was not an auditor, was not in the Auditing Department, did not challenge or contest the testimony of Ms. Holman nor Mr. Menie nor the statement by the Executive Director, nor in any way challenged any of the other testimony and factual evidence presented as to the conditions of employment of Mr. Menie in January/February 2003, the only relevant evidence from him as to the time of injury was that Mr. Menie worked only approximately 15-20 minutes longer each day during that time but even as to time, he did not challenge whether Mr. Menie worked through lunches and all of his breaks during this period.

There is simply no evidence in the Record to the contrary. Where there is no substantial evidence in the Record to support the Commission's decision, the Court should and must as a matter of law reverse the decision. Grayson v. Carter Rhoad Furniture Co., 317 S.C. 306, 454 S.E.2d 320 (1995); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (SC App. 2012) (cert. den. 2014).

Further, the Appellant's burden of proof is simply to prove by a preponderance of the evidence that he sustained injury by accident as defined under S.C. Code §42-1-160. The Supreme Court has held since time in memoriam as specifically stated in the case of Groesbeck v. Marshall, 44 S.C. 538, 22 S.E. 743

(1895) that the plaintiff is not required to prove to the jury (the Commissioner in this case) or to establish his case beyond a reasonable doubt but is required simply to prove his case by a preponderance of the evidence which means that when the,

> "plaintiff satisfies the jury by putting into evidence that it is more likely than not that such and such is the case, - not absolutely proved, not absolutely true, . . . nor . . . beyond a reasonable doubt, but, by the preponderance of the evidence that it is more likely than not that such and such was the case, then you can safely say that . . . the complaint has been established by a preponderance of the evidence."

Ever since the Supreme Court decision in Kearse v. South Carolina Wildlife Resources Dept., 236 S.C. 540, 115 S.E.2d 183 (1960), the definition or the standard that a claimant has to meet in a heart attack or a heart condition case is simply this, if the heart condition is, "induced by unexpected strain or over-exertion in the performance of the duties of his employment, or by unusual and extraordinary conditions in employment", the condition is compensable as constituting injury by accident. There are two cases that are instructional in reference to the Appellant's heart condition in this case and whether the conditions of his employment as a matter of law were unusual and extraordinary. First, since the Hearing Commissioner put great emphasis on the length of time to which Mr. Menie was exposed to the conditions, in the case of Poulos

v. Pete's Drive-In No. 3, 284 S.C. 264, 325 S.E.2d 583 (S.C. App. 1985) Mr. Poulus was hired on February 3, 1979 and died of a fatal heart attack on April 9, 1979. He was hired primarily to be responsible for attending the counter and handling the cash register. However, within several weeks of employment he was working longer hours and had to take on additional duties such as preparing food and was undergoing criticism for his dress and appearance. The claimant's family doctor testified that in his opinion unusual stress and strain associated with the employment contributed to the fatal heart attack and Dr. Steven Gold, internal medicine specialist, testified in response to a "hypothetical question" that his working conditions contributed to the heart attack. The Appellant would also note to the Court based on that decision in reference to the Hearing Commissioner's findings that he committed an error of law where he held as a Finding of Fact that a doctor cannot state an opinion in reference to unusual and extraordinary conditions of employment. While it is the Commissioner's decision to state whether or not the Claimant has met his burden of proof from a legal standpoint, a doctor is totally qualified to give an expert opinion as to whether or not the work conditions as described were the cause of the development of the heart condition.

Second, in Cline v. Nosredna Corp., 291 S.C. 75, 352 S.E.2d 291 (S.C. App. 1986), Mr. Cline was a food service manager in April of 1982 when his employer decided to open a second restaurant with a totally different menu, 150 yards apart and in less than four (4) months of having to traverse between the two and overseeing the development of a totally different menu and deal with approximately ten (10) new food suppliers, Mr. Cline developed a heart condition and was diagnosed as having a heart attack due to the conditions of employment. The claim was awarded mainly due to the extra duties that he undertook during that 3-4 months. In fact, Mr. Cline was diagnosed as having sustained a cardiac atrial fibrillation which is exactly the same condition that Mr. Menie developed. Like Mr. Shealy in Shealy v. Aiken Cty., supra, whose work conditions did not involve long hours; and Mr. Powell in Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989) whose conditions of employment involved a verbal altercation between the claimant and his supervisor on one (1) day alone; and Mr. Cline in Cline v. Nosredna Corp., supra, less than 3-4 months exposure and Mr. Poulus in Poulus v. Pete's Drive-In No. 3, supra, exposure conditions of less than two (2) months; and many others, Mr. Menie's unusual and extraordinary conditions in employment did not center around long hours.

Finally, in any case wherein this Court and/or the Supreme Court have upheld a decision denying benefits there has been specific conflicting factual evidence as to whether or not the conditions to which the claimant was exposed were unusual and extraordinary conditions in employment as, for example, in the Shealy case and as this Court found in Watt, supra. There was no conflicting evidence here.

Addressing specifically this Court's decision in Watt v. Piedmont Automotive, supra, first, in reference to the medical evidence presented, Mr. Watt had numerous heart related problems and had been treated for severe heart problems long before his work-related accident. In this case, there is absolutely no evidence in the Record that Mr. Menie suffered from any heart related problems particularly in reference to the two (2) conditions found to exist at the time of his emergency admission on March 3rd that being, high blood pressure and atrial fibrillation. From a factual standpoint on the conditions of employment in contrast to this case, three (3) different employees, Mr. Vincent, the assistant service manager, Mr. Searcy, the General Manager, and Mr. Dial, the Chief Financial Officer, all testified contrary to Mr. Watt that there were no changes in the amount of work needed or caused by the new system; that the new system did not upset customers causing additional stress in that regard, and they all denied that the

new system caused any additional problems, nor did it make customers unhappy causing additional stress on the employees. Again, on this essential issue as to whether the conditions were unusual and extraordinary in this case there is absolutely no contradictory evidence. Even the Deputy Director stated the conditions were "extraordinary".

In addition to the fact that not only did the Claimant meet his burden of proof by proving that it is more probably than not that his injury stemmed from his work activities and that he was exposed to unusual and extraordinary conditions in his employment, there is simply no evidence to the contrary and thus there is no contrary substantial evidence in the Record. The Commission's decision, either granting or denying benefits to an injured worker must be based on **evidence of substance** to support the Award or denial of benefits and must not be based on surmise, conjecture or speculation. Walker v. City Motor Car Co., 232 S.C. 392, 102 S.E.2d. 373 (1958). In this case, the Commission's decision is based on simply that; surmise, speculation and innuendo. No one, and the Appellant would like to emphasize no one, came in and testified that the conditions of his employment during this period of time were his usual and ordinary conditions of employment. There being no such evidence, the Commission erred by not granting this employee benefits.

II. THE COMMISSION ERRED AS A MATTER OF LAW BY RELYING ON THE TESTIMONY OF MR. ADAIR AND THAT PART OF MR. MURPHY'S IN REFERENCE TO THE AUDITOR POSITION, CONCERNING DIFFERENT TIMES AND UNDER DIFFERENT CONDITIONS OF EMPLOYMENT, TO MAKE FINDINGS OF FACT ON THE CONDITIONS OF APPELLANT'S EMPLOYMENT AT THE TIME OF THE INJURY BY ACCIDENT.

Mr. Adair's testimony was stricken by the Circuit Court which has not been appealed and is thus the law of the case wherein the Circuit Court found that his testimony was irrelevant and immaterial to the conditions of the employment at the time the injury occurred but found its admission by the Commission was harmless error. Mr. Adair was not with the State Accident Fund at the time Mr. Menie's injury occurred in 2003. His testimony was related to the position of an auditor between 2010 and the time of the hearing in 2012.

In reference to Mr. Murphy, in addition to his testimony concerning the number of days Mr. Menie worked as the lone auditor and the number of hours worked during the time in question, 1/1/03 to 3/3/03 when the conditions of Mr. Menie's employment were alleged to be unusual and extraordinary, Mr. Murphy's other testimony over objection was as to the work and the work conditions of other auditors at other times; mainly after 2009. Their combined testimony however served as the basis for numerous Findings of Fact on the conditions of employment at the time of injury - 2003. There is no question the Hearing Commissioner relied on the testimony of Mr. Adair

and of Mr. Murphy by finding that there had been, "other times when auditors worked in a like position" and based on this testimony made the following specific Findings of Fact:

> "10. The Defendants' witness (Mr. Murphy) stated there had been other times when auditors worked in a like position for as long as eight (8) months.
>
> 11. As of the date of hearing, the Defendant was employing just two auditors, and the Defendant never returned to three auditors....
>
> 13. The Defendants' witness "Mr. Murphy" was credible.
>
> 14. A second witness for the Defendant (Mr. Adair) testified **he had handled the job by himself and it was not as difficult as his previous jobs . . .**
>
> 18. The pressure the Claimant was under during the short period of time in 2003 was short in duration **and not unusual based on witness testimony**.

The Circuit Court found that the testimony of Mr. Adair was irrelevant and immaterial based on being too remote in time and circumstance to bear any relationship to the accident and the time period in question. Thus, after excluding that testimony, there was left only as a factual basis for the Commissioner's decision Mr. Murphy's testimony alone which was also irrelevant and immaterial as being too remote. It is clear that the Commissioner relied specifically on their testimony in reference to the auditing functions and conditions of employment that were in question at the time of the alleged injury in 2003 as a basis

for finding that the Claimant was not exposed to unusual and extraordinary conditions. However, none of their testimony in that regard applied to that time period or the conditions of the auditor position at that time.

Relevancy and materiality are often confused but there are two (2) general propositions that apply to both, and one in particular to materiality. To be relevant and material, it is necessary that the facts shown by the evidence offered legally tends to prove or make more or less probable, some matter at issue and bear directly or indirectly thereon.

> "If there is no logical or rational connection between the facts sought to be presented and a matter of fact in issue in the case, the evidence is immaterial and inadmissible." Gauze v. Livingston, 251 S.C. 8, 159 S.E.2d 604 (1968).

In this case, the issue for decision was whether or not the conditions of Mr. Menie's employment between January 1, 2003 and March 3, 2003 were unusual and/or extraordinary as compared to his usual and ordinary conditions of employment up until that time. It is totally immaterial to a decision on that issue as to what the conditions of employment of an auditor were at the time of the hearing, some 9 years later or in fact even after March 3, 2003 or at any other future time.

> "Evidence to be admissible, must be material. Evidence which does not fulfil this requirement may be rejected. Thus it may be rejected where the Court deems that a fact is

> not of probative value commensurate with the time required for its use as evidence either because it is too remote or because the fact is too uncertain or speculative in its nature . . ."
>
> 31A Corpus Juris Secundum, Evidence, §295, "Materiality", pp. 395-396.

In North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985), the Court of Appeals of North Carolina found that testimony of an attorney's partner who had left the city several years before the incident was properly excluded as being too remote in time to bear upon the incident in question. More importantly, in two of this Court's decisions, this Court has held that certain evidence was too remote to serve as a basis for decision on the "matter of fact in issue in the case". Gauze v. Livingston, supra. In the first, Henderson v. St. Francis Community Hosp., 295 S.C. 441, 369 S.E.2d 652 (SC App. 1988), this Court held that the testimony regarding the condition of the hospital's parking lot more than one year after the slip and fall accident was too remote and was thus inadmissible in a visitor's negligence action against the hospital. In the second opinion, Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 334 S.E.2d 131 (SC App. 1985), this Court found that the valuation reflected in an appraisal prepared three years earlier was too remote in point of time to be considered in valuing a property destroyed by fire.

In this case, the testimony of Mr. Murphy in reference to the acts and working conditions of auditors was in reference to 2009, some six (6) years after the date of the accident and Mr. Adair's testimony was concerning his ability to handle auditing activities from 2010 through the time of the hearing in 2012. All of this testimony is simply too remote and is totally immaterial, irrelevant and speculative as to the conditions of Mr. Menie's employment at the time of the alleged unusual and extraordinary conditions in the employment, at least six (6) years before any of the conditions established by that testimony occurred.

The admission or exclusion of evidence is left to the sound discretion of a trial judge, or in this case the Commissioner, and an abuse of discretion occurs when the trial court's ruling is based upon an error of law. Allegro, Inc. v. Scully, 400 S.C. 33, 733 S.E.2d 114 (S.C. App 2012) remanded on other grounds, 408 S.C. 200, 758 S.E.2d 716 (2014). In this case, the Circuit Court found an error of law in the admission of Mr. Adair's testimony. Once there is a finding of an abuse of discretion, the remainder of the analysis applies which is that the appealing party to be entitled to a reversal of the decision must show that the error is prejudicial. Prejudice is a reasonable probability that the jury's verdict, in this case the

Commissioner's decision, was influenced by the challenged evidence. Allegro, Inc. v. Scully, supra.

There is no question that the Commissioner's decision that the conditions to which the Appellant was exposed were not unusual and extraordinary is specifically based on his testimony and that it served as the basis for his specific Findings of Fact in that regard. Therefore, his Decision being based on the admission of this evidence and his Findings of Fact having been influenced by the challenged evidence, the admission was substantially prejudicial to the rights of the appellant in this case. While the Commission's Decision must be reversed based on the error of law in the admission and consideration of Mr. Adair's testimony alone, neither the testimony of Mr. Adair or Mr. Murphy concerning the functions and conditions of the auditor's position after March 3, 2003 constitutes any evidence of substance on the fundamental issue for decision before the Commission; i.e., whether the conditions of Mr. Menie's job as an auditor during the time in question in 2003 were unusual or extraordinary up to that time. Thus it does not constitute substantial evidence on the "matter of fact in issue in the case", and the Commissioner's Decision not being based on substantial evidence must be reversed. Lark v. Bi-Lo, supra.

III. THE COMMISSION ERRED AS A MATTER OF LAW BY MAKING A GENERAL FINDING OF FACT THAT, "LABOR TURNOVER, ILLNESS OF CO-WORKERS AND COMPUTER PROBLEMS ARE COMMON TO ALMOST ALL WORK ENVIRONMENTS AND ARE NOT UNUSUAL".

The Supreme Court of South Carolina and the South Carolina Court of Appeals have both found that these conditions can constitute unusual and extraordinary conditions of employment. See specifically Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 922 (S.C. App. 1988); 306 S.C. 46, 410 S.E.2d 248 (1991), in which the Supreme Court and this Court **both found that all three (3) of these factors specifically could and did constitute unusual and extraordinary conditions in employment in that case**. This Finding of Fact is totally and absolutely contrary to law and requires reversal as it indicates that the Commission failed to apply the law of the State of South Carolina to the facts in this case. It also indicates a bias and prejudice against the position of the Appellant and against an award of benefits in this matter in this type situation.

IV. THE CIRCUIT COURT ERRED BY FINDING THAT THE LIMITED RECORDS REVIEW PERFORMED BY DR. ZILES WHICH WAS SUBMITTED OVER OBJECTION AS BEING, AND AS BEING BASED ON, HEARSAY CONSTITUTED SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISISON'S DECISION ESPECIALLY WHERE THERE IS NO EVIDENCE IN THE RECORD THAT IT WAS CONSIDERED AS SUCH OR GIVEN ANY WEIGHT BY THE HEARING COMMISSIONER OR COMMISSION.

On appeal to the Full Commission and to the Circuit Court, the Appellant argued that there was no substantial evidence in the Record to support the Commission's Decision and thus the Decision was based on surmise, speculation and innuendo as to the fundamental issue before the Commission for decision that being whether the Claimant sustained a heart attack or heart related condition induced by unexpected strain or other exertion in the performance of the duties of the Claimant's employment or whether it resulted from unusual or extraordinary conditions in employment. If the factual evidence establishes either, then the heart attack or heart condition is compensable under the Act.

In concluding that there was substantial evidence in the Record to support the Commission's Decision that his working conditions were not unusual and extraordinary, the Circuit Court cited in its initial Decision to the testimony of Mr. Adair, Mr. Murphy and a records review report issued by Dr. Ziles that was admitted into evidence over objection and specifically as to it being hearsay and being based on hearsay and not being based on either the personal knowledge of Dr. Ziles or being based on a properly phrased hypothetical question.

After reconsideration the Court struck the testimony of Mr. Adair from the Record and consideration by the Commission as being immaterial and too remote in time concerning the duties of the Appellant at the time that the alleged accident happened, thus leaving the testimony of Mr. Murphy and the records review by Dr. Ziles. As set forth in the previous arguments, the testimony of Mr. Murphy provides no substantial evidence on whether or not the Appellant was exposed to unusual or extraordinary conditions in employment and is not contradictory in any way, shape or fashion as to the testimony of the Appellant, his witness and documentary evidence as to the uncontradicted facts that he was exposed to unusual and extraordinary conditions in employment during the time alleged.

That leaves the records review performed by Dr. Ziles as to whether or not it constitutes substantial evidence on this issue. First, the Court will find no place in the Order of the Commissioner wherein there is any reference whatsoever as to Dr. Ziles' report other than being listed as an Exhibit. There is no specific reference to it in any of the Findings of Fact made by the Hearing Commissioner which served as the basis for his Decision, nor is there any reference to it in the Conclusions of Law, nor is there is any reference to it in the Decision and Order part of the Decision. In fact, in the Statement of the

Case portion of the Order on R. p. 16, the Commissioner specifically states that,

> "to the extent the medical evidence had any impact on the undersigned Commissioner's Decision; the undersigned Commissioner will address those reports in his Findings of Fact set forth herein below." (Emp. add).

Throughout the entire Statement of the Case there is simply no reference at all to the records review performed by Dr. Ziles and again there is no reference to the report in the sections entitled, "**CONCLUSION**"; "**FINDINGS OF FACT**"; "**RULINGS OF LAW**" and/or the section entitled: "**ORDER**".

The Appellant would submit that the Commissioner's Decision was based only on and addressed only the testimony and evidence including that of Mr. Adair and Mr. Murphy as to whether the conditions of employment were unusual and/or extraordinary as compared to the usual and ordinary duties of Mr. Menie. This is bolstered by the Finding of Fact concerning medical evidence.

Further, the records review report was admitted under Commission Reg. 67-612 (SC Code of Laws, 1976, as Amended) and under subsection I although admitted into evidence by Regulation, a party does not waive such objections as and including relevancy, materiality, qualification of the expert or hearsay. The Record establishes that the Appellant specifically objected to the records review on the basis that the doctor had no first-hand knowledge of Mr. Menie nor had he examined Mr.

Menie; that the deposition of Dr. Hendricks referred to in the report was not admitted into evidence by the Defendants; that there were numerous reports and medical records not referred to in the report as having been submitted to or reviewed by Dr. Ziles for review; that the document and the records referred to within the records review were hearsay and that in addition it contained an additional article that was hearsay and that on all of those bases it was hearsay and should not be put into evidence or considered. (R. p. 620, l. 17 - 621, l. 10).

Besides the fact that there is absolutely nothing in the Record to establish that the Commissioner in any way took into consideration the records review report performed by Dr. Ziles in concluding that the Claimant was not exposed to unusual or extraordinary conditions in employment, the records review was a hearsay report and did not constitute nor does it establish a basis for its submission as opinion evidence. While in an administrative setting, a written report by a physician who has examined the claimant may constitute substantial evidence to support an administrative decision, uncorroborated hearsay not based on the physician's personal knowledge contained in a report of any nature does not constitute substantial evidence. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 59 S.Ct. 206 (1938). The Fourth Circuit has specifically held that the

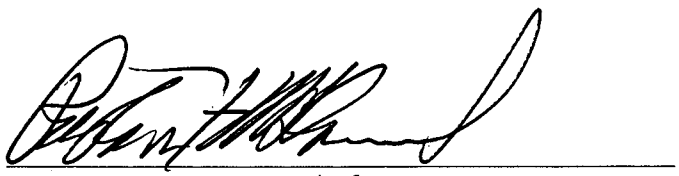
opinion of a doctor who has never examined or treated the claimant cannot serve as substantial evidence to support an administrative decision under the Social Security Act. Hayes v. Gardner, 376 F.2d 517, 4th Cir. (1967). The report of Dr. Ziles therefore constituted hearsay which was objected to; it was not based upon the personal knowledge of the physician; it did not contain a review of all the medical records; it was also based on hearsay within hearsay, or double hearsay, and it does not constitute substantial evidence to support an administrative decision.

Finally, it does not address nor does it contain a review of the facts and circumstances or the job conditions of an auditor before or at the time of the alleged unusual and extraordinary conditions, nor does it even address whether or not the Claimant's conditions to which he was exposed were unusual or extraordinary conditions of employment which was the specific essential issue before the Commission for decision. Therefore, the Circuit Court erred in referring to this evidence, the records review performed by Dr. Ziles, since it was not referred to by the Commission nor did it actually constitute substantial evidence in the Record to support the Decision of the Commission.

CONCLUSION

For all the foregoing reasons, the Decision of the Commission denying the Appellant benefits should be reversed as being based on an error of law in applying the law in reference to a heart attack concerning whether or not the Appellant's heart condition resulted from unusual and extraordinary conditions in his employment and on the further basis that there is no substantial evidence in the Record contrary to that which the Appellant presented which is that the Appellant was exposed to unusual and extraordinary conditions in his employment. The Decision is therefore based on an error of law and is not based on the substantial evidence in the Record and as a matter of law the Court should find the Appellant sustained compensable injury by accident, award benefits, and remand to the Commission to determine those benefits.

Respectfully submitted,



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February 10, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison R. Lee, Circuit Court Judge

Appellate Case No. 2016-001031

Alvin L. Menie, ... Appellant,

v.

State Accident Fund, ...Respondent.

CERTIFICATE OF COUNSEL

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

Dated: February 13, 2017

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