THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Petitioner,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ... Respondents.

PETITION FOR REHEARING

Pursuant to SCACR 221(a), the Petitioner hereby petitions the Court for rehearing on the following points that the Petitioner would respectfully submit to the Court that the Court overlooked or misapprehended in its decision in this matter as set forth hereinafter.

1. That the Petitioner would respectfully first request that the Opinion be withdrawn and Oral Argument be granted specifically and only on this Appeal. This Appeal involves a

reinstatement hearing involving many important issues on which the Court will have very few opportunities to speak. It is one of three Appeals arising out of the same workers' compensation case but is the only one arising out of that proceeding and was originally set for hearing before this Court individually. That argument was canceled and approximately six months later this matter was reset for hearing along with all three Appeals with the parties appearing as both Appellant(s) and Respondent(s) and being given an argument time of 10-10-5 to address all issues in all three Appeals. There was no way the Court could question and the parties could address all of the issues arising out of this Appeal.

2. That as to the **STANDARD OF REVIEW I** - The Standard of Review in this workers' compensation Appeal should be amended to include the following principles. First, the guiding principle of a liberal construction set forth in the Standard of Review by Court does not only apply to Coverage issues but as this Court and the Supreme Court have stated it undergirds our workers' compensation system in that the Act in its entirety is to be construed liberally in favor of the injured worker. Only exceptions and restrictions on coverage are to be strictly construed. James v. Anne's, Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). Also, the Workers' Compensation Act provides an exclusive compensatory system in derogation of common law rights

and therefore the Court must strictly construe such statutes, leaving it to the Legislature to amend and define any ambiguities. Cox v. BellSouth Communications, 356 S.C. 468, 589 S.E.2d 766 (S.C. App. 2005); Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). In Wigfall, the Court also held that where the term, "shall" is used, the action is mandatory.

Second, our Courts have repeatedly held that another guiding principle which must be added to the Standard of Review is the evidentiary principle that the Award may not rest upon surmise, conjecture or speculation but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Hudson v. S.C. State Port's Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). Finally, the construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overturned absent compelling reasons and the Regulations of an agency authorized by the Legislature have the force of law. Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (S.C. App. 1995), rehearing denied.

3. That in reference to **II. ISSUE #1** of the Opinion, the Court overlooked or misapprehended the fact and law that the Commission's decision must be based upon the evidence in the Record and cannot be based upon surmise, speculation or

innuendo. Pleadings or forms are not evidence. In Finding of Fact No. 6, the Commission found that the:

> "termination was based on a denial of the claim following an investigation. This is based on the Form 15, section II. dated September 12, 2013."

However, there is no evidence in the Record of an investigation; only the "representations" made by counsel for the Respondents. In Finding of Fact No. 7, the Commission found that the evidence in the Record was sufficient to establish that the Defendants had the medical records of the client in their possession prior to September 13, 2013 and that those records alone, "provide a basis for the Defendant's knowledge and good faith denial." (R., p. 28). Then in Finding of Fact No. 10, the Commission does not refer to or set out the factors and evidence that the Court refers to in its Opinion but instead, again based on a pleading, makes the Finding of Fact not that a, "good faith investigation" had disclosed the pre-existing factors that the Court refers to but simply that **the Form** contains the unsupported allegation that the basis was that the Claimant, "employee fails to meet the burden of a compensable injury ..." (R., p. 28). This is not evidence.

When the Court makes the statement from the Record that:

> "Winfrey's medical records evince a prolonged history of tobacco and alcohol use, obesity, and a family history of heart disease."

and then states that:

> "Archway points to Winfrey's tobacco and alcohol use, obesity, and family history of heart disease as potential causes of Winfrey's heart ailments." (emp. added).

Why is that not judicial fact finding? Where is the evidence there are "potential causes"? Where Liberty Mutual had accepted the claim where is the evidence Mr. Winfrey or Liberty Mutual's authorized doctors told they were questioning causation? Where are these potential causes even listed as a basis on the form? Why were the records if they were the basis not attached to the form? From the Record: why is it not surmise that these factors could potentially cause Mr. Winfrey's heart problems or were the basis for Liberty Mutual's decision?

The statute and Commission Regulation both set forth that in a stop payment, "without a hearing," situation under S.C. Code §42-9-260 (A)(B)(1-6), the insurance carrier is the moving party and thus has the burden of proof. Rule 67-612(B)(4), "the carrier **shall** be deemed the **moving party** in all hearings pursuant to a request under R. 67-504(C)." "**COMMISSIONER BECK:** ... as a moving party, Mr. Hughey, you may call your first witness ...". (R., p. 381, ll. 21-22). As the moving party without citation, the carrier has the burden of proof.

Not in any of the Findings of Fact but in the Conclusions of Law, the Commission found that the Defendants **"represented"**

to the Commission that their grounds for denial was a "good faith investigation" that the Claimant had failed to meet the burden of compensable injury. The Commission then specifically held as a matter of law, under the Act that , "**Claimant bears the burden of proving by a preponderance of the evidence**" (R., p. 30). Then, after stating that the Claimant has the burden of proof, the Commission then goes on to make the Conclusion of Law,

> "**a belief of the Defendants** formed following a **good faith investigation** that Claimant had **not met his burden of proving compensability** is adequate grounds for denial of the claim by the Defendants".

In Conclusion of Law No. 4, the Commission held as a matter of law, not a Finding of Fact, that Defendants terminated benefits,

> "on the **justification** that a good faith investigation reveals grounds for the denial of the claim".

The Commission in Conclusion of Law No. 4, again not a Finding of Fact, makes the holding as a matter of law that:

> "it is **possible** for Defendants **to have drawn a conclusion in good faith based on Claimant's medical records** that he suffered from pre-existing medical conditions unrelated to his employment that could be contributing to his current symptoms that would justify denying the claim."

The Court overlooked the fact that the Commission clearly states that the Claimant has the burden of proof in proving a compensable injury a principle with which everyone agrees, where

a claim is denied; but then makes absolutely no statement that the Defendants have the burden of proof to prove (present evidence) that: 1) they have conducted a good faith investigation, and 2) the good faith basis (evidence) for denial that is disclosed by that good faith investigation.

There is no evidence in the Record setting forth the proof of, and the findings of, any investigation. There is no evidence they contacted the authorized treating physicians to determine their opinion prior to September 13th. There is no evidence that they contacted any medical doctor or medical professional such as even a nurse to determine whether or not the cause of the Claimant's problem was the work-related accident. There is no testimony from an investigator nor from the adjuster or any other representative of the insurance carrier (or employer who was really not involved in this hearing) of any investigation that was conducted or the evidentiary basis for the denial. There are simply medical records and "**representations**" by Defense Counsel that those medical records constituted the investigation and the basis for the stoppage of benefits.

Our whole system of justice is based upon the presentation of evidence and there is simply no evidence linking any pre-existing conditions or facts found in the medical records to a decision to deny benefits. There must be evidence linking any

facts found in the medical records to the determination made and it simply is not there.

In fact, an issue that was not contested on appeal which is found in Finding of Fact No. 13 is that the Claimant is:

> "alleging a medically complex condition resulting from an injury by accident" and further that, "the causal relation between Claimant's alleged electrical shock and his current medical condition, **is one that can best be determined by review of the expert medical reports ...**".

So where is the evidence that is part of their alleged investigation, that the Defendants contacted any doctors prior to September 13th (much less their authorized treating physicians) or that there is any medical evidence in this, "medically complex case" to establish under evidence a cause other than the electrocution as a cause of injury.

Did the Defendants have the burden of proof to prove they had conducted a good faith investigation? Yes. Are there any facts, evidence, in the Record of pre-existing conditions upon which they could have formed a belief that there was a basis for a denial based on those pre-existing conditions and that they would require Claimant to meet his burden of proving a compensable injury? Yes. Is there any, "evidence" in the Record not, "representations" that the pre-existing conditions found in the medical records constituted a potential cause and the basis for the denial of benefits? No.

The Defendants have the burden of proof to prove a good faith investigation and the basis of any belief they formulate.

There is no evidence of the actual basis, and again the actual basis, based on evidence that resulted from a good faith investigation necessary to meet the Defendants burden of proof.

The Commission then found that the Claimant did not provide any evidence at the hearing to indicate the Defendants acted, "in anything other than good faith". Where is the evidence of good faith that needed to be controverted by the Claimant? In other words, where is the prima facia case that needed to be rebutted. The Commission clearly failed to set out that the Defendants had the burden of proof under the statute and regulation and then clearly shifted the burden of proof to the Claimant to rebut a prima facia case that was never made by the Defendants.

4. That as to **III. ISSUE #2**, Petitioner agrees that if the Defendants are found to have met their burden of proof they conducted a good faith investigation and submitted evidence that they had found a good faith reason to deny benefits, they are not subject to the fine.

5. That in reference to **IV. ISSUE #3** in the Opinion the Court clearly overlooked the Commission Regulations in regard to the time for admission of APA Submissions and Pre-Hearing Briefs. Reg. 67-612 provides for the submission of expert

reports and APA Submissions and specifically in reference to an expert's report which is what medical records from doctors are, Reg. 67-612(B)(1) provides that the moving party must provide for the report at least 15 days before the scheduled hearing. Under that same Regulation, under subsection(B)(4), the carrier is deemed to be the moving party in a reinstatement hearing which is what this hearing was under Rule 67-504(C) and had to file and serve APAs fifteen (15) days before.

In addition, the Court affirmed on the position taken by the Respondents and the Circuit Court Rule, and while the Petitioner would submit that it was agreed that the Pre-Hearing Brief was late filed, the time for filing under the Regulation is different from our Circuit Court Rules specifically as to the Pre-Hearing Brief. Reg. 67-611(A) and specifically subsection (B)(1) controls the filing of a Pre-Hearing Brief and specifically provides that the Pre-Hearing Brief and Proof of Service must be filed "**at least 10 days before the hearing**". Where the 10th day before the hearing falls on a Saturday, Sunday or holiday, the Regulation has been and is interpreted by the Commission to require that the Brief be filed on the last day before the holiday, Saturday or Sunday. In this case, to have been timely filed, the Pre-Hearing Brief should have been filed on the Friday before it was filed in this case. This specific requirement is the same as and is in accordance with other

stricter, different requirements in the various Rules of the Circuit Court and Appellate Courts which set specific deadlines for filing or providing notice to various parties involved in specific situations [see, ex. SCACR Rule 221(a)]. The Regulation has the specific purpose of making sure that no later than 10 days before the hearing, the parties have notice of the position of the parties and the documents that have been submitted or will be submitted. Regardless the APAs, documentary evidence, were late.

Finally, the Petitioner would ask the Court to look at p. 9 in the Order of Commissioner Beck where Commissioner Beck clearly states that the Pre-Hearing Brief of the Respondents was not timely filed and where he gave the opportunity during the informal conference to continue the hearing to allow the Petitioner, "adequate time to respond to Defendants Pre-Hearing Brief, Notice of Witness, APA Submissions and Exhibits." There is no question that the Pre-Hearing Brief was filed late, as were more importantly, the APA Submissions evidence.

6. That as to **V. ISSUE #4**, the Court overlooked the fact that the Petitioner nowhere, and the Petitioner wants to reiterate nowhere, in the Record stipulated to the evidence to be considered was only evidence before September 13, 2013. What the Court will find from a review of the Record, is that after the pre-hearing conference, the Commissioner told the parties

that he was only going to, consider "evidence" on and before September 13, 2013 (R., p. 378, l. 15, l. 23; p. 380, ll. 14-17). Funny, then the Commissioner bases his decision on a pleading form, not "evidence" filed September 13, 2013. Quoting the Commissioner:

> ". . . the Commission file becomes a part of the Record with the exception of self-serving declarations . . ."

Petitioner guesses the form is not a self-serving declaration.

7. That as to **VI. ISSUE #5,** the Court misapprehended the argument being made as to the pre-hearing motions conference that was held off the Record. The Hearing Notice was made a part of the Record which is found at the Record at p. 57. A party is required to be given notice of the issues to be addressed and it is a denial of due process and it is required that the case at the least be remanded where the Commission goes into issues of which the party did not have notice. The purpose of the hearing is set forth in the **Subject** of the Hearing Notice: "to determine if Claimant's temporary compensation was legally terminated." There is simply no reference to the fact that the outstanding motions would be considered at that time.

As all of the members of the Court are aware, and which the Petitioner is pointing out in this case, motions in reference to discovery are scheduled soon after they filed because the parties have to have rulings on those so that there can be

adequate preparation for the trial. In this situation, because the insurance carriers are stopping a claimant's benefits without hearing, the law makes a provision for a quick hearing. The Commission should have held a hearing on those motions way before the hearing that was held in this matter. Also, based upon a review of the Hearing Record the Court will find, which Petitioner verily believes and hopes that the Court will find to be abhorrent to due process, that the Petitioner did not even know until the day of the hearing that he would not be allowed to take the deposition of the adjuster and that the Defendants would have to produce their file but only 30 days after the hearing. The very purpose of requesting the file was to present evidence on the essential issue for decision so the Commissioner based on evidence, as argued above, could decide whether or not Defendants had conducted a good faith investigation which they, "represented" to the Commissioner they had conducted.

Again, in reference to the shifting of the burden of proof, the Defendants have the burden of proof, not to prove compensable injury but they have the burden of proof where they have chosen to stop benefits without a hearing to prove that they conducted a good faith investigation and the basis they found for denial. That is their responsibility under the statute and that is their responsibility under the Regulation as passed by the Commission. They are the moving party. The

moving party has the burden of proof. They had the burden of proof to prove that they conducted a good faith investigation. That was and is simply the issue before the Commission. How can it be argued that the Commission did not shift that by not requiring them to put forth evidence in that regard but simply to, "represent" to the Commission that they had conducted a good faith investigation and then make a specific Finding of Fact that the Claimant had not provided any evidence at the hearing to indicate that the, "Defendants acted in anything other than good faith ...". Without evidence to substantiate a good faith investigation, not medical records and not assumptions, but evidence of a good faith investigation establishing a prima facia case of a good faith investigation, and then without that the Claimant is required to put up rebuttal evidence that they had, "not conducted" a good faith investigation, how can it logically be argued that the burden of proof was not shifted to the Claimant? That is illogical.

The Court stated the Petitioner provided no "evidence" (there's that word again), that the single Commissioner had made decisions based on "evidence" not contained in the Record. In Conclusion of Law #2 (c) and (e), the Commissioner bases his ruling on the "representations" of the Defendants ("Defendants represented to the Commission"). The Court will not find those "representations" anywhere in the Record before him.

Even in their Pre-Hearing Brief, facts in issue:

> "Defendants have denied this claim pursuant to SC Code §42-9-260. The issue for this hearing is whether or not claimant can meet his burden of proving a compensable claim pursuant to the Act."

Where in the Record are the "representations"; where are the "factors" the Commissioner found they "possibly" relied upon?

8. That as to **VII. ISSUE #6,** in the Court's opinion, the Court overlooked or misapprehended that the Subpoena was issued under the Workers' Compensation Act; was for the deposition of the adjuster as the managing agent for the corporation, Liberty Mutual, a party to the action and whose name appeared on the Form 15, filed with the Commission stopping benefits and was for the production of Terri Hughes's file and other documents to which she as a party had access; that nothing in the subpoena prevented the Defendants from naming a 30(B)(6) representative as to any documents not relevant to the deposition of Ms. Hughes as a managing agent for the corporation in her capacity as a party as such; and that the Workers' Compensation Commission is not a Court but is a quasi-judicial body which is limited to its statutory authority; and nowhere in the Motion to Quash the Subpoena will the Court find any reference to or citation of the legal basis upon which the Commission actually based its decision.

First, this Court needs to address the legal fact that the

Commission's decision contains legal arguments outside of those made by the parties and issues raised. Since the Commission is a quasi-judicial body made up of lay and attorney Commissioners and since the specific basis for the Court's Opinion affirming the decision, which is a legal basis by the Commission found at p. 3 of the Record, where did that legal argument and basis come from? A review of the Motion to Quash, Pre-Hearing Brief, and Hearing Transcript will establish that the basis for and decision made by the Commission is nowhere to be found within that Motion nor is there even any reference to 30(B)(6) anywhere. S.C. Code §42-3-250 makes the Commissioners subject to the Code of Judicial Conduct as contained in Rule 501. Under Cannon 3(B)(7) and subsection (b), a Judge shall base his/her decision on the evidence and arguments made to him and shall not consider ex parte communications and shall not consult with outside legal experts concerning the issues of law "unless the Judge gives notice to the parties of the person consulted and/or the substance and advice sought and affords the parties a reasonable opportunity to respond." Where is that legal argument?

Next, the Court misapprehended and overlooked the fact that the subpoena was specifically for the adjuster as a party as the assigned Managing Agent as evidenced by the Form 15 II, that was filed by her with the Commission stopping payment of benefits on

September 13th. The Commission is a quasi-judicial body, not a Court, and is a creature of statute as is the Workers' Compensation Act, and its powers/authority is only as set out in the statute. Subpoenas, for the production of books and records and witnesses is provided for under S.C. Code §42-3-140; S.C. Code §42-3-150 provides for attendance of witnesses, taking depositions and production of records and subpoenas in conjunction with proceedings; and §42-3-160 allows for the taking of the deposition of witnesses either "within or without the state". Under Commission Regulation 67-214, attorneys are authorized to issue subpoenas on behalf of the Commission. Under §42-3-160, depositions are taken pursuant to the Circuit Court Rules.

Again, this Subpoena was for the deposition of the adjuster as a party as the managing agent on the file for the insurance carrier.

Under SCRCP Rule 45, under subsection (a), a subpoena for attendance at a deposition shall issue from the Court or the County designated in the Notice of Deposition and specifically provides that there is a different treatment for a subpoena issued to a person, "who is not a party or an officer, director or **managing agent of a party**". Under subsection (b), service on any person may be made in the same manner as prescribed for service, "of a summons and complaint in Rule 4(d) or (j). Under

Rule 4(d)(3), in reference to corporations, the Summons and Complaint may be served on a corporation by delivering a copy of the Complaint to, "an officer, **a managing or general agent** or any other agent authorized by appointment or by law to receive service of process. (Counsel will not bother with citing the numerous decisions by this Court and the Supreme Court in reference to agents wherein even a timber agent is considered as a managing agent and an appropriate party for service on a corporation). Rule 30(2), specifically provides in reference to a deposition that, "**a party may be compelled to attend in the County in which the subject civil action is pending".** The adjuster was subpoenaed as a party as one of the flesh and blood designated human beings that can be subpoenaed for a corporation as a party. See for example: James v. South Carolina Department of Transportation, 393 S.C. 440, 711 S.E.2d 919, (S.C. App. 2011).

The notice of stopping payment of benefits filed with the Commission on September 12, 2013 **was issued by Ms. Terri Hughes**, Senior Claims Specialist II for Liberty Mutual Insurance Company. **Ms. Hughes certified** by her signature that she had served the form per Rule 67-211 on the form and line stating, "signature of claims administrator". **Ms. Hughes** also attached a Form 19 Status Report in which she asserted that she was the, "employer's representative". (R., pp. 37-39). The caption on

the subpoena and to whom it was directed which was served on the Attorney of Record for the Defendants at that time was captioned and addressed to **Ms. Hughes** as follows:

> "TERRI HUGHES, SENIOR CLAIMS SPECIALIST II, as Managing Agent for the Insurance Carrier **and** as a 30(b)(6) Representative of the Insurance Carrier. (R., p. 43)."

In addition, the form subpoena, which was issued pursuant to the Workers' Compensation Act under the authority provided for the production of records, checked and required the production of records on a different date, September 30th, as compared to the date of the deposition set for October 2nd. There is no reference to this being for a 30(b)(6) representative and was within the format prescribed by the Workers' Compensation Act.

Further, there was no objection made by the Defendants/ Respondents to the subpoena as being an improper designation as a 30(b)(6) representative nor was there any effort to designate a separate 30(b)(6) representative. The Defendants simply sought to avoid the Claimant having the right to take the deposition of Ms. Hughes as the managing agent on the file who instituted and instigated the stopping of this man's benefits without a hearing. Without citation, this Court and our Courts have always been committed to liberal discovery and Counsel would beg the Court to tell him in light of the Record in this

matter, any evidence in the Record that would establish that Ms. Hughes was not the managing agent for Liberty Mutual and how that subpoena should have been captioned in reference to the Appellant's desire to take the deposition of Ms. Hughes. The Court will also not find any effort on behalf of the Defendants to allow the deposition by telephone or to require the deposition be held where Ms. Hughes resides, either of which Counsel would have been glad to accommodate. Also, under the rulings and in particularly under the ruling of James, the Appellant is well aware that he would be responsible of payment for the witness fee and the costs for Ms. Hughes to have attended the deposition.

Next, Rule 37(2) places on a corporation or other entity the responsibility to designate a 30(b)(6) representative and specifically provides that the failure to do so can result in sanctions for failure to cooperate in discovery. Quoting subsection (2):

> "a corporation or other entity fails to make a designation under Rule 30(b)(6) ... the discovering party may move for an Order compelling ... a designation, ..."

The Defendants never defended on this basis. It was wrong for the Commission to go outside of the issues presented and to consider, obviously, outside legal research and advice. The subpoena is in accordance with and actually goes far beyond the

requirements of normal practice and procedure in reference to the issuance of a subpoena and was actually more encompassing than is required under a concept of liberal discovery. The Commission had a responsibility to timely rule on the Motion to Quash and not to wait for the date of trial to do so.

How in the world can it be argued that the Claimant was not denied due process by not having the opportunity to perform discovery on the very person that signed the pleadings that stopped his weekly checks and stopped his entitlement to medical care at a time when under doctor's orders he was supposed to call EMS if he had a 2-pound weight gain or loss on a given day and when he was totally disabled and had no other source of income to pay the normal subsistence of life? Ms. Hughes signed the 15 II; Ms. Hughes certified that she was the Claims Administrator; Ms. Hughes asserted to the Commission that she was employer's representative.

Finally, an issue this Court does not want to address but at some point, needs to be addressed, the Workers' Compensation Commission is a creature of statute and it is limited specifically to its statutory authority. There is literally no statutory authority for the Commission to entertain a Motion to Quash. The enforcement powers of the Commission are extremely limited and in addition to that, the enforcement powers of the Commission as to discovery lie where they have always laid since

the inception of the Act and that is in the Circuit Court. It is up to the Circuit Court to enforce all discovery proceedings within the Commission in its authority over its Rules. If the Court wants to deal with this issue which at some point, it has to deal with, the Court will find that the Circuit Courts have always enforced the subpoenas and there are specific decisions by the Supreme Court directly on point. Wofford v. Ethyl Corp., 316 S.C. 75, 447 S.E.2d 187 (1994); prior to the advent of the Circuit Court Rules, the statutes read, "the Court of Commons Pleas shall upon application . . . enforce by proper proceedings" . . . §72-63 S.C. Code of Laws, 1962.

The Commission was wrong to quash the subpoena. The Commission was wrong to not allow discovery and the Commission did deny the Claimant due process and the Claimant's Counsel would beg the Court to tell him what he should have done in reference to issuance of a subpoena that was not done in this subpoena or what he could have stated to have the fundamental right to take the deposition of the very representative of the company that asserted to the Commission and certified to the Commission that she was the company representative and who stopped this Claimant's benefits. The Act is to be liberally construed in favor of benefits to the injured worker, to cast upon industry upon 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. The right to trial by jury was taken away from the injured worker in exchange for swift and sure compensation. Citation as to these fundamental principles of the Act are omitted as not being necessary.

9. That as to **VIII. ISSUE #7** in the Court's Opinion, the Petitioner agrees with the same and does not request rehearing on this issue. The Full Commission altered Finding of Fact No. 2 to the extent that it is not prejudicial nor binding on the parties as establishing an exact date of the myocardial infarction.

10. That as to **IX. ISSUE #8** of the Opinion, as to A. and Findings of Fact Nos. 4, 5 and 6, the Appellant agrees with the Court as to Findings 4 and 5 and the only objection is to the sentence contained in Findings of Facts No. 6 that the, "determination was based on a denial of the claim <u>following an investigation</u>." The Petitioner would submit as he did in his Brief that this is a Finding of Fact which would be binding on Appeal which must be based on the Record. That sentence as challenged, makes a Finding of Fact on an essential issue for determination by the Commission that the basis for a denial of the Claim was, "following an investigation" and would make it a fact that there was an investigation performed that would meet the requirements of conducting a good faith investigation which

is not in the evidence. As cited above, the Commission's decision must be based on the Record and the evidence before it and if it is not based on the evidence, it is the subject of surmise, speculation and innuendo.

As to Finding of Fact No. 7, while the first part of that finding would provide a reasonable basis for concluding that the Defendants had the medical records of the Claimant prior to September 13, 2013, the Petitioner verily believes that the Court overlooked or misapprehended the remainder of that finding which is that the medical records alone, "provide a basis for the Defendants knowledge and good faith denial". (Emp. added.) Since the Commission is the fact-finder (jury), as the Court knows, the Supreme Court long ago in its decisions added and held the Act adds a specific safeguard requiring the Commission to make detailed Findings of Fact and Conclusions of Law that are sufficiently definite and detailed enough to allow for judicial review. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962). The Commission must make those Findings of Fact on all essential factual issues and "awards without such specific findings do not comply with requirements of the Act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). As an example, in the case of Hill v. Jones, 251 S.C. 219, 178 S.E.2d 142 (1970). Where the Commission made a finding that,

> "in the absence of any medical testimony to the effect that the Claimant had a history of suffering from physical seizures and since there is so much controversy as to how the Claimant fell."

The Supreme in remanding that Finding of Fact as being inadequate held that the vice in such a finding,

> "which we here disapprove, is that the quoted statement, in the absence of <u>further factual</u> or legal clarification of the <u>basis</u> for the ultimate finding of compensability, creates a substantial question as to whether the majority Commission applied the correct rule of law ..." (Emp. add.).

in reference to the essential factual issue and issue of law for decision.

The essential issue in this case under the pleadings was whether or not the evidence in the Record established that the Defendants had conducted a, "good faith investigation". This Finding of Fact contains no factual references to the evidence in the Record to either the specific communications between the Claimant's attorney and the Defendant's representatives nor does it contain specific references to the medical records that would establish that the claim was not compensable.

11. That as to **(C) Finding of Fact #8**, most respectfully, that Finding of Fact is nowhere near to being a Finding of Fact but is actually a Conclusion of Law. This Court's statement in its decision is much more of a Finding of Fact than is the Commission's Finding of Fact No. 8. It is not the job of this

Court to perform the Commission's duty. The Commission is the fact-finder and the law requires that they make Findings of Fact on the essential issues and where they have not done that, this Court and the Supreme Court have repeatedly reversed those decisions and remanded to the Commission to perform their statutory responsibility. Most respectfully, this Court refers to the "myocardial infarction" and the resulting surgery to repair a ventricular septal defect as evidence of this being a "medically complex case" but yet that is not contained in the Commission's Finding of Fact: where is it? It is not there and the Commission has not fulfilled their statutory duty to make detailed Findings of Fact. The Petitioner is well aware that the decision by the Legislature in 2007 to provide for direct appeal from the Commission to this Court has placed a much greater burden on this Court as to the review of the Record and to oversee the responsibility of the Commission as to practice procedures and adherence to the Act. Prior to 2007, this matter would have been reviewed by the Circuit Court and would have been remanded to the Commission to make those detailed Findings of Fact and Conclusions of Law at a minimum. Unfortunately, now this Court must fulfill that role in addition to its other judicial responsibility to review the decisions of the Commission.

While not pertinent to a review of the adequacy of this

Finding of Fact, the Petitioner would differ with the Court as to this being a, "medically complex" case. The Court in its quotation leaves out that part of the requirement concerning a medically complex case that has to be considered in determining whether a case is a medically complex case. The Court recites and applies that part of the definition that the case must require, "highly scientific procedures or techniques for diagnosis or treatment" but leaves out the remainder of that sentence which defines the type of procedures and provides that, "**excluding MRIs, CT scans, x-rays, or other similar diagnostic techniques**." There are no, "highly scientific procedures and techniques" necessary to diagnose a myocardial infarction and septal defect. A doctor can diagnose those simply by the use of a stethoscope and that diagnosis was made long before even MRIs or CT scans were in existence.

12. That as to subsection **(D) Finding of Fact #9**, the Petitioner did not challenge that Finding of Fact individually and would not disagree with the Court's decision other than to state that when reviewing a Finding of Fact, the standard is whether or not it is a Finding of Fact that is sufficiently definite and detailed enough to allow for judicial review as to the essential factual issue which it addresses.

13. That as to subsection **(E) Finding of Fact #10**, the Petitioner would submit that there appears to be a fundamental

disagreement between the Petitioner and the Court over "state" versus "prove". The Court would agree with the Petitioner that pleadings are not evidence. The Petitioner is sure that every member of this Court has filed numerous pleadings even with the Workers' Compensation Commission. In every case, no matter what Board, Commission or Court you are before, the moving party has the responsibility to prove the allegations in the Complaint or Motion or the Form 50 or in this case, the Form 15 II. The Claimant and actually his employer agreed that Mr. Winfrey had sustained an injury by accident under the law that was compensable and reported it to the insurance carrier, Liberty Mutual. Liberty Mutual at that time accepted the claim as establishing a compensable injury by accident under the law. Liberty Mutual then approximately 118 days later filed a, "pleading" alleging that they had conducted a good faith investigation that established a basis for good faith denial. As the moving party, they simply had to put up evidence to establish that. Petitioner has been trying to think of a good example since there seems to be a lack of agreement on the fact that the Defendants who want to stop the Claimant's benefits without a hearing should be entitled to do so: without putting up any evidence; without conducting a good faith investigation; by simply throwing into the Record the medical records that simply establish that he had some pre-existing conditions; and

that the Commission can then review those and surmise that, "yes, in my opinion 'it is possible' you had sufficient grounds to deny this case"; and without putting up anybody to say that that was in fact the basis. (Petitioner would ask the Court to note that there are two totally different allegations as to the basis for denial; one being that he failed to establish compensable injury by accident and the other being the argument that he had pre-existing conditions that he smoked, etc.). The best correlation Petitioner can think of is in family Court and in criminal law as in a pendente lite decision or obtaining a search warrant. In a pendente lite hearing, you have to put up documents and records supported by affidavit or in other words, you have to produce some evidence. In obtaining a search warrant, you have to put in enough evidence to establish probable cause. Where is the evidence in this case of a good faith investigation other than unsupported, "representations" made by defense counsel to the Commission that the Commission should review the medical records and should find that Mr. Winfrey had pre-existing conditions such as smoking and should surmise that could have caused a heart attack. Medical evidence? After acceptance should there not be evidence to defeat the burden to require the burden?

There is nothing in this Record that is evidence to show either a good faith investigation or to defend compensable

injury by accident. In reality, the Defendants got the Commission to chasing rabbits and not looking at the evidence by alleging the smoke screen that this is a heart attack case. The heart attack standard has never been applied to an electrocution injury. Buff v. Columbia Baking Co., 215 S.C. 41, 53 S.E.2d 879 (1949). In reality, there is no difference between someone smoking as a possible cause of a heart attack versus somebody having degenerative changes in their back which are then aggravated by a subsequent work-related injury. Neither of those establish that the Claimant did not sustain injury by accident under the Act. Uncontested in the Record in the only records that the parties were allowed and considered which were prior to September 13, 2013, the day the Claimant found out that Liberty Mutual had changed its mind and was denying him benefits and would require him to prove that he had sustained a compensable injury, the uncontested evidence in the Record from the Rehab Nurse assigned by Liberty Mutual to the file states:

> "Claimant underwent heart surgery on May 29, 2013 as a result of an M.I. caused by electrical shock."
>
> "**Assessment**:
> Claimant is a 50-year-old man that suffered an electrical shock on May 22, 2013. As a result of the shock, Claimant suffered a myocardial infarction and underwent heart surgery on May 29, 2013. ..."

Further,

> "Dr. Karen Greenfield, 5-28-13 recorded injury as being workers' compensation, rotisserie shock on Thursday, diagnoses - tachycardia/electrical shock/muscle shock." (R., p. 169). "Off duty due to work related condition, Dr. Greenfield." (R., p. 173).
>
> "Dr. Jeffery Allan Travis, diagnoses, 5-29-13 - electrocution, cardiogenic shock, acute myocardial infarction, acute myocardial infarction ventral septal defect, severe pulmonary hypertension." (R., p. 166).
>
> "Lexington Medical Center Emergency Room, diagnoses - acute myocardial infarction, cardiogenic shock, tachycardia, acquired septal defect, electrocution and non-fatal effects of electric current, accident caused by unspecified electric current, place of occurrence - industrial places and premises."

There is not a scintilla of, "evidence" of a good faith investigation or that the Claimant's problems were not caused by the electrical shock injury.

The Commission found that, "a belief of Defendants formed following a good faith investigation that Claimant had not met his burden of compensability is adequate grounds for a denial of the claim by the Defendants." The Commission then went on to find that, "Claimant did not provide any evidence that Defendants conducted their investigation in anything other than good faith." (R., pp. 30-31). So, the Defendants are allowed to simply make uncorroborated, unsubstantiated, undocumented statements to the Commission that they have formed a belief

based on a good faith investigation and do not have to put in any, "evidence" as to what that good faith investigation was but then the Claimant is denied benefits because he did not provide any, "evidence" that the Defendants conducted their investigation (what investigation?) in anything other than good faith. So, the Defendants can state that they conducted a good faith investigation, do not have to prove it and then claimants have to introduce, "evidence" proving that the Defendants' investigation was not conducted in good faith when he does not know what that is; and that does not shift the burden to the Claimant. The Petitioner verily believes that the Court overlooked these actual issues and lack of evidence and overlooked these essential facts in reference to the Commission's decision.

14. As to subsection **(F) Finding of Fact #11**, the Petitioner agrees with the Court as to the production of two Form 15s, if the Court's conclusion is supported by the evidence. The Court concluded that, "Archway stopped payment after a good faith investigation lead to a reasonable belief that Mr. Winfrey did not sustain a compensable injury under the Act. In our view, this finding by the Appellate Panel is supported by substantial evidence and is dispositive of the Appeal. The Petitioner would beg the Court to point to the "evidence" in the Record, testimony or otherwise, that

establishes that the Defendants conducted a good faith investigation and that someone or some document, states that there was a reasonable belief based on evidence in the Record that Mr. Winfrey did not sustain a compensable injury under the Act. The Commission's decision cannot be based on surmise, speculation or innuendo but must be based on substantial evidence in the Record. Redundantly, there is simply no, "evidence" of a good faith investigation and no, "evidence" that would support a reasonable belief that the Claimant had not sustained injury by accident as defined in the Act.

As to the failure of the Respondents and in fact the insurance carrier, Liberty Mutual, to attach documentation to the Form 15, Regulation 67-504 requires that documentation **"shall"** be attached as to the reason for termination or suspension. The other Rules to the Commission are instructive as to what this entails. §42-9-260 under subsection (B)(1-6) provides six very limited and specific bases upon which an insurance carrier can stop benefits to the injured worker without a hearing. Of course, under general principles of law, this should be strictly construed because it would deny benefits or take away benefits to the injured worker as is set forth in the Standard of Review.

Subsection (B)(2) requires that the employee sign and, "execute a proper Commission form". (B)(4) requires that

employee has been released by the treating physician to work without restriction and employer offers comparable employment. (B)(5) provides that the employee has been released to limited duty work by a physician indicating limited duty work which requires a statement again by the physician or in other words, evidence and the employer provides limited duty work consistent with the terms upon which the employee had been released. If the employee contests that position, of course, as in all of the other exceptions referred to above, the employer is going to have to show that it was comparable work. Under (B)(6), if the employee refuses medical care or refuses examination, can stop benefits which requires documentation or in other words, evidence substantiating the refusal. As noted, other Commission Rules are instructive. Rule 67-505 suspending benefits after 150 days requires a, "report" concerning limited work or return to work without restriction and when the employers and insurance carriers seek to terminate benefits on one of those bases, they have to present evidence at the hearing.

So, prior to 150 days, the insurance carrier can stop benefits without a hearing and then at a reinstatement hearing make "representations" to the Commission whereas after 150 days, they have to have a hearing before stopping benefits and at that hearing, they have to present "evidence" to stop payment. So, before the first 150 days, they can just make the blanket

assertion without any evidence whatsoever, robbing the injured worker of the very subsistence of life but after 150 days they have to submit evidence. Query: to require evidence after 150 days and to not require it before, does that not violate equal protection?

The Petitioner would submit that reading the Commission Rules in conjunction the same type of reports are contemplated and the same type of evidence is required to be presented by, in this case, Liberty Mutual before 150 days as it would have to submit after 150 days in order to be able to stop benefits. There has to be evidence. Blanket assumptions by the Commission as to what the Defendants believed or that they conducted a good faith investigation are not adequate.

15. As to **X. ISSUE #9** in the Opinion, it is a general principle of law that the Legislature is presumed in its enactments to have done or not done something for a reason. When the Amendment to S.C. Code §42-9-260 allowing the Defendants to start benefits and then for a period of up to 150 days, to be able to stop those benefits based on certain specific enumerated, very limited bases without a hearing, the Legislature saw fit to mandate and require also that <u>if</u> a hearing is requested by the Claimant that the employee whose benefits have been terminated or suspended, may request a hearing and that that hearing, "must be held within 60 days of

the employee's request for a hearing". In all cases and in this case, that hearing is limited to one specific issue and here as to whether Liberty Mutual conducted a good faith investigation and did that investigation reveal grounds for denial of the claim. Under subsection (A) of §42-9-260, that means grounds which establish a basis for a, "good faith denial". Based on the evidence presented, it is a simple decision as to whether or not the evidence establishes they conducted a good faith investigation in the opinion of the Commission or they did not conduct a good faith investigation in the opinion of the Commission and that that good faith investigation determined a good faith reason for denial or it did not establish a good faith reason for denial.

The Legislature contemplated a very quick hearing to be held within no more than 60 days and the Legislature contemplated an immediate decision. The 22-day delay and a very formal written Order is not what was contemplated by the Legislature. The Petitioner stands by the position taken in the Brief and verily believes that the Court overlooked the purpose and intent of the Legislature in providing for the hearing and limiting that hearing to a very specific purpose so that a quick decision could be made. Remember, part of the purpose of the Act is to provide swift and sure benefits to the injured worker. In support of the position that as rapid a decision that can be

made is to be made and that the Legislature contemplated a rapid decision, an injured worker who is receiving temporary total disability benefits and medical care during the first 150 days, pursuant to the Act, is in the identical same posture as that of a welfare recipient. As Justice Brennan in Goldberg v. Kelley, 397 U.S. 254, 90 S.C.T. 1,011 (1990), writing for the Court that a welfare recipient should be allowed a hearing and the right of confrontation to test the "evidence" upon which the stoppage of welfare benefits was based before those benefits were stopped, as part of the fundamental requirements of due process in the Opinion stated:

> "Thus, the crucial factor in this context - a factor not present in ... virtually anyone else whose governmental entitlements are ended - is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. ..."
>
> The Court went on to quote from Green v. McElroy, 360 U.S. 474, 79 S.CT. 1,400, 3 L. ED. 2d 1,377 (1959):
>
> "Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of

> individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the 6th Amendment *** This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *** but also **in all types of cases where administrative** *** **actions were under scrutiny**."

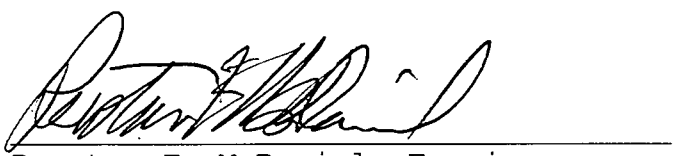
The Commissioner in this reinstatement hearing had two simple essential issues of fact to decide based on the evidence before him and the decision whether or not to reinstate benefits should have been made on the very day of the reinstatement hearing. The Legislature intended to have a very fast decision because the worker is out there without benefits, the very means upon which to live.

CONCLUSION

For all of the foregoing reasons, the Petitioner verily believes that the Court overlooked or misapprehended these very critical points as set forth in this Petition for Rehearing and in fairness to the Court and to the parties, the Court should withdraw the opinion and grand the parties further Oral Argument on these issues. These issues are very important to this injured worker and to the injured workers of our State who stand to have their benefits stopped without a hearing at a time when they represent the most vulnerable members of our society. To

receive temporary total disability benefits you must be temporary totally disabled from gainful employment and obviously, you need substantial medical care if that is in fact your condition. The Petitioner respectfully prays for Rehearing.

Respectfully submitted,



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August 17, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Petitioner,

v.

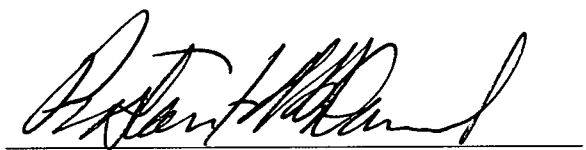
Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ...Respondents.

PROOF OF SERVICE

I certify that I have served the **PETITION FOR REHEARING** by depositing a copy of it in the United States Mail, postage prepaid, on August 17, 2017 addressed to:

Brett H. Bayne, Esquire
McAngus, Goudelock & Courie
Post Office Box 12519
Columbia, SC 29211

Dated: August 17, 2017



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August 17, 2017

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

RE: Clarence Winfrey v. Archway Services, Inc.
Appellate Case No. 2014-001815

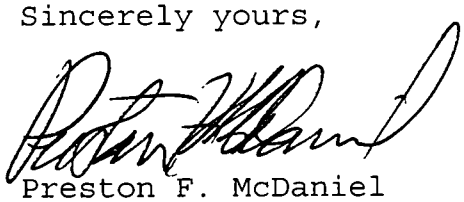
Dear Ms. Kitchings:

Please find attached the original and seven (7) copies of a **PETITION FOR REHEARING**. I would appreciate your returning a clocked-in copy of same to me via the courier.

By copy of this letter, I am serving Counsel of Record with a copy of same.

As always, I appreciate all the courtesies and kindnesses shown to me by the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Brett H. Bayne, Esquire