

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

OCT 30 2017

SC Court of Appeals

Unpublished Opinion No. 2017-UP-338
(SC Ct. App. Heard December 6, 2016;
Filed August 2, 2017)

Clarence B. Winfrey, Jr., Employee,Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 28, 2017.

QUESTIONS PRESENTED

I. Where after injury, insurance carrier accepted and paid compensation and medical care and under S.C. Code §42-9-260(B)(1-6) is then allowed within 150 days to stop all benefits, "without a hearing" using only a mailed WCC Form checking a box for the reason in the hearing where the sole issue is whether benefits were properly stopped, and if not, reinstated, is the employer/insurance carrier the moving party as stated in Reg 67-612(B)(4) and as such do they have the burden of proof to produce evidence to prove the exception or is it sufficient that they merely "represent" to the Commission they conducted a good faith investigation and had formed a "belief" there was a basis for denial; and does the legal decision that a "representation" and, "belief" are sufficient and requiring the disabled worker to "provide evidence" they did not conduct a good faith investigation shift the burden of proof to the worker?

II. Where the Employer's insurance carrier stopped payment without a hearing on September 12, 2013 and gave Notice that same day by regular mail to the disabled worker, did the Commission err as a matter of law by:

A. excluding all evidence after September 12, 2013 from the disabled worker, where his first Notice of stopping his benefits was after September 12th thus denying him due process of law.

B. basing the Commission's Decision on documentary evidence admittedly filed untimely and in violation of the Commission's Regulations.

III. Where the insurance carrier's assigned managing agent stopped payment without hearing by form September 12, 2013 personally signing all paperwork; and where Petitioner served Notice of Deposition with Subpoena on September 18th for the adjuster and her file; and where the insurance carrier filed a Motion to Quash the deposition, did the Commission deny Petitioner due process of law by not ruling on the discovery deposition/subpoena until the hearing on November 13, 2013 and by then denying Petitioner the right

to take the adjusters deposition as the managing agent; and by ordering the production of documents within fifty-two (52) days AFTER the hearing for which discovery was sought?

IV. By making rulings set out in its Findings of Fact, specifically #6, #10, and Findings #4 through #11 which are not supported by the evidence, but upon which the Commission found as a fact and as a matter of law that the insurance carrier had to only:

"represented" to the Commission they had conducted a good faith investigation,"; and that they had formed, "a belief" based on that investigation for denial, but then Holding Petitioner, "did not provide any evidence" they had not conducted an investigation in good faith.

did the Commission thereby as a matter of law shift the burden of proof from the insurance carrier to Petitioner as to a Good Faith Investigation?

V. Is the Commission's Decision the subject of surmise, speculation and innuendo where it is not based on substantial evidence on the essential issues for decision: whether the insurance carrier conducted a good faith investigation and was there evidence to support the reason for denial?

STATEMENT OF THE CASE

On May 22, 2013, while working on a rotisserie at Publix, Petitioner's left hand came in contact with a 240-480-volt line resulting in a severe electrical shock entering his left hand, running throughout his arm, left shoulder, neck and upper left quadrant of his chest with immediate, continual and worsening pain in those areas thereafter. After the injury, immediately reported to his employer, his pain continued to intensify over several days and he went to and from the Minute Clinic to Doctor's Care, to a cardiologist and across the street via ambulance to the

Emergency Room where he was hospitalized. (R., p. 169). The insurance carrier accepted the claim, authorized medical care, and started Temporary Total Disability benefits. On June 5th, Petitioner filed a claim with the SC Workers' Compensation Commission. (R. pp. 34-36). On June 12th, the Commission informed the carrier they had not properly filed a First Report of Injury and forms noting the starting of benefits and on July 23rd, Respondents paid a \$200.00 fine to the Commission. (R., pp. 611-13).

September 15, 2013, (less than 150 days after injury) Petitioner's attorney was notified by letter and WCC Form 15(II) the insurance adjuster had stopped payment of benefits (R., pp. 37-38). The Form was checked, "based on a Good Faith Investigation, the claim is denied". No required explanation for stop payment was attached.

September 18th Petitioner via hand delivery to the Commission filed a WCC Form 15(III) Request for Hearing to Reinstate Benefits. (R., pp. 40-42). Also, September 18th, Notice of the adjuster's deposition, as Managing Agent and a Subpoena for production records was personally served. A Motion to Quash the Deposition and production subpoena was filed that same date (R., pp. 47-56).

September 27th, a November 13th Hearing Notice was served (R., p. 57).

October 7th, Petitioner filed Reply to Defendants' Motion to Quash. (R., pp. 58-64). October 21st, a Motion for Continuance/Postponement was filed in part because

Petitioner had filed a Declaratory Judgment Action challenging the constitutionality of SC Code §42-9-260 (B) (1-6) stopping benefits without a hearing (R., pp. 68-137). October 30th, Petitioner filed his Pre-Hearing Brief and APA Submissions. (R., pp. 150-183).

November 4th by letter, 9 days before hearing, Respondents late filed their Pre-Hearing Brief and Notice of Witnesses and written medical reports (R., pp. 209-265). November 5th, 8 days before the hearing, Respondents late filed an Amended Pre-Hearing Brief and Supplemental Notice of Witnesses and Written Medical Reports. (R., pp. 266-272). November 7th, Petitioner filed formal Objections to both belated Pre-Hearing Briefs/APA Submissions. (R., pp. 622-624).

At the November 13th hearing (scheduled 1:45 p.m.; started 3:50 p.m. R., p. 57, 375) prior to going on the Record, the Commissioner held a long off-the-Record conference (two hours) long in which he decided the Motions, made numerous evidence rulings and admitted the late filed Pre-Hearing Briefs and APA Submissions all confirmed in Orders on the Motions and the Form 15(III). (R., pp. 1-6; 375-383). Subject: Reinstatement and 14 days later, Petitioner filed a Request for status of the Form 15(III) decision. (R., pp. 625-626).

December 5th, the Commissioner issued two Orders: "Order on Parties' Motions"; and order denying reinstatement. (R., pp. 1-6; pp. 7-15). December 18th a Form 30 Request for

Commission Review was filed as to both Orders. (R., pp. 273-292). After briefing, a hearing was held on May 19, 2014. (R., pp. 293-319; pp. 320-338; pp. 583-610). The Full Commission Order was filed July 25th. (R., pp. 16-33). Petitioner filed Notice of Intent to Appeal August 25th. (R., pp. 339-356). The Appeal was one of three Appeals from three separate Orders of the Commission: this appeal from the two Orders from the Form 15 (III) Hearing and two Appeals from the Decision of Commissioner Susan Barden finding compensable injury and awarding Petitioner reinstatement/continuing temporary total disability and medical care. After filing, Mediation resulted in an impasse and the rescheduling of the Briefing of these matters. All Appeals were decided by the Court of Appeals through Unpublished Opinions on August 2, 2017. A Petition for Rehearing was filed on August 17, 2017 which was denied by Order on September 28, 2017. (App P757-796; P819) This Petition for Writ of Certiorari follows. The Declaratory Judgment Action as to the constitutionality of SC Code §42-9-260(B), (1-6) is still pending in the Court of Appeals.

STATEMENT OF FACTS

This was a WCC Form 15(III) hearing. September 15th, one hundred and eighteen (118) days after accident, Petitioner's attorney received one copy of a Form 15(II) terminating benefits stating: "based on a Good Faith Investigation, the claim is denied." No Regulation required proof of service or documentation as to the alleged Good Faith Investigation

and/or results of that investigation were attached. (R., pp. 37-39). [See: SCWCC Form 15; Reg. 67-201(B)(1) and 504(A)]. The only additional information on the form as to the basis states, "reason denied: employee failed to meet the burden of a compensable injury under the South Carolina Workers' Compensation Act." (R., pp. 37-39). September 18th, Mr. Winfrey filed a Form 15(III) Request for Hearing (R., pp. 40-42); served both a Notice of Deposition for October 2nd for the adjuster as the, "Managing Agent", and subpoenaed document production for September 30th. The Notice of Deposition for October 2nd stated: "the claimant will take the deposition of Terri Hughes as managing agent American Fire and Casualty, Co..." The subpoena was captioned: "To: TERRI HUGHES, SENIOR CLAIMS SPECIALISTS II, as Managing Agent for the Insurance Carrier and as a 30 (B)(6) Representative of the Insurance Carrier..." The attachment read in part: "ATTACHMENT TO SUBPOENA AND SUBPOENA DUCES TECUM FOR TERRI HUGHES... A complete copy of the Adjuster's file... specifically including all documents alleged to represent a good faith investigation..."

No Order was issued quashing the Subpoena prior to date of deposition; even though placed on notice deposition would go forward barring an Order.

September 27th Hearing Notice for November 13th, listed its, "Subject: To Determine If Claimant's Temporary Compensation Was Legally Terminated." (R.P. 57)

As the moving party Respondents [Reg 67-612(B)(4)] are required to file their APA Submissions 15 days prior to hearing. (R., pp. 381, ll. 21-22.) Respondents did not file a Pre-Hearing Brief/APA Submissions fifteen (15) days nor even ten (10) days before hearing, but filed a Pre-Hearing Brief/APA's November 4th, 9 days and Amended Pre-Hearing Brief/Supplemental APAs November 5th; 8 days before hearing. (R., pp. 209-265; pp. 266-272).

November 7th, Petitioner filed objection to Respondents' late Pre-Hearing Briefs/APA Submissions. (R., pp. 622-624).

November 13th, in the off-the-Record Pre-Hearing Conference, the Commissioner, while not on the Hearing Notice, heard and entered Decisions on the Motions as reflected in the Motions Order of December 5th. (R., pp. 1-6). Petitioner argued under the Statute Respondents are the moving party, have the burden of proof to establish the basis upon which they stopped Benefits, and moved to exclude the Respondents APA Submissions/Pre-Hearing Brief as untimely and reiterated his argument that failure to comply with the mandatory provisions of SC Code §42-9-260 barred them stopping benefits. (R. pp378-381).

The Commissioner ruled that, in his "discretion" he was admitting the late filed APAs and Pre-Hearing Briefs; would consider any testimony offered by Defendants; and would consider only APA Submissions prior to, and including, the date Respondents gave notice of stopping benefits September

13th. The Commissioner would not consider any evidence from either party dated after September 13th. (R., p. 1-6; pp. 7-15). Twenty-two (22) days later, December 5th, the Commissioner filed two (2) Orders, addressing the Motions and denying reinstatement of benefits.

The Commissioner denied reinstatement on the basis Respondents had, "represented" they had conducted a Good Faith Investigation and Petitioner provided no "evidence" Respondents did not conduct a Good Faith Investigation.

Respondents

"represented to the Commission they conducted a Good Faith Investigation of the claim" . . . and that,

"the Claimant did not provide any evidence that Defendants conducted their investigation in anything other than good faith"

and that therefore,

"a belief of 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." (Emp. add.) (R., pp. 13-'c'; 'd'; 'f').

In the Motions Order twenty-two (22) days after the Hearing for which discovery was sought, the Commissioner denied Petitioner the right to take the adjusters discovery deposition but ruled Respondents had to, produce the adjusters file and records subpoenaed 52 days after the Hearing for which they were sought.

PREAMBLE TO ARGUMENTS

There are three specifically enumerated reasons in SCACR Rule 242(b) why this Court in its sound discretion should grant Certiorari:

1) There are novel questions of law presented. After accepting/paying benefits Respondents are granted a very limited right under statute to stop benefits without a hearing within the first 150 days which must be strictly construed against limiting a worker's benefits. A favorable decision for a worker before the Commission will result in this Court never hearing the issues addressed in the Court of Appeals' Unpublished Opinion and were only before the Court of Appeals because Respondents filed an Appeal to the Commission Award of benefits and Petitioner filed a Cross-Appeal on these issues. Left unaddressed that Opinion will be used as justification for the decision made by the Commission. This Court has not addressed these issues but should as being novel issues.

2) The Court of Appeals Opinion is contrary to the prior decisions of this Court. This Court has always been committed to a liberal discovery process. The Commission denied Petitioner the right to take the adjusters' deposition; only decided discovery issues at/after the hearing for which discovery was sought; and granted discovery subsequent to that hearing all of which denied a disabled worker due process/ a meaningful opportunity to be heard.

3) Fundamental issues of equal protection and due process are woven into all of the issues of this Appeal. Under the principles, the Act shall be liberally construed in favor of benefits to the injured worker and our constitutional commitment to due process requiring an opportunity to be heard and to cross-examine your accuser before that accuser can cut off your benefits and equal protection as to why is it not a denial of equal protection to cut off a disabled worker's benefits 149 days after accepting/paying benefits without a hearing but require a hearing before stopping benefits after 150 days, the right to stop payment without hearing within 150 days of accepting and paying benefits must be strictly construed.

ARGUMENTS

I. Where after injury, insurance carrier accepts and pays compensation and medical care and then 118 days later stops [S.C. Code §42-9-260(B) (1-6) exceptions within 150 days to stop benefits] "without a hearing" using only a mailed WCC Form checking a box for the reason, in the hearing where the sole issue is whether the benefits were properly stopped, and if not reinstated, where insurance carrier is the moving party as stated in 67-612(B) (4) and as such have the burden of proof to produce evidence to prove the

exception but they merely "represent" to the Commission they conducted a good faith investigation and formed a "belief" there was a basis for denial, the legal decision by the Commission that a "representation" and, "belief" are sufficient to meet their burden but requiring the disabled worker to "provide evidence" they did not conduct a good faith investigation shifts the burden of proof to the worker.

The Commission found both as a Matter of Fact and law that because Respondents, "represented to the Commission" they conducted a Good Faith Investigation and, "represented" that the "reason for denial" was a, "good faith belief" based on their Investigation Petitioner had not established compensable injury; and because Petitioner, "did not provide any evidence," to the contrary was sufficient to stop benefits without a hearing. The finding, a "representation" and a "belief" is sufficient beyond as a matter of law beyond belief.

Respondents are the moving party and have the burden of proof under the statute and Commission Regulations. SC Code §42-9-260(B) provides in pertinent part,

"once temporary disability benefits are commenced, the payments may be terminated.. if:"

one of the six (6) enumerated exceptions is proven. One of those is that a Good Faith Investigation reveals a grounds for denial. "If" is defined in Webster's Dictionary as a word, "used to say that something must happen before another thing can happen". The Statute creates a condition

precedent meaning that to stop temporary disability benefits without a hearing they can do that "if" they establish one of the conditions precedent; e.g. a Good Faith Investigation. "Plain English for Drafting Statutes and Rules", Chapter 13, §(C) Conditions and Exceptions (1) (a) "If" p. 121, Matthew Bender 2012. The fact that Respondents have the burden of proof to stop benefits without a hearing is made clear by the Commission's Regulations. Regulation 67-504(A) requires Respondents to attach documentation stating, "the reason for termination". Regulation 67-612(B) (4) specifically states that in a WCC Form 15(III) hearing, "the Carrier shall be deemed the moving party in all hearings scheduled pursuant to a request under R. 67-504(C). "The moving party has the burden of going forward as well as the burden of persuasion in an administrative hearing." 73A CJS, Public Administrative Law and Procedure §240, "Burden of Proof". (emp. added.)

The party claiming the benefit of a Statute has the burden of proof and this burden is one of "persuasion" by a preponderance of the evidence, Pike v. SCDOT, 343 S.C. 224, 540 S.E.2d 87 (2000); Trial Handbook for South Carolina Lawyers, 5th Ed. (2012-2013) §9.3 Burden of Proof, and §9.4, "Statutory Allocation of Burden of Proof"; Sutherland Statutes and Statutory Construction, 7th Ed. (2014),

Intrinsic Aids, §47.11 "Exceptions", (one who claims the benefit of an exception has the burden of proof proving they come within the limited class for whose benefit the exception was established). Thus, under both the Statute and the Commission's Regulations, Respondents had the burden of proof to prove the condition precedent they had conducted a Good Faith Investigation which would allow them to obtain the benefit of the Statute, i.e. to stop benefits without a hearing. Therefore, where Respondents had started benefits, they could only stop those benefits under a specifically listed statutory "exception" and they had the burden i.e., submit evidence, to prove the exception applies. This was the specific holding of the Court of Appeals in Martin v. Rapid City Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App 2006) wherein the Court held: "However, the statute is explicit that even under a Form 15 an employer can only terminate or suspend temporary compensation if one of the specified conditions is met." (Emp added).

The Commission as a matter of law holding Respondents meet their burden of persuasion by "representing" a Good Faith Investigation was conducted, but requiring Petitioner to provide, "evidence" Respondents did not conduct a Good Faith Investigation is an oxymoron.

II. Where the Employer's insurance carrier stopped payment without a hearing on September 12, 2013 and gave Notice that same day by regular mail to the disabled worker, the Commission erred as a matter of law by:

A. excluding all evidence after September 13, 2013 from the disabled worker, where his first Notice of stopping his benefits was September 15th thus denying him due process of law.

It is uncontested that Petitioner's first notice Respondents were stopping payment of compensation and medical benefits was by letter received September 15th. At hearing, the Commissioner not only excluded all evidence from Respondents after September 15th but excluded all evidence from Petitioner after September 15th.

Assuming arguendo the Commissioner was correct in ruling Petitioner had to "provide evidence" Respondents did not conduct a Good Faith Investigation, this ruling foreclosed him from presenting any evidence whatsoever on that issue, especially where the adjuster did not testify; the Motion to Quash her deposition was not heard until and was granted at the hearing; and where Respondents were not required to produce any records until long after the hearing. Thus, Petitioner had no way of knowing what Respondents did/did not know or do as far as conducting a Good Faith Investigation prior to and upon which they allegedly stopped benefits September 15th. Petitioner had no way of proving anything even if that was his burden.

The Commission also found, based on the belated APA medical records, Respondents could have formed a, "good faith belief", which was a sufficient basis to stop benefits. By excluding all evidence after September 15th, the Commission excluded all the opinions issued after September 15th from the treating doctors to the contrary. Thus, the Commission denied Petitioner the right to confront and cross-examine the adjuster; the right to review Respondents records before the hearing (Subpoena required production September 30th); and denied him the right to put in favorable evidence (doctors opinions) tending to prove the lack of a Good Faith Investigation and medical opinion he suffered a compensable injury all obtained after September 15th. Petitioner is entitled under due process to the disclosure of evidence, to have a meaningful opportunity to be heard, and to confront, examine and cross-examine witnesses in a meaningful way. The Commission's Rulings and exclusionary rulings denied him that right including the right to submit evidence to disprove the "representation" and "belief". Brown v. SC State Bd. of Education, 301 S.C. 326, 391 S.E.2d 866 (1990), (where important decisions turn on questions of fact due process requires cross-examination of adverse witnesses and the disclosure of evidence to an individual so he has the opportunity to show it is not

true); Smith v. SC Dept. of Mental Health, 329 S.C. 485, 494 S.E.2e 630 (SC App. 1997) (where important decisions turn on questions of fact due process at least requires the opportunity to present favorable witnesses).

II. B. BASING THE COMMISSION'S DECISION ON DOCUMENTARY EVIDENCE ADMITTEDLY FILED UNTIMELY AND IN VIOLATION OF THE COMMISSION'S REGULATIONS.

The Commission abused its discretion by admitting and basing its decision on Respondents' late-filed APA Submissions in violation of WCC Reg. 67-612(B)(1)(4 E, J); the Administrative Procedures Act; and due process.

An abuse of discretion occurs where the ruling is based on an error of law or where the ruling is grounded upon factual findings without evidentiary support. Where there is an exercise of discretion, the reviewing Court must consider whether or not the exercise of that discretion is prejudicial to a party. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011).

Here by Statute and Regulation, Respondents are the moving party and not only have the burden of proof, but Regulation 67-612(B) requires that they "**shall**", file their APA Submissions (documentary evidence) at least fifteen (15) days before hearing. Rule 67-611 requires all attorneys "**shall**" file a WCC Form 58 (Pre-Hearing Brief),

"at least ten (10) days before the hearing with the Hearing Commissioner's office identified on the Hearing Notice." and ("shall");
"serve the opposing party.

The Regulation also requires compliance with the Administrative Procedures Act (APA). SC Code §1-23-330, provides written evidence can only be submitted where, "the interests of the parties will not be prejudiced substantially.", (emp. added).

The provisions of R. 67-611(B) are mandatory. There is absolutely no discretion for the Commissioner to accept a late filed Pre-Hearing Brief (PHB) which sets out; the issues of fact and law for decision; the position of the parties; and notification of witnesses and evidence to be submitted. The only actions the Commissioner may take for failure to file a PHB are, if good cause is shown, postpone the hearing or assess a fine against the attorney.

The Commissioner ruled he had discretion to admit the APA written evidence which is not true. While the exclusion of such evidence under Reg. 67-612 is not mandatory, the Commissioner can only exercise his discretion admitting written evidence in accordance with:
1) the Regulations, specifically 67-611, 67-612(E,J); 2) the APA; and 3) due process.

Under Reg. 67-611; 67-612 (E,J), a party may move for adjournment but must show good cause under Reg. 67-613. There was no motion or showing of good cause for the late filings. Therefore the Commissioner had no discretion to accept the Pre-Hearing Briefs' or written evidence.

As APA submissions their admission was "substantially" prejudicial to Petitioner's interest and their admission constituted an abuse of discretion being controlled by an error of law.

Due process requires the right to cross examine and contest this evidence. Barring admission of these APA Submissions, there is a complete failure of evidentiary support for Respondents' stop payment.

The Commission's decision Respondents could have formed a good faith, "belief" Petitioner had not sustained a compensable injury is based on this evidence alone. Thus, its submission was in violation of Regulations; highly prejudicial to Petitioner violated due process and its admission under the guise of discretion was error.

III. Where the insurance carrier's assigned managing agent stopped payment without hearing by form September 12, 2013 personally signing all paperwork; and where Petitioner served Notice of Deposition with Subpoena on September 18th for the adjuster; and where the insurance carrier filed a Motion to Quash the deposition, the Commission denied Petitioner due process of law by not ruling on the discovery deposition/subpoena until the hearing on November 13, 2013 and by then denying Petitioner the right to take

the adjuster's deposition as the managing agent; but ordering production of documents only within fifty-two (52) days AFTER the hearing for which discovery was sought.

The Commission denied Petitioner the right to take the deposition of the adjuster/managing agent, who completed, issued and signed the WCC Form 15 II stopping his benefits without a hearing. That denial is clearly contrary to our Court Rules and case law. Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (SC App 1996).

First, the Commission's decision is based on legal arguments outside of those made by the parties. Since the Commission is a quasi-judicial body of lay and attorney Commissioners and since the specific basis for the decision, is a legal one, see Record p. 3, where did that legal argument/basis come from? A review of the Motion to Quash, Pre-Hearing Brief, and Hearing Transcript will establish this basis for the decision is nowhere found nor is there even any reference to 30(B)(6) in any of these. Under S.C. Code §42-3-250 Commissioners are subject to the Code of Judicial Conduct; Rule 501, Cannon 3(B)(7)(b), provides a Judge shall base his/her decision on the evidence and arguments made to him and shall not consider ex parte communications or consult with outside legal experts concerning 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 the 30(B)(6) argument made?

Next, the subpoena was for the adjuster as a party, the Managing Agent, as evidenced by the September 12th Form 15 II, stopping benefits. The Commission is a creature of statute and its powers/authority are only these set out in the statute. Subpoenas for production of books, records and witnesses is set out in S.C. Code §42-3-140; S.C. Code §42-3-150 provides for attendance of witnesses, taking depositions and production of records in conjunction with proceedings; and §42-3-160 allows for the taking of witness depositions either "within or without the state" and are taken pursuant to the Circuit Court Rules.

Under SCRCF Rule 45(a), a subpoena for a deposition shall issue from the Court designated in the "Notice of Deposition" and provides for different treatment as to a person, "who is not a party or an officer, director or managing agent of a party". Subsection (b) provides service may be made in the same manner as prescribed for service, "of a summons and complaint in Rule 4(d) or (j). Rule 4(d)(3), corporations, provides the Complaint may be served by delivering it to, "an officer, a managing or general agent" or any other agent authorized to receive

service. Under this Supreme Court's decision a timber agent is considered a managing agent for service. The adjuster was subpoenaed as a party managing agent on the file. James v SC DOT, 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 on the form/ line, "signature of claims administrator" that she had served the form per Rule 67-211. Ms. Hughes attached a Form 19 asserting she was the, "employer's representative". (R., pp. 37-39). The subpoena caption and to whom it was directed was 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, also checked and required the production of records but on a different date, September 30th, as compared to the date of the deposition set for October 2nd. There is no reference to the "deposition" being for a 30(b)(6) representative, in the deposition part of the Commission Form. Further, there was no objection to the subpoena as being an improper

designation of a 30(b)(6) representative. Rule 37(2) places on a corporation the responsibility to designate a 30(b)(6)(2) representative and specifically provides that the failure to do so can result in sanctions for failure to cooperate in discovery. Respondents simply sought to avoid Petitioner having the right to take the deposition of Ms. Hughes as the managing agent..

Without citation, this Court has always been committed to liberal discovery. How in the world can it be argued Petitioner was not denied due process by not having the opportunity to perform discovery on the very person that signed the pleadings that stopped both his weekly checks and his entitlement to medical care at a time when he was totally disabled and had no other source of income to pay for 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.

No Order of Protection was issued, the refusal to appear delayed discovery, and no decision before hearing denied him the right of confrontation, cross-examination and discovery necessary to prepare for the hearing. §42-3-160; SCRCP Rule 26(c)and(d); Rule 45(a)(2)and(c), (d)and(e). The disclosure of evidence to an individual so he has the

opportunity to show it is not true is fundamental. Brown v. SC State Bd. of Education, supra. Thus, the Order denying Petitioner the right to examine the adjuster denied him due process of law.

IV. .By making rulings set out in its Findings of Fact, specifically #6, #10, and making Findings #4 through #11 which are not supported by the evidence, but upon which the Commission found as a fact and as a matter of law that the insurance carrier had to only; "Represent" and state a "belief" violated the substantial evidence Rule.

The Commission's decision must be on evidence in the Record and cannot be based upon surmise, speculation or innuendo. Pleadings/forms are not evidence but in Finding of Fact No. 6, the Commission found "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." (emp. added.) There is no evidence in the Record of an investigation; only "representations" made by Respondents counsel. In Finding of Fact No. 7, the Commission found that the evidence in the Record was sufficient to establish Respondents had the medical records, APAs, in their possession prior to September 13th and that those provided "a basis for the Defendant's knowledge and good faith denial." (R., p. 28). In the Conclusions of Law, not the Findings of Fact the Commission found that Respondents "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; and that under the Act, "Claimant bears the burden of proving by a preponderance of the evidence" (R., p. 30).

There is no evidence in the Record setting forth, proof of or 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, the adjuster nor any other insurance carrier representative or of any investigation or of an evidentiary basis for denial. There are simply medical records and "representations" by Defense Counsel that those medical records constituted the investigation and basis for the stoppage of benefits. In Finding of Fact No. 13 The Commissioner held the Petitioner 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 as part of their alleged investigation, that Respondents contacted any doctors prior to September 13th, much less Petitioner's authorized treating physicians, or that there is any medical evidence in this, "medically complex case" to establish any cause, as the cause of injury other than the electrocution. There is no evidence of investigation or a basis of decision. Our whole system of justice is based upon the presentation of evidence and, assuming proper admission, there is simply no "evidence" linking any information found in the medical records to a decision to deny benefits.

V. The Decision of the Commission is the subject of surmise, speculation and innuendo where it is not based on substantial evidence in the Record on the essential issues for decision: whether the insurance carrier conducted a good faith investigation and was there evidence to support the reason for denial.

The Commission found as a fact an investigation was conducted. (R., pp. 11-12). Respondents put up no testimonial evidence concerning an investigation being conducted. The only testimonial evidence submitted was that of the Petitioner who testified that he had not been contacted. R., pp. 394-395). There is no documentary evidence of any investigation concerning compensability. Assuming proper admission, the medical records are simply

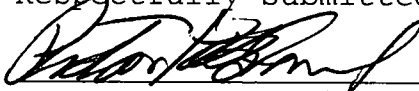
that: medical records. There is no testimony or evidence these records were even considered by Respondents as part of any investigation. There is simply no evidence an investigation was actually conducted or what was considered during investigation that allowed them to form a, "good faith belief" they had grounds for denial. Without evidence it was surmise, speculation and conjecture for the Commission to find an investigation was conducted.

The Commission decision must not be based upon surmise, speculation or conjecture and must be based on evidence in the Record. Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). There is simply no evidence to support the Commission's decision and where there is no evidence, the decision will be reversed as a matter of law. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (SC App. 1994); Pack v. SC D.O.T., 381 S.C. 526, 673 S.E.2d 461 (SC App. 2009).

CONCLUSION

For the forgoing reasons, the Petition should be granted.

Respectfully submitted,



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Attorney for Petitioner

October 27, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE

OCT 30 2017

Unpublished Opinion No. 2017-UP-388 Court of Appeals
(SC Ct. App. Heard December 6, 2016;
Filed August 2, 2017)

Clarence B. Winfrey, Jr., Employee, Petitioner,

v.

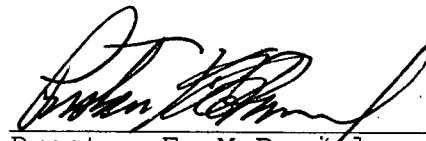
Archway Services, Inc., Employer,
and American Fire & Casualty Insurance Company,
Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the PETITION WRIT OF CERTIORARI on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, its attorneys of record:

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

Dated: 10/27/2017



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Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew Robertson

October 27, 2017

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HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk of Court
SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

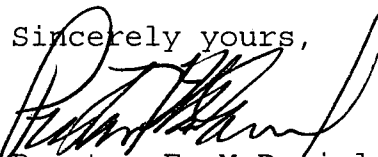
**RE: Clarence B. Winfrey, Jr. v. Archway Services,
Inc. and American Fire & Casualty Insurance Co.
SC Court of Appeals Case No. 2014-001815**

Dear Mr. Shearouse:

Please find attached the original and seven (7) copies of my Petition for a Writ of Certiorari and the unbound original and three (3) copies of the Appendix for filing with the Court in regard to the above referenced matter, along with the required \$100.00 filing fee. I would appreciate your returning the clocked-in copies to the courier.

By copy of this letter, I am serving the Court of Appeals and Counsel for Defense with a copy of same.

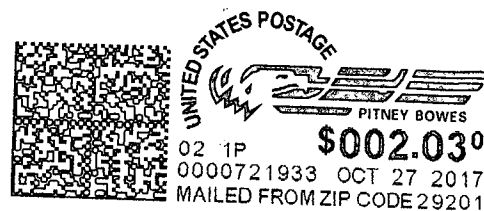
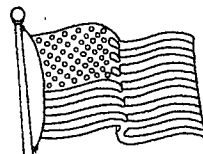
I hope this is sufficient for filing with the Court; however, if you require anything further, please do not hesitate to contact me.

Sincerely yours,

Preston F. McDaniel

PFM/abh/smk
Enclosures

cc: Brett H. Bayne, Jr., Esquire
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Columbia, SC 29201

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OCT 30 2017

SC Court of Appeals

