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**DEC 06 2017**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**SC SUPREME COURT**

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION  
COMMISSION

APPELLATE CASE NO. 2017-002236

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

v.

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

PETITIONER'S REPLY TO THE RETURN  
IN OPPOSITION TO THE  
PETITION OF WRIT OF CERTIORARI

By way of Reply to the Return filed by the  
Respondents, Petitioner would respectfully reply:

1. That the Petitioner objects to the Statement of  
the Case as set forth in the Return in that it refers to  
facts not in the Record or makes no reference to those  
facts from the Record.

Next, beginning with the second paragraph of the  
Statement of the Case, the Statement goes into facts  
totally irrelevant to the issue in the Reinstatement/Stop  
Payment (without Hearing) Hearing before the Commission and  
references a Summons and Complaint and a pending action in

the Circuit Court concerning the constitutionality of the statute. That action and issues was not an issue before the Commission and all of that Statement of the Case is irrelevant to the issues before the Commission. The Petitioner would also note to the Court in reference to the questions raised on Certiorari the clear-cut confusion caused by the Respondents asking a quasi-judicial Commissioner and Commission to address jurisdictional statute issues outside of the jurisdictional issues in a Workers' Compensation case which is limited to those created by the workers' compensation statute. For example, whether or not the employer is subject to the Act; whether or not the action is one covered under the South Carolina Workers' Compensation statute.

2. That the Petitioner has no objection to the Statement of the Facts and would note specifically to the Court that it coincides to some extent with the Petitioner's Statement of Facts and Questions Presented to the Court. In particular, all three treating doctors, Dr. Greenfield, Dr. Travis and Dr. Lide issued opinions after benefits were stopped without a hearing that the Claimant's problems were caused by his work-related electrocution injury. Also, Respondents Statement of Facts sets out no evidence, and the Petitioner would reiterate no evidence,

that these doctors were contacted as part of any alleged investigation prior to the stoppage of benefits.

3. That the Respondents have included a section in the Return entitled, "Constitutional Estoppel/Jurisdictional Issues." The Petitioner would point out that this is non-responsive to the issues raised on Appeal or upon which Certiorari is requested and again sets forth reference to a separate action filed in the Circuit Court. The Court will note that the arguments made apply to that Declaratory Judgment Action concerning the constitutionality of the statute. However, the Summons and Complaint in that declaratory judgment action were part of the improperly admitted documents which is one of the issues/questions presented to the Court for Decision. The Petitioner objected and appealed on the issues as to those as to their inclusion; as to whether or not they were evidence related to the issue before the Commission and as to whether or not those pleadings are considered and served as part of the basis for the Commissioner's decision as set forth in the issues presented to the Court upon which Certiorari is requested. The Petitioner would point out that the issues presented by that Declaratory Judgment Action had nothing to do with the issue before the Commission and the admission of those documents was clearly

prejudicial and should not have been admitted but were definitely considered by the Commissioner. This entire argument and separate issue supports the reason that this Court should grant Certiorari.

4. That in reference to the Return filed as to Question I presented for Certification, the Court will find that the Return supports the Petitioner's Request for Certification on this question and does not reflect the arguments that were made by the Respondents before the Commission or the Court of Appeals. Specifically, quoting from the Respondent's Return:

"There is no dispute that the burden rests with Respondents in proving that a good faith investigation occurred by a preponderance of the evidence. Respondents clearly met that burden as set out in the Commission's Decision and Order."

Outside of the fact that the Commission should not have admitted into the evidence the documents from the Respondents, the Court will find, from a review of the Commissioner's Order, that the Commission's Decision is based on, "representations" made by the Respondents that they conducted a, "good faith investigation", and that they formed, "a good faith belief" based on their investigation. (Pet. p. 8).

Unsworn, "representations", and statements from the defense lawyer about, "beliefs", on behalf of his client

are not evidence and his interpretation or opinion about what documents do or do not say, is not evidence.

Finally, the Petitioner would again point out that the Petitioner does not have the burden of proof of proving a compensable injury by accident whether the Defendants admit that an injury by accident occurred and where they admit the accident that the statute during the first 150 days shift the burden to the Defendants to prove that a good faith investigation disclosed evidence and again evidence, that an injury by accident did not occur if that is the basis upon which benefits are stopped. There is no evidence in the Record that the adjuster or defense counsel are doctors and there is no medical evidence prior to the stopping of benefits of any good faith investigation or that the Claimant's problems stem from anything other than the work-related injury which again the Defendants had accepted as constituting an injury by accident.

5. That in general, the Return lists and makes eight (8) arguments which in reality are a reassertion by the Respondents of the Arguments to the original issues presented to the Court of Appeals and are unresponsive specifically as to the issues and questions presented to the Court in reference to Certiorari.

Upon review of the Appendix to the Petition for Writ

of Certiorari, the Respondents have simply regurgitated their arguments to the original eight issues I-VIII presented to the Court of Appeals and have not addressed the specific issues raised on Certiorari. Being unresponsive makes it almost impossible for the Petitioner to make or file a Reply as to the Return.

6. That to the extent that Argument IV in the Return addresses II(A) in the Petition, the Petitioner would merely point out that the first notice to petition that Respondents were denying benefits occurred on September 13<sup>th</sup> and the Petitioner was foreclosed for submitting any evidence after he had notice including where he contacted and obtained opinions from all authorized doctors that his condition stemmed from the work-related accident.

To the extent that Argument III in the Return addresses Petition II(B), Petitioner will leave to the Court as to the reading of the Commission Regulation on the submission of medical evidence under the general principle of a liberal construction in favor of benefits to the injured worker. Although the Regulation refers to APA Submissions and expert medical reports and assuming that medical records from a doctor are not expert medical reports, the general provisions of the APA would apply. How can it be argued that the admission into evidence of

unsupported documentary evidence which is then interpreted as stating or as constituting expert medical opinion evidence without supporting medical testimony, that because the Claimant had pre-existing conditions that could result in a heart attack, that this could have been interpreted by a non-medical professional, that being the adjuster, (there is no evidence that the adjuster or anyone concerned with the insurance company is a licensed medical doctor), as a basis for the denial that an injury by accident had occurred caused by the electrocution injury. Under the general provisions of the APA on the admission of documents, this is prejudicial to the Claimant which it clearly was in this case and it cannot be admitted.

The absurdity of this argument is clear. An adjuster is allowed to say, without coming into Court and testifying, that they reviewed medical records and they determined that the injury could have been caused by something other than the electrocution injury and then to cut off his benefits and all medical care while being totally disabled without a hearing or presenting any evidence in Court that that was the opinion of any doctor. In addition, the Claimant is then excluded from being allowed cross-examination of the adjuster or even presenting any medical opinion evidence after he finds this

out at a hearing. This is a total void of due process making the Commission nothing but a kangaroo court. That is not what our forefathers envisioned when they took away an injured worker's right to trial by jury.

To the extent that Argument IV in the Return is responsive to II(A) and/or (B), there was no such stipulation as the Court will find from the reading of the Appendix (App. p. 497). Further, the Respondents focus on medical opinion evidence versus what they had available prior to September 13th, where there is no evidence from any medical opinion one way or the other from the treating doctors or any other doctor on which to base a reversal of their decision to accept the claim as being a compensable injury. The medical opinions from the authorized doctors establish a lack of a "good faith investigation".

7. That to the extent that VI of the Return addresses the issues raised in Question III(A), the uncontradicted evidence is that the adjuster is the managing agent on the file and there is no evidence to the contrary nor is there any evidence that the adjuster was the, "wrong person" to depose. A review of the Motion to Quash does not contain any allegation that the adjuster was not the managing agent (App. p. 164-168). In reference to VI(b), the Respondents filed a Motion to Quash and it is

their responsibility to have a decision reached before the date of the deposition, not the Petitioner's.

8. That to the extent VII of the Return is responsive to Question IV of the Petition, the Petitioner would simply reiterate that pleadings and forms are not documents. Finding of Fact No. 6 is clearly based on a form. There is no reference in the Return to specific challenged Findings of Facts 6 and 10 nor the Rulings of Law that are challenged and Respondents argument is simply a blanket regurgitation in reference to Findings of Fact No. 4-11. Those Findings of Fact were all not based on evidence but are based on representations and beliefs. (App. p. 127-130). That is not evidence and the Commissioner refers to none. Further, there is no evidence that the adjuster or defense counsel or anyone else with Respondents is a licensed medical doctor; or that they have any expertise in interpreting medical records (evidentiary foundation?) or even that the Commissioner has any legal basis upon which to interpret medical records in reference to a reason for the Claimant's heart-related problems other than the electrocution injury. So what if the Claimant had pre-existing conditions even if true. There is no expert medical evidence that those caused the Claimant's heart-related problems which began immediately after the

electrocution injury. This is clearly surmise, speculation and innuendo on the behalf of the Commissioner. It establishes bias, prejudice and that the decision is arbitrary and capricious.

The argument made in reference to Finding of Fact No. 7 in reference to an email from Appellant's counsel in June of 2013 forwarding records, is indicative of the quantum leap of Respondents to cull through the Record to find any support for the Decision and to furthermore, bootstrap this documentary evidence into the Record. Assuming, as a given fact, that Petitioner's counsel forwarded records back in June (quite frankly Petitioner cannot find in the Record) to the then assigned adjuster for the Respondents, where is there anything in the Record that establishes that those records are the belated records that Respondents sought to admit into evidence prior to the hearing. In reference to the issues before the Court, the Court needs to look no further than the concluding sentence in the argument to show the absurdity of the position of the Respondents wherein the Respondents state, "the receipt of these records is a sufficient basis for the Commission to determine Respondents conducted an investigation before denying the case over six weeks later." How in the world does that establish any investigation especially where it

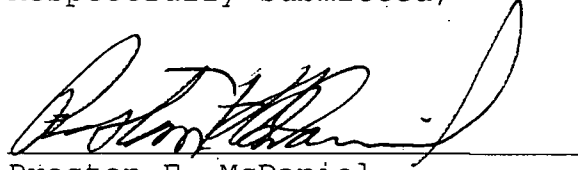
is the Respondent's burden, having agreed that the Claimant sustained injury by accident to deny further benefits on the basis that an injury by accident had not occurred. Again, having accepted the claim, they had an obligation and the burden to show why they reversed that decision. There is no evidence as to that burden.

#### CONCLUSION

Finally, in Conclusion, the Return is largely nonresponsive to the issues and questions presented to the Court for Certiorari and in many respects, the Return supports why the Court should grant the Petition. Again, simply put, in terms of due process, how in the world can you cut off a totally disabled worker's benefits on September 13<sup>th</sup> (118 days after acceptance) and not allow him to submit any evidence after that date nor allow him the right to take his accuser's deposition or to require that accuser to appear in Court; and/or allow the Commission, a quasi-judicial body, to make its decision based on its interpretation of medical records and to only require the insurance company to meet its burden of proof by having its counsel come into Court and state and make, "representations" that they formed a good faith, "belief" based on a, "representation" that a mystical, magical "good faith investigation" was performed. We are a country of

law and procedure and we require due process, nothing more and nothing less and that was denied to Mr. Winfrey.

Respectfully submitted,



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December 6, 2017

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**S.C. SUPREME COURT**

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION  
COMMISSION

APPELLATE CASE NO. 2017-002251

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

v.

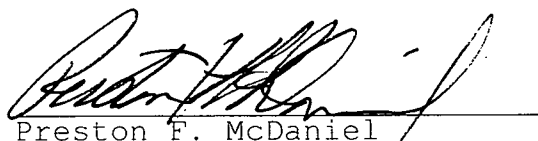
Archway Services, Inc., Employer,  
and American Fire & Casualty Insurance Company,  
Carrier, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the **PETITIONER'S REPLY TO THE RETURN IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid to their attorney of record:

Brett H. Bayne, Esquire  
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Dated: 12/6/2017



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