THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge
Trial Court Case No. 2013-CP-40-05888

Appellate Case No.: 2016-000788

Clarence B. Winfrey, Jr., ... Appellant,

v.

American Fire & Casualty Insurance Company
c/o Liberty Mutual Group.....Respondent,

and

State of South Carolina.....Respondent.

RECORD ON APPEAL
VOLUME I OF II

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DECISION AND ORDER
OF
T. SCOTT BECK, COMMISSIONER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO.: 1306305

Clarence Winfrey,

Claimant

v.

Archway Services, Inc.,

Employer, and

Liberty Mutual Ins. Co.,

Carrier, Defendants.

Hearing held in Richland County,
South Carolina on November 13th, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston F. McDaniel, Esquire, for Claimant

Landon L. Hughey, Esquire, and Brett H. Bayne, Esquire for Defendants

Filed: December 5, 2013

STIPULATIONS

Prior to the Hearing, the parties stipulated to the following:

1. The South Carolina Workers' Compensation Commission has jurisdiction of this claim;
2. Venue, set in Richland County, South Carolina, is proper;
3. Claimant and Employer were both subject to the South Carolina Workers' Compensation Act at all times relevant to this claim;
4. The sole purpose of the Hearing requested by Claimant pursuant to his Form 15, Section III is for the Commission to determine whether Defendants properly terminated workers' compensation benefits in accordance with § 42-9-260(B)(3); and
5. No documentary evidence dated after September 13th, 2013 would be considered by the undersigned in the adjudication of the issues in dispute.

STATEMENT OF THE CASE

This matter was set for a Hearing at the request of the Claimant pursuant to a Form 15, Section III, filed on September 23rd, 2013. Claimant alleges he suffered an injury by accident arising out of and in the course of his employment with Defendants when he sustained an electrical shock on May 22nd, 2013, resulting in an injury to his heart, left hand/arm/shoulder, neck, head (brain), and chest. Claimant asserts that Defendants accepted the claim and began paying temporary total disability benefits and medical treatment, but terminated all benefits on or about September 12th, 2013, citing § 42-9-260(B)(3) as authority to do so. Claimant asserts this termination of benefits was improper under the statute, and that Defendants should be assessed penalties provided for in § 42-9-260(G). Claimant asserts that he has filed a Form 50 Hearing request asking the Commission to award workers' compensation benefits, and that the sole purpose of the Hearing is to determine whether Defendants properly terminated benefits in accordance with § 42-9-260.

Defendants allege that Employer was aware Claimant suffered a medical emergency and began providing workers' compensation benefits, as a precaution to mitigate future damages should the claim be found compensable, to allow Defendants an opportunity to conduct a thorough investigation of the alleged incident to determine if it was a compensable workers' compensation claim. Defendants assert that on or about September 12th, 2013, it properly terminated workers' compensation benefits, following a good faith investigation by Employer that revealed grounds for denial of the claim. Defendants assert that this termination was lawful and proper by action of § 42-9-260(B)(3) and that therefore it should not be subject to sanctions under § 42-9-260(G).

Prior to the Hearing the parties filed a number of Motions with the Commission. These Motions were considered at the Hearing and were addressed by a separate Order issued by the undersigned on December 5th, 2013, which is incorporated herein by reference.

Following the resolution of the Motions, the parties addressed the merits of the claim raised on Claimant's Form 15, Section III. Both parties offered APA Submissions and Exhibits. Claimant renewed his objection first raised in his letter to the Commission dated November 7th, 2013 objecting to the submission of Defendant's Pre-Hearing Brief, Notice of Witnesses, APA Submissions and Exhibits as untimely. Claimant was offered the opportunity to have the Hearing postponed in order to allow him adequate time to respond to the Defendant's Pre-Hearing Brief, Notice of Witnesses, APA Submissions and Exhibits. Claimant declined to postpone the Hearing, and the following records were received into evidence, with the stipulation that no evidence dated after the date Claimant had actual notice of the denial, September 13th, 2013, would be reviewed or considered by the undersigned:

CLAIMANT'S APA SUBMISSIONS AND EXHIBITS

1. Dr. Lanneau Lide, SC Heart Center, 09/16/13- 10/04/2013, p. 1-2.
2. Dr. Jeffery Travis, Lexington Cardiovascular Assoc., 09/30/13, p. 3.
3. Lexington Medical Center, 05/28/2013 – 05/29/2013, p. 4-8.
4. Dr. Karen Greenfield, Doctors' Care, 05/28/2013 – 09/17/2013, p. 9-16.
5. Kristy Thompson, RN, Genex Services, Inc., 07/22/2013, p. 17-20.

6. "Correspondence", 07/30/2013- 08/07/2013, p. 21-25.

DEFENDANT'S APA SUBMISSIONS AND EXHIBITS

1. Doctors' Care, 05/28/2013, p. 1.
2. South Carolina Heart Center, 05/28/2013, p. 2-4.
3. Jeffrey A. Travis, M.D., Lexington cardiovascular Surgery, 05/28/2013, p. 5-7.
4. Statement of Bobby Ruppe, 09/23/2013, p. 8.
5. Emails between Bobby Ruppe and Claimant, 05/27/2013, p. 9.
6. Driver's Daily Log, 05/22/2013- 05/23/2013, p. 10-11.
7. Letter from Preston McDaniel to Defense Counsel, 10/16/2013, p. 12.
8. Motion to Quash the Deposition of the Adjuster, 09/27/2013, p. 13-21.
9. Motion to Compel Deposition and For Costs, 10/21/2013, p. 22-24.
10. Motion for Continuance, 10/21/2013, p. 25-30.
11. Summons and Complaint filed by Preston McDaniel, 09/27/2013, p. 31-48.
12. Temporary Restraining Order, 10/01/2013, p. 49-51.

FINDINGS OF FACT

Based on my consideration of the relevant evidence submitted into the record, excluding all evidence dated after September 13th, 2013, as well as the testimony of the Claimant offered at the Hearing, I make the following findings of fact:

1. Claimant suffered an incident while working on electrical equipment at work that he believed to be an electrical shock on May 22nd, 2013. This is based on the testimony of the Claimant as well as the medical records submitted by the Claimant from Lexington Medical Center.
2. Claimant suffered a myocardial infarction on May 28th, 2013. This is based on the medical records submitted by the Claimant from Lexington Medical Center.

3. Claimant alleged that he suffered an injury by accident arising out of and in the course and scope of his employment to his heart, left hand/arm/shoulder, neck, head (brain), and chest, and filed a claim for workers' compensation benefits. This is based on the Form 50 Employee's Notice of Claim filed by Claimant on June 6th, 2013.
4. Defendants began providing Claimant with temporary total disability benefits beginning on June 1st, 2013 and continuing through September 14th, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12th, 2013.
5. Defendants also provided Claimant with medical treatment between the alleged date of injury and September 12th, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12th, 2013.
6. Defendants terminated Claimant's workers' compensation benefits 114 days after employer could have had notice of his alleged injury, on September 12th, 2013. The termination was based on a denial of the claim following an investigation. This is based on the Form 15, Section II dated September 12th, 2013.
7. The Form 15, Section II was received by the Commission no later than September 18th, 2013. This is based on the records in the Commission's file and the Form 15, Section III filed by the Claimant.
8. The Form 15, Section II documented that the reason for termination was that the employee fails to meet the burden of a compensable injury under the S.C. Workers' Compensation Act. This is based on the Form 15, Section II dated September 12th, 2013.
9. Claimant received the Form 15, Section II in a timely manner and was able to exercise his rights under § 42-9-260(C) and R.67-504(C). This is based on the Form 15, Section III filed by the Claimant. Claimant alleged that the Form 15, Section II was not served on him properly pursuant to R.67-504(A) because he was only served with one copy of the Form 15, Section II and the documented reason for termination was printed on the Form 15 under Section II, rather than on an attached document. However, Claimant was in no way prejudiced from exercising his rights under the Act by the manner of service of the Form 15, Section II. This is evident by the fact that Claimant filed a Form 15, Section III asserting his rights shortly after receiving the Form 15, Section II. Claimant had the benefit of counsel at the time he was served with the Form 15, Section II,

rendering the requirement to provide him with two copies unnecessary. Therefore, Defendants alleged failure to provide Claimant with a second copy of the Form 15, Section II, and including the reasons for denial on the form itself rather than on a separate attachment are not grounds to find the termination of benefits was improper.

10. Claimant did not provide any evidence at the Hearing to indicate that Defendants acted in anything other than good faith during the investigation and eventual denial of the claim. This is based on the evidence (or lack thereof) submitted by the Claimant at the Hearing.
11. I find the Claimant's argument that the apparent failure of Defendants to interview Claimant prior to the denial of the claim as evidence of bad faith is unpersuasive. Claimant is alleging a medically complex condition resulting from an injury by accident. Defendants have not denied that Claimant suffered an incident he believed to be an electrical shock on May 22nd, 2013. 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, to which Defendants had access by operation of § 42-15-95. Claimant's statement would have been of little value to Defendants in attempting to determine whether his heart condition was causally related to the alleged electrical shock.

RULINGS OF LAW

Based on the foregoing, I make the following rulings of law:

1. The Workers' Compensation Act provides "[o]nce temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if . . . a good faith investigation by the employer reveals grounds for denial of the claim." § 42-9-260(B)(3).
2. Defendants properly terminated Claimant's workers' compensation benefits on September 12th, 2013 by meeting all the required elements for termination under § 42-9-260(B)(3).
    a. Benefits were commenced on or about June 1st, 2013. *See* Finding of Fact No. 4.

b. Benefits were terminated on or about September 12th, 2013, well within 150 days after the employer could have received notice of the injury. *See* Finding of Fact No. 6.

c. Defendants represented to the Commission they conducted a good faith investigation of the claim. *See* Form 15, Section II dated September 12th, 2013.

d. Claimant did not provide any evidence that Defendants conducted their investigation in anything other than good faith. *See* Finding of Fact Nos. 10-11

e. Defendants represented the grounds for denial revealed during their investigation was a good faith belief that "Claimant fails to meet the burden of a compensable injury under the SC Workers' Compensation Act". *See* Form 15, Section II, dated September 12th, 2013. Under the Act, Claimant bears the burden of proving by a preponderance of the evidence that it is more likely than not that Claimant suffered an injury by accident arising out of and in the course of his or her employment resulting in disability. *See* § 42-1-160; *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (S.C. App. 2009) ("A claimant has the burden of proving facts sufficient to allow recovery under the Workers' Compensation Act".); *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 113 S.E.2d 737 (1960) ("The burden rests upon claimants to show by competent testimony, not only the fact of injury, but that it occurred in connection with the employment of the deceased; and to furnish evidence from which the inference can logically be drawn that the injury arose out of and in the course of the employment." (*Internal citations omitted*)); *S.C. Second Injury Fund v. Luberty Mut. Ins. Co.*, 353 S.C. 117, 576 S.E.2d 119 (S.C. App. 2003) ("The burden lies with the workers' compensation claimant to demonstrate causation by a preponderance of the evidence.").

f. 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.

3. § 42-9-260(C) and R.67-504(C) provide a mechanism for a Claimant whose temporary disability benefits have been terminated by action of § 42-9-260(B)(3) to have an Order issued reinstating benefits following a Hearing held pursuant to a request made by Claimant on a Form 15, Section III. Counsel for Claimant stipulated on the record that

the sole purpose of the Hearing he had requested was to determine whether Defendants properly stopped benefits under § 42-9-260.

4. Based on the foregoing, I find that Defendants properly stopped benefits under § 42-9-260 on September 12th, 2013. Defendants terminated benefits on the justification that a good faith investigation reveals grounds for the denial of the claim. *See* Finding of Fact # 8. This is a permissible ground for termination under the statute. *See* § 42-9-260(B)(3). At the time Defendants terminated Claimant's benefits on September 12th, 2013, Defendants had access to Claimant's medical records by operation of § 42-15-95 and had knowledge of the course of Claimant's treatment through its Nurse Case Manager. *See* Claimant's APA Submission # 5, p. 17. 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. *See e.g.* Claimant's APA Submission #3, p.4 ("Discharge Diagnosis(es) . . . 3. Coronary artery disease[,] . . . 5. Hypertension[,] 6. Congestive heart failure."). The fact that there also exists evidence that was available to Defendants that could lead to the conclusion that Claimant's current condition is causally related to a compensable injury by accident does not lead me to conclude that Defendant's termination of benefits was improper. Claimant bears the ultimate burden of proving his claim is compensable and he has requested the Commission provide him an opportunity to do so.

5. Specifically, Claimant has requested a Hearing on the merits of whether Claimant sustained a compensable injury by accident and is entitled to benefits by operation of the Form 50 Employee's Request for Hearing filed on October 21st, 2013. Therefore, the question of whether Claimant sustained a compensable injury by accident and is entitled to benefits under the Act will be decided by the Commission at the Hearing set pursuant to Claimant's Form 50 Request for Hearing.

6. Claimant has availed himself of all relief available under § 42-9-260 and R.67-504 and, therefore, these provisions of the Workers' Compensation Act are no longer in contention in Claimant's claim for benefits against Defendants.

ORDER

IT IS THEREFORE ORDERED that Defendants properly terminated benefits under § 42-9-260 on September 12th, 2013.

IT IS FURTHERMORE ORDERED that Claimant's request for sanctions against Defendants under § 42-9-260(G) for failure to comply with the provisions of that statute is DENIED.

IT IS FURTHERMORE ORDERED that all other issues in contention, specifically including the question of whether Claimant sustained an injury by accident arising out of and in the course of his employment with Defendants resulting on compensable disability is preserved for adjudication at the Hearing set pursuant to Claimant's October 21st, 2013 Form 50 Employee's Request for Hearing.

AND SO IT IS ORDERED!

T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

December 5, 2013

By: Amy Bracy, Administrative Assistant to Commissioner Beck

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 OCT -1 AM 11:59
JEANETTE W. McBRIDE
C.C.P. & G.S.

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

TEMPORARY RESTRAINING ORDER ISSUED WITHOUT NOTICE PURSUANT TO SCRCP RULE 65(b)

This Court has reviewed the Affidavit and the verified Complaint and finds that the Plaintiff ~~is~~ appears to be totally disabled from gainful employment at this time due to his injuries and condition

and has no source of income other than his weekly compensation payments. I further find that failure to continue to provide medical care could result in severe immediate and irreparable damage to the physical condition of the Plaintiff due to his severe medical condition up to and including the death of the Plaintiff.

After due and proper consideration of the verified Complaint and the Affidavit attached thereto and incorporated therein by reference, and a after preliminary determination that the stopping of compensation benefits and medical benefits to the Plaintiff places the Plaintiff in danger of immediate and irreparable injury, loss or damage before a hearing can be properly held on a Motion for a Temporary Restraining Order,

IT IS HEREBY ORDERED that the request for a Temporary Restraining Order Without Notice be and hereby is **GRANTED** and that the Defendant American Fire and Casualty Co. by and through its Attorneys and Managing Agent, Ms. Terri Hughes, are hereby ordered to reinstitute and bring current temporary compensation benefits and to provide medical care until such time as a hearing may be held on the Motion requesting a Temporary Restraining Order pursuant to the Motion filed with the Court.

Pursuant to the provisions of Rule 65(b) this Order shall expire ten (10) days from the date and time of issuance. This Order is issued on Tuesday, October 1, 2013 (date) at (hour)

11:45, a m. o'clock. Upon notice for good cause shown, which shall be include the fact that a hearing cannot be held on the Motion for a Temporary Restraining Order, this Court will entertain an extension for a like period of time unless the Defendant American Fire and Casualty Co., the Defendant in this action, agrees to that this Temporary Restraining Order remains in place until such time as a hearing can be held on the Motion for a Restraining Order, on October 8, 2013 at 9:00 am at the Richland County Courthouse and until further order of this Court.

AND IT IS SO ORDERED.

Carl Shree Lee
PRESIDING JUDGE
Fifth Judicial Circuit

October 1, 2013

CERTIFIED TRUE COPY OF ORIGINAL FILED.
Jeanette W. McBride
Clerk of Court
RICHLAND COUNTY
SOUTH CAROLINA

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGME IN A CIVIL CASE

CASE NUMBER: 2013CP4005888

Clarence B Winfrey Jr

PLAINTIFF(S)

American Fire And Casualty Co
Archway Service, Inc.

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 11 October 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Landon L. Hughey

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

RICHLAND COUNTY FILED 2013 OCT 11 PM 4:22 JEANETTE W. McBRIDE C.C.P. & G.S.

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Clarence Winfrey, Plaintiff, vs. Archway Services, Inc., Employer, and American Fire & Casualty Insurance Company c/o Liberty Mutual Insurance, Carrier, Defendants.	)	CASE NO. 2013-CP-40-05888 **ORDER**

RICHLAND COUNTY
FILED
2013 OCT 10 AM 11:02
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court for a hearing on a Temporary Restraining Order issued without notice pursuant to Rule 65(b), SCRCP. Plaintiff filed a Summons and Complaint seeking a declaratory judgment on September 27, 2013. Plaintiff also filed for a temporary restraining order without notice on this date. This Court issued the temporary restraining order without notice on October 1, 2013. Defendants filed a Motion to Dismiss the temporary restraining order pursuant to Rule 12, SCRCP, on or about October 2, 2013.

The hearing on the temporary restraining order and Defendants' Motion to Dismiss was held on October 8, 2013. Plaintiff was represented by Preston McDaniel, Esquire, and Defendants were represented by Brett H. Bayne, Esquire.

FACTS

Plaintiff alleges his injuries arose from an electrocution accident on May 22, 2013. Plaintiff began receiving temporary compensation benefits and medical benefits as provided by the South Carolina Workers' Compensation Act on July 11, 2013. On September 16, 2013, Plaintiff received a letter stating that Defendants had stopped temporary compensation benefits and medical benefits and denied Plaintiff's claim following a good-faith investigation pursuant to S.C. Code Ann. § 42-9-260. Plaintiff filed for a temporary restraining order to reinstate the

SCANNED

temporary compensation benefits and an action for a declaratory judgment that Section 42-9-260 is facially unconstitutional.

ANALYSIS

Plaintiff argues that this Court should make a declaratory judgment that Section 42-9-260(B) is facially unconstitutional because it deprives Plaintiff of his benefits, a property interest, without a prior hearing in violation of his due process rights. Plaintiff seeks a corresponding temporary restraining order to reinstate the benefits until the issue of the constitutionality of the statute can be determined.

Defendants move for the temporary restraining order and declaratory judgment to be dismissed because this Court does not have subject matter jurisdiction over the matter pursuant to S.C. Code Ann. § 42-1-540, as the Workers' Compensation Commission has exclusive original jurisdiction over claims related to remedies against the employer. Additionally, Defendants argue the scope of the temporary restraining order is improper pursuant to Rule 65(d), SCRCP, in that it is not seeking to restrain activity.

This Court agrees that the temporary restraining order should be dismissed. The temporary restraining order requires this Court to take an affirmative action of ordering *reinstatement* of the benefits, rather than restraining any behavior, as Rule 65(d), SCRCP, requires. Additionally, a hearing before the Workers' Compensation Commission pursuant to Section 42-9-260 has been scheduled for November 13, 2013 to determine if the benefits should be reinstated. The Commission has the sole authority to reinstate benefits if appropriate. Because Plaintiff already has a mechanism for a remedy with the Workers' Compensation Commission, who has exclusive original subject matter jurisdiction over relief for work-related injuries, this Court must defer to their authority on the issue of reinstating the benefits.

However, regarding the declaratory judgment action, this Court does have jurisdiction over the issue of whether Section 42-9-260 is facially unconstitutional. The Supreme Court stated in *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), that the Administrative Law Court is unable to decide facial challenges to a statute. Instead, such challenges are "legal questions that are properly raised for the first time on appeal **or in a declaratory judgment action before the circuit court.**" *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 39 (emphasis added). Clearly the circuit court has original subject matter jurisdiction

over declaring a statute unconstitutional, even if the statute relates to an administrative agency. Therefore, this Court is not inclined to dismiss Plaintiff's declaratory judgment action.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED** that the temporary restraining order is **DISMISSED.** Defendants' motion to dismiss the declaratory judgment is **DENIED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
October 9, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGME. IN A CIVIL CASE

CASE NUMBER: 2013CP4005888

Clarence B Winfrey Jr

PLAINTIFF(S)

American Fire And Casualty Co
Archway Service, Inc.

DEFENDANT(S)

Submitted by: _____ Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

RICHLAND COUNTY FILED 2013 NOV -1 AM 11:38 JEANETTE W. McBRIDE C.C.P. & G.S.

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 7 November 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Landon L. Hughey

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Clarence Winfrey, Plaintiff, vs. Archway Services, Inc., Employer, and American Fire & Casualty Insurance Company c/o Liberty Mutual Insurance, Carrier, Defendants.	)	CASE NO. 2013-CP-40-05888 **ORDER**

RICHLAND COUNTY
FILED
2013 NOV -7 AM 11:34
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court on Plaintiff's Motion for New Trial, Reconsideration and/or to Alter or Amend the Judgment Pursuant to SCRCP Rule 59(e) submitted on or about October 18, 2013 and Defendant's Motion to Alter or Amend Pursuant to Rule 59(e) submitted on or about October 18, 2013. After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

The Court's Order on October 9, 2013 was issued following a hearing on a Temporary Restraining Order issued without notice. During the hearing, the defense spoke to reasons a corresponding Complaint for declaratory judgment should be dismissed and argues in its Motion to Alter or Amend that the Court failed to address these reasons. However, the matter of dismissing the Complaint was not the purpose of the hearing, and those reasons should be raised separately at another time.

Plaintiff argues in its Motion for New Trial, Reconsideration and/or to Alter or Amend the Judgment that the Court misunderstood the purpose of the Temporary Restraining Order, which is to maintain the status quo and restrain the Defendant from terminating benefits with the consequence that benefits be reinstated. Therefore, Plaintiff argues that granting the relief with

SCANNED

the effect of the affirmative action of reinstatement of Workers' Compensation Benefits is appropriate. Plaintiff cites two cases in support of this proposition. First, Plaintiff cites *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2006), where the South Carolina Court of Appeals held that granting a Temporary Restraining Order to an anesthesiologist to prevent the hospital where she was employed from revoking her privileges was appropriate. However, *Peek* is distinguishable from the present case because the plaintiff sought a temporary restraining order *before* the date her privileges were to be terminated in order to prevent the hospital from doing so. In the present case, Plaintiff seeks a temporary restraining order to reinstate his benefits *after* they were terminated, differentiating the present case from *Peek*.

Perhaps more on point is the second case Plaintiff cites. In *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), the Fourth Circuit Court of Appeals affirmed the granting of injunctive relief to a class of women who were denied unemployment compensation on the ground that they had voluntarily quit their employment for the personal reason of being pregnant, which at the time made a claimant ineligible for benefits. The relief the South Carolina federal district court granted was to permanently enjoin the South Carolina Employment Security Commission from implementing the policy disqualifying otherwise eligible women from the receipt of unemployment compensation and to order retrospective monetary relief for the benefits the women did not receive. *See Brown v. Porcher*, 502 F. Supp. 946, 958 (D.S.C. 1980). While this case does stand for the proposition that a court can order an injunction resulting in an affirmative action being made, this Court's unwillingness to order the affirmative action of reinstatement of benefits in the present case was based on more than a reluctance to order an affirmative action rather than a restraining of action. Rather, it was a reluctance to order an affirmative action, the reinstatement of benefits, which is in the sole discretion of another authority to order, the Workers' Compensation Commission. As a matter of public policy, this Court must defer to the Commission's authority to take action.

arl
#2

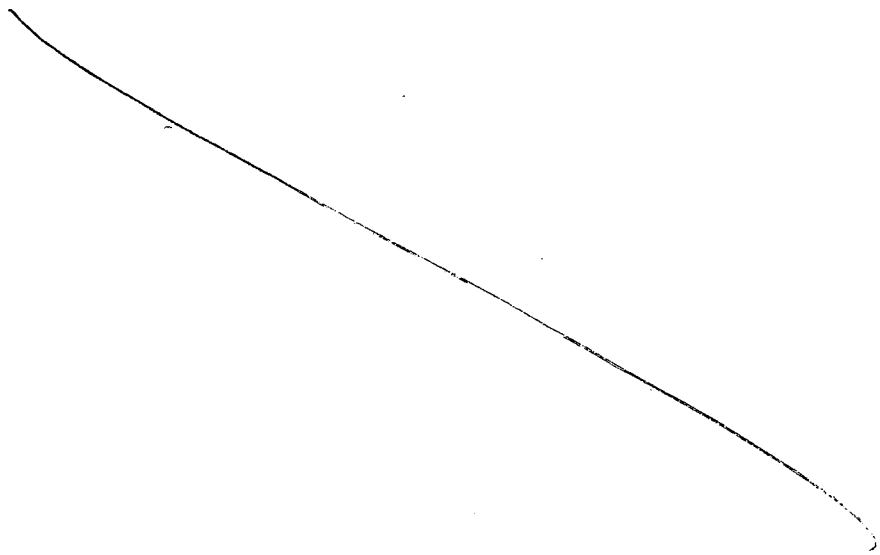
ORDER

Accordingly, this Court hereby **DENIES** both Plaintiff's Motion for New Trial, Reconsideration and/or to Alter or Amend the Judgment Pursuant to SCRCP Rule 59(e) and Defendant's Motion to Alter or Amend Pursuant to Rule 59(e). Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

November 6, 2013
Columbia, South Carolina



af
#3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-05888

Clarence B. Winfry, Jr.
PLAINTIFF(S)

American Fire and Casualty Co.
DEFENDANT(S)

Submitted by: _____ | **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _Dismissed without prejudice_____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion to Dismiss Under Rule 12(b)(7) and Motion for Summary Judgment are Under Advisement. Defendant's Motion for Fees, Costs, and Other Relief is DENIED. Plaintiff's Motion to Dismiss Counterclaims is GRANTED.

2014 JAN 16 PM 3:09
RICHLAND COUNTY
CLERK OF COURT
C.C.P. & G.S.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge G. L. Coop **Judge Code** 2126 **Date** 1-16-14

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Jan, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel
ATTORNEY(S) FOR THE PLAINTIFF(S)

Landon L. Hughey
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGM IN A CIVIL CASE

CASE NUMBER: 2013CP4005888

Clarence B Winfrey Jr

PLAINTIFF(S)

American Fire And Casualty Co
Archway Service, Inc.

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Voluntary Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 February 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Landon L. Hughey

James Keith Roberts

Jeanette W. McBride

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

SCRCP Form 4C (10/2011)

2014 FEB -3 PM 3:28
RICHLAND COUNTY
FILED
JANETTE W. McBRIDE
C.C.P. & G.S.

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Clarence B. Winfrey, Jr., Plaintiff, v. American Fire & Casualty Co., Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No.: 2013-CP-40-5888 **ORDER DENYING DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(7) AND MOTION FOR SUMMARY JUDGMENT** **RULE 19 ORDER**

RICHLAND COUNTY FILED
2014 JAN 31 PM 3: 55
JANETTE W. McBRIDE C.C.P. & G.S.

This matter came before the Court on January 15, 2014 by way of Defendant American Fire & Casualty Company's Motion to Dismiss Pursuant to Rule 12(b)(7), SCRCP, and Motion for Summary Judgment. Counsel for each party was present at the hearing and counsel for Plaintiff objected to both of Defendant's Motions. After due and proper consideration of the record, Defendant's Motions, opposing and supporting memoranda, and counsels' arguments at the hearing, the Court **DENIES** Defendant American Fire & Casualty Company's Motions for the reasons set forth below.

Defendant's Motion to Dismiss Pursuant to Rule 12(b)(7)

Defendant's 12(b)(7) Motion to Dismiss is based on Plaintiff's failure to join a necessary party under Rule 19 of the South Carolina Rules of Civil Procedure.[1] Defendant asserts that Plaintiff failed to join a necessary party, which the Motion asserts is an "indispensable party." However, the Motion does not list nor is there a name given for the alleged "indispensable party" in Defendant's Motion, thus rendering the Motion facially deficient.

1 Specifically, Rule 19(a) provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

SCANNED

Rule 19 of the South Carolina Rules of Civil Procedure was also not written to provide grounds to dismiss a cause of action but instead to make certain that all necessary parties are joined such that the Court can accord complete relief to all parties, to ensure that all parties with an interest in the subject matter of the action are given an opportunity to protect that interest, and to prevent non-joinder of a party from subjecting that party to a substantial risk of inconsistent obligations. Only if a party cannot be joined should the Court consider dismissing the underlying action, in which case the action should not proceed among the parties before it.[2]

In this case, Defendant's Motion does not name the alleged "indispensable party" or set forth any basis on which the Court could determine that: (1) an unnamed party cannot be joined, and (2) why the unnamed party is indispensable to the current action. Rule 19 clearly contemplates that the party claiming non-joinder of a necessary party must set forth both the name of that party and the reason why the party was not originally joined. Having failed to do so, Defendant's 12(b)(7) Motion is **DENIED**.

Defendant's Motion for Summary Judgment

In Plaintiff's Complaint, filed on September 27, 2013, Plaintiff sought a Temporary Restraining Order ("TRO") and a declaration that Section 42-9-260 of the South Carolina Code of Laws is unconstitutional. The TRO was issued on October 1, 2013 and subsequently dismissed on October 9. In that dismissal, the Court found that it had jurisdiction over Plaintiff's claim to determine whether Section 42-9-260 is facially constitutional and denied Defendant's Motion to Dismiss the Complaint.

The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), reh'g denied (Mar. 18, 2009). Having heard the arguments of counsel and considered the parties' pleadings and memoranda of law, this Court has determined that Plaintiff has

2 *See* Rule 19(b), SCRCP ("If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.").

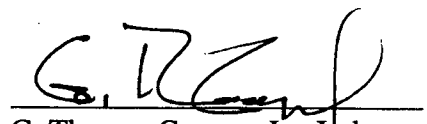
raised significant issues of law and/or fact concerning Plaintiff's claim that Section 42-9-260 of the South Carolina Code of Laws is unconstitutional. As such, Defendant's Motion for Summary Judgment must be **DENIED**.

Rule 19 Order

The Court is of the opinion that the State of South Carolina and/or the South Carolina Legislature should be named as a necessary party to any action challenging the constitutionality of a South Carolina statute.

Therefore, if this action is to proceed to a judicial determination of the constitutionality of Section 42-9-260, **IT IS ORDERED** that, pursuant to Rule 19, SCRCP, Plaintiff amend his Complaint to add the State of South Carolina and/or the South Carolina Legislature as parties to this action and serve the Attorney General of South Carolina with the Amended Complaint within thirty (30) days of the date of this Order.

IT IS SO ORDERED.



Columbia, South Carolina
January 31, 2014

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1306305

Clarence B. Winfrey, Jr.,

Employee/Claimant,

v.

Archway Services,

Employer,

and

American Fire & Casualty,

Carrier,

Defendant(s).

HEARING:	Date: January 13, 2014 Location: Columbia, South Carolina
APPEARANCES:	Claimant represented by Preston F. McDaniel, Esquire Defendant(s) represented by Brett Bayne, Esquire
PURPOSE OF HEARING:	This matter came before the Commissioner on a Form 50 and 51
COMMISSIONER:	Susan S. Barden
FILED:	February 27, 2014

APA SUBMISSIONS

At the time for Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission the parties have made records and reports from the following a part of the Record in this matter: Dr. Jeffrey A. Travis, Lexington Cardiovascular Surgery; Dr. Lanneau D. Lide, Dr. Himadri Dasgupta, SC Heart Center; Dr. Karen Greenfield, Doctor's Care; Lexington Medical Center; Dr. Barry J. Feldman, Lexington Heart; and employer records including a statement of Mr. Bobby Ruppe, emails between Mr. Bobby Ruppe and Clarence Winfrey and driver's daily logs. The Decision and Order of Commissioner T. Scott Beck was also offered as an exhibit but that is part of the Commission file which is admitted without objection. In addition to the APA Submissions and Exhibits, the depositions of Dr. Lanneau D. Lide dated January 23, 2014; Dr. Karen Greenfield dated January 9, 2014; Dr. Barry J. Feldman dated January 6, 2014; Dr. Jeffrey A. Travis dated December 16, 2013; and the Claimant's discovery deposition were admitted into evidence without objection. The Record was left open at the hearing on January 13th for the deposition of Dr. Lide. Counsel for the Claimant noted for the Record that Dr. Barry J. Feldman had neither seen nor evaluated the Claimant and had no personal knowledge of the Claimant and had only performed a records review and therefore his opinions

were not based on personal knowledge nor is there any evidence they are based on a properly phrased hypothetical; however Counsel did not enter any objection to this evidence being received but only asked the Commission to consider this in reference to the weight to be given to this evidence.

STIPULATIONS

The parties stipulated to venue. As to jurisdiction, the Defendants object to jurisdiction based on their argument (based on "law of the case" doctrine) that certain Findings in Commissioner Beck's Order from the Form 15(III) hearing concerning the Defendants stopping temporary benefits without a hearing under SC Code §42-9-260, which is on appeal, deprives this Commissioner of jurisdiction to hear the case on the merits/compensability issue. For the purpose of this hearing, the parties stipulated to an average weekly wage of $663.57 with a resulting compensation rate of $442.40 which is the compensation rate at which benefits were initially paid, have been paid and at which the Claimant requests that benefits be reinstated in this matter at this time. This stipulation of the average weekly wage and compensation rate is specifically for the purpose of this hearing only and it is agreed that the Claimant reserves the right to challenge the compensation rate at a later date. No inquiry has been made nor information

requested as to the applicable compensation rate at this point.

The Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record.

STATEMENT OF THE CASE

It is admitted that the Claimant sustained an electrical shock injury on May 22, 2013. The injury was immediately reported by the Claimant to his supervisors and subsequent to that, temporary total disability benefits were started and authorization was given for medical care. Subsequently on September 13th and by written notice on September 16th within the 150 day period allowed by statute, the Defendants through a Form 15 advised the Claimant that they were as of that date denying benefits with the reason given being that a good faith investigation had determined grounds to deny the claim. The Claimant then filed for a Form 15 hearing and filed a Form 50 with the Commission requesting a hearing and a determination that the Claimant had suffered a compensable injury involving injury and conditions resulting from that injury to his heart. Through their Form 51, the Defendants denied that the Claimant sustained injury by accident under the Act. At the hearing, the Defendants' position was that they admitted that the Claimant had sustained an electrical shock injury and based on the

medical reports and depositions, admitted injuries to the left shoulder and neck but specifically denied that the accident had resulted in any injury and/or related conditions to his heart. The Defendants admitted that they had previously authorized treatment with Dr. Lide and Dr. Travis and if Claimant's heart condition is determined to be compensable, Defendants have no opposition to the Claimant continuing to treat with Drs. Lide and Travis for his heart condition, which is injury to the heart. Also, as set out in the Statement of the Case the Defendants take the position that this Commissioner lacks jurisdiction to hear this case. The Claimant's position is that as a result of the electrical shock, he sustained compensable injury including injury to the heart and that temporary total benefits should be reinstated back to the date that they were stopped on September 15th and that he should be provided medical care through Dr. Lide and Dr. Travis until such time as he reaches maximum medical improvement or further order of the Commission. Both parties agree that the issue before the Commission is whether or not the Claimant has sustained compensable injury under the Act as a result of the electrical shock and specifically including injury to his heart which is the major injury and problem for which the Clamant is currently being treated; and that the doctors have not been requested to

opine as to whether or not there are any other medical conditions, problems or injuries stemming from the electrical shock injury.

Finally as to the Defendants' position challenging the jurisdiction of this Commissioner to hear this case; Commissioner Beck had been assigned to that portion of the claim, and after a hearing issued an Order; in reference to the specific issue concerning the termination of temporary benefits without a hearing by the Defendants under SC Code §42-9-260. This Commissioner was assigned to hear this case as to the merits/compensability issue. The Decision of Commissioner Beck is under appeal and after the arguments made at the hearing on this issue were considered by me, this Commissioner would not have held this hearing on the merits if this Commissioner did not believe that in doing so that I was not operating within my authority to hold the hearing on the merits/compensability. Further, in reference to my decision as set forth hereinafter, this Order is not inconsistent with Commissioner Beck's Findings and no attempt was made to change or disagree with Commissioner Beck's Finding of a heart attack occurring on a particular date. In fact, it is my specific and intentional finding based on the evidence presented before me that the Claimant injured his heart on the date of the accident. Under the testimony and evidence

presented, having made that decision, whether or not the heart attack occurred on a particular date is not made and there is no Finding contained within this Order that the Claimant sustained a heart attack on the date of the shock/electrocution. This Order is written to make Findings in reference to the merits of the claim as to whether or not the injury to the Claimant's heart stemmed from the accident. Whether or not I agree or disagree with Commissioner Beck's Finding as to a particular date for the heart attack, no decision is made on that issue so as to prevent any conflict with the previous Decision by Commissioner Beck and as being an unnecessary Finding to the issues before me, i.e., merits/compensability.

STATEMENT OF FACTS

In addition to the deposition testimony and APA Submissions, the following is a summary of the testimonial evidence given in this matter in relationship to the other evidence presented.

Testimony was taken from the Claimant, Mr. Clarence Winfrey and Mr. Mark Warren. A review of the Form 58 filed by the Defendants did not list Mr. Warren as a potential witness but his testimony was allowed without objection.

Based on the testimony and evidence submitted, the Claimant was working on a commercial rotisserie in the Deli Department of

Publix Supermarket wherein he was tracing a wire on May 22, 2013 when his left hand came in contact with a loose electrical wire resulting in a severe shock knocking and causing him to jerk backwards. Mr. Winfrey during his testimony showed the entrance location and scar from the wound where the electricity entered his left hand. His testimony and description is confirmed by the records of Dr. Karen Greenfield where she recorded at her initial visit on May 28, 2013 an entry wound on the dorsum of the left third finger.

According to both the testimony of Mr. Winfrey and Mr. Mark Warren, this commercial unit would be rated between 208 and 480 volts as to the power feeding into and supplying the rotisserie unit. Both witnesses agreed also that the exact power rating could not be determined without testing the machine. After receiving the electrical shock, the Claimant immediately went outside because he was stunned and wherein he was having pain from his left hand extending through his left arm into his left shoulder and into and over his left shoulder and into his neck. When describing the pain and location, the Claimant described the pain in his shoulder area as being from the top of his shoulder into the front part of the shoulder which he demonstrated by extending his hand from just on top of the shoulder into the front part of the shoulder and chest area.

According to Mr. Winfrey's testimony which is confirmed by the employer records and particularly the statement of Mr. Bobby Ruppe, and as confirmed on the driver's daily log, he immediately reported the shock to his employer when he was advised that if he needed to, to go to the doctor. The records also confirm Mr. Winfrey's testimony that he received a hard shock.

Mr. Winfrey testified that when he received the shock that he both jerked and was knocked away from the machine and because of the location of the pain and the severe pain he was having in his shoulder and neck, he thought he had hurt his neck. He tried to avoid going to the doctor hoping that he would get better but his pain continued in his left hand, arm, shoulder and up into the left side of his neck as described previously from the time of the shock until he finally went to the doctor. He first went to a Minute Clinic on the day before he went to see Dr. Greenfield but due to the severity of his pain, he was told he would have to seek medical attention outside of the Minute Clinic, at which point he went to Dr. Greenfield at Doctor's Care. He testified that while his pain was continuous from the time of the shock, it continued to worsen until he finally had to seek medical attention. A review of the histories of all doctors that initially treated the Claimant establish a

consistent history that the problems he had begun with and continued from the point of the shock and continuing until he sought medical care with Dr. Greenfield. For example, Dr. Dasgupta, to whom Mr. Winfrey was sent by Dr. Greenfield immediately upon the abnormal EKG and diagnosing him with tachycardia, electrical shock, and muscle shock, recorded in his medical summary, "received an electric shock in five days ago and since then has complained of a pain in his left shoulder radiating to the left scapula region, the left side of his neck, left intraclavicular region and left arm." This description again is consistent with the history given by Mr. Winfrey to all doctors involved initially in his treatment.

The Claimant's condition was such on May 28th that Dr. Dasgupta whose office is directly across the street from Lexington Medical Center required an ambulance to take the Claimant to Lexington Medical Center where he was admitted and where he immediately had the catheterization performed by Dr. Lide, and then immediate surgery by Dr. Travis.

This injury was properly reported and once reported, benefits were started and medical care was authorized through Dr. Greenfield, Dr. Lide and Dr. Travis and he remains under the care of Dr. Travis and Dr. Lide at the time of this hearing. Compensation benefits were paid at the rate of $442.40 up to and

including September 15th when compensation benefits and medical care were stopped based on an alleged good faith investigation which established grounds for denial.

Based on the above summary of the evidence and after due and proper consideration of the testimony and evidence presented, I find that Mr. Winfrey has sustained his burden of proof by proving by a preponderance of the evidence that he sustained compensable injury to include specifically injury to his heart as a result of the electrical shock that occurred on May 22, 2013, and specifically including that the electrical shock resulted in the Claimant's heart attack, myocardial infarction, and ventricular septal defect (VSD), and including the specific entrance and exit wounds and damage to the heart as described by Dr. Travis all being physical injuries to the heart stemming from this accident. Therefore, the Claimant is entitled to the benefits sought to include the provision of medical care and the resumption of temporary total benefits from September 15, 2013 when those benefits were stopped until further order of the Commission. Wherefore, I have made the following findings of salient fact:

FINDINGS OF FACT

1. Claimant injured his neck and left shoulder in an admitted accident on May 22, 2013. Claimant alleges that he

also injured his heart on the date of the accident, which injury (a) aggravated a pre-existing condition, and (b) ultimately resulted in a myocardial infarction and subsequent ventricle septal defect.

2. Claimant is 51 years of age (testimony of Claimant).

3. Claimant finished the 12th grade, but did not receive a diploma (Claimant's Deposition, pages 6-7).

4. Claimant's prior employment includes work (a) at USC installing Wi-Fi, (b) as electrical maintenance man at F. B. Johnson, (c) as an electrician for a company that "roughs in" wiring for new houses; and (d) as a roofer (Claimant's Deposition, pages 9-11 and 13; testimony of Claimant).

5. On the date of the accident, Claimant's job with Employer was equipment maintenance worker for deli and bakery departments at Publix and Wal-Mart stores (testimony of Clamant; Defendants' APA #9, page 94; Claimant's Deposition, page 11).

6. In the mechanics of the accident, Claimant was shocked with 240-480 volts of electricity; Claimant believes the actual voltage was 480 volts. Defendants' witness admitted at the hearing that he was unsure of the voltage amount involved, and Defendants did not present any evidence to rebut Claimant's estimation even though Employer had access to the rotisserie in question. The fact that Defendants did not present any specific

evidence leads me to rely on Claimant's estimation (Defendants' APA #7, page 90; testimony of Warren; Claimant's APA #5, page 78).

7. Temporal medical evidence from May 28, 2013, supports Claimant's testimony that Claimant experienced pain (the worst of which was in his neck, but was also in the front of his shoulder and his left arm as well) from the moment of the accident which got progressively worse. Dr. Greenfield testified that Claimant (a) rubbed his arm during the examination, and (b) reported that his arm hurt. Claimant began sweating the same night of the Thursday accident and also the next morning (Defendants' APA #7, page 90; Defendants' APA #8, page 91; Claimant's APA #2, page 56; Claimant's APA #3, page 66; Deposition of Dr. Feldman, page 35; Claimant's Deposition, pages 13-16, 18, 20-21, and 32; Deposition of Dr. Greenfield, including but not limited to pages 5, 8, 16, and 21).

8. Dr. Travis stated that neck pain is a common presentation for a heart attack (Deposition of Dr. Travis, page 21).

9. **Three physicians** have all opined to a reasonable degree of medical certainty that the electric shock ultimately resulted in Claimant's heart attack, regardless of the date on which the infarction occurred. The deposition testimony of Dr.

Travis (the treating cardiovascular surgeon) is very compelling, as he--unlike any of the other physicians involved in this case--actually examined Claimant's heart in the operating room. Dr. Lide (the treating cardiologist) also links the electrical shock to Claimant's post-accident heart condition; in fact, Dr. Lide testified twice that he does not "see any way" that Claimant's infarction and VSD are not related to the injury. The third physician is a general physician board certified in family medicine (Claimant's APA #1, page 1; Claimant APA #2, pages 23-24; Claimant's APA #3, page 65; Deposition of Dr. Greenfield, pages 30-31; Deposition of Dr. Travis, including but not limited to pages 8, 13-17, and 23-32; Deposition of Dr. Lide in its entirety, including but not limited to pages 14, 23-24, 28, and 39).

10. Even if I discount or disregard the opinion of the general physician (board certified in family medicine), I give great weight to the opinions of the Drs. Travis and Lide, who both opine that the heart condition is causally related. I fully considered the opinion of Dr. Feldman (the only physician who states that there is no nexus between the electrical shock and the heart condition), but his opinion is outweighed by the opinions of the three other doctors, all three of whom treated Claimant rather than simply reviewing his medical records. I

note that Dr. Feldman (a) did not examine Claimant or even speak with Claimant; (b) did not see Claimant's heart, as opposed to Dr. Travis, who held it in his hand; (c) initially states in his written opinion that it is "possible" that there was no connection between the plaque rupture and the electrical shock, and then in the very next sentence states that it is of the "highest certainty;" (d) Dr. Feldman is a cardiologist and not a cardiovascular surgeon; nor has he undergone a surgical residency; and (e) Dr. Feldman was specifically asked to opine in writing as to whether there was a connection between an electrical shock and a VSD, although he does address other pertinent issues for Defendants in his deposition (Defendants' APA #10, page 97; Deposition of Dr. Feldman in its entirety, including but not limited to pages: 5-6, 10-11, and 17—lines 15 through 25; page 18—lines 1-14; pages 22-23, 31, 42-43, and 45-47; Deposition of Dr. Greenfield, page 4).

11. The statement by Ruppe is dispositive only of the fact that Claimant has a good work ethic (Defendants' APA, Exhibit 1).

12. Claimant has not reached maximum medical improvement.

13. Drs. Travis and Lide are hereby named the treating physicians. Although Defendants have denied the compensability of Claimant's heart condition, Defendants do not object to Drs.

Travis and Lide serving as treating physicians.

14. The Claimant is specifically requesting a finding of compensability for the heart and no medical evidence was presented that Claimant sustained or even may have sustained a head or brain injury. I therefore find that at this point he has not met his burden of proof with regard to any injury to the head/brain, and any benefits for the head/brain are denied at this juncture.

15. While the head and brain are listed as bodily parts involved under #3 in the Pre-Hearing Brief, the Claimant also notes in his Pre-Hearing Brief that this is a systemic electrical shock and requests treatment for, "all organs, members and bodily parts determined to be related." I note from the testimony and records of Dr. Greenfield that the Claimant had tenderness in the left arm and shoulder and was diagnosed with muscle shock. In her deposition she stated that this tenderness found on examination is more indicative of actual injury to those areas than just the pain that is caused by a heart attack. Dr. Lide in his treatment notes and specifically on September 17, 2013 recorded that, "we tried this patient on Neurontin last month when he appeared to have peripheral neuropathy secondary to electrocution at work. Dr. Lide also recorded on the August 13th visit that he was having numbness in

his great toe and suggested this neurological symptom was due to the electrical shock he experienced rather than the myocardial infarction. Thus, if any problems are opined to have stemmed from the electrical shock injury which is outside of the area and expertise of Dr. Lide and Dr. Travis, those doctors may request referral for him to other physicians for evaluation and treatment but the Defendants retain the right to contest whether those are related to the accident and to select the physicians for treatment of any causally related problems.

16. For purposes of the hearing before the undersigned, Claimant is very credible. I base this finding on my observations of Claimant's demeanor and on the delivery of his testimony.

17. In reaching my conclusions, I fully considered the facts that Claimant (a) is a smoker, (b) has hypertension, (c) has a family history of "premature coronary artery disease, and (d) had pre-existing severe 3-vessel disease on the date of the accident. However, those four facts were also specifically considered by the 3 physicians who provided opinions to a reasonable degree of medical certainty. Further, Claimant does not allege that his pre-existing disease was caused by the accident; he only alleges an aggravation resulting in an injury to his heart (Defendants' APA #8, pages 91-92; Defendants' APA

#9, page 94; Claimant's APA #2, pages 26 and 28; Deposition of Dr. Feldman, page 37; Claimant's Deposition, pages 26 and 29).

18. Although certainly not dispositive on the issue of compensability, I do note that Claimant had no coronary symptoms prior to the date of the electrical shock (Claimant's Deposition, page 27; Deposition of Dr. Lide, page 7, lines 21-22).

19. Claimant to receive temporary total disability benefits from September 15, 2013, through the present and continuing until further Order of the Commission or by agreement of the parties.

20. Claimant to receive ongoing treatment until he reaches maximum medical improvement.

21. Permanency is premature.

22. The issue of average weekly wage/compensation rate is held in abeyance.

CONCLUSIONS OF LAW

In accordance with SC Code §42-17-40, the following conclusions of law apply in this case:

1. Under SC Code §42-1-160, the decision is made as an injury by accident arising out of and in the course of the employment. The medical problems which the Claimant has and which have resulted in his disability stem from the physical

injury, the electrical shock that he sustained on May 22, 2013. Any medical condition and/or disability that either results directly from the physical injury or which is a pre-existing condition that is aggravated, accelerated or caused to become symptomatic by the physical injury is compensable as injury by accident under SC Law. See for example, Buff v. Columbia Baking Co., 215 S.C. 41, 53 S.E.2d 879 (1949); Walker v. City of Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966); (as to pre-existing conditions being compensable), Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (SC App. 1995).

2. Under SC Code §42-9-10 and SC Code §42-1-120, the determination is made as to the entitlement to disability compensation.

3. Under SC Code §42-15-60 the determination is made as to the provision of medical care.

4. Under the stipulation of the parties, venue is proper and the applicable average weekly wage and compensation rate that applies for the purpose of this hearing is determined. As to jurisdiction, SC Code §42-3-180 provides that this Commission has jurisdiction to decide all questions arising under the Title and states in pertinent part, "all questions arising under this Title . . . shall be determined by the Commission except as otherwise provided in this Title." The Defendants main argument

in taking the position that this Commission does not have jurisdiction is based upon the doctrine of Law of the Case and is based upon certain Findings made by Commissioner Beck in his Order. However, after review of the position of the parties, arguments of the parties, and after review of Commissioner Beck's Order and the general jurisdiction of this Commission to decide issues arising under the Title and the Form 50 and 51 filed in this matter, this Commissioner is found, as a matter of law, to have jurisdiction over these proceedings. The Form 51 filed in this matter specifically admits that both the employee and the employer were subject to the Workers' Compensation Act at the time in question. Further, Commissioner Beck's Order which serves as the basis for the Defendants' argument states and holds:

> "**IT IS FURTHERMORE ORDERED** that all other issues in contention, specifically including the question of whether the Claimant sustained an injury by accident arising out of and in the course of his employment with Defendants resulting on compensable disability is preserved for adjudication at the hearing set pursuant to Claimant's October 21, 2013 Form 50 Employee's Request for Hearing."

5. Under the issues before the Commission for decision, all other issues are held in abeyance for further decision by the Commission.

ORDER AND AWARD

THEREFORE IT IS ORDERED that the Claimant having been found to have sustained compensable injury, temporary total benefits

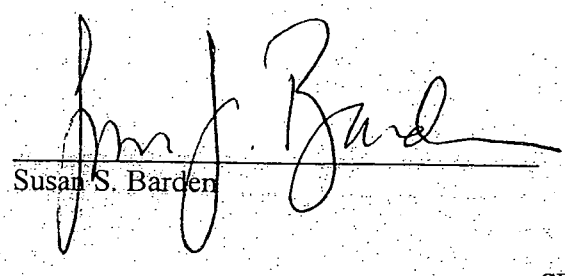
are ordered at this time to be reinstated from September 15, 2013 at the compensation rate of $442.40 with weekly compensation payments to continue until further order of the Commission. All benefits which have accrued prior to the date of this Order and which shall accrue before the resumption of weekly compensation payments shall be paid to the Claimant in a lump sum.

IT IS FURTHER ORDERED that the Claimant having been found to have sustained compensable injury specifically to include injury to his heart, the Claimant is to receive medical care for all injuries and conditions stemming from the accident that occurred in this matter and specifically to include all conditions related to the heart as found to be causally related by the authorized treating physicians which are hereby declared to be Dr. Jeffrey A. Travis and Dr. Lanneau D. Lide. The Defendants reserve the right to contest the compensability of any injury or condition opined to be related to the injury involving any bodily part, member, organ or system and the right to direct the treatment for all causally related medical problems outside of the area of expertise of the two (2) authorized treating physicians including the right to choose

authorized treating physicians to provide that medical care.

All other issues are held in abeyance.

AND IT IS SO ORDERED.



Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

February 27, 2014

By: Kristi Love, Administrative Assistant to Commissioner Barden

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4005888

Clarence B Winfrey Jr

PLAINTIFF(S)

American Fire And Casualty Co
Archway Service, Inc.

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Voluntary Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2161 **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Landon L. Hughey
Kristin M. Simons
Brett Harris Bayne

James Keith Roberts
T. Parkin C. Hunter

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

RICHLAND COUNTY FILED
2016 FEB 3 AM 10: 35
JEANETTE W. McBRIDE
C.C.P. & G.S.

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SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
CLARENCE WINFREY,	)	Civil Action No. 2013-CP-40-05888
Claimant/Plaintiff,	)	
v.	)	**ORDER**
AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP,	)	
Carrier/Defendant,	)	
and	)	
The State of South Carolina	)	
Defendants.	)	

RICHLAND COUNTY
FILED
2016 FEB 17 PM 4:00
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

This matter is before this Court by motion of the State of South Carolina ("State") seeking judgment on the pleadings. A hearing on the State's Motion was heard on September 10, 2014. The State was represented by T. Parkin Hunter and J. Emory Smith, Jr. of the South Carolina Attorney General's Office. The Plaintiff, Mr. Clarence Winfrey, was represented by Preston F. McDaniel of the McDaniel Law Firm. The insurance carrier, American Fire & Casualty Insurance Company c/o Liberty Mutual Group ("Carrier"), was represented by Brett H. Bayne of McAngus Goudelock & Courie, LLC. At the request of Plaintiff's counsel, another hearing was heard January 25, 2016, after a Form 4 issuing the Court's ruling was entered. This matter comes pursuant to the Declaratory Judgment Act. Plaintiff seeks to invalidate S.C. Code Ann. § 42-9-260 on the grounds that it is facially unconstitutional. Defendants sought to dismiss

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the Complaint and/or for a judgment on the pleadings based on several grounds including constitutional estoppel.

By way of background, Plaintiff has alleged he was injured in a work related accident on May 22, 2013. Following the May 22, 2013 accident, Carrier began paying weekly temporary disability benefits under the provisions of S.C. Code Ann. § 42-9-260(A) (1976, as amended) while conducting an investigation on the compensability of the claim. Section 42-9-260 expressly grants a defendant the right to pay these benefits without waiving any grounds for a good faith denial. Following the good faith investigation, Carrier denied Claimant's claim within 150 days on September 12, 2013, on the grounds that Claimant had failed to meet the burden of proof that he had sustained a compensable injury under the Workers' Compensation Act.—.

Following the denial of benefits, on September 18, 2013 Claimant filed a Form 15, Section III requesting a hearing pursuant to § 42-9-260(C) with the Workers' Compensation Commission. Then, On October 1, 2013, Claimant filed the underlying Summons and Complaint in Richland County Circuit Court, asking the court to declare that the statute under which he had received and accepted temporary disability benefits, and under which he had invoked his right to an expedited hearing, § 42-9-260, is unconstitutional. Claimant further accused Carrier of a bad faith denial of benefits, sought a temporary restraining order to stop Carrier from denying the claim, and sought an Order from Judge Lee finding the claim compensable and awarding benefits. On October 1, 2013, Judge Lee issued the temporary restraining order sought by Claimant related only to the denial and payment of benefits. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013. Judge Lee dismissed the temporary restraining order on October 9, 2013 based on a lack of jurisdiction to reinstate benefits. Carrier

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reinstate benefits. Carrier timely filed an Answer and Counterclaim asserting nine defenses and a counterclaim for costs and fees.

After the temporary restraining order was rescinded, the Commission set Claimant's Form 15, Section III for a hearing before Commissioner Beck on November 11, 2013, to determine Claimant's entitlement to relief under § 42-9-260. Prior to the hearing, Commissioner Beck conducted a standard pre-hearing conference as well as a Motions Hearing wherein Commissioner Beck ruled on all outstanding issues raised by the motions. Following the hearing, Commissioner Beck issued a Decision and Order on December 5, 2013 finding that Carrier had conducted a good faith investigation prior to its denial of the claim for Claimant's failure to meet the requisite burden of proof, and, therefore, Claimant was not entitled to further relief under § 42-9-260. Thereafter, Claimant timely filed a Form 30, appealing the Decision and Order to the Full Commission in accordance with § 42-17-50. The Full Commission affirmed Commissioner Beck's Decision and Order with minor amendments, finding that Claimant was not entitled to further relief under § 42-9-260.

On October 22, 2013, after the hearing Claimant requested under § 42-9-260 was set by the Commission, Claimant filed a Form 50 requesting a hearing pursuant to § 42-17-20, asking the Commission to hold a full evidentiary hearing to determine compensability of Claimant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. This request for Hearing was made pursuant to Claimant's right to a request a hearing under § 42-17-20, which is separate and distinct from his right to request a hearing under § 42-9-260. A hearing notice for the Form 50 hearing was sent by the Commission on December 6, 2013 with explicit instructions that the hearing would be to determine compensability of Claimant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other

organs, members, and bodily parts. The Form 50 hearing was held before Commissioner Barden on January 13, 2014. Following the hearing, Commissioner Barden issued a Decision and Order on February 27, 2014. Carrier timely filed an appeal to the Full Commission pursuant to § 42-17-50 based on legal errors contained in Commissioner Barden's Decision and Order. The Full Commission affirmed Commissioner Barden's finding of compensability for the heart but reversed and denied compensability for the alleged brain and head injuries.

Subsequent to Commissioner Barden's hearing under § 42-17-20, Judge Cooper conducted a hearing on all outstanding motions filed in the declaratory judgment action on January 15, 2014. Judge Cooper issued a Form 4 Order on January 16, 2014 denying as premature Carrier's motion for fees, costs, and other relief related to the request for a declaratory judgment and granting Claimant's motion to dismiss Carrier's counterclaim related to the request for a declaratory judgment. Judge Cooper issued a second written Order on January 31, 2014 denying Carrier's 12(b)(7) Motion to Dismiss and ordering that the State of South Carolina (the "State") be added as a party pursuant to Rule 19 if Claimant wished to proceed to a determination of the constitutionality of S.C. Code Ann. § 42-9-260. Judge Cooper denied a subsequent Motion to Alter or Amend filed by Carrier pursuant to Rule 59(e).

Claimant filed an Amended Summons and Complaint with the Circuit Court on February 18, 2014 adding the State as a Defendant. Carrier filed an Answer and Counterclaim to the Amended Summons and Complaint on March 5, 2014. Carrier has raised nine defenses in its Amended Answer and Counterclaim including an assertion that it is an improper party and should be dismissed. The State filed its Answer asserting eight defenses and a Motion for Judgment on the Pleadings pursuant to Rule 12(c) on April 21, 2014. Additionally, Carrier has filed a Motion for Costs related to the original improper temporary restraining order.

Claimant has specifically alleged that "...the provisions of S.C. Code Ann. § 42-9-260...(A) violated the [Claimant's] right to due process of law...(B) that the provisions of §42-9-260 are in direct conflict with provisions of the Administrative Procedures Act concerning notice and hearing...and (C) denies the [Claimant] equal protection of the laws by creating an irrational classification..." Claimant has also stated "...pursuant to S.C. Code §42-9-260 the constitutionality of which is the basis of the Declaratory Judgment Relief requested." In addition, Claimant presented to the Circuit Court a signed Verification asserting that the allegations and issues raised in the Complaint are true, accurate, and with merit. Claimant also filed a Motion for a New Trial with the South Carolina Circuit Court asking for a "...preliminary or prima facie determination that [S.C. Code Ann. § 42-9-260] is unconstitutional..."

Claimant simultaneously requested a hearing before the Commission pursuant to S.C. Code Ann. § 42-9-260—the very statute he seeks to invalidate as unconstitutional in this Circuit Court case. On one hand Claimant has argued to the Circuit Court that S.C. Code Ann. § 42-9-260 is unconstitutional and on the other hand demands relief from the Commission under the same statute.

Constitutional Estoppel is a principle which holds that a party cannot avail himself of the provisions of a statute while also reversing his position and contending the law under which he sought to avail himself is invalid. Typically this issue arises when a party proceeds with an action, loses, and then asserts the law the party sought recovery under is unconstitutional. However, this principle is a two-way street, so to speak. Specifically, constitutional estoppel prevents a party from seeking the protections and/or benefits under the same statute the party asserts is unconstitutional. Because Claimant received multiple benefits under the statute—

including temporary benefits and a post-termination hearing—Claimant is estopped from challenging the constitutionality of 42-9-260.

It is an elementary fundamental rule of constitutional law that **one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'** Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) citing United States v. City and County of San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940). Additionally, the United Stated Supreme Court has long held that "[o]ne who invokes the provisions of law may not thereafter question its constitutionality." Buck v. Kuykendall, 267 U.S. 307, 316, 45 S.Ct. 324, 326 (1925). These cases make it clear: a litigant cannot simultaneously obtain benefits under a statute while arguing the same statute it is unconstitutional. Because Claimant availed himself of the benefits of the Act, including 42-9-260, Claimant is not permitted to now challenge the constitutionality of 42-9-260.

The common law has long recognized the doctrine of constitutional estoppel, and has refused to allow litigants to challenge statutes under which they have voluntarily received benefits. Strickland v. Flue-Cured Tobacco Co-Op. Stabilization Corp. 643 F. Supp. 310 (D.S.C. 1986), *citing* U.S. v. City & County of San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); Ashwander v. Tenessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). *See also* Ross v. Lipscomb, 83 S.C. 136, 65 S.E. 451, 456 Am.St.Rep. 794 (1909) ("[a] party invoking the provisions of a statute is not in a position to raise the question of its constitutionality."); Federal Deposit Ins. Corp. v. American Bank Trust Shares, Inc., 460 F. Supp. 549, 556 (D.S.C. 1979) ("one who utilizes an Act to gain advantages . . . is estopped from questioning the validity of its vital conditions.")

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Claimant voluntarily benefited under § 42-9-260(A) by accepting and depositing payments of weekly temporary disability which Carrier voluntarily paid to him pursuant to this statute. After Carrier invoked its right to terminate benefits pursuant to § 42-9-260(B)(3), Claimant invoked his right to an expedited hearing under § 42-9-260(C)[1]. Claimant received his expedited hearing pursuant § 42-9-260(C) on November 11th, 2013. This matter was ruled upon and the written Decision and Order of the Commissioner was served on December 5th, 2013. While Claimant was reaping all the benefits provided under § 42-9-260 before the Workers' Compensation, Claimant attempted to simultaneously ask the courts to declare unconstitutional the very statute from which he was benefitting.

Additionally, while Claimant alleges he has a property interest in benefits that are voluntarily paid by a private insurance company prior to any action by the Carrier in accordance with § 42-9-260(A), he is still subject to the language of that statute. The law clearly states that "an employer may start temporary disability payments immediately, and may continue those payments for up to 150 days." S.C. Code Ann. 42-9-260(A). Furthermore, the statute allows employers to "terminate or suspend the temporary disability benefits immediately at any time within the 150 days." S.C. Code Ann. 42-9-260(B). The employer had the right to terminate the temporary disability payments to Claimant after completing a good faith investigation and within the 150 days. This action was done in accordance with the statute.

Therefore, for the foregoing reasons, and based on the statute and the fact that Claimant benefitted from the statute he seeks to invalidate in this action, Carrier and the State are entitled to judgment on the merits and, therefore, judgment on the pleadings is rendered in favor of

[1] Generally, the Workers' Compensation Act does not prescribe a time limitation during which a Hearing must be held after a request is received. See § 42-3-180; § 42-17-20; § 42-17-40. The General Assembly granted certain petitioners the right to an expedited hearing that must be held no more than 60 days following the date of the request in the limited circumstances provided for under § 42-9-260(C) and § 42-9-260(D).

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Carrier and the State. Furthermore, this Court does not need to decide the declaratory judgment or any other issues regarding this matter because the constitutional estoppel issue is dispositive. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

IT IS SO ORDERED.

DeAndrea G. Benjamin
Judge, Fifth Judicial Circuit

February 17, 2016

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-05888

Clarence Winfrey, Jr.

PLAINTIFF(S)

American Fire & Casualty Co. and State of South Carolina

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Plaintiff timely filed a SCRCP 59(e) motion for reconsideration of the February 17, 2016 Order of this Court. The memorandum in support of this motion outlined reasons for reconsideration, the most pertinent being that the doctrine of constitutional estoppel for which this Court based it's Order upon did not apply. Further, Plaintiff requests a re-hearing on the issues. Because this Court granted and held a rehearing on this matter on January 25, 2016 at Plaintiff's request, where he put forth the same argument referenced in the memorandum, the 59(e) motion for reconsideration is denied.

RICHLAND CO. FILED 2016 MAR 17 AM 8:45 JEANETTE W. McBRIDE C.C.P. & G.S.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2161 **Date** 3-16-16

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 18 day of March, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: 1306305
Carrier File #: 22209963
Carrier Code #: 00475
Employer FEIN #: 510663955

Claimant's Name: Clarence Winfrey SSN:
Address:
City: State: SC Zip:
Home Phone: Work Phone:
Preparer's Name: Terri Hughes Law Firm:

Employer's Name: Archway Services
Address: 2316 Kings Road Extn.
City: Shelby State: NC Zip: 28152
Insurance Carrier: Liberty Mutual Insurance
Preparer's Phone #: 800 334 0078

Date of injury: 5/22/2013 (m/d/yyyy)
Date of Notice to Employer of Injury: 5/22/2013 (m/d/yyyy)

I. Payment of Temporary Compensation Check one: ☒ Initial period ☐ Additional period ☐ Corrected compensation rate
(choose A, B, or C)

☒ A. Temporary Total at the compensation rate of $426.69 per week. For this period of disability, disability began on 6/1/2013 (m/d /yyyy) and the date of first payment was 7/11/2013 (m/d/yyyy).

☐ B. Temporary Partial at the compensation rate of _____ per week. Note: When the Temporary Partial compensation rate will vary, report the first payment here. Supplement this report throughout the period of Temporary Partial compensation by filing a **Form 15S** with the **Form 18**, which shall be filed six months after the date of injury and each six months thereafter until the file is closed.
For this period of disability, disability began on _____ (m/d/yyyy), and the date of first payment was _____ (m/d/yyyy).

Calculation of Temporary Partial Rate:

	Average weekly wage before injury	
–	Current weekly wage	
=	Difference in wages before injury and now	$0.00
x	.6667	$0.00
	Temporary Partial Compensation Rate	$0.00

☐ C. Salary in lieu of Temporary ☐ Total ☐ Partial (choose one) compensation in the amount of _____ per week. For this period of disability, disability began on _____ (m/d/yyyy) and the date of first payment of salary in lieu of temporary compensation was _____ (m/d/yyyy).

THIS SECTION MAY BE USED ONLY WITHIN 150 DAYS AFTER NOTICE TO EMPLOYER OF INJURY. ATTACH DOCUMENTATION AS TO THE REASON OF THE TERMINATION.

II. Termination of Temporary Compensation Temporary compensation payments were stopped on 9/12/2013 (m/d/yyyy) for the following reason:

☐ Claimant has returned to work at least 15 days and no temporary partial compensation is due.
☐ Claimant agrees he/she is able to return to work and has signed a **Form 17**.
☒ Based on a good faith investigation, the claim is denied. Reason for denial: Employee fails to meet the burden of a compensable injury under the SC Workers' Compensation Act.
☐ Claimant has been released to return to work without restrictions and employment has been offered.
☐ Claimant has been released to work at limited duty and employer has provided limited duty work consistent with the terms upon which the Employee has been released.
☐ Claimant has refused medical treatment, examination, or evaluation. Note: Benefits must be resumed if claimant accepts the treatment, examination, or evaluation. Additional report must be filed if compensation is resumed.

I certify that this form has been served on the claimant per R.67-211.

Terri Hughes
Signature of Claims Administrator

9/12/2013
Date (m/d/yyyy)

III. Notice to Injured Worker or Legal Representative when Temporary Compensation Has Been Stopped:
The employer's representative may stop temporary compensation within 150 days of the date of notice of injury for the above reasons. However, if you believe that the temporary compensation should not have been stopped, you may request a hearing by signing below and returning this form to SCWCC Judicial Department at the address at the top of this form. A hearing will be held within 60 days of receipt of your request to determine if temporary compensation has been properly terminated.

MY SIGNATURE BELOW INDICATES THAT I DO NOT AGREE WITH THE TERMINATION OF TEMPORARY COMPENSATION.
I REQUEST A HEARING TO DETERMINE WHETHER I AM ENTITLED TO FURTHER TEMPORARY COMPENSATION PAYMENTS.

Check one: **Form 15(II)** ☐ Has ☐ Has not been received.

Signature of Claimant or Legal Representative

Date (m/d/yyyy)

Employer's representative must complete and file **Form 15** with Claims Department within ten days after compensation begins or is terminated. Employer's representative must serve the **Form 15** on the claimant when compensation begins per R.67-211. Employer's representative must prepare and serve **Form 20** within thirty days of beginning compensation per R.67-1603. Employer's representative must serve per R.67-211 two copies of the **Form 15** on claimant immediately on termination of compensation with documentation attached as to the reason for the termination. Injured worker may contest termination of compensation by completing section III of the **Form 15** and filing it with Judicial Department.

WCC Form # 15
Rev. **10/04**

15

TEMPORARY COMPENSATION REPORT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

CLARENCE B. WINFREY, JR,)
Plaintiff(s))

vs.

AMERICAN FIRE AND CASUALTY CO.,)
Defendant(s))

CIVIL ACTION COVERSHEET

-CP - -

2013CP4005888

(Please Print)
Submitted By: Preston F. McDaniel, Esquire
Address: McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

SC Bar #: 3770
Telephone #: 803-771-7211
Fax #: 803-252-0709
Other:
E-mail: mcdaniellaw@hotmail.com

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

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☑ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☑ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☑ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** September 27, 2013

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

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT FOR THE
RICHLAND COUNTY	)	FIFTH JUDICIAL CIRCUIT
CLARENCE B. WINFREY, JR.,	)	
Plaintiff,	)	
vs.	)	CERTIFICATE OF EXEMPTION FROM ADR
AMERICAN FIRE AND CASUALTY CO.,	)	DOCKET NO.
Defendant.	)	

2013 SEP 27 PM 4:03
JEANETTE W. McBRIDE
C.C.P. G.S.

I certify that this action is exempt from ADR because:

☒ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;

☐ this action is appellate in nature;

☐ this is a post-conviction relief matter;

☐ ~~this is a contempt of court proceeding;~~

☐ this is forfeiture proceeding brought by the State;

☐ this is a case involving a mortgage foreclosure; or

☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

Preston F. McDaniel, Esquire
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
803-771-7211

Plaintiff/Attorney for Plaintiff

Defendant/Attorney(s) for Defendant(s)

Date: September 27, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. _____

SUMMONS

2013 SEP 27 PM 4:03

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on

the Plaintiff's attorney, Preston F. McDaniel, at his office, McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted,

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

September 27, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. _____

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

2013 SEP 27 PM 4:03
RICHLAND COUNTY
CLERK OF COURT
C.C.P. & G.S.

COMPLAINT

The Plaintiff, Clarence B. Winfrey, by and through his undersigned attorney, would respectfully show unto the Court as follows:

INTRODUCTION

1. That this action is filed by the Plaintiff under the Declaratory Judgment Statute, S.C. Code §15-53-10, 20, 30, et seq. to determine whether the provisions of S.C. Code §42-9-260 (B) of the S.C. Workers' Compensation Act which provides for the termination or suspension of compensation benefits within one hundred fifty (150) days from the date of the injury without a hearing is unconstitutional and in violation of the Plaintiff's rights to due process of law in violation of The United States Constitution Amendment XIV, §1 and Amendment V, and the S.C. Constitution Article I, §3 and 22, and/or is volative of the provisions of the Administrative Procedures Act, wherein §42-9-260 deprives the Plaintiff of his property interest without providing the Plaintiff with a hearing prior to the termination of said benefits. Thus this denies him his due process rights and equal protection under the law and specifically the right to notice and an opportunity to be heard before a termination of his compensation payments. Where there is either a deprivation of liberty or a property interest, the individual has a right to a hearing prior to a determination or termination of that property interest.

2. That as a result of his work-related injury which occurred in Richland County on May 22, 2013, which was timely and properly reported to his employer Archway Service, Inc. who

in turn reported the accident to its insurance carrier for workers' compensation purposes, American Fire and Casualty Company (pursuant to S.C. §42-5-210 the insurance carrier is subrogated to all the rights and duties of the employer and may enforce any such rights in its own name), the Defendant in this action, agreed to authorize and started paying benefits including temporary weekly compensation benefits, medical benefits and other benefits as provided under the South Carolina Workers' Compensation Act. (S.C. Code §42-17-10 provides that an agreement to pay compensation has the same effect as on order/award of the Commission.)

3. That after providing benefits to the Plaintiff including Temporary Total Disability compensation, medical care and other benefits under the Act from June 1, 2013 through September, veribly on Friday, September 13, 2013 and by letter received Monday, September 16, 2013, the carrier abruptly and without notice and without a hearing, filed a Form 15 with the South Carolina Workers' Compensation Commission terminating benefits on the basis checked on the form that, "based on a good faith investigation the claim is denied" and stopped all benefits. This action allegedly taken under the provisions of the statute has given rise for this action.

PARTIES

4. That the Plaintiff is a resident of Lexington County, South Carolina.

5. That the Defendant American Fire and Casualty Company is a corporation chartered under the laws of one of the States in the United States and is licensed to do and does insurance business in South Carolina specifically writing workers' compensation policies for employers to cover their employees in the State of South Carolina. As set forth above, the American Fire and Casualty Company is the insurance carrier for the Employer and pursuant to the Act is subrogated to the rights and benefits of the Employer in this Workers' Compensation Act. Their Attorney of Record in the underlying matter giving rise to this action is:

Landon Hughey, Esquire
McAngus, Goudelock & Courie, LLC
1320 Main Street, 10th Floor
Columbia, South Carolina 29201

Copy of the Notification of Representation is attached hereto and incorporated herein by reference as Exhibit "A".

JURISDICTION AND VENUE

6. That as set forth in the Introduction, this matter was brought due to a work-related injury which occurred in Richland County where pursuant to the Workers' Compensation Act and

specifically, S.C. Code §42-17-20, jurisdiction and venue are proper.

DECLARATORY JUDGMENT ACTION
RELIEF SOUGHT

7. That this action is brought under the provisions of the South Carolina Uniform Declaratory Judgment Act, §15-53-10 et seq., South Carolina Code of Laws (1976 as amended) on the basis that a real and actual controversy exists between the parties due to the Defendants stopping benefits under the provisions of S.C. Code §42-9-260 and under S.C. Code §15-53-30 wherein any person whose rights, are affected by a statute may have determined any question of construction or validity (constitutionality) arising under the statute and obtain a declaration of rights thereunder.

8. That the Plaintiff would submit that the provisions of S.C. Code §42-9-260 and specifically subsection (B)(1-6):

(A) violate the Plaintiff's right to due process of law by allowing for a deprivation of his property interest without notice and without a hearing and opportunity to be heard;

(B) that the provisions of §42-9-260 are in direct conflict with the provisions of the Administrative Procedures Act concerning notice and hearing in a contested case; and

(C) denies the Plaintiff equal protection of the laws by creating an irrational classification, i.e., " a legislative

classification which excludes .., (or treats differently).., a certain class of persons" .., which is not, "rationally related to the objective of the statute." The Plaintiff would argue as follows:

A

S.C. CODE §42-9-260 VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS OF THE PLAINTIFF UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS.

"In order to be entitled to the procedural safeguards encompassed by the due process clause of the Fourteenth Amendment (notice and an opportunity to be heard) the complaining party must suffer from deprivation of a liberty or **property interest.**" Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.E.2d 548 (1971) (Emphasis added). "Only when such a property interest exists does a constitutional right to a hearing attach." Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

Our Supreme Court has ruled, "workers' compensation benefits constitute a property interest." Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334, 336 (1991); Orszula v. Orszula, 292 S.C. 264, 356 S.E. 2d 114 (1987). Therefore, any attempt to deny a Claimant of his "property interest" without a hearing violates the due process clauses of both the United States and South Carolina Constitutions.

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the United States Supreme Court held that

procedural due process requires that a pre-termination hearing be held when public assistance payments to welfare recipients are discontinued. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Court held that even in that situation, the entitlement to welfare benefits constituted a sufficient property interest that due process requirements attached. The Court in Goldberg struck down a New York statute which allowed the termination of benefits prior to a hearing. The Court reasoned that,

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
>
> * * *
>
> Thus the crucial factor in this context . . . 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. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . ."
>
> * * *
>
> "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." Goldberg, 397 U.S. at 262-263, 264, 265-66, 90 S.Ct. at 1019.

Our Courts have similarly stated that compensation laws,

> Constitute a form of social legislation and were enacted primarily for the benefit, protection and **welfare** of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue to obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficial purposes for which they were enacted. Cokeley v. Robert Lee, Inc., 197 (1941) (Emphasis added).

In Goldberg, the Court stated that public assistance "is not mere charity, but a means to promote the general **welfare**, and secure the Blessings of Liberty to ourselves and our Posterity." Goldberg, 397 U.S. at 266, 90 S.Ct. at 1019 (Emphasis added). The Court continued and stated that "pre-termination evidentiary Hearings are indispensable to that end." Id. Our Supreme Court in the case of Hamm v. Mullin's Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) quoting from the United States Supreme Court decision in Powell v. Alabama, 287 U.S. 45 at p. 68, 53 S.Ct. 55 at p. 64, 77 Law Ed. 158 at p. 170, 84 ALR 527 stated:

> "It never has been doubted by this Court or any other so as far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they together with a legally competent tribunal having jurisdiction of the case, constitute

> basic elements of the constitutional requirement of due process of law. The words of Webster so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns' have been repeated by varying forms of expressions in a multitude of decisions."

In Brown v. S.C. State Bd., of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990), our Court echoed those sentiments and held that "[w]where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866, 867 (1990). Therefore, under South Carolina Law, a Claimant, as a matter of fundamental due process, is entitled to a hearing before the termination of his/her disability benefits.

B

THAT S.C. CODE §42-9-260 IS IN DIRECT CONFLICT WITH S.C. CODE §1-23-310(2), AND AS SUCH IS VOID.

Not only does §42-9-260 violate a Claimant's due process rights, it is in direct conflict with S.C. Code §1-23-310(2), which spells out the administrative procedure for **all "contested cases"**. S.C. Code §1-23-310(2) states that a,

> "contested case" means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency **after an opportunity to be heard.** S.C. Code §1-23-310(2) (as amended 1993) (Emphasis added).

Prior to June 18, 1996, a Claimant's temporary benefits could not be terminated until "after an opportunity to be heard". Id. Since then for the first 150 days, a Claimant is forced to seek a hearing long after their benefits have been stopped. Section 1-23-310, of the Administrative Procedures Act which governs the Workers' Compensation Commission, is in direct conflict with §42-9-260. After reading both statutes and reviewing existing case law, there is no way to reconcile §42-9-260's denial of the Plaintiff's property right to temporary compensation without a pre-termination hearing and §1-23-310's requirement of a hearing.

"Where provisions of the APA and the Workers' Compensation Act conflict, **the APA controls."** Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731, 732 (1989) (Emphasis added). Section 1-23-310(2) is not alone though; our Supreme Court has held that due process requires a hearing prior to the termination of benefits. "Due process law is that law that hears before it condemns **which proceeds upon inquiry and renders judgment only after a full and complete opportunity to be heard."** S.C. and G.R. Co. v. American Tel and Tel Co., 65 S.C. 459, 43 S.E. 970 (1903) (Emphasis added). When those fundamental rights are not provided, fundamental due process is not afforded. Stono River Environmental Protection Assn. v.

S.C. Dept. of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

C

THAT S.C. CODE §42-9-260 VIOLATES THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS BY DENYING A CLAIMANT EQUAL PROTECTION UNDER THE LAW.

"The Constitutional guarantee of equal protection under the law requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604, 605 (1978). While the General Assembly has "the right to make reasonable classifications of persons and property for public purposes", those classifications **must apply "equally to all members of the class" and must not be "arbitrary but [instead] rest upon some reasonable basis."** Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362, 368 (1970) (Emphasis added); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979).

Section 42-9-260 fails to meet this standard. The statute creates two classes, one class made of up of Claimants who have not yet been receiving temporary benefits one hundred and fifty (150) days and those that have been receiving benefits in excess of amount of time whose benefits cannot be stopped until after a hearing and who are entitled to benefits until after a hearing is held **and** benefits are stopped by Order of the Commission.

This classification serves absolutely no interest, has no rational basis and is purely arbitrary.

> The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be affected. Marley, 245 S.E.2d at 606.

In this case the indiscriminate choice of one hundred and fifty (150) days bears no reasonable and just relation to the legislative purpose of the Workers' Compensation Act, which, as stated earlier is for the **"benefit, protection and welfare of working men and their dependents."** Cokeley, 14 S.E.2d at 893-94. (Emphasis added).

The South Carolina Supreme Court struck down a similar statute in Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), which did not allow a passenger in an automobile accident to be compensated for their injuries unless they could show "reckless disregard." In striking down the guest statute, the Court stated that the justifications for passing the statute did not constitute "a rational basis for the differential treatment it spawned." Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883, 885 (1979). The Court could find no justification for allowing the driver of a car to recover for their injuries, yet hold the passenger to a higher standard in order to recover.

The same logic as applied in Ramey dictates that §42-9-260 be struck down. There is no justification as to why one

claimant is entitled to have a hearing before his benefits can be ended yet another is not entitled to a hearing solely on the basis of whether they have received benefits for one hundred and fifty (150) days. This classification bears no rational basis to the fundamental intent of the Workers' Compensation Act, which is to protect injured workers and to provide disability compensation until their disability to work has ended. Section 42-9-260 and the one hundred and fifty (150) day classification is arbitrary, and serves as absolutely no rational basis for stopping a claimant's benefits without a hearing.

Therefore, S.C. Code §42-9-260 (as amended 1996) does not provide equal protection under the law to Claimants due to its arbitrary, irrational and discriminatory effect.

9. That as to both the payment of temporary compensation benefits prior to the passage of one hundred fifty (150) days and to the payment of temporary compensation benefits after the one hundred fifty (150) days, S.C. Code §42-17-10 and 20 provide that where an agreement is reached to pay compensation by the parties as in this case which is filed with the Commission to pay compensation benefits that agreement is enforceable the same as any other Order of the Commission and that if subsequent to such agreement there is a disagreement as to the continuation of such benefits, either party may request a hearing. Prior case law has repeatedly help that a hearing is required <u>before</u> such

termination of benefits under that statute Halks v. Rust Engineering Co. 208 SC 39, 36 S.C. 2d 852 (1939); Gold v. Moragne 202 SC 281, 24 SE 2d 491 (1943). The only thing that §42-9-260 (A) adds is that during the first one hundred fifty (150) days of the payment of such compensation benefits, the Defendants do not waive any grounds for good faith denial. Subsection (B) then in violation of due process and in violation of Administrative Procedure Act and in violation of the other provisions of the Act seeks to allow the Defendants to stop payment of benefits before a hearing is held, thus depriving the Plaintiff of his entitlement to benefits under the Act without due process.

WHEREFORE, the Plaintiff would respectfully pray that the Court:

1. After review of the verified Complaint and the Affidavit attached hereto, issue a Temporary Restraining Order Without Notice as provided in SCRCP, Rule 65(b) ordering that the Defendants reinstate benefits until a hearing can be held on the Motion to Issue a Temporary Restraining Order after notice and after hearing on that Motion issue a Temporary Restraining Order to remain in place until such time as a hearing may be held on the Summons and Complaint as to the unconstitutionality of the statute. The Temporary Restraining Order Without Notice and a Temporary Restraining Order are necessary to prevent

irreparable harm to the Claimant who is out of work, disabled and has no visible means of support or income and wherein the failure to provide medical care could result in irreparable harm up to and including the death of the Claimant due to his severe medical condition both of which are set forth in the Affidavit in support of this Complaint as attached hereto.

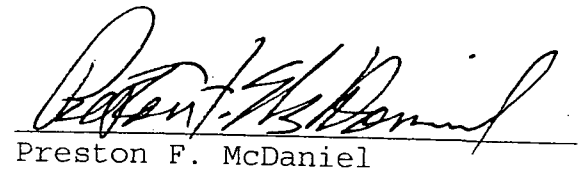
2. Review the provisions of S.C. Code §42-9-260 and specifically those contained in subsection (B) and declare the provisions of subsection (B) unconstitutional and/or in violation of the statutory notice and hearing provisions of the Administrative Procedures Act and the other provisions of the Workers Compensation Act and the Commission Regulations both on the basis of due process and equal protection of the laws as required by both the United States Constitution and our own State Constitution.

3. After making a determination that the statute is unconstitutional and/or in violation of other statutory provisions, issue an Order reinstating benefits and ordering that such benefits may be stopped without a due process hearing giving the Claimant notice as required by law and an opportunity to be heard. Ordering that at such hearing the Defendants have the burden of proof to establish one of the six exceptions as created by §42-9-260 unless the Court determines that such statute is in its entirety unconstitutional and cannot be

separated out to allow for any process to exist under the statute as written.

4. For such other and further relief as the Court may deem just and proper in this situation.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Plaintiff

September 27, 2013

McAngus Goudelock & Courie LLC

ATTORNEYS AT LAW

Reply To
LANDON HUGHEY
Direct Dial: (803) 227-2261
rhughey@mgclaw.com
COLUMBIA

September 20, 2013

VIA HAND DELIVERY
Virginia Crocker, Judicial Director
S. C. WORKERS' COMPENSATION COMMISSION
1333 Main Street, Suite 500
Columbia, South Carolina 29201

RE: Clarence Winfrey v. Archway Services and American Fire & Casualty Insurance Company c/o Liberty Mutual Insurance
Date of Accident: May 22, 2013
WCC File No.: 1306305
Our File No.: 2095.13137
Claim No.: 22209963
Claimant's SSN:

Dear Ms. Crocker:

This firm has been retained to represent the employer and carrier in the above case. We are requesting that you forward us a copy of your file and have enclosed a check in the amount of $20.00 to cover the cost of copying this file. If additional costs for copying your file exceed $50.00, please contact our office before processing our request.

If you have any questions, or if you need further assistance from us, please do not hesitate to call.

Very truly yours,

Landon Hughey

LLH/swk
Enclosures
cc: Susan Kizer, Archway Services Inc
Terri Hughes, Liberty Mutual Insurance (via email & HUB)
Preston F. McDaniel, Esquire, The McDaniel Law Firm

EXHIBIT
A

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. _____

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

AFFIDAVIT OF PRESTON F. MCDANIEL ATTORNEY FOR THE PLAINTIFF FILED IN SUPPORT OF TEMPORARY RESTRAINING ORDER WITHOUT NOTICE PURSUANT TO TO SCRCP RULE 65(b)

I, PRESTON F. MCDANIEL, having been duly and properly sworn do depose and state:

1. That I am the attorney for the Plaintiff who is the Claimant (hereinafter the "Plaintiff") in the workers' compensation claim of Clarence Winfrey vs. Archway Service, Inc. and American Fire and Casualty Co. which gives rise to the Declaratory Judgment action.

2. That the Plaintiff sustained an electrocution injury on May 22, 2013. The Plaintiff obtained counsel and counsel notified the adjuster as managing agent for the Employer's Workers' Compensation Insurance Carrier, American Fire and Casualty, Co., who after review of the file (June 25 email of Rebecca Evans, Adjuster, "I am going to have to review the file before I am able to respond") authorized and started temporary compensation benefits under the Workers' Compensation Act. See Exhibit "A", emails concerning Temporary Total Disability.

3. That thereafter the Plaintiff began receiving weekly compensation benefits in the amount of $426.69 and continued to receive medical care which had been previously authorized, paid for and provided through Dr. Lide and Dr. Travis and a rehab nurse was assigned for local handling of the claim. On September 13, 2013, Counsel for the Plaintiff was notified by the Plaintiff that his assigned rehab nurse, Ms. Kristy L. Thompson, RN, BA, BSN had been advised to close her file as the case was being denied. Thereafter, on September 16, 2013, by letter dated September 12,

Counsel for the Plaintiff, received a letter and Form 15 stating that the Defendant had stopped temporary compensation benefits and medical care and had denied the claim based on the grounds of, "a good-faith investigation.". The letter and the Form 15 are attached hereto and incorporated herein by reference as Exhibit "B".

4. That the Plaintiff is at home recuperating and is totally disabled from gainful employment. His medical situation is extremely tenuous, wherein any slight fluctuation in his physical and/or mental condition (stress) could result in irreparable harm up to and including the death of Plaintiff. A letter from his treating cardiologist as to the serious consequences that can result from the failure to provide medical care has been requested and a copy of the emergency instructions to the Plaintiff from his doctors is attached as Exhibit "C".

5. That to the knowledge of Counsel for the Plaintiff at the time of the filing of this Affidavit in Support of a Temporary Restraining Order Without Notice, the Defendant has stopped compensation to the Plaintiff and that due to his disabled condition he has no alternative economic means of paying his bills and supporting himself other than his temporary compensation. According to the communication from the rehab nurse, she has closed her file at the direction of the adjuster, robbing the

Claimant of all support and assistance in securing medical care and benefits. Also, while to the knowledge of Counsel, the doctors continue to treat the Plaintiff, they are doing so without guarantee of payment on the basis of the denial of the Defendant and necessary medical is being delayed. Therefore, based upon all of the above, Counsel for the Plaintiff variably believes that irreparable harm may come from this denial of benefits without a hearing, which is allowed for pursuant to S.C. Code §42-9-260 the constitutionality of which is the basis of the Declaratory Judgment Relief requested.

FURTHER THE AFFIANT SAYETH NOT.

PRESTON F. MCDANIEL, Affiant

SWORN TO BEFORE ME this

27 day of September, 2013.

L.S.

Notary Public for South Carolina

My Commission Expires: 1/21/14

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Tuesday, June 25, 2013 10:10 AM
To: rebeccam.evans@libertymutual.com
Subject: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963

Importance: High

Good morning Becky!

I am following up with an email regarding the voicemail I left you this morning in reference to Mr. Winfrey's claim. I understand you covered up in work but if you would please be so kind as to let me know if 1) you have gotten his TTD benefits started and 2) when you anticipate his check being mailed out, it would be GREATLY appreciated.

Thank you in advance and let me know if I can do anything to help in this regard. Kim

Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

Please consider the environment before printing

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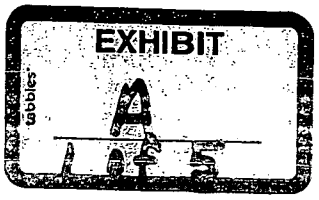

Kim Hinkle

From: Evans, Rebecca M <RebeccaM.Evans@LibertyMutual.com>
Sent: Tuesday, June 25, 2013 2:31 PM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963

Kim,

I have received your e-mails, but I am going to have to review the file before I am able to respond. I will get back with you as soon as possible.
Thanks.

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 |SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Tuesday, June 25, 2013 2:24 PM
To: Evans, Rebecca M
Subject: FW: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963
Importance: High

Any news yet on getting TTD started? Thanks, Kim

Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

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From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Tuesday, June 25, 2013 10:10 AM

EXHIBIT A

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Wednesday, June 26, 2013 11:00 AM
To: 'Evans, Rebecca M'
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

How will the check (bringing him current) be sent? And will it be sent to us or Mr. Winfrey? I simply ask this as I am sure Preston will ask. As soon as I receive any additional records, I will email you with them. Also, will you please have a check cut reimbursing Mr. Winfrey for his out of pocket prescription expenses which we sent you on 6/24 and send it out today as well?

Thank you so much Becky for your prompt attention to this. Let me know if I can do anything else to help. Kim

---

From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Wednesday, June 26, 2013 10:41 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Thanks, Kim.

I requested records from the hospital;, but if you get them sooner, please let me know and perhaps you can send those as well.

I will issue a payment today; I will also be leaving early today as I have a doctor's appt. Let Preston know to leave me a message in the event he missed me.

Thanks again!

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 | SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

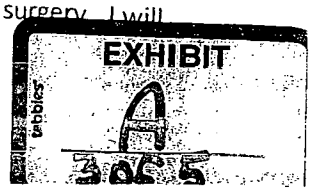
Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Wednesday, June 26, 2013 10:34 AM
To: Evans, Rebecca M
Subject: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963
Importance: High

Becky:

Attached please find the records I just received from Dr. Jeffrey A. Travis, who performed the surgery. I will have Mr. McDaniel call you once he arrives. Thank you in advance, Kim



Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

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EXHIBIT
tabbies
4 of 5

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Thursday, June 27, 2013 12:01 PM
To: 'Evans, Rebecca M'
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Thank you

From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Thursday, June 27, 2013 11:53 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

It was mailed.

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 | SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Thursday, June 27, 2013 11:42 AM
To: Evans, Rebecca M
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Becky: Will you please confirm for me that Mr. Winfrey's check was mailed out yesterday? Thanks, Kim

---

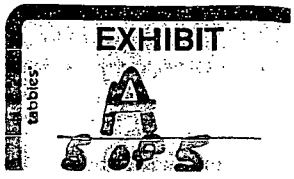
From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Wednesday, June 26, 2013 10:59 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963
Importance: High

Kim, what is his correct address? Am showing a London Pride address and address on bills (Artic Court is on your 50).

Thanks!

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 | SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com



Liberty Mutual
INSURANCE

Liberty Mutual Insurance

Workers' Compensation Claims
PO Box 515099
Los Angeles, CA 90051-5099
(866) 539-6449
(877) 840-7788 Fax

September 12, 2013

Clarence Winfrey
C/O McDaniel Law Firm
1315 Elmwood Avenue
Columbia SC 29201

Re: IC # 1306305
Employee: Clarence Winfrey
Employer: Archway Services
D/I: 5/22/2013
Claim# 22209963

Dear Mr. Winfrey:

After additional investigation, we are denying your claim. You have failed to meet the burden of a compensable claim under the SC Workers' Compensation Act.

Sincerely,

Terri Hughes

Terri Hughes
Sr. Claims Specialist II
800-334-0078 ext 83750

Cc: SCWC
Attorney Rockey Hughly-McAngus Goudelock and Courie

EXHIBIT
B

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: 1306305
Carrier File #: 22209963
Carrier Code #: 00475
Employer FEIN #: 510663955

Claimant's Name: Clarence Winfrey SSN:
Address:
City: State: SC Zip:
Home Phone: 803 429 7590 Work Phone:
Preparer's Name: Terri Hughes Law Firm:

Employer's Name: Archway Services
Address: 2316 Kings Road Extn.
City: Shelby State: NC Zip: 28152
Insurance Carrier: Liberty Mutual Insurance
Preparer's Phone #: 800 334 0078

Compensation Paid:	Number of Weeks	From (m/d/yyyy)	To (m/d/yyyy)	Amount
1. Number of Weeks T.T.	15	6/1/2013	9/14/2013	$ 6,400.35
2. Number of Weeks T.P.				$
3. Number of Weeks P.P.				$
4. Disfigurement				$
5. Agreement and Final Release				$
Total Compensation Paid				$ 6,400.35
6. Total Medical Benefits* Paid				$ 2,543.47
7. Funeral Benefits				$

☒ Case Denied

Date of Injury: 5/22/2013 (m/d/yyyy)

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: Claimant

By: Terri Hughes Employer's Representative

9/12/2013 Date (m/d/yyyy)

Terri Hughes
Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By:

Report of Additional Fees and Recoupment

A. Carrier Reimbursement by Third Party $

B. Attorney's Fee Paid by Employer $

C. Attorney's Fee Paid by Claimant (Non-contingent fees only) $

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. * Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within 16 days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC Form # 19
Rev. Date 3/96

19

STATUS REPORT AND COMPENSATION RECEIPT

EXHIBIT B

WHEN TO CALL YOUR HEALTH CARE PROVIDER

It is important to see your doctor on a regular basis. Call your doctor immediately if any of the following occurs:

- Excessive weight gain.
- Chest pain.
- Increased shortness of breath — at first with activity, progressing to shortness of breath at rest.
- A persistent cough.
- Swelling of feet, ankles, legs or abdomen.
- Loss of appetite.
- Extreme fatigue or weakness.
- Trouble sleeping (waking up short of breath, using more pillows than usual).
- Signs of infection, such as fever or chills.
- Nausea and vomiting.
- Rapid, irregular heart beat.
- If you develop a rash or hives, which might indicate an allergy to your medication.

Call 911 if your chest pain or shortness of breath is severe, if you have fainted or if you think you are having a heart attack.

HEART FAILURE MANAGEMENT PLAN

EMERGENCY

You feel as though you are suffocating and cannot get your breath.

CALL 911

RED ZONE • DANGER

Call Dr. _____ at _____

Weight gain of more than 3 pounds in one day or 5 pounds in one week.	Coughing during day and at night.	Wake during night very short of breath and sit on side of bed to breathe easier.
Missed two doses of a medication.	Swollen feet or ankles.	Cannot do important activities due to getting very short of breath.
Decreased appetite.	Have to sit or stand up to breathe easier.	

YELLOW ZONE • CAUTION

Weight gain of 1 to 2 pounds in a day.	**Cough sometimes during the day or at night.**	**Using a second pillow or raising head of bed to sleep.**
Missed a dose of a medication.	**Mild shortness of breath with usual activity but does not have to stop activity.**	**Not feeling like doing usual activities but able to do important things.**
Decreased appetite.		

GREEN ZONE • ALL CLEAR

Weight unchanged.	No cough.	No changes in appetite.
Taking all medications.	No shortness of breath while sleeping.	No shortness of breath with usual activities.

Name: _____

Date: _____ Target Weig

EXHIBIT C

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: 1306305
Carrier File #: NRCF20130612
September 27, 2013

NOTICE OF HEARING

Clarence Winfrey v. Archway Service.Inc

Subject: **To determine if claimant's temporary compensation was legally terminated.**

Date: **November 13, 2013 at 01:45 PM**

Location: **SC Workers' Compensation Commission, 1333 Main Street, Suite 500 Hearing Room B**
Columbia, SC 29202

2013 OCT -1 AM 11:1
RICHLAND COUNTY
C.C.P. & G.S.

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner T. Scott Beck
803-737-5698, abracy@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Amy A Bracy, SC Workers' Compensation, September 27, 2013

Party	Attorney
Employee: Clarence Winfrey	Preston F. McDaniel mcdaniellaw@hotmail.com 803-771-7211
Employer: Archway Service.Inc Carrier: American Fire & Casualty Co	Landon L. Hughey (5) lhughey@mgclaw.com 803-779-2300

EXHIBIT
D

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

VERIFICATION

PRESTON F. McDANIEL, being duly sworn, says that he is the Attorney of Record for the Plaintiff herein, and has read the foregoing **COMPLAINT** and knows the contents thereof, that the same is true of his own knowledge, except as matters therein stated to be alleged on information and belief; and to those matters he believes them to be true. This Verification is made pursuant to SCRCP Rule 11(c) and the requirements of Rule 65(b).

Preston F. McDaniel
Attorney for the Plaintiff

RICHLAND COUNTY
FILED
2013 SEP 27 PM 4:04
JANETTE W. McBRIDE
C.C.P. & G.S.

SWORN TO BEFORE ME this
27th day of September, 2013.

Kimberly T. Hinkle (L.S.)
Notary Public for South Carolina
My Commission Expires: 4-26-20

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
CLARENCE B. WINFREY, JR.,)
Plaintiff,)
vs.)
)
AMERICAN FIRE AND CASUALTY CO.)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
2013CP4005888
CASE NO.: _____-CP-_____

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm 1315 Elmwood Avenue Columbia, SC 29201 Phone: 803-771-7211Fax 803-252-0709 E-mail: mcdaniellaw@hotmail.comOther: _____	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

RICHLAND COUNTY FILED 2013 SEP 27 PM 4:05 JEANETTE W. McBRIDE C.C.P. & G.S.

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Pursuant to Rule 65(f)(1)
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☒ Other: Motion Required per SCRCP Rule 65(b)

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,) C/A No. _____

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

IN RE:

South Carolina Workers Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

2013 SEP 27 PM 4:06
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND
FILED

NOTICE OF MOTION AND MOTION PURSUANT TO SCRCP RULE 65(b)

TO: LANDON HUGHEY, ESQUIRE, ATTORNEY FOR DEFENDANT AMERICAN FIRE AND CASUALTY COMPANY, AND ATTORNEY OF RECORD IN THE WORKERS' COMPENSATION CLAIM; AND ALAN T. WILSON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel may be

heard or at such other designated time as the Court may direct, Counsel for the Plaintiff will move for a Temporary Restraining Order directing the Defendant to reinstate benefits both compensation and medical to the Plaintiff under the Workers' Compensation Act as more fully set out in the verified Complaint, which is attached hereto and incorporated herein by reference, in support of the Motion made in this matter. This Motion is made pursuant to SC Rules of Civil Procedure, Rule 65(b) as is the Verification of Counsel of Record for the Plaintiff, attached to the Complaint.

I SO MOVE.

Respectfully submitted,

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

September 27, 2013

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Plaintiff/Claimant, v. ARCHWAY SERVICES INC, Defendant/Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Defendants.	)	Civil Action No. 2013-CP-40-05888 **MOTION PURSUANT TO RULE 12**

TO: SOUTH CAROLINA CIRCUIT COURT, THE HONORABLE ALISON RENEE LEE, AND PRESTON F. MCDANIEL, ESQUIRE:

COMES NOW Defendants, by and through their undersigned counsel, and would move this court to dismiss the October 1, 2013 temporary restraining order issued by The Honorable Alison Renee Lee (and any Summons and/or Complaint[1] filed by Plaintiff/Claimant) pursuant to Rules 12(b)(1)[2], 12(b)(4), 12(b)(5), 12(b)(6), and 12(b)(8). A hearing in this matter has already been set for October 8, 2013 at 9 AM before The Honorable Alison Renee Lee and Defendants request that this matter be taken up at that time.

[1] Defendants have not been served with any Summons or Complaint in this matter. However, in the event a Summons and/or Complaint has been filed by Plaintiff/Claimant, Defendants contend that this Motion would cover any argument for dismissal under Rule 12 of a Summons and/or Complaint.

Rule 12 provides that the above listed defenses be made by motion. Specifically, Defendants challenge the temporary restraining order and seek its dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction; under Rule 12(b)(4) for insufficiency of process; under Rule 12(b)(5) for insufficiency of service of process; and under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action. A brief/memorandum is attached addressing each of these issues in detail.

Upon information and belief, the following is true:

1. Claimant obtained and served a temporary restraining order on Defendants on October 1, 2013.
2. This temporary restraining order is void because this court does not have original jurisdiction to hear any issue in this matter and, therefore, cannot issue any restraining order related to this matter[3].
3. This temporary restraining order is void because this court does not have subject matter jurisdiction to hear any issue in this matter and, therefore, cannot issue any restraining order related to this matter[4].
4. This temporary restraining order is invalid because Claimant did not properly comply with the service requirements contained in Rule 65(b)[5].
5. This temporary restraining order is void because Claimant did not post, and this court did not require, security as required by Rule 65(c).

---

[2] The Court of Appeals correctly held that the proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP. *See* Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

[3] This argument is the same for any Summons and Complaint that has been, or may be, filed in this matter.

[4] This argument is the same for any Summons and Complaint that has been, or may be, filed in this matter.

[5] This includes, but is not limited to, the filing and service of a Summons and Complaint.

6. This temporary restraining order is invalid because it does not state a claim for which relief can be granted by this court[6].

Further, Defendants have incurred substantial costs associated with responding to this matter. Defendants should be reimbursed for all costs associated with the receipt, reply, and defense of this action before this court. Pursuant to Rule 11, SCRCP and S.C. Code Ann. § 15-36-10, this court should award Defendants an amount equal to all costs and fees associated with defending this action.

Conclusion

For all of the foregoing reasons, the October 1, 2013 temporary restraining order and any accompanying complaint should be dismissed pursuant to Rules 12(b)(1), 12(b)(4), 12(b)(5) and/or 12(b)(6). In addition, Defendants are entitled to reimbursement for all costs and fees associated with defense of this action.

LANDON L. HUGHEY
BRETT H. BAYNE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 3, 2013

[6] This argument is the same for any Summons and Complaint that has been, or may be, filed in this matter.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant, v. ARCHWAY SERVICES INC, Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Defendants.	)	Civil Action No. 2013-CP-40-05888 **MOTION PURSUANT TO RULE 65**

TO: SOUTH CAROLINA CIRCUIT COURT, THE HONORABLE ALISON RENEE LEE, AND PRESTON F. MCDANIEL, ESQUIRE:

COMES NOW Defendants, by and through their undersigned counsel, and would move this court to hold a hearing to dissolve the October 1, 2013 temporary restraining order issued by The Honorable Alison Renee Lee[1].

Rule 65(b), SCRCP provides that "...[o]n two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution..." **Defendants respectfully request that pursuant to Rule 65(b), this court conduct a hearing as required**

[1] Defendants understand that a hearing has already been set for October 8, 2013 at 9 AM before the Honorable Alison Renee Lee and Defendants request that this matter be taken up at that time.

by the rule. A brief/memorandum is attached addressing each of the below issues in detail. Upon information and belief, the following is true:

1. Claimant obtained and served a temporary restraining order on Defendants on October 1, 2013.
2. This temporary restraining order is void because this court does not have original jurisdiction to hear any issue in this matter and, therefore, cannot issue any restraining order related to this matter.
3. This temporary restraining order is void because this court does not have subject matter jurisdiction to hear any issue in this matter and, therefore, cannot issue any restraining order related to this matter.
4. This temporary restraining order is invalid because Claimant did not properly comply with the service requirements contained in Rule 65(b).
5. This temporary restraining order is void because Claimant did not post, and this court did not require, security as required by Rule 65(c).
6. This temporary restraining order is invalid because it fails to conform to the proper scope of a temporary restraining order as required by Rule 65(d).

Further, Defendants have incurred substantial costs associated with responding to this matter. Defendants should be reimbursed for all costs associated with the receipt, reply, and defense of this action before this court. Pursuant to Rule 11, SCRCP and S.C. Code Ann. § 15-36-10, this court should award Defendants an amount equal to all costs and fees associated with defending this action.

Conclusion

Defendants respectfully request this court set this matter for hearing on no more than two (2) days notice pursuant to Rule 65(b). In addition, Defendants are entitled to reimbursement for all costs and fees associated with defense of this action.

LANDON L. HUGHEY
BRETT H. BAYNE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 3, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 OCT -8 AM 11:17
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

AFFIDAVIT OF SERVICE

I, Kristen Pinkerton, having been duly and properly sworn do depose and state that I have served the **SUMMMONS and COMPLAINT** and **NOTICE OF MOTION AND MOTION** in the matter of Clarence B. Winfrey, Jr. v. American Fire and Casualty Co. on Landon Hughey, Esquire, as

attorney for Defendant American Fire and Casualty Co., and Attorney of Record for the Employer and Carrier in the workers' compensation matter by delivering and leaving a copy with Josh Redwine at the office of:

Landon Hughey, Attorney at Law
MCANGUS GOUDELOCK & COURIE, LLC
1320 Main Street, 10th Floor
Columbia, SC 29211

K Pinkerton
Kristen Pinkerton

SWORN TO BEFORE ME this
27th day of September, 2013

Kimberly T. Hunter (L.S.)
Notary Public for South Carolina
My Commission Expires: 4-26-20

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2013-CP-40-05888

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

RICHLAND COUNTY
FILED
2013 OCT -8 AM 11:17
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

AFFIDAVIT OF SERVICE

PERSONALLY APPEARED before me Chris Lewis who, upon first being duly sworn, says that she served the SUMMONS and COMPLAINT in this action upon AMERICAN FIRE AND CASUALTY CO. by delivering a copy of the said documents to: SC DEPARTMENT OF

INSURANCE c/o _____ who accepted service, at SC DEPT. OF INSURANCE, 1201 MAIN STREET, SUITE 1000, COLUMBIA, SC on the 27th day of September, 2013, that she knows the person so served to be the person mentioned and described in the above pleadings; and that the deponent is not a party to this action.

Kimberley T. Hinkle

Kimberley T. Hinkle

SWORN to before me this

27 day of September, 2013

Notary Public for South Carolina

My Commission Expires: 1/21/14

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Alan T. Wilson
SC Attorney General
PO Box 11549
Columbia, SC 29211

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X James M. Allen
☐ Agent
☐ Addressee

B. Received by (Printed Name) James M. Allen
C. Date of Delivery 10/10

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 3150 0005 0282 1020

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-15

UNITED STATES POSTAL SERVICE

First-Class Mail
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USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Westin T. McDaniel
McDaniel Law Firm
1315 Elmwood Ave
Columbia SC 29201

RECEIVED OCT 07 2013

Re: Wilson

Re:
2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 OCT -8 AM 11:18
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-40-05888

CLARENCE B. WINFREY, JR.,)
Plaintiff,)
vs.)
AMERICAN FIRE AND CASUALTY CO.)
Defendant.)

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

RICHLAND COUNTY FILED
2013 OCT 18 PM 4:28
JEANETTE W. McBRIDE C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm 1315 Elmwood Avenue Columbia, SC 29201 Phone: 803-771-7211Fax 803-252-0709 E-mail: mcdaniellaw@hotmail.comOther: _____	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Pursuant to Rule 59(e)
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☒ Other: Motion Required per SCRCP Rule 59(e)

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
CLARENCE B. WINFREY, JR., Plaintiff-Movant, v. AMERICAN FIRE AND CASUALTY CO., Defendant-Respondent.	)	C/A No. 2013-CP-40-05888
IN RE: South Carolina Workers Compensation Commission WCC File No.: 1306305 CLARENCE B. WINFREY, JR., Employee-Claimant, v. ARCHWAY SERVICE, INC., Employer, and AMERICAN FIRE AND CASUALTY CO., As Carrier, Defendants.	)	**MOTION FOR NEW TRIAL, RECONSIDERATION AND/OR TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP RULE 59(e)**

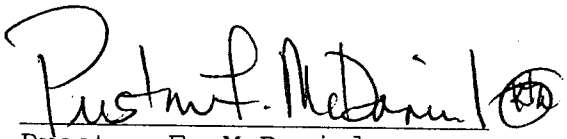
TO: LANDON L. HUGHEY, ESQUIRE, and BRETT H. BAYNE, ESQUIRE, ATTORNEYS FOR DEFENDANT AMERICAN FIRE AND CASUALTY COMPANY, AND ATTORNEY OF RECORD IN THE WORKERS' COMPENSATION CLAIM;

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel may be

heard or such other time as designated by the Court (**due to the emergency nature of the request for a Temporary Restraining Order, the Plaintiff would ask the Court to waive the ten (10) day notice requirement and set this matter for Hearing as soon as the Court's calendar will allow**), **Counsel will move for a New Trial, Reconsideration and/or to Alter or Amend the Judgment Pursuant to SCRCP Rule 59(e)**, as further set forth in the Memorandum attached hereto in support of Motion.

I SO MOVE.

Respectfully submitted,



Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

October 18, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff-Movant,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant-Respondent.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 OCT 18 PM 2:28
JEANETTE W. McBRIDE
C.C.P. & G.S.

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL, RECONSIDERATION AND/OR TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP RULE 59(e)

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

In support of the Motion, the Movant would respectfully submit unto the Court and ask for reconsideration on the following basis:

1. That the Plaintiff would respectfully submit that the Court overlooked or misapprehended the following points in reference to its Decision in this matter and would request a hearing and reconsideration of the Court's decision.

2. That attached hereto and incorporated herein by reference is the case of Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 626 S.E.2nd 34 (SC App 2006), reh. den., cert. den. That case is on all fours with the current case wherein the plaintiff was requesting affirmative relief by the Court in the form of a Temporary Restraining Order to maintain the status quo and to grant what the Plaintiff would refer to as affirmative relief in that case as was sought in this case. A copy is attached hereto as Exhibit "A".

3. That based upon a review of the Court's Order, the Court misapprehended its authority to require the Defendant to take an affirmative action in a Temporary Restraining Order. The Plaintiff was requesting a Temporary Restraining Order or Injunction restraining the Defendant from suspending or terminating benefits under the section of the Code, S.C. Code §42-9-260, which the Plaintiff alleged was unconstitutional. While the Plaintiff was requesting that benefits be reinstated, such request was in reality a request that the benefits be reinstated under the Temporary Restraining Order retroactively

to the date that they were wrongfully suspended under the unconstitutional provisions of the Statute. Therefore, the Plaintiff was specifically asking the Court to make a preliminary or prima facie determination that the Statute was unconstitutional (as it did in the TRO without notice) to prevent irreparable harm by issuing a Temporary Restraining Order "restraining" the Defendant from taking the action of suspending the Plaintiff's benefits based on the unconstitutional provisions of the Statute. This is identical to the situation in Peek v. Spartanburg Regional Healthcare System, supra, and in Brown v. Porcher, 660 F.2nd 1001, CA4, SC, (1981). In the Peek case as the Court will note, the Court of Appeals affirmed the Decision of the Circuit Court to enjoin and temporarily restrain the hospital from taking the affirmative action of suspending the doctor's privileges to practice anesthesiology in the hospital thus depriving her of income from her services. The Court found that in that case that irreparable harm existed and specifically stated the following:

> "When seeking preliminary injunction, plaintiff need not prove absolute legal right; plaintiff need only present fair question to raise as to existence of such right . . ."
>
> * * *
>
> "While economic loss does not, in and of itself constitute irreparable harm, such harm will be

> found if economic loss threatens the very existence of plaintiff's business." District of Columbia v. E. Trans-Waste of Md., Inc., 758 A.2d 1, 15 (S.C. 2000).

In this case, the economic loss threatens the very existence of the Plaintiff himself as this Court found in issuing the TRO without notice.

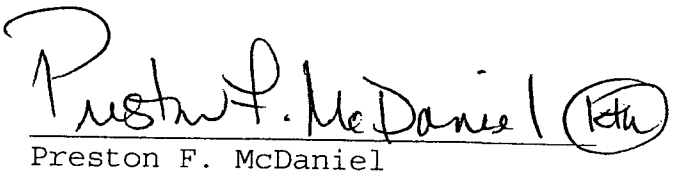
4. In the case of Brown v. Porcher, Ms. Brown sought a Temporary Restraining Order restraining the South Carolina Employment Security Commission from suspending her unemployment compensation benefits. In that case, the United States Fourth Circuit Court of Appeals affirmed the District Court's Decision to grant the Restraining Order, restraining the Commission from suspending or terminating the Claimant's benefits and ordered reinstatement of those benefits. Brown v. Porcher, supra. Therefore, this Court misapprehended that the Plaintiff's request for the Temporary Restraining Order was in fact to enjoin or restrain and to maintain again, as was argued to this Court in oral argument, the status quo by restraining the activity on the behalf of the Defendant of suspending the Plaintiff's (Claimant's) compensation benefits.

Quoting the United States Federal District Court of Appeals from the Fourth Circuit's opinion:

> "The nature of unemployment compensation creates strong equities in favor of the claimant. . . ."

The Plaintiff would submit that the same strong equities apply to compensation benefits and there can be no greater equity than the Plaintiff's life which is irreparable harm that can be done by the Defendant stopping his benefits to both compensation and medical care. See Exhibit "B" which is a letter from his doctor in support of that statement.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Plaintiff

October 18, 2013

Court of Appeals of South Carolina.
Sharon K. PEEK, M.D., Respondent,
v.
SPARTANBURG REGIONAL HEALTHCARE SYSTEM, Appellant.

No. 4064.
Heard Nov. 10, 2005.
Decided Dec. 19, 2005.
Rehearing Denied Feb. 16, 2006.
Certiorari Denied March 8, 2007.

Background: Hospital sought to terminate staff privileges of anesthesiologist after hospital discovered that anesthesiologist was not employed by professional corporation through which hospital obtained anesthesiology services. Anesthesiologist sought temporary restraining order (TRO) to prevent hospital from revoking her core anesthesia privileges. The Circuit Court, Spartanburg County, J. Mark Hayes, II, J., granted the TRO. Hospital appealed.

Holdings: The Court of Appeals, Hearn, C.J., held that:
(1) anesthesiologist established that irreparable harm would result from termination of her staff privileges by hospital;
(2) trial court did not abuse its discretion in finding that anesthesiologist would likely succeed on merits of underlying claim; and
(3) trial court did not abuse its discretion in finding anesthesiologist had inadequate remedy at law.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚷954(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚷954(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(2) k. Refusing injunction. Most Cited Cases

Grant or denial of injunction by trial court will not be reversed absent abuse of discretion.

[2] Injunction 212 ⚷1007

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1007 k. Extraordinary or unusual nature of remedy. Most Cited Cases
(Formerly 212k14)

Injunction 212 ⚷1046

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1041 Injury, Hardship, Harm, or Effect
212k1046 k. Irreparable injury. Most Cited Cases
(Formerly 212k14)

"Injunction" is drastic remedy issued by court in its discretion to prevent irreparable harm suffered by plaintiff.

[3] Injunction 212 ⚷1074

212 Injunction

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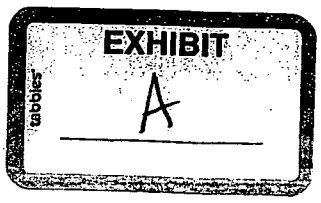

212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 k. Preservation of status quo. Most Cited Cases
(Formerly 212k138.3)

To obtain a temporary injunction, plaintiff must allege facts sufficient to constitute cause of action for injunction and demonstrate that injunction is reasonably necessary to protect legal rights pending in litigation.

[4] Injunction 212 ⚷1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases
(Formerly 212k138.1)

To establish cause of action for a temporary injunction, plaintiff must show: (1) it would suffer irreparable harm if injunction is not granted; (2) it will likely succeed on merits of litigation; and (3) there is inadequate remedy at law.

[5] Health 198H ⚷150

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk135 Eligibility for or Entitlement to Registration, Certification or License
198Hk150 k. Massage professionals. Most Cited Cases

Anesthesiologist established that irreparable harm would result from termination of her staff privileges by hospital, as was required for issuance of temporary restraining order (TRO) to prevent hospital from revoking her core anesthesia privileges; anesthesiologist was physician with private practice, and loss of privileges at hospital would lead to loss of her patient referral base and loss of her professional practice.

[6] Injunction 212 ⚷1099

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1099 k. Equitable considerations in general. Most Cited Cases
(Formerly 212k138.6)

Injunction 212 ⚷1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable injury. Most Cited Cases
(Formerly 212k138.6)

Injunction 212 ⚷1113

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1113 k. Adequacy of remedy at law. Most Cited Cases
(Formerly 212k138.6, 212k138.9)

Whether wrong is irreparable, in sense that equity may intervene through issuance of temporary injunctive relief, and whether there is adequate remedy at law, are questions that are not decided by narrow and artificial rules.

[7] Injunction 212 ⚷1099

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1099 k. Equitable considerations in general. Most Cited Cases

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(Formerly 212k138.15)

Before granting a temporary injunction, trial court should balance equities; court should look at particular facts of each case and equities of each party and determine which side, if any, is more entitled to equitable relief.

[8] Injunction 212 ⚷1074

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 k. Preservation of status quo. Most Cited Cases
(Formerly 212k132)

Injunction 212 ⚷1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable injury. Most Cited Cases
(Formerly 212k132)

Only purpose of temporary injunction is to preserve status quo to avoid possible irreparable injury to party pending litigation.

[9] Injunction 212 ⚷1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable injury. Most Cited Cases
(Formerly 212k138.6)

Complete loss of professional practice can be irreparable harm as will support issuance of temporary injunctive relief.

[10] Health 198H ⚷150

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk135 Eligibility for or Entitlement to Registration, Certification or License
198Hk150 k. Massage professionals. Most Cited Cases

Trial court did not abuse its discretion in finding that anesthesiologist would likely succeed on merits of underlying claim, in issuing temporary restraining order (TRO) to prevent hospital from revoking anesthesiologist's core anesthesia privileges; once trial court determined that anesthesiologist made prima facie showing that she was entitled to protection under hospital's bylaws, trial court was not required to determine whether hospital's agreement with professional corporation to provide anesthesia services to hospital was enforceable exclusive contract.

[11] Injunction 212 ⚷1096

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1096 k. Likelihood of success on merits. Most Cited Cases
(Formerly 212k138.18)

When seeking preliminary injunction, plaintiff need not prove absolute legal right; plaintiff need only present fair question to raise as to existence of such right.

[12] Injunction 212 ⚷1096

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief

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212k1096 k. Likelihood of success on merits. Most Cited Cases
(Formerly 212k138.18)

Injunction 212 ⚷1570

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1570 k. Prima facie showing. Most Cited Cases
(Formerly 212k138.18)

Determination of whether to grant a temporary injunction should not be based on merits of underlying case except insofar as merits may assist trial court in determining whether prima facie showing has been made.

[13] Injunction 212 ⚷1593

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1593 k. Scope of inquiry and matters considered. Most Cited Cases
(Formerly 212k151, 212k138.18)

Once prima facie showing has been made entitling plaintiff to injunctive relief, temporary injunction will be granted without regard to ultimate termination of case on merits.

[14] Health 198H ⚷150

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk135 Eligibility for or Entitlement to Registration, Certification or License
198Hk150 k. Massage professionals. Most Cited Cases

Trial court did not abuse its discretion in finding anesthesiologist had inadequate remedy at law, in anesthesiologist's action for temporary restraining order (TRO) to prevent hospital from terminating her core anesthesia privileges; monetary damages were not only option, and injunctive relief was better remedy because it would allow anesthesiologist to retain both her patient base and her expertise, while also retaining her income.

[15] Injunction 212 ⚷1074

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 k. Preservation of status quo. Most Cited Cases
(Formerly 212k132)

"Temporary injunction" is used to preserve subject of controversy in condition which it is at time of order until opportunity is offered for full and deliberate investigation, and to preserve existing status during litigation.

**35 Perry D. Boulier, of Spartanburg, for Appellant.

James C. Cothran, Jr., of Spartanburg, for Respondent.

HEARN, C.J.:

*453 This is an appeal from an order of the trial court enjoining Spartanburg Regional Healthcare System (the Hospital) from terminating the staff privileges of anesthesiologist Sharon Peek until the merits of her case can be adjudicated. We affirm.

FACTS

Peek is a licensed anesthesiologist.[FN1] She has maintained staff privileges at the Hospital for almost fourteen years. On January 30, 2004, general counsel for the Hospital **36 informed Peek that pursuant to a prospective agreement between the Hospital and Foothills Anesthesia Consultants, P.C. (Foothills), Peek would lose her staff privileges at the Hospital unless she was employed by Foothills. Although Peek did not wish to work at Foothills, she nevertheless sought employment there. Foothills declined to employ her.

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FN1. Peek's competency as a physician is not, and has never been, an issue in this case.

On February 1, 2004, the Hospital entered into an "Anesthesiology Services Agreement" with Foothills (2004 Agreement), which provided that Foothills "shall be the exclusive provider of Services" at the Hospital. This meant that core anesthesia services—essentially, all anesthesia services outside of chronic pain management—could be performed only by employees of Foothills. Accordingly, under the 2004 Agreement, if Foothills did not employ Peek, she could not practice core anesthesia services at the Hospital.

On February 24, 2004, Peek was asked about her employment status with Foothills. Because Foothills did not employ Peek, the Hospital acted under the 2004 Agreement and terminated her core anesthesia privileges. On March 1, 2004, the President of the Hospital told Peek that effective March 6, 2004, she would no longer be allowed to perform any core anesthesia services at the Hospital. On March 5, 2004, a day ***454** before Peek's privileges terminated, Peek sought a temporary restraining order to prevent the Hospital from revoking her core anesthesia privileges. Peek also brought a breach of contract action against the Hospital for failing to follow its own bylaws when it terminated Peek's privileges.

The trial court granted the temporary restraining order finding Peek made a prima facie showing she was entitled to protection under the Hospital bylaws. The Hospital appeals from this temporary injunction.

STANDARD OF REVIEW

[1] The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. *Gilley v. Gilley,* 327 S.C. 8, 11–12, 488 S.E.2d 310, 312 (1997); *MailSource, L.L.C. v. M.A. Bailey & Assocs.,* 356 S.C. 363, 367, 588 S.E.2d 635, 637–38 (Ct.App.2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.,* 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); *County of Richland v. Simpkins,* 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002).

LAW/ANALYSIS

The sole issue on appeal is whether the trial court abused its discretion in granting Peek injunctive relief until the merits of her case can be heard. We find no abuse of discretion.

[2][3][4] "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.,* 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). To establish a cause of action for injunction, the plaintiff must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the ***455** litigation; and (3) there is an inadequate remedy at law." *Scratch Golf,* 361 S.C. at 121, 603 S.E.2d at 908.

A. Irreparable Harm

[5] The Hospital argues Peek has not suffered irreparable harm entitling her to injunctive relief because the harm she alleges can be remedied by monetary damages alone. We disagree.

[6][7][8] Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *Kirk v. Clark,* 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the ****37** equities of each party and determine which side, if any, is more entitled to equitable relief.

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MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App.2003). The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); *MailSource,* 356 S.C. at 368, 588 S.E.2d at 638.

[9] The trial court found that because Peek was a physician with a private practice, she would suffer irreparable harm while her case against the Hospital was litigated, and that as between Peek and the Hospital, the equities favored Peek. The record supports this conclusion. Peek has lived and practiced anesthesiology in the Spartanburg area for fourteen years. During this time Peek built a patient referral base, which fueled her professional practice. The loss of privileges at the Hospital would lead to the loss of her patient referral base, which would, in turn, lead to the loss of her professional practice. The complete loss of a professional practice can be an irreparable harm.[FN2] Accordingly, we find the trial court did ***456** not abuse its discretion when it found Peek would suffer irreparable harm if the status quo was not maintained.

FN2. Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. *District of Columbia v. E. Trans–Waste of Md., Inc.,* 758 A.2d 1, 15 (D.C.2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.,* 148 Vt. 1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); *IAC, Ltd. v. Bell Helicopter Textron, Inc.,* 160 S.W.3d 191, 200 (Tex.App.2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

B. Success on the Merits

[10] The Hospital next argues Peek cannot succeed on the merits of the underlying case because the 2004 Agreement is an enforceable exclusive contract. We disagree.

[11][12][13] When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the existence of such a right." *Williams v. Jones,* 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. *MailSource,* 356 S.C. at 368, 588 S.E.2d at 638 (citing *Transcon. Gas Pipe Line Corp. v. Porter,* 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Helsel v. City of North Myrtle Beach,* 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) ("[I]t would have been improper for the hearing judge who issued the temporary injunction to make a finding upon the facts in such a manner as to affect the merits of the case.").

Once the trial court determined Peek made a prima facie showing she was entitled to protection under the Hospital bylaws, the trial court was not required to determine whether the 2004 Agreement was an enforceable exclusive contract because such a finding would affect the merits of the case. Therefore, the trial court did not abuse its discretion in deciding Peek would likely succeed on the merits.

***457 C. Inadequate Remedy at Law**

[14] Finally, the Hospital argues Peek had an adequate remedy at law in the form of monetary damages. We disagree.

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[15] Again, the purpose of an injunction is the preservation of the status quo. *MailSource,* 356 S.C. at 368, 588 S.E.2d at 638. "A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." *Id.* As explained above, the trial court correctly found that if **38 Peek lost her privileges at the Hospital, her professional practice and, by extension, her career would be lost long before her claims against the Hospital were adjudicated. Furthermore, Peek, who both sides agree is a competent and capable anesthesiologist, would lose expertise if she were not otherwise allowed to exercise her privileges at the hospital while this case is pending, and therefore her future ability to practice anesthesiology would be compromised. While courts do often award monetary damages when a plaintiff can no longer work, such damages are usually the only possible remedy and serve to make the plaintiff as whole as possible under the circumstances. Here, monetary damages are not the only option, and injunctive relief is a better remedy because it would allow Peek to retain both her patient base and her expertise while also retaining her income. Therefore, we find the trial court did not abuse its discretion in finding Peek had an inadequate remedy at law.

CONCLUSION

For the forgoing reasons, the order of the trial court enjoining the Hospital from revoking Peek's privileges until the merits of her case can be heard is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

S.C.App.,2005.
Peek v. Spartanburg Regional Healthcare System
367 S.C. 450, 626 S.E.2d 34

END OF DOCUMENT

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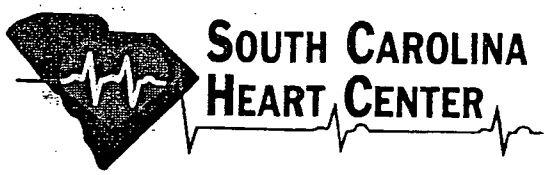


October 4, 2013

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Ave.
Columbia S. C. 29201

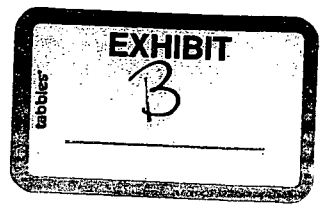
Dear Mr. McDaniel:

Re: CLARENCE WINFREY

Mr. Winfrey had a severe myocardial infarction after electrocution in the workplace in May. He required emergency surgery. He has severe congestive heart failure and requires continuous treatment. Lack of continuous medical therapy would likely be fatal for him. Without insurance, he cannot afford essential medication.

Sincerely,

Lanneau D. Lide, M. D.



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Clarence Winfrey)
)
Plaintiff(s))
)
vs.)
Archway Services and American Fire & Casualty)
Insurance Company c/o Liberty Mutual Insurance
)
Defendant(s))

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2013-CP-40-05888

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Esquire The McDaniel Law Firm 1315 Elmwood Avenue Columbia, South Carolina 29201 phone: (803) 771-7211 fax: (803) 252-0709 e-mail: mcdaniellaw@hotmail.com	Landon L. Hughey/Brett H. Bayne Address: McAngus, Goudelock & Courie, LLC Post Office Box 12519, Capitol Station Meridian, 1320 Main Street, 10th Floor (29201) Columbia, South Carolina 29211-2519 Phone: (803) 779-2300 Fax: (803) 748-0526 e-mail: lhughey@mgclaw.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss Pursuant to Rule 12(B)(7)
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 21, 2013 Date submitted

RICHLAND COUNTY
FILED
2013 OCT 21 PM 12:42
JEANETTE W. McBRIDE
C.C.P. & G.S.

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant/Plaintiff, v. ARCHWAY SERVICES INC, Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Of Whom Only American Fire & Casualty Insurance Company is a Defendant.	)	Civil Action No. 2013-CP-40-05888 **MOTION TO DISMISS PURSUANT TO RULE 12(B)(7)**

RICHLAND COUNTY
FILED
2013 OCT 21 PM 12:42
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: SOUTH CAROLINA CIRCUIT COURT, THE HONORABLE ALISON RENEE LEE, AND PRESTON F. MCDANIEL, ESQUIRE:

COMES NOW Defendant, by and through its undersigned counsel, and would move this court to dismiss the Complaint filed by Plaintiff pursuant to Rule 12(b)(7). Rule 12 provides that the above listed defenses be made by motion. Specifically, Defendant challenges the Complaint and seeks its dismissal for failure to join a party under Rule 19.

Upon information and belief, the following is true:

1. Plaintiff filed a Summons and Complaint on or about September 27, 2013.
2. According to Plaintiff, Plaintiff obtained and served a temporary restraining order on Defendant on or about October 1, 2013.
3. This Court dismissed the temporary restraining order on or about October 9, 2013.
4. Plaintiff has failed to join a necessary party pursuant to Rule 19.
5. Because Plaintiff has failed to join a necessary party pursuant to Rule 19, the Complaint must be dismissed.

Further, Defendant has incurred substantial costs associated with responding to this matter. Defendant should be reimbursed for all costs associated with the receipt, reply, and defense of this action before this court. Pursuant to Rule 11, SCRCP and S.C. Code Ann. § 15-36-10, this court should award Defendant an amount equal to all costs and fees associated with defending this action.

Conclusion

For all of the foregoing reasons, the Complaint should be dismissed pursuant to Rule 12(b)(7). In addition, Defendant is entitled to reimbursement for all costs and fees associated with defense of this action.

LANDON L. HUGHEY
BRETT H. BAYNE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 21, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Clarence Winfrey)

Plaintiff(s))
)
vs.)
Archway Services and American Fire & Casualty)
Insurance Company c/o Liberty Mutual Insurance
)
Defendant(s))

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2013-CP-40-05888

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Esquire The McDaniel Law Firm 1315 Elmwood Avenue Columbia, South Carolina 29201 phone: (803) 771-7211 fax: (803) 252-0709 e-mail: mcdaniellaw@hotmail.com	Landon L. Hughey/Brett H. Bayne Address: McAngus, Goudelock & Courie, LLC Post Office Box 12519, Capitol Station Meridian, 1320 Main Street, 10th Floor (29201) Columbia, South Carolina 29211-2519 Phone: (803) 779-2300 Fax: (803) 748-0526 e-mail: lhughey@mgclaw.com

FILED
2013 OCT 21 PM 12:41
RICHLAND COUNTY
CLERK OF COURT
JEANETTE W. McBRIDE
C.C.P. & G.S.

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 21, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant/Plaintiff, v. ARCHWAY SERVICES INC, Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Of Whom Only American Fire & Casualty Insurance Company is a Defendant.	)	Civil Action No. 2013-CP-40-05888 **MOTION FOR SUMMARY JUDGMENT**

RICHLAND CO.
FILED
2013 OCT 21 PM 12:41
JEANNETTE W. McBRIDE
C.C.P. & G.S.

TO: SOUTH CAROLINA CIRCUIT COURT, THE HONORABLE ALISON RENEE LEE, AND PRESTON F. MCDANIEL, ESQUIRE:

COMES NOW Defendant, by and through its undersigned counsel, and would move this court for summary judgment of the Complaint filed by Plaintiff pursuant to Rule 56.

Upon information and belief, the following is true:

1. Plaintiff filed a Summons and Complaint on or about September 27, 2013.
2. According to Plaintiff, Plaintiff obtained and served a temporary restraining order on Defendant on or about October 1, 2013.
3. This Court dismissed the temporary restraining order on or about October 9, 2013.

4. There is no genuine issue of material fact in this case.

5. Defendant is entitled to a judgment in their favor as a matter of law.

Further, Defendant has incurred substantial costs associated with responding to this matter. Defendant should be reimbursed for all costs associated with the receipt, reply, and defense of this action before this court. Pursuant to Rule 11, SCRCP and S.C. Code Ann. § 15-36-10, this court should award Defendant an amount equal to all costs and fees associated with defending this action.

Conclusion

For all of the foregoing reasons, this Court should enter judgment in favor of Defendant. In addition, Defendant is entitled to reimbursement for all costs and fees associated with defense of this action.

LANDON L. HUGHEY
BRETT H. BAYNE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 21, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Clarence Winfrey)
Plaintiff(s))
)
vs.)
Archway Services and American Fire & Casualty)
Insurance Company c/o Liberty Mutual Insurance
)
Defendant(s))

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2013-CP-40-05888

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Esquire The McDaniel Law Firm 1315 Elmwood Avenue Columbia, South Carolina 29201 phone: (803) 771-7211 fax: (803) 252-0709 e-mail: mcdaniellaw@hotmail.com	Landon L. Hughey/Brett H. Bayne Address: McAngus, Goudelock & Courie, LLC Post Office Box 12519, Capitol Station Meridian, 1320 Main Street, 10th Floor (29201) Columbia, South Carolina 29211-2519 Phone: (803) 779-2300 Fax: (803) 748-0526 e-mail: lhughey@mgclaw.com

FILED 2013 OCT 21 PM 12:42 JEANETTE W. McBRIDE C.C.P. & G.S. RICHLAND CO.

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Fees, Costs, and Any Other Relief this Court Deems Appropriate
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 21, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

CLARENCE WINFREY,

Claimant/Plaintiff,

v.

ARCHWAY SERVICES INC,

Employer,

and

AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE,

Carrier,

Of Whom Only American Fire & Casualty Insurance Company is a

Defendant.

Civil Action No. 2013-CP-40-05888

MOTION FOR FEES, COSTS, AND ANY OTHER RELIEF THIS COURT DEEMS APPROPRIATE

RICHLAND COUNTY
FILED
2013 OCT 21 PM 12:42
JEANETTE W. McBRIDE
C.C.P. & G.S.

COMES NOW Defendant American Fire & Casualty Insurance Company and would ask this Court to award all costs, fees, and any other award it deems proper related to the Defendant's response to the temporary restraining order issued by this Court on October 1, 2013.

I. PURSUANT TO RULE 11 AND S.C. CODE ANN. § 15-36-10, CLAIMANT'S ATTORNEY SHOULD BE SANCTIONED BY THIS COURT FOR ABUSE OF PROCESS AND KNOWINGLY FILING A FRIVOLOUS MOTION

Rule 11(a), SCRCP provides that "[t]he signature of an attorney...constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief **there is good ground to support it**; and that it is not interposed for

delay." (emphasis added). Rule 11(a) further provides that "[i]f a pleading, motion, or other paper is signed in violation of this Rule, **the court**, upon motion or upon its own initiative, **may impose upon the person who signed it...an appropriate sanction**, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee[1]." (emphasis added).

S.C. Code Ann. § 15-36-10(A)(4) (also known as the South Carolina Frivolous Proceedings Act), states that:

> "**[a]n attorney**...participating in a civil...action...**may be sanctioned for**:
>
> (a) **filing a frivolous** pleading, **motion, or document if**...
>
> (ii) a reasonable attorney in the same circumstances would believe that under the fact, **his claim or defense was clearly not warranted under** <u>**existing law**</u> and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; [or]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that **the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party**; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe **the pleading, motion, or document is frivolous, interposed for merely delay**, or merely brought for any purpose other than...adjudication of the claim or defense upon which the proceedings are based;
>
> (b) **making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts**; or
>
> (c) **making frivolous arguments that a reasonable attorney would believe were not warranted under the** <u>**existing law**</u> or if there is

[1] *See also* <u>Link v. School Dist. of Pickens County</u>, 302 S.C. 1, 393 S.E.2d 176 (1990); <u>Johnson v. Dailey</u>, 318 S.C. 318, 457 S.E.2d 613 (1995).

> no good faith argument that exists for the extension, modification, or reversal of existing law.
>
> (emphasis added).

S.C. Code Ann. § 15-36-10(B)(2) goes on to state that "[i]f...an attorney...has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances." Under S.C. Code Ann. § 15-36-10(G)(1), sanctions may include "...reasonable costs and attorney's fees of the prevailing party. Costs shall include but not be limited to the time required...by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding."

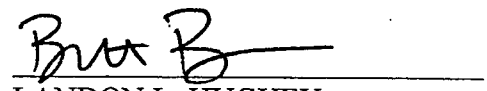
Claimant's attorney specifically and clearly violated Rule 11, S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) and 15-36-10(A)(4)(c). As previously noted above, Cook v. Mack's Transfer clearly establishes that this court has no jurisdiction to hear this matter or this type of action. For reference, The Cook court concluded "[i]**f the dispute concerns an alleged wrongful denial of statutory benefits, the Commission has exclusive jurisdiction to adjudicate the controversy. Whether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction**. Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts..." (emphasis added). Further, S.C. Code Ann. § 42-1-540, which states "[t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee**....as

against the employer, at common law or otherwise, on account of such injury, loss of service, or death." (emphasis added).

Cook is a well-known and often used case in the workers' compensation field. Claimant's attorney knows, or should know through regular practice[2], that Cook stands for the proposition that this exact action taken by him is improper, without legal merit or basis, and is functionally frivolous. Further, Claimant's attorney is most certainly aware of S.C. Code Ann. § 42-1-540 which clearly states that the Act is the sole and exclusive remedy for Claimant.

CONCLUSION

Because of the foregoing actions, this court should issue monetary sanctions equal to Defendant's costs, fees, and expenses to reply to the temporary restraining order pursuant to Rule 11 and S.C. Code Ann. § 15-36-10(G)(1).



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BRETT H. BAYNE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 21, 2013

[2] Or, at the very least, brief research prior to filing for a temporary restraining order.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant/Plaintiff, v. ARCHWAY SERVICES INC, Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Of Whom Only American Fire & Casualty Insurance Company is a Defendant.	)	Civil Action No. 2013-CP-40-05888 **ANSWER AND COUNTERCLAIM**

RICHLAND COUNTY
FILED
2013 OCT 21 PM 12:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

COMES NOW Defendant American Fire & Casualty Insurance Company and for its Answer to Plaintiff's Complaint states the following:

1. Each and every allegation not specifically admitted to in this Answer and Counterclaim is DENIED.
2. Paragraph 1 does not require a response. However, as laid out below, Defendant asserts that Plaintiff does not have a property interest and/or property right in *temporary* workers' compensation benefits.

3. The allegations contained in Paragraph 2 are denied. In addition to the general denial of Paragraph 2, it is denied that Defendant American Fire & Casualty Insurance Company is a proper party to this action.
4. The allegations related to the sequence of events contained in Paragraph 3 are admitted. The reasoning for filing the Complaint does not require a response.
5. The allegations contained in Paragraph 4 are denied for lack of knowledge.
6. The allegations contained in Paragraph 5 are denied. Defendant American Fire & Casualty Insurance Company is not the proper party to this action. Insofar as Paragraph 5 states that Defendant American Fire & Casualty Insurance Company is the insurance carrier for Employer and Landon Hughey is the attorney of record, Paragraph 5 is admitted.
7. The allegations contained in Paragraph 6 are denied.
8. The allegations contained in Paragraph 7 are denied.
9. The allegations contained in Paragraph 8 do not require a response. However, Defendant asserts that S.C. Code Ann. § 42-9-260(B) is constitutional. Further Defendant asserts that

   Plaintiff does not have a property interest in temporary disability benefits, that S.C. Code Ann. § 42-9-260 is not in conflict with the Administrative Procedures Act, and that Plaintiff has not been denied equal protection of the law.
10. The allegations contained in Section A[1] are denied in that S.C. Code Ann. § 42-9-260 does not violate the fundamental due process rights of the Plaintiff under the United States and/or South Carolina Constitutions.

[1] Plaintiff stopped numbering paragraphs at section A and the remainder of this Answer will refer to the sections of the Complaint.

11. Further, the allegations contained in Section A[2] are denied in that Plaintiff does not have a property interest in temporary disability benefits.

12. The allegations contained in Section B are denied in that S.C. Code Ann. § 42-9-260 is not in direct conflict with S.C. Code § 1-23-310(2).

13. The allegations contained in Section C are denied in that S.C. Code Ann. § 42-9-260 does not violate Plaintiff's right to equal protection under the United States and/or South Carolina Constitutions.

FIRST DEFENSE

14. Plaintiff fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

15. Specifically, Plaintiff asks this court to issue an Order reinstating workers' compensation benefits in the event it finds S.C. Code Ann. § 42-9-260 unconstitutional.

16. Even if this court were to determine that S.C. Code Ann. § 42-9-260 is unconstitutional, this court does not have jurisdiction to order Defendant to reinstate workers' compensation benefits as the Workers' Compensation Commission has sole, original, exclusive, and subject matter jurisdiction over the payment of workers' compensation benefits.

17. Therefore, Plaintiff fails to state a claim upon which relief can be granted by this court.

SECOND DEFENSE

18. This court lacks subject matter jurisdiction over Plaintiff's claims pursuant to Rule 12(b)(1).

THIRD DEFENSE

19. Plaintiff failed to properly serve Defendant pursuant to Rule 12(b)(5).

---

[2] Plaintiff stopped numbering paragraphs at section A and the remainder of this Answer will refer to the sections of the Complaint.

FOURTH DEFENSE

20. There is another action pending between the parties for the same claim pursuant to Rule 12(b)(8).

FIFTH DEFENSE

21. Plaintiff has failed to join a necessary party pursuant to Rule 12(b)(7) and Rule 19.

SIXTH DEFENSE

22. Defendant is not the proper party to this matter as this court cannot grant any relief against Defendant in favor of Plaintiff.

SEVENTH DEFENSE

23. This court lacks original jurisdiction over Plaintiff's claims pursuant to Cook v. Mack's Transfer and Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986) cert. denied 292 S.C. 230, 355 S.E.2d 861 (1987).

EIGHTH DEFENSE

24. Plaintiff does not have a property interest in temporary disability benefits.

25. Plaintiff asserts that to deny benefits without a hearing constitutes a violation of a property interest and therefore the ability to deny benefits without a hearing is unconstitutional.

26. Plaintiff cites two cases in support of his contention: (1) Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (S.C. 1991) and (2) Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (S.C. 1987).

27. Neither of these cases supports the contention of Plaintiff that *temporary* disability benefits constitute a property interest.

NINTH DEFENSE

28. Defendant reserves the right to add additional defenses, including additional affirmative defenses, as discovery progresses.

COUNTERCLAIM

29. Plaintiff has alleged he sustained an injury by accident to multiple body parts, including his heart, following a work related incident involving electrical shock.

30. Plaintiff has filed a Complaint attempting to either (1) improperly circumvent the Commission by asking for a determination of compensability from this court or (2) improperly establish a claim for bad faith denial of benefits by asking this court to order payment of benefits in direct contravention of the South Carolina Workers' Compensation Act.

31. South Carolina Code Regulations 67-504, 67-505, and 67-606 implement the procedures authorized by S.C. Code Ann. § 42-9-260 regarding the termination and/or suspension of temporary compensation benefits.

32. Regulation 67-504 states that within the first 150 days after the employer receives notice of injury, temporary compensation payments may be suspended or terminated immediately without a prior hearing, and the employee may later request a hearing to have the payments reinstated.

33. S.C. Code Ann. § 42-9-260(B)(3) provides that following a good faith investigation of the claim, and within 150 days of notice of injury, Defendant may deny compensability of the claim.

34. In the present claim, Defendant conducted a good faith investigation and subsequently denied compensability of the alleged injuries within the 150 day window.

35. Defendant's denial is permitted pursuant to S.C. Code Ann. § 42-9-260(B)(3) and Reg. 67-504 which allows a denial of compensability following a good faith investigation.

36. When a claim is denied, a claimant is not entitled to temporary compensation benefits under the Act.

37. The Act provides that if an employer and injured employee fail to reach an agreement in regard to compensation within fourteen days after the employer has knowledge of the injury, then the worker may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon. *See* S.C. Code Ann. § 42-17-20.

38. Further, all questions arising under the Act, if not settled by agreement of the parties, shall be determined by the Commission. *See* S.C. Code Ann. § 42-3-180.

39. Under the Workers' Compensation Act, Claimant has the burden of proving that he sustained an injury by accident and that his injury is compensable. *See* Frady v. Pacific Mills 231 S.C. 601, 99 S.E.2d 398 (S.C. 1957).

40. Defendant does not carry the burden of disproving compensability.

41. Claimant's sole method of proving compensability is by filing the proper form with the Commission, requesting a hearing, and conducting a hearing before the Commission.

42. During a hearing, the Commission receives evidence from both parties and makes a determination of compensability.

FIRST COUNTERCLAIM

Defendant is entitled to an award of costs, fees, and other damages pursuant to the South Carolina Frivolous Proceedings Act.

43. Defendant brings a counterclaim for costs, fees, and other damages pursuant to the South Carolina Frivolous Proceedings Act codified at S.C. Code Ann. § 15-36-10(A)(4).

44. Plaintiff and/or Plaintiff's attorney has clearly framed this action in his Complaint as a suit for a denial of benefits in bad faith. (*See* Plaintiff's Complaint Paragraph 3).

45. While Plaintiff has asserted a Declaratory Judgment Action, the clear underlying purpose of this Complaint is a bad faith denial of benefits. (*See* Plaintiff's Complaint Paragraph 3).

46. In addition, Plaintiff is well aware that this Court has no jurisdiction to issue workers' compensation benefits and any motion or Order filed and/or requested by Plaintiff is improper.

47. Plaintiff's motion for a temporary restraining was clearly without merit and was clearly not warranted under existing law.

48. The South Carolina Frivolous Proceedings Act states that "**[a]n attorney**...participating in a civil...action...**may be sanctioned for**:

(a) **filing a frivolous** pleading, **motion, or document if**...

> (ii) a reasonable attorney in the same circumstances would believe that under the fact, **his claim or defense was clearly not warranted under <u>existing law</u>** and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; [or]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that **the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party**; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe **the pleading, motion, or document is frivolous, interposed for merely delay**, or merely brought for any purpose other than...adjudication of the claim or defense upon which the proceedings are based;

(b) **making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts**; or

(c) **making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law** or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

49. S.C. Code Ann. § 15-36-10(B)(2) states that "[i]f...an attorney...has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances."

50. Pursuant to S.C. Code Ann. § 15-36-10(G)(1), sanctions may include "...reasonable costs and attorney's fees of the prevailing party. Costs shall include but not be limited to the time required...by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding."

51. Plaintiff and/or Plaintiff's attorney specifically and clearly violated S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) and 15-36-10(A)(4)(c).

52. Cook v. Mack's Transfer clearly establishes that this court has no jurisdiction to hear this matter or this type of action.

53. For reference, The Cook court concluded "[i]**f the dispute concerns an alleged wrongful denial of statutory benefits, the Commission has exclusive jurisdiction to adjudicate the controversy. Whether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction**. Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts..." (emphasis added).

54. In addition, S.C. Code Ann. § 42-1-540, states "[t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee**....as against the employer, at common law or otherwise, on account of such injury, loss of service, or death." (emphasis added).

55. Cook stands for the proposition that this exact action taken by Plaintiff and/or Plaintiff's attorney is improper, without legal merit or basis, and is functionally frivolous.

56. Further, Plaintiff and/or Plaintiff's attorney is most certainly aware of S.C. Code Ann. § 42-1-540 which clearly states that the Act is the sole and exclusive remedy for Claimant.

57. Because of these actions, this court should order Plaintiff and/or Plaintiff's attorney to pay monetary sanctions equal to Defendant's costs, fees, and expenses to reply to this Complaint and the original temporary restraining order pursuant to S.C. Code Ann. § 15-36-10(G)(1).

PRAYER FOR RELIEF

WHEREFORE, Defendant/Counterclaim Plaintiff prays for judgment in their favor and against Plaintiff as follows:

a. Pursuant to Rule 57, this Court may order a speedy hearing on a declaratory judgment action and may advance it on the calendar. Defendant requests this Court order a speedy hearing pursuant to Rule 57.

b. A finding that Plaintiff has not joined the proper parties to this matter.

c. A finding that Defendant is not a proper party to this matter.

d. A denial of Plaintiff's request for declaratory judgment that S.C. Code Ann. § 42-9-260 is unconstitutional.

e. A finding that Plaintiff's Complaint is in violation of the South Carolina Frivolous Proceedings Act codified at S.C. Code Ann. § 15-36-10(A)(4).

f. A finding that the motion for a temporary restraining order was not warranted under the existing law.

g. A monetary award equal to the total costs and fees related to the response and defense of the Complaint and/or the temporary restraining order;

h. All attorney's fees and costs;

i. Pre- and post-judgment interest in the statutory amount; and

j. Any other relief this Court deems just.

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(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 21, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Clarence Winfrey)
)
Plaintiff(s))
)
vs.)
Archway Services and American Fire & Casualty)
Insurance Company c/o Liberty Mutual Insurance
)
Defendant(s))

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

C/A No: 2013-CP-40-05888

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Esquire The McDaniel Law Firm 1315 Elmwood Avenue Columbia, South Carolina 29201 phone: (803) 771-7211 fax: (803) 252-0709 e-mail: mcdaniellaw@hotmail.com	Landon L. Hughey/Brett H. Bayne Address: McAngus, Goudelock & Courie, LLC Post Office Box 12519, Capitol Station Meridian, 1320 Main Street, 10th Floor (29201) Columbia, South Carolina 29211-2519 Phone: (803) 779-2300 Fax: (803) 748-0526 e-mail: lhughey@mgclaw.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

FILED
2013 OCT 21 PM 12:42
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Pursuant to Rule 59(e)
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 21, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant/Plaintiff, v. ARCHWAY SERVICES INC, Employer, and AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL INSURANCE, Carrier, Of Whom Only American Fire & Casualty Insurance Company is a Defendant.	)	Civil Action No. 2013-CP-40-05888 **MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(e)**

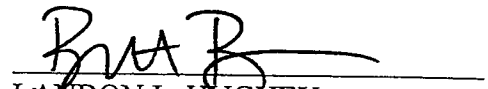
RICHLAND COUNTY
FILED
2013 OCT 21 PM 12: 42
JANETTE W. McBRIDE
C.C.P. & G.S.

COMES NOW Defendant American Fire & Casualty Insurance Company and would ask this Court to alter or amend its Order of October 9, 2013.

This Court entered an Order in this case on October 9, 2013 finding against Defendant on a Motion to Dismiss the underlying Complaint on the grounds that the constitutionality of a statute may be properly raised "...in a declaratory judgment action before the circuit court." However, this Court did not rule on the remaining Rule 12 grounds raised by Defendant. Specifically, Defendant raised additional grounds that the Complaint should be dismissed pursuant to Rule 12(b)(4), 12(b)(5), 12(b)(6), and 12(b)(8).

Pursuant to Rule 12(b)(6), a claim must state facts sufficient to constitute a cause of action and there must be some relief that can be granted by this court. Plaintiff asks this court to issue an Order reinstating workers' compensation benefits in the event it finds S.C. Code Ann. § 42-9-260 unconstitutional. Even if this court were to determine that S.C. Code Ann. § 42-9-260 is unconstitutional, this court does not have jurisdiction to order Defendant to reinstate workers' compensation benefits as the Workers' Compensation Commission has sole, original, exclusive, and subject matter jurisdiction over the payment of workers' compensation benefits. Therefore, Plaintiff fails to state a claim upon which relief can be granted by this court.

For that reason, Defendant respectfully asks this Court to reconsider and alter or amend the October 9, 2013 Order to dismiss the Complaint pursuant to Rule 12(b)(6) as there is no relief requested by Plaintiff that can be granted by this Court.



LANDON L. HUGHEY
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Post Office Box 12519, Capitol Station
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Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
October 21, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013 -CP-40-05888

CLARENCE B. WINFREY, JR.,
Plaintiff,
vs.
AMERICAN FIRE AND CASUALTY CO.
Defendant.

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm 1315 Elmwood Avenue Columbia, SC 29201 Phone: 803-771-7211Fax 803-252-0709 E-mail: mcdaniellaw@hotmail.comOther: _____	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

RICHLAND COUNTY FILED 2013 NOV -4 AM 11:25 JEANETTE W. McBRIDE C.C.P. & G.S.

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Pursuant to Rule 12(b)(6)
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant 10/31/13 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☒ Other: Motion Required per SCRCP Rule 12(b)(6)

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 NOV -4 AM 11:26
JEANETTE W. McBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

MOTION TO DISMISS COUNTERCLAIM PURSUANT TO SCRCP RULE 12(b)(6)

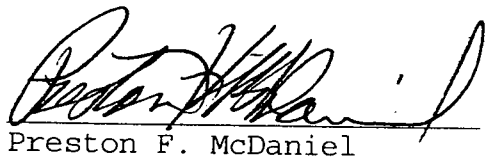
TO: BRETT H. BAYNE, ESQUIRE, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel may be heard or at such other or further time as designated by the Court, the

Plaintiff will move for an Order of the Court dismissing the Counterclaim filed in the above-stated matter. Said Motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.

Respectfully submitted,



Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

October 31, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 NOV -4 AM 11:26
JEANETTE W. McBRIDE
C.C.P. & G.S.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM PURSUANT TO SCRCP RULE 12(b)(6)

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

In support of the Motion, the Movant would respectfully submit unto the Court as follows:

1. That on October 21, 2013, the Defendant filed an Answer and Counterclaim to the Complaint filed by the Plaintiff

requesting a declaration of rights under the Declaratory Judgment action concerning SC Code §42-9-260(B) and specifically subsection (4) including that it be declared unconstitutional as violating the Claimant's due process rights among other reasons as set forth in the Complaint.

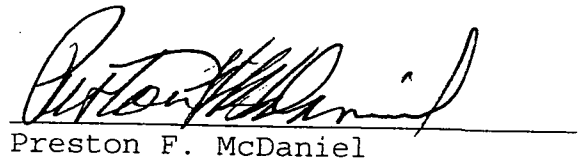
2. That in addition to filing an Answer to the Complaint, the Defendant set forth a Counterclaim filing a Counterclaim under the SC Frivolous Proceedings Act, SC Code §15-36-10(A)(4). While that Code Section commonly referred to as the Frivolous Proceedings Act, provides for a determination of whether its provisions have been violated and a Motion for Sanctions, it does not provide for separate causes of action.

3. That SC Code §15-36-10(C)(1) specifically provides that at the conclusion of a trial or after a verdict for or against damages has been rendered or after a case has been dismissed by a directed verdict, a summary judgment or judgment notwithstanding the verdict, "**upon Motion of the prevailing party**", the Court shall proceed to determine if the claim or defense was frivolous. While the Act specifically provides for a Motion, prior to such a Motion even being filed, there must be a verdict or a case must be dismissed which has not occurred in this matter. At nowhere in the Statute does it provide for a separate cause of action and only provides for a Motion being filed by a, "prevailing" party **in any**

action filed. Therefore, the Counterclaim which is based upon the Frivolous Proceedings Act fails to state a cause of action.

WHEREFORE, the Plaintiff would move that the Counterclaim be dismissed for failure to state a cause of action.

Respectfully submitted,



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(803) 771-7211

Attorney for Plaintiff

October 31, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 NOV -6 AM 10:41
JEANNETTE W. MCBRIDE
CLERK OF C.C.P. & G.S.

REPLY TO MOTION FOR SUMMARY JUDGMENT

IN RE:

South Carolina Workers Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

By way of Reply to the Motion for Summary Judgment filed by the Defendant, Counsel for the Plaintiff would respectfully show unto the Court as follows:

1. That the Declaratory Judgment in part requested a declaration that SC Code §42-9-260 and in particular, subsection (D)(4) was unconstitutional and in violation of the Plaintiff's due process rights. The Verified Complaint on file with the Court is incorporated herein by reference.

2. That in its Order, this Court found that, "however, regarding the Declaratory Judgment action this Court does have jurisdiction over the issue of whether §42-9-260 is facially unconstitutional" and dismissed the Motion to Dismiss.

3. That both the Declaratory Judgment action Complaint contained and this Court found a genuine issue of material fact for trial as to the constitutionality of the Statute alleged to be unconstitutional as set out in the Verified Complaint in its Order, clearly a genuine issue of fact exists and the Motion should be dismissed. After hearing, if the Motion is dismissed, the Plaintiff would request a determination by the Court pursuant to the SC Code §15-36-10(C)(1) as to whether the Defendant has violated the provisions of SC Code §15-36-10.

Respectfully submitted,

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Columbia, SC 29201
(803)771-7211

Attorney for the Claimant

October 31, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 NOV -5 PM 12:46
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

REPLY TO MOTION FOR FEES, COSTS, AND ANY OTHER RELIEF THIS COURT DEEMS APPROPRIATE

By way of Reply to the Motion filed, Counsel for the Plaintiff would respectfully show unto the Court as follows:

1. That while Plaintiff's Counsel takes personal offense to the allegation that he would ever submit a frivolous cause of action or Complaint or Motion to the Court that in refutation of the allegation that the cause of action, that being a Declaratory Judgment action filed by the Plaintiff in this matter, is frivolous, Plaintiff's Counsel would simply reiterate the words of the Court from its Order,

> "However, regarding the Declaratory Judgment action, this Court does have jurisdiction over the issue of whether §42-9-260 is facially unconstitutional. The Supreme Court stated in Travelscape, LLC v. SC Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011), that the Administrative Law Court is unable to decide facial challenges to a Statute. Instead, such challenges are 'legal questions that are properly raised for the first time on appeal **or in a Declaratory Judgment action before the Circuit Court.'"** Travelscape, LLC v. SC Dept. of Revenue, 391 SC at 109, 705 S.E.2d at 39 (Emphasis added).

Clearly the Circuit Court has original subject matter jurisdiction over declaring a Statute unconstitutional, even if the Statute relates to an Administrative Agency. While further response is not necessary, Plaintiff's Counsel because of the Footnote #2 that states that, "at the very least, brief research prior to filing for a Temporary Restraining Order", Counsel would like to augment in this Reply to the Motion for sanctions and attorney's fees and costs, quoting our SC Supreme Court:

"As stated in Video Gaming (Video Gaming Consultants, Inc. v. SC Dept. of Revenue, 342 S.C. 34, 535 S.E.2d, 642 (2000), 'if the sole issue posed in a particular case is the constitutionality of a Statute, a Court may decide the case without waiting for an administrative ruling . . . **requiring** a party to raise an issue which cannot be ruled upon by an ALJ makes little sense' and certainly is not effective or appropriate. Here declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. **The Agency** and the ALJ cannot rule on the constitutionality issue. In fact, requiring the Agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine. Thus, the Statute does not apply in cases where the sole issue is whether a statute or other legislative action is constitutional.

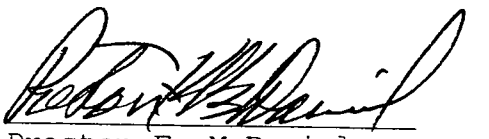
The Circuit Court erred in dismissing the Declaratory Judgment **and injunction causes of action** and the case should be remanded. In doing so, we want to clarify that simply because a party can file a Declaratory Judgment action challenging the constitutionality of a Statute in Circuit Court does not mean that a party does not have to follow the Revenue Procedures Act when applicable." Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).

Clearly both this Court and the Supreme Court agree with Counsel's interpretation of the law and the action that he brought was clearly in accordance with law and clearly was, "warranted under existing law" and there is no evidence that it was intended to harass or injure the other party, nor that it was merely interposed for delay. In reference to delay, the action actually sought to speed up or the restoration of benefits to the Plaintiff so that he would have the very subsistence to be able to live on. There is nothing in the

Declaratory Judgment action that was even meant to delay the administrative function under existing law and in fact the Plaintiff had filed for that as well, as is set out in the attachments to the Declaratory Judgment action.

WHEREFORE, based upon the Motion that has been filed, the Plaintiff would request that it be denied and dismissed and pursuant to SC Code §15-36-10(C)(1), Plaintiff's Counsel would request a review and determination as to whether or not Defense Counsel has violated the provisions of the Frivolous Proceedings Act.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Claimant

October 31, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2013 NOV -5 PM 12:49
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

**REPLY TO MOTION
TO DISMISS PURSUANT TO
RULE 12(B)(7)**

By way of Reply to the Motion, Counsel for the Plaintiff would respectfully show unto the Court as follows:

1. That this Motion was signed and filed with the Court on October 21, 2013 and on that same date, the Defendant signed and filed an Answer and Counterclaim in the above-referenced matter.

2. That SC Rules of Civil Procedure, Rule 12(b) specifically provides that, "a Motion making any of these defenses shall be made **before** pleading if a further pleading is permitted." Therefore, since this Motion was filed simultaneously with the filing of the Answer and Counterclaim, the Motion should be dismissed.

3. That further, the Motion is filed on the basis of joining a party under SCRCP Rule 19 and asserts that the Plaintiff failed to join a necessary party. However, based upon a review of the allegations in the Motion, the Defendant does not list nor name the alleged, "indispensable party". Therefore the pleading is facially insufficient and should be dismissed.

4. That further under Rule 19 under subsection A, a party should be joined where a request is made for that party to be joined: wherein due to his absence a complete relief cannot be accorded among those already parties; or the party to be joined claims an interest relating to the subject matter and the failure to join him as a practical matter may impede or impair his ability to protect an interest that he has; or non-joinder leaves someone that is already a party subject to substantial risk of incurring

double, multiple or otherwise inconsistent obligations by reason of the non-joined party's "claimed interest". Under subsection B of the Rule, the only time, and the Plaintiff would reiterate the only time, that the party should not simply be joined as a party is in a situation where the party cannot be joined. Only at that point, and again the Plaintiff would reiterate only at that point, should the Court reach and make a determination as to whether, "in equity and good conscience" the action should proceed among the parties before it or should be dismissed, the absent person, "being thus regarded as indispensable". Should the Court reach the point of making a determination that the party cannot be joined and proceeds to the further determination as to whether or not equity and good conscience should allow the action to proceed or it should be dismissed, the Court should consider certain specific factors under the rule, the first of which is to make a determination as to whether or not a judgment if rendered would be prejudicial to the parties that are already part of the lawsuit; and the second is whether or not any protective provisions in the judgment, the shaping of the relief or other measures can be avoided or lessened by joining or the non-joinder of the party; and the third is whether or not the judgment rendered in the person's absence would be adequate; and the fourth (and very important to this cause of action) is whether the Plaintiff will have an adequate remedy if the action is dismissed for non-

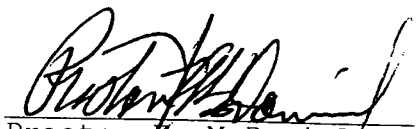
joinder. The Plaintiff would first point out that at nowhere in the Motion does the Defendant set forth any basis upon which this Court could reach the determination that the unnamed party that was not joined cannot be joined and further that they are indispensable to the litigation under the criteria set out in the Rule.

The notes to the Rule state that, Dean Lightsey in Code Pleading noted that the number of cases in which there is truly an, "indispensable party" in whose absence the Court should not proceed are very rare. The Plaintiff would respectfully submit that the Defendant has failed to meet any burden of proof under their Motion as the moving party to move either that there is any party that should be and could not be joined and/or that the unnamed party is indispensable to a complete judgment being granted under the relief sought.

5. That further under subsection C of the Rule, the party claiming non-joinder requires that, "any pleading asserting a cause of action for relief **shall state the names** if known to the pleader, of any persons described in subsection (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined. As noted above, the Defendant does not name in the Motion the party that was not joined nor again set forth any basis as to why that party is indispensable to this litigation.

For the foregoing reasons, the Motion should be dismissed.

Respectfully submitted,



Preston F. McDaniel
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1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Claimant

October 31, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. 2013-CP-40-05888

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

**REPLY TO MOTION
TO ALTER OR AMEND
PURSUANT TO RULE 59(e)**

RICHLAND COUNTY
FILED
2013 NOV -5 PM 12:52
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

By way of Reply to the Motion, Counsel for the Plaintiff would respectfully show unto the Court as follows:

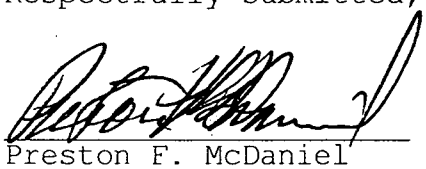
1. That first in the Motion, the Defendant alleges that the Court did not rule on the remaining grounds raised by the Defendant and states that the Defendant raised, "additional grounds that the Complaint should be dismissed pursuant to Rule 12(b)(4)(5)(6) and (8). However, under the provisions of Rule 59(e), as to alleged grounds (4)(5) and (8) the Defendant in the Motion fails to set forth any basis for the Motion and only addresses the same basis as to a ruling under Rule 12(b)(6). For those reasons, the Motion should be dismissed.

2. That further as to the allegations that there must be some relief that can be granted by the Court, the Defendant argues that the Plaintiff is alleged to be requesting a reinstatement of workers' compensation benefits. However, the Plaintiff in the Complaint is requesting a determination of the unconstitutionality of the Statute and that a Temporary Restraining Order be issued preserving the status quo and restraining action until that decision could be made. The Declaratory Judgment action upon which this Complaint is filed alleges that the Plaintiff has a property right in temporary compensation benefits and that it is a violation to stop those benefits under due process requirements without a hearing. The Plaintiff sought a Temporary Restraining Order restraining the Defendant from taking the action of stopping the Plaintiff's benefits. In the case of County Council of

Charleston v. Felkel, 244 S.C. 480, 137 S.E.2d 577 (1964), the plaintiff sought a temporary injunction and the Court stated that, "in case of property rights, the purpose is to preserve the status quo pending litigation." Further, in the two federal cases cited to the Court decided that in a property right situation the purpose of a Temporary Restraining Order is to maintain the status quo. Further, in the case of Peak v. Spartanburg Regional Healthcare Systems, 367 S.C. 450, 626 S.E.2d 34 (SC App 2005), among the interests that were found to be appropriate for the granting of a Temporary Restraining Order was the irreparable harm to the Plaintiff's income from being deprived of her right to practice anesthesiology in the hospital. The Temporary Restraining Order was thus an affirmative action by the Court restraining the action of depriving the plaintiff of income from her trade, anesthesiology, during the pendency of the litigation. The allegation that this Court does not have jurisdiction to issue a Restraining Order restraining the Defendant from taking the affirmative action of stopping the Plaintiff's benefits is simply not the case. This Court has jurisdiction to issue a Declaratory Judgment action and under the jurisdiction has the jurisdiction to issue Temporary Restraining Orders (TRO) and Temporary Injunctions as to both affirmative and negative actions by a party. In this case, there is a specific time limit involved as to the TRO in that the Plaintiff was requesting a Temporary Restraining Order

until such time as either a decision can be reached as to the constitutionality or as to a due process hearing can be held. A due process hearing has already been scheduled in the workers' compensation case before the SC Workers' Compensation Commission for November 13th. For the above stated reasons, the Motion for reconsideration of the Court's ruling as filed by the Defendant, and specifically under Rule 12(b)(6) should be denied.

Respectfully submitted,



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(803)771-7211

Attorney for the Claimant

October 31, 2013

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov

WCC File #: **1306305**
Carrier File #:
Carrier Code #:
Employer FEIN #:

Claimant's Name: Clarence B. Winfrey, Jr. SSN: Employer's Name: Archway Services, Inc.
Address: Address: 2316 Kings Road
City: State: SC Zip: City: Shelby State: NC Zip: 28152
Home Phone: ( ) - Work Phone: ( ) - Insurance Carrier: American Fire & Casualty Co.
Preparer's Name: Preston F. McDaniel Law Firm: McDaniel Law Firm Preparer's Phone #: (803) 771 - 7211

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 5/22/2013

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

SEE ATTACHMENT.

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

☐ **Mediation**

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to **mediation@wcc.sc.gov.**

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SEE ATTACHED CERTIFICATE OF SERVICE on the ___day of ____20__,by ☒ first class postage ____ certified mail ____ personal service.

Preston F. McDaniel (14th)
Preparer's Signature

ATTORNEY FOR CLAIMANT
Title

preston@pfmcdlaw.com
Email

12-18-13
Date

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

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

ATTACHMENT TO FORM 30

Clarence B. Winfrey, Jr. v. Archway Services, Inc.

WCC File No. 1306305

1. That pursuant to S.C. Code of Laws §42-17-40, the Claimant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That the Hearing Commissioner erred as a matter of law by shifting the burden of proof at a Form 15 hearing to require the Claimant to prove that the Defendants did not conduct a Good Faith Investigation.

3. That the Hearing Commissioner erred as a matter of law concerning the burden of proof based on SC Code §42-9-260 and Commission Reg. 67-504(C) and 67-612(B)(4), all of which provides that the employer and the insurance carrier are the moving parties in a Form 15 stop payment situation and are the moving parties and have the burden of proof to prove that they have complied with the Act and in applying the law established by the Court of Appeals in the case of Martin v. Rapid City Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) which held that the employer and its insurance carrier have the burden of proof to prove that they have met one of the conditions under the Act wherein the Court specifically 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.**" (Emphasis added).

4. That the Hearing Commissioner erred as a matter of law where the Record is uncontroverted that the Defendants failed to comply with the requirements of SC Code §42-9-260 which provides that, "upon making the first payment, the employer immediately **shall notify the Commission, in accordance with a form prescribed by the Commission**, that payment of compensation has begun." This is a mandatory provision and the Commissioner

erred by failing to find that the Defendants could not take the benefit of the remainder of the Statute for having failed to comply with the Statute, which would thereafter allow them to take advantage of the stop payments provisions of that Statute.

5. That the Hearing Commissioner not only erred by shifting the burden of proof to the Claimant, but by holding where the Record is uncontroverted that the Claimant's first notice that the Defendants were alleging they were entitled to stop benefits based on a good faith investigation on September 13, 2013, and refusing to allow any evidence on behalf of the Claimant subsequent to that date into the Record therein placing the Claimant in a paradoxical situation of being required to prove that the Defendants did not conduct a Good Faith Investigation, being denied the right to take the deposition of the adjuster after that notice, being denied the file by the Defendants of the adjuster, and being denied the right to submit any evidence after that date that would establish that he had sustained a compensable injury by accident, thus contradicting no evidence to the contrary.

6. That the Hearing Commissioner erred as a matter of law by admitting into evidence and considering both the Defendants' Pre-Hearing Brief and their APA Submissions which were not only not submitted 15 days or more prior to the hearing in accordance with the Commission Regulations, but were not even timely served as a non-moving party and were only served 9 and 8 days respectively prior to the date of the hearing, which is uncontroverted in the Record. The Commission abused his discretion in admitting these documents into the Record and then relying on those documents to rule against the Claimant.

7. That the Hearing Commissioner erred as a matter of law by first finding that there was a stipulation and then setting forth the position of the Claimant that it was the position of the Claimant that the only issue before the Commission was whether the Defendants had properly terminated workers' compensation benefits, wherein to the contrary it was the position of the Claimant that the Defendants had the burden of proof to prove that they had stopped disability benefits without a hearing under the alleged exception to the Act, which allows them to do so, as claimed in this case, that they had conducted a Good Faith Investigation.

8. That the Hearing Commissioner erred as a matter of law by finding that the Defendants had properly stopped payment of benefits where the Defendants had failed to comply with the

requirements of the Rule 67-504(A) by failing to comply with the provisions of that subsection which specifically require that, "shall" serve two copies of the Form 15 immediately on the Claimant according to Rule 67-211 **with documentation attached as to the reason for termination or suspension.** The Hearing Commissioner erred by failing to apply the law as dictated to the Commission by our Appellate Courts wherein the SC Court of Appeals has specifically held in the case of Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) that an employer and its insurance carrier may not stop temporary total disability benefits and shall be required to resume such benefits where it

> "Failed to follow the proper procedure for doing so as outline in §42-9-260 and Reg. 67-504. Rapid Plumbing terminated the compensation on August 10, 2002 . . . **and failed to attach the supporting documentation as required by §42-9-260**. These deficiencies are not mere technicalities but are **substantial deviations from the statutory procedure**." (Emphasis added).

9. That the Hearing Commissioner erred as a matter of law by not assessing the mandatory 25% penalty and ordering reinstatement where the Defendants had failed to comply with the statute at least admittedly in one regard, that being that they failed to file the mandatory form with the Commission at the time that benefits were started. In Rapid City the Court of Appeals held that the provisions of §42-9-260(G) which provides that the failure to comply with that section (doesn't specify in which regard but generally specifies in any regard) is mandatory as far as the imposition of the 25% penalty and the reinstitution of benefits. The Court of Appeals specifically stated, "the language of §42-9-260(G) is mandatory."

10. That the Hearing Commissioner erred as a matter of law by considering evidence irrelevant and immaterial to the singular issue before the Commission by considering the Motion to Quash the deposition of the adjuster, the Motion to Compel Deposition for cause, the Motion for Continuance, the Summons and Complaint, and a Temporary Restraining Order, all of which were immaterial and irrelevant to the issue before the Hearing Commissioner on a Form 15(III) hearing under SC Code §42-9-260.

11. That the Hearing Commissioner erred as a matter of law by finding in Finding of Fact No. 2 that the Claimant suffered a myocardial infarction, "on May 28, 2013" where there is

absolutely no evidence in the Record to support that finding in that there is no medical doctor opining that the myocardial infarction happened on May 28, 2013. This is surmise, speculation and innuendo on behalf of the Commissioner.

12. That the Hearing Commissioner erred as a matter of law in making Finding of Fact No. 6 and specifically by finding as a fact in violation of the statute that, "a determination was based on the denial of the claim following an investigation." There is no documentation attached to the Form 15 in violation of the Statute to establish that an investigation was conducted and the statute specifically provides that not only must an investigation be conducted, but a, "good faith" investigation must be conducted.

13. That while the Commissioner probably erred as a matter of law in making Findings of Fact Nos. 4-9 in that they refer to statements contained in various forms on file with the Commission as being in evidence and is not based on either testimony, stipulations or documentary evidence submitted pursuant to the Administrative Procedures Act, the Commissioner specifically erred in Finding of Fact No. 8 by finding that the Form 15, section 2, documented that the reason for termination was the employee failed to meet the burden of proof of compensable injury under the Workers' Compensation Act. This is set out again as a Finding of Fact by the Commissioner but is not based on evidence in the Record.

14. That the Hearing Commissioner erred as a matter of law in making Finding of Fact No. 9 and specifically:

A. That the Claimant alleged that he was not properly served with a Form 15 because he was only served with 1 copy wherein the statute specifically provides that the Defendants are required to serve the Claimant with 2 copies. The Commissioner then goes on to make a factual conclusion that the Claimant was in no way, "prejudiced" which is not supported by the law or any evidence in the Record as the Defendants again failed in this regard in their compliance with both the statute and the Commission Regulations.

B. By making the conclusory statement that the Defendants' failure to not only not provide the Claimant with 2 copies of the Form 15 but by not setting forth a separate attachment as to the grounds was not improper where such is an absolute violation of the law and a determination of the law which is contrary to that as dictated by our Appellate Courts in

reference to the Defendants' requirement to "strictly" meet the requirements of the Act.

15. That the Hearing Commissioner erred as a matter of law by making Finding of Fact No. 10 which is a violation of law and an error of law in that it shifts the burden of proof to the Claimant and provides that the Claimant not only has the burden to prove that the Defendants did not conduct a Good Faith Investigation but makes the blanket factual assumption which is based on surmise, speculation and innuendo that the Claimant did not put up evidence that would, "indicate that the Defendants acted in anything other than good faith during the investigation". There is simply no evidence and this is an error of law because whether or not the Defendants acted in good faith during the investigation is not a requirement under the Act. The requirement is whether or not they conducted a good faith investigation and this is speculation, innuendo and surmise and an abuse of discretion by the Commissioner since it also reaches the factual conclusion than an investigation was performed. The Hearing Commissioner further erred as a matter of law, abused his discretion and subjected his decision to caprice by making the statement that, "this is based on the evidence **or lack thereof** submitted by the Claimant at the hearing."

16. That the Hearing Commissioner erred as a matter of law by making Finding of Fact No. 11, which in many ways is not a Finding of Fact, but by specifically making the following statements contained within that Finding that:

A. The Commissioner alleges in that Finding that the Claimant is alleging, "a medically complex condition". This is surmise, speculation and innuendo and a blanket assumption made by the Commissioner that is not supported by any evidence in the Record.

B. Making the statement that it is an "alleged" shock. There is absolutely no evidence in the Record that the Defendants in any way challenged the fact that the Claimant suffered an electrical shock and electrocution on May 22, 2013.

C. As a Finding of Fact under No. 11, the Commissioner makes the statement that a causal relationship between the Claimant's electrical shock and his current medical condition is best determined by review of the medical expert medical reports to which the Defendants had access by operation of §42-15-95. There is absolutely no evidence and this was a

hotly contested issue at the hearing as to when or how the Defendants received any of the belated medical records that they were allowed to put into evidence (only based on the discretionary decision of the Commissioner) and there was simply no testimonial or documentary evidence submitted into the Record that would establish whether or not those records were received before September 13, 2013.

17. That the Hearing Commissioner erred by making a Finding of Fact that is not supported by any facts and evidence that the Defendants' refusal to continue benefits and the reason for stopping benefits was a determination as to whether or not his heart condition was causally related to the alleged electrical shock. The only, and the Claimant would reiterate the only, evidence in the Record as to a causal relationship is that set forth in the statement of the insurance carrier's own assigned rehab nurse wherein she specifically refers to the Claimant's treatment as being directly related to his electrical shock. That in fact is the uncontradicted evidence and the Commissioner's statement in that regard is speculation, surmise and innuendo and is the subject of being capricious and an abuse of discretion.

18. That the Hearing Commissioner erred as a matter of law in making Conclusion of Law 2, subparagraph c, by holding as a matter of law that the Defendants do not have to establish that they conducted a Good Faith Investigation but only that they have to have, "represented to the Commission" that they had conducted such an investigation.

By shifting the burden of proof and requiring that, "the Claimant did not provide any evidence that the Defendants conducted their investigation in anything other than good faith." Thus placing the burden of proof for the Claimant to prove that the Defendants did not conduct a Good Faith Investigation where they did not put in one iota of evidence that they had conducted a Good Faith Investigation or in any way met their burden of proof or even that of a prima facie case.

19. That the Commissioner erred by holding as a matter of law that their investigation, "revealed" a good faith belief that the Claimant had failed to meet his burden of proof. There is absolutely no evidentiary support of an investigation by the Defendants nor that this is what such investigation revealed. Under subsection (e) the Commissioner further erred by shifting the burden of proof to the Claimant where the benefits had been started on the basis that a prima facie case had been

established that the Claimant had suffered a compensable injury. The Hearing Commissioner in a Form 15 hearing which only comes about after the Defendants have started benefits on the basis that a compensable injury has occurred by citing to law under SC Code §42-1-160 as to the Claimant's burden of proof where it is denied that a compensable injury has occurred.

20. That the Hearing Commissioner erred as a matter of law by finding as a Conclusion of Law 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." The error being among many that the Defendants put up no substantial evidence to meet their burden of proof that they conducted a, "Good Faith Investigation" or that they in fact conducted any investigation as to what factually that investigation was, or the facts that substantiated that the Claimant had not met his burden of proof on compensability. That Finding or actually the Conclusion is and makes the Commissioner's decision based on surmise, speculation and innuendo and the subject of caprice, prejudice and the subject of an abuse of discretion. The Hearing Commissioner failed in his oath of office by not complying with the dictates of the law under the law as dictated by the Legislature, this Commission in its Regulations and under the decisions of the SC Appellate Courts. There is simply no evidence put into the Record to support this conclusion of law and this is an error of law under the law which this Commission is sworn by oath to uphold. It also violates the fundamental principles of the Act, which is that the Act shall be liberally construed in favor of benefits to the injured worker.

21. That the Hearing Commissioner erred as a matter of law by making Conclusion of Law No. 3 which improperly states the position of the Claimant stated on the Record repeatedly, in his Pre-Hearing Brief and at the Hearing, and in the unrecorded Pre-Hearing Motion Conference.

22. That the Hearing Commissioner erred as a matter of law in making Conclusion of Law No. 4 for all the reasons as set forth hereinabove and in addition, by making the statement that it is, "possible" for the Defendants to have drawn a conclusion in good faith based on the 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 in denying the claim." There is no medical evidence to this effect nor is there any evidence to that

effect, nor is there any testimony nor documentary evidence to that effect and in addition, assuming that the Claimant is correct that the Defendants have the burden of proof, they have a burden of proof to establish by a preponderance of the evidence that they conducted a good faith investigation and the basis for denial based on that good faith investigation, none of which is met in this conclusion or case.

23. That the Hearing Commissioner erred as a matter of law by delaying a decision from November 13, 2013 until December 5, 2013, a period of 22 days where the singular issue before the Commissioner was whether or not the Defendants had established that they conducted a Good Faith Investigation and had denied benefits based on that investigation. The statute contemplates a quick determination as to whether or not the Defendants properly stopped benefits on one of the limited bases as provided for under the Act, wherein in this case the Commissioner not only delayed the Decision for over 22 days but also did not issue the Decision until after a decision on all Motions that had been filed before the Commission.

24. That the Hearing Commissioner erred as a matter of law where the Hearing Commissioner stated that the purpose of the Hearing was to determine whether or not the Claimant was entitled to a reinstatement of benefits by including without notice and holding an off the Record hearing on motions that took over an hour and ruling on all motions before even reaching the only issue of which the parties had notice on the date of the hearing.

25. That the Hearing Commissioner erred as a matter of law in an ancillary and interlocutory Order issued by:

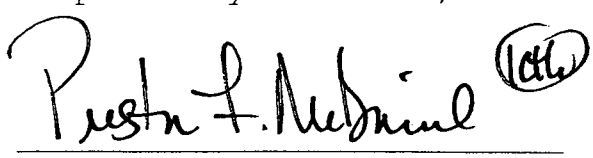
A. Denying the right of the Claimant to take the deposition of the adjuster and in that regard, also by not making a Finding that the Defendants had failed to obtain an Order in reference to the Deposition that had been properly and timely set prior to the time that the Deposition was to take place.

B. By not hearing a Motion to Quash a Subpoena issued for the adjuster's file prior to the date of the hearing on the Form 15(III) hearing where such Subpoena had been issued for the production of the adjuster's file back in September to be produced before the end of September and the hearing was not held on the Motion to Quash prior to the production time nor was it held until the date of the hearing on the Form 15(III).

26. That the Hearing Commissioner erred as a matter of law in his preliminary and interlocutory Order as to all legal bases set out and all conclusions of law as to the Findings of Fact and Conclusions of Law made that would justify the Commissioner's refusal to grant the Claimant the right to take the adjuster's deposition and to quash the Subpoena for that Deposition. That Decision and the hearing on that not being held until the date of the hearing on the Form 15 (III) was prejudicial to the Claimant and in violation of his rights to due process of law in that it failed to give him "an adequate" opportunity to be heard especially in light of the Commissioner's decision in his Order that the Claimant had the duty and responsibility and burden of proof to prove that the Defendants did not, and the Claimant would emphasize did not, conduct a Good Faith Investigation.

The above-referenced Exceptions are subject to amendment upon receipt of the Transcript.

Respectfully submitted,



Preston F. McDaniel, Esquire
Attorney for the Claimant

December 18, 2013

DECISION AND ORDER
OF
T. SCOTT BECK, COMMISSIONER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO.: 1306305

Clarence Winfrey,

Claimant

v.

Archway Services, Inc.,

Employer, and

Liberty Mutual Ins. Co.,

Carrier, Defendants.

Hearing held in Richland County,
South Carolina on November 13th, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston F. McDaniel, Esquire, for Claimant

Landon L. Hughey, Esquire, and Brett H. Bayne, Esquire for Defendants

Filed: December 5, 2013

STIPULATIONS

Prior to the Hearing, the parties stipulated to the following:

1. The South Carolina Workers' Compensation Commission has jurisdiction of this claim;
2. Venue, set in Richland County, South Carolina, is proper;
3. Claimant and Employer were both subject to the South Carolina Workers' Compensation Act at all times relevant to this claim;
4. The sole purpose of the Hearing requested by Claimant pursuant to his Form 15, Section III is for the Commission to determine whether Defendants properly terminated workers' compensation benefits in accordance with § 42-9-260(B)(3); and
5. No documentary evidence dated after September 13th, 2013 would be considered by the undersigned in the adjudication of the issues in dispute.

STATEMENT OF THE CASE

This matter was set for a Hearing at the request of the Claimant pursuant to a Form 15, Section III, filed on September 23rd, 2013. Claimant alleges he suffered an injury by accident arising out of and in the course of his employment with Defendants when he sustained an electrical shock on May 22nd, 2013, resulting in an injury to his heart, left hand/arm/shoulder, neck, head (brain), and chest. Claimant asserts that Defendants accepted the claim and began paying temporary total disability benefits and medical treatment, but terminated all benefits on or about September 12th, 2013, citing § 42-9-260(B)(3) as authority to do so. Claimant asserts this termination of benefits was improper under the statute, and that Defendants should be assessed penalties provided for in § 42-9-260(G). Claimant asserts that he has filed a Form 50 Hearing request asking the Commission to award workers' compensation benefits, and that the sole purpose of the Hearing is to determine whether Defendants properly terminated benefits in accordance with § 42-9-260.

Defendants allege that Employer was aware Claimant suffered a medical emergency and began providing workers' compensation benefits, as a precaution to mitigate future damages should the claim be found compensable, to allow Defendants an opportunity to conduct a thorough investigation of the alleged incident to determine if it was a compensable workers' compensation claim. Defendants assert that on or about September 12th, 2013, it properly terminated workers' compensation benefits, following a good faith investigation by Employer that revealed grounds for denial of the claim. Defendants assert that this termination was lawful and proper by action of § 42-9-260(B)(3) and that therefore it should not be subject to sanctions under § 42-9-260(G).

Prior to the Hearing the parties filed a number of Motions with the Commission. These Motions were considered at the Hearing and were addressed by a separate Order issued by the undersigned on December 5th, 2013, which is incorporated herein by reference.

Following the resolution of the Motions, the parties addressed the merits of the claim raised on Claimant's Form 15, Section III. Both parties offered APA Submissions and Exhibits. Claimant renewed his objection first raised in his letter to the Commission dated November 7th, 2013 objecting to the submission of Defendant's Pre-Hearing Brief, Notice of Witnesses, APA Submissions and Exhibits as untimely. Claimant was offered the opportunity to have the Hearing postponed in order to allow him adequate time to respond to the Defendant's Pre-Hearing Brief, Notice of Witnesses, APA Submissions and Exhibits. Claimant declined to postpone the Hearing, and the following records were received into evidence, with the stipulation that no evidence dated after the date Claimant had actual notice of the denial, September 13th, 2013, would be reviewed or considered by the undersigned:

CLAIMANT'S APA SUBMISSIONS AND EXHIBITS

1. Dr. Lanneau Lide, SC Heart Center, 09/16/13- 10/04/2013, p. 1-2.
2. Dr. Jeffery Travis, Lexington Cardiovascular Assoc., 09/30/13, p. 3.
3. Lexington Medical Center, 05/28/2013 – 05/29/2013, p. 4-8.
4. Dr. Karen Greenfield, Doctors' Care, 05/28/2013 – 09/17/2013, p. 9-16.
5. Kristy Thompson, RN, Genex Services, Inc., 07/22/2013, p. 17-20.

6. "Correspondence", 07/30/2013- 08/07/2013, p. 21-25.

DEFENDANT'S APA SUBMISSIONS AND EXHIBITS

1. Doctors' Care, 05/28/2013, p. 1.
2. South Carolina Heart Center, 05/28/2013, p. 2-4.
3. Jeffrey A. Travis, M.D., Lexington cardiovascular Surgery, 05/28/2013, p. 5-7.
4. Statement of Bobby Ruppe, 09/23/2013, p. 8.
5. Emails between Bobby Ruppe and Claimant, 05/27/2013, p. 9.
6. Driver's Daily Log, 05/22/2013- 05/23/2013, p. 10-11.
7. Letter from Preston McDaniel to Defense Counsel, 10/16/2013, p. 12.
8. Motion to Quash the Deposition of the Adjuster, 09/27/2013, p. 13-21.
9. Motion to Compel Deposition and For Costs, 10/21/2013, p. 22-24.
10. Motion for Continuance, 10/21/2013, p. 25-30.
11. Summons and Complaint filed by Preston McDaniel, 09/27/2013, p. 31-48.
12. Temporary Restraining Order, 10/01/2013, p. 49-51.

FINDINGS OF FACT

Based on my consideration of the relevant evidence submitted into the record, excluding all evidence dated after September 13th, 2013, as well as the testimony of the Claimant offered at the Hearing, I make the following findings of fact:

1. Claimant suffered an incident while working on electrical equipment at work that he believed to be an electrical shock on May 22nd, 2013. This is based on the testimony of the Claimant as well as the medical records submitted by the Claimant from Lexington Medical Center.
2. Claimant suffered a myocardial infarction on May 28th, 2013. This is based on the medical records submitted by the Claimant from Lexington Medical Center.

3. Claimant alleged that he suffered an injury by accident arising out of and in the course and scope of his employment to his heart, left hand/arm/shoulder, neck, head (brain), and chest, and filed a claim for workers' compensation benefits. This is based on the Form 50 Employee's Notice of Claim filed by Claimant on June 6th, 2013.
4. Defendants began providing Claimant with temporary total disability benefits beginning on June 1st, 2013 and continuing through September 14th, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12th, 2013.
5. Defendants also provided Claimant with medical treatment between the alleged date of injury and September 12th, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12th, 2013.
6. Defendants terminated Claimant's workers' compensation benefits 114 days after employer could have had notice of his alleged injury, on September 12th, 2013. The termination was based on a denial of the claim following an investigation. This is based on the Form 15, Section II dated September 12th, 2013.
7. The Form 15, Section II was received by the Commission no later than September 18th, 2013. This is based on the records in the Commission's file and the Form 15, Section III filed by the Claimant.
8. The Form 15, Section II documented that the reason for termination was that the employee fails to meet the burden of a compensable injury under the S.C. Workers' Compensation Act. This is based on the Form 15, Section II dated September 12th, 2013.
9. Claimant received the Form 15, Section II in a timely manner and was able to exercise his rights under § 42-9-260(C) and R.67-504(C). This is based on the Form 15, Section III filed by the Claimant. Claimant alleged that the Form 15, Section II was not served on him properly pursuant to R.67-504(A) because he was only served with one copy of the Form 15, Section II and the documented reason for termination was printed on the Form 15 under Section II, rather than on an attached document. However, Claimant was in no way prejudiced from exercising his rights under the Act by the manner of service of the Form 15, Section II. This is evident by the fact that Claimant filed a Form 15, Section III asserting his rights shortly after receiving the Form 15, Section II. Claimant had the benefit of counsel at the time he was served with the Form 15, Section II,

rendering the requirement to provide him with two copies unnecessary. Therefore, Defendants alleged failure to provide Claimant with a second copy of the Form 15, Section II, and including the reasons for denial on the form itself rather than on a separate attachment are not grounds to find the termination of benefits was improper.

10. Claimant did not provide any evidence at the Hearing to indicate that Defendants acted in anything other than good faith during the investigation and eventual denial of the claim. This is based on the evidence (or lack thereof) submitted by the Claimant at the Hearing.
11. I find the Claimant's argument that the apparent failure of Defendants to interview Claimant prior to the denial of the claim as evidence of bad faith is unpersuasive. Claimant is alleging a medically complex condition resulting from an injury by accident. Defendants have not denied that Claimant suffered an incident he believed to be an electrical shock on May 22nd, 2013. 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, to which Defendants had access by operation of § 42-15-95. Claimant's statement would have been of little value to Defendants in attempting to determine whether his heart condition was causally related to the alleged electrical shock.

RULINGS OF LAW

Based on the foregoing, I make the following rulings of law:

1. The Workers' Compensation Act provides "[o]nce temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if . . . a good faith investigation by the employer reveals grounds for denial of the claim." § 42-9-260(B)(3).
2. Defendants properly terminated Claimant's workers' compensation benefits on September 12th, 2013 by meeting all the required elements for termination under § 42-9-260(B)(3).
    a. Benefits were commenced on or about June 1st, 2013. *See* Finding of Fact No. 4.

b. Benefits were terminated on or about September 12th, 2013, well within 150 days after the employer could have received notice of the injury. *See* Finding of Fact No. 6.

c. Defendants represented to the Commission they conducted a good faith investigation of the claim. *See* Form 15, Section II dated September 12th, 2013.

d. Claimant did not provide any evidence that Defendants conducted their investigation in anything other than good faith. *See* Finding of Fact Nos. 10-11

e. Defendants represented the grounds for denial revealed during their investigation was a good faith belief that "Claimant fails to meet the burden of a compensable injury under the SC Workers' Compensation Act". *See* Form 15, Section II, dated September 12th, 2013. Under the Act, Claimant bears the burden of proving by a preponderance of the evidence that it is more likely than not that Claimant suffered an injury by accident arising out of and in the course of his or her employment resulting in disability. *See* § 42-1-160; *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (S.C. App. 2009) ("A claimant has the burden of proving facts sufficient to allow recovery under the Workers' Compensation Act".); *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 113 S.E.2d 737 (1960) ("The burden rests upon claimants to show by competent testimony, not only the fact of injury, but that it occurred in connection with the employment of the deceased; and to furnish evidence from which the inference can logically be drawn that the injury arose out of and in the course of the employment." (*Internal citations omitted*)); *S.C. Second Injury Fund v. Luberty Mut. Ins. Co.*, 353 S.C. 117, 576 S.E.2d 119 (S.C. App. 2003) ("The burden lies with the workers' compensation claimant to demonstrate causation by a preponderance of the evidence.").

f. 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.

3. § 42-9-260(C) and R.67-504(C) provide a mechanism for a Claimant whose temporary disability benefits have been terminated by action of § 42-9-260(B)(3) to have an Order issued reinstating benefits following a Hearing held pursuant to a request made by Claimant on a Form 15, Section III. Counsel for Claimant stipulated on the record that

the sole purpose of the Hearing he had requested was to determine whether Defendants properly stopped benefits under § 42-9-260.

4. Based on the foregoing, I find that Defendants properly stopped benefits under § 42-9-260 on September 12th, 2013. Defendants terminated benefits on the justification that a good faith investigation reveals grounds for the denial of the claim. *See* Finding of Fact # 8. This is a permissible ground for termination under the statute. *See* § 42-9-260(B)(3). At the time Defendants terminated Claimant's benefits on September 12th, 2013, Defendants had access to Claimant's medical records by operation of § 42-15-95 and had knowledge of the course of Claimant's treatment through its Nurse Case Manager. *See* Claimant's APA Submission # 5, p. 17. 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. *See e.g.* Claimant's APA Submission #3, p.4 ("Discharge Diagnosis(es) . . . 3. Coronary artery disease[,] . . . 5. Hypertension[,] 6. Congestive heart failure."). The fact that there also exists evidence that was available to Defendants that could lead to the conclusion that Claimant's current condition is causally related to a compensable injury by accident does not lead me to conclude that Defendant's termination of benefits was improper. Claimant bears the ultimate burden of proving his claim is compensable and he has requested the Commission provide him an opportunity to do so.
5. Specifically, Claimant has requested a Hearing on the merits of whether Claimant sustained a compensable injury by accident and is entitled to benefits by operation of the Form 50 Employee's Request for Hearing filed on October 21st, 2013. Therefore, the question of whether Claimant sustained a compensable injury by accident and is entitled to benefits under the Act will be decided by the Commission at the Hearing set pursuant to Claimant's Form 50 Request for Hearing.
6. Claimant has availed himself of all relief available under § 42-9-260 and R.67-504 and, therefore, these provisions of the Workers' Compensation Act are no longer in contention in Claimant's claim for benefits against Defendants.

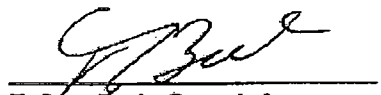
ORDER

IT IS THEREFORE ORDERED that Defendants properly terminated benefits under § 42-9-260 on September 12th, 2013.

IT IS FURTHERMORE ORDERED that Claimant's request for sanctions against Defendants under § 42-9-260(G) for failure to comply with the provisions of that statute is DENIED.

IT IS FURTHERMORE ORDERED that all other issues in contention, specifically including the question of whether Claimant sustained an injury by accident arising out of and in the course of his employment with Defendants resulting on compensable disability is preserved for adjudication at the Hearing set pursuant to Claimant's October 21st, 2013 Form 50 Employee's Request for Hearing.

AND SO IT IS ORDERED!



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

December 5, 2013

By: Amy Bracy, Administrative Assistant to Commissioner Beck

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	5th JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2013-CP-40-05888
	)	
Clarence B. Winfrey, Jr., Plaintiff,	)	**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.	)	
American Fire and Casualty Co., Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. _____	Brett H. Bayne, Bar No. _____
Address:	Address:
McDaniel Law Firm	McAngus, Goudelock & Courie, L.L.C.
1315 Elmwood Ave.	PO Box 12519
Columbia, SC 29201	Columbia, SC 29211-2519
Phone: (803) 771-7211 Fax (803) 252-0709	Phone: 803-779-2300 Fax_____
E-mail: mcdaniellaw@hotmail.comOther: _____	E-mail: _____ Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — Date submitted 1/21/13

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
	)	
	)	2013-CP-40-05888
	)	
Clarence Winfrey,	)	**MOTION FOR LEAVE TO FILE BRIEF**
	)	***AMICUS CURIAE***
Plaintiff,	)	
vs.	)	
	)	
American Fire and Casualty Co.	)	
	)	
	)	
	)	
	)	
Defendant.	)	

The South Carolina Workers' Compensation Commission moves the Court for leave to file a brief *amicus curiae*. The Commission submits that it has sufficient interest in the present matter and hearing its position would be desirable to the court, based on the following grounds:

1. The current matter pending before the Court is Plaintiff's action for a declaratory judgment on the constitutionality of § 42-9-260.
2. On January 15th, 2014, the Honorable G. Thomas Cooper, Jr., heard arguments on a number of motions filed by the parties. This included a Rule 12(b)(7), SCRCP, Motion by Defendant American Fire and Casualty Co., raising as a defense that Plaintiff had failed to join a necessary party defendant under Rule 19. *See Attached Motion.*
3. During oral argument on the motions, Defendant asserted that the South Carolina Workers' Compensation Commission should be considered as a possible party to be added as a defendant. *See transcript.*
4. As the Commission has not been added as a party, it was not able to present an argument of its own at that time.
5. The Commission asserts that there are matters of law that have not been brought to the Court's attention by the parties that should be considered by the Court regarding whether the Commission should be added as party defendants.

6. The Supreme Court of South Carolina has found that the inclusion or exclusion of evidence is addressed to the sound discretion of the trial judge. *Cook v. S.C. Dep't. of Highways and Public Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 849 (1992). The Court further held that it was appropriate to permit an agency of the State of South Carolina the opportunity to appear *amicus curiae*. Id. at 850.

THEREFORE the Commission moves the Court to permit it the opportunity to submit a brief *amicus curiae* prior to issuing a ruling on the Defendant's Rule 12(b)(7), SCRCP, motion.

SO MOVED:

J. Keith Roberts, Attorney at Law
Counsel for the South Carolina Workers' Compensation Commission
S.C. Bar No. 100735
1333 Main St., Suite 500
PO Box 1715
Columbia, SC 29202-1715
(803)737-5701
(803)737-5764(f)
keroberts@wcc.sc.gov

1/21/14
DATE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
	)	
	)	2013-CP-40-05888
	)	
Clarence Winfrey,	)	**PROPOSED BRIEF OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION, *AMICUS CURIAE***
Plaintiff,	)	
vs.	)	
American Fire and Casualty Co.,	)	
Defendant.	)	

STATEMENT OF THE CASE

This matter comes before the Court of Common Pleas as a result of the Summons and Complaint filed by Plaintiff on September 27th, 2013. In his complaint, Plaintiff brought an action against American Fire and Casualty Company asking the Court to issue a declaratory judgment that S.C. Code § 42-9-260(B) (1976, as amended) is facially unconstitutional. The Court found it has jurisdiction over this issue pursuant to *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). *See Order of Judge Lee*, October 9th, 2013.

In his complaint, Plaintiff named American Fire and Casualty Company as the sole defendant. American Fire and Casualty Company is the defendant insurance carrier in a workers' compensation claim brought by Plaintiff, *Winfrey v. Archway Services, Inc., and American Fire and Casualty Company*, WCC File No. 1306305.[1] In its Answer and Counterclaim filed October 21st, 2013, Defendant asserted that Plaintiff had failed to join a

[1] In the proceeding before the Workers' Compensation Commission Plaintiff sought to avail himself of a Hearing as provided for by S.C. Code Ann. § 42-9-260. That hearing has been conducted and was decided by the Decision and Order of the Single Commissioner that was filed on December 5th, 2013. Plaintiff has since appealed this ruling. The Full Commission has not had the opportunity to consider Plaintiff's appeal. Plaintiff has also sought a determination on the merits of his claim. That issue has been heard and is pending a ruling by the single Commissioner.

necessary party pursuant to Rule 12(b)(7), SCRCP, and Rule 19, SCRCP. Defendant did not name the party it alleged should be added at that time, either.

Defendant subsequently filed a Motion to Dismiss pursuant to Rule 12(b)(7) and Rule 19 SCRCP for failure to join a necessary party again. Defendant did not name the party it alleged should be added at that time.

On January 15th, 2014, a Hearing on Defendant's Motion to Dismiss was heard by the Honorable G. Thomas Cooper, Jr. During oral argument at that hearing, for the first time, Defendant alleged the Workers' Compensation Commission may be a necessary party to be joined as a defendant to this action. Since the Commission had not been added as a party, the Commission was not permitted to weigh in on Defendant's assertion.

The Commission asserts that the Court should decline to add it as a party defendant to the declaratory judgment action seeking to declare a portion of the Workers' Compensation Act facially unconstitutional. The Commission's responsibilities to hear and decide contested cases under the Workers' Compensation Act in a fair and impartial manner should take precedence over responsibilities to defend the Act's constitutionality in a declaratory judgment action brought by a Claimant. Public policy favors the Commission remain neutral on questions regarding the constitutionality of the Act the Commission is charged to uphold. Lastly, the Commission is an agency of limited resources and the General Assembly did not intend for the Commission to be responsible for defending against facial challenges to the Act's constitutionality, particularly when other parties, such as the State of South Carolina, the General Assembly of South Carolina, or a potential party to a workers' compensation claim are in a better position than the Commission to defend the constitutionality of S.C. Code Ann. § 42-9-260.

ARGUMENT

The Commission's responsibilities to hear and decide contested cases under the Workers' Compensation Act in a fair and impartial manner should take precedence over responsibilities to defend the Act's constitutionality in a declaratory judgment action brought by a Claimant.

The Workers' Compensation Commission was created by the Workers' Compensation Act, Title 42, South Carolina Code of Laws. The Commission is composed of a judicial and an administrative department. S.C. Code Ann. § 42-3-10. The Commission is the governing body

of both the judicial department and the administrative department. S.C. Code Ann. § 42-3-25. As the governing body of the judicial department, the Commissioners are charged to ". . . hear and determine all contested cases. . . and handle such other matters as may come before the department for judicial disposition." S.C. Code Ann. § 42-3-20(C). The Commission has exclusive authority to judicially decide all questions arising under Title 42. S.C. Code Ann. § 42-3-180.

Because the Commission is charged with the responsibilities of the adjudication of contested cases the Commission should not be participating in the defense of the constitutionality of a statute it is charged with applying in a judicial matter. The Commissioners' judicial duties take precedence over all other activities. Rule 501, SCACR, CJC, Canon 3(A). The Commission asserts that this includes taking precedence over defending the constitutionality of a statute that is part of the Act it is charged with administering. The Commission should not participate as an advocate of the constitutionality of a statute before the Court of Common Pleas while simultaneously applying it in contested cases which the Commission is responsible for adjudicating. Therefore, the Commission should not be added as a party defendant to this declaratory judgment action.

Acting as an interested party in the Court of Common Pleas by taking a position on the constitutionality of a statute while at the same time applying that statute in a judicial manner in contested cases would create a conflict of interest. The Commissioners are bound to perform their responsibilities in accordance with the Code of Judicial Conduct. S.C. Code Ann. § 42-3-250; Rule 501, SCACR, Code of Jud. Conduct. The Code of Judicial Conduct requires Commissioners to avoid conflicts of interest. *See* Rule 501, SCACR, CJC, Canon 2. Furthermore, it is grounds for discipline for Commissioners to engage in conflicts of interest. *See* S.C. Code Ann. § 1-3-240(C).

The Commission is an agency of limited resources and the General Assembly did not intend for the Commission to be responsible for defending against facial challenges to the Act's constitutionality.

The South Carolina Workers' Compensation Commission is a creature of statute. It has only the powers that have been specifically enumerated to it by the Legislature. The Act specifically provides that the Commission is expected to hear and decide contested cases. S.C.

Code Ann. § 42-3-180. The Act does not contain any provision that charges the Commission with advocating the constitutionality of the Act.

Neither Plaintiff nor Defendant have cited to any reported decision where the Commission was called upon or authorized to advocate the constitutionality of a provision of the Act. To hold so in this matter would be unprecedented.

While there have historically been challenges to the constitutionality of state workers' compensation statutes, few have involved the government agency arguing the constitutionality of the challenged statute. *See* 1 Lex K. Larson, Larson's Workers' Compensation § 2.07 (Matthew Bender, Rev. Ed.); *N.Y. Central Railroad Co. v. Sarah White,* 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917) (Employer vs. Injured worker's widow); *Mountain Timber Co. v. State of Washington,* 243 U.S. 219, 37 S.Ct. 260 (1917) (State vs. Employer).

In one early case, the defendant-employer successfully challenged the constitutionality of a state workers' compensation statute in a suit brought by the State Auditor in charge of administering their coal miners' compensation act for the collection of fines and penalties. *Cunningham v. Northwest Improvement Co.,* 44 Mont. 180 (1911). This case is distinguishable from the instant action because it was initiated by the state official charged with administering the act's provisions to collect fines and penalties. *Id.* Another early case from Iowa named an individual industrial commissioner as a party to a constitutional challenge. *Hawkins v. Bleakly,* 243 U.S. 210, 37 S.Ct. 255 (1917). However, under the law being challenged, the individual industrial commissioner was not a mere impartial adjudicator, but was part of an arbitration committee assigned to ". . . make such inquiries and investigations as it shall deem necessary. . ." *Id.* at 243 U.S. 215. South Carolina's workers' compensation commissioners have no such obligations. Therefore, this case is of little value in determining who should be parties to the present action.

Modern cases have not involved the state agency charged with the administration of the act as a party. *See Huffman v. Douglas Aircraft Co., Inc.*, 260 N.C. 308, 132 S.E.2d 614 (1963) (Employee v. Employer and Insurance Carrier); *Satterlee v. Lumberman's Mutual Casualty Co.*, 353 Mont. 265, 222 P.3d 556 (2009).

In South Carolina, the Commission is unaware of any instance where the Commission itself has been called upon to advocate as a party when the constitutionality of a portion of the Act has been challenged. *See Tedars v. Savannah River Veneer co.,* 202 S.C. 363, 25 S.E.2d

235, 147 A.L.R. 914 (1943) (Deceased injured worker's next of kin v. Employer and Insurance Carrier).

The Commission has seldom been a party to a case at a trial in the Court of Common Pleas during its 78-year history. There are fewer than a dozen reported decisions from South Carolina's appellate courts where the Commission was a party to the appellate proceedings. None of these cases involved facial challenges to the constitutionality of the Workers' Compensation Act. *See Grice v. Graniteville Co., et. al.,* 278 S.C. 461, 298 S.E.2d 446 (1982) (appeal from an order of the Industrial Commission); *S.C. Indus. Commission v. Progressive Life Ins. Co.,* 242 S.C. 547, 131 S.E.2d 694 (1963) (action by the Industrial Commission to enforce an Order and Rule to Show Cause against Insurance Carrier not in compliance with the Act); *Blue Cross and Blue Shield v. S.C. Indus. Commission,* 274 S.C. 204, 262 S.E.2d 35 (1980) (declaratory judgment brought by Health Insurer against Commission seeking determination it was entitled to participate in proceedings before the Commission); *G.E. Moore Co. v. Walker,* 232 S.C. 320, 102 S.E.2d 106 (1958) (original proceeding before Supreme Court to enjoin Industrial Commission from enforcing a new regulatory formula for computing an award for specific loss of use of a member of the body); *Morris v. S.C. Workers' Compensation Com'n.,* 370 S.C. 85, 634 S.E.2d 651 (2006) (former Commission employees brought action against public employer the South Carolina Workers' Compensation Commission); *Bethea v. S.C. Workers' Compensation Com'n.,* 2004 WL 6249196 (Unpublished Opinion) (action by physicians and insurers alleging they were adversely affected by Commission's failure to amend fee schedule created by regulation); *S.C. Workers' Compensation Com'n. v.Ray Covington Realtors, Inc.,*318 S.C. 546, 459 S.E.2d 302 (1995) (appeal from an Order of the Workers' Compensation Commission); *Lester v. S.C. Workers' Compensation Com'n.,* 334 S.C. 557, 514 S.E.2d 751 (1999) (employer was ordered to appear before the Workers' Compensation Commission to show cause why he should not be found in violation of the Workers' Compensation Act for failure to maintain coverage for his employees); *S.C. Ambulatory Surgery Center Ass'n. v. S.C. Workers' Compensation Com'n.,* 389 S.C. 380, 699 S.E.2d 146 (2010) (action challenging Commission's revised fee schedule for maximum allowable medical payments).

These actions can be broken down into several categories. Two involved appeals of judicial decisions by the Commission. *See Grice,* 278 S.C. 461, 298 S.E.2d 446; *Ray Covington*

Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302. In two others the Commission was the plaintiff seeking enforcement of an Order and Rule to Show Cause. *See Progressive Life Ins. Co.*, 242 S.C. 547, 131 S.E.2d 694; *Lester*, 334 S.C. 557, 514 S.E.2d 751. One involved a challenge by former employees of the Commission to an employment action taken by the Commission in its capacity as a public employer. *Morris*, 370 S.C. 85, 634 S.E.2d 651. Another was an action by a third party seeking to intervene in a proceeding pending before the Commission. *Blue Cross and Blue Shield*, 274 S.C. 204, 262 S.E.2d 35. The remaining cases involved challenges to rules, regulations, or policies set by the Commission. *See Walker*, 232 S.C. 320, 102 S.E.2d 106; *Bethea*, 2004 WL 6249196; and *S.C. Ambulatory Surgery Centers*, 389 S.C. 380, 699 S.E.2d 146.

What all of these cases have in common is that what is in dispute is an action taken by the Commission. The present action does not involve a dispute to any action taken by the Workers' Compensation Commission. Rather, it involves a challenge to the constitutionality of a statute passed by the General Assembly and signed into law by the Governor. Unlike rules, regulations, and policies published by the Commission in its quasi-legislative capacity, the Commission has no say in the contents of a statute. That power is reserved for the General Assembly.

Requiring the Commission to defend a facial challenge to the constitutionality of a statute created by the General Assembly would be a significant departure from precedent, and therefore this honorable Court should decline to add the Commission as a party defendant to the present action.

When a criminal defendant raises a challenge to the constitutionality of the statute being applied to him, he does not add the Court of General Sessions as a defendant to his action and require the Circuit Court judge to make an appearance to defend the constitutionality of the statute the judge must consider. Because the Commission is already responsible for adjudicating the Workers' Compensation laws, it should not also be required to advocate for its constitutionality.

There are other parties better suited to defend the constitutionality of § 42-9-260

The statute challenged in this action provides "[w]hen an employee has been out of work due to a reported work-related injury. . . an employer may start temporary disability payments. . . and may continue these payments for up to one hundred fifty days . . . without waiver of any

grounds for good faith denial." S.C. Code Ann. § 42-9-260(A). It further provides "[o]nce temporary benefits are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if . . . a good faith investigation by the employer reveals grounds for denial of the claim. . ." S.C. Code Ann. § 42-9-260(B)(3). The Commission asserts that there is no relief against it that can be granted to Plaintiff if this statute is ruled unconstitutional.

In the majority of cases cited above, where the constitutionality of a workers' compensation statute has been challenged, the parties to the case have included at least the injured worker and the employer. Very few have involved the state agency charged with administration of the Act as a party, and the cases that are distinguishable from the present action. *See Cunningham,* 44 Mont. 180; *Hawkins,* 243 U.S. 210. The Commission asserts that the body of case law examining the constitutionality of workers' compensation laws supports its position that there is no adequate basis for adding the Workers' Compensation Commission as a defendant to this present action.

The Commission has never before been required to defend a declaratory judgment challenge to the constitutionality of a provision of the Workers' Compensation Act. Safeguarding the Commission's neutrality where issues of constitutionality are concerned allows the Commission to faithfully and impartially hear and decide contested cases, make findings of fact based on the evidence presented, and make rulings of law based on those facts without having simultaneously to advocate a position on the constitutionality of the applicable statute.

The State of South Carolina may be better suited than the Commission to defend the constitutionality of this statute. All those who could potentially be negatively impacted by the declaration of the unconstitutionality of this statute, including the injured workers, could be advocated by the State. The State of South Carolina is not faced with the conflicts of interest that would arise from requiring the Commission to both advocate and adjudicate the same statute. If the State of South Carolina took a position in the declaratory judgment action as an advocate, the Commission would still be free to adjudicate the statute without having to worry about conflicted interests.

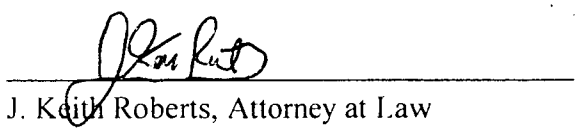
Finally, the Legislative branch of government of South Carolina may have an interest in defending the constitutionality of this statute. The original Workers' Compensation Act passed by the General Assembly and signed into law by Governor Johnston on July 17th, 1935 included

a provision that allowed employers to suspend payment of compensation, which is the precursor to the modern statute being challenged. *See* 1936 (39) 1231. It was the General Assembly, and not the Workers' Compensation Commission, who crafted the language now under challenge. The General Assembly has an interest in preserving the constitutionality of its laws.

CONCLUSION

THEREFORE, the South Carolina Workers' Compensation Commission as *amicus curiae* urges the Court of Common Pleas to deny the portion of the Defendant's Rule 12(b)(7), SCRCP, Motion that seeks to add the Commission as party defendant in favor of another party better suited to defend the statute's constitutionality.

SO STATED:



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1/24/14

DATE

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant/Plaintiff, v. AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP, Carrier, Defendant.	)	Civil Action No. 2013-CP-40-05888 **DEFENDANTS' REPLY TO SCWCC AMICUS BRIEF**

TO: The Honorable G. Thomas Cooper, Jr., Preston F. McDaniel, Attorney for Plaintiff, and J. Keith Roberts, Attorney for South Carolina Workers' Compensation Commission.

BACKGROUND AND STATEMENT OF THE CASE

This matter comes before this court by way of a Declaratory Judgment action filed by Claimant/Plaintiff (hereinafter "Plaintiff") on September 27th, 2013. Plaintiff's Summons and Complaint (1) alleged a bad faith denial of benefits; (2) alleged that S.C. Code Ann. § 42-9-260 is unconstitutional and requested a Declaratory Judgment to that effect; and (3) moved for a temporary restraining order to force Defendants to pay benefits outside of the jurisdiction of the South Carolina Workers' Compensation Commission. Plaintiff improperly sought and obtained a temporary restraining order from Judge Alison Renee Lee on October 1, 2013 ordering Defendants to pay temporary compensation benefits. Judge Lee dismissed the improper temporary restraining order on October 9, 2013 stating "[t]he Commission has the sole authority to reinstate benefits if appropriate." Subsequent to the dismissal, and prior to filing an Answer and Counterclaim, Defendant filed a Motion to Dismiss pursuant to SCRCP 12(b)(7) for failure

to join a party pursuant to Rule 19 on October 21, 2013. In the memorandum and proposed order submitted to this court on this issue, Defendant asserted it should be dismissed from the case and that the necessary and proper party is the South Carolina Workers' Compensation Commission and/or the South Carolina Legislature[1]. In response to this position, the South Carolina Workers' Compensation Commission sought permission to file a brief *amicus curiae.* Judge Cooper granted the Commission's request to file a brief *amicus curiae* and permitted each party to respond within five (5) days of receipt of the brief.

LEGAL ARGUMENTS AND ANALYSIS

I. DEFENDANT'S 12(B)(7) MOTION TO DISMISS SHOULD BE GRANTED AND THIS CASE SHOULD BE DISMISSED IN ITS ENTIRETY.

Plaintiff submitted a reply to Defendant's 12(b)(7) Motion on October 31, 2013. In that reply, Plaintiff incorrectly cited to Rule 19 as grounds for a denial of Defendant's Motion. Specifically, Plaintiff incorrectly asserted that Rule 19 requires Defendant to state the name of the party that was not joined pursuant to Rule 12(b)(7) and that Defendant was required to set forth the basis for which the unnamed party would be considered "indispensable." In addition, Plaintiff submitted a letter to this court on or about January 21, 2014 in which he took the incorrect position that the issue of joinder is irrelevant because Defendant did not file a Motion pursuant to Rule 19 to join a necessary party. Finally, Plaintiff submitted an email to this Court on January 27, 2014 in which he, again, took the incorrect position that Defendant "[did] not and cannot name who that indispensable party is...."

In BancOhio Nat. Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (S.C. 1993), the Supreme Court took up the issue of a motion to dismiss under Rule 12(b)(7) and the applicability of Rule(s) 14(c) and 19 to the case. The case involved a dispute over highway construction but

[1] Defendants would point out that the proper "party" for the Legislature would actually be The State of South

the analysis of Rule(s) 12 and 19 are applicable to this claim. The defendants raised a 12(b)(7) motion at the onset of the trial and asserted that the South Carolina Department of Highways and Public Transportation, as well as the Town of West Union, were necessary and indispensable parties to the action. The Court of Appeals stated that denial of the motion was proper because pursuant to Rule 14(c), either party could have joined another party and by failing to do so, the defendants had waived their claim. The Supreme Court stated "[t]he [defendants] correctly assert that the result of this decision is to place the burden of assuring that all indispensable parties are before the court squarely on the defendant. **The effect of this holding is to excuse plaintiffs from their duties under Rule 19 while providing a means for a plaintiff to completely circumvent the purpose and meaning of Rule 12(b)(7).**" Id. at 326, 426 S.E.2d at 776 (emphasis added).

According to the BancOhio court, "**[a] motion under Rule 12(b)(7) is proper where a necessary party under Rule 19 should be joined for a just adjudication of the issues**, and, 'may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings...." Id. The relevant portions of Rule 19 provide that: "(c) Pleading Reasons for Nonjoinder. **Any pleading asserting a cause of action for relief shall state the names, if known to the pleader**[2], of any persons described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined." Id. (emphasis added). The Supreme Court stated that "[t]he defendants correctly rely on the phrasing of Rule 19(c) to place the burden on the [plaintiff] to justify any reasons for nonjoinder. [The defendants] also correctly interpret Rule 12 as allowing a defendant to establish an affirmative defense to any such nonjoinder by the plaintiff, regardless of the feasibility of the party's joinder. **There is nothing in the rules which**

Carolina. The remainder of this Brief will refer to the State of South Carolina for that purpose.

[2] The pleader, in this case, being Plaintiff who filed this declaratory judgment action.

shifts the burden onto the defending party to either add or identify, for the plaintiff, other parties which are indispensable." Id. at 326-27, 426 S.E.2d at 775-76 (emphasis added).

Further, in Lee v. Kelley, 298 S.C. 155, 378 S.E.2d 616 (S.C. App. 1989), the Court of Appeals stated that "...Rule 12(b)(7) incorporates as its basis Rule 19, SCRCP... ." A motion pursuant to Rule 12(b)(7) does not require the moving party to also file a motion pursuant to Rule 19. Rule 19 simply lays out the groundwork for who should be joined as a party to a dispute. As stated in Lee, a 12(b)(7) motion implicitly incorporates the requirements of Rule 19. Therefore any assertion made by Plaintiff that Defendant's 12(b)(7) Motion must fail because it did not file a motion pursuant to Rule 19 is incorrect[3].

In short, Plaintiff is incorrect in asserting in his Reply and to this court that Defendant had to name the indispensable party. BancOhio and Lee clearly stand for the exact opposite posture—namely that it was solely Plaintiff's responsibility to identify all necessary parties pursuant to Rule 19 in his pleadings. If Plaintiff failed to do that, as has occurred in this case, the appropriate remedy is a 12(b)(7) Motion to Dismiss which incorporates Rule 19. Defendants properly filed a 12(b)(7) Motion to Dismiss that is presently before this court and the subject of this Brief. For these reasons, this case should be dismissed in its entirety pursuant to Rule 12(b)(7) for Plaintiff's failure to comply with Rule 19.

II. IF DEFENDANT'S 12(B)(7) MOTION TO DISMISS IS DENIED, THIS COURT MUST ORDER PLAINTIFF TO ADD THE NECESSARY AND PROPER PARTIES PURSUANT TO RULE 12(B)(7), RULE 19, AND S.C. CODE ANN. § 15-53-80.

In the event this case is not dismissed due to Plaintiff's deficient pleadings as required by Rule 12(b)(7), Defendant has asked this court to substitute and/or join the proper party to this

[3] As noted above, BancOhio makes it clear that Rule 19 applies to Plaintiff in this matter. Defendant would not have grounds to file a Rule 19 motion.

case[4]. Specifically, Defendant has suggested in memoranda and in hearings before this court that the proper party pursuant to Rule 12(b)(7), Rule 19, and S.C. Code Ann. § 15-53-80 is the South Carolina Workers' Compensation Commission[5] and/or the State of South Carolina.

Rule 19 provides, in pertinent part, that:

> "(a) Persons to Be Joined if Feasible. **A person** who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action **shall be joined** as a party in the action **if** (1) **in his absence complete relief cannot be accorded among those already parties, or** (2) **he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may** (i) **as a practical matter impair or impede his ability to protect that interest** or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."
>
> (emphasis added).

S.C. Code Ann. § 15-53-80 provides, in pertinent part, that:

> "When declaratory relief is sought **all persons shall be made parties who have or claim any interest which would be affected by the declaration**...If the statute, ordinance or franchise is alleged to be unconstitutional the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard."
>
> (emphasis added).

As noted throughout, this matter was brought pursuant to the Declaratory Judgment Act. Plaintiff specifically seeks to invalidate S.C. Code Ann. § 42-9-260 on the grounds that it is facially unconstitutional. Defendant is the improper party to be protecting and/or defending the constitutionality of the Workers' Compensation Act in a Declaratory Judgment action. If this

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[4] Defendant makes this request even though, as noted above, a motion pursuant to Rule 19 is not required to be filed by Defendant because (1) Rule 19 applies to Plaintiff and (2) Rule 12(b)(7) incorporates Rule 19 as its basis.

[5] As it relates to the Commission's brief *amicus curiae*, Defendant does not disagree with or dispute anything raised by the Commission related to why they should not be joined as a party. In fact, Defendant agrees with the Commission's position that the State of South Carolina is the party better suited to defend this case because the statue at issue was created by the Legislature and the State's lack of conflict of interest on the issues.

court were to rule in Plaintiff's favor, there is no relief that can be awarded to Plaintiff by Defendant. If this matter were simply ancillary to a proceeding (for example, the method in which a statute was applied to Plaintiff at trial was unconstitutional or a judge misstated a jury instruction resulting in a conviction) Defendant would be a proper party. However, that is not the case here. Rather, Plaintiff has simply picked a defendant to name as a party in his challenge to the facial validity of S.C. Code Ann. § 42-9-260. Hypothetically, this situation is functionally no different than if the undersigned chose to name opposing counsel as a defendant in order to challenge the constitutionality of a statute requiring the undersigned to pay sales tax. There would be no relief that opposing counsel could grant and opposing counsel would not be the proper party to defend the constitutionality of a statute raised by the undersigned—yet that is exactly what Plaintiff asserts in this matter.

In his January 27, 2014 reply, Plaintiff cites to Marley v. Kirby and Last v. MSI Construction Company as support for his position that a private party has been called to defend the constitutionality of a statute. However, Marley involved a challenge to a comparative negligence jury instruction at trial and Last involved a challenge to the method by which a statute was applied and the case was *on appeal* from a Workers' Compensation Hearing. Neither were declaratory judgment actions. This case is a declaratory judgment action. The sole purpose of the case brought by Plaintiff is to challenge the constitutionality of a statute. A CaseMaker search of South Carolina case law with the connector terms of "declaratory judgment" and "unconstitutional" reveals a total of 142 reported cases involving a request to find a statute unconstitutional. Of these 142 cases, only a handful involves a challenge to constitutionality of an act or statute in the course of a hearing or trial (and, therefore, would not be a declaratory judgment action). However, majority of these cases consist of declaratory judgment actions filed

with the sole purpose being to declare a statute unconstitutional. **There is not one reported case involving a declaratory judgment action filed to declare a statute unconstitutional that involves a private entity as a defending party**. Further, every single one of the cases involves a state or municipal agency and/or state or municipal government[6] as the moving plaintiff or the proper defendant. Plaintiff has not pointed to a single declaratory judgment action that involved a private party as a, let alone the sole, defendant.

If this Court does not dismiss this claim in its entirety pursuant to Rule 12(b)(7) due to Plaintiff's deficient pleadings as requested above, then this Court should order the necessary and proper parties to be joined in this action. Defendant's position as stated in memoranda and in the hearing conducted before this Court is that either the South Carolina Workers' Compensation Commission and/or the State of South Carolina must be added as a party. Based on the Commission's brief *amicus curiae*, Defendant would submit the most appropriate party to be joined is the State of South Carolina.

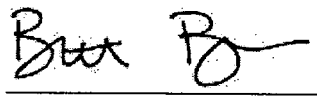
CONCLUSION AND SIGNATURE BLOCK ON THE FOLLOWING PAGE

[6] A survey of the cases show that the parties include, but are not limited to: The State of South Carolina, The Governor of South Carolina, The South Carolina Department of Revenue, The South Carolina Department of Transportation, The Attorney General of South Carolina, Richland County, Richland County School District One,

CONCLUSION

For all the foregoing reasons, Defendant's Motion to Dismiss Pursuant to Rule 12(b)(7) should be GRANTED and this case should be dismissed in its entirety. However, if Defendant's Motion to Dismiss is denied, this court should order that all necessary and proper parties be added to the case.

Respectfully submitted,



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January 31, 2014
Columbia, South Carolina

The Town of Edisto Beach, The City of Charleston, The South Carolina State Ports Authority, and The South Carolina Law Enforcement Division.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

C/A No.: 2013-CP-40-05888

RICHLAND COUNTY
FILED
2014 FEB 18 PM 1:55
JEANETTE W. McBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

SUMMONS
FOR AMENDED COMPLAINT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served

upon you, and to serve a copy of your Answer to the Amended Complaint on the Plaintiff's attorney, Preston F. McDaniel, at his office, McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted,

Preston F. McDaniel
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(803)771-7211

Attorney for the Plaintiff

February 18th, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

C/A No.: 2013-CP-40-05888

RICHLAND COUNTY
FILED
2014 FEB 18 PM 1:55
JEANETTE W. McBRIDE
C.C.P. & G.S.

AMENDED COMPLAINT

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

The Plaintiff, Clarence B. Winfrey, by and through his undersigned attorney, would respectfully show unto the Court as follows:

INTRODUCTION

1. That this action is filed by the Plaintiff under the Declaratory Judgment Statute, S.C. Code §15-53-10, 20, 30, et seq. to determine whether the provisions of S.C. Code §42-9-260 (B) of the S.C. Workers' Compensation Act which provides for the termination or suspension of compensation benefits within one hundred fifty (150) days from the date of the injury without a hearing is unconstitutional and in violation of the Plaintiff's rights to due process of law in violation of The United States Constitution Amendment XIV, §1 and Amendment V, and the S.C. Constitution Article I, §3 and 22, and/or is volative of the provisions of the Administrative Procedures Act, wherein §42-9-260 deprives the Plaintiff of his property interest without providing the Plaintiff with a hearing prior to the termination of said benefits. Thus this denies him due process and equal protection under the law and specifically the right to notice and an opportunity to be heard before a termination of his compensation payments. Where there is either a deprivation of liberty or a property interest, the individual has a right to a hearing prior to a determination or termination of that property interest.

2. That as a result of his work-related injury which occurred in Richland County on May 22, 2013, which was timely and properly reported to his employer Archway Service, Inc. who

in turn reported the accident to its insurance carrier for workers' compensation purposes, American Fire and Casualty Company (pursuant to S.C. §42-5-210 the insurance carrier is subrogated to all the rights and duties of the employer and may enforce any such rights in its own name), the Defendant in this action, agreed to authorize and started paying benefits including temporary weekly compensation benefits, medical benefits and other benefits as provided under the South Carolina Workers' Compensation Act. (S.C. Code §42-17-10 provides that an agreement to pay compensation has the same effect as on order/award of the Commission.)

3. That after providing benefits to the Plaintiff including Temporary Total Disability compensation, medical care and other benefits under the Act from June 1, 2013 through September, veribly on Friday, September 13, 2013 and by letter received Monday, September 16, 2013, the carrier abruptly and without notice and without a hearing, filed a Form 15 with the South Carolina Workers' Compensation Commission terminating benefits on the basis checked on the form that, "based on a good faith investigation the claim is denied" and stopped all benefits. This action allegedly taken under the provisions of the statute has given rise for this action.

PARTIES

4. That the Plaintiff is a resident of Lexington County, South Carolina.

5. That the Defendant American Fire and Casualty Company is a corporation chartered under the laws of one of the States in the United States and is licensed to do and does insurance business in South Carolina specifically writing workers' compensation policies for employers to cover their employees in the State of South Carolina. As set forth above, the American Fire and Casualty Company is the insurance carrier for the Employer and pursuant to the Act is subrogated to the rights and benefits of the Employer in this Workers' Compensation Act. Their Attorney of Record in the underlying matter giving rise to this action is:

Landon Hughey, Esquire
McAngus, Goudelock & Courie, LLC
1320 Main Street, 10th Floor
Columbia, South Carolina 29201

Copy of the Notification of Representation is attached hereto and incorporated herein by reference as Exhibit "A".

6. That the Defendant State of South Carolina has been added as a party to this action by the Circuit Court by Order dated 1-31-14 as being a necessary party since this action challenges the constitutionality of a statute.

JURISDICTION AND VENUE

7. That as set forth in the Introduction, this matter was brought due to a work-related injury which occurred in Richland County where pursuant to the Workers' Compensation Act and specifically, S.C. Code §42-17-20, jurisdiction and venue are proper.

DECLARATORY JUDGMENT ACTION
RELIEF SOUGHT

8. That this action is brought under the provisions of the South Carolina Uniform Declaratory Judgment Act, §15-53-10 et seq., South Carolina Code of Laws (1976 as amended) on the basis that a real and actual controversy exists between the parties due to the Defendants stopping benefits under the provisions of S.C. Code §42-9-260; and under S.C. Code §15-53-30 wherein any person whose rights, are affected by a statute may have determined any question of construction or validity (constitutionality) arising under the statute and obtain a declaration of rights thereunder.

9. That the Plaintiff would submit that the provisions of S.C. Code §42-9-260 and specifically subsection (B)(1-6):

(A) violate the Plaintiff's right to due process of law by allowing for a deprivation of his property interest without notice and without a hearing and opportunity to be heard;

(B) that the provisions of §42-9-260 are in direct conflict with the provisions of the Administrative Procedures Act concerning notice and hearing in a contested case; and

(C) denies the Plaintiff equal protection of the laws by creating an irrational classification, i.e., " a legislative classification which excludes .., (or treats differently).., a certain class of persons" .., which is not, "rationally related to the objective of the statute." The Plaintiff would argue as follows:

A

S.C. CODE §42-9-260 VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS OF THE PLAINTIFF UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS.

"In order to be entitled to the procedural safeguards encompassed by the due process clause of the Fourteenth Amendment (notice and an opportunity to be heard) the complaining party must suffer from deprivation of a liberty or **property interest.**" Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.E.2d 548 (1971) (Emphasis added). "Only when such a property interest exists does a constitutional right to a hearing attach." Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

Our Supreme Court has ruled, "workers' compensation benefits constitute a property interest." Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334, 336 (1991); Orszula v. Orszula, 292 S.C. 264, 356 S.E. 2d 114 (1987). Therefore, any

attempt to deny a Claimant of his "property interest" without a hearing violates the due process clauses of both the United States and South Carolina Constitutions.

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the United States Supreme Court held that procedural due process requires that a pre-termination hearing be held when public assistance payments to welfare recipients are discontinued. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Court held that even in that situation, the entitlement to welfare benefits constituted a sufficient property interest that due process requirements attached. The Court in Goldberg struck down a New York statute which allowed the termination of benefits prior to a hearing. The Court reasoned that,

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
>
> * * *
>
> Thus the crucial factor in this context . . . 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. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . ."

* * *

> "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." Goldberg, 397 U.S. at 262-263, 264, 265-66, 90 S.Ct. at 1019.

Our Courts have similarly stated that compensation laws,

> Constitute a form of social legislation and were enacted primarily for the benefit, protection and **welfare** of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue to obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficial purposes for which they were enacted. Cokeley v. Robert Lee, Inc., 197 (1941) (Emphasis added).

In Goldberg, the Court stated that public assistance "is not mere charity, but a means to promote the general **welfare**, and secure the Blessings of Liberty to ourselves and our Posterity." Goldberg, 397 U.S. at 266, 90 S.Ct. at 1019 (Emphasis added). The Court continued and stated that "pre-termination evidentiary Hearings are indispensable to that end." Id. Our Supreme Court in the case of Hamm v. Mullin's Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) quoting from the United States Supreme Court decision in Powell v. Alabama, 287 U.S. 45

at p. 68, 53 S.Ct. 55 at p. 64, 77 Law Ed. 158 at p. 170, 84 ALR 527 stated:

> "It never has been doubted by this Court or any other so as far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns' have been repeated by varying forms of expressions in a multitude of decisions."

In Brown v. S.C. State Bd., of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990), our Court echoed those sentiments and held that "[w]where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866, 867 (1990). Therefore, under South Carolina Law, a Claimant, as a matter of fundamental due process, is entitled to a hearing before the termination of his/her disability benefits.

B

THAT S.C. CODE §42-9-260 IS IN DIRECT CONFLICT WITH S.C. CODE §1-23-310(2), AND AS SUCH IS VOID.

Not only does §42-9-260 violate a Claimant's due process rights, it is in direct conflict with S.C. Code §1-23-310(2), which spells out the administrative procedure for **all "contested cases"**. S.C. Code §1-23-310(2) states that a,

> "contested case" means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency **after an opportunity to be heard.** S.C. Code §1-23-310(2) (as amended 1993) (Emphasis added).

Prior to June 18, 1996, a Claimant's temporary benefits could not be terminated until "after an opportunity to be heard". Id. Since then for the first 150 days, a Claimant is forced to seek a hearing long after their benefits have been stopped. Section 1-23-310, of the Administrative Procedures Act which governs the Workers' Compensation Commission, is in direct conflict with §42-9-260. After reading both statutes and reviewing existing case law, there is no way to reconcile §42-9-260's denial of the Plaintiff's property right to temporary compensation without a pre-termination hearing and §1-23-310's requirement of a hearing.

"Where provisions of the APA and the Workers' Compensation Act conflict, **the APA controls.**" Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731, 732 (1989) (Emphasis added). Section 1-23-310(2) is not alone though; our Supreme Court has held that due process requires a hearing prior to the termination of benefits. "Due process law is that law that hears before it condemns **which proceeds upon inquiry and renders judgment only after a full and complete opportunity to be heard.**" S.C. and G.R. Co. v. American Tel and Tel Co., 65 S.C.

459, 43 S.E. 970 (1903) (Emphasis added). When those fundamental rights are not provided, fundamental due process is not afforded. Stono River Environmental Protection Assn. v. S.C. Dept. of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

C

THAT S.C. CODE §42-9-260 VIOLATES THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS BY DENYING A CLAIMANT EQUAL PROTECTION UNDER THE LAW.

"The Constitutional guarantee of equal protection under the law requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604, 605 (1978). While the General Assembly has "the right to make reasonable classifications of persons and property for public purposes", those classifications **must apply "equally to all members of the class" and must not be "arbitrary but [instead] rest upon some reasonable basis."** Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362, 368 (1970) (Emphasis added); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979).

Section 42-9-260 fails to meet this standard. The statute creates two classes, one class made of up of Claimants who have not yet been receiving temporary benefits one hundred and fifty (150) days and those that have been receiving benefits in excess of amount of time whose benefits cannot be stopped until after a

hearing and who are entitled to benefits until after a hearing is held and benefits are stopped by Order of the Commission. This classification serves absolutely no interest, has no rational basis and is purely arbitrary.

> The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be affected. Marley, 245 S.E.2d at 606.

In this case the indiscriminate choice of one hundred and fifty (150) days bears no reasonable and just relation to the legislative purpose of the Workers' Compensation Act, which, as stated earlier is for the **"benefit, protection and welfare of working men and their dependents."** Cokeley, 14 S.E.2d at 893-94. (Emphasis added).

The South Carolina Supreme Court struck down a similar statute in Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), which did not allow a passenger in an automobile accident to be compensated for their injuries unless they could show "reckless disregard." In striking down the guest statute, the Court stated that the justifications for passing the statute did not constitute "a rational basis for the differential treatment it spawned." Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883, 885 (1979). The Court could find no justification for allowing the driver of a car to recover for their injuries, yet hold the passenger to a higher standard in order to recover.

The same logic as applied in Ramey dictates that §42-9-260 be struck down. There is no justification as to why one claimant is entitled to have a hearing before his benefits can be ended yet another is not entitled to a hearing solely on the basis of whether they have received benefits for one hundred and fifty (150) days. This classification bears no rational basis to the fundamental intent of the Workers' Compensation Act, which is to protect injured workers and to provide disability compensation until their disability to work has ended. Section 42-9-260 and the one hundred and fifty (150) day classification is arbitrary, and serves as absolutely no rational basis for stopping a claimant's benefits without a hearing.

Therefore, S.C. Code §42-9-260 (as amended 1996) does not provide equal protection under the law to Claimants due to its arbitrary, irrational and discriminatory effect.

10. That as to both the payment of temporary compensation benefits prior to the passage of one hundred fifty (150) days and to the payment of temporary compensation benefits after the one hundred fifty (150) days, S.C. Code §42-17-10 and 20 provide that where an agreement is reached to pay compensation by the parties as in this case which is filed with the Commission to pay compensation benefits that agreement is enforceable the same as any other Order of the Commission and that if subsequent to such agreement there is a disagreement as to the continuation of

such benefits, either party may request a hearing. Prior case law has repeatedly help that a hearing is required before such termination of benefits under that statute Halks v. Rust Engineering Co. 208 SC 39, 36 S.C. 2d 852 (1939); Gold v. Moragne 202 SC 281, 24 SE 2d 491 (1943). The only thing that §42-9-260 (A) adds is that during the first one hundred fifty (150) days of the payment of such compensation benefits, the Defendants do not waive any grounds for good faith denial. Subsection (B) then in violation of due process and in violation of Administrative Procedure Act and in violation of the other provisions of the Act seeks to allow the Defendants to stop payment of benefits before a hearing is held, thus depriving the Plaintiff of his entitlement to benefits under the Act without due process.

WHEREFORE, the Plaintiff would respectfully pray that the Court:

1. (As of the filing of the Amended Complaint, this relief has been addressed by the Court.) After review of the verified Complaint and the Affidavit attached hereto, issue a Temporary Restraining Order Without Notice as provided in SCRCP, Rule 65(b) ordering that the Defendants reinstate benefits until a hearing can be held on the Motion to Issue a Temporary Restraining Order after notice and after hearing on that Motion issue a Temporary Restraining Order to remain in place until

such time as a hearing may be held on the Summons and Complaint as to the unconstitutionality of the statute. The Temporary Restraining Order Without Notice and a Temporary Restraining Order are necessary to prevent irreparable harm to the Claimant who is out of work, disabled and has no visible means of support or income and wherein the failure to provide medical care could result in irreparable harm up to and including the death of the Claimant due to his severe medical condition both of which are set forth in the Affidavit in support of this Complaint as attached hereto.

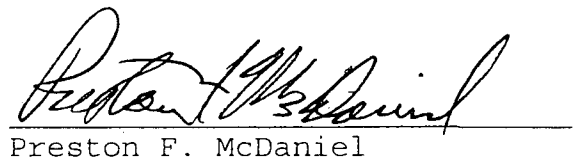
2. Review the provisions of S.C. Code §42-9-260 and specifically those contained in subsection (B) and declare the provisions of subsection (B) unconstitutional and/or in violation of the statutory notice and hearing provisions of the Administrative Procedures Act and the other provisions of the Workers Compensation Act and the Commission Regulations both on the basis of due process and equal protection of the laws as required by both the United States Constitution and our own State Constitution.

3. After making a determination that the statute is unconstitutional and/or in violation of other statutory provisions, issue an Order: (A) reinstating benefits and ordering that such benefits may not be stopped without a due process hearing giving the Claimant notice as required by law

and an opportunity to be heard (as of the filing of the Amended Complaint a due process hearing was held on November 13, 2013 on the issues under SC Code §42-9-260); and (B) finding, construing and Ordering that under the Statute the Defendants have the burden of proof at any such hearing to establish one of the six exceptions as created by §42-9-260(B) unless the Court determines that such statute is in its entirety unconstitutional and cannot be separated out so as to allow for any process to exist under the statute as written.

4. For such other and further relief as the Court may deem just and proper in this situation.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Plaintiff

February 18th, 2014

McAngus Goudelock & Courie LLC

ATTORNEYS AT LAW

Reply To
LANDON HUGHEY
Direct Dial: (803) 227-2261
rhughey@mgclaw.com
COLUMBIA

September 20, 2013

VIA HAND DELIVERY
Virginia Crocker, Judicial Director
S. C. WORKERS' COMPENSATION COMMISSION
1333 Main Street, Suite 500
Columbia, South Carolina 29201

RE: Clarence Winfrey v. Archway Services and American Fire & Casualty Insurance Company c/o Liberty Mutual Insurance
Date of Accident: May 22, 2013
WCC File No.: 1306305
Our File No.: 2095.13137
Claim No.: 22209963
Claimant's SSN:

Dear Ms. Crocker:

This firm has been retained to represent the employer and carrier in the above case. We are requesting that you forward us a copy of your file and have enclosed a check in the amount of $20.00 to cover the cost of copying this file. If additional costs for copying your file exceed $50.00, please contact our office before processing our request.

If you have any questions, or if you need further assistance from us, please do not hesitate to call.

Very truly yours,

Landon Hughey

LLH/swk
Enclosures
cc: Susan Kizer, Archway Services Inc
Terri Hughes, Liberty Mutual Insurance (via email & HUB)
Preston F. McDaniel, Esquire, The McDaniel Law Firm

EXHIBIT
A

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

Defendant.

C/A No. _____

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

**AFFIDAVIT OF
PRESTON F. MCDANIEL
ATTORNEY FOR THE PLAINTIFF
FILED IN SUPPORT OF
TEMPORARY RESTRAINING ORDER
WITHOUT NOTICE PURSUANT TO
TO SCRCP RULE 65(b)**

I, PRESTON F. MCDANIEL, having been duly and properly sworn do depose and state:

1. That I am the attorney for the Plaintiff who is the Claimant (hereinafter the "Plaintiff") in the workers' compensation claim of Clarence Winfrey vs. Archway Service, Inc. and American Fire and Casualty Co. which gives rise to the Declaratory Judgment action.

2. That the Plaintiff sustained an electrocution injury on May 22, 2013. The Plaintiff obtained counsel and counsel notified the adjuster as managing agent for the Employer's Workers' Compensation Insurance Carrier, American Fire and Casualty, Co., who after review of the file (June 25 email of Rebecca Evans, Adjuster, "I am going to have to review the file before I am able to respond") authorized and started temporary compensation benefits under the Workers' Compensation Act. See Exhibit "A", emails concerning Temporary Total Disability.

3. That thereafter the Plaintiff began receiving weekly compensation benefits in the amount of $426.69 and continued to receive medical care which had been previously authorized, paid for and provided through Dr. Lide and Dr. Travis and a rehab nurse was assigned for local handling of the claim. On September 13, 2013, Counsel for the Plaintiff was notified by the Plaintiff that his assigned rehab nurse, Ms. Kristy L. Thompson, RN, BA, BSN had been advised to close her file as the case was being denied. Thereafter, on September 16, 2013, by letter dated September 12,

Counsel for the Plaintiff, received a letter and Form 15 stating that the Defendant had stopped temporary compensation benefits and medical care and had denied the claim based on the grounds of, "a good-faith investigation.". The letter and the Form 15 are attached hereto and incorporated herein by reference as Exhibit "B".

4. That the Plaintiff is at home recuperating and is totally disabled from gainful employment. His medical situation is extremely tenuous, wherein any slight fluctuation in his physical and/or mental condition (stress) could result in irreparable harm up to and including the death of Plaintiff. A letter from his treating cardiologist as to the serious consequences that can result from the failure to provide medical care has been requested and a copy of the emergency instructions to the Plaintiff from his doctors is attached as Exhibit "C".

5. That to the knowledge of Counsel for the Plaintiff at the time of the filing of this Affidavit in Support of a Temporary Restraining Order Without Notice, the Defendant has stopped compensation to the Plaintiff and that due to his disabled condition he has no alternative economic means of paying his bills and supporting himself other than his temporary compensation. According to the communication from the rehab nurse, she has closed her file at the direction of the adjuster, robbing the

Claimant of all support and assistance in securing medical care and benefits. Also, while to the knowledge of Counsel, the doctors continue to treat the Plaintiff, they are doing so without guarantee of payment on the basis of the denial of the Defendant and necessary medical is being delayed. Therefore, based upon all of the above, Counsel for the Plaintiff variably believes that irreparable harm may come from this denial of benefits without a hearing, which is allowed for pursuant to S.C. Code §42-9-260 the constitutionality of which is the basis of the Declaratory Judgment Relief requested.

FURTHER THE AFFIANT SAYETH NOT.

PRESTON F. MCDANIEL, Affiant

SWORN TO BEFORE ME this

27 day of September, 2013.

L.S.

Notary Public for South Carolina

My Commission Expires: 1/21/14

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Tuesday, June 25, 2013 10:10 AM
To: rebeccam.evans@libertymutual.com
Subject: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963

Importance: High

Good morning Becky!

I am following up with an email regarding the voicemail I left you this morning in reference to Mr. Winfrey's claim. I understand you covered up in work but if you would please be so kind as to let me know if 1) you have gotten his TTD benefits started and 2) when you anticipate his check being mailed out, it would be GREATLY appreciated.

Thank you in advance and let me know if I can do anything to help in this regard. Kim

Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

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EXHIBIT
A

Kim Hinkle

From: Evans, Rebecca M <RebeccaM.Evans@LibertyMutual.com>
Sent: Tuesday, June 25, 2013 2:31 PM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963

Kim,

I have received your e-mails, but I am going to have to review the file before I am able to respond. I will get back with you as soon as possible.
Thanks.

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 |SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Tuesday, June 25, 2013 2:24 PM
To: Evans, Rebecca M
Subject: FW: Clarence B. Winfrey v. Archway Service, Inc.; Claim No. 22209963
Importance: High

Any news yet on getting TTD started? Thanks, Kim

Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

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From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Tuesday, June 25, 2013 10:10 AM

EXHIBIT A

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Wednesday, June 26, 2013 11:00 AM
To: 'Evans, Rebecca M'
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

How will the check (bringing him current) be sent? And will it be sent to us or Mr. Winfrey? I simply ask this as I am sure Preston will ask. As soon as I receive any additional records, I will email you with them. Also, will you please have a check cut reimbursing Mr. Winfrey for his out of pocket prescription expenses which we sent you on 6/24 and send it out today as well?

Thank you so much Becky for your prompt attention to this. Let me know if I can do anything else to help. Kim

---

From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Wednesday, June 26, 2013 10:41 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Thanks, Kim.

I requested records from the hospital;, but if you get them sooner, please let me know and perhaps you can send those as well.

I will issue a payment today; I will also be leaving early today as I have a doctor's appt. Let Preston know to leave me a message in the event he missed me.

Thanks again!

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 |SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Wednesday, June 26, 2013 10:34 AM
To: Evans, Rebecca M
Subject: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963
Importance: High

Becky:

Attached please find the records I just received from Dr. Jeffrey A. Travis, who performed the surgery. I will have Mr. McDaniel call you once he arrives. Thank you in advance, Kim

EXHIBIT A 3 of 5

Kimberley T. Hinkle, Paralegal
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
Tel: 803.771.7211
Fax: 803.252.0709

Please consider the environment before printing

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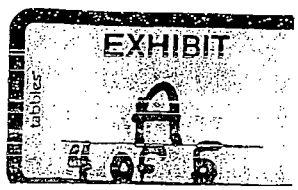


Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Thursday, June 27, 2013 12:01 PM
To: 'Evans, Rebecca M'
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Thank you

From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Thursday, June 27, 2013 11:53 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

It was mailed.

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 |SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

Please consider the environment before printing this e-mail.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Thursday, June 27, 2013 11:42 AM
To: Evans, Rebecca M
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963

Becky: Will you please confirm for me that Mr. Winfrey's check was mailed out yesterday? Thanks, Kim

---

From: Evans, Rebecca M [mailto:RebeccaM.Evans@LibertyMutual.com]
Sent: Wednesday, June 26, 2013 10:59 AM
To: Kim Hinkle
Subject: RE: Clarence B. Winfrey v. Archway Service, Inc.; Claim #:22209963
Importance: High

Kim, what is his correct address? Am showing a London Pride address and ddress on bills (Artic Court is on your 50).

Thanks!

Rebecca Evans | Senior Claims Specialist I
Liberty Mutual Commercial Insurance Workers Compensation Claims
Tel: 1-800-334-0078 x 83812 | Fax: 877-840-7788 |SDN: 8-759-7812
Medical Billing/Inquires – 866-608-2725

Please let my manager know how I am doing: Christine.Jones@libertymutual.com

EXHIBIT A 5 of 5

Liberty Mutual
INSURANCE

Liberty Mutual Insurance

Workers' Compensation Claims
PO Box 515099
Los Angeles, CA 90051-5099
(866) 539-6449
(877) 840-7788 Fax

September 12, 2013

Clarence Winfrey
C/O McDaniel Law Firm
1315 Elmwood Avenue
Columbia SC 29201

Re: IC # 1306305
Employee: Clarence Winfrey
Employer: Archway Services
D/I: 5/22/2013
Claim# 22209963

Dear Mr. Winfrey:

After additional investigation, we are denying your claim. You have failed to meet the burden of a compensable claim under the SC Workers' Compensation Act.

Sincerely,

Terri Hughes

Terri Hughes
Sr. Claims Specialist II
800-334-0078 ext 83750

Cc: SCWC
Attorney Rockey Hughly-McAngus Goudelock and Courie

EXHIBIT
B

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: 1306305
Carrier File #: 22209963
Carrier Code #: 00475
Employer FEIN #: 510663955

Claimant's Name: Clarence Winfrey SSN: Employer's Name: Archway Services
Address: Address: 2316 Kings Road Extn.
City: State: SC Zip: City: Shelby State: NC Zip: 28152
Home Phone: 803 429 7590 Work Phone: Insurance Carrier: Liberty Mutual Insurance
Preparer's Name: Terri Hughes Law Firm: Preparer's Phone #: 800 334 0078

Compensation Paid:	Number of Weeks	From (m/d/yyyy)	To (m/d/yyyy)	Amount
1. Number of Weeks T.T.	15	6/1/2013	9/14/2013	$ 6,400.35
2. Number of Weeks T.P.				$
3. Number of Weeks P.P.				$
4. Disfigurement				$
5. Agreement and Final Release				$
Total Compensation Paid				$ 6,400.35
6. Total Medical Benefits* Paid				$ 2,543.47
7. Funeral Benefits				$

☒ Case Denied

Date of Injury: 5/22/2013 (m/d/yyyy)

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: Claimant

By: Terri Hughes Employer's Representative

9/12/2013 Date (m/d/yyyy)

Terri Hughes
Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By:

Report of Additional Fees and Recoupment

A. Carrier Reimbursement by Third Party $

B. Attorney's Fee Paid by Employer $

C. Attorney's Fee Paid by Claimant (Non-contingent fees only) $

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. * Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within 16 days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC Form # 19
Rev. Date 3/96

19

STATUS REPORT AND COMPENSATION RECEIPT

EXHIBIT B 2 of 2

WHEN TO CALL YOUR HEALTH CARE PROVIDER

It is important to see your doctor on a regular basis. Call your doctor immediately if any of the following occurs:

- Excessive weight gain.
- Chest pain.
- Increased shortness of breath — at first with activity, progressing to shortness of breath at rest.
- A persistent cough.
- Swelling of feet, ankles, legs or abdomen.
- Loss of appetite.
- Extreme fatigue or weakness.
- Trouble sleeping (waking up short of breath, using more pillows than usual).
- Signs of infection, such as fever or chills.
- Nausea and vomiting.
- Rapid, irregular heart beat.
- If you develop a rash or hives, which might indicate an allergy to your medication.

Call 911 if your chest pain or shortness of breath is severe, if you have fainted, or if you think you are having a heart attack.

HEART FAILURE MANAGEMENT PLAN

EMERGENCY

You feel as though you are suffocating and cannot get your breath.

CALL 911

RED ZONE • DANGER

Call Dr. _____ at _____

Weight gain of more than 3 pounds in one day or 5 pounds in one week.	Coughing during day and at night.	Wake during night very short of breath and sit on side of bed to breathe easier.
Missed two doses of a medication.	Swollen feet or ankles.	Cannot do important activities due to getting very short of breath.
Decreased appetite.	Have to sit or stand up to breathe easier.	

YELLOW ZONE • CAUTION

Weight gain of 1 to 2 pounds in a day.	Cough sometimes during the day or at night.	Using a second pillow or raising head of bed to sleep.
Missed a dose of a medication.	Mild shortness of breath with usual activity but does not have to stop activity.	Not feeling like doing usual activities but able to do important things.
Decreased appetite.		

GREEN ZONE • ALL CLEAR

Weight unchanged.	No cough.	No changes in appetite.
Taking all medications.	No shortness of breath while sleeping.	No shortness of breath with usual activities.

Name: _____

Date: _____ Target Weig

EXHIBIT C

© 2012 Lexington County Health Services District, Inc.

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

WCC File #: 1306305
Carrier File #: NRCF20130612
September 27, 2013

NOTICE OF HEARING

Clarence Winfrey v. Archway Service.Inc

Subject: To determine if claimant's temporary compensation was legally terminated

Date: November 13, 2013 at 01:45 PM

Location: SC Workers' Compensation Commission, 1333 Main Street, Suite 500 Hearing Room B
Columbia, SC 29202

2013 OCT -1 PM 11:1

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

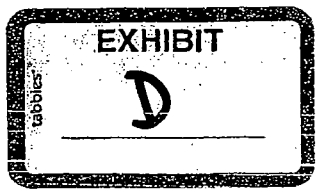
Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner T. Scott Beck
803-737-5698, abracy@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Amy A Bracy, SC Workers' Compensation, September 27, 2013

Party	Attorney
Employee: Clarence Winfrey	Preston F. McDaniel mcdaniellaw@hotmail.com 803-771-7211
Employer: Archway Service.Inc Carrier: American Fire & Casualty Co	Landon L. Hughey (5) lhughey@mgclaw.com 803-779-2300



STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF RICHLAND)

RICHLAND COUNTY
FILED
2014 FEB 18 PM 1:56
JEANETTE W. McBRIDE
C.C.P. & G.S.

PRESTON F. McDANIEL, being duly sworn, says that he is the Attorney of Record for the Plaintiff herein, and has read the foregoing **AMENDED COMPLAINT** and knows the contents thereof, that the same is true of his own knowledge, except as matters therein stated to be alleged on information and belief; and to those matters he believes them to be true. This Verification is made pursuant to SCRCP Rule 11(c) and the requirements of Rule 65(b).

Preston F. McDaniel
Attorney for the Plaintiff

SWORN TO BEFORE ME this
18th day of February, 2014.

Kimberly T. Hinkle (L.S.)
Notary Public for South Carolina
My Commission Expires: 4-26-20

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant, v. AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP, Carrier, And THE STATE OF SOUTH CAROLINA, Defendants.	)	Civil Action No. 2013-CP-40-05888 **DEFENDANT AMERICAN FIRE AND CASUALTY CO.'S ANSWER AND COUNTERCLAIM IN REPLY TO PLAINTIFF'S AMENDED SUMMONS AND COMPLAINT**

2014 MAR -5 PM 12:54
RICHLAND CO. FILED
JEANETTE W. McBRIDE
C.C.P. & G.S.

COMES NOW Defendant American Fire & Casualty Insurance Company and for its Answer to Plaintiff's Amended Summons and Complaint states the following:

1. Each and every allegation not specifically admitted to in this Answer and Counterclaim is DENIED.
2. Paragraph 1 states a legal conclusion and does not require a response. However, as laid out below, Defendant asserts that:
    a. S.C. Code Ann. § 42-9-260 is not unconstitutional;
    b. S.C. Code Ann. § 42-9-260 does not violate Plaintiff's rights to due process of law pursuant to either the South Carolina or United States Constitutions;
    c. S.C. Code Ann. § 42-9-260 does not violate equal protection;
    d. S.C. Code Ann. § 42-9-260 does not violate the Administrative Procedures Act;

e. Plaintiff does not have a property interest and/or property right in *temporary* workers' compensation benefits;

f. Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of temporary disability benefits;

g. Plaintiff does not have any legal or constitutional right to notice prior to the termination of temporary disability benefits;

h. Plaintiff does not have any legal or constitutional right to be heard prior to the termination of temporary disability benefits;

i. The termination of temporary disability benefits is not a determination or termination of a property interest and, therefore, Plaintiff has no legal or constitutional right to a hearing prior to the termination of temporary disability benefits.

3. The allegations contained in Paragraph 2 are denied. In addition to the general denial of Paragraph 2, it is denied that Defendant American Fire & Casualty Insurance Company is a proper party to this action.

4. The allegations related to the sequence of events contained in Paragraph 3 are admitted. Defendant denies that Plaintiff has any legal or constitutional right to a hearing prior to the termination of temporary disability benefits. It is undisputed that S.C. Code Ann. §42-9-260 permits the termination of temporary disability benefits based on a good faith investigation[1]. The reasoning for filing the Complaint does not require a response.

5. The allegations contained in Paragraph 4 are denied for lack of knowledge.

[1] The Workers' Compensation Commission has already determined in a prior hearing that Defendant properly stopped benefits based on a good faith investigation.

6. The allegations contained in Paragraph 5 are denied. Defendant American Fire & Casualty Insurance Company is not the proper party to this action. Insofar as Paragraph 5 states that Defendant American Fire & Casualty Insurance Company is the insurance carrier for Employer and Landon Hughey is the attorney of record, Paragraph 5 is admitted.
7. The allegations contained in Paragraph 6 are denied. The State of South Carolina was not added by an Order of the Circuit Court. Rather, the Circuit Court ordered that, if Plaintiff wished to proceed, it would need to add the State of South Carolina as a party.
8. The allegations contained in Paragraph 7 are denied.
9. The allegations contained in Paragraph 8 do not require a response. However, Defendant asserts that S.C. Code Ann. § 42-9-260(B) is constitutional. Further Defendant asserts that Plaintiff does not have a property interest in temporary disability benefits, that S.C. Code Ann. § 42-9-260 is not in conflict with the Administrative Procedures Act, and that Plaintiff has not been denied equal protection of the law.
10. Paragraph 9 states a legal conclusion that does not require a response. However, Defendant asserts that:
    a. S.C. Code Ann. § 42-9-260 is not unconstitutional;
    b. S.C. Code Ann. § 42-9-260 does not violate Plaintiff's rights to due process of law pursuant to either the South Carolina or United States Constitutions;
    c. S.C. Code Ann. § 42-9-260 does not violate equal protection;
    d. S.C. Code Ann. § 42-9-260 does not violate the Administrative Procedures Act;
    e. Plaintiff does not have a property interest and/or property right in *temporary* workers' compensation benefits;

f. Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of temporary disability benefits;

g. Plaintiff does not have any legal or constitutional right to notice prior to the termination of temporary disability benefits;

h. Plaintiff does not have any legal or constitutional right to be heard prior to the termination of temporary disability benefits;

i. The termination of temporary disability benefits is not a determination or termination of a property interest and, therefore, Plaintiff has no legal or constitutional right to a hearing prior to the termination of temporary disability benefits.

11. The allegations contained in Section A[2] are denied in that S.C. Code Ann. § 42-9-260 does not violate the fundamental due process rights of the Plaintiff under the United States and/or South Carolina Constitutions. Specifically, Defendant asserts:

a. S.C. Code Ann. § 42-9-260 is not unconstitutional;

b. S.C. Code Ann. § 42-9-260 does not violate Plaintiff's rights to due process of law pursuant to either the South Carolina or United States Constitutions;

c. S.C. Code Ann. § 42-9-260 does not violate equal protection;

d. S.C. Code Ann. § 42-9-260 does not violate the Administrative Procedures Act;

e. Plaintiff does not have a property interest and/or property right in *temporary* workers' compensation benefits;

f. Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of temporary disability benefits;

[2] Plaintiff stopped numbering paragraphs at section A and the remainder of this Answer will refer to the sections of the Complaint.

g. Plaintiff does not have any legal or constitutional right to notice prior to the termination of temporary disability benefits;

h. Plaintiff does not have any legal or constitutional right to be heard prior to the termination of temporary disability benefits;

i. The termination of temporary disability benefits is not a determination or termination of a property interest and, therefore, Plaintiff has no legal or constitutional right to a hearing prior to the termination of temporary disability benefits.

12. The allegations contained in Section B are denied in that S.C. Code Ann. § 42-9-260 is not in direct conflict with S.C. Code § 1-23-310(2).

13. The allegations contained in Section C are denied in that S.C. Code Ann. § 42-9-260 does not violate Plaintiff's right to equal protection under the United States and/or South Carolina Constitutions.

14. The allegations contained in Paragraph 10 are denied.

15. Plaintiff's Prayer For Relief Paragraph 1 has already been ruled upon by Judge Allison Lee wherein Judge Lee determined she did not have jurisdiction to issue a temporary restraining order in a workers' compensation case.

16. Plaintiff's Prayer For Relief Paragraph 2 does not require a response.

17. Plaintiff's Prayer for Relief Paragraph 3 asks this Court to issue an Order or take an action that is has no jurisdiction under the law to do.

    a. For (A), this Court has no jurisdiction to order Defendant to pay benefits to Claimant. Sole, original jurisdiction to order the payment of benefits rests with the South Carolina Workers' Compensation Commission.

b. For (B), this issue has already been ruled on by the South Carolina Workers' Compensation Commission and is presently on appeal. Any decision by this Court on this issue would constitute this Court sitting in an appellate capacity that is not authorized under the law.

FIRST DEFENSE

18. Plaintiff fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

19. Specifically, Plaintiff asks this court to issue an Order reinstating workers' compensation benefits in the event it finds S.C. Code Ann. § 42-9-260 unconstitutional.

20. Even if this court were to determine that S.C. Code Ann. § 42-9-260 is unconstitutional, this court does not have jurisdiction to order Defendant to reinstate workers' compensation benefits as the Workers' Compensation Commission has sole, original, exclusive, and subject matter jurisdiction over the payment of workers' compensation benefits.

21. Therefore, Plaintiff fails to state a claim upon which relief can be granted by this court.

SECOND DEFENSE

22. This court lacks subject matter jurisdiction over Plaintiff's claims pursuant to Rule 12(b)(1).

THIRD DEFENSE

23. Plaintiff failed to properly serve Defendant pursuant to Rule 12(b)(5).

FOURTH DEFENSE

24. There is another action pending between the parties for the same claim pursuant to Rule 12(b)(8).

FIFTH DEFENSE

25. Plaintiff has failed to join a necessary party pursuant to Rule 12(b)(7) and Rule 19.

26. Because of Plaintiff's failure to join a necessary and proper party, this case must be dismissed pursuant to BancOhio Nat. Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (S.C. 1993).

SIXTH DEFENSE

27. Defendant is not the proper party to this matter as this court cannot grant any relief against Defendant in favor of Plaintiff.

SEVENTH DEFENSE

28. This court lacks original jurisdiction over Plaintiff's claims pursuant to Cook v. Mack's Transfer and Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986) cert. denied 292 S.C. 230, 355 S.E.2d 861 (1987).

EIGHTH DEFENSE

29. Plaintiff does not have a property interest in temporary disability benefits.

30. Plaintiff asserts that to deny benefits without a hearing constitutes a violation of a property interest and therefore the ability to deny benefits without a hearing is unconstitutional.

31. Plaintiff cites two cases in support of his contention: (1) Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (S.C. 1991) and (2) Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (S.C. 1987).

32. Neither of these cases supports the contention of Plaintiff that *temporary* disability benefits constitute a property interest.

NINTH DEFENSE

33. Defendant reserves the right to add additional defenses, including additional affirmative defenses, as discovery progresses.

COUNTERCLAIM

34. Plaintiff has alleged he sustained an injury by accident to multiple body parts, including his heart, following a work related incident involving electrical shock.

35. Plaintiff has filed a Complaint attempting to either (1) improperly circumvent the Commission by asking for a determination of compensability from this court or (2) improperly establish a claim for bad faith denial of benefits by asking this court to order payment of benefits in direct contravention of the South Carolina Workers' Compensation Act.

36. South Carolina Code Regulations 67-504, 67-505, and 67-606 implement the procedures authorized by S.C. Code Ann. § 42-9-260 regarding the termination and/or suspension of temporary compensation benefits.

37. Regulation 67-504 states that within the first 150 days after the employer receives notice of injury, temporary compensation payments may be suspended or terminated immediately without a prior hearing, and the employee may later request a hearing to have the payments reinstated.

38. S.C. Code Ann. § 42-9-260(B)(3) provides that following a good faith investigation of the claim, and within 150 days of notice of injury, Defendant may deny compensability of the claim.

39. In the present claim, Defendant conducted a good faith investigation and subsequently denied compensability of the alleged injuries within the 150 day window.

40. Defendant's denial is permitted pursuant to S.C. Code Ann. § 42-9-260(B)(3) and Reg. 67-504 which allows a denial of compensability following a good faith investigation.

41. When a claim is denied, a claimant is not entitled to temporary compensation benefits under the Act.

42. The Act provides that if an employer and injured employee fail to reach an agreement in regard to compensation within fourteen days after the employer has knowledge of the injury, then the worker may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon. *See* S.C. Code Ann. § 42-17-20.

43. Further, all questions arising under the Act, if not settled by agreement of the parties, shall be determined by the Commission. *See* S.C. Code Ann. § 42-3-180.

44. Under the Workers' Compensation Act, Claimant has the burden of proving that he sustained an injury by accident and that his injury is compensable. *See* Frady v. Pacific Mills 231 S.C. 601, 99 S.E.2d 398 (S.C. 1957).

45. Defendant does not carry the burden of disproving compensability.

46. Claimant's sole method of proving compensability is by filing the proper form with the Commission, requesting a hearing, and conducting a hearing before the Commission.

47. During a hearing, the Commission receives evidence from both parties and makes a determination of compensability.

FIRST COUNTERCLAIM

Defendant is entitled to an award of costs, fees, and other damages pursuant to the South Carolina Frivolous Proceedings Act.

48. Defendant brings a counterclaim for costs, fees, and other damages pursuant to the South Carolina Frivolous Proceedings Act codified at S.C. Code Ann. § 15-36-10(A)(4).

49. Plaintiff and/or Plaintiff's attorney has clearly framed this action in his Complaint as a suit for a denial of benefits in bad faith. (*See* Plaintiff's Complaint Paragraph 3).

50. While Plaintiff has asserted a Declaratory Judgment Action, the clear underlying purpose of this Complaint is a bad faith denial of benefits. (*See* Plaintiff's Complaint Paragraph 3).

51. In addition, Plaintiff is well aware that this Court has no jurisdiction to issue workers' compensation benefits and any motion or Order filed and/or requested by Plaintiff is improper.

52. Plaintiff's motion for a temporary restraining was clearly without merit and was clearly not warranted under existing law.

53. The South Carolina Frivolous Proceedings Act states that "**[a]n attorney**...participating in a civil...action...**may be sanctioned for**:

(a) **filing a frivolous** pleading, **motion, or document if**...

> (ii) a reasonable attorney in the same circumstances would believe that under the fact, **his claim or defense was clearly not warranted under <u>existing law</u>** and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; [or]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that **the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party**; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe **the pleading, motion, or document is frivolous, interposed for merely delay**, or merely brought for any purpose other than...adjudication of the claim or defense upon which the proceedings are based;

(b) **making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts**; or

(c) **making frivolous arguments that a reasonable attorney would believe were not warranted under the <u>existing law</u>** or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

54. S.C. Code Ann. § 15-36-10(B)(2) states that "[i]f...an attorney...has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances."

55. Pursuant to S.C. Code Ann. § 15-36-10(G)(1), sanctions may include "...reasonable costs and attorney's fees of the prevailing party. Costs shall include but not be limited to the time required...by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding."

56. Plaintiff and/or Plaintiff's attorney specifically and clearly violated S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) and 15-36-10(A)(4)(c).

57. <u>Cook v. Mack's Transfer</u> clearly establishes that this court has no jurisdiction to hear this matter or this type of action.

58. For reference, The <u>Cook</u> court concluded "[i]**f the dispute concerns an alleged wrongful denial of statutory benefits, the Commission has exclusive jurisdiction to adjudicate the controversy. <u>Whether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction</u>**. Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts..." (emphasis added).

59. In addition, S.C. Code Ann. § 42-1-540, states "[t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee**....as against the employer, at common law or otherwise, on account of such injury, loss of service, or death." (emphasis added).

60. Cook stands for the proposition that this exact action taken by Plaintiff and/or Plaintiff's attorney is improper, without legal merit or basis, and is functionally frivolous.

61. Further, Plaintiff and/or Plaintiff's attorney is most certainly aware of S.C. Code Ann. § 42-1-540 which clearly states that the Act is the sole and exclusive remedy for Claimant.

62. Because of these actions, this court should order Plaintiff and/or Plaintiff's attorney to pay monetary sanctions equal to Defendant's costs, fees, and expenses to reply to this Complaint and the original temporary restraining order pursuant to S.C. Code Ann. § 15-36-10(G)(1).

PRAYER FOR RELIEF

WHEREFORE, Defendant/Counterclaim Plaintiff prays for judgment in their favor and against Plaintiff as follows:

a. Pursuant to Rule 57, this Court may order a speedy hearing on a declaratory judgment action and may advance it on the calendar. Defendant requests this Court order a speedy hearing pursuant to Rule 57.

b. A finding that Plaintiff has not joined the proper parties to this matter.

c. A finding that Defendant is not a proper party to this matter.

d. A denial of Plaintiff's request for declaratory judgment that S.C. Code Ann. § 42-9-260 is unconstitutional.

e. A finding that Plaintiff's Complaint is in violation of the South Carolina Frivolous Proceedings Act codified at S.C. Code Ann. § 15-36-10(A)(4).

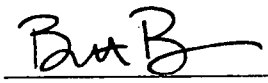
f. A finding that the motion for a temporary restraining order was not warranted under the existing law.

g. A monetary award equal to the total costs and fees related to the response and defense of the Complaint and/or the temporary restraining order;

h. All attorney's fees and costs;

i. Pre- and post-judgment interest in the statutory amount; and

j. Any other relief this Court deems just.



LANDON L. HUGHEY, ESQUIRE
BRETT H. BAYNE, ESQUIRE
MCANGUS GOUDELOCK & COURIE, L.L.C.
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
Columbia, South Carolina 29211-2519
(803) 779-2300
Attorneys for the Employer/Carrier

Columbia, South Carolina
March 5, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-05888

Clarence Winfrey,

Claimant/Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

DEFENDANT STATE OF SOUTH CAROLINA'S ANSWER IN REPLY TO CLAIMANT/PLAINITFF'S AMENDED SUMMONS AND COMPLAINT

Defendant State of South Carolina hereby answers Claimant/Plaintiff Clarence Winfrey's Amended Complaint as follows. All allegations of the Amended Complaint are denied unless specifically admitted herein.

FOR A FIRST DEFENSE
Response to Factual Allegations

1. Paragraph 1 states a legal conclusion and does not require a response, however, Defendant State of South Carolina denies that Section § 42-9-260 of the South Carolina Code of Laws is unconstitutional, and would show that:

    a. Claimant/Plaintiff lacks standing to challenge the constitutionality of §42-9-260;

    b. § 42-9-260 is not unconstitutional;

c. § 42-9-260 does not violate Claimant/Plaintiff's rights to due process of law pursuant to either the Constitution of the United States or the Constitution of the State of South Carolina;

d. § 42-9-260 does not violate the Equal Protection Clause;

e. § 42-9-260 does not violate the Administrative Procedures Act;

f. Claimant/Plaintiff does not have a property interest or property right in discretionary temporary worker's compensation benefits paid pursuant to § 42-9-260;

g. Claimant/Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of discretionary temporary disability benefits; and

h. Claimant/Plaintiff does not have any legal or constitutional right to notice prior to termination of discretionary temporary disability benefits.

2. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 2, and therefore denies those allegations.

3. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3, and therefore denies those allegations.

4. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 4, and therefore denies those allegations.

5. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 5, and therefore denies those allegations.

6. With regard to paragraph 6, Defendant denies that the State of South Carolina was added as a party by Order dated January 31, 2014, and craves reference to the Order. Defendant denies that the State of South Carolina is a necessary party to any action challenging the constitutionality of a South Carolina statute. Defendant admits only that Rule 4(d)(4)(B) of

the South Carolina Rules of Civil Procedure requires that "[i]n any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General."

7. Defendant admits the allegations of paragraph 7.
8. Paragraph 8 states a legal conclusion and does not require a response, however, to the extent that paragraph 8 requires a response, Defendant denies those allegations, and would show that § 42-9-260 is constitutional.
9. Paragraph 9 states a legal conclusion and does not require a response, however, Defendant denies that § 42-9-260 is unconstitutional, and would show the following:
    a. Claimant/Plaintiff lacks standing to challenge the constitutionality of §42-9-260;
    b. § 42-9-260 is not unconstitutional;
    c. § 42-9-260 does not violate Claimant/Plaintiff's rights to due process of law pursuant to either the Constitution of the United States or the Constitution of the State of South Carolina;
    d. § 42-9-260 does not violate the Equal Protection Clause;
    e. § 42-9-260 does not violate the Administrative Procedures Act;
    f. Claimant/Plaintiff does not have a property interest or property right in discretionary temporary worker's compensation benefits paid pursuant to § 42-9-260;
    g. Claimant/Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of discretionary temporary disability benefits; and
    h. Claimant/Plaintiff does not have any legal or constitutional right to notice prior to termination of discretionary temporary disability benefits.

10. Defendant denies the allegations of "Section A," and specifically denies that § 42-9-260 is unconstitutional, and would show the following:

    a. Claimant/Plaintiff lacks standing to challenge the constitutionality of §42-9-260;

    b. § 42-9-260 is not unconstitutional;

    c. § 42-9-260 does not violate Claimant/Plaintiff's rights to due process of law pursuant to either the Constitution of the United States or the Constitution of the State of South Carolina;

    d. § 42-9-260 does not violate the Equal Protection Clause;

    e. § 42-9-260 does not violate the Administrative Procedures Act;

    f. Claimant/Plaintiff does not have a property interest or property right in discretionary temporary worker's compensation benefits paid pursuant to § 42-9-260;

    g. Claimant/Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of discretionary temporary disability benefits; and

    h. Claimant/Plaintiff does not have any legal or constitutional right to notice prior to termination of discretionary temporary disability benefits.

11. "Section A" of Claimant/Plaintiff's Amended Complaint is a legal argument, and does not require a response. However, Defendant denies that § 42-9-260 is unconstitutional and would show that:

    a. Claimant/Plaintiff lacks standing to challenge the constitutionality of §42-9-260;

    b. § 42-9-260 is not unconstitutional;

    c. § 42-9-260 does not violate Claimant/Plaintiff's rights to due process of law pursuant to either the Constitution of the United States or the Constitution of the State of South Carolina;

d. Claimant/Plaintiff does not have a property interest or property right in discretionary temporary worker's compensation benefits paid pursuant to § 42-9-260; and

e. Claimant/Plaintiff does not have any legal or constitutional right to a hearing prior to the termination of discretionary temporary disability benefits.

12. "Section B" of Claimant/Plaintiff's Amended Complaint is a legal argument, and does not require any response. However, Defendant denies that § 42-9-260 is in conflict with the Administrative Procedures Act.

13. "Section C" of Claimant/Plaintiff's Amended Complaint is a legal argument, and does not require any response. However, Defendant denies that §42-9-260 violates the Equal Protection Clause.

14. With regard to paragraph 1 of Claimant/Plaintiff's prayer for relief, Defendant craves reference to the public record and denies the allegations to the extent that paragraph 1 is inconsistent with the public record. Defendant denies that Claimant/Plaintiff is entitled to any relief whatsoever. Moreover, even assuming, *arguendo*, that Claimant/Plaintiff is entitled reinstatement of benefits, Defendant State of South Carolina is without the authority to reinstate benefits, and any benefits should be paid by Carrier/Defendant American Fire & Casualty Insurance Company c/o Liberty Mutual Group.

15. Defendant denies that Claimant/Plaintiff is entitled to the relief sought in paragraph 2 of Claimant/Plaintiff's prayer for relief, and would should that Defendant lacks standing to challenge the constitutionality of § 42-9-260.

16. Defendant denies that Claimant/Plaintiff is entitled to the relief sought in paragraph 3 of Claimant/Plaintiff's prayer for relief, and would aver that this court is without jurisdiction to grant such relief.

17. With regard to paragraph 4 of Claimant/Plaintiff's prayer for relief, Defendant denies that Claimant/Plaintiff is entitled to any relief whatsoever.

FOR A SECOND DEFENSE
Constitutionality of Statute

18. Section 42-9-260 of the South Carolina Code of Laws is constitutional.

FOR A THIRD DEFENSE
Lack of Subject Matter Jurisdiction

19. This Court lacks jurisdiction to reinstate worker's compensation benefits, and otherwise lacks subject matter jurisdiction over this action.

FOR A FOURTH DEFENSE
Failure to State Facts Sufficient to Constitute a Cause of Action

20. Claimant/Plaintiff lacks standing to challenge the constitutionality of § 42-9-260; accordingly the Amended Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE
Failure to Present Justiciable Controversy

21. Claimant/Plaintiff's Amended Complaint fails to present a justiciable controversy, and accordingly should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to constitute a cause of action.

FOR A SIXTH DEFENSE
Mootness

22. Claimant/Plaintiff's Amended Complaint fails for mootness, as the underlying worker's compensation action has been litigated, and a favorable ruling of this court would not resolve the alleged controversy.

FOR A SEVENTH DEFENSE
Constitutional Estoppel

23. Claimant/Plaintiff is barred from challenging the constitutionality of § 42-9-260 based upon the doctrine of Constitutional Estoppel.

FOR AN EIGHTH DEFENSE

24. Defendant reserves the right to add additional defenses, including additional affirmative defenses, as discovery progresses.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, Defendant State of South Carolina prays that this Court:

A. denies any and all relief sought by the Plaintiff;

B. declares that § 42-9-260 is constitutional; and

C. grants such other and further relief as the Court may deem just and proper.

signature to follow

Respectfully Submitted,

ALAN WILSON
Attorney General

J. EMORY SMITH, JR.
Deputy Solicitor General

KRISTIN M. SIMONS
Assistant Attorney General

BY: Kristin M. Simons
KRISTIN M. SIMONS
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(803) 734-3970

ATTORNEYS FOR DEFENDANT
STATE OF SOUTH CAROLINA

April 21, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Clarence Winfrey)
Plaintiff,)
vs.)
)
State of South Carolina, et al)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2013_-CP-40-05888

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
_____, Bar No. _____	Kristin M. Simons, Bar No. 74004
Address:	Address:
_____	P.O. Box 11549, Columbia, SC 29211
Phone: _____Fax _____	Phone: 803.734.6134 Fax803.734.3677
E-mail: _____Other: _____	E-mail: ksimons@scag.govOther: _____

2014 APR 21 P 1:39

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Judgment on the Pleadings
Estimated Time Needed: _____ Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Kristin M. Simons 4/21/2014
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 15.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-05888

Clarence Winfrey,

Claimant/Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

DEFENDANT STATE OF SOUTH CAROLINA'S MOTION FOR JUDGMENT ON THE PLEADINGS

TO: Preston F. McDaniel, Esquire, Attorney for Claimant/Plaintiff, and Brett H. Bayne, Esquire, Attorney for Defendant American Fire & Casualty Insurance Company c/o Liberty Mutual Group:

PLEASE TAKE NOTICE THAT the Defendant State of South Carolina, by and through the undersigned counsel, will move before this Honorable Court within ten (10) days hereof (or at such time and place as the Court determines) for an Order of Judgment on the Pleadings against the Claimant/Plaintiff pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, on the following grounds.

1. Claimant/Plaintiff's Complaint fails to present a justiciable controversy in that Claimant/Plaintiff lacks standing to challenge the constitutionality of § 42-9-260, as

he has failed to allege any injury, and because a favorable ruling would not redress the alleged controversy.

2. Claimant/Plaintiff's Complaint fails to present a justiciable controversy in that the alleged controversy is moot, as the underlying worker's compensation action has been litigated, and a favorable ruling would not resolve the alleged controversy.
3. Claimant/Plaintiff is barred from challenging the constitutionality of § 42-9-260 under the doctrine of Constitutional Estoppel.
4. Claimant/Plaintiff cannot establish a due process violation, because as a matter of law, as insurers are not state actors under the Fourteenth Amendment, and accordingly, there is no state action.
5. Claimant/Plaintiff cannot establish that § 42-9-260 violates the Due Process Clause because, as a matter of law, there is no property interest in discretionary, temporary workers compensation benefits paid pursuant to § 42-9-260(A).
6. Even if Claimant/Plaintiff could establish a property interest in temporary benefits paid at the discretion of the employer pursuant to § 42-9-260, due process does not require a pre-termination hearing, and is satisfied by § 42-9-260(C), which specifically provides that upon the termination of temporary benefits, the employee may request a hearing to have payments reinstituted, and that the hearing must be held within 60 days.
7. Claimant/Plaintiff cannot establish, as a matter of law, that § 42-9-260, which provides for the payment of temporary worker's compensation benefits at the discretion of the employer, and for the termination of those benefits, violates the Equal Protection Clause. The statute is rationally related to the state's interest in

protecting injured workers by encouraging the prompt payment of temporary worker's compensation benefits, among other things.

8. Claimant/Plaintiff cannot establish that § 42-9-260 violates the South Carolina Administrative Procedures Act.

9. The Amended Complaint fails to state a claim for which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

This Motion is supported by the pleadings in this case, the South Carolina Rules of Civil Procedure, the statutory and common law of the State of South Carolina and the United States of America, and any memoranda and other materials that may be filed in this action.

Respectfully Submitted,

ALAN WILSON
Attorney General

J. EMORY SMITH, JR.
Deputy Solicitor General

KRISTIN M. SIMONS
Assistant Attorney General

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ATTORNEYS FOR DEFENDANTS

April 21, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-05888

Clarence Winfrey,

Claimant/Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

DEFENDANT STATE OF SOUTH CAROLINA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Background and Procedural History

On or about June 6, 2014, Plaintiff initiated a claim for workers compensation benefits with the South Carolina Worker's Compensation Commission, alleging he suffered a work-related injury on May 29, 2013. Amend. Comp. p. 2. Plaintiff requested temporary total disability benefits applicable under the South Carolina Workers Compensation Act, but declined to request a hearing. Amend. Comp. p. 3. American Fire & Casualty Insurance Company c/o Liberty Mutual Group (Carrier) paid temporary total benefits from July 11, 2013, to September 14, 2013, at which time the carrier terminated benefits, citing a good faith investigation which revealed that the claim was not compensable. Amend. Comp. p. 3. On or about September 18, 2013, Claimant filed a Form 15 Temporary Compensation Report requesting a hearing to determine entitlement to further temporary compensation benefits. The Worker's Compensation Commission found, in an Order dated December 12, 2013, that Carrier properly terminated

temporary total benefits pursuant to a good faith investigation. On December 18, 2013, Plaintiff filed a Form 30, Request for Commission Review of all findings of fact and arguing that the Commission erred in shifting the burden of proof to Plaintiff that the employer/insurer did not conduct a good faith investigation. On or about January 13, 2014, a hearing was held to determine whether Claimant sustained an injury by accident arising out of an in the course of his employment resulting in compensable disability. The Worker's Compensation ultimately found that Claimant sustained a compensable injury and reinstated temporary total benefits from September 15, 2013. Upon information and belief, the December 12, 2013, Order and the Order on the merits were appealed to the full commission.

Plaintiff challenges the constitutionality of Section 42-9-260 of the South Carolina Code of Laws. Section 42-9-260(A) allows an employer to start payment of temporary benefits to an employee who has been out of work due to a reported work-related injury or occupational disease for eight days. The payments may be continued for up to 150 days from the date of the report of the injury "without any waiver of grounds for good faith denial." § 42-9-260(A). If the employer continues to pay temporary benefits past 150 days, the benefits may not be terminated without an evidentiary hearing and approval of the commission. S.C. Code Ann. § 42-9-260(F). Subsection (B) provides the grounds upon which an employer may terminate benefits prior to the 150 days, and does not require a pre-termination hearing, but does allow the employee to request a hearing upon termination of benefits, which must be held within 60 days of the request for the hearing. § 42-9-260 (C). Moreover, an employee may request a hearing prior to the termination of temporary benefits, or at any time. S.C. Code Ann. § 42-17-20. Section 42-17-20 provides that "[i]f the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this Title within fourteen days after the employer has knowledge

of the injury...either party may make application to the commission for a hearing in regard to the matters at issue and for a ruling thereon." Plaintiff argues that the termination of temporary benefits paid at the discretion of the employer within the 150 days, and prior to a hearing, constitutes a deprivation of a property interest without due process and equal protection under the law. The Plaintiff's claims fail as a matter of law, and the State of South Carolina is entitled to judgment on the pleadings.

STANDARD OF REVIEW

Judgment on the pleadings is proper where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant. Where the pleadings disclose all facts necessary or present no issue of fact, the Court may exercise its discretion. *Rosenthal v. Unarco Indus., Inc.*, 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). "A motion for judgment on the pleadings...will be granted 'when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts.'" *Brown v. United Ins. Co. of Am.*, 268 S.C. 254, 257, 233 S.E.2d 298, 300 (1977), quoting *Wooten v. Standard Life & Casualty Insurance Co.*, 239 S.C. 243, 248, 122 S.E.2d 637, 639 (1961). Here, judgment on the pleadings is appropriate because Defendant State of South Carolina is entitled to a judgment in its favor as a matter of law, regardless of the outcome of any disputed facts.

Plaintiff's Amended Complaint challenges the constitutionality of Section 42-9-260 of the South Carolina Code of Laws. "This Court is directed by the constitution, and our precedent, to make every effort to find acts of the General Assembly constitutional." *Joytime Distribs.*, 338 S.C. at 653, 528 S.E.2d at 657. As the South Carolina Supreme Court stated in *S. Carolina Pub.*

Interest Found. v. S. Carolina Transp. Infrastructure Bank, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013):

> This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). "A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution." *Segars–Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Id.*

The presumption in favor of constitutionality is very difficult to overcome, and "places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the constitution." *S. Carolina Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 334, 741 S.E.2d 739, 745 (2013), reh'g denied (May 15, 2013), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 313, 187 L. Ed. 2d 221 (U.S.S.C. 2013). Furthermore, Plaintiff raises a facial challenge, which is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 543, 737 S.E.2d 830, 843 (2012), reh'g denied (Jan. 10, 2013), quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

ARGUMENT

1. Lack of Subject Matter Jurisdiction

As a threshold matter, Defendant State of South Carolina asserts that while this Court has subject matter jurisdiction to determine the constitutionality of Section 42-9-260 of the South Carolina Code of Laws, this court lacks subject matter jurisdiction to provide Plaintiff with any other relief.

First, Plaintiff seeks a Temporary Restraining Order requiring Defendants to reinstate benefits. Amend. Comp. pp. 14-15. This Court dismissed Plaintiff's claim for a temporary restraining order by Order dated October 9, 2013. The court reasoned that the temporary restraining order was improper under Rule 65 SCRCP, as requiring affirmative action, instead of restraining any behavior, and because the Workers Compensation Commission has exclusive subject matter jurisdiction over relief for work-related injuries, and the sole authority to reinstate benefits if appropriate. The unappealed October 9, 2013, Order of this Court is the law of this case. S.C. Code Ann § 14-3-330(4), *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 477, 602 S.E.2d 83, 86 (Ct. App. 2004) (An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable).

Second, Plaintiff seeks an order of this Court reinstating benefits and ordering that benefits may not be stopped without a due process hearing. Again, the October 9, 2013, Order finding that this Court is without subject matter jurisdiction to reinstate worker's compensation benefits is the law of this case and controls.

Third, Plaintiff asks for the court to Order that where an employer terminates temporary benefits within 150 days, and the employee requests a hearing to have the payments reinstituted pursuant to § 42-9-260(C), that the employer/insurer has the burden of proof to establish one of the six exceptions as created by § 42-9-260 (B) allowing for termination. This issue is not properly before this court. Plaintiff has appealed the decision of the Worker's Compensation Commission finding that the insurer properly terminated benefits, and arguing that the Commission erred in shifting the burden of proof in that matter to the Plaintiff. Accordingly, the Worker's Compensation Commission has exclusive jurisdiction over the issue. Moreover,

because the interpretation of the statute as to burden of proof is not properly at issue here, any opinion by this court would amount to an advisory opinion. See, *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("It is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.")

2. Lack of Standing

Plaintiff lacks standing to challenge the constitutionality of Section 42-9-260 of the South Carolina Code of Laws. "Standing is a fundamental requirement for instituting an action." *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985), *Brock v. Bennett*, 313 S.C. 513, 443 S.E.2d 409 (Ct. App. 1994). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the Constitution of the United States]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

Our courts are "obligated to inquire in every action whether a justiciable controversy exists." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002). "No justiciable controversy is presented unless plaintiff has standing to maintain action." *Brock*, 313 S.C. at 519, 442 S.E.2d at 413. The Plaintiff, as the party seeking to establish standing, carries the burden of demonstrating each of the three elements of standing, as follows: (1) the Plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 289 (2001), *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864 (2006). Here, a decision of this Court declaring Section 42-9-260 unconstitutional would

not redress Plaintiff's alleged injury. This Court cannot grant Plaintiff a pre-termination hearing, nor reinstate workers compensation benefits. Following the termination of benefits, Plaintiff exercised his right to request a hearing before the Workers Compensation Commission to have the temporary disability benefits reinstituted pursuant to § 42-9-260(C). The Committee has the exclusive jurisdiction to reinstate benefits if appropriate. Moreover, the Commission found that benefits were properly terminated.[1]

A. Constitutional Estoppel

Plaintiff, having sought and received benefits pursuant to Section 42-9-260, is estopped from now challenging its constitutionality. United States Supreme Court and South Carolina Courts have recognized the doctrine of constitutional estoppel, and have refused to allow litigants to challenge statutes under which they have voluntarily received benefits. *Strickland v. Flue-Cured Tobacco Co-Op. Stabilization Corp.*, 643 F. Supp. 310 (D.S.C. 1986), citing *United States v. City & County of San Francisco*, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). See also, *Ross v. Lipscomb*, 83 S.C. 136, 65 S.E. 451, 456, Am.St.Rep. 794 (1909) ("[a] party invoking the provisions of a statute is not in a position to raise the question of its constitutionality."); *Federal Deposit Ins. Corp. v. American Bank Trust Shares, Inc.*, 460 F. Supp. 549, 556 (D.S.C. 1979), ("one who utilizes an Act to gain advantages... is estopped from questioning the validity of its vital conditions.")

"It is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions...the Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its

[1] Upon information and belief, the Order of the Committee finding that benefits were properly terminated was appealed to the full Commission.

benefits." *Id* at 319, quoting *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed 2030 (1947) (internal quotations omitted). In fact, Plaintiff continues to maintain that he is entitled to benefits under the very statute that he claims is unconstitutional, and asks this court to reinstate those benefits. In addition to seeking and accepting temporary disability benefits pursuant to Section 42-9-260, Plaintiff exercised his right to request a hearing pursuant to subsection (C) following the termination of the benefits. Accordingly, by accepting temporary benefits paid pursuant to Section 42-9-260 and continuing to seek those benefits, and by invoking the protections of the statute by requesting a post-termination hearing, Plaintiff has waived his right to contest its constitutionality. *Id.*

B. Lack of Property Interest

Plaintiff argues that Section 42-9-260 violates the Due Process Clauses of the Constitutions of the United States and the State of South Carolina, in that it allows an employer to initiate temporary disability benefits, and to terminate those benefits under certain circumstances without a pre-termination hearing. Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. U.S. Const. amends. V and XIV, § 1; *Mathews v. Eldridge*, 424 U.S. 319, 331, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The fundamental requirements of due process under the Constitutions of United States and the State of South Carolina include notice, an opportunity to be heard in a meaningful way, and judicial review. U.S. Const. amends. V and XIV, § 1; S.C. Const. art. 1, § 22; *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Further, due process is flexible and calls for such

procedural protections as the particular situation demands. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

The initial inquiry in a due process analysis is whether the Plaintiff has been deprived of a protected property or liberty interest. In order to have a property interest in a benefit, one must have "more than a unilateral expectation of it;" one must have "a legitimate claim of entitlement to it." *Hamilton v. Board of Trustees of Oconee County School Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (1984). "Property interests are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Hamilton v. Board of Trustees of Oconee County School Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (1984). The determination of whether the expectation of entitlement to a benefit is sufficient to constitute a property interest "will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [agency]..." *Grimsley v. South Carolina Law Enforcement Div.*, 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012), quoting *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). "An important factor in the determination of a property interest is the presence or absence of mandatory language in the statute." *Id.*, citing *Bowles v. Tennant*, 613 F.2d 776, 778 (9th Cir. 1980).

Here, Plaintiff claims a property interest in temporary disability payments pursuant to Section 42-9-260 of the South Carolina Code of Laws, which allows an employer to start temporary disability benefits prior to any adjudication of the employees entitlement to those benefits, and to make those payments for up to one hundred fifty days without waving any defense to the employee's entitlement to the benefits. The language of the statute is clearly

discretionary: an "employer **may** start temporary disability payments immediately, and **may** continue these payments for up to one hundred fifty days." S.C. Code Ann. § 42-9-260(A) (emphasis added). The employer's payment of benefits under this section is absolutely voluntary. Moreover, if the employer choses to start paying temporary benefits, the statute allows the employer to terminate temporary benefits within 150 days upon certain grounds: "the payments **may** be terminated or suspended immediately at any time within the one hundred fifty days ..." S.C. Code Ann. § 42-9-260(B) (emphasis added). Here, the employer terminated benefits pursuant to Section 42-9-260(B)(3), citing a good faith investigation which revealed grounds for denial of the claim. Any expectation Plaintiff had of the continued payment of benefits pursuant to this section was clearly unilateral and unreasonable in light of the purely discretionary language of the statute.

In support of his argument that he has a property interest in discretionary, temporary disability payments, Plaintiff cites *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114, which held that a $16,000 check from the settlement workers compensation was marital property subject to equitable division. Clearly, Plaintiff's reliance on this case is misplaced. Plaintiff also cites *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), in which the United States Supreme Court held that due process required a hearing prior to the termination of welfare benefits, as "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." *Goldberg*, 297 U.S. at 262, 90 S.Ct. at 1017. Like *Orzzula*, the *Goldberg* case is distinguishable because it finds a property interest only where there was an established and definitive entitlement to the benefit. As the United State Supreme Court subsequently recognized, where, as here, there is no established and definitive entitlement to benefits under state law, there is no corresponding property interest. *American Manufacturers Mutual Insurance*

Company v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 143 L.ed.2d 130 (1999). In *American Manufacturers*, the Court considered a challenge to the Pennsylvania Worker's Compensation Act, which provided that once an employer becomes liable for a work-related injury, the employer must pay for all reasonable and necessary medical treatment. The Court held that employees did not have a property interest in having insurers pay for medical treatments prior to a determination that the treatments were reasonable and necessary, explicitly rejecting the argument that the termination of worker's compensation benefits without predeprivation notice and an opportunity to be heard constituted a deprivation of property without due process, The Court distinguished its holding in *Goldberg*:

> In *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), we held that an individual receiving federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in *Mathews, supra,* we recognized that the same was true for an individual receiving Social Security disability benefits. In both cases, an individual's entitlement to benefits **had been established**.... Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in *Goldberg* and the recipient of disability benefits in *Mathews.*

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 60, 119 S. Ct. 977, 990, 143 L. Ed. 2d 130 (1999) (emphasis added).

Thus, is clear that in order for a property interest in benefits to attach, the employee first must establish an entitlement to the benefit under state law. Here, Plaintiff cannot establish an entitlement to the temporary disability benefits under the South Carolina Workers Compensation Act. An employer starts paying temporary benefits, if at all, prior to any determination that the employee is entitled to such benefits, and without waiver of any defenses to the entitlement to those benefits. If the employer elects to start temporary disability payments under Section 42-9-

260(A), state law allows for the termination of those payments within 150 days upon certain grounds, including upon a good faith investigation by the employer which reveals grounds for denial of the claim. The Worker's Compensation Commission has the exclusive jurisdiction to determine whether temporary benefits were properly terminated. Plaintiff requested a hearing pursuant to Section 42-9-260(C) to have the payments reinstituted, and the Commissioner found that the payments were in fact properly terminated.[2] Thus, Plaintiff cannot establish any legitimate claim to entitlement to continued discretionary temporary benefits. Accordingly, Plaintiff's due process challenge fails.

Finally, even if Plaintiff had a constitutionally protected property interest in temporary disability payments paid pursuant to Section 42-9-260(A), due process does not require a pre-termination hearing, and is satisfied by the availability of a post-termination hearing. In *Mathews v. Eldridge*, the United States Supreme Court held that due process did not require a hearing prior to the termination of disability benefits. The Court reasoned that a while "[t]his Court consistently held that some form of hearing is required before an individual is finally deprived of a property interest, " a "claim to a *predeprivation* hearing as a matter of constitutional right rests on the proposition that **full relief cannot be obtained at a postdeprivation hearing**." *Mathews v. Eldridge*, 424 U.S. 319, 331-333, 96 S.Ct. 893, 900-902, 47 L.Ed.2d 18 (1976) (emphasis added). Here, as in *Mathews*, an employee whose benefits are terminated is awarded full retroactive relief if he ultimately prevails. Accordingly, even if Plaintiff had a constitutionally protected property interest in discretionary disability payments, due process is satisfied by Section 42-9-260(C) which provides for a postdeprivation hearing within 60 days. Moreover, the Workers Compensation Act does provide for a pre-termination hearing; an employee can request

[2] Upon information and belief, the Order of the Commissioner finding temporary benefits were properly terminated is on appeal to the full Commission.

a full hearing on the merits of his claim immediately upon initiating a claim with the Worker's Compensation Commission, or at any time thereafter. There is no requirement that an employee wait until benefits are terminated to request a hearing. Plaintiff certainly could have availed himself of the opportunity for an immediate, pretermination hearing, but simply failed to do so.

3. Equal Protection

The Equal Protection Clauses of our federal and state constitutions general requires that "all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994), quoting *GTE Sprint Communications v. Public Service Commission,* 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986). It has long been recognized that the Constitution does not bar the Legislature from classifying persons. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 147, 568 S.E.2d 338, 350 (2002). "The Equal protection clause only forbids 'irrational and unjustified classifications.' *Id.*, quoting *South Carolina Pub. Serv. Auth. v. Citizens & Southern Nat'l Bank*, 300 S.C. 142, 164, 386 S.E.2d 775, 786 (1989).

Our courts give great deference to the General Assembly's decision to create a classification. *Bodman v. State, 403 S.C. 60, 69-70, 742 S.E.2d 363, 367-68 (2013).* Consequently, those who challenge the validity of one under rational basis review bear the burden of proving its unconstitutionality beyond a reasonable doubt, and must "negate every conceivable basis which might support it." *Id.*, quoting *Lee v. S.C. Dep't of Natural Res.,* 339 S.C. 463, 470 n. 4, 530 S.E.2d 112, 115 n. 4 (2000). The classification will be upheld if it is not plainly arbitrary and there is any reasonable hypothesis to support it. *Skyscraper Corp. v. Cnty. of Newberry, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996).* Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction

actually motivated the legislature." *Bodman v. State, 403 S.C. 60, 69-70, 742 S.E.2d 363, 367-68 (2013).* The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.*

Plaintiff argues that Section 42-9-260 violates equal protection because employees who receive benefits for more than 150 days are entitled to a pre-termination hearing, while employees who receive benefits for less than 150 days are not. Where, as here, the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test applies. *City of Beaufort v. Holcombe*, 369 S.C. 643, 647-48, 632 S.E.2d 894, 897 (Ct. App. 2006). Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. *Skyscraper Corp. v. Cnty. of Newberry*, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996). "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993), citing *Cokeley v. Robert Lee, Inc.,* 197 S.C. 157, 14 S.E.2d 889 (1941). Section 42-9-260 treats all employees whose benefits are terminated within 150 days the same: they all have the opportunity to request a post-termination hearing to seek the reinstatement of benefits, which must be held in 60 days. Section 42-9-260 treats all employees who receive temporary disability benefits for more than 150 days the same: the benefits may not be terminated without an evidentiary hearing and commission approval. Section 42-9-260 encourages the prompt payment of temporary

disability benefits to injured workers. It allows an injured worker to receive temporary benefits without establishing the employer's liability for the injury. It allows the employer to mitigate any potential damages by starting payments and medical treatment, and allowing the employer to terminate those benefits if the employee is able to return to work, refuses medical treatment, or if the employer's investigation reveals good faith grounds for the denial of the claim. Allowing the employer to terminate discretionary disability payments within 150 days for the reasons set forth in § 42-9-260(B) provides an incentive for the employer to start disability payments to the injured worker immediately. Moreover, the 150 day period allows the employer to conduct an investigation of the claim, and allows the employee to prepare the claim for benefits.

4. Administrative Procedures Act

Plaintiff argues that the lack of a pre-termination hearing violates the administrative procedures act, arguing that it is a "contested case" within the definition of the Administrative Procedures act, and requires a an agency to determine rights after the opportunity for a hearing. Plaintiff argues that "a Claimant is forced to seek a hearing long after their benefits have been stopped." Amend. Comp. p. 10. This is simply not true. A claimant is not required to wait until an employer terminates temporary disability benefits in order to request a hearing, but can request a full hearing on the merits of his claim immediately upon filing the claim, or at any time thereafter.

In support of his argument, Plaintiff cites the definition of "contested case," which reads " a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the **legal rights, duties, or privileges** of a party **are required by law to be determined by an agency** after an **opportunity** for hearing." S.C. Code Ann. § 1-23-210(3).

Here, the termination of benefits does not fall within the definition of "contested case" as defined by the Administrative Procedures Act, as there is no law requiring the Worker's Compensation Commission to determine the duty of an employer to pay temporary disability benefits pursuant to Section 42-9-260(A), or the employee's right to receive those temporary disability benefits. Indeed, the plain language of the statue is clear that that there is no such duty on the part of the employer, and accordingly, no such right of the employee. The payment of temporary disability benefits pursuant to Section 42-9-260(A) is exclusively within the employer's discretion. Moreover, all that the definition requires is the opportunity for a hearing. As previously discussed, an employee can request a hearing on the merits at any time.

Thus, under Section 42-9-260, an employer has no **duty** to pay temporary disability benefits, and accordingly, there is no corresponding **right** of an employee to receive those benefits. Thus, it is clear that the termination of temporary disability benefits paid by the employer, where the employer has no duty to pay those benefits, and the employee has no right to receive those benefits is not a "contested case" for purposes of the Administrative Procedures Act, and no pre-termination hearing is required.

Respectfully Submitted,

ALAN WILSON
Attorney General

KRISTIN M. SIMONS
Assistant Attorney General

BY: Kristin M. Simons
KRISTIN M. SIMONS
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P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR STATE OF SOUTH CAROLINA

June 11, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CASE NO.: 2013 -CP-40-05888

CLARENCE B. WINFREY, JR.,)
Plaintiff,)
vs.)
)
AMERICAN FIRE AND CASUALTY CO.)
and THE STATE OF SOUTH CAROLINA)
Defendants.)

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm 1315 Elmwood Avenue Columbia, SC 29201 Phone: 803-771-7211Fax 803-252-0709 E-mail: mcdaniellaw@hotmail.comOther: _____	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

RICHLAND COUNTY FILED
2014 AUG -8 PM 3:10
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss State of South Carolina as a Party Defendant
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant 8/1/14 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☒ Other: Motion to Dismiss State of South Carolina as a Party Defendant

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____
Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

C/A No. 2013-CP-40-05888

RICHLAND COUNTY
FILED
2014 AUG -8 PM 3:10
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

**MOTION TO DISMISS
STATE OF SOUTH CAROLINA
AS A PARTY DEFENDANT**

TO: T. PARKIN HUNTER, ASSISTANT ATTORNEY GENERAL, AND BRETT H. BAYNE, ESQUIRE, ATTORNEYS FOR STATE OF SOUTH CAROLINA AND AMERICAN FIRE AND CASUALTY CO., RESPECTIVELY DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that prior to the hearing to be held in the above-referenced matter during the Non-Jury Term of Court for the week of August 11, 2014, or at such other time as

designated by the Court, the Plaintiff will move for an Order of the Court dismissing the State of South Carolina as a party to this action pursuant to SCRCP Rule 21. Said Motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.

Respectfully submitted,

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

August 1, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2013-CP-40-05888

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

IN RE:

South Carolina Workers Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

RICHLAND COUNTY
FILED
2014 AUG -8 PM 3:10
JEANNETTE W. McBRIDE
C.C.P. & G.S.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS STATE OF SOUTH CAROLINA AS A PARTY DEFENDANT

The Plaintiff would respectfully show unto the Court in support of the Motion to Dismiss the State of South Carolina as a party as follows:

1. That this is a declaratory judgment action challenging the constitutionality of a part of SC Code §42-9-260 as is set

forth in both the Complaint and the Amended Complaint which action was commenced by the filing of the original Complaint with the Court on September 27, 2013. In accordance with the Rules of the Circuit Court as to service of process, the action was duly and properly served on American Fire & Casualty Company at that time.

2. That in accordance with SCRCP, Rule 4(d)(4)(B), since the constitutionality of the statute was asserted, the Summons and Complaint attacking the constitutionality of the State was duly and properly served on Alan T. Wilson, SC Attorney General. The affidavit of service of process on the Attorney General was duly and properly filed with the Court on October 7, 2013, and is part of the Court Record.

3. That subsequent to the service of the Summons and Complaint upon the Attorney General no Answer or Reply or other pleading was filed by the Attorney General's office to the original Summons and Complaint. The Plaintiff would submit that he purpose of service of the Summons and Complaint upon the Attorney General is to notify the State that an action challenging the constitutionality of a statute has been brought in one of the Courts of the State so that the Attorney General in his responsibility as the chief legal officer for the State can review the Complaint and decide whether or not the State should intervene or apply to the Court to become a party to the action.

4. That on October 21, 2013 the Defendant American Fire & Casualty Company filed a Rule 12(b)(7) Motion with the Court

alleging that the Plaintiff had failed to join a necessary party pursuant to SCRCP, Rule 19. The Motion did not specify the name of the necessary party that was supposedly failed to be joined. Subsequent to that filing and through the time that the Motion was heard, no Motion was filed to join the State nor was there any Motion by the State of South Carolina to intervene as a party in the action.

5. That the Motion to Dismiss for failure to join a necessary party came to be heard by the Honorable G. Thomas Cooper, Jr., Presiding Judge for the Fifth Judicial Circuit who after argument denied the Defendant's Motion; in part because the Defendant had failed to name who was alleged to be an indispensable party and also because pursuant to Rule 19 the party claiming the non-joinder must set forth the name of the party and also, "the reason why the party was not originally joined" as a necessary party. As part of the Order denying the Motion, Judge Cooper also issued a Rule 19 Order finding that the State of South Carolina should be added as a necessary party and ordered that the Plaintiff amend his Complaint adding the State of South Carolina as a party and serving the Amended Complaint on the Attorney General within thirty (30) days of the date of the Order. The Order was complied with and the Amended Complaint was duly, properly and timely served.

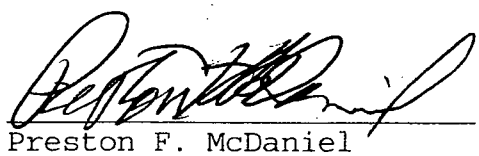
6. That after service of the Amended Complaint the Attorney General's office was allowed additional time to file an Answer and

Reply, which Answer and Reply was filed on April 21, 2014 and as part of that Answer and Reply under paragraph 6 of the Answer and Reply, the State of South Carolina denied specifically that, "the State of South Carolina is a necessary party to any action challenging the constitutionality of a South Carolina statute." The Plaintiff agrees with this statement by the State of South Carolina and concurs that it is not a necessary party to the action. Further, the Plaintiff would submit when initially served with the original Summons and Complaint, the Attorney General's office performed its constitutional and statutory responsibility as the State's Chief legal officer and decided not to intervene or request to be made a party to the action. Also, while the Circuit Court has the authority to add a party per its own Motion, only a Motion to Dismiss for failure to add a necessary party was before the Court and the Court by adding the Attorney General's office without notifying them and requesting whether or not in their opinion they should be added as a party, while not exceeding the authority of the Court should not have been ordered without the Attorney General's office being given an opportunity to state a position on the Record as to whether or not the State was a necessary party which is clearly the Attorney General's position as stated in its responsive pleading.

Wherefore for all the above stated reasons, the Plaintiff would move for an Order of the Court dismissing the State of South

Carolina as a party to this action pursuant to the Circuit Court Rules.

Respectfully submitted,



Preston F. McDaniel
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1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Plaintiff

August 1, 2014

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS
CLARENCE WINFREY, Claimant, v. AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP, Carrier, And THE STATE OF SOUTH CAROLINA, Defendants.	)))))))))))))))))	Civil Action No. 2013-CP-40-05888 **MEMORANDUM IN SUPPORT OF DEFENDANT AMERICAN FIRE'S ANSWER, COUNTERCLAIM, AND MOTIONS**

This claim arises out of an alleged accident on May 22, 2013. On that date, Claimant contends he was momentarily shocked by a rotisserie oven he was working on. Following the accident, Claimant continued to work for the remainder of the day and the following day. Claimant had scheduled time off after May 23, 2013. On May 28, 2013—six days after the accident—Claimant presented to Doctor's Care and Lexington Medical Center with severe three vessel coronary disease and an acute myocardial infarction which caused an acute ventricular septal defect. Following the diagnosis, Claimant underwent surgery to repair the ventricular septal defect caused by the acute myocardial infarction.

Following the May 22, 2013 accident, Defendants instituted weekly temporary disability benefits while conducting an investigation on the compensability of the claim. Defendants reserved their rights to deny the claim within 150 days pursuant to S.C. Code Ann. § 42-9-260.

Following the good faith investigation, Defendants denied Claimant's claim on September 12, 2013—within 150 days.

Following the denial of benefits, Claimant filed a Form 15, Section III requesting a hearing on September 18, 2013. On October 1, 2013, Claimant filed the underlying Summons and Complaint in Richland County Circuit Court alleging a bad faith denial of benefits, alleging that S.C. Code Ann. § 42-9-260 is unconstitutional, seeking a temporary restraining order to stop Defendants from denying the claim, and seeking an Order from Judge Lee finding the claim compensable and awarding benefits. On October 1, 2013, Judge Lee issued the temporary restraining order sought by Claimant related only to the denial and payment of benefits. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013. Judge Lee dismissed the temporary restraining order on October 9, 2013 based on a lack of jurisdiction to reinstate benefits. Defendants timely filed an Answer and Counterclaim asserting nine defenses and a counterclaim for costs and fees related to the frivolous pleading. Defendants also concurrently filed several motions with the Circuit Court which are addressed below.

After the temporary restraining order was rescinded, the Commission set Claimant's Form 15, Section III for a hearing before Commissioner Beck. In addition, Defendants filed several motions with the Commission including a Motion to Quash the deposition of the adjuster, a Motion to Quash discovery of the adjuster's claim file, and a Motion to Postpone the Hearing.

A hearing on all of the motions and on Claimant's Form 15, Section III was set on September 30, 2013 for November 11, 2013. Prior to the hearing, Commissioner Beck conducted a standard pre-hearing conference as well as a Motions Hearing wherein Commissioner Beck ruled on all outstanding issues raised by the motions. Following the hearing, Commissioner Beck issued a Decision and Order on December 5, 2013 finding that Defendants had conducted a good

faith investigation. Thereafter, Claimant timely filed a Form 30. The Full Commission affirmed Commissioner Beck's Decision and Order finding that Defendants properly denied the claim.

On October 22, 2013, after the Form 15 hearing was set by the Commission, Claimant filed a Form 50 requesting a hearing on compensability for alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. A hearing notice for the Form 50 hearing was sent by the Commission on December 6, 2013 with explicit instructions that the hearing would be to determine compensability of Claimant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. The Form 50 hearing was held before Commissioner Barden on January 13, 2014. Following the hearing, Commissioner Barden issued a Decision and Order on February 27, 2014. Defendants timely filed a Form 30 based on legal errors contained in Commissioner Barden's Decision and Order. The Full Commission affirmed Commissioner Barden's finding of compensability for the heart but reversed and denied compensability for the alleged brain and head injuries.

Subsequent to the hearing before Commissioner Barden, Judge Cooper conducted a hearing on all outstanding motions filed in the declaratory judgment action on January 15, 2014. Judge Cooper issued a Form 4 Order on January 16, 2014 denying Defendants' motion for fees, costs, and other relief related to the request for a declaratory judgment and granting Claimant's motion to dismiss Defendants' counterclaim related to the request for a declaratory judgment. Judge Cooper issued a second written Order on January 31, 2014 denying Defendants 12(b)(7) Motion to Dismiss and ordering that the State of South Carolina be added as a party pursuant to Rule 19 if Claimant wished to proceed to a determination of the constitutionality of S.C. Code Ann. § 42-9-260. Judge Cooper denied a subsequent Motion to Alter or Amend filed by Defendants pursuant to Rule 59(e).

Claimant filed an Amended Summons and Complaint on February 18, 2014 adding the State of South Carolina as a Defendant. Defendant American Fire filed an Answer and Counterclaim to the Amended Summons and Complaint on March 5, 2014. Claimant filed a Motion to Dismiss Counterclaim on March 14, 2014. Defendant American Fire has raised nine defenses in its Amended Answer and Counterclaim. In addition, Defendant American Fire has asserted a counterclaim for fees and costs related to the unlawful temporary restraining order. Defendant American Fire will move before this court to amend its Answer and Counterclaim only to change the counterclaim to an affirmative defense so that this court may adjudicate the issue. Defendant State of South Carolina filed its Answer asserting eight defenses and a Motion for Judgment on the Pleadings pursuant to Rule 12(c) on April 21, 2014. Additionally, Defendant American Fire has filed a Motion for Costs related to the original improper temporary restraining order.

In summation, the following is to be resolved by the Circuit Court:

Claimant has asked that (1) the court issue another temporary restraining order against Defendant; (2) the court determine whether S.C. Code Ann. § 42-9-260 is unconstitutional based on violations of due process and equal protection of the South Carolina and United States Constitutions; (3) the court reinstate workers' compensation benefits; (4) the court determine who has the burden of proof in a denied workers' compensation claim; and (5) the court dismiss Defendant American Fire's counterclaim for failure to state a cause of action.

Defendant American Fire has asked that (1) the court dismiss Defendant American Fire and Casualty as they are not a proper party to a individual declaratory judgment action; (2) the court deny Claimant's request for declaratory judgment; (3) the court find that the temporary restraining order was not warranted under the existing law; (4) the court find that Claimant was

in violation of the South Carolina Frivolous Proceedings Act related to the request for a temporary restraining order; (5) the Court sanction Plaintiff for his numerous frivolous filings and pleadings; and (5) the Court find that Claimant must pay Defendant American Fire all costs and fees associated with replying to the unlawful temporary restraining order.

Defendant State of South Carolina has asked that the court (1) dismiss Plaintiff's Complaint in its entirety; (2) deny Claimant's request for relief; (3) deny Claimant's request for a declaratory judgment; (4) grant other relief the court deems proper.

Defendant American Fire will incorporate by reference and join with Defendant State of South Carolina in their prior submission to this court addressing all constitutional issues including constitutional estoppel. This memorandum will address Defendant American Fire's request to dismiss American Fire as well as the request for sanctions and costs against Plaintiff.

I. THIS COURT SHOULD DISMISS DEFENDANT AMERICAN FIRE AS THEY ARE NOT A PROPER PARTY TO THIS ACTION.

As noted throughout, this matter was brought pursuant to the Declaratory Judgment Act. Plaintiff specifically seeks to invalidate S.C. Code Ann. § 42-9-260 on the grounds that it is facially unconstitutional. Defendant American Fire is the improper party to be protecting and/or defending the constitutionality of the Workers' Compensation Act in a Declaratory Judgment action. If this court were to rule in Plaintiff's favor, there is no relief that can be awarded to Plaintiff by Defendant American Fire. If this matter were simply ancillary to a proceeding (for example, the method in which a statute was applied to Plaintiff at trial was unconstitutional or a judge misstated a jury instruction resulting in a conviction) Defendant would be a proper party. However, that is not the case here. Rather, **Plaintiff has simply picked a defendant to name as a party in his challenge to the facial validity of S.C. Code Ann. § 42-9-260**. Hypothetically, this situation is functionally no different than if the undersigned chose to name opposing counsel

as a defendant in order to challenge the constitutionality of a statute requiring the undersigned to pay sales tax. There would be no relief that opposing counsel could grant and opposing counsel would not be the proper party to defend the constitutionality of a statute raised by the undersigned—yet that is exactly what Plaintiff asserts in this matter.

In his January 27, 2014 filing, Plaintiff cites to Marley v. Kirby and Last v. MSI Construction Company as support for his position that a private party has been called to defend the constitutionality of a statute. However, Marley involved a challenge to a comparative negligence jury instruction at trial and Last involved a challenge to the method by which a statute was applied and the case was *on appeal* from a Workers' Compensation Hearing. Neither were declaratory judgment actions. **This case is a declaratory judgment action**. The sole purpose of the case brought by Plaintiff is to challenge the constitutionality of a statute. A search of South Carolina case law with the connector terms of "declaratory judgment" and "unconstitutional" reveals a total of 142 reported cases involving a request to find a statute unconstitutional. Of these 142 cases, only a handful involves a challenge to constitutionality of an act or statute in the course of a hearing or trial (and, therefore, would not be a declaratory judgment action). However, a majority of these cases consist of declaratory judgment actions filed with the sole purpose being to declare a statute unconstitutional. **There is not one reported case involving a declaratory judgment action filed to declare a statute unconstitutional that involves a private entity as a defending party**. Further, every single one of the cases involves a state or municipal agency and/or state or municipal government[1] as the moving plaintiff or the proper defendant. Plaintiff has not pointed to a single declaratory judgment action that involved a

[1] A survey of the cases show that the parties include, but are not limited to: The State of South Carolina, The Governor of South Carolina, The South Carolina Department of Revenue, The South Carolina Department of Transportation, The Attorney General of South Carolina, Richland County, Richland County School District One,

private party as a, let alone the sole, defendant. Plaintiff can provide no authority for Defendant American Fire's involvement in this suit and Defendant American Fire should be dismissed from further proceedings in this action.

II. DEFENDANT AMERICAN FIRE'S AFFIRMATIVE DEFENSE FOR SANCTIONS, FEES, AND COSTS AGAINST PLAINTFF.

Plaintiff has alleged he sustained an injury by accident to multiple body parts, including his heart, following a work related incident involving electrical shock. Plaintiff has filed a Complaint attempting to either (1) improperly circumvent the Commission by asking for a determination of compensability from this court or (2) improperly establish a claim for bad faith denial of benefits by asking this court to order payment of benefits in direct contravention of the South Carolina Workers' Compensation Act.

South Carolina Code Regulations 67-504, 67-505, and 67-606 implement the procedures authorized by S.C. Code Ann. § 42-9-260 regarding the termination and/or suspension of temporary compensation benefits. Regulation 67-504 states that within the first 150 days after the employer receives notice of injury, temporary compensation payments may be suspended or terminated immediately without a prior hearing, and the employee may later request a hearing to have the payments reinstated. S.C. Code Ann. § 42-9-260(B)(3) provides that following a good faith investigation of the claim, and within 150 days of notice of injury, Defendant may deny compensability of the claim.

In the present claim, Defendant conducted a good faith investigation and subsequently denied compensability of the alleged injuries within the 150 day window. Defendant's denial is permitted pursuant to S.C. Code Ann. § 42-9-260(B)(3) and Reg. 67-504 which allows a denial of compensability following a good faith investigation. When a claim is denied, a claimant is not

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The Town of Edisto Beach, The City of Charleston, The South Carolina State Ports Authority, and The South

entitled to temporary compensation benefits under the Act. The Act provides that if an employer and injured employee fail to reach an agreement in regard to compensation within fourteen days after the employer has knowledge of the injury, then the worker may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon. See S.C. Code Ann. § 42-17-20. Further, all questions arising under the Act, if not settled by agreement of the parties, shall be determined by the Commission. See S.C. Code Ann. § 42-3-180.

Under the Workers' Compensation Act, Claimant has the burden of proving that he sustained an injury by accident and that his injury is compensable. See Frady v. Pacific Mills 231 S.C. 601, 99 S.E.2d 398 (S.C. 1957). Defendant does not carry the burden of disproving compensability. Claimant's sole method of proving compensability is by filing the proper form with the Commission, requesting a hearing, and conducting a hearing before the Commission. During a hearing, the Commission receives evidence from both parties and makes a determination of compensability.

Defendant has asked this Court to award all costs, fees, and any other award it deems proper **related solely to the Defendant's response to the improper temporary restraining order issued by this Court on October 1, 2013**. Plaintiff and/or Plaintiff's attorney has clearly framed this action in his Complaint as a suit for a denial of benefits in bad faith. (See Plaintiff's Complaint Paragraph 3). While Plaintiff has asserted a Declaratory Judgment Action, the clear underlying purpose of this Complaint is a bad faith denial of benefits. (See Plaintiff's Complaint Paragraph 3). Plaintiff is well aware that this Court has no jurisdiction to issue workers' compensation benefits and any motion or Order filed and/or requested by Plaintiff is improper. Plaintiff's motion for a temporary restraining was clearly without merit and was clearly not warranted under existing law.

Carolina Law Enforcement Division.

Rule 11(a), SCRCP provides that "**[t]he signature of an attorney**...constitutes a certificate by him that he has read the pleading, motion or other paper; **that to the best of his knowledge, information and belief there is good ground to support it**; and that it is not interposed for delay." (emphasis added). Rule 11(a) further provides that "[i]f a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it...**an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee** ." (emphasis added).

S.C. Code Ann. § 15-36-10(A)(4) (also known as the South Carolina Frivolous Proceedings Act), states that:

> "**[a]n attorney**...participating in a civil...action...**may be sanctioned for**:
>
> (a) **filing a frivolous** pleading, **motion, or document if**...
>
> (ii) a reasonable attorney in the same circumstances would believe that under the fact, **his claim or defense was clearly not warranted under <u>existing law</u>** and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; [or]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that **the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party**; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe **the pleading, motion, or document is frivolous, interposed for merely delay**, or merely brought for any purpose other than...adjudication of the claim or defense upon which the proceedings are based;
>
> (b) **making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts**; or

(c) **making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law** or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

(emphasis added).

S.C. Code Ann. § 15-36-10(B)(2) goes on to state that "[i]f...an attorney...has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances." Under S.C. Code Ann. § 15-36-10(G)(1), sanctions may include "...reasonable costs and attorney's fees of the prevailing party. Costs shall include but not be limited to the time required...by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding."

Plaintiff and/or Plaintiff's attorney specifically and clearly violated S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) and 15-36-10(A)(4)(c). Cook v. Mack's Transfer clearly establishes that this court has no jurisdiction to hear this matter or this type of action. For reference, The Cook court concluded "**[i]f the dispute concerns an alleged wrongful denial of statutory benefits, the Commission has exclusive jurisdiction to adjudicate the controversy. Whether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction. Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts...**" (emphasis added).

In addition, S.C. Code Ann. § 42-1-540, states "[t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title,

respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee....as against the employer, at common law or otherwise, on account of such injury, loss of service, or death**." (emphasis added).

Plaintiff's attorney specifically and clearly violated Rule 11, S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) and 15-36-10(A)(4)(c). Cook stands for the proposition that this exact action taken by Plaintiff and/or Plaintiff's attorney is improper, without legal merit or basis, and is functionally frivolous. Further, Plaintiff and/or Plaintiff's attorney is most certainly aware of S.C. Code Ann. § 42-1-540 which clearly states that the Act is the sole and exclusive remedy for Claimant. Because of these actions, this court should order Plaintiff and/or Plaintiff's attorney to pay monetary sanctions equal to Defendant's costs, fees, and expenses to reply to this Complaint and the original temporary restraining order pursuant to S.C. Code Ann. § 15-36-10(G)(1).

Plaintiff's replies to this issue address the propriety of filing a declaratory judgment action and that sanctions should not be awarded for the filing of the declaratory judgment action. Defendant has not argued, at this time, for sanctions related to the declaratory judgment action. Rather, the sole issue before this court is whether or not the request for an improper temporary restraining order that Plaintiff knew he had no authority to seek should result in compensation to Defendant for the costs and fees associated with replying to and challenging the improper temporary restraining order as well as an award of sanctions against Plaintiff.

III. SHOULD THIS COURT DETERMINE THAT SANCTIONS ARE NOT WARRANTED AGAINST PLAINTIFF, DEFENDANT AMERICAN FIRE SEEKS REIMBURSEMENT FOR ALL COSTS AND FEES ASSOCIATED WITH THE IMPROPER TEMPORARY RESTRAINING ORDER.

On October 1, 2013, Claimant filed the underlying Summons and Complaint in Richland County Circuit Court alleging a bad faith denial of benefits, alleging that S.C. Code Ann. § 42-9-

260 is unconstitutional, seeking a temporary restraining order to stop Defendants from denying the claim pursuant to Rule 65, SCRCP, and seeking an Order from Judge Lee finding the claim compensable and awarding benefits. Judge Lee issued the temporary restraining order sought by Claimant related to the denial of benefits on October 1, 2013. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013. Judge Lee dismissed the temporary restraining order on October 9, 2013 based on a lack of jurisdiction to reinstate benefits under the Workers' Compensation Act.

Plaintiff is well aware that this Court has no jurisdiction to issue workers' compensation benefits and any motion or Order filed and/or requested by Plaintiff is improper. Plaintiff's motion for a temporary restraining was clearly without merit and was clearly not warranted under existing law. Cook v. Mack's Transfer clearly establishes that this court has no jurisdiction to hear this matter or this type of action. The Cook court concluded "[i]f the dispute concerns an alleged wrongful denial of statutory benefits, **the Commission has exclusive jurisdiction to adjudicate the controversy**. Whether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction. Since a remedy exists under the statute, the injured worker has no right to bring a common law action in the courts..." (emphasis added). Cook stands for the proposition that this exact action taken by Plaintiff and/or Plaintiff's attorney is improper and without legal merit or basis.

In addition, S.C. Code Ann. § 42-1-540, states "[t]he rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies of such employee**....as against the employer, at

common law or otherwise, on account of such injury, loss of service, or death." (emphasis added).

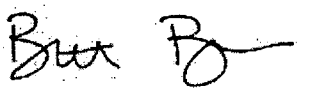
In Chambron v. Lost Colony Homeowners Ass'n, 451 S.E.2d 410, 317 S.C. 43 (S.C.App. 1994, the Court stated that "[b]y the clear language of [Rule 65], the recovery of costs and damages is limited to the period of a temporary restraining order or temporary injunction. The possibility of damages during the duration of a temporary injunction is provided for by security because the party which is the object of the injunctive relief has not had an opportunity to fully adjudicate his rights." Further, in Martin v. Paradise Cove Marina, Inc., 559 S.E.2d 348, 348 S.C. 379 (S.C.App. 2001), the court stated "Recovery under an injunction bond is limited to costs and damages incurred during the period of the temporary restraining order or temporary injunction." (*citing to* Chambron at 45, 451 S.E.2d at 411). The Martin court went on to state that "Rule 65(c) does not state a time limit within which a party suffering injuries due to a temporary injunction must move to recover damages on the injunction bond. 'The general rule is that no right or cause of action accrues for the wrongful issuance of an injunction until there has been a final determination of the action in which the injunction was issued.' 43A C.J.S. Injunctions § 320 (1978)."

Because of the improper temporary restraining order sought by Plaintiff, Defendant incurred substantial, excessive, and unnecessary costs exceeding $2,000 in defending their rights before this court. This court should order Plaintiff and/or Plaintiff's attorney to pay monetary value equal to Defendant's costs, fees, and expenses to reply to the original improper temporary restraining order pursuant to S.C. Code Ann. § 42-1-540, Rule 65, Cook, Chambron, and Martin.

CONCLUSION

Defendant American Fire seeks dismissal from this case as they are not a proper party to this action. Further, Defendant American fire respectfully asks this Court sanction Plantiff for the frivolous pleadings contained herein. If this Court determines that Plaintiff's conduct does not rise to the level where sanctions are warranted, Defendant American Fire seeks reimbursement of costs and fees pursuant to Cook, Chambron, Martin, Rule 65, and S.C. Code Ann. § 42-1-540.

MCANGUS GOUDELOCK & COURIE, L.L.C.



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ATTORNEYS FOR DEFENDANT, AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP

August 28, 2014

STATE OF SOUTH CAROLINA CIRCUIT COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL
CLARENCE B. WINFREY, JR., Claimant/Plaintiff, v. AMERICAN FIRE & CASUALTY INSURANCE COMPANY, Carrier/Defendant, and The State of South Carolina, Defendants.	)	C/A No. 2013-CP-40-05888 **MEMORANDUM IN REPLY TO THE MEMORANDUM OF THE DEFENDANT AMERICAN FIRE'S ANSWER, COUNTERCLAIM, AND MOTIONS**
IN RE: South Carolina Workers Compensation Commission WCC File No.: 1306305 CLARENCE B. WINFREY, JR., Employee-Claimant, v. ARCHWAY SERVICE, INC., Employer, and AMERICAN FIRE AND CASUALTY CO., As Carrier, Defendants.	)	

While the Plaintiff disagrees with the Statement of Fact and issues for decision by the Court and while the Plaintiff will rely on the Memorandums and Motions as previously filed and the pleadings and arguments made within the pleadings, by way of

further Reply to the specific issues addressed in the Memorandum, the Plaintiff would Reply as follows:

I. THE COURT SHOULD NOT DISMISS THE DEFENDANT AMERICAN FIRE AS THEY ARE A PROPER PARTY TO THIS ACTION.

Quoting from Power v. McNair, 255 SC. 150, 177 S.E.2d 551 (1970) which quotes from Guimarin & Doan v. Georgetown Textile and Manufacturing Co., 249 S.C. 561, 155 S.E.2d 618 (1967) (an action between private individual parties) concerning a declaratory judgment action:

> "In order to maintain an action under the statute, there must exist a judiciable controversy."

Then citing from Dantzler:

> "In Dantzler, we referred to the elements necessary to constitute a judiciable controversy as follows: 'where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal right with the respect thereto, which are denied by the adverse party, there is judicial controversy calling for the invocation of a declaratory judgment action."

In this case, the Defendant American Fire agreed to and began paying temporary total disability benefits to the Plaintiff under the SC Workers' Compensation Act, a statutorily created scheme of compensation requiring the payment of benefits by an employer and/or its insurance carrier to an injured worker for work-related injuries, or in other words, personal injuries that arise out of and in the scope of the employment. After starting those benefits, the Defendant American Fire claimed the benefit of SC Code §42-9-260 and stopped benefits without a hearing.

Thus the actions of the Defendant American Fire under the statute have created a justiciable controversy between the parties and under the declaratory judgment action statute the parties are entitled to a declaration of rights, duties and responsibilities by this Court.

The Plaintiff did not simply pick the Defendant to name as a party to challenge the constitutionality of the Statute but the Defendant by taking the action of stopping compensation under the statute subjected itself to a determination as to whether or not that statute and the action taken pursuant to that statute are constitutional.

Next, in reference to the uniqueness, or maybe better put, the lack of previous declaratory judgment actions concerning personal injury actions, the Plaintiff would first note to the Court that there is no other statutorily created compensatory scheme that provides for benefits payable to an individual by a private party in reference to personal injury a person, other than the Workers' Compensation Act. Therefore, due to the uniqueness of the Act itself is the reason that there is very little case law involving a declaratory judgment action and the constitutionality of a statute involving a private party.

However, there are numerous cases involving the constitutionality of a statute between individual private parties that are not governmental entities. See for example: Last v. MSI

Construction Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991); Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979). Of course the Last decision was a decision involving the constitutionality of a statute under the Workers' Compensation Act. In reference to both the Marley and the Ramey decisions, they involve personal injury lawsuits that were filed as a result of and requesting damages (benefits) for personal injury. While different in that the Plaintiff filed a claim for benefits due to his work-related accident at the point that a Claimant files a request for compensation benefits with the employer/insurance carrier, it is the same as filing a claim with the Defendant and/or his insurance company for damages. However, again there is simply no other administrative/statutory scheme for the compensation of personal injury damages. Therefore, the whole purpose of the declaratory judgment action process and specifically SC Code §15-53-20, 30 and particularly 80, is to have a declaration made of the rights between the parties and to have a determination made as to the constitutionality of any statute, ordinance or regulation. Thus, the Defendant American Fire being the party that took the action pursuant to the statute that is thought to be unconstitutional by the Plaintiff, the Defendant American Fire is the proper party against whom the action should be taken in accordance with SC Code §15-53-80 which specifically provides for the declaration and the determination of the constitutionality of a statute between and affecting the parties. It further provides that

where the constitutionality of a statute is attacked between two private parties, the party challenging the constitutionality is to serve the Attorney General with a copy of the proceedings so that the Attorney General may, "be entitled to be heard". Therefore, again, the Defendant American Fire being the party that sought the protection of the statute and who took action under the statute, they are the proper specific party for a determination in this case as to the controversy that has arisen between the Defendant and the Claimant, the Plaintiff in this action.

II. THE DEFENDANT AMERICAN FIRE'S COUNTERCLAIM (NOT AN AFFIRMATIVE DEFENSE) FOR SANCTIONS, FEES AND COSTS AGAINST THE PLAINTIFF HAS ALREADY BEEN RULED UPON BY THE COURT AND FOR THE SAME REASONS PREVIOUSLY ARGUED TO THE COURT SHOULD BE DENIED.

In response to this section of the Memorandum, the Plaintiff would submit that prior to the filing of this Answer and Counterclaim to the Amended Complaint, the Defendant American Fire had filed the same identical Counterclaim to the original Complaint filed in this matter. As to the Counterclaim that was filed as to the original Complaint, the, "Counterclaim" was set out in that pleading as paragraphs 29 through 57. As to the Counterclaim filed as to the Amended Complaint which simply added the State of South Carolina as a party pursuant to the Order of the Circuit Court, that Counterclaim was set out in that pleading as paragraphs 34 through 62. Based on a review of the two (2) Counterclaims contained in the pleadings, the Counterclaims are exactly and completely identical in every word. After hearing on

the Motion to Dismiss this Counterclaim in the first Answer, the Court issued its Order on January 16, 2014 granting the Motion of the Plaintiff to dismiss the Counterclaim. Therefore, this issue related to this Counterclaim and whether this should be stricken has already been decided and is res judicata. Smith v. Smith, 272 S.C. 350, 251 S.E.2d 768 (1979). The Motion also specifically violates the provisions of SCRCP, Rule 43(L).

That while an Order has already been issued by the Court dismissing this Counterclaim, the Plaintiff would argue that in addition to filing the Answer to the Amended Complaint, the Defendant American Fire as set forth above filed this Counterclaim under the SC Frivolous Proceedings Act, SC Code §15-36-10(A)(4). While that Code Section commonly referred to as the Frivolous Proceedings Act, provides for a determination of whether its provisions have been violated and a Motion for Sanctions, it does not provide for separate causes of action.

SC Code §15-36-10(C)(1) specifically provides that at the conclusion of a trial or after a verdict for or against damages has been rendered or after a case has been dismissed by a directed verdict, a summary judgment or judgment notwithstanding the verdict, "**upon Motion of the prevailing party**", the Court shall then proceed to determine if the claim or defense was frivolous. While the Act specifically provides for a Motion, prior to such a Motion even being filed, there must be a verdict

or a case must be dismissed which has not occurred in this matter. Nowhere in the Statute does it provide for a separate cause of action and only provides for a Motion being filed by a, "prevailing" party **in any action filed.** Therefore, the Counterclaim which is based upon the Frivolous Proceedings Act fails to state a cause of action.

Wherefore the Defendant American Fire's Counterclaim should again be struck and the Motion denied.

III. ATTORNEY'S FEES ARE NOT RECOVERABLE UNLESS AUTHORIZED BY CONTRACT OR BY STATUTE.

Quoting from Hugler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978) with Chief Justice Lewis delivering the opinion of the Court:

> "The question at issue in this appeal is whether an insured is entitled to recover attorney's fees incurred by him in the successful defense of a declaratory judgment action brought by the insurer in an effort to relieve itself of coverage under an automobile liability insurance policy . . . ."
>
> * * *
>
> "As a general rule, attorney's fees are not recoverable unless authorized by contract or statute. No right to recover is here asserted under any statute. Appellate then must recover if at all upon some contractual right."

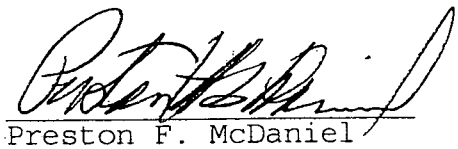
There is no right of recovery under any statute and specifically no right of recovery of attorney's fees under the declaratory judgment statute.

Therefore, outside of attorney's fees being awarded in an ancillary action brought after a final determination as to frivolous defenses or causes of action or as otherwise allowed by statute or by Rule 11, there simply is no right to recover attorney's fees. The issue is without merit.

Further, as a rebuttal to the jurisdictional argument by the Commission and also the characterization of this declaratory judgment action which has been herein repeated ad nauseum, first the Plaintiff did not, and the Plaintiff would like to reiterate did not, file a bad faith failure to pay benefits cause of action nor is that alleged anywhere in the declaratory judgment Complaint. What the Plaintiff did seek is a determination by the Court that as a matter of law the statute under which the Defendant American Fire stopped the Plaintiff's benefits is unconstitutional. As is argued previously numerous times and as this Court is well aware, the Commission has absolutely no authority or jurisdiction, nor can the Commission rule on the constitutionality of a statute. See Travelscape, LLC v. SC Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). (Proper challenge is by appeal or declaratory judgment action). The determination of the law is strictly within the purview of this Court and the Supreme Court. Also as previously argued, where the Supreme Court, Court of Appeals or this Court finds that the Commission has committed an error of law and the Court determines what the law is, this Court or our Appellate Courts will remand the case

to the Commission for an entry of judgment in accordance with the ruling of the Court. This Court absolutely has the authority to declare the statute unconstitutional and to remand to the Commission to enter an Order reinstating benefits. There is no attempt by this Court nor the Plaintiff to interfere with the statutory authority of the Commission under the Act. On legal issues, it is the responsibility of this Court to determine those legal issues and for the Commission to follow the dictates of the law as determined by the Court.

Respectfully submitted,



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September 4, 2014

STATE OF SOUTH CAROLINA)
)
CIRCUIT
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL

C/A No. 2013-CP-40-05888

CLARENCE B. WINFREY, JR.,

Claimant/Plaintiff,

v.

AMERICAN FIRE & CASUALTY INSURANCE COMPANY,

Carrier/Defendant,

and

The State of South Carolina,

Defendants.

IN RE:

South Carolina Workers Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

REPLY MEMORANDUM TO DEFENDANT STATE OF SOUTH CAROLINA'S MEMORANDUM AND MOTION FOR JUDGMENT ON THE PLEADINGS

By way of Reply to the Motion and Memorandum in Support of Motion for Judgment on the pleadings filed by the State of South Carolina, first the Plaintiff will not bore the Court with any additional statement of the background of the case as the

background and facts are sufficiently set forth in all the pleadings and by the parties in reference to what is currently pending before the Court. With that said, the Plaintiff would reply to the standard of review and the various arguments made. The arguments made in the Memorandum in fact, are not only as to the Motion for Judgment on the Pleadings but also are on the substantive constitutional and statutory construction made in the Complaint that has been filed by the Plaintiff in this action. A very quick review will establish that the arguments made in the Motion and Memorandum are identical to the arguments and Memorandum on the issues presented by the Complaint. With that said:

STANDARD OF REVIEW

The Plaintiff could not disagree more and would submit that the standard of review as set forth by the Defendant State of South Carolina is a misstatement of the standard of review applicable to a judgment on the pleadings Motion filed under SCRCP Rule 12(c). Quoting the Supreme Court with Justice Finney speaking for the Court in a case of Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 as later cited by Justice Pleicones in 2013 in the case of Homebuilders Assoc. of SC v. School Dist. #2 of Dorchester County, 405 S.C. 458, 748 S.E.2d 230 (2013):

> "A judgment on the pleadings against the Plaintiff is not proper if there is an issue of fact raised by the Complaint which, if resolved in favor of the

> Plaintiff, would entitle him to judgment. A judgment on the pleadings is in the nature of a demurrer. All properly pleaded facts or allegations are deemed admitted for purposes of consideration of a demurrer. When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a Complaint is sufficient if it states any cause of action or if it appears that the Plaintiff is entitled to any relief whatsoever. Our Courts have held that pleadings in a case should be liberally construed so that substantial justice is done between the parties. Further, a judgment on the pleadings is **considered to be a drastic procedure by our Courts.**" (Emphasis added).

The Complaint alleges and it is undisputed that the Plaintiff was receiving weekly workers' compensation benefits and that those benefits under the Statute were stopped without a hearing under the provisions of SC Code §42-9-260(B,106). The Plaintiff has alleged that this violates his procedural due process rights under law and filed a declaratory judgment action to have a declaration made pursuant to this Court's jurisdiction to make the declaration. Therefore, since there is a legal inference that the Plaintiff is entitled to the relief sought under the D.J. Act; i.e. declaration as to constitutionality, and there are properly plead facts that would establish that judgment on the pleadings should not be granted.

REPLY ARGUMENTS

1. **Lack of Subject Matter Jurisdiction**

While the caption of the argument is that this Court lacks subject matter jurisdiction, the Defendant State of South Carolina then admits that the Court has subject matter jurisdiction over declaratory judgment actions and has the authority to determine and declare whether or not a statute is constitutional but then alleges that in some way the Court lacks subject matter jurisdiction because the Court cannot grant the Plaintiff any relief. While in reality, this is not actually a subject matter jurisdiction argument, the Plaintiff would simply respond that this Court unquestionably does have jurisdiction to grant at least part of the relief sought; i.e. a declaration of rights. See SC Code §15-53-20, 30.

After this part of the argument, first, the Defendant State of South Carolina alleges that because the Plaintiff sought a Temporary Restraining Order which was denied that that has become the law of the case because it was not immediately appealed. This is simply not true. While the Plaintiff would agree that under SC Code §14-3-330(4) that the denial of a Temporary Restraining Order <u>can</u> be immediately appealed, it does not have to be. In this case, a Rule 59(e) Motion was filed to the denial, the issue is preserved for later appeal and a Plaintiff may simply wait and appeal all of the issues at the same time after a final judgment is entered in the action. The Court will find that most of the cases deal with whether or not (and in fact the case cited by the State of South Carolina is a case on

whether or not an injunction was immediately appealable) the intermediate action can be appealed. For an excellent review of the law in reference to the fact that while a Temporary Restraining Order may be immediately appealed, but that the Plaintiff may at his option wait to appeal that decision until the final conclusion of the case, please see the case of Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). (In that case, Link was not prevented from appealing a summary judgment decision as to one of the causes of action where he preserved it by the filing of a Rule 59(e) motion and then appealed it after a conclusion of the final Order of the case.)

Second, the Defendant State of South Carolina argue again that because the Plaintiff did not appeal the Temporary Restraining Order denial that findings within that Order have become the law of the case which is simply not true for the above-stated reasons.

Third, under the lack of subject matter jurisdiction argument while this Court has the jurisdiction to declare whether or not the statute in question is unconstitutional, the Defendant State asks for judgment on the pleadings based only on one part of the relief requested which is that the Plaintiff seeks a declaration as to which party has the burden of proof when and if a hearing is held under the statute. While again this is not truly applied to subject matter jurisdiction, in answer to this

argument under SC Code §15-53-20, this Court has the, "power to declare rights, status, and other legal relations . . ." between the parties and under SC Code §15-53-30, this Court has the further authority where any party's, "rights, status or other legal relations are affected by a statute . . ." to have those rights, statues or other legal relations determined and to, "have determined **any question of construction** or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." The Plaintiff has asked for a legal construction of the statute as to who has the burden of proof under that statute. The issue is patently without merit.

2. **Lack of Standing**

The Defendant State of South Carolina appropriately sets out the three-prong test for standing and does not challenge that prong of the test that holds that the Plaintiff must have suffered an injury in fact nor does the Defendant challenge the second prong which there must be a causal connection between the injury and the conduct complained of, i.e., the stopping of benefits versus the constitutionality of the statute under which those benefits were stopped. The Defendant asserts however that under the third prong of the test which is that it must be likely and not merely speculative that the injury will be redressed by a favorable decision that the Claimant lacks standing and asserts

that a determination of unconstitutionality would not redress the Plaintiff's alleged injury because under the position of the Defendant, the Court cannot grant the Plaintiff a pre-termination hearing nor can the Court reinstate workers' compensation benefits. This is simply not true. It is Black Letter law that the Commission is the finder of fact but it is also Black Letter Law that this Court and our Appellate Courts have the exclusive jurisdiction to declare the law and to apply the law. For example, the compensability of a particular event as an accident within the purview of the workers' compensation law is a question of law to be decided by the Courts. Stuckie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (SC App. 1987). Where the issue is one of law to be decided by the Courts, the Courts decide the legal issues and remand the cases to the Commission as the Court did in the Grayson case for the Commission to enter an Order ordering the Claimant to be entitled to benefits under the Act. Quoting from Grayson as to the ruling of the Court:

> "For the reasons stated, the appealed Order is reversed and remanded with direction that judgment be entered for the Claimant."

In addition, it is also Black Letter law as previously cited in the numerous Motions that the Plaintiff has had to respond to that the Commission can only apply the law as determined by the Court to the facts and has absolutely no authority to address the constitutionality of a statute. Travelscape, LLC v. SC Dept. of

Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). Therefore, this Court has the jurisdiction and authority to declare the statute unconstitutional and to return this matter to the Commission for an entry of judgment ordering the reinstatement of benefits due to the unconstitutionality of the statute. Clearly the Claimant has standing and this Court can grant the relief requested.

A. **Constitutional Estoppel**

Defendant State of South Carolina's argument in this regard is frivolous but the Plaintiff would ask that the Court forgive the submission of this argument based on the Attorney General's lack of understanding of benefits under the SC Workers' Compensation Act. The answer to the argument and the reason that this is frivolous is contained within the first sentence wherein the argument begins with the statement that, "Plaintiff, having sought and received benefits pursuant to §42-9-260 . . . is estopped from challenging the constitutionality." The Plaintiff is not receiving benefits pursuant to SC Code §42-9-260 and did not request benefits under that section; He claimed benefits due to his disability. Benefits to an injured worker for periods of total disability are paid under three statutes. SC Code §42-17-10 provides for the payment of weekly compensation benefits to an employee based upon the agreement of the parties to start benefits. Where the claimant has a total loss of earning capacity, weekly compensation benefits are paid for that period of

disability under SC Code §42-9-10 and §42-1-120 defining total disability under the Act. These are the provisions of the Act under which benefits have been paid since the inception of the Act in 1936. SC Code §42-9-260 is the stop payment provision of the Act and §42-9-260(B)(1-6) provides for the method whereby an insurance carrier which has started benefits may stop those benefits. However unfortunately that part of the statute provides for stopping benefits without a hearing giving rise to this declaratory judgment action. It is the Defendant insurance carrier in this case that sought the use of the provisions of the statute and not the Plaintiff. The Defendant American Fire & Casualty Company took the affirmative action to stop benefits pursuant to that Code Section. Obviously, due to this misunderstanding, this issue is without merit.

B. Lack of Property Interest

This argument by the Defendant State of South Carolina is in fact a responsive argument to the Claimant's argument that the statute violates due process. The Plaintiff does not disagree with the first paragraph of this argument but the argument in paragraph 2 states as an initial premise, "the initial inquiry in a due process analysis is <u>whether the Plaintiff has been deprived of a protected property or liberty interest."</u> Therefore, let us determine whether or not the Plaintiff has a property interest in weekly compensation benefits payable under the Act. The SC

Supreme Court has answered affirmatively as is set out in the Plaintiff's Memorandum in the Complaint that a claimant does have a property interest in weekly compensation benefits under the Act. Quoting the SC Supreme Court from the premier case, that for some reason was left out of the analysis by the Defendant State of South Carolina, Last v. MSI Construction Co., Inc., 305 S.C. 349, 409 S.E.2d 344, 336 (1991):

> We have previously recognized that entitlement to workers' compensation benefits constitutes a property interest. Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987). We therefore decline to construe §42-1-470 to unconstitutionally deprive an inmate **of a property interest without due process of law."** (Emphasis added).

The Court also in that case went on to explain what is explained above in reference to the payment of weekly compensation benefits. Those benefits are not payable under §42-9-260 and that is not the statute that entitles a claimant to benefits. That statute is referred to as the stop payment statute which sets forth the provisions, where benefits have been started, under which an employer and/or its insurance carrier may apply to stop those benefits. Again quoting from the Supreme Court from Last:

> "Under the Workers' Compensation Act, a claimant is entitled to compensation for total disability resulting from a work-related injury. SC Code Ann. §42-9-10 (sup. 1990). 'Disability' is statutorily defined as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment'. SC Code Ann. §42-1-120 (1985)."

As noted above, benefits are payable under those statutes and may be started by agreement under §42-17-10. Further, the Act has always provided, current SC Code §42-17-20, that where a disagreement arises as to the continuation of such weekly benefits that the insurance carrier may, "**make application to the Commission for a hearing.**" Thus, the Act has always provided for due process of law before those benefits once an employee was receiving those disability benefits to be stopped.

The Plaintiff actually welcomes the citation by the Defendant State of South Carolina and appreciates reference to the citation to American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) because that United States Supreme Court decision specifically supports the Plaintiff's position taken in this case. As is quoted by the Defendant in their brief, which will be quoted here, in American Manufacturers the Court stated in pertinent part:

> "In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), we held that an individual **receiving** federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in Mathews, supra, we recognized that the same was true **for an individual receiving Social Security disability benefits.** In both cases, an individual's entitlements to benefits **had been established . . .**" (Emphasis added).

In this case, the Plaintiff's entitlement to weekly compensation benefits had been established which were being paid by agreement in accordance with the above-stated Code sections and also in

accordance with SC Code §42-9-260(A). Subsection A of the statute only provides and adds that the insurance carrier may start benefits but retains the right within the first 150 days of those payments to assert and does not waive any grounds for good faith denial. Thus the SC Supreme Court has stated that a claimant has a property interest in weekly compensation benefits and the evidence establishes that by agreement those weekly benefits had been started to the Plaintiff in this declaratory judgment action and due process requires a hearing before stopping those benefits.

The Defendant State of South Carolina also cites to the United States Supreme Court case of which the Plaintiff is well aware Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 900-902, 47 L.Ed.2nd 18 (1976) and cites that case for the proposition that a predetermination hearing in reference to Social Security disability benefits is not necessary. [As will be argued later, this case does not involve the payment of public assistance benefits or Social Security disability benefits under a Federal Program but instead involves the payment of benefits under an insurance contract by a private party under State law to which an entirely separate line of cases apply.] However, the Mathews decision in fact supports the Plaintiff's entitlement to a due process hearing in this case. Even in public assistance and/or public benefit programs, the requirement of a due process hearing before termination of benefits depends on the adequacy of the

pre-termination due process procedures and the procedural protections available to the recipient. As the Court stated, "due process is flexible and calls for such procedural protections as a particular situation demands." The Court then turned first to, "a description of the procedures for termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures." In Mathews, the Court found that the following pre-termination procedures were adequate to meet due process requirements:

1. The beneficiary was informed that benefits may be terminated and was provided with a summary of the evidence upon which the proposed determination to terminate was based and was afforded an opportunity to review the medical reports and other evidence in his case file. He could also respond in writing and submit additional evidence.

2. After the initial determination is made by a state agency which is accepted by the Social Security Administration, the recipient was notified in writing and informed of the "reasons for the decision and of his right to seek a de novo reconsideration of the State Agency".

3. After such notification and all of the above procedural rights, benefits would be terminated effective two months **after** the month in which medical recovery was found to have occurred.

4. If after the initial determination by the agency, #2 reconsideration by the state agency, and #3 the SSA's review and #4 reconsideration determination and #5 after notification to the recipient of the decision, he then has a right to a hearing.

Also in reaching its decision in Mathews, the Court specifically noted, "a further safeguard against mistake is the policy of allowing the disability recipient's representative **full access to all information relied upon by the state agency**." In light of all the above, pre-termination due process procedures and safeguards the Court determined that a full-fledged administrative hearing was not necessary. Our statute simply has none of those and neither the Defendant State of South Carolina nor the Defendant American Fire & Casualty Insurance Company can point to any case where there are absolutely no safeguards as there are in this case where the Court has not required a due process hearing before the deprivation of a property right under the constitution.

Now as to a line of cases that really should be considered and should be applied is the line of cases in reference to a private party taking action, such as we have here, under a state statute including the US Supreme Court's decision in Sniadach v. Family Finance Corp. of Bayview, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). In Sniadach, the United States Supreme Court was called upon to review whether or not a state statute that

allowed a private individual to garnish the wages of an individual involved a debt collection action without a hearing prior to a determination in that action that the debt was in fact owed is constitutional. In Sniadach, the Defendants finance company filed a Summons & Complaint alleging that the Defendant Sniadach owed $420.00 on a promissory note. The Wisconsin statute provided that after the filing of a Summons & Complaint that the plaintiff Family Finance Corp. could garnish the wages of the defendant to pay off the debt before there was any determination as to whether or not the debt was in fact owed. The Supreme Court held that the deprivation of the defendant's property interests under the provisions of the statute by the plaintiff, a private party, denied the defendant's due process of law and declared the statute unconstitutional on that basis.

The Plaintiff would submit that based on every precedent cited by the Defendant State of South Carolina, by the Defendant American Fire & Casualty Insurance Company and by the Plaintiff that given the total lack of any pre-termination procedures of any nature in the statute that the Supreme Court would find SC Code §42-9-260(B)(1-6) procedurally inadequate to protect the due process rights of Mr. Winfrey.

3. **Equal Protection**

In response to this part of the Memorandum in Support of the Motion, the Plaintiff would simply refer the Court to the

argument contained in the Complaint in reference to equal protection under §9c. The Plaintiff would only reiterate and ask the Court's reference to the case of Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d, 883 (1979) and the other cases cited all for the proposition that while the General Assembly has the right to make reasonable classifications of persons and property, such classifications **must not be "arbitrary but [instead] rest upon some reasonable basis"**. There is simply no rational or reasonable basis for the classification under the statute. The Claimant would add specific reference to the case of United States Fidelity & Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d, 239 (1972).

While Ramey is dealt with in the brief and not to be redundant, but in Ramey two individuals one driver and one passenger were riding in an automobile and were injured in an automobile accident. The guest passenger under the statute had to meet a higher standard as to burden of proof in a negligence action for damages than the driver. The Court found there was no logical or rational difference between the two individuals as plaintiffs in a negligence action as to their burden of proof. In Unites States Fidelity & Guaranty Co., the Plaintiff was simply a business required to pay a business license fee to operate that business in the city. The City of Newberry required three types of businesses to pay for a license fee at a higher rate, one being life, health, accident and hospital insurance

companies, another being companies that delivered (without prior order) crackers, cakes and tobacco and another one being a Fire & Casualty Insurance Co., which was the Plaintiff's business. The Court found that there was simply no rational basis for requiring the Plaintiff's business to pay a higher rate. It was simply a business requesting a license to do business and there was no rational basis for any distinction.

The same applies here. Any person involved (i.e., receiving weekly disability benefits) is simply an injured worker (claimant) who due to disability is entitled to temporary weekly disability compensation during the disability. There is simply no rational basis for treating those receiving benefits less than 150 days differently than those receiving benefits afterwards. A review of the statutes and regulations established that the basis upon which an insurance carrier can request to stop payment of benefits are the same before and after 150 days.

4. **Administrative Procedures Act**

In addition to the argument made in the Complaint in reference to the Administrative Procedures Act and as set forth previously, the Attorney General's Memorandum misunderstands and does not refer to the appropriate statutes under which benefits are being paid. §42-9-260 is specifically referenced as the stop payment statute. The only thing that subsection A of that statute added to the previous requirements of the Act is the allowance to

the employer and/or its insurance carrier of a period of 150 days to deny the claim where it has been initially accepted. As the statute puts it, "without waiver of any grounds for good faith denial".

Since the inception of the Act, where the employer and/or its insurance carrier and the employee agree that compensation is due and benefits are started, the parties are required to file the agreement with the Commission and that agreement has the same force and effect as an Order of the Commission ordering compensation. The document that has been used since the Commission developed forms is a Form 15. Under the provisions of SC Code §42-9-260, the insurance carrier **must** file a Form "immediately upon starting compensation". A Form 15 is the form used for that purpose. However, again this statute does not serve as the basis for the settlement to and the payment of compensation. §42-9-10 and §42-1-120 serve as the basis for the payment of temporary total disability benefits and requires the payment of disability benefits for all periods of disability. For an injured worker to be entitled to and for the defendants to pay disability compensation, there must be an initial agreement that the Claimant is disabled as a result of injury by accident.

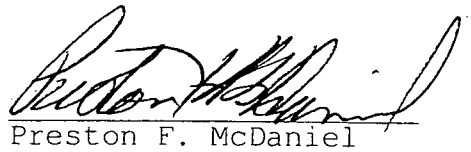
Based on this, the argument by the Attorney General that this is not a contested case is in error. The parties have to agree that the Claimant is entitled initially to disability

compensation benefits. Subsequent to that, the employer for certain enumerated reasons during the first 150 days may then deny benefits. Obviously there is a disagreement to the continuation of benefits. In this case, the Defendant American Fire & Casualty Insurance Company disputed that they owe any further benefits and filed for the Protection Act under §42-9-260. To quote Webster's Dictionary, "contest," is defined, as to make the subject of dispute, contention, or litigation; especially: dispute, challenge. Actually in Webster's the words "contest" and "deny" have a very similar meaning in that under both words, one of the meanings is, "to say you do not accept".

The Plaintiff would submit simply that where the carrier admits and agrees that the Claimant is entitled to weekly compensation benefits for his disability and they then change that position and deny that the right to benefits means that there is now a, "contest" between the two parties and there is a contested case under the Administrative Procedures Act which requires a hearing under that Act. In fact, not only are the provisions of §42-9-260 in conflict with the provisions of the Administrative Procedures Act, they are also in conflict with SC Code §42-17-20. Since this Court is committed to a liberal construction of the Act in favor of benefits to the injured worker under the clear language of the APA and the discrepancies under the Act a hearing is required before the right so the parties are determined.

Finally there is a duty created by the Act and by the agreement of the parties to pay benefits and there is a corresponding right to have that changed only after hearing.

Respectfully submitted,



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September 4, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

C/A No. 2013-CP-40-05888

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF THE COMPLAINT

IN RE:

South Carolina Workers
Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

The Plaintiff would submit that the provisions of S.C. Code §42-9-260 and specifically subsection (B)(1-6):

(A) violate the Plaintiff's right to due process of law by allowing for a deprivation of his property interest without notice and without a hearing and opportunity to be heard;

(B) that the provisions of §42-9-260(B)(1-6) are in direct conflict with the provisions of the Administrative Procedures Act concerning notice and hearing in a contested case; and

(C) denies the Plaintiff equal protection of the laws by creating an irrational classification, i.e., " a legislative classification which excludes .., (or treats differently).., a certain class of persons" .., which is not, "rationally related to the objective of the statute." The Plaintiff would argue as follows:

I.

S.C. CODE §42-9-260 VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS OF THE PLAINTIFF UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS BY ALLOWING THE DEFENDANTS TO STOP WEEKLY DISABILITY COMPENSATION WITHOUT A HEARING AND DETERMINATION AS TO WHETHER THE DEFENDANTS ARE ENTITLED TO STOP PAYMENTS.

"In order to be entitled to the procedural safeguards encompassed by the due process clause of the Fourteenth Amendment (notice and an opportunity to be heard) the complaining party must suffer from deprivation of a liberty or **property interest.**" Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.E.2d 548 (1971) (Emphasis added). "Only when such a property

interest exists does a constitutional right to a hearing attach." Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

Our Supreme Court has ruled, "workers' compensation benefits constitute a property interest." Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334, 336 (1991); Orszula v. Orszula, 292 S.C. 264, 356 S.E. 2d 114 (1987). Therefore, any attempt to deny a Claimant of his "property interest" without a hearing violates the due process clauses of both the United States and South Carolina Constitutions.

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the United States Supreme Court held that procedural due process requires that a pre-termination hearing be held when public assistance payments to welfare recipients are discontinued. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Court held that even in that situation, the entitlement to welfare benefits constituted a sufficient property interest that due process requirements attached. The Court in Goldberg struck down a New York statute which allowed the termination of benefits prior to a hearing. The Court reasoned that,

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

* * *

> Thus the crucial factor in this context . . . 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. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . ."

* * *

> "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." Goldberg, 397 U.S. at 262-263, 264, 265-66, 90 S.Ct. at 1019.

Our Courts have similarly stated that compensation laws,

> Constitute a form of social legislation and were enacted primarily for the benefit, protection and **welfare** of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue to obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficial purposes for which they were enacted. Cokeley v. Robert Lee, Inc., 197 (1941) (Emphasis added).
> SC 157, 14 SE2d 889

In Goldberg, the Court stated that public assistance "is not mere charity, but a means to promote the general **welfare**, and secure the Blessings of Liberty to ourselves and our Posterity." Goldberg, 397 U.S. at 266, 90 S.Ct. at 1019 (Emphasis added). The Court continued and stated that "pre-termination evidentiary

Hearings are indispensable to that end." Id. Our Supreme Court in the case of Hamm v. Mullin's Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) quoting from the United States Supreme Court decision in Powell v. Alabama, 287 U.S. 45 at p. 68, 53 S.Ct. 55 at p. 64, 77 Law Ed. 158 at p. 170, 84 ALR 527 stated:

> "It never has been doubted by this Court or any other so as far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns' have been repeated by varying forms of expressions in a multitude of decisions."

In Brown v. S.C. State Bd., of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990), our Court echoed those sentiments and held that "[w]where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866, 867 (1990). Therefore, under South Carolina Law, a Claimant, as a matter of fundamental due process, is entitled to a hearing before the termination of his/her disability benefits.

Addendum to Due Process Argument

The United States Supreme Court decision in American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct.

977, 143 L.Ed.2d 130 (1999) quoted first by the State specifically supports the Plaintiff's position taken in this case. Quoting from American Manufacturers, the Court stated in pertinent part:

> "In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), we held that an individual **receiving** federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in Mathews, supra, we recognized that the same was true for an individual **receiving** Social Security disability benefits. In both cases, **an individual's entitlement to benefits had been established . . ."** (Emphasis added).

In this case, the Plaintiff's "entitlement" to weekly compensation benefits had been established which were being paid by agreement in accordance with Code §42-9-10, §42-1-120 and §42-17-10 and also in accordance with SC Code §42-9-260(A). Subsection A of the statute only provides and adds that the insurance carrier may start benefits but retains the right within the first 150 days of those payments to assert, and does not waive, any grounds for good faith denial. Thus the SC Supreme Court having held that a claimant has a property interest in weekly compensation benefits and the evidence establishes that by agreement those weekly benefits had been started and paid to the Claimant (the Plaintiff in this declaratory judgment action), i.e., his entitlement to such payments; due process requires a hearing before stopping those benefits.

As for the United States Supreme Court decision in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 900-902, 47 L.Ed.2nd 18 (1976) that case stands for the proposition that a pre-termination hearing in reference to Social Security disability benefits is not necessary considering all of the pre-termination due process procedures and safeguards that are in place under the SSA's process. [As will be argued later, this case does not involve the payment of public assistance benefits or Social Security disability benefits under a Federal Program but instead involves the payment of benefits under an insurance contract by a private party under a State law requiring a private party to pay compensation to a private party, to which an entirely separate line of cases apply.] Thus, the Mathews decision in fact supports the Plaintiff's entitlement to a due process hearing in this case. Even in public assistance and/or public benefit programs, the requirement of a due process hearing before termination of benefits depends on the adequacy of the pre-termination due process procedures and the procedural protections available to the recipient. As the Court stated, "due process is flexible and calls for such procedural protections as a particular situation demands." The Court stated that the Court would turn to, "a description of the procedures for termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures." In

Mathews, the Court found that the following pre-termination procedures were adequate to meet due process requirements:

1. The beneficiary is informed that benefits may be terminated and is provided with a summary of the evidence upon which the proposed determination to terminate benefits is based and is afforded an opportunity to review the medical reports and other evidence in his case file. He/she can also respond in writing and submit additional evidence.

2. After the initial determination is made by a state agency which is accepted by the Social Security Administration, the recipient is notified in writing and informed of the "reasons for the decision and of his right to seek a de novo reconsideration of the State Agency" before termination.

3. After such notification and all of the above procedural rights, benefits would be terminated effective two months **after** the month in which medical recovery was found to have occurred.

4. If after the initial determination by the agency, #2 reconsideration by the state agency, and #3 the SSA's review and #4 reconsideration determination and #5 after notification to the recipient of the decision, he then has a right to a hearing.

Also in reaching its decision in Mathews, the Court specifically noted, "a further safeguard against mistake is the

policy of allowing the disability recipient's representative **full access to all information relied upon by the state agency**." In light of all the above pre-termination due process procedures and safeguards, the Court determined that a full-fledged administrative hearing was not necessary prior to termination. Our statute simply has none of those and neither the Defendant State of South Carolina nor the Defendant American Fire & Casualty Insurance Company can point to any case where there are absolutely no safeguards as there are in this case where the Court has not required a due process hearing before the deprivation of a property right under the constitution.

Now the line of cases that really should be considered and should be applied is the line of cases in reference to a private party taking action, such as we have here, under a state statute including the US Supreme Court's decision in Sniadach v. Family Finance Corp. of Bayview, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). In Sniadach, the United States Supreme Court was called upon to review whether or not a state statute that allowed a private party to garnish the wages of an individual involved a debt collection action without a hearing prior to a determination in that action that the debt was in fact owed is constitutional. In Sniadach, the Defendants finance company filed a Summons & Complaint alleging that the Defendant Sniadach owed $420.00 on a

promissory note. The Wisconsin statute provided that after the filing of a Summons & Complaint that the plaintiff Family Finance Corp. could garnish the wages of the defendant to pay off the debt before there was any determination as to whether or not the debt was in fact owed. The Supreme Court held that the deprivation of the defendant's property interests without a hearing (notice and meaningful opportunity to be heard) under the provisions of the statute by the plaintiff, a private party, denied the defendant due process of law and declared the statute unconstitutional on that basis.

The Plaintiff would submit that based on every precedent cited by the Defendant State of South Carolina, by the Defendant American Fire & Casualty Insurance Company and by the Plaintiff that given the total lack of any pre-termination procedures of any nature in the statute that the Supreme Court would find SC Code §42-9-260(B)(1-6) procedurally inadequate to protect the due process rights of Mr. Winfrey; specifically notice and a meaningful opportunity to be heard in a meaningful manner before a deprivation of his property right to weekly disability payments.

II.

S.C. CODE §42-9-260 IS IN DIRECT CONFLICT WITH S.C. CODE §1-23-310(2), AND AS SUCH IS VOID.

Not only does §42-9-260 violate a Claimant's due process rights, it is in direct conflict with S.C. Code §1-23-310(2),

which spells out the administrative procedure for **all "contested cases".** S.C. Code §1-23-310(2) states that a,

> "contested case" means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency **after an opportunity to be heard.** S.C. Code §1-23-310(2) (as amended 1993) (Emphasis added).

Prior to June 18, 1996, a Claimant's temporary benefits could not be terminated until "after an opportunity to be heard". Id. Since then for the first 150 days, a Claimant is forced to seek a hearing long after their benefits have been stopped. Section 1-23-310, of the Administrative Procedures Act which governs the Workers' Compensation Commission, is in direct conflict with §42-9-260. After reading both statutes and reviewing existing case law, there is no way to reconcile §42-9-260's denial of the Plaintiff's property right to temporary compensation without a pre-termination hearing and §1-23-310's requirement of a hearing.

"Where provisions of the APA and the Workers' Compensation Act conflict, **the APA controls.**" Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731, 732 (1989) (Emphasis added). Section 1-23-310(2) is not alone though; our Supreme Court has held that due process requires a hearing prior to the termination of benefits. "Due process law is that law that hears before it condemns **which proceeds upon inquiry and renders judgment only after a full and complete opportunity to be heard.**" S.C. and G.R.

Co. v. American Tel and Tel Co., 65 S.C. 459, 43 S.E. 970 (1903) (Emphasis added). When those fundamental rights are not provided, fundamental due process is not afforded. Stono River Environmental Protection Assn. v. S.C. Dept. of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

Addendum to APA Argument

In addition to the argument made in the Complaint in reference to the Administrative Procedures Act, benefits are not paid under §42-9-260 which is specifically referred to as the stop payment statute. The only thing that subsection A of that statute added to the previous requirements of the Act is the allowance to the employer and/or its insurance carrier of a period of 150 days to deny the claim where it has been initially accepted. As the statute puts it, "without waiver of any grounds for good faith denial".

Since the inception of the Act, where the employer and/or its insurance carrier and the employee agree that compensation is due and benefits are started, the agreement has the same force and effect as an Order of the Commission ordering compensation. The document that has been used since the Commission developed forms is a Form 15. Under the provisions of SC Code §42-9-260, the insurance carrier **must** file a Form "immediately upon starting compensation". A Form 15 is the form used for that purpose.

However, again this statute does not serve as the basis for the entitlement to and the payment of compensation. §42-9-10 and §42-1-120 are the basis for the payment of temporary total disability benefits and require the payment of disability benefits for all periods of disability. For an injured worker to be entitled to and for the defendants to be required to pay disability compensation, there must be an initial agreement that the Claimant is disabled as a result of injury by accident.

Based on this, the argument that this is not a, "contested case" is in error. The parties have to agree that the Claimant is entitled initially to disability compensation benefits. Subsequent to that, the employer for certain enumerated reasons during the first 150 days may then deny benefits. Obviously at that point there is a disagreement to the continuation of benefits. In this case, the Defendant American Fire & Casualty Insurance Company disputed that they owed any further benefits and filed for the protection of the Act under §42-9-260. In Webster's Dictionary, "contest," is defined, as to make the subject of dispute, contention, or litigation; especially: dispute, challenge. In Webster's the words "contest" and "deny" have a very similar meaning in that under both words, one of the meanings is, "to say you do not accept".

The Plaintiff would submit simply that where the carrier admits and agrees that the Claimant is entitled to weekly compensation benefits for his disability and they then change that position and deny the right to benefits means that there is now a, "contest" between the two parties and there is a contested case under the Administrative Procedures Act which requires a hearing under that Act. In fact, not only are the provisions of §42-9-260 in conflict with the provisions of the Administrative Procedures Act, they are also in conflict with SC Code §42-17-20. Since our Courts are committed to a liberal construction of the Act "in favor of benefits to the injured worker" under the clear language of the APA and the discrepancies under the Act a hearing is required before the rights of the parties are determined.

Finally there is a duty created by the Act and by the agreement of the parties to pay benefits and there is a corresponding right to have that changed only after hearing.

III.

S.C. CODE §42-9-260 VIOLATES THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS BY DENYING A CLAIMANT EQUAL PROTECTION UNDER THE LAW.

"The Constitutional guarantee of equal protection under the law requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Marley v. Kirby, 271 S.C. 122, 245

S.E.2d 604, 605 (1978). While the General Assembly has "the right to make reasonable classifications of persons and property for public purposes", those classifications **must apply "equally to all members of the class" and must not be "arbitrary but [instead] rest upon some reasonable basis."** Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362, 368 (1970) (Emphasis added); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979).

Section 42-9-260 fails to meet this standard. The statute creates two classes, one class made of up of claimants who have not yet been receiving temporary benefits one hundred and fifty (150) days and those that have been receiving benefits in excess of that amount of time whose benefits cannot be stopped until after a hearing and who are entitled to benefits until after a hearing is held **and** benefits are stopped by Order of the Commission. This classification between claimants receiving weekly disability compensation payments serves absolutely no interest, has no rational basis and is purely arbitrary.

> The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be affected. Marley, 245 S.E.2d at 606.

In this case the indiscriminate choice of one hundred and fifty (150) days bears no reasonable and just relation to the legislative purpose of the Workers' Compensation Act, which, as stated earlier is for the **"benefit, protection and welfare of**

working men and their dependents." Cokeley, 14 S.E.2d at 893-94. (Emphasis added).

The South Carolina Supreme Court struck down a similar statute in Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), which did not allow a passenger in an automobile accident to be compensated for their injuries unless they could show "reckless disregard." In striking down the guest statute, the Court stated that the justifications for passing the statute did not constitute "a rational basis for the differential treatment it spawned." Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883, 885 (1979). The Court could find no justification for allowing the driver of a car to recover for their injuries, yet hold the passenger to a higher standard in order to recover.

The same logic as applied in Ramey dictates that §42-9-260 be struck down. There is no justification as to why one claimant is entitled to have a hearing before his benefits can be ended yet another is not entitled to a hearing solely on the basis of whether they have received benefits for one hundred and fifty (150) days. This classification bears no rational basis to the fundamental intent of the Workers' Compensation Act, which is to protect injured workers and to provide disability compensation until their disability to work has ended. Section 42-9-260 and the one hundred and fifty (150) day classification is arbitrary,

and serves as absolutely no rational basis for stopping a claimant's benefits without a hearing.

Therefore, S.C. Code §42-9-260 (as amended 1996) does not provide equal protection under the law to Claimants due to its arbitrary, irrational and discriminatory effect.

Addendum to Equal Protection Argument

In reference to equal protection under §9c, the Plaintiff would reiterate again ask the Court's reference to the case of Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d, 883 (1979) and the other cases cited all of which stand for the proposition that while the General Assembly has the right to make reasonable classifications of persons and property, such classifications **must not be "arbitrary but [instead] must rest upon some reasonable basis"**. There is simply no rational or reasonable basis for the classification under the statute. There is no difference between a worker who is disabled under the Act before 150 days versus after 150 days. Benefits are paid for disability; see again: SC Code §42-9-10 and §42-1-120. Probably even more directly on point is the SC Supreme Court decision in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). In the Marley case, the statute provided for a different standard of contributory negligence as applied to motor vehicle accidents and plaintiff's requesting damages as a result of those accident versus any other plaintiff in any other negligence cause of action wherein the Court stated specifically,

> "We cannot perceive the rational classification for singling out persons injured in automobile accidents as different from all others injured in negligent torts."

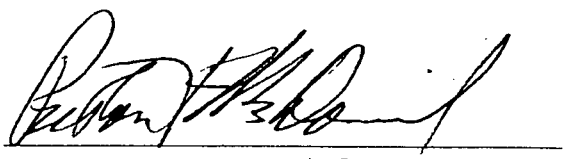
The Court also specifically pointed out in reference to equal protection that:

> "The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation **to the legislative purpose sought to be affected.** There is no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."

Under the Workers' Compensation Act, one of the legislative purposes in establishing the Act is to pay weekly compensation payments to injured workers during all periods of disability as defined in the Act. The worker is entitled, under the legislative purpose, to have those benefits (weekly payments for all periods of disability) paid to the worker whether that is 15 days after the accident, 50 days after the accident, 150 days after the accident, or 300 days after the accident. The benefits to be paid are the same, again weekly payments during all periods of disability and there is simply no rational basis for treating those receiving benefits less than 150 days differently than those receiving benefits afterwards. Finally, a review of the statutes and regulations establishes that the basis upon which an insurance carrier can request to stop payment of benefits are the same before and after 150 days.

The Claimant would also add specific reference to the case of United States Fidelity & Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d, 239 (1972). In Unites States Fidelity & Guaranty Co., the Plaintiff was simply a business required to pay a business license fee to operate that business in the city. The City of Newberry required three types of businesses to pay for a license fee at a higher rate, one being life, health, accident and hospital insurance companies, another being companies that delivered (without prior order) crackers, cakes and tobacco and another one being a Fire & Casualty Insurance Co., which was the Plaintiff's business. The Court found that there was simply no rational basis for requiring the Plaintiff's business to pay a higher rate. It was simply a business requesting a license to do business and there was no rational basis for any distinction.

Respectfully submitted,



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September 5, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-05888

Clarence Winfrey,

Claimant/Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

SUR-REPLY MEMORANDUM BY THE STATE OF SOUTH CAROLINA IN RESPONSE TO REPLY MEMORANDUM TO DEFENDANT STATE OF SOUTH CAROLINA'S MEMORANDUM AND MOTION FOR JUDGMENT ON THE PLEADINGS

PROCEDURAL POSTURE

This matter is before this Court pursuant to Defendant State of South Carolina's Motion for Judgment on the Pleadings.

The State of South Carolina's (the "State") only interest in this matter is the defense of the constitutionality of S.C. Code Ann. § 42-9-260, an issue that is not properly before this Court. All issues with regard to the merits of the underlying Workers' Compensation claim have been before the Workers' Compensation Commission (the "Commission") pursuant to its statutory processes and are presently under appeal to the South Carolina Court of Appeals by both the Carrier/Defendant (the "Company") and the Claimant/Plaintiff ("Winfrey"). Winfrey filed two appeals to the South Carolina Court of Appeals on August 25, 2014. Two separate orders were issued by the full Commission. One addressed whether benefits were properly terminated under § 42-9-260 that was originally decided by Commissioner Beck. The appeal of

this order is attached hereto as Exhibit A. The other order addressed the merits of the claim and was originally decided by Commissioner Barden. The appeal of this order is attached hereto as Exhibit B. Each appeal was received by the Court of Appeals on August 25, 2014. The State takes no position on and has no interest in the merits or ultimate resolution of the disputes between the Company and Winfrey and is not involved in either appeal.

There is no state action here. The Commission is not a party to this action. The State is a party pursuant to an order entered by Judge Cooper because of the constitutionality issue and the State has appeared solely to defend the constitutionality of S.C. Code Ann. § 42-9-260.

The two appeals address the merits of the entire procedure including such things as whether the investigation performed by the Company was in good faith, the burden of proof, and other matters pertaining to the findings and the merits. Of interest here is Winfrey's failure in either appeal to challenge the constitutionality of § 42-9-260. The two appeals also cover the gamut of relief and the merits and make it clear that there is nothing for this Court to address in terms of providing relief to Mr. Winfrey that is not before the South Carolina Court of Appeals.

FACTS

The pertinent facts, should this Court reach the issue of constitutionality, are straight forward and are not disputed.

May 22, 2013: Winfrey suffered an accident at his workplace (Amended Complaint Paragraph 2)

June 1, 2013 through September 14, 2013: Company elected to pay and paid temporary total benefits to Winfrey (Amended Complaint Paragraph 3)

September 14, 2013: Payments were stopped by the carrier pursuant to a Form 15 on the basis of an investigation whereby the carrier determined that there were grounds for denial of the claim. Amended Complaint Paragraph 3

February 27, 2014: Temporary benefits restored February 27, 2014.

These facts are uncontested.

ISSUE

Winfrey asks this Court to "[r]eview the provisions of S.C. Code § 42-9-260 and specifically those contained in Subsection (B) and declare provisions of Subsection (B) unconstitutional and or in violation of the statutory notice and hearing provisions of the Administrative Procedures Act and the other provisions of the Workers Compensation Act and the Commission Regulations both on the basis of due process and equal protection of the laws as required by both the United States Constitution and our own State Constitution." Amended Complaint, Paragraph 2 of the Prayer for Relief (the "Prayer").

Winfrey also asks for a temporary restraining order (Paragraph 1 of the Prayer), reinstatement of benefits (Paragraph 3 of the Prayer), that the benefits cannot be terminated without a due process hearing (Paragraph 3 of the Prayer), and a declaration about the burden of proof at any such due process hearing (Paragraph 3 of the Prayer), and for other appropriate relief (Paragraph 4 of the Prayer).

DISCUSSION

1. This Court does not need to reach and should not reach the constitutionality issue.

This Court is not in a position to grant any relief to Winfrey. Nothing is justiciable before this court. Therefore, this Court should not reach the Constitutional issue. The Supreme Court has stated that the "Court's firm policy [is] to decline to rule on constitutional issues unless such a ruling is required." *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002); *see In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) ("Further, it is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."); *Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (1996) ("In keeping with our firm policy of declining to reach constitutional issues unnecessary to the resolution of the case

before us, we do not address the circuit court's alternative ruling that the ordinance fee violated equal protection.").

1. The merits of the claims are before the Court of Appeals pursuant to the Winfrey Appeal and the Company Appeal. Furthermore, the temporary benefits have been restored by Commission order and Winfrey is receiving temporary benefits. The only temporary benefits that Winfrey has not received are those from September 14, 2013, through February 27, 2014, and his entitlement to those benefits is before the Court of Appeals. The Commission has the sole authority to order reinstatement of benefits. The Court of Common Pleas does not have authority to award Winfrey any benefits.

2. The issue of the constitutionality of § 42-9-260 has not been raised before the Court of Appeals and is therefore not preserved for review before that Court and Winfrey does not have standing to raise it as a collateral matter before this Court.

3. A declaration by this Court would not afford any relief to Winfrey. He is currently receiving temporary total disability payments. The issues of his continuing entitlement to receive these benefits and his entitlement to receive the back benefits for the period of time the benefits were suspended are before the Court of Appeals. A ruling from this Court on the constitutionality of § 42-9-260, whether constitutional or unconstitutional, will play no role in the resolution of Winfrey's entitlement to receive benefits. Furthermore, this action is directed towards Winfrey only and does not purport to assert the rights of others similarly situated.

4. The Workers' Compensation claim has been fully litigated before the Commission and is under appeal to the Court of Appeals. There is no justiciable matter before this Court.

To have standing, there must be a justiciable injury. *In re Treatment & Care of Luckabaugh,* 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002). It must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass 'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 289 (2001).

It is clear in this case that no ruling by this Court on the constitutionality of § 42-9-260 will have any impact on the resolution of Winfrey's workers' compensation claim. Any concerns about future terminations of Winfrey's benefits without a hearing are purely speculative, have not happened, and are not ripe for adjudication. Regardless of the allocation of the burden of proof, at this point that is moot as Winfrey is receiving his benefits. As to any issues with regard to burden of proof at the appeal of the Workers' Compensation case, those are issues to be raised pursuant to the appeal. As no issue is properly before this Court, any opinion by this Court would be an advisory opinion. *See, Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("It is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.").

Judge Lee in a previous order (the "Lee Order") in this case dated October 9, 2013, ruled that:

> The Commission has the sole authority to reinstate benefits if appropriate. Because Plaintiff [Winfrey] already has a mechanism for a remedy with the workers' Compensation Commission, who has exclusive original subject matter jurisdiction over relief to work-related injuries, this Court must defer to their authority on the issue of reinstating the benefits.

Note that Judge Lee declined to dismiss the facial challenge to the constitutionality. However, she did not address the standing issue.

5. The doctrine of constitutional estoppel prevent Winfrey from challenging the constitutionality of § 42-9-260. Winfrey is challenging the very statute under which his temporary benefits were commenced. After his temporary benefits were terminated, Winfrey exercised his right to request a hearing pursuant to § 42-9-260(C). He may not take the benefits of the statute and simultaneously attack its constitutionality. "A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality." *Ross v. Lipscomb*, 83 S.C. 136, 65 S.E. 451 (1909).

NO FURTHER INQUIRY IS NECESSARY

There is no standing, no relief can be granted by this Court to Winfrey, and there is no justiciable issue that can provide relief to Winfrey so this Court should not proceed to the issue of constitutionality. The issue of the constitutionality of § 42-9-260 is not properly before this Court as no relief can be granted to Winfrey. However, should this Court desire to inquire into the constitutionality of § 42-9-260, there is no doubt as to its constitutionality.

A declaration of unconstitutionality requires Winfrey to meet a high burden. "This Court is directed by the constitution, and out precedent, to make every effort to find acts of the General Assembly constitutional." *Joytime Distrib. And Amusement Co., Inc. v. State*, 338 S.C. 634, 653, 528 S.E.2d 647, 657 (1999).

Due Process

The initial inquiry in a due process analysis is whether the Plaintiff has been deprived of a protected property or liberty interest. In order to have a property interest in a benefit, one must have "more than a unilateral expectation of it;" one must have "a legitimate claim of entitlement to it." *Hamilton v. Board of Trustees of Oconee County School Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (1984). "

As § 42-9-260's language sets forth, payment under this provision is purely voluntary by the company. Furthermore, due process is afforded by the provision in § 42-9-260 that if a payment is stopped, a post termination hearing may be requested as was done in this case. *See Mathews v. Eldridge*, 424 U.S. 319, 331 "a claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." For there to be a potential due process violation, Winfrey must have had a property interest in the payments. There was none.

§ 42-9-260(A) provides:

> (A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an **employer may start** temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

Id., (emphasis added)

The key to this issue is the language that an "employer may start." Starting the temporary benefits under the facts of this case was discretionary with the employer. Winfrey had no right or entitlement to receive the benefits. Whether to pay the benefits was solely at the employers' option. Therefore, Winfrey had no property interest in the temporary benefits and due process did not require a hearing to end these benefits within 150 days pursuant to § 42-9-260(B)(3). Regardless, Winfrey was protected under the South Carolina Worker's Compensation process by exercising his rights to a post termination hearing pursuant to § 42-9-260(C) which he did request and the benefits were restored.

Winfrey cites *Last v. MSI Construction Co., Inc.*, 305 S.C. 349, 409 S.E.2d 344 (1991). In *Last*, the Court states "We have previously recognized that entitlement to workers' compensation benefits constitutes a property interest," *citing Orszula v. Orszula,* 292 S.C. 264,

356 S.E. 2d 114 (1987). In *Last*, the carrier terminated temporary benefits on the ground that the claimant refused medical treatment after he was incarcerated and was prevented from attending a medical appointment. The Commission found the termination was not proper because *Last* should not have been deemed to have terminated his medical treatment since he was incarcerated. The benefits were improperly terminated under the statute. A post termination hearing was held as required by the statute. The case does not rest on a denial of property rights. Last is correct in that "entitlement to workers' compensation benefits constitutes a property interest." However, Last simply proceeded under § 42-9-260, a hearing was held, and benefits were reinstated. *Orszula* affirmed the ruling of the Family Court that "the workers' compensation award was marital property subject to equitable distribution." The compensation award in *Orszula* was a $16,000 check "in settlement of his Tennessee workers' compensation claim." The settlement had become a vested right constituting marital property in *Orszulla*. In the instant case, as pointed out, under § 42-9-260, the company may start the payment and it may terminate after a good faith investigation. At the time of the termination of payments in the instant case, Winfrey did not have a vested property right – the temporary total benefits could clearly be taken away under proper circumstances. The benefits were terminated in accordance with the statute and the Commission subsequently ordered the temporary benefits restarted. Just as "May" is the key word in § 42-9-260, "entitled" is a key word in *Last*. Under the facts of this case, Winfrey was not "entitled" to receive benefits pursuant to § 42-9-260 as this Section clearly provides that an "employer may start" the benefits and it further provides that benefits may be stopped under certain circumstances. The benefits were paid at the option of the company and were terminated in accordance with the statute and were later reinstated in accordance with the statute.

Winfrey also relies on *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, *Goldberg* was about termination of welfare benefits where "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." *Id.* at 262. Cases litigating welfare, social security, and other vested benefits shed no light on this issue in this case.

In the instant case, the Company voluntarily commenced payments. There is no property interest or right to receive the payments until (a) the passage of 150 days pursuant to § 42-9-260(A), (b) the parties have entered into a written agreement in accordance with § 42-17-10, or pursuant to an Order of the Commission finding eligibility to receive benefits in accordance with § 42-17-20. By not entering into an agreement or demanding a hearing, Winfrey did not acquire a property interest until the Commission reinstated his temporary benefits. Winfrey did not seek state action to order his rights to receive benefits and in the absence of doing so, his receipt of the temporary payments remained subject to an investigation by the Company for the first 150 days. The temporary benefits received in this manner were based on the language of § 42-9-260 which independently provides for the voluntary payment of benefits by stating "an employer may start temporary disability. . ." The temporary benefits were terminated by the Company in accordance with § 42-9-260 with no state action.

Equal Protection

The State's courts "give great deference to the General Assembly's decision to create a classification." *Bodman v. State,* 403 S.C. 60, 69-70, 742 S.E.2d 363,368 (2013). "Consequently, those who challenge the validity of one [a classification] under rational basis review must 'negate every conceivable basis which might support it.' *Id.* (citation omitted). Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the

classification rests on some reasonable basis. *Skyscraper Corp. v. Cnty. of Newberry,* 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996).

Here, under § 42-9-260, Winfrey alleges a violation of equal protection because after 150 days of payment of temporary benefits, the carrier may no longer terminate on the basis of a good faith investigation. Deference must be given to the Legislature's classification here. Section 42-9-260 allows the employer to provide an apparently injured employee with needed medical treatment and benefits and receive the protection of its workers' compensation insurance policy while the employer conducts an investigation into the facts surrounding the alleged accident in order for it to determine whether it has a legal obligation to provide benefits under the Workers' Compensation Act. The time the employer has to investigate is limited to 150 days so that an employee will receive a final decision within a known period of time and can pursue his or her claim accordingly. The public policy is served of encouraging employers to start paying temporary benefits immediately after an accident rather than waiting for a hearing to require the employer to pay.

Administrative Procedures Act

The definition of a contested case is "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the **legal rights, duties, or privileges** of a party **are required by law to be determined by an agency** after an **opportunity** for hearing." S.C. Code Ann. § 1-23-210(3) (emphasis added). § 42-9-260 simply does not require a hearing before the temporary benefits can be stopped pursuant to § 42-9-260(B) as was done in this case. There is no violation of the Administrative Procedures Act. The Administrative Procedures Act applies to the situation where "the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." As discussed in more detail in the due

process section above, there was no state action involved in the termination of the temporary benefits. There was no agency action and no agency action was required. The Administrative Procedures Act simply does not apply.

CONSLUSION

For the reasons set forth herein, this Court should grant the States motion for judgment on the pleadings.

Respectfully submitted,

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September 8, 2014

Exhibit A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

M 33340

Trial Court Case No. 1306305

Clarence Winfrey, ... Appellant,

v.

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

NOTICE OF APPEAL

RECEIVED
AUG 25 2014
SC Court of Appeals

Appellant Clarence Winfrey appeals the Decision of the Appellate Panel of the South Carolina Workers' Compensation Commission filed July 25, 2014 which affirmed the Form 15(III) Hearing Commissioner's Decision with amendments. Appellant received notice of entry of the Appellate Panel Order (the final Agency Decision which is attached) according to an unsigned "Affidavit of Service" by email on July 25, 2014.

Pursuant to SC Code §42 17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

1. That the Commission erred as a matter of law by not reversing the Decision of the Hearing Commissioner pursuant to

S.C. Code of Laws §42-17-40, based on its review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That the Commission and the Hearing Commissioner erred as a matter of law by shifting the burden of proof at a Form 15 hearing to require the Claimant to prove that the Defendants did not conduct a Good Faith Investigation.

3. That the Commission and the Hearing Commissioner erred as a matter of law concerning the shifting of the burden of proof as set forth in #2 above wherein SC Code §42-9-260 and Commission Reg. 67-504(C) and 67-612(B)(4), all provide that the employer and the insurance carrier are the moving parties at the subsequent hearing held in a Form 15 situation wherein benefits are stopped without a hearing and as the moving parties have the burden of proof to prove that they have complied with the Act and by not applying the law established by the Court of Appeals in the case of Martin v. Rapid City Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) which held that the employer and its insurance carrier have the burden of proof to prove that they have met one of the conditions under the Act wherein the Court specifically 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." (Emphasis added).

4. That the Commission and the Hearing Commissioner erred as a matter of law where the Record is uncontroverted that the Defendants failed to comply with the requirements of SC Code §42-9-260 which provides that, "upon making the first payment, the employer immediately **shall notify the Commission, in accordance with a form prescribed by the Commission**, that payment of compensation has begun." This is a mandatory provision and the Commission erred by failing to find that the Defendants could not take the benefit of the remainder of the Statute for having failed to comply with the Statute, which would allow them to stop payment of benefits without a hearing under the other provisions of that Statute.

5. That the Commission and the Hearing Commissioner not only erred by shifting the burden of proof to the Claimant but where the Record is uncontroverted that the Claimant's first notice that the Defendants were alleging they were entitled to stop benefits based on a good faith investigation was on September 13, 2013, by then holding and refusing to allow any evidence on behalf of the Claimant subsequent to that date into the Record therein placing the Claimant in a paradoxical situation of being required to prove that the Defendants did not conduct a Good Faith Investigation but at the same time being

denied the right to take the deposition of the adjuster after that date with no ruling until the hearing; being denied the file by the Defendants of the adjuster until after the Form 15 hearing; and being denied the right to submit any evidence after that date that would establish that he had sustained a compensable injury by accident which would rebut/contradict any evidence in the Record to the contrary.

6. That the Commission and the Hearing Commissioner erred as a matter of law by admitting into evidence and considering both the Defendants' Pre-Hearing Brief and their APA Submissions which were not only not submitted 15 days or more prior to the hearing in accordance with the Commission Regulations, but were not even timely served 10 days before the hearing as a non-moving party and were only served 9 and 8 days respectively prior to the date of the hearing, which is uncontroverted in the Record. The Commissioner abused his discretion in admitting these documents into the Record and then relying on those documents to rule against the Claimant.

7. That the Commission and the Hearing Commissioner erred as a matter of law by first finding that there was a stipulation and then setting forth the position of the Claimant that it was the position of the Claimant that the only issue before the Commission was whether the Defendants had properly terminated workers' compensation benefits, wherein to the contrary it was the position of the Claimant that the Defendants had the burden of proof to prove that they had stopped disability benefits

without a hearing under the alleged exception to the Act which allows them to do so; as claimed in this case that they had conducted a Good Faith Investigation.

8. That the Commission and the Hearing Commissioner erred as a matter of law by finding that the Defendants had properly stopped payment of benefits where the Defendants had failed to comply with the requirements of the Rule 67-504(A) by failing to comply with the provisions of that subsection which specifically require that, "**shall**" serve two copies of the Form 15 immediately on the Claimant according to Rule 67-211 **with documentation attached as to the reason for termination or suspension**. The Hearing Commissioner erred by failing to apply the law as dictated to the Commission by our Appellate Courts wherein the SC Court of Appeals has specifically held in the case of Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) that an employer and its insurance carrier may not stop temporary total disability benefits and shall be required to resume such benefits where it:

> "Failed to follow the proper procedure for doing so as outlined in §42-9-260 and Reg. 67-504. Rapid Plumbing terminated the compensation on August 10, 2002 . . . **and failed to attach the supporting documentation as required by §42-9-260**. These deficiencies are not mere technicalities but are **substantial deviations from the statutory procedure**." (Emphasis added).

9. That the Commission and the Hearing Commissioner erred as a matter of law by not assessing the mandatory 25% penalty and ordering reinstatement where the Defendants had failed to comply

with the statute at least admittedly in one regard, that being that they failed to file the mandatory form with the Commission at the time that benefits were started. In Rapid City the Court of Appeals held that the provisions of §42-9-260(G) which provides that the failure to comply with that section (doesn't specify in which regard but generally specifies in any regard) is mandatory as far as the imposition of the 25% penalty and the reinstitution of benefits. The Court of Appeals specifically stated, "the language of §42-9-260(G) is mandatory."

10. That the Commission and the Hearing Commissioner erred as a matter of law by considering evidence irrelevant and immaterial to the singular issue at a Form 15 hearing before the Commission by considering the Motion to Quash the deposition of [illegible], the Motion to Compel Deposition for cause, the Motion for Continuance, the Summons and Complaint, and a Temporary Restraining Order, all of which were immaterial and irrelevant to the issue before the Hearing Commissioner on a Form 15(III) hearing under SC Code §42-9-260.

11. That the Commission erred as a matter of law by affirming Hearing Commissioner Order Finding of Fact No. [illegible] and specifically by finding as a fact in violation of the statute that, "a determination was based on the denial of the claim following an investigation." There is no documentation attached to the Form 15 in violation of the Statute to establish that an investigation was conducted and the statute specifically provides

that not only must an investigation be conducted, but a, "good faith" investigation must be conducted.

12. That while the Hearing Commissioner erred as a matter of law in making Findings of Fact Nos. 4-9 in that they refer to statements contained in various forms on file with the Commission as being in evidence and are not based on either testimony, stipulations or documentary evidence submitted pursuant to the Administrative Procedures Act, the Commission specifically erred by affirming his finding in Finding of Fact No. 8 finding that the Form 15, section 2, documented that the reason for termination was the employee failed to meet the burden of proof of compensable injury under the Workers' Compensation Act. This Finding of Fact by the Commissioner is not based on evidence in the Record.

13. That the Commission and the Hearing Commissioner erred as a matter of law in affirming and by making Finding of Fact No. 9 and specifically:

A. That the Claimant alleged that he was not properly served with a Form 15 because he was only served with 1 copy wherein the statute specifically provides that the Defendants are required to serve the Claimant with 2 copies. The Commissioner then goes on to make a factual conclusion that the Claimant was in no way, "prejudiced" which is not supported by the law or any evidence in the Record as the Defendants again failed in this regard in their compliance with both the statute and the

Commission Regulations and stopped benefits without hearing in violation of due process.

B. By making the conclusory statement that the Defendants' failure to comply with the statute by not only not providing the Claimant with 2 copies of the Form 15 but also by not setting forth a separate attachment as to the grounds was not improper, where such failures of compliance are an undisputed violation of the law. This statement violates one of the fundamental principles of the law as dictated by our Appellate Courts in reference to strict construction of the wording of the Act and the Defendants' requirement to "strictly" meet the requirements of the Act.

14. That the Commission and the Hearing Commissioner erred as a matter of law by affirming and making Finding of Fact No. 10 which is a violation of law and an error of law in that it shifts the burden of proof to the Claimant and provides that the Claimant not only has the burden to prove that the Defendants did not conduct a Good Faith Investigation but makes the blanket factual assumption which is based on surmise, speculation and innuendo that the Claimant did not put up evidence that would, "indicate that the Defendants acted in anything other than good faith during the investigation". There is simply no evidence and this is an error of law because whether or not the Defendants acted in good faith during the investigation is not a requirement under the Act. The requirement is whether or not they conducted a good faith investigation and this is speculation, innuendo and

surmise and an abuse of discretion by the Commissioner since it also reaches the factual conclusion that an investigation was performed. The Hearing Commissioner further erred as a matter of law, abused his discretion and subjected his decision to caprice by making the statement that, "this is based on the evidence **or lack thereof** submitted by the Claimant at the hearing."

15. That the Commission and the Hearing Commissioner erred as a matter of law by affirming and making the Hearing Commissioner's Finding of Fact No. 11, which in many ways is not a Finding of Fact, but by specifically making the following statements contained within that Finding that:

A. The Commissioner states that the Claimant is alleging, "a medically complex condition". This is surmise, speculation and innuendo and a blanket assumption made by the Commissioner that is not supported by any evidence in the Record;

B. Making the statement that it is an "alleged" shock. There is absolutely no evidence in the Record that the Defendants in any way challenged the fact that the Claimant suffered an electrical shock and electrocution on May 22, 2013; and

C. Making the statement that a causal relationship between the Claimant's electrical shock and his current medical condition is best determined by review of the medical expert medical reports to which the Defendants had access by operation of §42-15-95. There is absolutely no evidence, and this was a

hotly contested issue at the hearing, as to when or how the Defendants received any of the belated medical records that they were allowed to put into evidence (only based on the discretionary decision of the Commissioner). There was simply no testimonial or documentary evidence submitted into the Record that would establish whether or not those records were received before September 13, 2013.

16. That the Commission and the Hearing Commissioner erred by affirming and making a Finding of Fact that is not supported by any facts and evidence that the Defendants' refusal to continue benefits and the reason for stopping benefits was a determination as to whether or not his heart condition was causally related to the alleged electrical shock. The only, and the Claimant would reiterate the only, evidence in the Record as to a causal relationship is that set forth in the statement of the insurance carrier's own assigned rehab nurse wherein she specifically refers to the Claimant's treatment as being directly related to his electrical shock. That in fact is the uncontradicted evidence and the Commissioner's statement in that regard is speculation, surmise and innuendo and is the subject of being capricious and an abuse of discretion.

17. That the Commission and the Hearing Commissioner erred as a matter of law in affirming and by making the Hearing Commissioner's Conclusion of Law 2, subparagraph c, holding as a matter of law that the Defendants do not have to establish that they conducted a Good Faith Investigation but only that they have

to have, "represented to the Commission" that they had conducted such an investigation; and by shifting the burden of proof and requiring that, "the Claimant did not provide any evidence that the Defendants conducted their investigation in anything other than good faith", thus placing the burden of proof on the Claimant to prove that the Defendants did not conduct a Good Faith Investigation where they did not put in one iota of evidence that they had conducted a Good Faith Investigation or in any way met their burden of proof or even that of a prima facie case.

18. That the Commission and the Hearing Commissioner erred by holding as a matter of law that the Defendants' investigation, "revealed a good faith belief" that the Claimant had failed to meet his burden of proof. There is absolutely no evidentiary support of an investigation by the Defendants nor that this is what such investigation revealed. Under subsection (e) the Commissioner further erred by shifting the burden of proof to the Claimant where the benefits had been started on the basis that a prima facie case had been established that the Claimant had suffered a compensable injury. The Hearing Commissioner erred in a Form 15 hearing, which only comes about after the Defendants have started benefits on the basis that a compensable injury has occurred, by citing to law under SC Code §42-1-160 as to the Claimant's burden of proof where it is denied that a compensable injury has occurred.

19. That the Commission and the Hearing Commissioner erred as a matter of law by finding as a Conclusion of Law 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." The error being among many that the Defendants put up no substantial evidence to meet their burden of proof that they conducted a, "Good Faith Investigation" or that they in fact conducted any investigation as to what factually that investigation was, or the facts that substantiated that the Claimant had not met his burden of proof on compensability. That Finding or actually that Conclusion of Law is and makes the Commission Decision based on surmise, speculation and innuendo and the subject of caprice, prejudice and the subject of an abuse of discretion. The Commission failed in their oath of office by not complying with the dictates of the law as dictated by the Legislature, the Commission in its Regulations and under the decisions of the SC Appellate Courts. There is simply no evidence put into the Record to support this conclusion of law and this is an error of law under the law which the Commission is sworn by oath to uphold. It also violates the fundamental principles of the Act, which is that the Act shall be liberally construed in favor of benefits to the injured worker.

20. That the Court and the Hearing Commissioner erred as a matter of law by making Hearing Commissioner Order Conclusion of Law No. 3 which improperly states the position of the Claimant

stated on the Record repeatedly, in his Pre-Hearing Brief and at the Hearing, and in the unrecorded Pre-Hearing Motion Conference.

21. That the Court and the Hearing Commissioner erred as a matter of law in making Hearing Commissioner Order Conclusion of Law No. 4 for all the reasons as set forth hereinabove and in addition, by making the statement that it is, "possible" for the Defendants to have drawn a conclusion in good faith based on the 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 in denying the claim." There is no medical evidence to this effect nor is there any evidence to that effect, nor is there any testimony nor documentary evidence to that effect and in addition, assuming that the Claimant is correct that the Defendants have the burden of proof, they have a burden of proof to establish by a preponderance of the evidence that they conducted a good faith investigation and the basis for denial based on that good faith investigation, none of which is met in this conclusion or case.

22. That the Commission erred in affirming and the Hearing Commissioner erred as a matter of law by delaying a decision from November 13, 2013 until December 5, 2013, a period of 22 days where the singular issue before the Commissioner was whether or not the Defendants had established that they conducted a Good Faith Investigation and had denied benefits based on that investigation. The statute contemplates a quick determination as

to whether or not the Defendants properly stopped benefits on one of the limited bases as provided for under the Act, wherein in this case the Commissioner not only delayed the Decision for over 22 days but also did not issue the Decision until after a decision on all Motions that had been filed before the Commission.

23. That the Commission by affirming and the Hearing Commissioner erred as a matter of law where the Hearing Commissioner stated that the purpose of the Hearing was to determine whether or not the Claimant was entitled to a reinstatement of benefits by holding, without notice prior to that hearing, an off the Record hearing on filed motions that took over an hour and ruling on all motions before even reaching the only issue of which the parties had notice on the date of the hearing.

24. That the Commission by affirming and the Hearing Commissioner erred as a matter of law in an ancillary and interlocutory Order concerning motions issued by:

A. Denying the right of the Claimant to take the deposition of the adjuster and in that regard, also by not making a Finding that the Defendants had failed to obtain an Order in reference to the Deposition that had been properly and timely set prior to the time that the Deposition was to take place; and

B. By not hearing a Motion to Quash a Subpoena issued for the adjuster's file prior to the date of the hearing on the Form 15(III) hearing where such Subpoena had been issued for the

production of the adjuster's file back in September to be produced before the end of September and the hearing was not held on the Motion to Quash prior to the production time nor was it held until the date of the hearing on the Form 15(III).

25. That the Commission erred in affirming and the Hearing Commissioner erred by making as a matter of law in his preliminary and interlocutory Order all of legal bases set out and all conclusions of law as to the Findings of Fact and Conclusions of Law made that would justify the Commissioner's refusal to grant the Claimant the right to take the adjuster's deposition and to quash the Subpoena for that Deposition. That Decision and the hearing on that not being held until the date of the hearing on the Form 15 (III) was prejudicial to the Claimant and in violation of his rights to due process of law in that it failed to give him "an adequate" opportunity to be heard especially in light of the Commissioner's decision in his Order that the Claimant had the duty and responsibility and burden of proof to prove that the Defendants did not, and the Claimant would emphasize did not, conduct a Good Faith Investigation.

26. That the Commission erred as a matter of law under the provisions of the Administrative Procedures Act and the Worker's Compensation Act by allowing a party to draft the three Commissioner consensus Decision representing the <u>final</u> decision of the Commission and by not making its <u>own</u> detailed Findings of Fact and Conclusions of Law as is required by law.

27. That the Full Commission erred as a matter of law by issuing an Order drafted by Defense Counsel with a Statement of the Case which contains evidence outside of the Record, misstatements of the Record, assumptions from the Record and statements that constitute surmise, speculation, and innuendo and reference to an action filed in the Circuit Court which establishes that the Commission considered information outside of the Record.

28. That the Full Commission erred as a matter of law by adding Finding of Fact #7 specifically including but not limited to as a basis that said finding:

A. Was not requested or addressed to any issue raised;

B. Consists of no evidence in the Record establishing possession of Records, knowledge of Defendants or evidence supporting a good faith denial; and

C. Is the subject of surmise, speculation and innuendo.

29. That the Full Commission erred as a matter of law by adding Finding of Fact #8 specifically including but not limited to that said Finding:

A. Is not a statement of fact but is an unsupported, inaccurate conclusion of law;

B Is a statement of law non-supported by any case law and statutory law; and

C. Exceeds the authority of the Commission as fact-finder.

Respectfully submitted,

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August 22, 2014

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Exhibit B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

73332

Trial Court Case No. 1306305

Clarence Winfrey, ... Appellant,

v.

Midway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ... Defendants/Respondents.

RECEIVED
AUG 25 2014
SC Court of Appeals

NOTICE OF APPEAL

Appellant Clarence Winfrey appeals the Decision of the Appellate Panel of the South Carolina Workers' Compensation Commission filed July 25, 2014. Appellant received notice of entry of the Appellate Panel Order (the final Agency Decision which is attached) according to an unsigned "Affidavit of Service" by email on July 25, 2014.

Pursuant to SC Code §42-17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

1. That the Full Commission erred as a matter of law by permanently denying the Claimant benefits for the head and brain where the issues before the Hearing Commissioner were whether the

Claimant had sustained compensable injury by accident and whether he was entitled to reinstatement of weekly compensation benefits and to medical benefits for all causally related injuries and conditions stemming from the accident.

2. That where there was no request for an Award for permanent loss of earning capacity, SC Code §42-9-10 and 20, and/or permanent loss of or loss of use of the head or brain under SC Code §42-9-30 and no request for medical care for the head or brain under SC Code §42-15-60, the Full Commission erred as a matter of law by denying the Claimant permanently the right to request any medical benefits or compensation benefits.

3. That the Full Commission erred as a matter of law by permanently denying the Claimant medical and/or compensation benefits for injury to the brain and/or head wherein the Hearing Commissioner in accordance with law found that the Claimant at the time of hearing was not at maximum medical improvement, was seeking benefits for injury to the heart due to the electrocution injury and at the time of hearing there was no evidence of injury to the head or brain, and wherein she found that "if any problems are opined to have stemmed from the electrical shock injury which is outside of the area of expertise of Dr. Lide and Dr. Travis, those doctors may request referral for him for evaluation and treatment but the Defendants retain the right to contest whether those are related to the accident and to select the physician for treatment for any causally related problems."

4. That the Full Commission erred as a matter of law by

allowing Counsel for the Defendants to draft a proposed Order and by not fulfilling its statutory duty under the Administrative Procedures Act and the Workers' Compensation Act by failing to make its own detailed Findings of Fact and Conclusions of Law.

5. That where the Full Commission's decision was to "affirm in part and reverse in part the Decision and Order of the Single Commissioner" and its only instruction as to the reversal was:

> "The Panel denies the brain injury based in insufficient evidence."

The Commission erred as a matter of law by issuing an Order written by Defense Counsel that deleted and/or substantially modified unrelated but substantial findings of fact and conclusions of law made by the Hearing Commissioner specifically including but not limited to deleted Findings such as Hearing Commissioner Finding #16:

> "For purposes of the hearing before the undersigned, Claimant is very credible! I base this finding on my observations of Claimant's demeanor and on the delivery of his testimony."

and substantially modified Finding such as Hearing Commissioner Finding #15 (see Full Commission #29):

> "(Deleted) While the head and brain are listed as bodily parts under #3 in the Pre-hearing Brief that this is a systemic electrical shock and requests treatment for, "all organs, members and bodily parts determined to be related.") I note from the testimony and records of Dr. Greenfield that the Claimant had tenderness in the left arm and shoulder and was diagnosed with muscle shock. In her deposition she stated that this tenderness found on examination is more indicative of actual injury to those areas than just the pain that is

caused by a heart attack. Dr. Lide in his treatment notes and specifically on September 17, 2013, recorded that, 'we tried this patient on Neurontin last month when he appears to have peripheral neuropathy secondary to electrocution at work. Dr. Lide also recorded on the August 13th visit that he was having numbness in his great toe and suggested this neurological symptom was due to the electrical shock he experienced rather than the myocardial infarction. Thus, if any problems are opined to have stemmed from the electrical shock injury which is outside of the area and expertise of Dr. Lide and Dr. Travis, those doctors may request referral for him to other physicians for evaluation and treatment but the Defendants retain the right to contest whether those are related to the accident and to select the physicians for treatment for any causally related problems."

and substantially modified Hearing Commissioner Finding of Fact #39:

> "Claimant to receive temporary total disability benefits from September 15, 2013 through the present and continuing...."

Full Commission Finding of Fact #32 modified to:

> "Due to the compensable injury to his heart, Claimant shall receive temporary ...."

and added Findings outside of the request for proposed Order Full Commission such as Finding of Fact #27:

> "We decline to leave the claim open for possibly unlimited future hearings to determine compensability of presently alleged body parts as it would be grossly prejudicial to Defendants."

6. That the Full Commission erred as a matter of law by issuing an Order far exceeding its only specific holding that, "The Panel denies the brain injury based in insufficient evidence" and by making and including Conclusions of Law #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, and especially where

the Order part of the Decision affirms all Findings of Fact and Conclusions of Law of the Hearing Commissioner except as to the Findings on the, "head and/or brain".

7. That where the Full Commission Panel instructions stated that "the Panel denies the brain injury", the Commission erred as a matter of law and in violation of due process rights of the Appellant to notice and an opportunity to be heard by signing an Order denying the, "Claimant's head and/or brain injury."

8. That the Full Commission erred as a matter of law by not applying the basic fundamental principles of the Act and by applying established law that provides that a claimant may withdraw a request at any time prior to or at hearing.

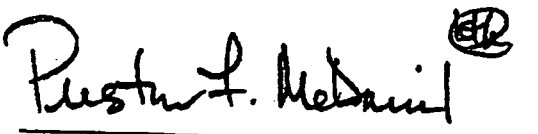
9. That the Full Commission, in what was termed as a decision reversing the Hearing Commissioner's decision on brain injury, erred as a matter of law by making Findings of Fact #14, #15, #16. #17, #18, #19, #20, #21, #22, #23, #24, #25, #26, #27, and #28.

10. That based on the Statement of the Case as set out in the Full Commission Order, the Commission Decision denying the Claimant the right to ever seek any benefits for brain injury should be reversed for numerous reasons as a matter of law specifically including but not limited to, the Panel considered information outside of the evidence in the Record; considered information not relevant or material that was prejudicial to the Claimant; misstatements of the Record; statements about off the

Record conferences; reference to post-hearing matters not part of the Record before the Full Commission for review and thus outside of the Record.

11. That where the Full Commission's only specific Finding it made following the Appeal Hearing was, "The Panel denies the brain injury based in insufficient evidence", the Full Commission erred as a matter of law by issuing an Order, ordering that a request for benefits for the brain and/or head were forever barred.

Respectfully submitted,



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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No. 2013-CP-40-05888
CLARENCE WINFREY, Claimant/Plaintiff, v. AMERICAN FIRE & CASUALTY INSURANCE COMPANY C/O LIBERTY MUTUAL GROUP, Carrier/Defendant, and The State of South Carolina Defendants.	)	**ORDER**

This matter comes before this court pursuant to the Declaratory Judgment Act. Plaintiff seeks to invalidate S.C. Code Ann. § 42-9-260 on the grounds that it is facially unconstitutional. Defendant American Fire ("Defendant") seeks dismissal from this matter as they contend they are not a proper party to this action.

By way of background, Plaintiff has alleged he was injured in a work related accident on May 22, 2013. Following the May 22, 2013 accident, Defendant instituted weekly temporary disability benefits while conducting an investigation on the compensability of the claim. Defendant reserved their rights to deny the claim within 150 days pursuant to S.C. Code Ann. § 42-9-260. Following the good faith investigation, Defendant denied Claimant's claim on September 12, 2013—within 150 days.

Following the denial of benefits, Claimant filed a Form 15, Section III requesting a hearing on September 18, 2013. On October 1, 2013, Claimant filed the underlying Summons and Complaint in Richland County Circuit Court alleging a bad faith denial of benefits, alleging that S.C. Code Ann. § 42-9-260 is unconstitutional, seeking a temporary restraining order to stop Defendants from denying the claim, and seeking an Order from Judge Lee finding the claim compensable and awarding benefits. On October 1, 2013, Judge Lee issued the temporary restraining order sought by Claimant related only to the denial and payment of benefits. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013. Judge Lee dismissed the temporary restraining order on October 9, 2013 based on a lack of jurisdiction to reinstate benefits. Defendants timely filed an Answer and Counterclaim asserting nine defenses and a counterclaim for costs and fees related to the frivolous pleading.

After the temporary restraining order was rescinded, the Commission set Claimant's Form 15, Section III for a hearing before Commissioner Beck. A hearing on Claimant's Form 15, Section III was set on September 30, 2013 for November 11, 2013. Prior to the hearing, Commissioner Beck conducted a standard pre-hearing conference as well as a Motions Hearing wherein Commissioner Beck ruled on all outstanding issues raised by the motions. Following the hearing, Commissioner Beck issued a Decision and Order on December 5, 2013 finding that Defendants had conducted a good faith investigation. Thereafter, Claimant timely filed a Form 30. The Full Commission affirmed Commissioner Beck's Decision and Order finding that Defendants properly denied the claim.

On October 22, 2013, after the Form 15 hearing was set by the Commission, Claimant filed a Form 50 requesting a hearing on compensability for alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. A hearing notice for

the Form 50 hearing was sent by the Commission on December 6, 2013 with explicit instructions that the hearing would be to determine compensability of Claimant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. The Form 50 hearing was held before Commissioner Barden on January 13, 2014. Following the hearing, Commissioner Barden issued a Decision and Order on February 27, 2014. Defendants timely filed a Form 30 based on legal errors contained in Commissioner Barden's Decision and Order. The Full Commission affirmed Commissioner Barden's finding of compensability for the heart but reversed and denied compensability for the alleged brain and head injuries.

Subsequent to the hearing before Commissioner Barden, Judge Cooper conducted a hearing on all outstanding motions filed in the declaratory judgment action on January 15, 2014. Judge Cooper issued a Form 4 Order on January 16, 2014 denying Defendants' motion for fees, costs, and other relief related to the request for a declaratory judgment and granting Claimant's motion to dismiss Defendants' counterclaim related to the request for a declaratory judgment. Judge Cooper issued a second written Order on January 31, 2014 denying Defendants 12(b)(7) Motion to Dismiss and ordering that the State of South Carolina be added as a party pursuant to Rule 19 if Claimant wished to proceed to a determination of the constitutionality of S.C. Code Ann. § 42-9-260. Judge Cooper denied a subsequent Motion to Alter or Amend filed by Defendants pursuant to Rule 59(e).

Claimant filed an Amended Summons and Complaint on February 18, 2014 adding the State of South Carolina as a Defendant. Defendant American Fire filed an Answer and Counterclaim to the Amended Summons and Complaint on March 5, 2014. Defendant American Fire has raised nine defenses in its Amended Answer and Counterclaim including an assertion that it is an improper party and should be dismissed. Defendant State of South Carolina filed its

Answer asserting eight defenses and a Motion for Judgment on the Pleadings pursuant to Rule 12(c) on April 21, 2014. Additionally, Defendant American Fire has filed a Motion for Costs related to the original improper temporary restraining order.

Defendant American Fire is the improper party to be protecting and/or defending the constitutionality of the Workers' Compensation Act in a Declaratory Judgment action. If this court were to rule in Plaintiff's favor on the underlying Declaratory Judgment Action, there is no relief that can be awarded to Plaintiff by Defendant American Fire. If this matter were simply ancillary to a proceeding (for example, the method in which a statute was applied to Plaintiff at trial was unconstitutional or a judge misstated a jury instruction resulting in a conviction) Defendant would be a proper party. However, that is not the case here. Rather, Plaintiff has simply picked a defendant to name as a party in his challenge to the facial validity of S.C. Code Ann. § 42-9-260. Hypothetically, this situation is functionally no different than if Defendant American Fire chose to name Plaintiff as a defendant in order to challenge the constitutionality of a statute requiring Defendant American Fire to pay corporate sales tax. There would be no relief that Plaintiff could grant and Plaintiff would not be the proper party to defend the constitutionality of a statute raised by Defendant American Fire—yet that is exactly what Plaintiff asserts in this matter.

In his January 27, 2014 filing, Plaintiff cites to Marley v. Kirby and Last v. MSI Construction Company as support for his position that a private party has been called to defend the constitutionality of a statute. However, Marley involved a challenge to a comparative negligence jury instruction *at trial* and Last involved a challenge to the method by which a statute was applied and the case was *on appeal* from a Workers' Compensation Hearing. Neither were declaratory judgment actions. This case is a declaratory judgment action. The sole purpose

of the case brought by Plaintiff is to challenge the constitutionality of a statute. A search of South Carolina case law with the connector terms of "declaratory judgment" and "unconstitutional" reveals a total of 142 reported cases involving a request to find a statute unconstitutional. Of these 142 cases, only a handful involves a challenge to constitutionality of an act or statute in the course of a hearing or trial (and, therefore, would not be a declaratory judgment action). However, a majority of these cases consist of declaratory judgment actions filed with the sole purpose being to declare a statute unconstitutional. There is not one reported case involving a declaratory judgment action filed to declare a statute unconstitutional that involves a private entity as a defending party. Further, every single one of the cases involves a state or municipal agency and/or state or municipal government[1] as the moving plaintiff or the proper defendant. Plaintiff has not pointed to a single declaratory judgment action that involved a private party as a, let alone the sole, defendant. Plaintiff has provided no authority for Defendant American Fire's involvement in this Declaratory Judgment suit and Defendant American Fire should be dismissed from further proceedings in this action.

For the foregoing reasons, I find that Defendant American Fire must be dismissed from further proceedings in this action. Plaintiff has failed to show any remedy available to him from Defendant American Fire. Plaintiff has further failed to provide any authority for a private party defendant's involvement in a facial challenge to the constitutionality of a statute.

IT IS SO ORDERED.

DeAndrea G. Benjamin
Judge, Fifth Judicial Circuit

[1] A survey of the cases show that the parties include, but are not limited to: The State of South Carolina, The Governor of South Carolina, The South Carolina Department of Revenue, The South Carolina Department of Transportation, The Attorney General of South Carolina, Richland County, Richland County School District One, The Town of Edisto Beach, The City of Charleston, The South Carolina State Ports Authority, and The South Carolina Law Enforcement Division.

_____, 2014

Draft order (Constitutional Issues) submitted by the State of South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-05888

Clarence Winfrey,

Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

ORDER GRANTING THE STATE OF SOUTH CAROLINA'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before this Court by motion of the State of South Carolina ("State") seeking judgment on the pleadings. A hearing on the State's Motion was held on September 9, 2014. The State was represented by T. Parkin Hunter and J. Emory Smith, Jr. of the South Carolina Attorney General's Office. The Plaintiff, Mr. Clarence Winfrey, was represented by Preston F. McDaniel of the McDaniel Law Firm. The insurance carrier, American Fire & Casualty Insurance Company c/o Liberty Mutual Group ("Carrier"), was represented by Brett H. Bayne of McAngus Goudelock & Courie, LLC.

FINDINGS

This action derives from a workplace accident that occurred on May 22, 2013. The State has asserted that this Court should not address the equal protection and due process claims Plaintiff has asserted against S.C. Code Ann. § 42-9-260 because this Court cannot give Plaintiff any remedy and therefore lacks standing. The State also argues that Plaintiff is constitutionally

estopped from making his constitutional arguments because the benefits he received were pursuant to S.C. Code Ann. § 42-9-260, the very statute whose constitutionality is being challenged. Plaintiff also asserts § 42-9-260 is in conflict with and violates the South Carolina Administrative Procedures Act (the "APA"). For the purposes of this Order, I assume, without deciding, that Plaintiff has the appropriate standing and is not constitutionally estopped. For the reasons set forth hereafter, I find the constitutional issues lack merit and find that the statute at issue, S.C. Code Ann. § 42-9-26, is constitutional and does not violate the South Carolina Administrative Procedures Act as asserted by Plaintiff.

BACKGROUND

On May 22, 2013, Plaintiff suffered an accident at his workplace. Ten days later, on June 1, 2013, the Carrier started paying temporary total benefit payments to the Plaintiff in accordance with the South Carolina Workers' Compensation Act (the "Act") pursuant to § 42-9-260. Carrier subsequently suspended benefit payments on September 14, 2013, on the basis that its investigation revealed that the injury was not compensable in accordance with § 42-9-260. Claimant petitioned the Commission for a Hearing to request his benefits be reinstituted pursuant to § 42-9-260(C). Commissioner Beck conducted a Hearing in accordance with § 42-9-260(C) on November 13th, 2013 and issued his Decision and Order finding Carrier terminated the benefits in good faith in accordance with § 42-9-260 on December 5, 2013. Plaintiff appealed Commissioner Beck's finding that the termination was in good faith to the Full Commission on December 23, 2013.

Subsequent to the filing of his petition for a Hearing under § 42-9-260(C), but prior to the Hearing on that petition, Claimant filed a WCC Form 50 Employee's Request for a Hearing to determine the merits of his claim for workers' compensation benefits on October 22nd, 2013.

Commissioner Barden conducted a Hearing on the merits on January 13th, 2014, and issued her Decision and Order on February 27th, 2014 finding Plaintiff sustained an injury resulting in disability under the Act. On March 7, 2014, Carrier appealed Commissioner Barden's Order. On July 25, 2014, the Full Commission issued simultaneous Decisions and Orders deciding the issues raised on the parties' appeals of the two prior orders of the single Commissioners. The Full Commission affirmed Commissioner Beck's finding that benefits were properly terminated under § 42-9-260(B) (3) and confirmed Commissioner Barden's Order that Claimant sustained a compensable injury and is entitled to temporary total disability benefits and medical treatment.

Plaintiff filed an appeal with the South Carolina Court of Appeals dated August 22, 2014, of the Decision of the Appellate Panel of the Commission filed July 15, 2014, which confirmed Commissioner Beck's findings.[1] Carrier has also appealed the finding that Plaintiff's injury is compensable under the Act.

Plaintiff filed his Amended Complaint in this action on February 18, 2014, wherein he named the State and sought a declaration that § 42-9-260 is unconstitutional. Prior to filing the Amended Complaint, Plaintiff sought and this Court issued a TRO without notice that ordered restoration of benefits. In that proceeding, Plaintiff argued that this Court should declare § 42-9-260 facially unconstitutional and asked for the TRO to reinstate benefits until the constitutionality could be determined. Carrier successfully moved to dismiss the TRO. *See Order* entered by Judge Lee dated October 9, 2013. Judge Lee dismissed the TRO and did not rule on the constitutionality.

In this action, Plaintiff asks this Court under the Declaratory Judgment Act, S. C. Code Ann. § 15-53-10, *et seq.*, to declare § 42-9-260 unconstitutional on the grounds of violations of

[1] Plaintiff also filed an appeal dated August 22, 2014, of the Commission's order denying compensation for brain injury, a matter that is not involved in the instant case.

due process and equal protection under the United States and South Carolina Constitutions. In addition, Plaintiff seeks an order declaring that § 42-9-260 violates the "APA".[2]

Section 42-9-260(A) provides that an employer may start payment of temporary benefits to an employee who has been out of work due to a reported work-related injury or occupational disease for eight days. The payments may be continued for up to 150 days from the date of the report of the injury "without any waiver of grounds for good faith denial." § 42-9-260(A). The employer may terminate the temporary benefits in the first 150 days without a hearing after a good faith investigation reveals grounds for denial of the claim. § 42-9-260(B) (3). A termination after 150 days requires a hearing. § 42-9-260(F). Rather than rely on the determination of the employer/carrier to start benefits during the 150 day period, § 42-17-20 allows either party to request a hearing if the employer and the injured party fail to reach an agreement with regard to compensation within 14 days of the injury. This was not done in this case.

The State's only interest in this matter is the defense of the constitutionality of § 42-9-260 and the preservation of the desirable public policy that encourages carriers to provide temporary benefits to injured workers for up to 150 days or until the issue of compensability is determined without prejudicing the carrier's ability to challenge compensability.

STANDARD OF REVIEW

Judgment on the pleadings is proper where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant. Where the pleadings disclose all facts necessary or present no issue of fact, the Court may exercise its discretion. *Rosenthal v. Unarco Indus., Inc.*, 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). "A

[2] Plaintiff also asks for a TRO (Amended Complaint, Prayer, Paragraph 1), asks this Court to reinstate benefits after declaring § 42-9-260 unconstitutional and to order that benefits cannot be stopped without a hearing (Amended Complaint, Prayer, Paragraph 3), and for such other and further relief as this Court deems just and proper. These requests are moot by virtue of this Order.

motion for judgment on the pleadings ... will be granted 'when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts." *Brown v. United Ins. Co. of Am.,* 268 S.C. 254, 257, 233 S.E.2d 298, 300 (1977), quoting *Wooten v. Standard Life & Casualty Insurance Co.,* 239 S.C. 243, 248, 122 S.E.2d 63 7, 639 (1961).

This Court may take judicial notice of its own records and what was stated in a former opinion in a prior action of the same case. *Wise v. Wise*, 394 S.C. 591, 601, 715 S.E.2d 117, 122 (Ct. App. 2011). *See, Doe V. Bishop of Charleston* 407 S.C. 128, 135, 754 S.E.2d 49, 498 (2014) ("the trial court's reliance on transcripts and court orders in the underlying class action did not convert the motion to one for summary judgment").

CONCLUSIONS OF LAW

This Court has assumed without deciding that Plaintiff has standing to bring this action and that he is not constitutionally estopped. I find that the due process, equal protection, and APA claims have no merit; therefore, the State is entitled to judgment on the pleadings, with prejudice.

A declaration of unconstitutionality requires Plaintiff to meet a high burden. "This Court is directed by the constitution, and our precedent, to make every effort to find acts of the General Assembly constitutional." *Joytime Distrib. And Amusement Co., Inc. v. State*, 338 S.C. 634, 653, 528 S.E.2d 647, 657 (1999).

1. § 42-9-260 does not violate Due Process under the Constitutions of the State or of the United States.

The initial inquiry in a due process analysis is whether the plaintiff has been deprived of a protected property or liberty interest. In order to have a property interest in a benefit, one must have "more than a unilateral expectation of it;" one must have "a legitimate claim of entitlement

to it." *Hamilton v. Board of Trustees of Oconee County School Dist.,* 282 S.C. 519, 525, 319 S.E.2d 717, 721 (1984).

Payment under § 42-9-260 is voluntary by the carrier/company during the first 150 days from the injury. Furthermore, as happened in this matter, a post deprivation [termination of benefits] hearing is required within sixty days if the carrier suspends or terminates payments. § 42-9-260(C). "[A] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Mathews v. Eldridge*, 424 U.S. 319, 331.

Furthermore, for there to be a due process violation, Plaintiff must have had a property interest in the temporary payments. There was no such property interest in this case.

§ 42-9-260(A) provides:

> (A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an **employer may start** temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

Id., (emphasis added).

Carrier took advantage of the "may" language and voluntarily started paying the temporary benefits. Then Carrier, after the performance of a good faith investigation[3] pursuant to § 42-9-260(B) (3), stopped paying the temporary benefits. Plaintiff did not have any right to the temporary benefits in the first 150 days absent a ruling by the Commission after Carrier terminated the benefits. Plaintiff was vested with a property interest in the temporary payments after the Commission ordered the benefits reinstated but not before. Regardless, Plaintiff was

[3] Commissioner Beck's Order found the investigation was in good faith. The good faith finding is under appeal to the South Carolina Court of Appeals.

protected under the South Carolina Worker's Compensation process by exercising his rights to a post termination hearing pursuant to § 42-9-260(C) which he did request and the benefits were restored.

One may have a protected property interest in Workers' Compensation Act benefit payments under the appropriate circumstances. For example, under § 42-9-260, after 150 days, an injured employee's temporary benefit payments may not be terminated without a hearing. Plaintiff cites numerous cases with regard to trying to establish that the temporary payments made in the first 150 days were property rights. However, these cases do not stand for the proposition that payments started voluntarily by the carrier/employer that can be terminated for certain reasons in the first 150 days are property rights. Plaintiff cites *Last v. MSI Construction Co., Inc.*, 305 S.C. 349, 409 S.E.2d 344 (1991) which states "We have previously recognized that entitlement to workers' compensation benefits constitutes a property interest," *citing Orszula v. Orszula,* 292 S.C. 264, 356 S.E. 2d 114 (1987). Section 42-9-260 clearly does not create an "entitlement" in the first 150 days. To hold otherwise would require this Court to ignore the clear language of § 42-9-260(A) that "an employer may start temporary benefits" and § 42-9-260(B)(3) that allows the carrier/ employer to terminate without a hearing in the first 150 days if certain conditions are met. There is no entitlement to the receipt of the payments in the first 150 days unless payment has been ordered by the Commission.

Moreover, the version of § 42-9-260 in effect when *Last* was decided in 1991 was enacted pursuant to 1988 Act No. 410, effective March 28, 1988, and does not provide for the carrier to start payments voluntarily in the first 150 days. The voluntary payment provision was inserted into § 42-9-260 by 1996 Act No. 424, § 13. Therefore, findings in *Last* with regard to property rights are not on point with the issue in this case. Additionally, in *Last* the carrier

terminated temporary benefits on the ground that the claimant refused medical treatment after he was incarcerated and was prevented from attending a medical appointment. The Commission found the termination was not proper because *Last* should not have been deemed to have terminated his medical treatment since he was incarcerated. Therefore, the benefits were improperly terminated under the statute. A post termination hearing was held as required by the statute. *Last* does not rest on statutorily authorized termination of temporary benefits under certain conditions as happened in the instant case. The *Last* court was correct under the facts of that case and the version of § 42-9-260 then in existence that "entitlement to workers' compensation benefits constitutes a property interest." However, *Last* simply proceeded under § 42-9-260 as it existed in 1991, a hearing was held, and benefits were reinstated. *Orszula*, upon which *Last* relied, affirmed the ruling of the Family Court that "the workers' compensation award was marital property subject to equitable distribution." The compensation award in *Orszula* was a $16,000 check "in settlement of his Tennessee workers' compensation claim." The settlement was an asset represented by a settlement check, a vested right constituting marital property in *Orszulla*. In the instant case, as pointed out, under § 42-9-260, the company may start the payment and it may terminate after a good faith investigation. At the time of the termination of payments in the instant case, Plaintiff did not have a vested property right – the temporary total benefits could clearly be taken away under proper circumstances. The benefits were terminated in accordance with the statute and the Commission subsequently ordered the temporary benefits restarted. Just as "may" is the key word in § 42-9-260, "entitled" is a key word in *Last*. Under the facts of this case, Plaintiff was not "entitled" to receive benefits pursuant to § 42-9-260 as this Section clearly provides that an "employer may start" the benefits and it further provides that benefits may be stopped under certain circumstances. The initial benefits

were paid at the option of the company and were terminated in accordance with the statute and were later reinstated in accordance with the statute. Plaintiff cites numerous other cases with regard to property interests and rights to hearings but these all involve vested interests of various sorts or state action.[4]

In short, Carrier voluntarily commenced payments and terminated them pursuant to § 42-9-260. There is not an agreement. If there were, it would have to comply with the requirements of § 42-17-10. The termination of the temporary benefits was the unitary act of Carrier and the statute permitted it. For the reasons set forth herein, I find that there was no due process violation under either the State Constitution or the United States Constitution.

2. § 42-9-260 does not violate Equal Protection under the Constitutions of the State or of the United States.

Where, as here, the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test applies. *City of Beaufort v. Holcombe,* 369 S.C. 643, 647-48, 632 S.E.2d 894, 897 (Ct. App. 2006). In *State v. Thompson*, 349 S.C. 346, 353, 563 S.E.2d 325, 329 (2002), the court found that the right to protect property [real property in *Thompson*] is not a fundamental right deserving strict scrutiny. Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. *Skyscraper Corp. v. Cnty. of Newberry,* 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996). "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

[4] Some examples are *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits that were a matter of statutory entitlement), *Brown v. South Carolina State Board of Education*, 301 S.C. 326, 391 S.E.2d 866 (termination of employment as a teacher), and *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969) (garnishment of earned wages pursuant to a summary process involving state action). These were terminations of vested rights.

Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. *Peay v. US Silica Co.,* 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993), citing *Cokeley v. Robert Lee, Inc.,* 197 S.C. 157, 14 S.E.2d 889 (1941). "It is the established law of this State that any reasonable doubt as to the construction of a Workmen's Compensation Law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed toward the end of providing coverage rather than non-coverage." *Cokeley*, 14 S.E.2d at 894.

South Carolina courts may analyze legislative intent without legislative history. In *Cokeley*, without citation to an outside source of legislative history, the Court stated "we do not feel that it was the intention of the Legislature to make the decision as alleged by the appellants." *Id.* at 894. In *Thompson, supra* (trapping beaver out of season), the court found, without citing any legislative history, that two statutes survived scrutiny and stated "Clearly, the purpose of these laws is to protect wildlife." *Id.*, 349 S.C. at 355, 563 S.E.2d at 330. As part of its justification as to intent, the *Thompson* court cited *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.,* 216 S.C. at 524, 59 S.E.2d at 142 for the proposition that preservation of game and fish is a matter of public interest. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 409 S.C. 331, ___ S.E.2d ___, 2014 WL 4055533 (2014). In the instant case, *Peay* and *Cokeley* provide a basis for determining the legislative intent for the Workers' Compensation laws.

Section 42-9-260 treats all employees whose benefits are terminated within 150 days the same: they all have the opportunity to request a post-termination hearing to seek the reinstatement of benefits, which hearing must be held in 60 days. Section 42-9-260 treats all employees who receive temporary disability benefits for more than 150 days the same: the benefits may not be terminated without an evidentiary hearing and Commission approval. The Act through § 42-9-260(B) provides a limited period of time (150 days) in which the employer can make provisional payment of benefits without being estopped from denying liability if the investigation turns up grounds for denial. This allows the employee to begin immediately receiving benefits, while at the same time allowing the employer an adequate, limited time period (150 days) in which he can conduct a thorough investigation to enable him to make an informed decision on whether or not to terminate payment of benefits. The reason for the 150 day distinction is to place a limitation on the period of time in which the employer enjoys the protection of being able to pay benefits, but not having to worry about being estopped from denial based on the findings of his investigation. Choosing the fixed number of 150 days allows a certain time period in which the employer knows he must complete his investigation or be forced to admit or deny coverage. Section 42-9-260 encourages the prompt payment of temporary disability benefits to injured workers. It allows an injured worker to receive temporary benefits without establishing the employer's liability for the injury. It allows the employer to mitigate any potential damages by starting payments and medical treatment, and allowing the employer to terminate those benefits if the employee is able to return to work, refuses medical treatment, or if the employer's investigation reveals good faith grounds for the denial of the claim. Allowing the employer to terminate discretionary disability payments within 150 days for the reasons set forth in § 42-9-260(B) provides an incentive for the employer to start disability

payments to the injured worker immediately. Moreover, the 150 day period allows the employer to conduct an investigation of the claim while paying temporary benefits without prejudice to the employer's legal position.

As set forth in *Cokeley supra*, "it is the established law of this State that any reasonable doubt as to the construction of a Workmen's Compensation Law must be resolved in favor of the claimants." When § 42-9-260 was amended in 1996 by Act No. 424, § 13, the law was changed to encourage carriers to start payments before a hearing to determine whether an injured employee was entitled to compensation benefits; therefore, encouraging carriers to provide needed funds to the injured employee earlier in the process in the first 150 days. It certainly cannot be said based on the policies behind the Workers' Compensation system and the history of the enactment of the current version of § 42-9-260 that there is not a rational basis for the classification based on before and after 150 days from injury.

Plaintiff states in his Memorandum of Law in Support of the Complaint that "There is no difference between a worker who is disabled under the Act before 150 days versus after 150 days." This misses the point. The law was specifically changed to allow carriers to voluntarily pay benefits in the first 150 days without waiving their rights. This allows the payments to be made before entitlement is established, therefore encouraging carriers to start paying. The Legislature clearly had a rational basis for this classification and, furthermore; the law is clear that classifications do not have to be perfect and great deference will be given to legislative classifications. Unlike *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 606 (1978) cited in Plaintiff's Memorandum of Law in Support of the Complaint at p. 18, where the court stated "We cannot perceive the rational classification for singling out persons injured in automobile accidents as different from all other injured in negligent torts", there is clearly a rational basis for the

classification in § 42-9-260 to encourage carriers to start paying benefits to injured workers. If the commencement of benefits in the first 150 days resulted in prejudice to their ability to challenge compensability, carriers would be chilled from making early payments.

3. § 42-9-260 does not violate or conflict with the Administrative Procedures Act.

The definition of a contested case is "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the **legal rights, duties, or privileges** of a party **are required by law to be determined by an agency** after an **opportunity** for hearing." S.C. Code Ann. § 1-23-310(3) (emphasis added). Section 42-9-260 simply does not require a hearing before the temporary benefits can be stopped pursuant to § 42-9-260(B) as was done in this case. There is no violation of the Administrative Procedures Act. The Administrative Procedures Act applies to the situation where "the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." As discussed in more detail in the due process section above, there was no state action involved in the termination of the temporary benefits. There was no agency action and no agency action was required. The Administrative Procedures Act simply does not apply.

NOW THEREFORE, for the grounds set forth herein, this Court finds § 42-9-260 to be constitutional on its face and finds that it does not conflict with or violate the APA. This Court grants judgment to the State with prejudice.

AND IT IS SO ORDERED.

_____

DeAndrea Gist Benjamin
Circuit Judge

Columbia, SC
September ___, 2014

Proposed Order (Estoppel Issues) submitted by the State of South Carolina October 9, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

Case No. 2013-CP-40-05888

Clarence Winfrey,

Plaintiff,

vs.

American Fire & Casualty Insurance Company c/o Liberty Mutual Group,

Carrier/Defendant,

And

The State of South Carolina,

Defendants.

ORDER GRANTING THE STATE OF SOUTH CAROLINA'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter is before this Court by motion of the State of South Carolina ("State") seeking judgment on the pleadings. A hearing on the State's Motion was heard on September 10, 2014. The State was represented by T. Parkin Hunter and J. Emory Smith, Jr. of the South Carolina Attorney General's Office. The Plaintiff, Mr. Clarence Winfrey, was represented by Preston F. McDaniel of the McDaniel Law Firm. The insurance carrier, American Fire & Casualty Insurance Company c/o Liberty Mutual Group ("Carrier"), was represented by Brett H. Bayne of McAngus Goudelock & Courie, LLC.

BACKGROUND

On May 22, 2013, Plaintiff suffered an accident at his workplace. Ten days later, on June 1, 2013, the Carrier started paying temporary total benefit payments to the Plaintiff in accordance with the South Carolina Workers' Compensation Act (the "Act") pursuant to § 42-9-260. Carrier subsequently suspended benefit payments on September 14, 2013, on the basis that its

investigation revealed that the injury was not compensable in accordance with § 42-9-260. Claimant petitioned the Commission for a Hearing to request his benefits be reinstituted pursuant to § 42-9-260(C). Commissioner Beck conducted a Hearing in accordance with § 42-9-260(C) on November 13th, 2013 and issued his Decision and Order finding Carrier terminated the benefits in good faith in accordance with § 42-9-260 on December 5, 2013. Plaintiff appealed Commissioner Beck's finding that the termination was in good faith to the Full Commission on December 23, 2013.

Subsequent to the filing of his petition for a Hearing under § 42-9-260(C), but prior to the Hearing on that petition, Claimant filed a WCC Form 50 Employee's Request for a Hearing to determine the merits of his claim for workers' compensation benefits on October 22nd, 2013. Commissioner Barden conducted a Hearing on the merits on January 13th, 2014, and issued her Decision and Order on February 27th, 2014 finding Plaintiff sustained an injury resulting in disability under the Act. On March 7, 2014, Carrier appealed Commissioner Barden's Order. On July 25, 2014, the Full Commission issued simultaneous Decisions and Orders deciding the issues raised on the parties' appeals of the two prior orders of the single Commissioners. The Full Commission affirmed Commissioner Beck's finding that benefits were properly terminated under § 42-9-260(B) (3) and confirmed Commissioner Barden's Order that Claimant sustained a compensable injury and is entitled to temporary total disability benefits and medical treatment.

Plaintiff filed an appeal with the South Carolina Court of Appeals dated August 22, 2014, of the Decision of the Appellate Panel of the Commission filed July 15, 2014, which confirmed Commissioner Beck's findings.[1] Carrier has also appealed the finding that Plaintiff's injury is compensable under the Act.

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In this action, Plaintiff asks this Court under the Declaratory Judgment Act, S. C. Code Ann. § 15-53-10, *et seq.*, to declare § 42-9-260 unconstitutional on the grounds of violations of due process and equal protection under the United States and South Carolina Constitutions. In addition, Plaintiff seeks an order declaring that § 42-9-260 violates the "APA".[2]

Section 42-9-260(A) provides that an employer may start payment of temporary benefits to an employee who has been out of work due to a reported work-related injury or occupational disease for eight days. The payments may be continued for up to 150 days from the date of the report of the injury "without any waiver of grounds for good faith denial." § 42-9-260(A). The employer may terminate the temporary benefits in the first 150 days without a hearing after a good faith investigation reveals grounds for denial of the claim. § 42-9-260(B) (3). A termination after 150 days requires a hearing. § 42-9-260(F). Rather than rely on the determination of the employer/carrier to start benefits during the 150 day period, § 42-17-20 allows either party to

[2] Plaintiff also asks for a TRO (Amended Complaint, Prayer, Paragraph 1), asks this Court to reinstate benefits after declaring § 42-9-260 unconstitutional and to order that benefits cannot be stopped without a hearing (Amended Complaint, Prayer, Paragraph 3), and for such other and further relief as this Court deems just and proper. These requests are moot by virtue of this Order.

request a hearing if the employer and the injured party fail to reach an agreement with regard to compensation within 14 days of the injury. This was not done in this case.

The State's only interest in this matter is the defense of the constitutionality of § 42-9-260 and the preservation of the desirable public policy that encourages carriers to provide temporary benefits to injured workers for up to 150 days or until the issue of compensability is determined without prejudicing the carrier's ability to challenge compensability.

STANDARD OF REVIEW

Judgment on the pleadings is proper where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant. Where the pleadings disclose all facts necessary or present no issue of fact, the Court may exercise its discretion. *Rosenthal v. Unarco Indus., Inc.,* 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). "A motion for judgment on the pleadings ... will be granted 'when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts.'" *Brown v. United Ins. Co. of Am.,* 268 S.C. 254, 257, 233 S.E.2d 298, 300 (1977), quoting *Wooten v. Standard Life & Casualty Insurance Co.,* 239 S.C. 243, 248, 122 S.E.2d 63 7, 639 (1961).

This Court may take judicial notice of its own records and what was stated in a former opinion in a prior action of the same case. *Wise v. Wise*, 394 S.C. 591, 601, 715 S.E.2d 117, 122 (Ct. App. 2011). *See*, *Doe V. Bishop of Charleston* 407 S.C. 128, 135, 754 S.E.2d 49, 498 (2014) ("the trial court's reliance on transcripts and court orders in the underlying class action did not convert the motion to one for summary judgment").

CONCLUSIONS OF LAW

The State is entitled to judgment on the pleadings, with prejudice, and this Court does not have jurisdiction to rule on the equal protection, due process, and APA challenges to § 42-9-260 because these matter are not properly before this Court.

1. Plaintiff does not have standing to ask this Court to reach the constitutionality issues because this Court cannot provide a remedy to Plaintiff.

To have standing, there must be a justiciable injury. *In re Treatment & Care of Luckabaugh,* 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002). It must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass 'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 289 (2001).

No ruling on the constitutionality or unconstitutionality of § 42-9-260 by this Court will grant relief to Plaintiff. The Supreme Court of South Carolina has stated that the "Court's firm policy [is] to decline to rule on constitutional issues unless such a ruling is required." *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002); *see also Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (1996) ("In keeping with our firm policy of declining to reach constitutional issues unnecessary to the resolution of the case before us, we do not address the circuit court's alternative ruling that the ordinance fee violated equal protection.").

This Court cannot grant Plaintiff's demand for relief because (1) Plaintiff is now receiving weekly payment of benefits and medical treatment pursuant to § 42-17-60; (2) the Commission has sole authority regarding Workers' Compensation matters (§ 42-3-180); (3) payment of the benefits when the Carrier suspended payments between September 14, 2013, and

February 27, 2014, was ruled on by the Commission and is presently under appeal to the South Carolina Court of Appeals; and (4) payments may not be terminated under the Act without a hearing now that 150 days have passed.[3]

Initially, as noted above, Plaintiff's temporary benefit payments were recommenced on February 27, 2014. The issues of whether Carrier must pay the benefits for the time they were stopped and whether the stoppage was in good faith are before the Court of Appeals. Therefore, even if this Court had jurisdiction over the payment of the benefits, which it does not have, there would be no relief this Court could provide.

The Commission has sole jurisdiction over matters relating to compensation claims. This Court, by a declaration either way on constitutionality cannot order benefits reinstated. "All question arising under this Title [42], if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this Title." § 42-3-180. As no issue with regard to the Plaintiff's benefits is properly before this Court, any opinion by this Court would simply be advisory. *See, Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("It is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.").

Matters regarding Plaintiff's benefits have been ruled on by the Commission and are under appeal to the South Carolina Court of Appeals. This action is nothing more than a collateral attack for which no ruling will bestow any benefit on Plaintiff.

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[3] The only possible exception, which is not before the Court, would be termination without a hearing because of an agreement by Plaintiff (§ 42-9-260(B) (2)).

In light of Judge Lee's Order issued in this case, I find it necessary to address *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) which held in part that:

> We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court.

Id., 391 S.C. at 109, 705 S.E.2d at 39.

Judge Lee, relying on *Travelscape*, stated "Clearly the circuit court has original subject matter jurisdiction over declaring a statute unconstitutional. . . ". There is no doubt that in the proper circumstances, the Circuit Court may address a facial constitutional challenge. However, to have standing there must still be a justiciable injury. To read the language of *Travelscape* to abrogate the standing requirement, which is what must be done here if this Court is to reach the constitutionality challenges, would open the door to parties to mount collateral constitutional attacks in every case where constitutionality is raised. Though the Commission cannot address the facial constitutionality of § 42-9-260, Plaintiff's compensation relief is now before the Court of Appeals which may hear the constitutionality if properly before it and there is standing to do so.

The State's motion for Judgment on the Pleadings must be granted because there is no standing because this Court cannot grant any relief that would benefit Plaintiff.

2. Constitutional estoppel bars Plaintiff's claims.

The doctrine of constitutional estoppel prevents Plaintiff from challenging the constitutionality of § 42-9-260. In spite of Plaintiff's argument to the contrary, there is no question that § 42-9-260 is the basis for the temporary payments that were started by Carrier:

> (A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, **an employer may start temporary disability** payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.
>
> (C) An employee whose disability payments have been terminated or suspended pursuant to this section **may request a hearing to have the payments reinstituted**. The hearing must be held within sixty days of the date of the employee's request for a hearing.

§ 42-9-260 (emphasis added).

Plaintiff is challenging the very statute under which his temporary benefits were commenced. After his temporary benefits were terminated, Plaintiff exercised his right to request a hearing pursuant to § 42-9-260(C). He may not take the benefits of the statute and simultaneously attack its constitutionality. "A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality." *Ross v. Lipscomb*, 83 S.C. 136, 65 S.E. 451 (1909). Furthermore, his appeals with the South Carolina Court of Appeals are with regard to Commission findings and rulings under § 42-9-260.

The State's motion for Judgment on the Pleadings must be granted because Plaintiff is constitutionally estopped from challenging § 42-9-260.

NO FURTHER INQUIRY IS NECESSARY OR PERMISSIBLE

No relief can be granted by this Court to Plaintiff. Therefore, there is no standing for this matter to proceed before this Court and there is no jurisdiction to make any further rulings. I cannot address due process, equal protection, and the APA. To address these issues would be the improper rendering of an advisory opinion.

NOW THEREFORE, for the grounds set forth herein, this Court grants judgment to the State with prejudice.

AND IT IS SO ORDERED.

_____

DeAndrea Gist Benjamin
Circuit Judge

Columbia, SC
September ___, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,

Plaintiff,

v.

AMERICAN FIRE AND CASUALTY CO.,

and

STATE OF SOUTH CAROLINA,

Defendants.

C/A No. 2013-CP-40-05888

IN RE:

South Carolina Workers Compensation Commission
WCC File No.: 1306305

CLARENCE B. WINFREY, JR.,

Employee-Claimant,

v.

ARCHWAY SERVICE, INC.,

Employer, and

AMERICAN FIRE AND CASUALTY CO.,

As Carrier,

Defendants.

ORDER AS TO MOTIONS AND DECLARATORY JUDGMENT ACTION

This matter came to be heard by me on September 11, 2014. The Plaintiff was represented by Preston F. McDaniel, Esquire of the Richland County Bar. The Defendant American Fire & Casualty Insurance Company was represented by Brett H. Bayne, Esquire of the law firm of McAngus, Goudelock & Courie, also of the Richland

County Bar. The State of South Carolina was represented at the hearing by T. Parkin Hunter, Esquire, Assistant Attorney General and by Emory Smith, Esquire, Deputy Attorney General, both of whom are members of the Richland County Bar.

At the hearing, in addition to a decision on the Declaratory Judgment Action several Motions that had been filed were to be heard, two (2) of which were disposed of at the hearing and are addressed in this Order. As to the other Motions, the Defendant American Fire & Casualty Insurance Company (hereinafter American Fire) had filed a counterclaim, which at the hearing it asserted to be an affirmative defense to which the Plaintiff had filed a Motion to strike the Counterclaim. American Fire had also filed a separate Motion requesting attorney's fees and costs concerning the defense of the Temporary Injunction. As to the counterclaim which is now alleged to be an affirmative defense, the Defendants withdrew that defense and also the separate Motion and stated they would refile the Motion at a later time before Judge Lee. Based on this, the Motion by the Plaintiff to dismiss the counterclaim is rendered moot.

Next, the Plaintiff filed a Motion to Dismiss the State of South Carolina and asserted several reasons in reference to why the State of South Carolina should be dismissed as a party. By way of history, the State of South Carolina was properly served pursuant to the Circuit Court Rules with a copy of the Summons and Complaint

when it was originally served on September 27, 2013 to which no response was filed nor was any request to intervene or to be made a party to the action filed by the Attorney General's Office. Subsequently in response to a Rule 12(b)(7) Motion filed by American Fire, Judge G. Thomas Cooper, Jr. after hearing issued an Order denying the Motion to Dismiss for failure to join a necessary party but directing the Plaintiff to add the State of South Carolina as a party to the action and serve an Amended Complaint. Pursuant to the Court's direction, the Plaintiff filed an Amended Complaint adding the State of South Carolina.

While the Plaintiff does not challenge the right of the Court to add a party at any time, he does note to the Court that the issue of adding a party was not before Judge Cooper and that the Attorney General had previously been properly served and had chosen not to reply or become involved in this action and requested that the State be dismissed as a party on that basis.

The Plaintiff further argued, and argued that this is the primary basis and reason for the request for dismissal, that the State of South Carolina in its Answer agreed with the Plaintiff that it is not a proper party by specifically denying and alleging in its Answer in paragraph #6 that,

> "the State of South Carolina is not a necessary party to any action challenging the constitutionality of a South Carolina statute"

and the State asked to be dismissed from the action as not being a proper or necessary party to the action. The Plaintiff agrees with that position and requested that the State be dismissed. However, at the hearing the Attorney General changed its position and although it specifically answered denying that it was a necessary party to any action challenging the constitutionality of a South Carolina statute, the Attorney General decided to and did request to continue as a party to the action. After review, this Court denied Plaintiff's Motion. While the Attorney General did not originally take a position as to this litigation although properly served and while the State did deny they are a necessary party, they now wish to proceed and based on Judge Cooper's Order and the intent of SCRCP Rule 4(d)(4)(B), they should be allowed to proceed.

With this decision there remains two other issues to be decided before addressing the Declaratory Judgment Action. First American Fire in its Answer alleged that it is not a proper party and while this was not presented to the Court through a separate Motion, the Court will address that issue before reaching the State's Motion for Judgment on the Pleadings and the Declaratory Judgment Action. Based on a review of the arguments made, the defense that American Fire is not a proper party and should be removed as a party to the action is DENIED. In reference to this decision, SC Code §15-53-20 and 30, specifically gives a party the right to have determined by, and confers jurisdiction on, the

Courts of general jurisdiction of this State to declare the rights, status and other legal relations of, by and between the parties. As to jurisdiction, SC Code §15-53-30 specifically provides that any person whose:

> "rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder."

SC Code §15-53-80 establishes who are the parties that may or should be made a party to that action and states that when a Declaratory Judgment is sought all parties shall be made parties who,

> "have or claim any interest which would be affected by the declaration . . .".

That statute also specifically provides that when the constitutionality of a statute is challenged that the Attorney General is required to be served with a copy of the proceedings which was done in this case. In this case, the Plaintiff challenges the constitutionality of a statute, SC Code §42-9-260(B)(1-6) under which the Defendant American Fire took the benefit of the provisions of that statute to stop the Plaintiff's benefits including temporary total disability compensation benefits and medical benefits payable under the Act without a hearing. In other words, American Fire is the party that took the action under the provisions of the statute as passed by the General Assembly and asserted its right under the provisions of that Statute to stop

benefits to the Plaintiff without a hearing, thus affecting his rights. Nothing further needs to be said, the Defendant American Fire is a proper party to this action and the Motion and Answer alleging that it should be dismissed as a proper party to this action is hereby DENIED.

Next, the State of South Carolina filed a Motion for Judgment on the Pleadings setting forth various grounds in the Memorandum in Support of the Motion as to why Judgment on the Pleadings should be granted. Within the Motion for Judgment on the Pleadings, in addition to other grounds which will be addressed hereinafter, the State also makes arguments that the Statute does not violate the Plaintiff's due process rights; that it does not conflict with the provisions of the Administrative Procedures Act; and that it does not deny the Plaintiff equal protection of the laws under our State and Federal Constitutions. Those issues and arguments will be addressed hereinafter under the decision of this Court on the Declaratory Judgment Action. As to the other issues raised in the Motion, those issues are addressed as set forth hereinafter.

First and precatory to any decision on a Motion for Judgment on the Pleadings, the standard of review and the standard that applies to a Motion for Judgment on the Pleadings must be set forth. Quoting the Supreme Court with Justice Finney speaking for the Court in the case of Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) as later cited by Justice Pleicones in 2013

in the case of Homebuilders Assoc. of SC v. School Dist. #2 of Dorchester County, 405 S.C. 458, 748 S.E.2d 230 (2013):

> "A judgment on the pleadings against the Plaintiff is not proper if there is an issue of fact raised by the Complaint which, if resolved in favor of the Plaintiff, would entitle him to judgment. A judgment on the pleadings is in the nature of a demurrer. All properly pleaded facts or allegations are deemed admitted for purposes of consideration of a demurrer. When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a Complaint is sufficient if it states any cause of action or if it appears that the Plaintiff is entitled to any relief whatsoever. Our Courts have held that pleadings in a case should be liberally construed so that substantial justice is done between the parties. Further, a judgment on the pleadings is **considered to be a drastic procedure by our Courts.**" (Emphasis added).

Based on a review of the Pleadings and the inferences obtained therefrom, the Plaintiff has set forth sufficient pleadings to entitle him to a declaration as to the constitutionality of SC Code §42-9-260(d)(1)(6) and therefore the Motion on the Pleadings should be dismissed for that reason alone. However, this Court will address the other issues raised by the Motion for Judgment on the Pleadings except again for those addressed later in reference to the Declaratory Judgment Action.

The State of South Carolina alleges that the Plaintiff does not have standing to challenge the constitutionality of the Statute. Under the three (3) prong test concerning standing, the State does not challenge that the Plaintiff suffered injury nor

that there is a causal connection between the injury and the conduct complained of, which is to say the stopping of his weekly disability payments under the Statute without a hearing. The State challenges the third prong as to whether there is a justiciable controversy and whether the injury can be redressed by a favorable decision by this Court. Again, the Declaratory Judgment Act specifically provides that no Declaratory Judgment Action or proceeding shall be open to objection on the ground that a Declaratory Judgment Action or decree is what is prayed for. In addition, under the Declaratory Judgment Act and under the pleadings in this case, there is clearly a judiciable controversy between the Plaintiff and American Fire. The Defendant American Fire asserted its right to stop the Plaintiff's benefits under the Statute without a hearing and the Plaintiff has asserted his rights under the Declaratory Judgment Act to have that part of the Statute declared unconstitutional and/or in violation or derogation of other State law. This Court has jurisdiction over a determination as to whether or not that statute is in fact constitutional. In workers' compensation matters, this Court and our Appellate Courts have the exclusive jurisdiction to declare the law and to apply the law while the Commission is the fact finder. Where the issue is one of law, it is a question to be decided by the Courts. Stuckie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (SC App. 1987). In this

case, the issue is one of law, this Court has jurisdiction and this Court has jurisdiction to declare the law and to remand this case to the Commission with direction to enter judgment in accordance with its ruling on the law; that is to say ordering the Defendants to reinstate benefits during the period of time in question. Therefore, there is clearly a justiciable issue between the parties, the Plaintiff and American Fire, and the Plaintiff has standing in this case.

Next, as part of its Motion for Judgment on the Pleadings, the State raises the concept of constitutional estoppel. Without recitation of the citations concerning this concept, the concept and doctrine of constitutional estoppel applies to estop a party from challenging the constitutionality of a statute under which they have voluntarily received benefits. The argument of the State is premised upon the presumed fact that the, "Plaintiff having sought and received benefits pursuant to SC Code §42-9-260" the Plaintiff should be estopped from challenging the constitutionality of that statute. Herein lays the fallacy of the argument of the State concerning this doctrine. The Plaintiff is not receiving benefits pursuant to SC Code §42-9-260 and did not request benefits under that section; He claimed benefits due to his disability. Under the Workers' Compensation Act benefits to an injured worker for periods of total disability are paid where the parties agree the worker is disabled under three statutes; SC Code §42-1-120, §42-9-

10, and §42-17-10. Where a worker (claimant) is disabled from work as defined in SC Code §42-1-120, the worker is entitled to weekly compensation benefits for that period of disability under SC Code §42-9-10. SC Code §42-17-10 provides for the payment of those weekly compensation benefits to the worker based upon the agreement of the parties to start and pay benefits. These are the provisions of the Act under which benefits have been paid since the inception of the Act in 1936 and under which the Plaintiff was receiving benefits. SC Code §42-9-260 is the stop payment provision of the Act and provides for the methods whereby the employer and/or an insurance carrier which has started benefits may stop those benefits. That statute was amended by adding §42-9-260(B)(1-6) which provides for stopping benefits without a hearing giving rise to this Declaratory Judgment Action. It is the Defendant American Fire in this case that sought the use of the provisions of §42-9-260(B)(1-6) and not the Plaintiff. The Defendant American Fire took the affirmative action, i.e., claimed the benefit of that Code Section to stop the Plaintiff's benefits pursuant to that Code Section. The doctrine of constitutional estoppel thus does not apply.

The remainder of the arguments of the State in the Motion are addressed to and are in reference specifically to the issues raised by the Declaratory Judgment Action as to whether or not the Plaintiff's due process rights have been violated; whether or not he

has been denied equal protection of the laws and whether or not the statute is in derogation of the provisions of the SC Administrative Procedures Act. As set forth above, those arguments will be dealt with hereinafter as part of the decision of this Court on the Declaratory Judgment Action filed by the Plaintiff. Therefore, for all the above-stated reasons, the Motion for Judgment on the Pleadings filed by the State is hereby denied.

THE DECLARATORY JUDGMENT ACTION

As to the Declaratory Judgment Action and the constitutionality of the statute in question, that being SC Code §42-9-260(B)(1-6), after due and proper consideration of the arguments, the Briefs and the case law, it is the opinion of this Court that SC Code §42-9-260(B)(1-6) is unconstitutional and violates the Plaintiff's rights to due process of law, violates his constitutional right to equal protection under the Act and is in derogation of the provisions of the Administrative Procedures Act.

First, S.C. Code §42-9-260(B)(1-6) violates the fundamental due process rights of the Plaintiff under the United States and South Carolina Constitutions. That statute specifically provides for and allows the Defendant American Fire to stop weekly disability compensation and medical benefits without a hearing thus denying him the fundamental procedural due process rights of notice and an opportunity to be heard before he is deprived of a property

interest; that being his entitlement to compensation and medical benefits under the SC Workers' Compensation Act.

"In order to be entitled to the procedural safeguards encompassed by the due process clause of the Fourteenth Amendment (notice and an opportunity to be heard) the complaining party must suffer from deprivation of a liberty or **property interest.**" Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.E.2d 548 (1971) (Emphasis added). "Only when such a property interest exists does a constitutional right to a hearing attach." Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

Our Supreme Court has specifically held that, "workers' compensation benefits constitute a property interest" of which a claimant cannot be deprived without due process of law; Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334, 336 (1991); Orszula v. Orszula, 292 S.C. 264, 356 S.E. 2d 114 (1987). Therefore, any attempt to deprive a Claimant of his "property interest" without a hearing violates the due process clauses of both the United States and South Carolina Constitutions.

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the United States Supreme Court held that procedural due process requires that a pre-termination hearing be held when public assistance payments to welfare recipients are discontinued. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The Court held that even in that situation, the

entitlement to welfare benefits constituted a sufficient property interest that due process requirements attached. The Court in Goldberg struck down a New York statute which allowed for the termination of benefits prior to a hearing. The Court reasoned that,

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
>
> * * *
>
> Thus the crucial factor in this context . . . 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. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . ."
>
> * * *
>
> "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." Goldberg, 397 U.S. at 262-263, 264, 265-66, 90 S.Ct. at 1019.

Our Courts have similarly stated that compensation laws,

> Constitute a form of social legislation and were enacted primarily for the benefit, protection and **welfare** of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue to obtain compensation is taken away, and

> such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficial purposes for which they were enacted. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941) (Emphasis added).

Recently in Mendenhall v. Anderson Hardwood Floors, LLC, 401 S.C. 558, 738 S.E.2d 251 (2013), the Court stated:

> "The concept of workers' compensation is founded upon recognition of the advisability, from the standpoint of society as well as the employer and employee, of discarding the common law idea of tort liability in the employee-employer relationship and of substituting therefore the principle of liability on the part of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, **for loss of earnings** resulting from the accidental injury . . . ."

In Goldberg, the Court stated that public assistance "is not mere charity, but a means to promote the general **welfare**, and secure the Blessings of Liberty to ourselves and our Posterity." Goldberg, 397 U.S. at 266, 90 S.Ct. at 1019 (Emphasis added). The Court continued and stated that "pre-termination evidentiary Hearings are indispensable to that end." Id. Our Supreme Court in the workers' compensation case of Hamm v. Mullin's Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940), (a case involving the due process right of notice of the issues to be addressed), quoting from the United States Supreme Court decision in Powell v. Alabama, 287 U.S. 45 at p. 68, 53 S.Ct. 55 at p. 64, 77 Law Ed. 158 at p. 170, 84 ALR 527 stated:

> "It never has been doubted by this Court or any other so as far as we know, that notice and hearing are preliminary steps essential to the passing of

> an enforceable judgment and that they together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns' have been repeated by varying forms of expressions in a multitude of decisions."

In Brown v. S.C. State Bd., of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990), [invalidation of teaching certificate and resulting deprivation of employment (wages, property interest) requires a due process hearing, confrontation of witnesses, and disclosure of evidence], our Court echoed those sentiments and held that "[w]where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866, 867 (1990).

However, the analysis in this particular case should not stop there as Goldberg v. Kelly, supra, and the line of cases decided under that Decision specifically address situations where the government is seeking to deprive an individual of a property interest (welfare benefits, social security benefits, teachers certificates, etc.) and do not specifically address the situation involved in this case wherein a private party under statutory authority seeks to deprive another party of a protected property interest. This Court agrees with the Plaintiff that there are a very limited number of situations wherein a private party is either paying benefits under the provisions of a statute and/or is seeking

to deprive a party of a property interest under the provisions of a statute. In that sense, our system of workers' compensation laws across the United States are unique, and specifically so, in that they require the payment of benefits to a private party by another private party pursuant to the provisions of a statutory scheme.

The Supreme Court of the United States has specifically addressed a private party's right to procedural due process where another private party takes action under a state statute or statutory scheme that affects the private property interest of that party. In Sniadach v. Family Finance Corp. of Bayview, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the United States Supreme Court was called upon to determine whether a state statute was constitutional that allowed a private party (creditor) to garnish the wages of another private party (debtor) involved in a debt collection action without a hearing prior to a determination in that action that the debt was in fact owed. In Sniadach, the Defendant finance company filed a Summons & Complaint alleging that the Defendant Sniadach owed $420.00 on a promissory note. The Wisconsin statute provided that after the filing of a Summons & Complaint that the plaintiff Family Finance Corp. could garnish the "wages" of the defendant Sniadach to pay off the debt before there was any determination made in the action as to whether or not the debt was in fact owed. The Supreme Court declared the statute unconstitutional and held that the deprivation of the defendant's

property interests (his wages) under the provisions of the statute by the plaintiff, a private party, denied the defendant due process of law.

> "Where the taking of one's property (i.e. wages) is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process."

Also the United States Supreme Court decision (a case cited by both the State and the Plaintiff) in American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) specifically supports the Plaintiff's position taken in this case. In American Manufacturers the Court stated in pertinent part:

> "In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), we held that an individual **receiving** federal welfare assistance has a statutorily created property interest in the continued receipt of those benefits. Likewise, in Mathews, supra, we recognized that the same was true for an individual **receiving** Social Security disability benefits. In both cases, an individual's **entitlements to benefits had been established . . .**" (Emphasis added).

In this case, the Plaintiff's entitlement to weekly compensation benefits which were being paid by agreement in accordance with Code sections §42-1-120, §42-9-10 and §42-17-20 and also in accordance with SC Code §42-9-260(A) had been established. Subsection A of §42-9-260 as amended provides and adds that the insurance carrier may start benefits but within the first 150 days of payment of those payments retains the right to assert and does not waive any grounds for good faith grounds of denial to deny

those benefits. Had the statutory amendment stopped there and had only added those grounds for applying for a hearing to stop benefits the statute would not run afoul of due process requirements. However the amendment also added subsection (B)(1-6) which allows for stopping the injured worker's benefits without a hearing. The SC Supreme Court has held that a claimant has a property interest in weekly compensation benefits and the Record in this case establishes that by agreement those weekly benefits had been started to the Plaintiff in this Declaratory Judgment Action. Thus, under Goldberg v. Kelly, supra; Sniadach v. Family Finance Corp., supra, and their progeny and under the decisions of our SC Supreme Court including Last v. MSI Constr. Co., supra; Hamm v. Mullings Lumber Co., supra; and Brown v. SC State Board of Education; and applying the concepts of fundamental due process as set out in Hamm quoting from Powell v. Alabama, supra; recognized and held that,

> "notice and hearing are **preliminary** steps essential to the passing of an enforceable judgment and that they together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." (Emphasis added),

due process requires a hearing before stopping those benefits. Therefore, under South Carolina Law, a claimant and the Plaintiff in this action, as a matter of fundamental due process, is entitled to a hearing before the termination of his/her property interest; disability and medical benefits, and SC Code of Laws, §42-9-

260(B)(1-6) is and hereby is declared to be unconstitutional in violation of a Plaintiff's constitutional right to due process of law under both our State and Federal Constitutions.

Next, it is the opinion and holding of this Court that S.C. Code §42-9-260 violates the South Carolina and United States Constitutions by denying the Plaintiff, Mr. Winfrey, equal protection under the law.

"The Constitutional guarantee of equal protection under the law requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604, 605 (1978). While the General Assembly has "the right to make reasonable classifications of persons and property for public purpose", those classifications **must apply "equally to all members of the class" and must not be "arbitrary but [instead] rests upon some reasonable basis."** Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362, 368 (1970) (Emphasis added); Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979).

Section 42-9-260 fails to meet this standard. SC Code §42-9-260 creates two classes, one class made of up of claimants who have not yet been receiving temporary disability benefits for one hundred and fifty (150) days whose benefits can be stopped without a hearing and those that have been receiving benefits in excess of one hundred and fifty (150) days whose benefits cannot be stopped

and who are entitled to benefits until after a hearing is held **and** benefits are stopped by Order of the Commission. This classification between claimants receiving weekly disability compensation payments serves absolutely no interest, has no rational basis and is purely arbitrary.

> The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be affected. Marley, 245 S.E.2d at 606.

In this case the indiscriminate choice of one hundred and fifty (150) days bears no reasonable and just relation to the legislative purpose of the Workers' Compensation Act, which, as stated earlier is for the **"benefit, protection and welfare of working men and their dependents."** Cokeley, 14 S.E.2d at 893-94. (Emphasis added).

In Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979), the South Carolina Supreme Court struck down a similar type statute which did not allow a guest passenger in an automobile accident to be compensated for their injuries unless they could show "reckless disregard" on behalf of the driver. In striking down the guest statute, the Court stated that the justifications for passing the statute did not constitute "a rational basis for the differential treatment it spawned." Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883, 885 (1979). The Court could find no justification for allowing any other party to recover for their injuries based on simple negligence but yet holding the guest passenger to a higher

standard of negligence in order to recover. Probably even more directly on point is the SC Supreme Court decision in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). In Marley, the statute provided for a different standard of contributory negligence as applied to a plaintiff claiming damages as a result of a motor vehicle accident versus the standard applied to a plaintiff in any other negligence cause of action wherein the Court held,

> "We cannot perceive the rational classification for singling out persons injured in automobile accidents as different from all others injured in negligent torts."

The Court also specifically pointed out in reference to equal protection that:

> "The requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation **to the legislative purpose sought to be affected.** There is no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."

Under the Workers' Compensation Act, one of the legislative purposes in establishing the Act is to pay weekly compensation payments to injured workers during all periods of disability as defined in the Act. The worker is entitled, under the legislative purpose, to have those benefits (weekly payments for all periods of disability) paid to the worker whether that is 15 days of disability after the accident, 50 days of disability after the accident, 150 days of disability after the accident, or 300 days of disability after the accident. The benefits to be paid are the

same, i.e. weekly payments during all periods of disability. The definition of and entitlement to disability under the Workers' Compensation Act is the same before and after 150 days. Finally, a review of the statutes and regulations establishes that the basis upon which an insurance carrier can request to stop payment of benefits based on the disability (§42-1-120) status of the claimant are the same before and after 150 days.

The Court also takes specific notice of the case of United States Fidelity & Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d, 239 (1972). In Unites States Fidelity & Guaranty Co., the Plaintiff was simply a business required to pay a, "business" license fee to operate that, "business" in the city. The City of Newberry required three types of businesses to pay for a license fee at a higher rate as compared to other "businesses", one being life, health, accident and hospital insurance companies, another being companies that delivered (without prior order) crackers, cakes and tobacco and another one being a Fire & Casualty Insurance Co., which was the Plaintiff's "business". The Court found that there was simply no rational basis for requiring the Plaintiff's, "business" to pay a higher rate. It was simply a, "business" requesting a license to do, "business" and there was no rational basis for any distinction between, "businesses".

There is simply no rational distinction between the protections to which a claimant who has been receiving "disability"

benefits for 149 days should be entitled as compared to a claimant who has been receiving "disability" benefits for 151 days. Therefore, S.C. Code §42-9-260 (as amended 1996) does not provide equal protection under the law to Claimants due to its arbitrary, irrational and discriminatory classification. Therefore it is the opinion and holding of this Court that SC Code §42-9-260 is unconstitutional as violating the Plaintiff (Claimant), Mr. Winfrey's, right to equal protection under the law as required by both the South Carolina and the United State Constitutions.

Finally, it is the opinion of this Court that S.C. Code §42-9-260(B)(1-6) is in direct conflict with S.C. Code §1-23-310(2). S.C. Code §1-23-310(2) reads in pertinent part,

> "contested case" means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency **after an opportunity to be heard.** S.C. Code §1-23-310(2) (as amended 1993) (Emphasis added).

Prior to June 18, 1996, a Claimant's weekly disability benefits could not be terminated until "after an opportunity to be heard". SC Code §42-17-20. After the 1996 amendment to SC Code §42-9-260, Subsection (B) provides:

> "Once temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred and fifty days if:"

After which six (6) bases are listed as grounds for immediate termination. After termination without a hearing a Claimant must

request a hearing to have benefits possibly reinstated. While a hearing must be held within sixty (60) days of the request, there is no time limit for a ruling and that decision may be appealed pursuant to SC Code §42-17-50 to the Full Commission, and thus it could be many months even over a year, disabled, unable to work without any means to live. After reading both statutes and reviewing existing case law, there is no way to reconcile §42-9-260's denial of the Plaintiff's property right to temporary disability compensation without a pre-termination hearing and §1-23-310's requirement of a hearing before a determination of a party's rights by an Administrative Agency.

"Where provisions of the APA and the Workers' Compensation Act conflict, **the APA controls.**" Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731, 732 (1989) (Emphasis added).

The Defendant American Fire and the State argue that this is not a contested case arguing that there is no entitlement to benefits. This Court finds that the argument that this is not a, "contested case" is erroneous. Under the Act, The parties to the workers' compensation claim have to agree initially that the Claimant is entitled to disability compensation benefits in order for those benefits to be started. Subsequent to that, the employer for certain enumerated reasons during the first 150 days may then deny and stop benefits. Obviously at that point there is a disagreement as to the continuation of benefits. In this case, the

Defendant American Fire disputed that they owed any further benefits and stopped benefits without a hearing under §42-9-260(B)(1-6). In Webster's Dictionary, "contest," is defined, as to make the subject of dispute, contention, or litigation; especially: dispute, challenge. (Emphasis added). In Webster's the words "contest" and "deny" have a very similar meaning in that under both words, one of the meanings is, "to say you do not accept".

Thus as in this case, where the insurance carrier and/or employer agrees that the Claimant is entitled to weekly compensation benefits for his disability and they then change that position and deny the right to benefits that means that there is now a, "contest" between the two parties over disability benefits and there is a "contested case". Where there is a contested case the Administrative Procedures Act requires a hearing. Therefore, since this is a contested case and since the provisions of SC Code §42-9-260(B)(1-6) provide for the stopping of the Claimant's benefits, both disability and medical, without a hearing those provisions are in derogation of the specific provisions of SC Code §1-23-310(2) which require that in a, "contested case", the legal rights, duties and responsibilities of a party can only be determined after an opportunity to be heard. Since the provisions of the Administrative Procedures Act control over provisions of the Workers' Compensation Act when they are in conflict, the provisions of §1-23-310(2) control and require that a hearing be held prior to

the termination of the Plaintiff's disability and medical benefits under the Act.

Wherefore, based on the findings and conclusions of this Court,

THEREFORE IT IS THE HOLDING AND DECLARATION OF THIS COURT that SC Code §42-9-260(B)(1-6) is unconstitutional as being in violation of the Plaintiff's right to due process of law and specifically his right to notice and an opportunity to be heard before he can be deprived of his property right, which in this case is his entitlement to disability and medical benefits under the Workers' Compensation Act; and in addition as being in violation of the Plaintiff's constitutional right to equal protection of the law by creating an unreasonable and irrational classification. It is the further holding of the Court that SC Code §42-9-260(B)(1-6) is in derogation of the provisions and requirements of the Administrative Procedures Act, SC Code 1-23-310(2), which requires that in all contested cases the rights and benefits of a party cannot be determined without notice and an opportunity to be heard. Under our law and Supreme Court decisions the provisions of the Administrative Procedures Act, SC Code §1-23-310(2) controls and requires a hearing before a deprivation of the Plaintiff's entitlement to benefits.

IT IS FURTHER ORDERED based on the statute having been declared unconstitutional, that this matter be and hereby is remanded to the SC Workers' Compensation Commission for an Order consistent with the decision of this Court ordering the Defendant American Fire to

reinstate benefits from the date that such benefits were stopped through the date that a decision is made by the Commission on the Defendant's denial of benefits under the Act.

FURTHER based on the decision of this Court that the statute is unconstitutional, the relief requested concerning who has the burden of proof at a hearing concerning reinstatement of such benefits under SC Code §42-9-260(B)(1-6) is rendered moot and any proceedings held and decisions rendered under the provisions of that statute are hereby declared VOID and are vacated.

AND IT IS SO ORDERED.

_____
Honorable DeAndrea G. Benjamin
Presiding Judge, Fifth Judicial Circuit

Dated: _____, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: ~~2015~~ 2013 -CP-40-05888

CLARENCE B. WINFREY, JR.,
Plaintiff,
vs.

AMERICAN FIRE & CASUALTY INSURANCE COMPANY, et al.
Defendants.

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

RICHLAND COUNTY FILED
2016 FEB 29 AM 11:40
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm 1315 Elmwood Avenue Columbia, SC 29201 Phone: 803-771-7211 Fax 803-252-0709 E-mail: mcdaniellaw@hotmail.com Other:	_____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Pursuant to Rule 59
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☑ Plaintiff / ☐ Defendant 2/26/16 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
CLARENCE B. WINFREY, JR., Claimant/Plaintiff, v. AMERICAN FIRE $ CASUALTY INSURANCE COMPANY c/o LIBERTY MUTUAL GROUP, Carrier/Defendants and The State of South Carolina Defendants.	)))))))))))))))	C/A No. 2013-CP-40-05888 **MOTION FOR NEW TRIAL/ REHEARING/RECONSIDERATION AND/OR TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59, SCRCP**

RICHLAND COUNTY
FILED
2016 FEB 29 AM 11:40
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: T. PARKIN HUNTER, SENIOR ASSISTANT ATTORNEY GENERAL, AND BRETT H. BAYNE, ESQUIRE; ATTORNEYS FOR THE STATE OF SOUTH CAROLINA AND AMERICAN FIRE & CASUALTY INSURANCE COMPANY, RESPECTIVELY DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that within ten (10) days of the date of the service hereof, or as soon thereafter as Counsel may be heard, Counsel for the Plaintiff, pursuant to SCRCP Rule 59, will move for Rehearing and Reconsideration and/or to Alter or Amend the Judgment issued in the above-referenced matter dated and filed with the Court on February 17, 2016. Said Motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.

Respectfully submitted,

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211
Attorney for the Plaintiff

February 26, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CLARENCE B. WINFREY, JR.,
Claimant/Plaintiff,
v.

AMERICAN FIRE & CASUALTY INSURANCE COMPANY c/o LIBERTY MUTUAL GROUP,
Carrier/Defendants
and
The State of South Carolina
Defendants.

C/A No. 2013-CP-40-05888

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL/ REHEARING/RECONSIDERATION AND/OR TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59, SCRCP

RICHLAND COUNTY
FILED
2016 FEB 29 AM 11:40
JEANNETTE W. McBRIDE
C.C.P. & G.S.

In support of the Motion for Rehearing and/or Reconsideration and/or to Alter or Amend the Judgment, the Plaintiff would respectfully show unto the Court as follows:

1. That as set forth in the Record, the Defendant American Fire and Casualty Insurance Company has never raised the issue of constitutional estoppel. By Order of the Honorable G. Thomas Cooper, Jr., the State of South Carolina was added as a party to address the constitutionality of the statute in question, that being SC Code §42-9-260(B)(1-6) and the Attorney General's office as part of their Response filed a Motion for Judgment on the Pleadings and as part of that raised as a grounds the issue of constitutional estoppel.

That the Attorney General's Office is not regularly involved in handling claims and/or is familiar with the Workers' Compensation Act and as a part of that Motion made a misstatement and committed a fundamental error of law in its presentation to the Court in reference to the section of the Act under which the Plaintiff was receiving weekly "disability", "compensation" benefits. In their argument, specifically the Attorney General stated as follows:

> "Accordingly, by accepting temporary benefits **paid pursuant to §42-9-260** and continuing to seek those benefits, and by invoking the protections of the statute by requesting a post-termination hearing, Plaintiff has waived his right to contest its constitutionality."

Due to this misrepresentation as to the section under which weekly "disability", "compensation" benefits are paid, the Court misapprehended the sections of the Act under which the Claimant was receiving those benefits and his right to challenge the specific provisions of §42-9-260(B)(1-6); which section of §42-9-260 is a specific statutory provision created for the benefit and use of the insurance industry and/or self-insured employers to stop benefits.

In reference to the misrepresentation and the misstatement of the law and misapprehension of the Court, the Claimant has not ever received nor has he ever been entitled to benefits under SC Code §42-9-260. His entitlement to benefits is under completely different sections of the Act.

Rehearing should be granted on this basis alone.

Since the inception of the Act, workers' compensation benefits for total disability, either of a temporary or permanent nature, have always been paid under SC Code §42-9-10 which provides for the payment of weekly workers' "compensation" (defined in SC Code §42-1-100) benefits during any period of, "disability". "Disability" is defined under SC Code §42-1-120. A claimant is entitled to those weekly compensation disability benefit payments in either one of two ways under SC Code §42-17-10 and 20. Under SC Code §42-17-10, if the employee and the employer agree to the payment of weekly "disability" "compensation" benefits, then those benefits are paid pursuant to that agreement. Under §42-17-20, if they fail to reach agreement within fourteen (14) days of the date of the injury or claim is made, those benefits are paid pursuant to an Award of the Commission. It is undisputed that in this case benefits were started and paid pursuant to agreement of the parties. Therefore, the Claimant is not entitled to nor does he receive any weekly disability benefits under §42-9-260 or any subdivision thereof.

That entire section of SC Code §42-9-260 (captioned in part "**Suspension or Termination of Payments**") is referred to in general practice in the workers' compensation arena as the "stop payment statute", and is the statute specifically created from the inception of the Act to allow for the insurance carrier to request

a hearing to stop payment of weekly compensation disability benefits. Prior to the amendment of §42-9-260 in 1996 by Act No. 424, §6, effective June 18, 1996, once the insurance carrier had agreed to pay benefits they had accepted the claim and could never stop benefits. In and after that amendment, the stop payment statute was amended in two fashions. First, subsection (A) was created to provide, that for a period of 150 days after the injury is reported, the insurance company may start benefits but does not waive any grounds for good faith denial. This is simply an exception to the original provision under §42-17-10 that payment is irrevocable acceptance and provides a 150 day window for investigation of the claim. Under that subsection (A), which contemplates the same as §42-17-20, the Defendants have a right to deny the claim for any basis under the Act and to apply to the Commission for a hearing to establish the basis for denial and to stop those all benefits under the Act.

In addition subsection (B)(1-6) was added and it is that specific subsection that the Claimant challenges as being unconstitutional which allows the Insurance Company to stop payment of benefits for certain specifically enumerated reasons without a hearing.

Therefore, as a fundamental flaw in the argument made by the Attorney General's office, the Claimant has never requested nor is he entitled to weekly compensation benefits under that subsection

of the Act. This misconception and misrepresentation lead to this, the issue of constitutional estoppel being misconstrued by the Court in its Decision. Again, this is a fundamental part of and precursor to the legal argument made and the Decision made in this matter. This part of and basis for the argument is wrong, specifically wrong as a matter of law and the Claimant would specifically ask for reconsideration on that basis alone.

That further, the US Supreme Court cases and more importantly, the SC Supreme Court cases cited by the Attorney General's office in support of the constitutional estoppel argument are misrepresented and misstated to the Court. In addition and more importantly, the Attorney General's office did not cite, and the Plaintiff would reiterate did not cite, specific SC Supreme Court cases directly on point which hold that where a party receives benefits under one section of an Act but challenges another section of the Act the party is not barred from challenging as being unconstitutional those other provisions of the Act. Constitutional estoppel simply does not apply. It is a boilerplate defense that is regurgitated by the Attorney General's office and has been so since at least the 1970's in reference to every constitutional challenge. Again, in this case it does not apply based on a reading of the US Supreme Court decisions and the SC Supreme Court decisions rendered in reference to that concept.

First, and foremost, the SC Supreme Court in several cases, but specifically in the cases of Gamble v. Clarendon County, et al., 188 S.C. 250, 198 S.E. 857 (1938) and Williamsburg County v. Graham, 190 S.C. 233, 196 S.E. 547 (1938) specifically held that were a party is receiving or receives benefits under one part of an Act but claims that another section of the Act is unconstitutional that party is not barred from challenging the constitutionality of that other section. Also, the Court addressed in the Gamble decision, which it has repeatedly addressed in other decisions, which is very important to all of the US Supreme Court decisions and also the SC Supreme Court decisions **and is paramount in this case**, the concept and the application of severability.

Next, as a fundamental basis or precedent for alleging the concept of constitutional estoppel to the Court, which the Plaintiff believes is another material misrepresentation to the Court, the Attorney General's Office cited (as fundamental to its argument) the case of Buck v. Kuykendall, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925). While the Attorney General's Office accurately but out of context cites the quote that, "it is true that one cannot in the same proceeding, both assail a statute and rely upon it. Hurley v. Commissioner of Fisheries, 257 U.S. 223, 225; compare Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 411. Nor can one who avails himself of the benefits conferred by

a statute deny its validity." What the Attorney General's Office did not quote and did not note to the Court, in addition to not fully explaining to the Court the facts and circumstances of the Buck case, they do not quote the two sentences directly above that quotation, which are as follows in reference to why the US Supreme Court did not, and the Plaintiff would reiterate did not, apply the State's request to apply the concept of constitutional estoppel in the Buck case. Again, the Court did not apply the concept of constitutional estoppel in the Buck case and those two sentences are as follows:

> "One who invokes the provisions of law may not thereafter question its constitutionality. **The argument is unsound.**"

In Buck, Buck sought a permit for a public conveyance between the State of Washington and the State of Oregon, or in other words, to establish a bus service. The permit was denied in Washington and one of the subsections provided that the State could refuse the permit where there was already permits granted and there was sufficient bus service or sufficient means of public transportation. Buck specifically challenged subsection **4** of the Washington Law. In finding that the concept of constitutional estoppel did not apply, the Court noted that Buck was challenging that specific provision of the statute and that he had received no benefit under it. Quoting from the Court's decision:

"But, in the case at bar, Buck does not rely **upon any provision of the statute assailed**, and **he has received no benefit under it**."

Next, the Attorney General cites but obviously did not fully read the other Supreme Court cases that it cites in support of the application of the doctrine of constitutional estoppel. The Attorney General's Office in both its Memorandum and in the Order drafted for the Court states that, "the common law has long recognized the doctrine of constitutional estoppel, and has refused to allow litigants to challenge statutes under which they have voluntarily received benefits." The Plaintiff would respectfully ask and verily believes that when the Court reads those cases that it will concur in the Plaintiff's reading. Specifically when the Court reads the case of Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936) the Court will find that that United States Supreme Court decision is directly in accord with our Supreme Court decision in Williamsburg County v. Graham, supra, and is also directly in accord with Gamble v. Clarendon County, supra, holding again that where a Plaintiff receives benefits under one section of the same Act, he is not barred from challenging the constitutionality of another section of the Act.

Next, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936), a power company who was receiving benefits under one part of the Tennessee Valley

Authority's Act was not precluded from challenging the constitutionality of another part of the Act. Further, in reference to the citation of that case in the Strickland v. Flue-Cured Tobacco Cooperative Stabilization Corp., 643 F.Supp. 310 (1986) Strickland, as was the other cases cited, unlike this case was a challenge to the entire Act not a specific severable section.

In reference to the other case cited, Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), this was a stockholder's derivative action the Court specifically noted that one of the specific reasons the Court would not strike down the provision challenged was because it was not "severable" from the other provisions of the Act under which the Association existed. In other words the stockholders, as Plaintiffs, right to sue was based specifically on the Association's right to exist under the entire Act and the specific provisions of the Act which they wanted declared unconstitutional were not severable from the other provisions. Obviously this has nothing to do with reaping benefits under the Act and in addition to that, the provisions were not severable. Severability is a specific constitutional concept that applies in every constitutional challenge. In this situation as cited above, the subsection (B)(1-6) sought to be declared unconstitutional as violating

the Claimant's due process right to a hearing before his benefits are stopped and also because it denied him equal protection under the law by allowing an injured worker's weekly benefits who had been out of work for 149 days to be stopped without a hearing versus a person that has been out of work for 151 days being entitled to a hearing before benefits could be stopped, or in other words, based on one day's difference is completely severable from the other stop payment provisions contained in the stop payment section. SC Code §42-9-260(A-G).

2. That the office of the Attorney General in its Motion and the Court in reviewing that, and in reference to the arguments made, overlooked the fact that SC Code §42-9-260(A) not only is severable but there is absolutely no challenge to that provision. If that provision is viewed without subsection (B)(1-6), there is absolutely nothing unconstitutional about it because SC Code §42-17-20 specifically provides that when a disagreement occurs the employer may apply to stop payment of benefits and that the claimant is entitled to a hearing before those benefits are stopped. The Plaintiff did not, does not, and will not challenge the constitutionality of SC Code §42-9-260(A). Whether or not the Defendants establish that they conducted a good faith investigation at a hearing is irrelevant to the

issue before the Court and for a better term is a red-herring or again, is an irrelevant issue. What is constitutionally challenged about section (B) and its subsections (1-6) is the fact that that specific section and its subsections allow for a termination of benefits before a hearing is held and a determination is made by a Commissioner as to whether or not they have met the criteria set forth under the Act to be entitled to stop payment.

For all the foregoing reasons, the Plaintiff would respectfully request that rehearing be granted on the issues specifically as to the issue as to whether or not the concept of constitutional estoppel applies and/or whether or not the Defendants have established a right to a decision based on constitutional estoppel. The US Supreme Court cases and the SC Supreme Court cases do not support the application of constitutional estoppel and the elements for that doctrine to apply have not been established. Again, the SC Supreme Court has specifically held that where a party is entitled to benefits under one section of an Act and challenges another section of the Act as to its constitutionality, the party is specifically not barred under the concept of constitutional estoppel. The Plaintiff in this case did not request nor did he receive benefits

under §42-9-260(B)(1-6) and the doctrine and the elements of the doctrine of constitutional estoppel do not apply.

Respectfully submitted,

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Attorney for the Plaintiff

February 26, 2016