THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2018-001274

Ray K. Logan, Employee,.....Respondent,

vs.

Winthrop University, Employer, and
South Carolina State Accident Fund, Carrier,.....Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Pursuant to the South Carolina Workers' Compensation Act ("the Act"), Winthrop University by and through its carrier the South Carolina State Accident Fund (together "Appellants") provided Ray K. Logan ("Respondent") with benefits under the Act after he sustained a minor low back injury on February 26, 2014, and again on December 1, 2014. Appellants continued to provide said benefits through the time at which the Respondent reached maximum medical improvement on December 3, 2015. (Def's APA # 9, 480-81).

Subsequently, the Respondent independently sought treatment with his family provider and an orthopedist for an unrelated right hip condition. (Clt's APA #3, 274). In accordance with the orders of his independently chosen physicians, the Respondent thereafter obtained his own functional capacity evaluation ("FCE") on July 14, 2016, and his own vocational assessment on August 31, 2016, indicating he was permanently and totally disabled. (Clt's APA #7, 386; #8, 408). In response, the Appellants scheduled an FCE for February 15, 2017, which would be used to obtain a vocational assessment. But, when Respondent refused to attend, the Appellants were left with no choice but to file a Motion to Compel Attendance on March 17, 2017. (Appellants' Mot. to Compel.)

Appellants' Motion was denied on April 10, 2017, and an appellate hearing before the Full Commission was set for June 20, 2017, but later dismissed as interlocutory. (Mot. Order 4/10/17.) Thus, a hearing on the merits was set before a Single Commissioner for August 24, 2017, to determine compensability, permanency, and entitlement to future medical treatment, if any. (Hr'g. Tr., p. 1.) The issue originally set forth in Appellants' Motion of whether the Appellants were entitled to a vocational assessment and functional capacity evaluation—which

the Respondent refused to attend after obtaining his own favorable vocational assessment and FCE—was also before the Commissioner. (Hr'g. Tr., p. 1.)

By Decision and Order dated January 4, 2018, the Single Commissioner concluded that Appellants were not entitled to either a vocational assessment or a FCE and, based on only the Respondents' vocational assessment and FCE, that the Respondent was totally and permanently disabled as a result of injuries to the low back and right hip, (Decision & Order 1/04/18.)

In turn, the Appellants appealed to the Full Commission requesting an order for a hearing *de novo* because the Single Commissioner's entire order was erroneously premised upon a piecemealed, claimant-driven evidentiary record. (Appellants' Form 30 1/18/18.) An appellate hearing was conducted on March 20, 2018. (Notice of Hrg. 1/19/18.) By Decision and Order dated June 5, 2018, the Appellate Panel affirmed the Single Commissioner's Decision and Order in its entirety and denied Appellants' request for an order requiring a hearing *de novo*. (Decision & Order 6/05/18.)

The Appellants thereafter filed a Notice of Appeal with this Court on July 5, 2018, and respectfully request that this Court vacate the Commission's order and remand for a hearing *de novo* for the reasons stated herein. (Appellants' Notice of Appeal 7/05/18.)

STATEMENT OF THE FACTS

The Respondent first sustained an admitted lumbar spine strain on February 26, 2014. The Appellants subsequently provided the medical care required, albeit minimal, to treat his minor injury. (Clt's APA #5, 310-17). The next month, after completing physical therapy, the Respondent was released to work in a full duty capacity. (Clt's APA #5, 346-50).

Later that year, the Respondent sustained a second, minor low back injury on December 1, 2014, while attempting to move a ladder. Following this incident, the Respondent declined

treatment through the workers' compensation system and chose to treat on his own for months, primarily seeing only a chiropractor. (Clt's APA #4, 302-09). The Respondent admitted that he complained only of back problems during this time. (Hr'g Tr. 31:7-9, 32:9-11; 33:7-24). Eventually, however, he requested treatment for his back, and the Appellants once again initiated proper and adequate medical care.

Dr. Charlton Scott McNair with Riverview Medical Center/Occumed served as the Respondent's authorized treating provider for both incidents. (Clt's APA #5). As even the intake forms make plain, the Respondent presented to Dr. McNair complaining only of low back pain following the initial accident. (Clt's APA #5, 310-17). When the Respondent presented to Dr. McNair following the second incident, the Respondent again complained of low back pain without mention of any hip issues. (Clt's APA #5, 352-60). Accordingly, Dr. McNair limited his diagnosis to a lumbar sprain and treatment to medications and physical therapy. (Clt's APA #5, 359-60). He allowed the Respondent to continue working in a full duty capacity and ordered lumbar spine x-rays, which revealed minor multilevel degenerative disc disease. (Clt's APA #5, 351, 360). Completely by coincidence, the x-rays also revealed incidental findings of joint space narrowing and subchondral cyst formation of the right hip. (Clt's APA #5, 351).

During a return appointment on May 13, 2015, Dr. McNair indicated that, while the right hip x-ray findings suggested avascular necrosis of the hip, this was unrelated to the Respondent's work injury. (Clt's APA #5, 369). Dr. McNair indicated that there were no acute findings regarding the low back and instructed the Respondent to continue his medications and full duty work. (Clt's APA #5, 369). Dr. McNair released the Respondent but suggested a follow-up with an orthopedist to address the unrelated, incidental right hip findings. (Clt's APA #5, 369).

Likewise, Dr. James F. Bethea of Columbia Orthopaedic Specialists also opined that the Respondent's coincidentally discovered right hip problem was unrelated to his work incident. (Def's APA # 10). Instead, "[h]is right hip problem was a chronic degenerative process and the magnitude of the trauma from the accident at work December 1, 2014 falls way short." (Def's APA # 10, 482). Dr. Bethea further pointed out that the Respondent relayed no complaint of hip pain until at least three months after the accident. (Def's APA # 10, 482).

Because neither doctor assigned an impairment rating, Appellants arranged an appointment with a third physician, Dr. Ryan Wetzel, on December 3, 2015. (Def's APA # 9). Dr. Wetzel placed the Respondent at maximum medical improvement, assigned a 7 percent impairment rating to the back, and indicated that the Respondent could continue working in a full duty capacity. (Def's APA # 9, 480-81). Dr. Wetzel did not definitively recommend any further medical care. (Def's APA # 9, 481).

Meanwhile, the Respondent independently obtained a referral from his family provider—not a workers' compensation provider—to begin treatment with Dr. William L. Lehman for his unrelated right hip issue. (Clt's APA #3, 274). In stark contrast with the three other physicians' opinions, Dr. Lehman related the hip problem to the Respondent's work accident and ultimately performed a total right hip replacement on December 15, 2015. (Clt's APA #3, 111). Interestingly, Dr. Lehman later admitted on multiple occasions that the Respondent would have required a hip replacement at some point irrespective of the work accident. (Clt's APA #3, 300-01). The Respondent was removed from work following the procedure (for the very first time since his December 2014 accident), but by May 2016, Dr. Lehman remarked that the Respondent "was doing remarkably well." (Clt's APA #3, 131-34). Dr. Lehman assigned just a 7 percent

impairment rating to the lumbar spine, assigned a 37 percent impairment rating to the right hip, and recommended a FCE to determine work restrictions. (Clt's APA #3, 131-34, 299).

In accordance with the orders of his independently chosen physician, the Respondent thereafter obtained his own FCE on July 14, 2016, which indicated that he is capable of at least light work. (Clt's APA #7, 386). The Respondent then obtained his own vocational assessment on August 31, 2016, which concluded that he was permanently and totally disabled. (Clt's APA #8, 408). In response, the Appellants scheduled an FCE for February 15, 2017, which would be used to obtain a vocational assessment. Respondent refused to attend.

The Appellants then filed a Motion to Compel Attendance on March 17, 2017, which was denied on April 10, 2017, and appealed to the Full Commission but dismissed as interlocutory. A hearing on the merits went forward on August 24, 2017, which resulted in the denial of Appellants' request for a vocational assessment and a FCE and a finding that the Respondent was permanently and totally disabled. (Decision & Order 1/2/18.) Upon appeal, the Full Commission again denied the Appellants a vocational assessment and a FCE and affirmed the Single Commissioner's Decision and Order in its entirety. (Decision & Order 6/05/18.) This appeal followed. (Notice of Appeal 7/05/18.)

STANDARD OF REVIEW

The Administrative Procedures Act, South Carolina Code Ann. § 1-23-380, establishes the "substantial evidence" rule as the standard of review for decisions of the South Carolina Workers' Compensation Commission where no jurisdictional question arises. Lark v. Bi-Lo, 276 S.C. 130, 133-34, 276 S.E.2d 304, 305-06 (1981) (citing S.C. Code Ann. § 1-23-380).

Under this standard, the Court of Appeals should affirm the Full Workers' Compensation Commission's decision where the factual findings are supported by substantial evidence in the record. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453, 458 (Ct. App. 1999). To this end, "[w]here there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." Gadson v. Mikasa Corp., 368 S.C. 214, 221-22, 628 S.E.2d 262, 266 (Ct. App. 2006).

However, the Court of Appeals may reverse the Full Workers' Compensation Commission's decision where "substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are" as follows:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5). An abuse of the Commission's discretion constitutes grounds for this Court to reverse and remand a case for a hearing *de novo*. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 659, 726 S.E.2d 9, 13 (Ct. App. 2012) (vacating, remanding, and ordering a *de novo* hearing).

ARGUMENTS

I. The Commission abused its discretion in arbitrarily denying Appellants a functional capacity evaluation and vocational assessment after the Respondent had already obtained the same, which in turn, resulted in a piecemealed, claimant-driven evidentiary record.

The Commission erred in arbitrarily denying Appellants' request for an order requiring the Respondent to submit to a vocational assessment and FCE. This error is made plain by the demonstrably underdeveloped evidentiary record that resulted. And, both the Decision and Order of the Single Commissioner and that of the Full Commission were then entirely based upon that incomplete evidentiary record. However, such a basis falls patently short of that which is required of each and every order of the Commission. Therefore, Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo* following the Appellants' vocational assessment and FCE

It is well-settled that an "award [of the Commission] must not be based on surmise, conjecture or speculation." Shealy v. Aiken Co., 341 S.C. 448, 455, 535 S.E.2d 438, 443 (2000); Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Otherwise, our courts will overturn an award by the Commission as unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 267 (Ct. App. 2006) (citing cases). See also Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-136, 276 S.E.2d 304, 306 (1981) ("'Substantial evidence' is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached."). But here, the record is devoid of the required substantial evidence due to the denial of Appellants' request for a vocational assessment and FCE. Instead of relying upon a complete evidentiary record, the Decision and Orders of the

Commission are based on surmise and conjecture as to what the vocational assessment and FCE *would have* revealed.

Indeed, the Single Commissioner's Decision and Order in this case is, in no way, supported by the requisite "substantial evidence." From start to finish, the Decision and Order is brimming with citations to the claimant-driven medical record without reference to the fact that the Appellants were denied the opportunity to fully develop the record or put on an adequate defense. The Full Commission's Decision and Order affirming the Single Commissioner just duplicates the very same error.

Notably, the Appellants repeatedly attempted to complete the evidentiary record and obtain an FCE, even making an appointment for February 15, 2017. Conveniently, the Respondent refused. Ostensibly, if the Respondent was permanently and totally disabled as he alleges, he would not fear appearing for an evaluation on that very issue.

The Appellants then appropriately moved for an order compelling attendance pursuant to their right to direct treatment under § 42-15-60 and ability to request additional examination to which the employee must submit under § 42-15-80. S.C. Code Ann. § 42-15-60; § 42-15-80; see also Clark v. Aiken Co. Gov., 366 S.C. 102, 113, 620 S.E.2d 99, 104 (Ct. App. 2005) (citing § 42-15-60). Indeed, the Act is clear that "so long as he claims compensation, the employee, if so requested by his employer . . . shall submit himself to examination." S.C. Code Ann. § 42-15-80.

Moreover, "[t]he full commission is afforded much discretion under Section 42-15-60" and "is empowered to order further medical care when controversies arise between a claimant and the employer." Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 114, 576 S.E.2d 191 (Ct. App. 2003); Clark, 366 S.C. at 113, 620 S.E.2d at 104 (citing S.C. Code Ann. § 42-15-60 and Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002)). But, even

though the Commission explicitly has both the discretion and power to order the examinations necessary to complete the evidentiary record, both the Single Commissioner and the Full Commission declined to do so.

Furthermore, the Commission has consistently cited FCEs and vocational assessments in its analysis of claims for permanent and total disability. See Watson v. Xtra Mile Driver Training Inc., 399 S.C. 455, 464, 732 S.E.2d 190, 195 (Ct App. 2012) (relying on an FCE that showed claimant capable of light duty work in PTD case); Fishburne v. ATI Sys. Int'l., 384 S.C. 76, 87, 681 S.E.2d 595, 600 (Ct App. 2009) (citing an FCE and vocational assessment in determining claimant was not totally disabled in PTD case). Thus, Appellants' request is not only in accordance with the Act, but also comports with the longstanding trend to consider both FCEs and vocational assessments in cases where the claimant alleges permanent and total disability.

Nevertheless, the Single Commissioner arbitrarily denied the Appellants' request for a vocational assessment and FCE and the Full Commission affirmed—clearly committing an abuse of discretion. Unfortunately, this denial also resulted in an underdeveloped, stilted evidentiary basis for the Commission's entire analysis—undermining both Decision and Orders published thereafter. Accordingly, Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo* following finally requiring that the Respondent submit to the Appellants' vocational assessment and FCE.

II. Even if the arbitrary denial did not constitute an abuse of discretion, the incomplete claimant-driven evidentiary record that resulted wholly fails to support, and thereby renders, the Commission's entire Decision and Order arbitrary, capricious, and an abuse of discretion.

Appellants further respectfully request that this Court reverse and remand for a hearing *de novo* because the record, as it stands albeit demonstrably underdeveloped and one-sided, supports that the Respondent was—at absolute best—only entitled to an award for his minor back injury pursuant to the schedule set forth in § 42-9-30. Accordingly, the record, however unsatisfactory and partisan, simply fails to support that the Respondent was entitled to the award of permanent and total disability, rendering the Commission's award for the same arbitrary, capricious, and an abuse of discretion. This fact, alone, constitutes a separate and independent basis for reversing and remanding this case and would have been all the more apparent if only the Appellants been allowed to fully develop the evidentiary record.

The burden is on the Respondent to establish that he is totally disabled, whether under § 42-9-10 or § 42-9-30. See, e.g., Watson, 399 S.C. at 462-63, 732 S.E.2d at 194 (concluding the claimant failed to meet his burden under both § 42-9-10 and § 42-9-30); Fishburne, 384 S.C. at 84, 681 S.E.2d at 599 (same). More specifically, unless Respondent pursues a claim of 50 percent or more to the back under § 42-9-30, he must show a loss of earning capacity as a result of injuries to multiple body parts under the long-accepted test for total disability: an "inability to perform services other than those that are so limited in quality, dependability, and quantity that no reasonable stable market exists." Watson, 399 S.C. at 463, 732 S.E.2d at 194; see also Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). The Respondent may proffer evidence on a number of factors, including, *inter alia*, age, experience, medical testimony,

the claimant's reasonable efforts to secure employment, and the claimant's own testimony. See, e.g., Coleman, 245 S.C. at 629, 142 S.E.2d at 44.

Here the evidence overwhelmingly supports that the Respondent is not permanently and totally disabled under § 42-9-10 or § 42-9-30 because he only sustained a minor back injury. This plainly falls far below the threshold 50 percent impairment required for total disability under the § 42-9-30 schedule. Indeed, both Dr. Wetzel and Dr. Lehman—the Respondent's self-selected physician—assigned a negligible 7 percent impairment rating to the back, (Def's APA # 9, 480-81; Clt's APA #3, 131-34, 299). Surely, if even the Respondent's own physician cannot justify a double-digit rating, a finding of 50 percent or more loss of use to the back constitutes an untenable leap.

But even under § 42-9-10, assuming that the Respondent's hip condition was actually work-related to release him from the § 42-9-30 schedule, the Respondent in no way established an "inability to perform services other than those that are so limited in quality, dependability, and quantity that no reasonable stable market exists." Coleman, 245 S.C. at 629, 142 S.E.2d at 44. He admitted just the opposite during the hearing: he had experience working in multiple jobs, working in a supervisory capacity, negotiating pricing, managing personnel, receiving orders, and purchasing materials. (Hr'g Tr. 16:13-25). Moreover, he has recently driven far distances out-of-state and been on a cruise. (Hr'g Tr. 59: 9-20). Despite such apparent capabilities, the Respondent conceded that he had not actually tried a single job since his accident. (Hr'g Tr. 59:25-60:1). Thus, he made no "reasonable efforts to secure employment." Coleman, 245 S.C. at 631, 142 S.E.2d at 45 (quoting Larson's Workmen's Compensation Law, Vol. II, Section 57-66).

In reality, all the Respondent did to bolster his position was shop for a favorable FCE and vocational assessment, but even his own FCE indicated capability to work. (Clt's APA #7, 386).

He then, quite conveniently, refused to attend any other appointments. Presumably, if the Respondent was actually permanently and totally disabled as he alleges, then he would have no reason to fear an evaluation on the very point that he was trying to prove. Because it simply defies all logical to allow the Respondent to satisfy his burden by such reverse-engineered means, the Appellate Panel should have limited any award to partial disability to the back under § 42-9-30. However, the Commission nevertheless awarded the Respondent permanent and total disability. Thus, the Commission's Decision and Order is arbitrary, capricious, and an abuse of discretion and Appellants respectfully request that this Court remand the case for a hearing *de novo*.

In fact, not only did the Respondent wholly fail to satisfy his burden of proof to establish permanent and total disability under either § 42-9-10 or § 42-9-30, he also failed to satisfy his burden of proof to establish compensability of the hip whatsoever. See Glover v. Columbia Hosp. of Richland Co., 236 S.C. 410, 414, 114 S.E.2d 565, 567 (1960) ("[T]he burden is upon the claimant to prove such facts as well render the injury compensable within the provisions of the Workmen's Compensation Act.").

The dearth of the medical evidence militates against any award for a right hip injury of any amount. First and foremost, by his own testimony, the Respondent relayed no hip complaints following either one of his two incidents. (Hr'g Tr. 31:7-9, 32:9-11; 33:7-24; Clt's APA #5, 310-17). Even the intake forms document that the Respondent presented to Dr. McNair complaining only of low back pain following the initial accident. (Clt's APA #5, 310-17). Later, the Respondent presented to Dr. McNair after the second incident again complaining of only low back pain without relaying a single hip complaint. (Clt's APA #5, 352-60). For these reasons, Dr. McNair's diagnosis was strictly limited to a lumbar sprain. (Clt's APA #5, 359-60).

In fact, the Respondent's discovery that he even had a hip condition was by complete coincidence: x-rays ordered for his admitted minor back injury revealed *incidental* findings of joint space narrowing and subchondral cyst formation of the hip. (Clt's APA #5, 351). Only after this fortuitous finding did Dr. McNair suggest a follow-up appointment with an orthopedist to address the unrelated hip issue. (Clt's APA #5, 369). Notably, no referral through workers' compensation was made. Moreover, Dr. Bethea also opined that the Respondent's right hip problem was unrelated to his work incident, was the result of "a chronic degenerative process, and the magnitude of the trauma from the accident at work December 1, 2014 falls way short." (Def's APA # 10, 482).

By comparison, the only evidentiary support to bolster the Respondent's tenuous argument is Dr. Lehman's opinion. But, Dr. Lehman did not examine the Respondent until the end of August 2015—more than a year and a half after the initial incident and months after the Respondent was released by his authorized treating physician in May 2015. (Clt's APA #3, 284). Accordingly, Dr. Lehman never examined the Respondent to evaluate the status of his hip condition before either of the work-related accidents. (Clt's APA #3). Nor did he examine the Respondent in the more than a year and a half that followed. (Clt's APA #3).

By all accounts, the Respondent only came to Dr. Lehman upon receipt of a referral from the Respondent's family provider, not any workers' compensation provider, and without any reason to believe that his incidental hip findings were related to his workplace injury. (Clt's APA #3, 274). Moreover, the treatment that Dr. Lehman provided appears to be the exact same treatment that the Respondent would have undergone regardless of either work-related accident; Dr. Lehman admitted on multiple occasions that the Respondent would have required a hip replacement irrespective of the work accident. (Clt's APA #3, 300-01). For these reasons, it is

hardly surprising that the Respondent's treatment with Dr. Lehman was conducted separate and apart from the workers' compensation system.

Any one of the above facts, alone, undercuts the Respondent's sole reliance on the opinion of Dr. Lehman; but taken together, the circumstances completely unravel the Respondent's claim for compensation for loss of use of the hip. And, even if the means by which Dr. Lehman's opinion and care were procured were not questionable, the fact remains that his opinion stands alone as the one and only voice in support of the Respondent's position. Certainly, a single opinion falls remarkably short of the burden of proof that the Respondent must, but simply cannot, satisfy in this case.

Therefore, the record, as it stands despite being demonstrably underdeveloped, wholly fails to support the Commission's Decision and Orders, rendering the same arbitrary, capricious, and an abuse of discretion. Accordingly, Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo*.

III. Notwithstanding its clear abuse of discretion, the Commission's denial also constituted a structural defect that violated the Appellants' constitutional guarantee to due process, requiring that the entire Decision and Order be vacated.

The Commission's denial of Appellants' request for an FCE and vocational assessment after Respondent had already obtained the same with his preferred individuals constitutes a patent violation of Appellants' constitutional guarantee to due process and—alone—provides independent grounds for reversing and remanding this case for a hearing *de novo*. Therefore, the Appellants' respectfully request that this Court, at minimum, reverse and remand the case *sub justice* on constitutional grounds, regardless of the fact that the Full Commission's Decision and Order was also arbitrary, capricious, and an abuse of discretion.

In South Carolina, our state constitution provides, in pertinent part, that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting privates rights except on due notice and an opportunity to be heard." S.C. Const., art. I, § 22. Our constitution further provides that "nor shall any person be deprived of life, liberty, or property without due process of law." S.C. Const., art. I, § 3.

As explained by the South Carolina Supreme Court:

> Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

In re Dickey, 395 S.C. 336, 359-60, 718 S.E.2d 739, 751 (2001) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003); Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)) (concluding defendant's due process rights were not violated

where defendant was given an opportunity to engage in discovery and present evidence in his defense).

Additionally, the Administrative Procedures Act also requires that an "[o]pportunity must be afforded all parties to respond and present evidence and argument on all issues involved." S.C. Code Ann. § 1–23–320(E). Thus, without a doubt, "[a]dministrative agencies are required to meet minimum standards of due process." Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) (citing S.C. CONST., art. I, § 3).

Importantly, a constitutional error that constitutes a "structural defect" serves as grounds for reversal. See, e.g., State v. Mouzon, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991)) (applying the structural defect analysis developed by the United States Supreme Court to South Carolina cases wherein the violation of due process rights is alleged). "Structural defects affect the entire conduct of the trial." Id. By comparison, mere "harmless errors" may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." Id. (internal quotations omitted).

Furthermore, once this Court has determined that a structural defect exists which violates an appellant's constitutional guarantee to due process, this Court shall not only reverse the case, but also declare the preceding hearing a nullity, vacate the resulting order, and require a hearing *de novo* be set. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 659, 726 S.E. 2d 9, 13 (Ct. App. 2012) (citing LaSalle Bank Nat'l Ass'n v. Davidson, 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009) (declaring the hearing a nullity, vacating the resulting order, and ordering a new trial)) (vacating, remanding, and ordering a *de novo* hearing where defendants' due process rights were violated by the South Carolina Workers' Compensation Commission).

Here, in violation of explicit constitutional requirements, Appellants did not have the "opportunity to be heard" or the opportunity to "introduce evidence" with respect to either an FCE or vocational assessment arranged by Appellants. S.C. Const., art. I, §§ 3, 22. Indeed, the Commission denied the Appellants' the chance to obtain not just one, but both, evaluations even though the Respondent was allowed to obtain, and submit into evidence, the same assessments conducted by his preferred evaluators.

Likewise, the Appellants were never afforded the opportunity "to respond and present evidence and argument on all issues involved." S.C. Code Ann. § 1–23–320(E). For the avoidance of any doubt, Appellants' request to procure an FCE and vocational assessment *was their response* in the face of Respondent's prior procurement of the very same evaluations at the hands of those he believed would favor his case. But, the Appellants' efforts to respond to these evaluations were cut off by the Commission's outright denial of Appellants' request. Clearly, Appellants' could not present evidence they were not even permitted to obtain. And, Appellants' argument on the issue was manifestly limited without the ability to obtain evidence in support thereof. Therefore, the Commission's denial of Appellants' request to obtain a *responsive* FCE and vocational evaluation is violative of not only our state constitution, but also the Administrative Procedures Act to which the Commission must, but did not, adhere.

Under these circumstances, the Commission's denial does not constitute a mere "harmless error" that may "be quantitatively assessed in the context of other evidence presented." Mouzon, 326 S.C. at 204, 485 S.E.2d at 921. In fact, the very denial of Appellants' request to obtain a responsive FCE and vocational evaluation severely limited the evidence presented by Appellants and, ultimately, admitted and considered by the Commission. In turn, the resulting evidentiary record was demonstrably underdeveloped and clearly claimant-driven.

Accordingly, as our Supreme Court decided in LaSalle Bank National and this Court decided in Adams, the Appellants respectfully request that the Court deem the hearings before the Commission in this case a nullity, vacate the resulting Decision and Orders, and order a *de novo* hearing to be conducted following the Respondent's submission to both an FCE and a vocational assessment as arranged by the Appellants. LaSalle Bank Nat'l, 386 S.C. at 277, 688 S.E.2d at 1221; Adams, 397 S.C. at 659, 726 S.E. at 13.

Bolstering the evident justification for ordering a hearing *de novo* even further, as this Court will recall, it recently applied the constitutional and administrative due process requirements specifically to the issue of vocational assessments in cases before the South Carolina Workers' Compensation Commission just six days prior to the date of the Appellants' Initial Brief. Tedder v. Darlington Cnty. Cmty. Action Agency, No. 2018-UP-349, slip op. at 2-3 (Ct. App. Aug. 1, 2018) (affirming the exclusion of claimant's vocational assessment in the determination of claim for permanent and total disability benefits where claimant persistently refused to submit to defendants' responsive vocational assessment).

In Tedder, the Full Commission denied a claim for permanent and total disability benefits, while specifically declining to consider the vocational assessment and FCE report of the claimant, Ms. Tedder, because Ms. Tedder had persistently declined to attend a vocational assessment scheduled by the defendant-respondents, her employer and its carrier. Id. at 2. But, as this Court observed, even though [g]reat liberality is to be exercised in allowing the introduction of evidence in workers' compensation proceedings," "minimum standards of due process" still apply. Id. at 2-3 (quoting Trotter v. Trane Coil Facility, 384 S.C. 109, 116, 681 S.E.2d 36, 40 (Ct. App. 2009); Smith, 329 S.C. at 500, 494 S.E.2d at 638).

Thus, this Court concluded that "Tedder's refusal to submit to an evaluation by Respondents' vocational expert would have placed Respondents at an unfair disadvantage had the single commissioner or the Appellate Panel considered and given any weight to Tedder's vocational report, thus depriving Respondents of due process." Id. at 3 (citing Smith, 329 S.C. at 500, 494 S.E.2d at 638 ("In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses")).

Exactly like the claimant in Tedder, here, Respondent alleged entitlement to permanent and total disability benefits, proffered his own vocational assessment and FCE report, and outright refused to submit to a vocational assessment and FCE scheduled by Appellants. However, unlike in Tedder, both the Single Commissioner and the Appellate Panel in this case considered and gave weight to Respondent's vocational assessment and FCE report. Both could have, but did not, exclude the claimant-procured reports because the defendants, employer and carrier, were denied the opportunity to obtain their own reports in response.

In other words, here, both the Single Commissioner and the Appellate Panel exercised the "great liberality" granted to the agency "in allowing the introduction of evidence" as if "great liberality" meant "unrestricted" or "unlimited." Id. at 2-3. Clearly, "great" is not synonymous with "unrestricted" or "unlimited," and thus the Commission cannot act in ignorance of the constraints patently imposed upon it by basic due process requirements. But, the Commission did precisely that in the case at bar. Thus, applying the very same logic as just applied in Tedder, Appellants respectfully request that this Court conclude that the Appellants in this case were placed at an "unfair disadvantage" and deprived of due process. Id. at 3 (citing Smith, 329 S.C. at 500, 494 S.E.2d at 638). While this Court concluded that the procedure in Tedder was fair to both parties, the same simply cannot be said here.

IV. The Commission's denial also constituted a violation of Appellants' right to equal protection of laws, requiring that the entire Decision and Order be vacated on separate grounds.

Appellants request that this Court reverse and remand this case based on further constitutional grounds because not only does the Commission's denial of Appellants' FCE and vocational assessment constitutes a violation of due process, but it also constitutes a violation of Appellants' right to equal protection of laws under the Equal Protection Clause of the South Carolina Constitution. S.C. CONST., art. I, § 3 ("[N]or shall any person be denied the equal protection of the laws.").

As long-held by our Supreme Court, "[d]ue process of law and the equal protect of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Johnson, Lytle & Co. v. Spartan Mills, 68 S.C. 339, 339, 47 S.E. 695, 698 (1904). The constitutional guaranty of equal protection requires "that there be a reasonable basis for the limitation or differentiation and that all persons similarly situated in the same territory be treated alike." Moseley v. Welch, 218 S.C. 242, 249-50, 62 S.E.2d 313, 317 (1950). In short, the law must "apply equally to all persons within the territorial limits." Id., 218 S.C. at 250, 62 S.E.2d at 317 (internal quotations omitted).

But here, the Commission inexplicably—and without any "reasonable basis"—differentiated Appellants from other parties coming before the agency, and specifically from the opposing party in the case: Respondent, when it arbitrarily declined to allow Appellants to obtain either an FCE or vocational assessment even though the Respondent had already obtained both such evaluations with individuals he hand-picked and believed would further his case. Id., 218 S.C. at 250, 62 S.E.2d at 317.

Moreover, the Commission considered both reports submitted by Respondent in rendering a decision regarding disability benefits under the Act. But both the denial of Appellants' requested responsive FCE and vocational assessment and the subsequent consideration of Respondent's FCE and vocational evaluation constitute markedly different treatment of the two parties. Even worse, the record is devoid of any justification whatsoever—legal or otherwise—which could possibly add color to why the Appellants' where somehow underserving of either an FCE or vocational assessment.

Therefore, Appellants respectfully request that this Court require that the laws applicable to the South Carolina Workers' Compensation Commission "operate on all alike," and specifically the Appellants in this case, to ensure that equal protection rights remain intact. Johnson, Lytle & Co., 68 S.C. at 339, 47 S.E. at 698. Appellants, much less any employer or carrier within the purview of the Act, should not be subjected "to an arbitrary exercise of the powers of government" as Appellants were here by the powers of the Commission. Id., Thus, Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo* following the Appellants' vocational assessment and FCE, if not for the abuse of discretion committed by the Commission, then at the very least for the violation of basic constitutional guarantees which antedate the Commission's existence and overpower its authority.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo*.

First, the Commission abused its discretion when it arbitrarily denied Appellants' request for an order requiring the Respondent to submit to a vocational assessment and FCE after Respondent had already obtained the same from his hand-selected evaluators. In turn, the resulting evidentiary record was piecemealed and claimant-driven. Nevertheless, the Commission premised its entire Decision and Order on this incomplete record.

Second, the record, as it stands despite being demonstrably underdeveloped, wholly fails to support the Commission's Decision and Order, rendering the same arbitrary, capricious, and an abuse of discretion.

Third, the Commission's denial of Appellants' request for an FCE and vocational assessment after Respondent had already obtained the same constitutes a patent violation of Appellants' constitutional guarantee to due process and—alone—provides independent grounds for not only reversing and remanding this case for a hearing *de novo*, but simultaneously declaring the preceding hearing a nullity and vacating the resulting order.

Finally, the Commission's denial of Appellants' request is reversible on second, independent constitutional grounds because the Appellants' right to equal protection of laws under the Equal Protection Clause of the South Carolina Constitution was also violated by the Commission without any justification therefore.

Any of the above reasons—alone—constitutes separate and sufficient grounds for reversing and remanding this case.

Respectfully submitted,

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The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Ray K. Logan, Employee, Respondent, v. Winthrop University, Employer, and South Carolina State Accident Fund, Carrier, Appellants.
Appellate Case No. 2018-001274

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, please find enclosed please find the original and one (1) copy of the Initial Brief of Appellants and one (1) copy of Appellants' Designation of Matter to Be Included in the Record on Appeal.

By copy of this letter, we are also serving Tyler Bathrick, Esquire, attorney for claimant.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

David H. Keller, Esquire

DHK/sbd

Enclosures: (1) Initial Brief of Appellants
(2) Designation of Matter to Be Included in the Record on Appeal
(3) Proof of Service

cc: Tyler Bathrick, Esq.
Page S. Hilton, Esq.

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