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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018–UP–280 (S.C. Ct. App. filed June 27, 2018)

Scott Ledford, Employee, ... Petitioner,

–vs.–

Department of Public Safety, Employer,
and State Accident Fund, Carrier, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 16, 2018.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN RULING THE PETITIONER HAD TO ATTRIBUTE PREJUDICE TO THE DECISION OF THE APPELLATE PANEL?

II. DID THE COURT OF APPEALS ERR IN FAILING TO FIND EVIDENCE OF PREJUDICE IN ADDITION THE SHOCKINGLY INADEQUATE AWARD?

III. DID THE COURT OF APPEALS ERR IN FINDING THE REVERSAL OF THE INADEQUATE AWARD CURED THE PREJUDICE SUFFERED BY THE PETITIONER?

IV. WHILE THE COURT OF APPEALS WAS BOUND BY PRECEDENT, THIS COURT SHOULD ADOPT *DE NOVO* REVIEW BASED UPON AN OBJECTIVE STANDARD WHEN DECIDING WHETHER RECUSAL IS REQUIRED UNDER THE CODE OF JUDICIAL CONDUCT?

This Petition for Certiorari to the Court of Appeals is filed pursuant to Rule 242, SCARC, seeking discretionary review of the unpublished Opinion of the Court of Appeals, No. 2018–UP–280 (S.C. Ct. App. filed June 27, 2018). The issues raised involve a novel question of law whether cursory administrative review can defeat review of judicial misconduct. *See:* Rule 242(b)(1), SCARC. The issues raised also directly involve a substantial constitutional issue concerning the expectation of a fair and impartial tribunal that is fundamental to due process. *See:* Rule 242(b)4), SCACR. And the Petition gives the Court an opportunity to revisit the desirability of

adopting *de novo* review based upon an objective standard it declined to adopt "at this time" in *Patell v. Patell*,, 359 S.C. 515, 599 S.E.2d 114 (2004) for deciding whether recusal is required under Cannon 3(E) of the Code of Judicial Conduct, Rule 501, SCRAC, ,.

STATEMENT OF THE CASE

On July 15, 2010 the Petitioner had an admitted injury by accident arising out of and in the course of his employment as a highway patrolman. He volunteered to be tasered during a training exercise and the muscle contractions were so severe he fractured his T6 through T9 vertebra. (A, Vol. I, p. 246). He experienced radicular arm symptoms following the injury and was referred to a neurologist, Dr. Sarb, who reported the symptoms had completely resolved. (A, Vol. I, Pp. 109 – 120). On September 29, 2011, this claim was settled on a Form 16 for a 25% scheduled loss of the spine under § 42–9–30(21), S.C. Code Anno., as amended 2007. (A, Vol. I, p. 262). The Petitioner returned to full duty as a patrol officer.

On March 10, 2012 the Petitioner had a second admitted accidental injury. He was in a motorcycle accident chasing a speeding motorist. (A, Vol. I, pp. 247 – 250). He experienced neck, lumbar spine, and right leg pain. On April 17, 2012 an MRI documented C5-C6, C6-C7 spinal cord stenosis with impingement of the spinal cord, a T8-T9 and T9-T10 posterior disc bulge effacing the spinal cord, and a L4-5 mild to moderate circumferential disc bulge with mild effacement of the tecal sac and central spinal cord stenosis. (A, Vol. I, 384 – 385). The medical doctors who treating or evaluated the Petitioner assigned permanent impairment ratings of 13% to 15% to

his cervical spine and between 5% and 10% to his lumbar spine in addition to his prior 25% impairment of his spine.[1] (A, Vol. I, pp. 543 – 547; 607 – 612).

On June 8, 2012 and September 25, 2012 April 28, 2011 the Petitioner filed claims for a change of condition and a new accidental injury because there was a medical question whether the Petitioner suffered a change of condition from his 2010 taser injury or a new injury from his motorcycle accident. (AR, Vol. I, pp. 340, 350).

On July 9, 2012, the State Disability Board determined the Petitioner was unable to return to duty as a patrol officer and awarded him disability retirement benefits based on the combined effects of both injuries. (A., Vol. II, p. 600).

On October 8, 2012 a motion to consolidate the claims for a change of condition and new injury was granted. (A, Vol. I, p. 184). On January 15, 2013 the consolidated claims were heard before Commissioner Roche. The Respondents denied the Petitioner suffered a cervical spine injury in 2010 and, therefore, denied there had been a change in condition. (A, Vol. I, p. 188). On May 2, 2013 Commissioner Roche found the Petitioner suffered only temporary radicular arm symptoms which had completely resolved following his 2010 injury. (A, Vol. I, pp. 185 – 196). Commissioner Roche ruled the Appellant did not suffer a change of condition but was entitled to ongoing medical treatment and weekly benefits for his motorcycle

[1] The combined impairments from his two admitted injuries, his prior award of 25% loss of use of his back for his taser injury together with his 13% to 15% percent medical impairment to his cervical spine and 5% to 10% medical impairment of his lumbar spine for his motorcycle accident, put him close to a 50% loss of use of the back which would have increased the number of weeks awarded for compensation from 300 to 500 and raised a rebuttable statutory presumption of total and permanent disability, without regard to earning capacity, under § 42-9-30(21), S.C. Code Anno., as amended July 1, 2007.

accident. (A, Vol. I, pp. 192 193). No appeal was taken from Commissioner Roche's Order.

On August 15, 2014, the motorcycle accident permanency claim was heard before Commissioner Barden. On September 16, 2014, Commissioner Barden requested a telephone conference with the attorneys. (A, Vol. I, pp. 322 – 330). During the telephone conference Commissioner Barden said she "did not believe anything the [Petitioner] said except his name and age." (A, Vol. I, pp. 322 – 330). She said the Petitioner lied about not having neck pain following his prior accident commenting, "while he may be a former member of the South Carolina Highway Patrol ACE Team, he was not a member of the 'Truth Team.'" (A, Vol. I, pp. 322 – 330). She then said she had an "obligation" to report insurance fraud to the Attorney General for prosecution but, if the Petitioner settled his claim for whatever "minimal offer" made in light of the telephone conference, a report would be unnecessary. (A, Vol. I, pp. 322 – 330).

Petitioner's counsel immediately dictated a memorandum to document what was said. (A, Vol. I, p. 334). He hired counsel to research the law of perjury, insurance fraud, and judicial ethics. He sought advice from other attorneys and a legal ethics professor. On September 30, 2014 he received a draft motion to recuse and discussed with counsel the need to prepare supporting affidavits, exhibits, and a memorandum in support of the motion. Most importantly, he discussed what had been said, the recusal motion, and the possible consequences of filing the recusal motion with his client. The Petitioner, a 17 year law enforcement officer, reasonably believed he was

being falsely accused of insurance fraud and threatened with criminal prosecution unless he settled his career ending admitted injury claim on unfavorable terms. He refused to forfeit his right to have his claim fairly and impartially determined, not just by Commissioner Barden, but by the Appellate Panel and the Appellate Courts if necessary. On October 10, 2014 the motion, supporting affidavit and documents, and a memorandum of law were filed. (A, Vol. I, pp. 322 – 330).

On November 3, 2014 Commissioner Barden denied the recusal motion without a hearing,. (A, Vol. I, pp. 174 – 183). She admitted she had only reached "tentative findings" at the time of the telephone conference. Calling the allegation she threatened prosecution unless the Petitioner settled his claim false and frivolous she said a settlement would only have made "unnecessary the promulgation of a written decision **on the merits**." (Emphasis added) (A, Vol. I, pp. 175 – 176). She became defensive and combative. Having "assured [Petitioner's counsel] that her findings were in no way a reflection on him or his abilities" during the telephone conference, in Finding of Fact 10 of her Order denying recusal, she found:

> ... the [Petitioner] alleges that the undersigned must disqualify herself on the ground that she 'threaten[ed] criminal proceedings unless the case settles.' This is a false statement of fact and a frivolous allegation. The undersigned made no such proclamation, either expressly or impliedly. Counsel for the [Petitioner] has made such statement with the knowledge that it is false, or, at best, a reckless disregard for its truth or falsity. **The undersigned will not consider a frivolous and materially false statement as reasonable grounds for disqualification.**" (Emphasis added).

(A, Vol. I, p. 178). Her denials notwithstanding, she admitted the substance of the allegation in Findings of Fact 10 – 14 of her Order denying recusal. (A, Vol. I pp. 178 – 179).

On November 14, 2014 the Petitioner filed a Form 30 seeking review of Commissioner Barden's denial of the recusal motion. (AR, Vol. I, p. 309). On December 15, 2014 the Commission, Commissioner Barden participating, ruled the denial was interlocutory. (AR, Vol. I, p. 173).

On December 17, 2014 Commissioner Barden issued her permanency Order. A., Vol. I, pp. 133 – 171). Her findings were neither fair nor impartial. She attacked the Petitioner's character by referring to him a "hustler" in the derogatory sense of him being a liar and a cheat. She attacked the honesty and character of the Petitioner's attorney who she called an unethical liar and the Petitioner's CPA who she accused of "creative accounting." She found the Petitioner lied when he testified he did not have a neck injury as a result of his 2010 injury even though that is what Commissioner Roche's unappealed order found. She did not accuse the Respondents of being liars when they also denied the Petitioner had suffered a neck injury in 2010. Her finding the Petitioner's neck and low back problems were part of his 2010 taser injury had the effect of improperly reversing Commissioner Roche's unappealed order. Her finding the Petitioner lied about continuing to perform physical labor in his lawn care business because he testified in the "present tense," if he exceeds his doctor's restrictions, he suffers increased pain, so he must be working in his lawn care business is unfounded and speculative. She admitted as much when in Finding of

Fact 65 of her permanency Order she found, "I have no concrete idea as to whether the [Petitioner] is performing most of the work himself (as he "works a lot" and is "somewhat of a hustler"), I would assume he is working and don't trust his testimony about having employees who perform the physical labor." (A, Vol. I, p. 169). She ignored the unanimous opinions of the treating or evaluating doctors and the objective, radiographic evidence of disrupted discs pressing on the spinal cord and nerve roots. Her ruling the Petitioner should receive nothing for his admitted career ending injury, nothing for the MRI documents cervical and lumbar disc injuries impinging on the spinal cord and nerve roots, and be ordered to repay $18,932.80 was neither fair nor impartial. It was so shockingly inadequate it provided evidence of actual bias or prejudice.

On December 29, 2014 the Petitioner filed a Form 30 seeking Appellate Panel review of the denial of the recusal motion and of the permanency Order. (A, Vol. I, pp. 328 – 336). On January 21, 2016 the Appellate Panel affirmed in part and reversed in part. (A, Vol. I, pp. 79 – 13255). The Appellate Panel found "...there is no evidence to support [Petitioner's] assertion that the Hearing Commission '*threatened* criminal proceedings' unless the case settled." (A, Vol. 1, p. 107). The Appellate Panel reversed the shockingly inadequate award and overpayment but let stand the unfounded, speculative, improper, and offensive findings attacking the Petitioner's character and reputation. On February 1, 2016 the Petitioner moved for a rehearing on the ground:

> The [Petitioner} is sincerely grateful [for] the Appellate Panel's amendments to the Single Commissioner's Decision and Order

> that have saved him and his family from financial bankruptcy, authorized him to receive ongoing physical therapy and injections recommended by his physicians, and has preserved his right to seek a change of condition within one year from the last payment of compensation under § 42-17-90, S.C. Code Anno., 1976 as amended. The problem is the Appellate Panel, by adopting the majority of the Single Commissioner's findings has left the {Petitioner] still accused of being a liar and a cheat whose reputation has be destroyed.

(R. Vol. I, pp. 289 – 290). On February 22, 2016 the Appellate Panel denied rehearing. (A, Vol. I, p. 78).

On March 21, 2016 The Petitioner filed a Notice of Appeal. On March 26, 2018 the Petitioner filed a motion to argue against precedent for *de novo* review based on an objective standard whether a judicial officer's conduct would create in reasonable minds a perception that the judge violated the Code of Judicial Conduct or engaged in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. On May 16, 2018 the motion was denied at the call of the case for oral argument. On June 27, 2018 the Court of Appeals issued an unpublished opinion affirming the Appellate Panel. The Court of Appeals ruled the Petitioner failed to show prejudice attributable to the Appellate Panel and "[d]ue to the Appellate Panel's reversal, we find the further discussion of the single commissioner's ruling is not warranted." On July 10, 2018 the Petitioner filed for rehearing again on the ground:

> The Court misapprehended this appeal was about money. It is about a law enforcement officer, who served honorably and with distinction until disabled by two admitted injuries in the line of duty, being called a liar by the single commissioner and threatened with criminal prosecution unless he settled his claim forfeiting his rights.

(A., Vol. I, p. 2 – 3). On August 16, 2018 the Court of Appeals denied rehearing.

ARGUMENT

1. The Court should not adopt a rule permitting cursory administrative review to defeat judicial review of misconduct by a judicial officer.

The enforcement of the Code of Judicial Conduct is a matter too important to be delegated to administrative agencies. This Court should not adopt a novel rule allowing cursory review by an administrative agency to absolve misconduct by a judicial officer. The Court of Appeals proposed this novel rule when it found the Petitioner "has not attributed prejudice to the decision of the Appellate Panel." Such a rule would allow the misconduct to go unchecked and would infringe upon judicial review guaranteed as a check on administrative decision making when needed most.[2]

The Court of Appeals cited none and the Petitioner has been unable to find precedent for such a rule. The rejection of such a rule is all the more important when the administrative review conducted is only cursory as happened in this case. The Appellate Panel review in this case was cursory at best. The Appellate Panel found "...there is no evidence to support [Petitioner's] assertion that the Hearing Commission '*threatened* criminal proceedings' unless the case settled." The Appellate Panel failed to consider the only evidence in the record consisting of the affidavit of Petitioner's attorney. The Respondents' attorney, who was a party to the telephone conference when the threat was made, chose not to file a counter affidavit of her own disputing the allegation or to respond to the motion. No hearing was held so no other

[2] Art. I, § 22, South Carolina Constitution.

evidence or testimony was introduced to dispute the allegation. The Appellate Panel not only failed to consider the only evidence in the record, it failed to find Commissioner Barden admitted the substance of the allegation in Findings of Fact 10 — 14 of her Order denying recusal.[3]

Finding no evidence existed, the Appellate Panel performed no analysis of the issues. It did not consider whether the allegation should have been deemed as true when deciding whether to grant recusal.[4] It did not consider the violations of Code of Judicial Conduct or applicable statutes argued in the memorandum supporting the motion. It did not acknowledge Commissioner Barden was bound by the Code of Judicial Conduct,[5] her duty to "... respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[6] Nor did it acknowledge "[a] judge's judicial duties include all the duties of the judge's office prescribed by law,"[7] including the statutory duty to report suspected false statements made to obtain an undeserved insurance benefit.[8] It did not explain what gave Commissioner Barden the right to choose not to enforce the law if the claim was settled. It did not consider that, "[a] judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."[9] It did not consider whether

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[3] Order Denying Recusal filed 11/3/14, Findings of Fact 10 – 14, pp. 5 – 6.
[4] *Shaw v. State,* 276 S.C. 190, 277 S.E.2d 140 (1981)(we conclude that as a general rule the judge, in determining whether to proceed, must accept as true the factual allegations of a motion to disqualify).
[5] § 42-3-250, S.C. Code Anno., as amended April 15, 2005; Rule 501, SCACR.
[6] Canon 2 (A), Rule 501, SCACR.
[7] Canon 3(A), Rule 501, SCACR.
[8] § 38-55-530(D) and § 42-9-440, S.C. Code Anno., as amended April 15, 2005.
[9] Canon 3(B)(8), Rule 501,

settling would have caused the Petitioner to surrender his right to have his claim fairly and impartially adjudicated, not just by Commissioner Barden, but by the Appellate Panel and the Appellate Courts if necessary. The Appellate Panel did not consider whether Commissioner Barden accusing the Petitioner of a breaking the law but then offering not to comply with the law herself, could have reasonably caused a sixteen year law enforcement officer to question her integrity, fairness, and impartiality.[10]

The cursory review performed by the Appellate Panel should not be allowed to absolve Commissioner Barden of the serious misconduct alleged and allow it to go unchecked. Cursory administrative review should not be allowed to defeat judicial review guaranteed as a check on administrative decision making guaranteed by Article I, § 22 of the South Carolina Constitution when needed most. This Court should not adopt the novel rule of law proposed by the Court of Appeals.

2 The hearing commissioner's shockingly inadequate award was not the only unfounded, speculative, or improper finding providing evidence of bias and prejudice.

The Code of Judicial Conduct requires recusal whenever there is an appearance of impropriety, however, case law requires evidence of judicial prejudice for reversal on appeal.[11] While appellate courts have given weight to a trial judge's assurances

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[10] *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995).

[11] *Mallett v. Mallet*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996); *Roche v. Young Brothers, Inc. of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998); *Patel v. Patel*, 359 S.C. 515 (2004); *Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008).

of impartiality, they have held a judge's impartiality can be questioned when his or her factual findings are not supported by the record.[12]

The Petitioner was a client any lawyer would be proud to represent. He was faithfully married for fourteen years and the proud father of three children. All he ever wanted to be was a law enforcement officer and, after studying criminal justice for two years, he joined the South Carolina Highway Patrol. He proudly served as a patrolman officer for 17 years earning the rank of lance corporal and becoming a member of the prestigious ACE team providing motorcycle escorts for visiting dignitaries. To supplement his law enforcement salary to better provide for his family, he owned and operated two small businesses, a lawn care company and a fishing and hunting guide service. Before Commissioner Barden called him a liar who should be prosecuted for insurance fraud, his good name and reputation were unblemished.

Unfortunately, the Petitioner suffered two admitted, career ending accidents arising out of and in the course of his employment as a highway patrolman. The first admitted injury occurred when he volunteered to be tased during a training demonstration and the muscle contractions were so severe he fractured his T6 through T9 vertebra. (AR, Vol. I, p. 169). The second admitted injury occurred when he was involved in a motorcycle accident while on duty. (AR, Vol. I, pp. 172 – 173). The motorcycle accident caused neck and lumbar spine pain. MRI's documented spinal cord stenosis and impingement at the C5-C6 and C6-C7, a posterior disc bulge

[12] *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

effacing the cord at T8-T9 and T9-T10, and a mild to moderate circumferential disc bulge effacing of the tecal sac and causing central spinal cord stenosis at L4-L5. Ignoring the unanimous opinions of the medical doctors[13] and the objective, radiographic findings, Commissioner Barden ruled the Petitioner should receive nothing for his admitted career ending motorcycle injury, nothing for the MRI documented impairments of the cervical and lumbar spine, and be ordered to repay $18,932.80he had been paid under Commissioner Roche's unappealed Order. Her award was so shockingly inadequate it provided evidence of actual bias and prejudice. The shockingly inadequate award, however, was not the only unfounded, speculative, or improper finding providing evidence of bias and prejudice.

Commissioner Barden attacked the Petitioner's character and reputation by repeatedly calling him a hustler in the derogatory sense of him being a liar and a cheat. A review of the record shows the testimony Commissioner Barden relies upon to support this attack was nothing more than the Petitioner answering a question posed by his attorney that used the term "hustler" in the Pete Rose sense of him operating two businesses in addition to his working full time as a highway patrol to provide a better life for his family. Her finding the Petitioner was a "hustler, was unfounded. And, it was not just the Petitioner's character and reputation she attacked. She also attached the character and reputation of his attorney who she called an unethical liar and his CPA she accused of "creative accounting." Judges

[13] Commissioner Barden was previously reversed for substituting her opinions for those of the medical doctors in a case also involving a police officer. *Burnett v. City of Greenville*, 401 S.C. 417, 737 S.C.2d 200 (Ct. App. 2012).

decide contested cases without feeling the need to personally attack the credibility and reputations of the parties, their attorneys, and witnesses. It is reasonable to believe the personal animosity demonstrated in Commissioner Barden's Orders arose from the Petitioner refusing to succumb to her threat to report him for criminal prosecution unless he settled his case on unfavorable terms. Becoming defensive and combative when denying a recusal motion has been identified as a matter of concern to reviewing courts.[14]

Recognizing the conflict inherent in a judge deciding a disqualification motion, the Court has said, "... as a general rule the judge, in determining whether to proceed, must accept as true the factual allegations of the motion to qualify."[15] While a judge is not precluded from deciding a recusal motion, the inquiry should be limited to determining the legal sufficiency of the facts alleged.[16] Commissioner Barden went far beyond determining the legal sufficiency of the uncontested allegation she threatened the Petitioner with criminal prosecution unless he settled his claim on unfavorable terms. She dismissed the allegation out of hand and called it frivolous and false.[17] Dismissing the allegation as frivolous and false when denying a recusal motion has been identified as a matter of concern to reviewing courts.[18]

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[14] *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996)(We question whether the trial judge could impartially decide the recusal issue give his apparent combative and defensive attitude exhibited during the recusal hearing).

[15] *Id.*, 473 S.E.2d at 808.

[16] *Id.* (deeming the allegations as true does not prevent the judge from exercising his right to consider the legal sufficiency of those facts)

[17] *Id.*

[18] *Id.*

Commissioner Barden's finding the Petitioner lied when he testified he did not have a neck injury as a result of his 2010 injury is unfounded. Commissioner Roche found he did not suffered a neck injury in her unappealed order. Commissioner Barden did not similarly accuse the Respondents of being liars or threaten to report them for prosecution when they denied the Petitioner suffered a neck injury in 2010 too. Her finding the Petitioner's neck and low back injuries documented by the MRI's were part of his 2010 taser injury had the effect of improperly reversing Commissioner Roche's unappealed order.[19]

Commissioner Barden's findings the Petitioner lied about not continuing to perform physical labor in his profitable lawn care business are unfounded. She made this finding because the Petitioner testified in the "present tense," if he exceeds his doctor's restrictions, he suffers increased pain." Her strained logic based on what tense the Petitioner was testifying in was just the jumping off place for her finding the Petitioner lied about his law care business remaining profitable due to his physical labor. She admitted this was pure speculation in her Finding of Fact 65, when she said, "I have no concrete idea as to whether the [Petitioner] is performing most of the work himself (as he "works a lot" and is "somewhat of a hustler"), I would assume he is working and don't trust his testimony about having employees who perform the physical labor." She admits she is "the worst of the bunch" when it comes to understanding accounting and says, "[w]hat deductions the [Petitioner] takes on

[19] *See*: *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 340 S.E.2d 546 (1986); *Samonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008)(one commissioner does not have the authority to overrule another).

his income tax returns are of no concern" to her give herself an excuse to ignore the Petitioner's businesses profits plummeted to $688.00 in 2012 and $716.00 in 2013 following his injury and to ignore his tax returns showed employee salaries of $74,629.00 and subcontractors fees of $53,844.00 to account for the labor performed.

Commissioner Barden made her threat to refer the Petitioner for criminal prosecution unless he settle his claim on unfavorable terms before she reached her decision on the merits. She said she had only reached "tentative findings" at the time of the telephone conference. She said a settlement would only have made "unnecessary the promulgation of a written decision on the merits." Making statements disparaging a litigant's case before reaching a decision on the merits has also been identified as a matter of concern to reviewing courts.[20]

The Petitioner risked his life serving as a law enforcement officer. He worked hard to provide a good life for his wife and family. He suffered two admitted, career ending injuries. Upon closer examination, Commissioner Barden's accusation the Petitioner was a liar attempting to get an undeserved insurance benefit can be seen for what they are – untrue, unfounded, speculative, and improper. When falsely accused of insurance fraud and threatened with criminal prosecution unless he settled his case on unfavorable terms, the Petitioner refused to be bullied into forfeiting his rights. He deserves better than to have his character and reputation

[20] *Mallett v. Mallette, supra.* 473 S.E.2d at 808 (We are convinced prudence and judiciousness would have dictated the trial judge disqualify himself. Nevertheless, we see no indication from the record the trial judge ever expressed his opinion on the merits of the case prior to his decision)..

needlessly destroyed because of personally offensive, unfounded, speculative, and improper findings.

3. The reversal of the hearing commissioner's inadequate award did not cure the prejudice suffered by the Petitioner.

The Appellate Panel thankfully reversed Commissioner Barden's shockingly inadequate award but that lead the Court of Appeals to rule, "[d]ue to the Appellate Panel's reversal, we find the further discussion of the single commissioner's ruling is not warranted." The reversal of Commissioner Barden's inadequate award may have saved the Petitioner and his family from financial ruin but it did not eliminate the inadequate award as evidence of Commissioner Barden's personal bias and prejudice or cure the prejudice suffered by the Petitioner.

The Appellate Panel and the Court of Appeals misunderstood money was not and is not the only, or even the most important reason, the Petitioner has pursued this appeal. His money concerns were greatly alleviated by the State Disability Board awarding him disability retirement benefits. To him it is his reasonable belief he has been deprived of his right to a fair and impartial hearing that is more important[21] He reasonably believes being deprived of his right to judicial review based on a record untainted by untrue, biased, unfair, unfounded, and speculative findings is more important. But, most important of all, he reasonably believes his reputation as a former law enforcement officer has been impugned by the false and unfounded accusation he attempted to commit insurance fraud.

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[21] *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) cited in *Shaw v. State*, 276 S.C. 190, 277 S.E.2d 140 (1981).

This is the argument he has maintained throughout the appeal process. That is why the Petitioner moved for a rehearing on the ground:

> The [Petitioner} is sincerely grateful [for] the Appellate Panel's amendments to the Single Commissioner's Decision and Order that have saved him and his family from financial bankruptcy, authorized him to receive ongoing physical therapy and injections recommended by his physicians, and has preserved his right to seek a change of condition within one year from the last payment of compensation under § 42-17-90, S.C. Code Anno., 1976 as amended. The problem is the Appellate Panel, by adopting the majority of the Single Commissioner's findings has left the {Petitioner] still accused of being a liar and a cheat whose reputation has be destroyed.

(R. Vol. I, pp. 212 – 213). When the Court of Appeals affirmed, the Petitioner requested rehearing on the ground:

> The Court misapprehended this appeal was about money. It is about a law enforcement officer, who served honorably and with distinction until disabled by two admitted injuries in the line of duty, being called a liar by the single commissioner and threatened with criminal prosecution unless he settled his claim forfeiting his rights.

(A., p.). The reversal of the shockingly inadequate award did not cure the prejudice suffered by the Petitioner. "It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution."[22] The Petitioner believes he was being denied a fair and impartial hearing and denied based on a record untainted by untrue, unfounded, unfair, speculative, and improper findings.

4. This Court should adopt an objective standard of review for Deciding when recusal is required under the Code of Judicial Conduct

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[22] *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) cited in *Shaw v. State*, 276 S.C. 190, 277 S.E.2d 140 (1981).

This case illustrates how the judicially imposed requirement of judicial prejudice intended to prevent judge shopping and the abuse of Cannon 3(E) of the Code of Judicial Conduct can have the converse unintended effect of allowing judicial misconduct to go unchecked. The Code seeks to ensure judicial proceedings are conducted impartially both in appearance and in fact. Cannon 3(E) of the Code of Judicial Conduct, Rule 501, SCACR, governs disqualification and provides, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[23] Despite the plain language used in the Code, our Courts have the additional requirement of proof of judicial prejudice for reversal of a judge's decision not to recuse himself or herself.

Under South Carolina law, unless there is evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.[24] It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias or prejudice.[25] Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case.[26] If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.[27] But, as argued above, while appellate courts will accord "great weight to the trial judge's assurances of his own impartiality, [they will] find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record."[28]

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[23] *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998)
[24] *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998).
[25] *Mallett v. Mallett,supra.*
[26] *Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct.App.1994).
[27] *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).
[28] *Id.* 433 S.E.2d at 857.

In the case of *Patel v. Patel*,[29] the appellant husband, moved to recuse the Family Court judge because he had received three letters from State Senators solicited by the wife. The Judge acted immediately to dispel any perception of impartiality. He promptly wrote the Senators advising he was not permitted to consider the letters and provided copies of his correspondence to the parties' attorneys. He chastised the wife for her inappropriate attempt to influence the court at the hearing. Under these facts, the Court of Appeals found there was no evidence the Judge was prejudiced by the letters and affirmed his denial of the husband's recusal motion. This Court granted the husbands motion to argue against precedent for *de novo* review based upon an objective standard based upon the United States Supreme Court's holding in *Lifeberg v. Health Services Acquistion Corp.*[30] In that case, the Supreme Court held recusal is required in the Federal Courts even when there is no evidence of bias if a reasonable person, knowing the circumstances, would expect the judge is biased." [31]

This Court, after carefully considering the husband's arguments and, assuming without deciding there was merit in his policy arguments, declined to adopt *de novo* review based upon an objective standard "at this time" because the husband had not demonstrated any evidence that could lead an objective observer to conclude the Judge had been improperly influenced by the Senator's letters. This Court was concerned, "to hold disqualification was mandated under the facts of this case, would require every judge to recuse himself upon receiving unsolicited contact from the legislature, or other potentially influential persons/organizations, or even officious

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[29] Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004)
[30] *Lifeberg v. Health Services Acquistion Corp.*, 486 U.S. 847, 108 S.Ct 2194, 100 L.Ed.2d 855 (1988)
[31] *Id.*, 486 U.S. at 860 – 61.

intermeddlers."[32] Furthermore, such a holding would "invite the less scrupulous to employ this stratagem to eliminate any judge."[33]

None of these concerns is present in this case. The Petitioner does not allege prejudice due to the actions of a third-party, he alleges prejudice from the misconduct of Commissioner Barden in violation of the Code of Judicial Conduct and statutes. As argued above, unlike the husband in *Patel*, the Petitioner can show judicial prejudice from Commissioner Barden's personal attacks on the Petitioner, his attorney, and witness, her dismissal of the uncontested allegations as false and frivolous, her combative and defensive attitude in denying the recusal motion, her broadcasting her opinions before deciding the merits of the case, and her unfounded, unfair, and speculative findings.

This case presents a strong factual basis for the Court to adopt *de novo* review based upon an objective standard. The objective standard is whether the judicial conduct would create in reasonable minds a perception that the judge violated the Code of Judicial Conduct or engaged in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.[34] Adoption of *de novo* review based upon an objective standard would give meaning to the plain language of Canon 3(E) of the Code of Judicial Conduct, Rule 501, SCACR, help prevent judicial misconduct from occurring, and help preserve public confidence in the impartiality of our tribunals.

CONCLUSION

[32] Patel, supra., 599 S.E.2d at 119.
[33] *Id.*
[34] Model Code of Judicial Conduct, R. 1.2 cmt. 5 (2007).

Judicial review of administrative decisions is guaranteed by Art. I, § 22 of the South Carolina. Cursory review by an administrative agencies internal appeal process should not be allowed to defeat judicial review of a worker's compensation commissioner's denial of a recusal motion. The administrative review affirmed by the Court of Appeals in this case was cursory at best. It failed to consider the undisputed facts in the record or perform any legal analysis of the issues raised. It allowed serious allegations of violations of the Code of Judicial Conduct and applicable statues go unchecked by summarily dismissing the uncontested allegation as frivolous and false. Adoption of the rule proposed by the Court of Appeals requiring the showing of prejudice attributable to the administrative reviewing body would defeat judicial review of judicial misconduct when needed most.

The Petitioner has shown judicial prejudice in this case based on the unfounded and shockingly inadequate award and other untrue, unfounded, unfair, and speculative findings, her combative and defensive attitude demonstrated by her personal attacks on the Petitioner, his attorney and witnesses, her ignoring of the unanimous opinions of the medical doctors and objective radiographic findings, her summary dismissal of the allegation as frivolous and false, and her shockingly inadequate award. While the reversal of the inadequate award is appreciated, the damage to the Petitioner's reputation and anxiety associated with being falsely accused of criminal conduct and threatened with prosecution was not cured by the reversal of Commissioner Barden's shockingly inadequate award.

This case presents a strong factual basis and the opportunity for this Court to revisit and finally adopt *de novo* review based upon an objective standard to give meaning to the plain language of Cannon 3(E) of the Code of Judicial Conduct, Rule

501, SCACR, prevent the misconduct alleged in this case from reoccurring, and help preserve public confidence in the fairness and impartiality of our courts.

Respectfully submitted,

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By: _____
J. Kevin Holmes

Charleston, South Carolina

September 17, 2018

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-000601

Scott Ledford, Employee..... Appellant,

v.

Department of Public Safety, Employer, and
State Accident Fund, Carrier..... Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on the SC Court of Appeals, Clerk of Court and opposing counsel by depositing a copy of it in the United States Mail, postage prepaid on September ___, 2018, addressed to the SC Court of Appeals, Clerk of Court, P.O. Box 11629, Columbia, SC 29211 and to Sarah C. Sutusky, Esquire, Willson, Jones, Carter & Baxley, PA, 3600 Forest Drive, Suite 204, Columbia, SC 29204.

September 17, 2018.

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