

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

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WCC File No. 0810152

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Patricia Fore, Employee ..... Appellant,

v.

Griffco of Wampee, Inc., Employer, and Chartis Claims, Inc., Carrier, ..... Respondents.

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**INITIAL BRIEF OF APPELLANT**

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**SC Court of Appeals**

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in denying Claimant's Motion for the Commission to recuse itself on the grounds that the Commission engaged in improper *ex parte* contact with Respondents in violation of the *Code of Judicial Conduct*, Canon 3 B (7) and S.C. Code Ann. § 1-23-360 (1985), by instructing the Attorney General's Office to forward a letter from the Commission's Compliance Director to the Respondents without copying the same to Appellant.
2. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to make specific findings for the refusal to recuse himself and the Commission, such refusal being an abuse of discretion mandating a new trial before an impartial and unbiased tribunal.
3. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in denying Appellant's Motion to exclude the *ex parte* letter from the Commission's Compliance Director on the ground that said letter:
  - A. Contained prejudicial *ex parte* communication between the Commission and a witness in a pending case;
  - B. Contained inadmissible hearsay;
  - C. Was more prejudicial than probative;
  - D. denied Appellant the opportunity to conduct meaningful discovery to rebut evidence Respondents were able to develop without Appellant's knowledge based on the improper *ex parte* communication between the Commission and Respondents; and
  - E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.
4. Whether Appellant was denied a fair trial due to:
  - A. the Commission's refusal to recuse itself or otherwise insulate the trial from the taint of "an ongoing insurance fraud investigation;"
  - B. the admission and reliance on an improper *ex parte* communication between the Commission and Respondents;
  - C. the improper *ex parte* communication itself which denied the Appellant the opportunity to conduct meaningful discovery to rebut evidence Respondents were able to develop without Appellant's knowledge based on the improper *ex parte* communication between the Commission and Respondents;

- D. allowing Respondents to improperly admit incompetent evidence of a potential criminal investigation initiated by the Commission, such evidence being unduly prejudicial, irrelevant, unsupported and offered for the improper purpose of intimidating and threatening Appellant; and
  - E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" which prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.
5. Whether the Single Commissioner erred as a matter of law in excluding the testimony of Tony Owens, as such testimony was essential to rebut the incredible and biased testimony of Steve McGowan – the witness whose identity was provided to the Respondents by a Director of the Commission in an improper *ex parte* communication.
  6. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to find Appellant sustained a loss of greater than 50% use of her back when the objective evidence of an undisputed 36% impairment rating, non-union of her surgery; and permanent out of work restrictions by the authorized treating physician mandate such a result.
  7. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in failing to find Appellant is permanently and totally disabled under § 42-9-10 based on her failed work attempt; unrefuted expert vocational opinion of Glenn Adams opining she is totally and permanently disabled; her testimony about her inability to sustain gainful employment; and Dr. Wolgin's opinion that she is to remain out of work indefinitely.
  8. Whether the Single Commissioner and Appellate Panel erred as a matter of fact and law in the finding wherein, "I do not find her a credible witness and believe she can work," such finding being tainted by inadmissible prejudicial evidence.
  9. Whether the Appellate Panel denied due process to Claimant by beginning oral argument before the scheduled time without one of Fore's attorneys being present as that attorney was appearing before a second Appellate Panel.
  10. Whether the Appellate Panel erred in finding there was no *ex parte* communication in this case?

## STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission filed by the Employee, Patricia Fore. The case arises out of a work-related injury suffered by Fore on August 21, 2008 on her job with the Employer. The Employer and Carrier are the Respondents.

Fore filed a Form 50 (Claimant's Request for Hearing) on May 13, 2009. [5/13/09 50]. The case was tried on August 12, 2009 before Commissioner Andrea Roche. On October 13, 2009, Commissioner Roche issued a Decision and Order directing Respondents to provide medical treatment and pay temporary total disability compensation to Fore. [Order 10/13/09]. No appeal was taken and benefits were provided

Fore was placed at maximum medical improvement (MMI) by her doctor on February 14, 2011.

Fore filed a Form 50 (Claimant's Request for Hearing) on June 27, 2011. [6/27/11 50]. Respondents filed a Form 51 (Employer's Answer to Request for Hearing) on July 27, 2011 (7/27/11 51).

Fore served her Form 58 (Pre-hearing Brief) and Notice of Witnesses on Appellant on September 12, 2011. [Form 58].

Respondents served their Form 58 (Pre-hearing Brief) and Notice of Witnesses on Appellant on September 19, 2011. [Form 58]. It was received on September 20, 2011, by Appellant's attorney. Included in the exhibits were two letters previously unknown to Fore: one from Garry Smith, the Director of the Commission's Compliance Division, to the Insurance Fraud Division of the Attorney General; and a second transmitting the Smith letter to the Carrier.

In response to the previously unknown allegations of insurance fraud, Fore served an

Amended Form 58 (Pre-hearing Brief) and Notice of Witnesses on September 12, 2011. [Form 58].

Fore specifically listed Tony Owens as a rebuttal witness.

The case was tried before Commissioner Bryan Lyndon on September 27, 2011. The primary issue was the extent of Fore's disability. Fore contended she was permanently and totally disabled – both under § 42-9-10 and § 42-9-30 (21)(50% loss of use of the back). Fore further contended that even if she were not totally disabled, she had certainly lost more than 50% loss of use of the back, such that any partial disability award should be based on 500 weeks.

Respondents claimed disability should be awarded under § 42-9-30. Respondents additionally requested credit for any wages paid during the disability period. Appellant agreed Respondents were entitled to this credit. Credit was taken in the amount of \$1,244.00. [Form 18].

The case was marred with the surprise revelation that the Director of the Commission's Compliance Division had received communication from a material witness (Steve McGowan) in the case. Instead of advising both parties of this communication, he first conducted an investigation. He then forwarded the evidence *ex parte* to the Respondents via the Attorney General's office. [Defendants' Exhibit 1]. Respondents used the *ex parte* communication to allege that Fore was the target of an "ongoing fraud investigation" without Fore being able to challenge the falsity of the allegation or present rebuttal evidence.

Respondents introduced the Director's letter at the hearing as substantive evidence of an "ongoing fraud investigation" over Claimant's objection. Fore then moved to have the Commissioner recuse himself and the rest of the Commission based on Rule 501, Canon 3B(7) of the Code of Judicial Conduct. Fore requested that the Commissioner either transfer the case to the circuit court or appoint a former commissioner to hear the case. The motion was summarily denied.

[Tr. page 4, line 22-page 10, line 20].

The case went forward on the merits. After Fore testified, Appellant called Tony Owens. The Single Commissioner sustained Respondents objection to allowing the witness to testify on the grounds he was not listed on the Claimant's original pre-hearing brief and that listing him on an amended pre-hearing brief was untimely. Fore then proffered the testimony of the witness. [Tr. Pages 65-69].

On January 18, 2012, Commissioner Lyndon issued a Decision and Order ruling:

IT IS HEREBY ORDERED that the greater weight of evidence supports a finding that Claimant suffered an admitted injury by accident to the back. Claimant's injury resulted in a forty percent (40%) disability to the back.

IT IS HEREBY ORDERED that the greater weight of evidence supports a finding that the Defendants are entitled to credit for overpayment of temporary total benefits from the date of maximum medical improvement, February 14, 2011 at a rate of \$299.59 and credit for any wages earned while paying benefits during the prior disability period.

IT IS HEREBY ORDERED that Defendants shall furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.

AND IT IS SO ORDERED.

Fore timely appealed this Decision and Order to the Appellate Panel on February 1, 2012.

[Form 30].

Oral arguments were heard by Appellate Panel A on June 18, 2012. Arguments were scheduled to begin at 4:00 p.m. [Notice of Hearing]. However, Appellate Panel A was running ahead of schedule and called the case ahead of time. Oral arguments commenced at 3:54 p.m. [6/18/12 Tr. page 1]. Fore's lead attorney, Stephen Samuels, was currently appearing in a 3:30 p.m. oral argument before Panel B. Despite the inability of Fore's lead counsel to appear, the Panel began

oral argument with Mr. Samuels not present. He arrived during the Respondent's argument – after his co-counsel had made the Appellant's argument. Mr. Samuels argued the Reply, but was handicapped by the inability to hear or participate in the initial appellant's argument.

On August 27, 2012, the Appellate Panel issued its Appellate Panel Decision and Order in which it affirmed with modifications the Decision and Order of the Single Commissioner. The Appellate Panel added additional findings of fact and conclusions of law addressing the allegations of *ex parte* communication. [FC Order].

This appeal followed.

### **STATEMENT OF THE FACTS**

Patricia Fore, the Claimant, had been employed as a meat cutter in a Myrtle Beach grocery store for two-and-a-half years. Fore injured herself on February 21, 2008 when she bumped into a meat saw while carrying approximately 60 pounds of meat. She last worked on March 30, 2008. In May 2008, Fore moved to Georgia because her husband had been transferred.

This case was originally denied (Respondents admitted it only as a minor medical-only hip injury). After a hearing, Commissioner Roche held Fore had suffered compensable injuries to “her back and right hip. Her back injury affects her right leg.” Dr. Wolgin was designated her authorized treating physician. Fore was put on a running award of temporary total disability compensation. [order, 10/13/09].

Fore underwent a lumbar fusion at L4-L5 and L5-S1 on May 19, 2010. The surgery was not successful, leaving her with a non-union and failed back syndrome. Dr. Wolgin has recommended a revision, but at this stage, Fore is unwilling to proceed as there is only a 50% chance of

improvement. [APA page 76].

In late August 2010, Dr. Wolgin advised Fore to attempt to go back to work. This was also discussed with the Carrier's nurse case manager. [Apa page 57]. Following her doctor's advice, Fore went to work part time as a clerk for ABC Bail Bonds in late August 2010. She averaged about 12 hours per week. She tried this for about 4 ½ months, but was not able to tolerate it, despite her employer allowing her to go home when her pain tolerance was reached. She quit "because the pain was just – it was too much; I couldn't handle it." She further explained:

Up and down so much out of the office chairs, just getting up from that lower chair up into standing up, it was just killing my back. So, having to climb in and out of bed all hours of the night, it – it was killing me. I was just eating Vicodin like they were candy. [Tr. Page 26, lines 16-24].

Fore last worked for ABC on January 21, 2011. In her work journal, she wrote, "I gave Bill the phone, the charger, hurting too bad work in the office anymore." [Journal]. Her earnings for ABC from late August through January 21, 2011 totaled \$1,244.00. [Form 18].

Fore kept Dr. Wolgin and the nurse case manager apprised of her work attempt. Dr. Wolgin put Fore at MMI on February 14, 2011. He assigned a 36% whole person impairment rating. He wrote she is "unable to return to work until further notice." [APA page 77]. He gave her specific restrictions "sit or stand only for about 15 or 20 minutes at a time and unless employment is able to be found within those restrictions, functionally she is not able to participate in the workplace and will remain so until her condition changes or further notice." [APA page 76].

Sometime in February 2011, Fore was approached by long-time friend Tony Owens. Owens operates A1 Bail Bonding – a competitor to ABC Bail Bonding. Owens asked Fore if he could use her name and license because she is well known in the community. ABC got a lot of bonds because

people knew her. Owens bought some letters reading “A-1 Bail Bonds” to put on the back window of Fore’s truck for advertising. Fore lives on the same street as the courthouse.

Fore agreed to help Owens. She transferred her license to A1. To make the transfer effective, she did one bond in February 2011. [Claimant’s Exhibit 2].

In July, 2011, Owens developed serious health problems. He asked Fore if she could help him out during his period of infirmity. Fore agreed to do a few bonds until Owens could locate and train an actual employee. **Fore did this for free to help out her friend.**

Fore did 5 bonds in July; 12 bonds in August; and one bond in September. [Claimant’s Exhibit 2]. In August, Owens hired Mary Weaver to be his bondsman. Fore arranged for Weaver to get licensed as a bondsman and then to work for Tony Owens. Fore would have taken the job herself had she been able – and “would have stayed with Steve [McGowan] if I could have physically done it.” [Tr. page 33, line 4-page 35, one 21].

Also in July 2011, Steve McGowan, Fore’s former employer at ABC, called Garry Smith, the Director of the Commission’s Compliance Division.<sup>1</sup> McGowan allegedly reported to Smith that Fore was working for his competitor, A1 Bonding, and “getting paid off the books.” McGowan’s grievance was primarily against his small town competitor, A1 Bonding: “Because she is getting paid off the books, her employer is avoiding paying premium. So ultimately, my overhead is higher than A1 Bonding’s because my insurance costs are higher.” [Defendants’ Exhibit 1]. His claim of higher overhead is a lie as he admitted to committing tax fraud himself by not paying payroll taxes on

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<sup>1</sup>McGowan testified he called the Carrier, but denied having called the Commission. [Tr. page 86, line 21-page 87, line 4].

Fore's earnings.<sup>2</sup> [Tr. Page 87, lines 5-17].

On July 18, 2011, Smith wrote a letter on Commission letterhead to the Insurance Fraud Division of the Office of the Attorney General. In the letter, Smith detailed his conversation with McGowan, along with other information he developed as part of his investigation. He then specifically instructed the Attorney General to forward his letter to the Carrier "so it can conduct an investigation" – even while simultaneously acknowledging that "I don't believe I can alert the carrier to the alleged fraud." [Defendants' Exhibit 1].

The Attorney General's office complied with Smith's instructions and forwarded his letter to the Carrier on July 20, 2011.<sup>3</sup> [Defendants' Exhibit 1]. Upon receipt of the letter, the Carrier apparently contacted McGowan and enlisted his help in putting Fore under surveillance.

McGowan began harassing Fore. The harassment became so bad that Fore ultimately took out a restraining order against McGowan. [Claimant's Exhibit 5]. The Carrier conducted surveillance of Fore at the courthouse obtaining the restraining order on September 7, 2011.

Since her failed work attempt with Steve McGowan and ABC Bail Bonding, Fore has not worked at all. She did help out Tony Owens by doing a total of 19 bonds for him over the course of 8 months. She also trained an employee for him. Fore received no pay and there is no evidence these *de minimus* activities constituted employment.

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<sup>2</sup>Fore was not paid at all for the short time she helped out Tony Owens and A1 Bonding. At best McGowan was speculating about her being paid; at worst it was a deliberate fabrication.

<sup>3</sup>Fore objected to both Smith's letter and the AG's letter being introduced into evidence. The Single Commissioner excluded the AG's letter but admitted Smith's letter. The AG's letter was sealed and made part of the record as a proffer.

Tony Owens testified Fore was not physically able and capable of working as a bondsman.<sup>4</sup> He stated, “If she was, we would probably could have saved the office, and she could have worked down there and saved that office for me.” He would have hired her, “if she could have. But, she wasn’t in the shape to do it either.” [Proffered testimony, Tr. page 9, lines 16-24].

At the time of the hearing, Fore rated her pain as 6 of 10. It gets worse if she does a lot of up and down. Dr. Wolgin wrote she is “unable to return to work until further notice.” [APA p. 77]. He gave her specific restrictions to “sit or stand only for about 15 or 20 minutes at a time and unless employment is able to be found within those restrictions, functionally she is not able to participate in the workplace and will remain so until her condition changes or further notice.” [APA p. 76]. Dr. Wolgin further wrote, “I think enough time has gone by that would make her a surgical candidate if she wanted to do an open revision of the L4 through S1 fusion.” [APA p. 76].

Glen Adams performed a vocational assessment on Fore on September 7, 2011. Fore told Mr. Adams about her failed work attempt with ABC Bail Bonding. [APA p. 98]. Adams noted that even if Fore could perform sedentary duties – which he noted “is not supported by Dr. Wolgin's work statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies.” He opined she “is considered to be totally vocationally disabled.”

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<sup>4</sup>The Single Commissioner sustained Respondents’ motion to exclude the testimony of Owens on the grounds that he was not listed on the original pre-hearing brief. He was listed on the supplemental pre-hearing brief as a rebuttal witness. The supplemental brief was filed after Claimant learned of the Commission’s *ex parte* communication with the Carrier and Steve McGowan. Owens’ testimony was proffered. [Tr. page 65, line 3-page 69, line 5].

## ARGUMENT

### **1. Fore was denied a fair trial due to the Commission's ex parte communication with a witness and the Carrier.**

This case raises troublesome issues about the fairness of the workers' compensation system and the neutrality of the hearing process. Patricia Fore was denied due process and a fair trial due to the Commission's *ex parte* communication with a witness and the Carrier. The inherent prejudice was compounded by the denial of Fore's motion to recuse and various evidentiary rulings. The final decision ignored the evidence, instead arising from passion and caprice engendered by bogus allegations of insurance fraud. The Appellate Panel compounded this error by finding there had been no *ex parte* communication despite the overwhelming evidence to the contrary. The members of the Appellate Panel appeared to be offended and incensed by the very suggestion – more so than concerned about the integrity of the hearing process and the rights of the litigants. This further shows that even the appeals process before the Appellate Panel was tainted.

“[A] fair trial in a fair tribunal is a basic requirement of due process, [and] [t]his applies to administrative agencies which adjudicate as well as to courts.” Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). “*Ex parte* communications are inherently improper and are anathema to quasi-judicial proceedings.” Jennings v. Dade County, 589 So.2d 1337 (Fla.App. 3 Dist. 1991). Although part of the executive branch, the Commission is in fact a quasi-court. Both the federal and state courts give the same weight to the Commission's decisions as they do to trial courts. See Hall v. Marion School Dist. No. 2, 860 F.Supp. 278 (D.S.C.1993); Crosby v. Prysmian Communications Cables and Systems USA, LLC, 723 S.E.2d 813, 397 S.C. 101 (Ct.App. 2011). The Commission's judicial function encompasses every aspect of a trial in a

traditional court:

The commission affords both the claimant and the employer a full and fair opportunity to litigate the issue. The parties are entitled to present witnesses and other evidence, make factual and legal arguments, and appeal a ruling they contend was made in error. The commission may not award benefits without actually litigating and directly determining the factual question of whether the claimant was injured in the course and scope of employment, and such a finding is necessary to support a judgment awarding benefits. Crosby.

Workers' compensation Commissioners are bound by the same Code of Judicial Conduct governing judges. S.C. Code Ann. § 42-3-250 (2005).

The specific issue in this case concerns Canon 3B(7) of the Code of Judicial Conduct. The

Canon states:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.\* **A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding** except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(I) the judge reasonably believes that **no party will gain a procedural or tactical advantage as a result of the ex parte communication**, and

(ii) the judge makes provision promptly to **notify all other parties of the substance of the ex parte communication and allows an opportunity to respond**.

Rule 501, Canon 3B(7), SCACR (emphasis added).

The Comments to the rule add, "A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff." Id.

The Workers' Compensation Commission is also subject to the Administrative Procedures Act (APA). See Lark v. Bi-Lo, Inc., 276 S.E.2d 304, 276 S.C. 130 (1981). The APA explicitly prohibits *ex parte* communication by members or employees of the agency with any party – even going so far as to criminalize a violation of this rule.<sup>5</sup> The statute states:

members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

S.C. Code Ann. § 1-23-360 (1985).

Both the Canons of Judicial Conduct and the Administrative Procedures Act were violated by the Commission.<sup>6</sup> Garry Smith, the Director of the Commission's Compliance Division, received *ex parte* communication from a potential material witness (Steve McGowan) in the case. Instead of advising both parties of this communication, he forwarded the evidence *ex parte* to the Carrier via the Attorney General's office. [Defendants' Exhibit 1]. Respondents used the *ex parte* communication to obtain additional evidence and prepare a witness without Fore being allowed to respond or present rebuttal evidence.

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<sup>5</sup>The statute provides:

Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months." S.C. Code Ann. § 1-23-360 (1985).

<sup>6</sup>Appellant wishes to emphasize that there is no suggestion that the Commissioners or any other employees or officers of the Commission deliberately or intentionally violated the Judicial Canons. The Commission was put in an untenable position by the passage of § 42-9-440 and § 38-55-510 et seq. Requiring the adjudicative body to "report all cases of suspected false statement or misrepresentation" and then requiring it to try the same cases is a fundamental conflict of interest, invasion of the independence of the tribunal, and denial of due process to the injured party. The violations occurred as an inevitable result of the Commission's attempt to balance these mutually exclusive duties. Nonetheless, the violation did occur and did deprive Fore of her right to procedural due process.

The Director in question is an employee of the Commission and would be considered a member of “the judge’s staff.” As such, the Commissioners were bound to make reasonable efforts to ensure that the Canon was not violated by him. It does not matter whether or not the *ex parte* communication was made in an effort to comply with S.C. Code Ann. § 42-9-440 (2008). The fact is the violation occurred and no steps were taken to cure it – to the manifest prejudice of Patricia Fore.

The first problem arose with the *ex parte* communication itself. It is fundamental that any communication to the court from a witness in a case must be immediately shared in the same manner at the same time with all the parties to the case. Rule 501, Canon 3B(7), SCACR. That didn’t happen. Instead, the Commission made its own *ex parte* communication when it sent the substance of the communication to the Attorney General with explicit instructions to forward it to a party in this case. This alone is extremely prejudicial to Fore.

The second problem arose with the conduct of the hearing. Counsel for Respondents attached the two letters as exhibits to his pre-hearing brief. [Defense Exhibit 1]. This was the first notice Fore had that the Commission had engaged in *ex parte* contact with the Carrier or that “insurance fraud” was even an allegation in the case.<sup>7</sup> Neither the Commission nor Respondents had ever raised the issue to Fore nor had they previously disclosed surveillance video or communication with Steve McGowan.

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<sup>7</sup>Fore went to work for ABC Bonding on the advice of her doctor with the participation of the Carrier’s nurse case manager, Cathy Nelson. She was released to work with restrictions on August 27, 2010. [APA page 55, 57]. Her work efforts were documented by Dr. Wolgin on September 30, 2010, where he noted, “She is able to continue with her work which is 3 hours per day 3 days per week helping in an office setting.” [APA page 61]. As Fore *never* concealed her attempt to work from her doctor and the Carrier’s nurse, *there is no evidence of insurance fraud.*

In an attempt to rebut the allegations that might be made by McGowan, Fore filed an amended pre-hearing brief listing Tony Owens as a rebuttal witness. The amended brief was filed and served on September 20, 2011 (one day after receiving Respondents' pre-hearing brief and seven days before the hearing). [Amended Form 58 and Notice of Witnesses].

Fore made several motions at the hearing. She first moved for the Commission to recuse itself from hearing the case. She requested that the case be transferred to circuit court or that an impartial referee (such as a former commissioner) be appointed as a deputy commissioner to hear the case. The motion was made on the grounds that a Director of the Commission had engaged in "ex parte contact with one of the parties, and that the party is then able to use that to build a case and to further pursue a fraud investigation against [Clamant]." [Tr. page ].

Fore also moved to exclude both the letter from Garry Smith to the Attorney General and the transmittal letter from the Attorney General's office forwarding Smith's letter to the Carrier. The Commissioner excluded the transmittal letter, but admitted Smith's letter. The motion was made on prejudice, relevance and hearsay grounds. [Tr. ].

Counsel for Respondents argued, "I do not feel that it can in any way be construed as a threat of criminal prosecution being alleged by the Defense. It is simply evidence that there is a fraud investigation ongoing by the A.G.'s office in this claim, and it is properly admissible."<sup>8</sup> [Tr. page

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<sup>8</sup>Evidence of a criminal investigation of any kind is *absolutely inadmissible* in any tribunal. The Rules of Evidence allow admission of an *actual conviction* of certain crimes; never mere allegations – and certainly not on as flimsy a pretense as this case. Rule 404; Rule 609, SCRE.

Furthermore, the basis of the Commissioner's ruling appears to be that he found Fore not credible. The only possible relevance of an ongoing fraud investigation would be to attack the witness's character and credibility. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009)("[Admission of prior bad acts] is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404."). Cf. State v. Bryant, 369 S.C. 511, 633 S.E.2d

9, line 24-page 10, line 4].

The Commissioner responded with his ruling: “I do agree with [Respondents’ counsel]. It’s in the Commission file. It’s been made a part of the record or will be made a part of the record. So I deny the motion to remove or have this case heard by someone other than myself.” [Tr. page 10, lines 7-11]. The Commissioner’s ruling is prejudicial in two aspects. First, his agreement with Respondents’ counsel that an ongoing fraud investigation is admissible – and therefore probative – is a plain error of law. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009)(“[Admission of prior bad acts] is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404.”). Second, it is improper for the trier of fact to rely on materials outside the record. Part of the Commissioner’s reasoning for admitting the Smith letter was that “It’s in the Commission file.” [Tr. page 10, lines 7-11]. The Smith letter was kept in the segregated portion of the file for Commission use only. A party has the ability to view the public portion of the file; not the segregated portion. As such, the Commissioner’s ruling on this ground effectively meant he was relying on extraneous material. It would be improper for the Commission to *ever* rely on documents within its file which were unknown or unavailable to the parties. State v. Harris, 530 S.E.2d 626, 340 S.C. 59 (2000)(court must determine whether extraneous material received by the trier of fact is prejudicial; trier of fact “must rely solely on . . . the evidence presented in court for the facts.”). Yet, if the Commission has a practice of sending ex-parte letters with allegations of fraud to insurance carriers via the Attorney General’s Office, these letters must exist within the Commission’s file in other cases.

The Single Commissioner had the opportunity to mitigate the prejudice by recusing the  

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152 (2006)(reversing verdict where court improperly admitted evidence of prior convictions).

Commission and by excluding evidence arising out of the *ex parte* communication from any future hearings. Instead, he heard the case, allowed Respondents to fully develop the prejudicial aspects of the unfounded fraud allegations, and excluded the testimony of Fore's rebuttal witness (Tony Owens). These rulings only compounded the prejudice. See Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996)("Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.").

The Appellate Panel could have cured the prejudice by either reversing the Single Commissioner on the issue of permanent and total disability (as called for by the evidence) or by granting the motions made below and vacating the Single Commissioner's Decision and Order. It did neither. Instead, the Appellate Panel made additional findings of fact and conclusions of law to justify the *ex parte* communication and the handling of the matter at the trial level.

The Appellate Panel made three specific rulings:

1. there is substantial evidence and a legal basis for a finding no *ex parte* communication exists in this case.
2. The Commission did not ever send [the Smith letter] to either party[, t]hus, there could be no argument that the Commissioner allowed any *ex parte* communication to take place.
3. we find neither the South Carolina Statutory Code nor the Judicial Cannons require the Commission to notify either party to a claim when it reports suspected fraud to the Attorney General's Office.

[FC Order, pages 11-13].

These rulings are legal error. The Appellate Panel adopted a narrow definition of *ex parte* communication as "prohibited communication between counsel and the court when opposing counsel

is not present.” [FC Order, page 11]. If the Commission were correct, not only would the Smith letter be permitted, but a Commissioner could even conduct *ex parte* communication directly with a witness about the substance of his testimony.

As to the Commission’s claim that it “did not ever send” the Smith letter to either party, this is belied by the text of the letter itself. The Commission plainly intended that the letter be read and acted on by the Carrier – without the knowledge of the opposing party. Smith explicitly instructed the Attorney General to forward his letter to the Carrier “so it can conduct an investigation” – even while simultaneously acknowledging that “I don’t believe I can alert the carrier to the alleged fraud.” [Defendants’ Exhibit 1].

The Appellate Panel’s legal conclusion that it has no duty to notify either party when it reports suspected fraud to the Attorney General’s office is simply wrong. The Judicial Canon permits even the most innocent *ex parte* communication only when “the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.” Rule 501, Canon 3B(7), SCACR.

The Appellate Panel’s rulings on these points go to the crux of the problem in the instant case. The Commission, by virtue of taking on the role of reporting “suspected fraud” to insurance carriers to “conduct an investigation,” has impermissibly involved itself in an investigative and prosecutive role. There is no statutory authority for the Commission to investigate and police suspected fraud. This role fundamentally conflicts with the Commission’s sole function as an impartial tribunal for adjudicating disputes between employees and employers arising out of work-related accidents.

This case makes everyone uncomfortable. The undersigned attorneys regularly practice

before the Commission. Raising issues about the integrity and ethics of the Commission's procedures to that body is not something taken lightly. However, the rights of the parties to a fair trial is paramount. As our Supreme Court observed, members of administrative bodies are subject to "the inevitable human tendency to develop a will to win." Garris v. Governing Bd. of South Carolina Reinsurance Facility, 511 S.E.2d 48, 333 S.C. 432 (1998). The added findings evince the fact that the issues in this case made the panel uncomfortable, such that their rulings were not impartial. "Partiality exists where, among others, an adjudicator has *ex parte* information as a result of prior investigation or has developed, by prior involvement in the case, a 'will to win.'" Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997).

Appellant was further prejudiced by events at the oral argument itself. Oral arguments were heard by Appellate Panel A on June 18, 2012. Arguments were scheduled to begin at 4:00 p.m. [Notice of Hearing]. However, Appellate Panel A was running ahead of schedule and called the case ahead of time. Oral arguments commenced at 3:54 p.m. [6/18/12 Tr. page 1]. Fore's lead attorney, Stephen Samuels, was currently appearing in another courtroom for a 3:30 p.m. oral argument before Panel B. Despite the inability of Fore's lead counsel to appear, the Panel began oral argument with Mr. Samuels not present. He arrived during the Respondent's argument – after his co-counsel had made the Appellant's argument. Mr. Samuels argued the Reply, but was handicapped by the inability to hear or participate in the initial appellant's argument. Due process requires notice and the opportunity to be heard. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 505 S.E.2d 598, 332 S.C. 551 (Ct. App. 1998).

There are no South Carolina reported cases identical to the instant situation. The few extant cases all deal with *ex parte* communication between a lawyer and the judge concerning legal

arguments and preparation of proposed orders after the trial of the case. The Supreme Court has repeatedly emphasized “the Bench and Bar are cautioned to strictly observe the Canons governing judicial and attorney conduct with regard to *ex parte* contacts as they relate to maintaining the appearance of propriety and to comply with both the letter and the spirit of Opinion No. 2-1988 of the Advisory Committee on Standards of Judicial Conduct.” Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993).

Burgess dealt with *ex parte* communication between a lawyer and a judge regarding a proposed order. The Court ultimately determined that the *ex parte* communication did not influence the judge’s decision. However, the Supreme Court added:

It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against “prejudicial” *ex parte* communications, but against *ex parte* communications. Id.

A few months after Burgess was decided, the Supreme Court reached a contrary opinion in Ellis v. Procter and Gamble Distributing Co., 315 S.C. 283, 433 S.E.2d 856 (1993). In Ellis, the defense attorney sent the trial judge an 8-page memorandum of law without serving it on opposing counsel. The plaintiff learned of the memorandum during the pendency of her appeal. The Supreme Court remanded the case to the trial judge to make findings as to whether the *ex parte* memorandum affected the decision. The trial judge found the *ex parte* memorandum “if consulted at all, had no bearing on the trial court's decision.” Id.

Notwithstanding the trial judge’s conclusion, the Supreme Court reversed and remanded for a new trial, holding “While we accord great weight to the trial judge's assurance of his own

impartiality, we find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. Accordingly, we find evidence of judicial prejudice in this case.”

Id. This reasoning is consistent with other decisions which hold an *ex parte* communication raises a rebuttable presumption of prejudice. See, e.g., Blaker v. Planning and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989).

In PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (1982), the United States Court of Appeals set forth the following criteria for determining the prejudicial effect of an *ex parte* communication:

. . . a court must consider whether, as a result of improper *ex parte* communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant; the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communication were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

As noted above, the prejudice in this case is manifest. Not only were Respondents allowed to introduce patently prejudicial and legally inadmissible “evidence” to taint the entire case (and ambush Fore to boot), but Fore was denied the opportunity to present a rebuttal witness.

Furthermore, the result in this case was obviously tainted by the improper characterization of this case as an “insurance fraud” matter. A failed back surgery case with an undisputed 36% whole person impairment rating and the surgeon writing the patient “out of work until further notice” after a failed work attempt is as clear cut a permanent total disability case as one will ever see. See, e.g., McCollum v. Singer Co., 386 S.E.2d 471, 300 S.C. 103 (Ct. App. 1989)(“While claimant's

ability to drive, walk and shop may effectively establish that he is not helpless, they do nothing to dissuade our view that there is substantial evidence, medical and otherwise, to establish this claimant's total and permanent disability.”). This is shown by the Commissioner’s comments during an unguarded moment in the hearing:

I didn’t have any idea – this seemed like such a – I worked the case up, and we’re on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we’re in. If I had known that, you know, you should have asked for three hours or somebody, but you didn’t. That’s why I don’t want to put the [rebuttal] witness up, but if he wants to proffer the testimony, that’s fine. I’ll leave the room while he testified. [Tr. page 68, lines 5-16].

This case must be reversed. If the Appellate Panel had been able to make an unbiased analysis of the evidence and disregard the improper and prejudicial effect of the *ex parte* contact, then it would have found Fore has proven that she is permanently and totally disabled. This Court could find Fore is permanently and totally disabled as a matter of law. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when “The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]”). The only other viable alternative for this Court is to vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

**2. Fore proved she is permanently and totally disabled.**

The Single Commissioner awarded Fore 40% to the back for partial permanent disability. He also allowed Respondents credit for overpayment back to the date of MMI (32.2857 weeks). As such, her disability award equated to 29.2% to the back – less than even her 36% impairment rating.

The Appellate Panel affirmed. Such a ruling is manifestly arbitrary, capricious and unfair given the evidence of the case.

Fore had previously worked as a meat cutter in a grocery store where she regularly lifted up to 100 pounds (she was lifting 60 pounds of meat when she was injured). She underwent a two-level fusion with hardware at L4/5 and L5/S1. The fusion did not heal resulting in a nonunion. Dr. Wolgin described the nonunion as shown on the CT scan: “there appears to be a lucency throughout the whole fusion mass that indicates a nonunion at that level. Also, the posterolateral fusion while growing a significant amount of bone does not appear to have solid connections.” [APA page 76].

Dr. Wolgin placed Fore at MMI on February 14, 2011. He assigned a 36% whole person impairment rating (which Respondents agreed is accurate). He recommended open revision of the surgery in the future, but noted Fore was not able to consider the revision as a valid option at this time because the first surgery was “very painful” and because of the social demands of taking care of a toddler. [APA page 76]. Fore was further concerned that the odds of a successful result of another surgery were only 50/50. [Tr. page 20, lines 14-22].

As to work, Dr. Wolgin had recommended in August 2010 that Fore “could do limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weightlifting limit. [APA page 57]. Acting on her doctor’s advice, Fore began working part-time as a bail bondsman for Steve McGowan and ABC Bonding. Her work activities were documented in her medical records – copies of which were faxed to the Carrier’s nurse case manager, Cathy Nelson. [APA page 61].

Fore continued her part-time work until sometime around January 21, 2011. Fore quit the job “because the pain was just – it was too much; I couldn’t handle it.” She further explained:

Up and down so much out of the office chairs, just getting up from that lower chair up into standing up, it was just killing my back. So, having to climb in and out of bed all hours of the night, it – it was killing me. I was just eating Vicodin like they were candy. [Tr. Page 26, lines 16-24].

In her work journal, she documented her schedule and her worsening difficulties. On November 30, 2010, she wrote, “Call Dr. Wolgin. Get stronger pain killers. To [sic] much work.” On December 1, 2010, she wrote, “Don’t want me to get addicted. Painful today.” On December 3, 2010, she wrote “Hardly could get out of bed.” December 6, 2010 she noted working only a half day and “Hurts to [sic] bad.” Two days later, she “Talked to Steve & Bill about less hours on phone.” [Claimant’s Exhibit 1].

On January 21, 2011, she wrote, “I gave Bill the phone, the charger, hurting too bad work in the office anymore.” [Claimant’s Exhibit 1]. Her earnings for ABC from late August through January 21, 2011 totaled \$1,244.00. [Form 18].

Her increasing difficulty with working coincided with Dr. Wolgin ultimately taking her entirely out of work. In fact, Fore attempted to work for a month or two even after Dr. Wolgin formally took her back out of work on October 26, 2010. [APA page 66]. Dr. Wolgin ultimately wrote she is “unable to return to work until further notice.” [APA page 77]. He gave her specific restrictions “sit or stand only for about 15 or 20 minutes at a time and unless employment is able to be found within those restrictions, functionally she is not able to participate in the workplace and will remain so until her condition changes or further notice.” [APA page 76].

Dr. Wolgin’s opinion was confirmed by the vocational expert, Glen Adams. Fore told Mr. Adams about her failed work attempt with ABC Bail Bonding. [APA p. 98]. Adams noted that even if Fore could perform sedentary duties – which he noted “is not supported by Dr. Wolgin’s work

statement – a transferable skills analysis revealed no sedentary occupations for which she qualifies.” He opined she “is considered to be **totally vocationally disabled** as a result of injuries sustained on February 24, 2008 while working for Griffin IGA. No reasonably stable market exists that is compatible with Mrs. Fore’s vocational profile and resulting physical activities.” [APA page 106].

The out of work statement came from the authorized treating physician, Dr. Wolgin. Respondents presented no evidence to refute his opinions or those of Glen Adams. As such, the evidence of Fore’s total and permanent disability is all one way.

Despite this overwhelming one-sided evidence, the Single Commissioner found “After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work.” [Order, Finding of Fact 21]. This finding is plainly arbitrary, capricious and contrary to the evidence. Considering the impairment rating and “no work” statements by the authorized treating physician went unchallenged, a finding of less than 50% disability (and barely more than the impairment rating) seems to impute some sort of credibility finding onto the physician without an evidentiary foundation. As argued elsewhere in this brief, the only explanation is that the Commissioner was substantially influenced by the improper *ex parte* communication and the erroneous admission of the spurious allegations of insurance fraud.

It defies common sense to hold a failed work attempt against an injured worker. Fore deserves accolades for trying to work after her surgery; not condemnation. See Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935) (“The conduct of the plaintiff is highly commendable, as he showed that he was doing all he could to minimize the liability of the defendant. If the fact that the insured undertook to do his regular work, even when his final recovery was doubtful, would preclude recovery, it would encourage less scrupulous people to refuse to work so long as they could

draw disability compensation.”).

The evidence is overwhelming that Fore was forced quit the job at ABC because it increased her pain beyond the point where she could function. Dr. Wolgin’s records are replete with references to her increasing difficulties from the work attempt – such that he took her completely out of work. Fore’s testimony and the contemporaneous notes in her work journal are totally consistent with Dr. Wolgin’s records.

The testimony of her disgruntled former employer, Steve McGowan, simply has no bearing on these case – even if it were credible, which it patently is not. McGowan was blatantly hostile, uncooperative, and disruptive on cross-examination. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”).

McGowan knew little of her medical condition. He didn’t know – or more likely refused to acknowledge – that she “had major back problems.” The most he was willing to admit was “She’s stiff every now and then” and that on one occasion “she said, ‘My back is hurting today.’” [Tr. page 83, line 9-page 84, line 3].

McGowan claimed Fore quit the job at ABC because “she needed to make more money . . .” [Tr. page 78, line 8]. This makes zero sense. If Fore needed to make *more* money, she would either have increased her hours or taken another job that paid better. She did neither.

Instead, Fore went completely out of work. It is true that in July and August she helped out her friend Tony Owens by processing several bonds for him when he became incapacitated for health

reasons. However, this was not a real job and she never got paid a dime. Moreover, she did it for a short time – only until Owens could hire and train an actual employee. Fore would have taken the job herself had she been able – and “would have stayed with Steve [McGowan] if I could have physically done it.” [Tr. page 33, line 4-page 35, one 21]. Owens himself testified she was not physically able and capable of working as bondsman. He stated, “If she was, we would probably could have saved the office, and she could have worked down there and saved that office for me.” He would have hired her, “if she could have. But, she wasn’t in the shape to do it either.” [Proffered testimony, Tr. page 9, lines 16-24].

In August, Owens hired Mary Weaver to be his bondsman. Weaver’s duties were well beyond anything Fore did. Fore did no more than go to the jail and actually bond someone out. Tony Owens testified, that Weaver was “doing more than Patricia was doing. . . . She’s responsible for taking down all the information, writing up the whole contract on the bond, getting all the information for it, bonding them out, and following up with the people. And if they don’t show up, she’s got to go get them herself. . . . She’s a full employee.” [Proffered testimony, Tr. page 14, line 25-page 15, line 11].

A. Permanent and Total Disability under § 42-9-10.

The evidence is overwhelming that Fore is permanently and totally disabled under S.C. Code Ann. § 42-9-10 (2007). The legal test for total disability is the inability to perform services other than those that are “so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.” See, e.g. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). The test applied by the Single Commissioner (“I think she can work.”) is not the law.

Our supreme court laid down the essential premise over fifty years ago:

“Total disability” in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. \* \* \* An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955).

The mere fact Fore helped out Tony Owens by signing 19 bonds over eight months does not disqualify her from receiving total and permanent disability benefits. See Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability). This cannot be considered evidence that she can work a proper job – not when her doctor wrote her out during the failed work attempt; and not when both Fore and Tony Owens testified she is unable to do the full job required of a bail bondsman. Moreover, even during the four-month period when she worked for Steve McGowan before Dr. Wolgin took her entirely out of work, Fore only earned \$1,244.00. [Form 18]. See Colvin v. E.I. Du Pont De Nemours Company, 227 S.C. 465, 88 S.E.2d 581 (1955)(“Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial.”). To use this failed work attempt against her “would punish an employee for merely exploring the chance of overcoming an unanticipated injury by exploring other possible career options.” Hutson v. South Carolina State Ports Authority, Op. No. 27171 (S.C.Sup.Ct. filed September 19, 2012)(Shearouse Adv.Sh. No. 33 at 15).

The Appellate Panel found as a fact that Fore’s treating doctor, Dr. Wolgin, assigned a “36% impairment rating with restrictions of ‘unable to return to work.’” [FC page 5, Finding of Fact 6].

Dr. Wolgin's work restrictions constitute the sole medical evidence of work capacity in the record.

Any possible question about Fore's employability in the open job market was dispelled by the report of vocational expert Glen Adams. He opined, "No reasonably stable market exists that is compatible with Mrs. Fore's vocational profile and resulting physical activities." [APA page 106]. See Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003)(claimant's age and transferable skills are proper factors to consider in determining if a reasonably stable employment market exists). His opinion directly addresses the proper legal standard for cases such as this.

Respondents presented no evidence to contradict the expert opinions of Dr. Wolgin and Glenn Adams. Indeed, Respondents' counsel conceded that the impairment rating was correct.

The evidence shows Fore meets the test for total disability under § 42-9-10. Therefore, the Appellate Panel should be reversed. The Court should issue an Order finding Fore is permanently and totally disabled as a matter of law, is entitled to a lump sum award of 90% of the commutable value of the remainder of 500 weeks allocated pursuant to James v. Anne's, and is to receive lifetime medical treatment.

B. Permanent and Total Disability under § 42-9-30 (21).

The evidence also shows that Fore has suffered a loss of use of her back greater than 50%. As such, she should be presumed to be permanently and totally disabled. See S.C. Code Ann. § 42-9-30 (21) (2007).

Dr. Wolgin assigned a 36% whole person impairment rating as a consequence of Fore's failed two-level fusion. Respondents admitted that the impairment rating is accurate.

Impairment ratings are a starting point for the analysis, but it is well-established that

impairment is a different concept than disability or loss of use. A disability award does not directly correlate with medical impairment.<sup>9</sup> The disability award is an appraisal of the injured worker's "present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment." Beard, Poteat, Lamar, Sumwalt, *The Law of Workers' Compensation Insurance in South Carolina* (3<sup>rd</sup> ed. 2003), § 11-24. There are numerous examples showing that disability awards generally exceed the impairment ratings. See, e.g. Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(substantial evidence supported an award for a 50 per cent loss of use of the back even though the medical testimony "established, at most, a 30 [per cent] impairment rating."); Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966)(50% loss of use of arm upheld even though medical experts testified to 10% and 20% impairment); Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% permanent partial *disability* to leg affirmed even though treating physician assigned 35% *impairment* rating to foot); Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)(30% loss of use of back with 10% impairment rating with no surgery and medium duty restrictions)*reversed on other grounds*, Op. No. 27171 (S.C.Sup.Ct. filed September 19, 2012)(Shearouse Adv.Sh. No. 33 at 15); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35%

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<sup>9</sup>The AMA explains this distinction in the manual physicians use for determining permanent impairment:

The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to use the Guides criteria or ratings to make direct estimates of work disability. Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.) at 9.

impairment rating); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct.App. 1992)(affirming award of 15% to back when treating physician assigned 5% impairment rating); Cropf v. Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986)(affirming Commission's award of 30% to the back where highest impairment rating was 15% to the neck).

These cases show that a 36% *whole person* impairment rating with the added complications of a non-union and less than sedentary work restrictions plainly equates to more than 50% loss of use of the back. It was reversible error for the Single Commissioner to limit his award to 40% loss of use of the back (or 29.2% considering the improvidently granted credit).

The statute provides that an injured worker suffering "fifty percent or more loss of use of the back shall be presumed to have suffered total and permanent disability . . ." S.C. Code Ann. § 42-9-30 (21) (2007). As such, Fore is deemed to be permanently and totally disabled.

The above presumption can be rebutted on a showing by the Respondents that the employee is able to work under the same tests set applicable to § 42-9-10. The burden of proof is on Respondents. Respondents failed to present any evidence to rebut the opinions of Dr. Wolgin and Glen Adams or the testimony of Fore and Tony Owens. The testimony of Steve McGowan is insufficient as a matter of law since McGowan admitted he knows little if anything about Fore's medical condition and limitations.<sup>10</sup> [Tr. page 83, line 9-page 84, line 3]. He did not know that Dr. Wolgin "was allowing her and recommending that she try to work." [Tr. page 86, lines 5-7]. See Hutson v. South Carolina State Ports Authority, Op. No. 27171 (S.C.Sup.Ct. filed September 19, 2012)(Shearouse Adv.Sh. No. 33 at 15)(reversing Appellate Panel's conclusion because "rank

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<sup>10</sup>Even if Respondents were able to rebut the presumption of total disability, an award based on 500 weeks would be far more equitable and appropriate. At the time of the hearing, 182 weeks had already been paid.

speculation” cannot outweigh competent evidence of disability).

As such, the Appellate Panel should have issued an Order finding Fore is deemed permanently and totally disabled due to fifty percent or more loss of use of her back, is entitled to a lump sum award of 90% of the commutable value of the remainder of 500 weeks allocated pursuant to James v. Anne’s, 701 S.E.2d 730, 390 S.C. 188 (2010) and is to receive lifetime medical treatment. This Court should reverse and hold Fore is permanently and totally disabled as a matter of law.

**3. The finding on Fore’s credibility must be vacated because it is based on inadmissible evidence of an “ongoing fraud investigation.”**

The Commission made a finding concerning Fore that “I did not find her a credible witness and believe she can work.” FC Order, Finding of Fact 21]. This finding is a direct result of bias engendered by the improper admission of evidence of an “ongoing fraud investigation” – which itself arose out of the improper *ex parte* communication.

Although the general rule is that the Appellate Panel is the sole judge of the credibility of the witnesses, this rule is subject to the same limitations as any finding of fact. It must be based on *properly admitted* evidence; not speculation, bias or prejudice – nor inadmissible evidence. This Court has the authority to rule on the credibility of a witness when either the Commission gives no explanation for its finding or the finding is based on speculation. See Hutson v. South Carolina State Ports Authority, Op. No. 27171 (S.C.Sup.Ct. filed September 19, 2012)(Shearouse Adv.Sh. No. 33 at 15)(reversing Appellate Panel’s conclusion because “rank speculation” cannot outweigh competent evidence of disability); Cranford v. Hutchinson Const., 731 S.E.2d 303, 399 S.C. 65 (Ct. App. 2012)(holding the nature and timing of a visit to a doctor did not discredit the credibility of the

medical evidence). See, also Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)(“How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.”).

In analyzing credibility, the Commission must look at the totality of the evidence. Respondents’ attack on Fore’s credibility was based on the spurious allegation that she was committing insurance fraud based on Steve McGowan’s *ex parte* statement to Garry Smith that “she’s working and getting a check.” [Defendants’ Exhibit 1]. Respondents characterized this as “simply evidence that *there is a fraud investigation ongoing by the A.G.’s office* in this claim, and it is properly admissible. [Tr. Page 10, lines 2-4 (emphasis added)]. As argued previously, the admission of this evidence was reversible error.

The reality is that Fore never hid anything from anybody. Her doctor told her to try to work. She kept Dr. Wolgin and the Carrier’s nurse case manager apprised of her attempts to work at ABC Bonding. [APA page 57, 61]. She told the vocational assessor of her failed work attempt when he interviewed her on September 7, 2011. She informed the Commissioner of her failed work attempt in her pre-hearing brief (which was filed before Fore ever knew of the fraud allegations and the Commission’s *ex parte* communication with the Carrier). At the hearing, she stipulated that “a credit should be given toward those wages that may have been earned during the disability period.” [Tr. page 14]. She provided all the records she had regarding her work schedule and pay with ABC.

[Claimant's Exhibit 1]. In short, she made no attempt to defraud anyone.<sup>11</sup>

As to the assistance she provided to Tony Owens, she was exceptionally forthcoming about that as well. She never once denied she had helped him out. She produced the official records from the jail proving the number of bonds she actually did for Owens and when she did them. [Claimant's Exhibit 2]. She even brought Mr. Owens to the hearing so he could testify to the arrangement. Although not considered by the Single Commissioner, Owens was respectful, cooperative and forthcoming during his testimony. [Proffered testimony, tr. pages 3-24].

Finally, one cannot overlook what she actually did – which was to find work supposedly within her restrictions and to attempt it even after her doctor took her back out of work. See Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935) (“The conduct of the plaintiff is highly commendable, as he showed that he was doing all he could to minimize the liability of the defendant. If the fact that the insured undertook to do his regular work, even when his final recovery was doubtful, would preclude recovery, it would encourage less scrupulous people to refuse to work so long as they could draw disability compensation.”). These are the acts of a credible person – the kind of hard working individual the workers' compensation system is designed to protect. She should not be punished because her former employer has a personal grievance with his competitor.

The credibility findings in the Order should be reversed or vacated.

**4. Fore is entitled to lifetime medical treatment.**

As to additional medical treatment, the Single Commissioner ordered “that Defendants shall

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<sup>11</sup>At the hearing, Fore admitted she had answered “no” to a question in her deposition where she was “asked if you had earned any money since some point in time.” [Tr. page 36, line 23-page 37, line 10]. She clarified that she had earned money from Steve McGowan. The deposition transcript itself is not in evidence.

furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.” Fore requires ongoing medical treatment to lessen her period of disability. As she is permanently and totally disabled, she should receive causally related treatment for life. S.C. Code Ann. § 42-15-60 (2007). Even if she were not totally disabled, the evidence shows she requires additional ongoing treatment which will tend to lessen her period of disability.

Dr. Wolgin has recommended open revision of Fore’s L4/5 L5/S1 fusion. He has also recommended a dorsal column stimulator, along with ongoing prescriptions of Vicodin and Ambien. [APA pages 70, 76]. He stated, “Since the patient may benefit from surgery, I recommend that she keep open the option for future care . . .” [APA page 76].

These treatment recommendations go well beyond furnishing of prosthetic devices. As such, the Court should reverse the Appellate Panel and order additional medical treatment be provided.

**5. The Single Commissioner committed reversible error in excluding the rebuttal testimony of Tony Owens.**

Fore attempted to call Tony Owens as a rebuttal witness in response to the testimony of Steve McGowan. The Single Commissioner excluded the rebuttal testimony – apparently because the hearing was taking longer than he had anticipated. He stated:

I didn’t have any idea – this seemed like such a – I worked the case up, and we’re on the record. I saw 36-percent impairment rating. I had no clue that we were going to get in this tangled mess that we’re in. If I had known that, you know, you should have asked for three hours or somebody, but you didn’t. That’s why I don’t want to put the [rebuttal] witness up, but if he wants to proffer the testimony, that’s fine. I’ll leave the room while he testified. [Tr. page 68, lines 5-16].

Owens was not listed on Fore’s original pre-hearing brief as Fore had no way of knowing a rebuttal witness would be necessary. The first time Fore ever knew that Respondents had received *ex parte* communication from the Commission was when her lawyer was served with Respondents’

pre-hearing brief. The brief listed Steve McGowan as a witness and contained the two *ex parte* letters. [Defendants' Exhibit 1].

Respondents brief was received by Fore's attorney on September 20, 2011. She filed and served an amended pre-hearing brief later that same day listing Tony Owens. [Amended Form 58 dated September 20, 2011]. Fore acted with due diligence by identifying and advising Respondents of her rebuttal witness on the very same day she learned his testimony might be needed. Owens' testimony was proffered. [Tr. page 65, line 3-page 69, line 5].

"[The rules of discovery] were adopted to require litigants to disclose the essential elements of their case, so that the outcome of trial would be the result of a full examination of all relevant facts and issues rather than the efforts of one side to surprise the other through the introduction of unexpected testimony." McGaha v. Mosley, 322 S.E.2d 461, 283 S.C. 268 (Ct. App. 1984). Fore did all she could do within the rules to overcome the unfair surprise created by the Smith letter. Her only avenue to respond – since her motions were overruled – was to find and call a rebuttal witness. This she did. The Commissioner was required to allow Owens to testify, given the fact Respondents had been developing new issues and witnesses since their receipt of the Smith letter.

It is a clear abuse of discretion for a Commissioner to exclude a properly noticed and available witness when that witness is crucial to the decision. See Morgan v. JPS Automotives, 467 S.E.2d 457, 321 S.C. 201 (Ct. App. 1996). Cf. Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App. 1985)(when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice). "Exclusion of a witness, however, is a severe sanction which should be imposed only after the court inquires into (1) the type of witness involved; (2) the

content of the evidence to be presented; (3) the nature of the failure to identify the witness; and (4) the degree of surprise to the other party.” Kramer v. Kramer, 323 S.C. 212, 217, 473 S.E.2d 846, 848 (Ct. App. 1996).

Unfortunately, it appears that the case had already been decided by the improper injection of the so-called ongoing fraud investigation, such that nothing Tony Owens could say would eliminate the unfair prejudice created by the *ex parte* communication. Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 498, 494 S.E.2d 630, 636-7 (1997) (finding commissioner erred by admitting irrelevant testimony, but then refusing to continue hearing to elicit relevant testimony; commissioner allowed attorneys to proffer their evidence, but refused to consider it).

Owens' testimony was relevant. Owens was able to explain how it came about that Fore did five bonds for him in July 2011 and 12 in August – and why she only did one bond in March 2011. He further explained that he did not pay her and she was not his employee. He explained that she only helped him during a period of his own ill health and only until he could hire an actual employee. His testimony was critical to Fore's disability claim as Owens testified that he would have hired her but she was unable to perform the regular duties of a bail bondsman. Lastly, Owen's testimony was critical in giving perspective to McGowan's testimony and showing the underlying reasons for McGowan's obvious bias and lack of credibility.

As such, it was error for the Commission to exclude Owens' testimony. If the Court does not outright reverse and find Fore totally and permanently disabled, the Court should find Fore was deprived of a fair trial by the improper and prejudicial exclusion of the witness's testimony. The case should be remanded for a *de novo* trial before a circuit court judge or a deputy Commissioner unfamiliar with the case who will not be exposed to the spurious fraud allegations.

## CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order of the Appellate Panel as unsupported by substantial evidence. The Court should hold Fore has proven that she is permanently and totally disabled as a matter of law. She should be awarded the balance of the remaining weeks in a lump sum allocated per James along with lifetime medical treatment. Alternatively, the Court should vacate the decision below, grant the motion to recuse the Commission, exclude the improperly obtained evidence from any future hearings, and either transfer the case to the circuit court or direct the Commission appoint a former commissioner as a deputy commissioner to conduct a *de novo* hearing.

Respectfully Submitted,



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