8013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1414226
Appellate Case No.: 2016-000595

Laurent W. Britton, Decedent/Employee and
Marsha P. Britton, Claimant, ... Respondents,

v.

Charleston County, Employer, and
SC Association of Counties, SIF, Carrier, ... Appellants.

APPELLANTS' PETITION FOR REHEARING

Grady L. Beard
Nicolas L. Haigler
Robinson Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Appellants

J. Hubert Wood, III
Wood Law Group, LLC
P.O. Box 20550
Charleston, South Carolina 29413
(843) 577 5732
Attorneys for Appellants

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Charleston County and SC Association of Counties, SIF ("Appellants" or "Defendants") hereby petition for a rehearing of Unpublished Opinion No. 2018-UP-368 wherein this Honorable Court affirmed the decision of the Workers' Compensation Commission (the Commission) finding Laurent W. Britton's (Decedent's) heart attack a compensable injury and awarding Marsha Britton (Claimant) compensation of death benefits.

Defendants now request this Court to reconsider the issues on appeal and respectfully contend the Court applied the incorrect standard of review and failed to find the Commission applied the incorrect standard for evaluating cases involving heart attacks. Furthermore, Defendants contend the Court misapprehended the denial of due process afforded to the Defendants by virtue of the inappropriate actions of the Full Commission below. In support of this Petition, the Defendants state as follows:

1. This Court utilized the incorrect standard of review in applying the "substantial evidence" standard where there were no factual disputes.

In affirming the decision of the Commission, this Court applied the "substantial evidence" standard of review. According to this Court, "The Administrative Procedures Act (APA) establishes the 'substantial evidence' rule as the standard of review for decisions of the Commission." Further, the Court explained they "must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence." *Britton v. Charleston County*, Unpublished Opinion No. 2018-UP-368 (quoting *Beaufort County Sch. Dist.*, 381 S.C. 617, 620, 674 S.E.2d 488, 490 (2009)). Defendants contend the Court has applied the incorrect standard of review, as this case does not involve disputed facts.

An appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the [Appellate Panel] are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. § 1-23-380(A)(6)(d), (e) (Supp. 1997).

In this case, the material facts are not in dispute and the paramount question is whether the accident is compensable. The issue of the standard of review for a case with these circumstances has been addressed by our Supreme Court in *Grant v. Grant Textiles* where like in the case at bar there were essentially no disputed material facts. *Grant*, 372 S.C. 196, 641 S.E.2d 869 (2007). The Court noted that "where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Id.* (citing *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 140 S.E.2d 173 (1965)). Therefore, the question before this Court was not whether there was substantial evidence to affirm the decision of the Commission, rather the question was whether the Commission committed an error of law. While appellate courts are required to give deference to the Appellate Panel regarding questions of fact, this deference does not prevent the courts from overturning the Panel's decision when it is legally incorrect. *Id.* at 202, 641 S.E.2d at 872. The Defendants contend this Court should have overturned the decision of the Commission as a matter of law.

2. <u>The Court overlooked the Commissions' failure to apply the required heightened heart attack standard.</u>

The general rule is that a stress-related injury or heart attack is compensable under § 42-1-160 if it is induced by unexpected strain or overexertion in the performance of the duties of a claimant's

employment or by unusual or extraordinary conditions of employment. *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 464, 405 S.E.2d 407, 409 (1991); *Raley v. City of Camden*, 222 S.C. 303, 311-12, 72 S.E.2d 572, 575 (1952); *Jennings v. Chambers Dev. Co.*, 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). In assessing what constitutes "unusual or extraordinary" conditions of employment, a court must look at the particular job duties applicable to the employee specifically and his particular employment, and not merely that of an objective example of employment in general. *Shealy v. Aiken County*, 341 S.C. 448, 456, 535 S.E.2d 438, 442 (2000). In determining whether particular facts and circumstances are unusual and extraordinary in comparison to the normal conditions of a particular employment, the analysis does not concern the frequency with which such particular events and circumstances occur; rather, whether such is a standard or necessary condition of the particular employment. *See Bentley v. Spartanburg County*, 398 S.C. 418, 730 S.E.2d 296 (2012) ("the only issue is whether the employment condition was extraordinary and unusual with respect to the Appellant's profession as a deputy sheriff").

This Court discounted Defendants' reliance on *Bentley*, stating the Court in *Bentley* "considered a claim for mental-mental injury governed by a statute not applicable in this death case, and its facts are distinguishable." *Britton v. Charleston County*, Unpublished Opinion No. 2018-UP-368. However, Defendants respectfully argue the Court is overlooking our Supreme Court's language from *Powell v. Vulcan Materials Co.*, 299 S.C. 325, 384 S.E.2d 725 (1989) which recognizes the same standard is used for mental-mental claims and heart attack claims. *See Powell*, at 328, 384 S.E.2d at 725. ("We agree with the Court of Appeals' opinion in *Stokes* to the extent it holds that 'mental-mental injuries may be compensable and concur in its adoption of the heart attack injury standard – unusual or extraordinary conditions of employment – to determine compensability." Defendants contend the standard is the exact same for mental-mental injuries

and heart attack claims, therefore, their reliance on *Bentley* is not misplaced and the Commission erred as a matter of law in failing to apply this standard. This Court appears to have also overlooked the Supreme Court's ruling in *Powell.*

The Commission's failure to properly apply the required heightened heart attack standard in this matter can be established by simply reviewing Finding of Fact 18 in the Decision and Order, whereby the Panel found that "[a]fter consideration of all the evidence, what is left is (a) the fact that every single witness testified that the circumstances regarding the standoff/shootings were unusual and/or not typical; not a single witness testified to the contrary." Pursuant to § 42-1-160 and *Bentley*, the question is not whether the circumstances regarding the standoff/shootings were atypical, unusual or extraordinary – the proper and only inquiry is whether the Decedent's specific employment on the night in question were unusual and extraordinary for a Radio Communications Manager. This test was never conducted or addressed at all by the Commission and erroneously discounted by this Court.

3. This Court misapprehended the Commission's failure to make sufficient findings of fact because of this Court's error in discounting the appropriate heart attack standard.

The Commission failed to provide a single finding of fact or conclusion of law as to whether the conditions of the Decedent's specific employment on the night in question were unusual and extraordinary. This Court wrote the Commission's order "reflects at least seven findings of fact relevant to this inquiry." *Britton v. Charleston County*, Unpublished Opinion No. 2018-UP-368. Defendants, without knowing which seven findings this Court is referring, cannot identify a single Finding of Fact from the Commission's Order that states how the conditions of Decedent's employment from 8:30 p.m. to 1:30 a.m. on the night in question were unusual or extraordinary for a Radio Communications Manager. While Defendants note Finding of Fact #6 outlines

Decedent's job as a Radio Communications Manager and Finding of Fact #11 highlights witness testimony that this was not a "normal emergency," none of the Findings link how this uncommon emergency made the conditions of employment for a Radio Communications Manager several miles away unusual or extraordinary. As our Supreme Court held in *Able Communications Inc. v. SCPSC*, 290 S.C. 409, 351 S.E.2d 151 (1986), implicit findings of fact are not sufficient. While the Court, in its view, may have found seven Findings of Fact relevant to this inquiry, the Defendants respectfully argue those findings would be implicit to the issue at best. Notably missing from either the Commission's Decision or this Court's Opinion is any mention of Decedent's job description requiring him to "be able to deploy 24/7 and function in an austere environment." (R. pp. 339-343).

4. The Court misapprehended the denial of due process afforded to the Defendants by virtue of the inappropriate actions of the Full Commission below.

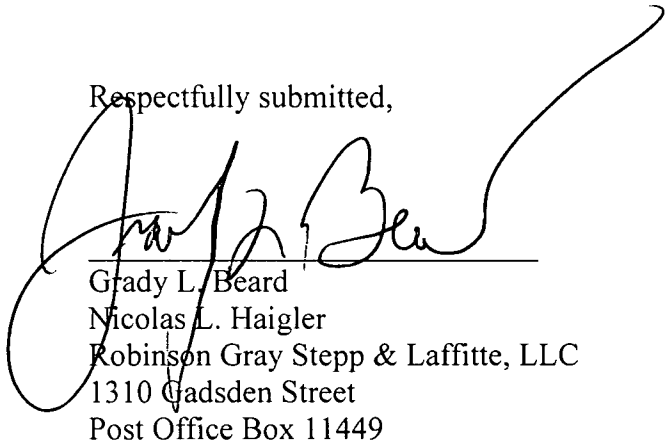
The Defendants argued the Order denying their Petition for Rehearing violated their right to due process and Regulation 67-709 of the Act. Regulation 67-709 provides for Commission review of a single commissioner's decision by a three or six-member panel "which excludes the original Hearing Commissioner." The Panel reviewing this case consisted of Commissioners James, McCaskill, and Taylor, appropriately excluding the Hearing Commissioner – Commissioner Barden. Under *Rhame v. Charleston County School District*, 412 S.C. 273, 772 S.E.2d 159 (2015), Appellants may then request review of the Panel Decision from the Appellate Panel prior to appealing to the Court of Appeals. Furthermore, pursuant to Rule 59, SCRCP, Motions for Rehearing must be disposed of by the trial judge. In conjunction with *Rhame,* Defendants' interpret this rule to mandate that a Motion for review of the Appellate Panel's decision must be disposed of by the Appellate Panel that heard the appeal. Defendants exercised

that right in this matter by filing a Motion to Reconsider on January 20, 2016. In an Order filed by Commissioner Beck on February 22, 2016, the Motion for Rehearing was denied. Commissioner Beck was joined in his denial with concurrences by Commissioners Wilkerson, Campbell, James, McCaskill, Taylor, and Barden. All seven commissioners – including the single commissioner from the underlying hearing – participated in the denial of Defendants' Motion for Rehearing. This would be analogous to this Petition for Rehearing being reviewed by all nine Court of Appeals judges rather than the three judges who heard and ruled initially on this case and have the only knowledge about what was argued during oral argument.

This error was not harmless, as the Opinion states. *Britton v. Charleston County*, Unpublished Opinion No. 2018-UP-368. The single commissioner who conducted the Hearing in this matter which is under review participated in the decision to deny Defendants' Motion for Rehearing, necessitating this Appeal. If the single commissioner is not allowed to sit on the Panel reviewing the Hearing initially, why would said commissioner appropriately participate in the denial of the Motion for Rehearing? Defendant's contend that under Regulation 67-709, *Rhame*, and Rule 59, SCRCP, the only appropriate Commissioners to review their Motion for Rehearing were Commissioners James, McCaskill, and Taylor. As they were denied the opportunity to have their Motion for Rehearing heard in a meaningful way before a legally constituted and impartial tribunal, Defendants' due process rights were violated.

For the reasons set forth above, Defendants respectfully request that this Court reconsider the Opinion granting compensation to Claimant.

Respectfully submitted,



Grady L. Beard
Nicolas L. Haigler
Robinson Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Appellants

J. Hubert Wood, III
Wood Law Group, LLC
P.O. Box 20550
Charleston, South Carolina 29413
(843) 577 5732
Attorneys for Appellants

October 3, 2018

CERTIFICATE OF SERVICE

I, the undersigned, Legal Assistant of Robinson Gray Stepp & Laffitte, L.L.C., attorneys for Defendants, do hereby certify that I have served the following parties with the foregoing document(s) by mailing a copy of the same via United States Mail, postage prepaid, and/or hand delivering, or otherwise indicated, to the following address(es):

Pleading(s): **APPELLANTS' PETITION FOR REHEARING**

Parties served:

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

VIA U.S. MAIL
R. Walter Hundley, Esquire
1517 Sam Rittenberg Blvd. (29407)
Post Office Box 31189
Charleston SC 29417-1189

J. Kevin Holmes, Esquire
The Steinberg Law Firm, L.L.C.
118 Goose Creek Boulevard
Post Office Box 1028
Goose Creek SC 29445

J. Hubert Wood, III, Esquire
Wood Law Group, LLC
One Wesley Drive (29407)
Post Office Box 20550
Charleston SC 29413

Emily Andrews

Columbia, South Carolina
October 3, 2018

ROBINSON
GRAY
Litigation + Business

GRADY L. BEARD
Direct Dial 803 231.7824
Direct Fax 803 231.7874
Email gbeard@sowellgray.com

October 3, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Laurent W. Britton v. Charleston County
Appellate Case No. 2016-000595
WCC File No.: 1414226
Date of Accident: 9/19/2014
Claim No.: 20140619958
Our File No.: 6830/8000

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Appellants' Petition for Rehearing, in the above-referenced matter. We would appreciate your filing the original and six (6) copies then return a clocked-in copy of same to us via our courier. Please note I have enclosed a check for $25.00 to cover the Petition for Rehearing filing fee.

By copy of this letter and aforementioned documents to the opposing counsel, we are serving them with a copy of our Petition for Rehearing.

Thank you for your consideration.

Very truly yours,

Grady L. Beard

GLB:esa
Enclosures
cc: J. Kevin Holmes, Esquire (via U.S. Mail)
R. Walter Hundley, Esquire (via U.S. Mail)
J. Hubert Wood, III, Esquire (via U.S. Mail)
Lang Kohel (via e-mail)