THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018-UP-280 (Filed June 27, 2018)

Appellate Case No. 2018-001677

Scott Ledford, Employee, ... Petitioner,

–vs.–

Department of Public Safety, Employer,
And State Accident Fund, Carrier, ... Respondent.

BRIEF OF THE PETITIONER

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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. On September 29, 2011, this claim was settled on a Form 16 for a 25% scheduled loss of the back under § 42–9–30(21), *S.C. Code Anno.*, as amended 2007. (A., Vol. I, p. 321). The Petitioner returned to full duty as a patrol officer.

On March 10, 2012 the Petitioner had a second admitted injury by accident. Being uncertain whether the Petitioner's symptoms following his second accident were a change of condition or a new injury, the Petitioner filed claims for both on June 8, 2012 and September 25, 2012. (A., Vol. I, pp. 322, 331). On October 8, 2012 a motion to consolidate the claims was granted. (A., Vol. I, p. 170).

On January 15, 2013 the consolidated claims were heard by Commissioner Roche. On May 2, 2013 Commissioner Roche ruled the Petitioner did not suffer a change of condition but was entitled to ongoing medical treatment and compensation benefits for his second accident. (A., Vol. I, p. 182). No appeal was taken from this order.

On August 15, 2014 the permanency claim for the Petitioner's second accident was heard by Commissioner Barden. On September 16, 2014 Commissioner Barden requested a telephone conference with the attorneys. (A., Vol. I, pp. 313 – 316). On October 10, 2014 the Petitioner filed a motion for Commissioner Barden to recuse herself, supporting affidavits, and supporting memorandum. (A., Vol. I, pp. 306 – 306, 313 –318). The Respondent did not file a response to the motion.

On November 3, 2014 Commissioner Barden denied the motion to recuse. (A., Vol. I, pp. 159 – 169). On November 14, 2014 the Petitioner filed a Form 30 seeking review of the denial of the motion. (A., Vol. I, p. 290). On December 15, 2014 the Commission, Commissioner Barden participating, ruled the denial was interlocutory. (A., Vol. I, p. 159).

On December 17, 2014 Commissioner Barden issued her permanency order. (A., Vol. I, pp. 119– 157). On December 29, 2014 the Petitioner filed a Form 30 seeking Appellate Panel review of the denial of the recusal motion and the permanency order. (A., Vol. I, pp. 284 – 289). On January 21, 2016 the Appellate Panel affirmed in part and reversed in part. (A, Vol. I, pp. 79 – 118). 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 been destroyed.

(R. Vol. I, pp. 275 – 283). On February 22, 2016 the Appellate Panel denied rehearing. (A, Vol. I, p. 68).

On March 21, 2016 the Petitioner filed a Notice of Appeal. On March 26, 2016 the Petitioner filed a motion to argue against precedent for *de novo* review based on an objective standard whether a judicial officer's conduct violated the Code of Judicial Conduct. On May 16, 2018 the motion was denied at the call of the appeal for oral argument. On June 27, 2018 the Court of Appeals issued an unpublished opinion affirming the Appellate Panel. (A., Vol. I, pp. 9 – 11). On July 10, 2018 the Petitioner filed for rehearing by the Court of Appeals 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 – 8). On August 16, 2018 petitioner for rehearing was denied. (A. Vol. I, p. 1).

On September 17, 2018, the Petitioner filed a Petition for Certiorari to the Court of Appeals pursuant to Rule 242, SCARC. On December 13, 2018, this Court granted the petition.

FACTS

The Petitioner was a seventeen year veteran of the South Carolina Highway Patrol. He earned the rank of lance corporal and was a member of the prestigious ACE motorcycle team providing escorts for visiting dignitaries. (A., Vol. I, pp. 222 – 224). He was a devoted husband and the proud father of three children. He owned and operated a lawn care company and a fishing and hunting guide service to provide a better life for his family. (A., Vol. I, pp. 224 – 230). Before Commissioner Barden called him a liar who should be prosecuted for insurance fraud, his good name and reputation were unblemished.

On July 15, 2010 the Petitioner suffered an admitted injury by accident arising out of and in the course of his employment as a highway patrolman when he volunteered to be tasered during a training exercise and suffered muscle contractions so severe they fractured his T6 through T9 vertebra. (A., Vol. I, pp. 322, 330). He was referred to a neurologist, Dr. Sarb, because he initially suffered radicular arm symptoms but they resolved. (A., Vol. I, Pp. 171 – 182). The Petitioner returned to full duty as a patrol officer. On September 29, 2011 this claim was settled on a Form 16 for a 25% scheduled loss of the back under § 42–9–30(21), *S.C. Code Anno.*, as amended 2007. (A., Vol. I, p. 321).

On March 10, 2012 the Petitioner suffered a second admitted injury by accident when he was involved in a motorcycle accident pursuing a speeding motorist. (A., Vol. I, pp. 331, 332). He experienced neck, mid-back, low back, and right leg pain. 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, 366 – 367). Dr. Mills, the authorized treating physician for both accidents, testified by deposition the Petitioner's neck and back pain was a change in condition from his prior taser accident contributed to by the motorcycle accident. (A., Vol. II, pp. 607 – 608, 661).

The Petitioner's attorney prudently filed claims for both a change of condition and for a new accident to resolve the medical question but moved to consolidate the claims to avoid the possibility of inconsistent rulings. (AR, Vol. I, pp. 322, 331). The medical doctors assigned permanent impairment ratings of 13% to 15% to his cervical spine, between 5% and 10% to his lumbar spine[1], and 18% to his lower extremity in addition to the 25% permanent impairment previously assigned following his taser accident. (A., Vol. II, p. 516 – 547).

[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 or at a 50% loss of use of the back which would have increased the number of weeks that can be 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.

On July 9, 2012, the State Disability Board determined the Petitioner could not return to duty as a patrol officer and awarded him disability retirement benefits. (A., Vol. II, p. 600).

On January 15, 2013 the consolidated change of condition and new accident claims were heard by Commissioner Roche. The Respondents denied the Petitioner suffered a cervical spine injury in the taser accident and, therefore, denied there had been a change in condition. (A., Vol. I, pp. 174). On May 2, 2013 Commissioner Roche found the Petitioner suffered only temporary radicular arm symptoms following his taser accident which had resolved, ruled the Petitioner did not suffer a change of condition, but was entitled to ongoing medical treatment and compensation benefits for his motorcycle accident. (A., Vol. I, p. 182). No appeal was taken from Commissioner Roche's Order.

On August 15, 2014 the motorcycle accident permanency claim was heard by Commissioner Barden. On September 16, 2014 Commissioner Barden requested a telephone conference with the attorneys. (A., Vol. I, pp. 313 – 316). During the telephone conference Commissioner Barden said she "did not believe anything the [Petitioner] said except his name and age." (A., Vol. I, p. 316). She said the Petitioner lied about not having neck pain following his taser accident and commented "... 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. 313 – 316). 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" might be made, given

the telephone conference, a report would be not be necessary. (A., Vol. I, pp. 313 – 316).

Petitioner's counsel felt the Petitioner had been unfairly threatened with criminal prosecution unless he settled his admitted, career ending injury claim on unfavorable terms and immediately dictated a memorandum documenting what had been said. (A, Vol. I, p. 316). 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 the need to prepare supporting affidavits and a memorandum in support of the motion.

The most important thing Petitioner's counsel did, however, was to discuss what happened and the possible consequences of filing the recusal motion with his client. The Petitioner, a 17 year law enforcement officer, also reasonably believed he was being unfairly threatened with criminal prosecution unless he settled his admitted, career ending injury claim on unfavorable terms. He refused to forfeit his right to have his claim fairly and impartially adjudicated, not just by Commissioner Barden, but by the Appellate Panel and the Appellate Courts thereafter if necessary.

On November 3, 2014 Commissioner Barden denied the recusal motion. (A., Vol. I, pp. 159 – 169). Significantly, she stated she had only reached "tentative findings" at the time of the telephone conference. (A., Vol. I, p. 161). She called the allegation she threatened criminal prosecution unless the Petitioner settled his claim false and frivolous, she claimed a settlement merely would have made "unnecessary

the promulgation of a written decision on the merits." (A, Vol. I, p. 162). Her denial of the recusal motion was defensive and combative. Having "assured [Petitioner's counsel] her findings were in no way a reflection on him ..." 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, pp. 178, 316). Despite her denials she admitted the substance of the allegations she accused the Petitioner of lying, said she had a duty to report insurance fraud to the Attorney General for prosecution, and, if the Petitioner settled his claim, she would not report him. (A, Vol. I pp. 178 – 179, Findings of Fact 10 - 14).

On December 17, 2014 Commissioner Barden issued her permanency Order. (A., Vol. I, pp. 133 – 171). Her findings were neither fair nor impartial. Her decision awarded the Petitioner no compensation for his admitted, career ending motorcycle accident, no scheduled compensation for his MRI documented cervical and lumbar disc injuries impinging on his spinal cord and nerve roots, and ordered him to repay $18,932.80 in temporary total disability payments he received under Commissioner Roche's order. She attacked the Petitioner's character by referring to him as a "hustler" in the derogatory sense of him being 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 because of his 2010 taser injury even though that is what Commissioner Roche's unappealed order had found. She found the Petitioner lied about continuing to perform physical labor because he testified in the "present tense," if he did not follow his doctor's restrictions, he experienced increased pain. Commissioner Barden speculated this proved he continued to work in his lawn care business. (A., Vol. I, p. 148, Finding No. 47). In Finding of Fact 65, "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." *Emphasis added.* (A, Vol. I, p. 154 – 155). She admitted she is "the worst of the bunch" when it comes to understanding tax accounting which was obvious when she said, "[w]hat deductions the [Petitioner] takes on his income tax returns are of no concern..." (A., Vol. I, pp. 153 – 154, Finding of Fact 62). Apparently, the payment of $74,629.00 in 2012 and $63,867.00 in 2013 for employee salaries could not explain the gross revenues of the law care business. (A., Vol. II, pp. 663, 699). She ignored the unanimous impairment ratings of the treating and evaluating physicians and the objective, radiographic evidence of disrupted discs pressing on the Petitioner's spinal cord and nerve roots. Her ruling the Petitioner should receive nothing for his admitted, career ending injury, no scheduled award for his 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.

The Appellate Panel found "...there is no evidence to support [Petitioner's] assertion that the Hearing Commission '*threatened* criminal proceedings' unless the case settled" but reversed the shockingly inadequate award. (A, Vol. 1, p. 98). In the process the Appellate Panel let stand the unfounded, speculative, and offensive findings attacking the Petitioner's character and reputation.

The Court of Appeals affirmed because the Petitioner failed to show prejudice "attributed to the decision of Appellate Panel" and ruled "[d]ue to the Appellate Panel's reversal, we find the further discussion of the single commissioner's ruling is not warranted." (A, Vol. 1, p. 10).

ARGUMENT

"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."[2] The Code of Judicial Conduct seeks to ensure judicial proceedings are conducted fairly and impartially both in appearance and fact. Cannon 3(E) of the Code, 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."[3]

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[2] *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).

[3] *Roche v. Young Bros., Inc.,* 332 S.C. 75, 504 S.E.2d 311 (1998)

Despite the plain language used in the Code, however, under South Carolina case law a judge's failure to disqualify himself will not be reversed on appeal unless there is evidence of judicial prejudice.[4] Whatever the boundaries of judicial prejudice may be, it has been held one way a judge's impartiality might reasonably be questioned is "when his [or her] factual findings are not supported by the record."[5] Becoming defensive and combative in denying a recusal motion, calling serious allegations frivolous and false, and making disparaging comments before deciding a case on the merits have all been identified as additional matters of concern to Courts reviewing the denial of a recusal motion. All are present in this appeal.

The allegations Commissioner Barden violated the Code of Judicial Conduct were specific, serious, and supported by the sworn affidavit of an officer of the Court. Allegations it must be noted the Respondent chose not to respond to. Commissioner Barden was bound by the Code of Judicial Conduct.[6] Her duties included "... all the duties of the judge's office prescribed by law."[7] One of her duties was to report suspected cases of insurance fraud to the Attorney General.[8] Nothing in the statues imposing this duty gave her the right to threaten criminal prosecution to coerce unfavorable settlements. Just the threat of criminal prosecution can be financially and emotionally devastating, especially to a career law enforcement officer.

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[4] *Id.*

[5] *Id.* 433 S.E.2d at 857.

[6] § 42-3-250, *S.C. Code Anno.*, as amended April 15, 2005.

[7] Canon 2 (A), Rule 501, SCACR.

[8] § 38-55-530(D) and § 42-9-440, *S.C. Code Anno.*, as amended April 15, 2005.

Commissioner Barden misused her authority to threaten criminal prosecution unless the Petitioner settled his admitted, career ending injury claim on unfavorable terms. This created an appearance of impropriety and violated the Code's admonition, "[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] (*Emphasis added*). It should not matter what Commissioner's Barden's intent was, proposing not to comply with a statutory duty caused the Petitioner, a seventeen year law enforcement officer, to reasonably question her integrity, fairness and impartiality. Her shockingly inadequate award, personal attacks against the Petitioner, his attorney, and witnesses, and her unfounded, improper, and speculative findings demonstrate his concerns were justified.

1. The Court should not adopt a rule permitting cursory administrative review to shield judicial misconduct.

The Appellate Panel reversed Commissioner Barden's shockingly inadequate award but found "...there is no evidence to support [Petitioner's] assertion that the Hearing Commissioner '*threatened* criminal proceedings' unless the case settled." (A., Vol. 1, p. 98). The Court of Appeals affirmed finding the Petitioner failed to attribute prejudice to the decision of the Appellate Panel and ruled "... [d]ue to the Appellate Panel's reversal, we find the further discussion of the single commissioner's ruling is not warranted." (A, Vol. 1, p. 10).

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[9] Commentary to Canon 3(B)(8), Rule 501.

It is respectfully submitted the enforcement of the Code of Judicial Conduct is a matter too important to be delegated to administrative agencies. Allowing administrative review to shield judicial misconduct defeats constitutionally guaranteed judicial review as a check on administrative decision making when needed most.[10] This Court should decline to adopt the novel rule proposed by the Court of Appeals because it imposes a virtually insurmountable burden on the aggrieved party and allows judicial misconduct to go unchecked.

The motion to recuse alleged Commissioner Barden violated the Code of Judicial Conduct, not the Appellate Panel. The Petitioner neither had a reason to believe the Appellate Panel violated the Code nor to believe he had to attribute prejudice to them. The Court of Appeals cited no authority for such a novel rule. As applied in this case the proposed rule would allow cursory administrative review to shield misconduct by an administrative law judge from judicial review.

It is all the more important to reject such a rule when the administrative review conducted was cursory. Finding no evidence existed, the Appellate Panel failed to consider the evidence in the record consisting of the affidavit of Petitioner's attorney. The Appellate Panel failed to even note the Respondents' attorney was a party to the telephone conference and chose not to respond to the motion or dispute the allegations. The Appellate Panel failed to consider Commissioner Barden admitted the substance of the allegations she accused the Petitioner of being a liar, said she had to report insurance fraud to the Attorney General for prosecution, but

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

no report would be made if the Petition settled his claim in her Order denying recusal.[11] Finding no evidence existed, the Appellate Panel performed no analysis of the legal issues. It failed to consider whether the allegation should have been deemed true when deciding whether to grant the recusal motion.[12] The Appellate Panel failed to consider the Code and statutory violations argued supporting the motion or whether Commissioner Barden had the right not to enforce the law she was charged with enforcing if the claim was settled. The Appellate Panel did not consider whether settling the claim would have forced the Petitioner to forfeit his right to have his claim fairly and impartially adjudicated, not just by Commissioner Barden, but by the Appellate Panel and the Appellate Courts his right to receive future medical treatment, and his right to seek additional compensation if he experienced a worsening of his condition within a year. Most important, the Appellate Panel did not consider whether threatening criminal prosecution unless the Petitioner settled his career ending, admitted injury claim on unfavorable terms, would reasonably cause the seventeen year law enforcement officer to question Commissioner Barden's integrity, fairness, and impartiality.[13]

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

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[11] Order Denying Recusal filed 11/3/14, Findings of Fact 10 – 14, pp. 5 – 6.

[12] *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).

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

The Petitioner suffered two career ending, admitted accidents arising out of and in the course of his employment as a highway patrolman. His 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). His second admitted injury occurred when he was involved in a motorcycle accident attempting to pursue a motorist. (AR, Vol. I, pp. 172 – 173). The motorcycle accident caused neck and lumbar spine pain. An MRI documented spinal cord stenosis and impingement at C5-C6 and C6-C7, a posterior disc bulge 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[14] and the objective, radiographic findings, Commissioner Barden ruled the Petitioner should receive nothing for his admitted injury, nothing for the MRI documented cervical and lumbar spine injuries, and be ordered to repay $18,932.80 he had received under Commissioner Roche's Order. Commissioner Barden's award was neither fair nor impartial. It was so shockingly inadequate it provided evidence of actual bias and prejudice against the Petitioner for refusing to succumb to her threat to report him for criminal prosecution unless he settled his admitted, career ending accident claim on grossly unfavorable terms.

[14] 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).

The shockingly inadequate award was not the only unfounded, speculative, or improper finding providing evidence of bias and prejudice. Commissioner Barden attacked the Petitioner's character by repeatedly calling him a hustler in the derogatory sense of him being a liar and a cheat. A review of the testimony she 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 besides working full time to provide a better life for his family. Her calling the Petitioner a "hustler" was unfounded and provided additional evidence of bias and prejudice. It was not just the Petitioner's character she attacked. She attacked the character of his attorney who she called unethical and his CPA who she accused of "creative accounting." Judges decide contested cases without feeling the need to personally attack the parties, their attorneys, and witnesses. Becoming defensive and combative when denying a recusal motion has been identified as a matter of concern to reviewing courts.[15]

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 disqualify."[16] 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.[17] Commissioner Barden went

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[15] *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 given his apparent combative and defensive attitude exhibited during the recusal hearing).

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

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

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.[18] Dismissing the serious and documented allegations as frivolous and false when denying a recusal motion has been identified as a matter of concern to reviewing courts.[19]

Commissioner Barden's finding the Petitioner lied when he testified he had no neck injury because of his 2010 taser accident contradicted Commissioner Roche's unappealed order any neck injury had completely resolved. 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.[20]

Commissioner Barden's finding the Petitioner lied about not continuing to perform physical labor in his lawn care is based on speculation. She concluded since the Petitioner testified in the "present tense," if he exceeds his doctor's restrictions, he suffers increased pain, he must still be working in his lawn care business. In her Finding of Fact 65, 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

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[18] *Id.*

[19] *Id.*

[20] *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).

employees who perform the physical labor." She admits to being "the worst of the bunch" when it comes to understanding tax accounting and says, "[w]hat deductions the [Petitioner] takes on his income tax returns are of no concern." That enables her to ignore the Petitioner's CPA prepared tax returns that showed employee salaries of $74,629.00 in 2012 and $53,844.00 in 2013 to account for the labor performed.

Significantly, Commissioner Barden made her threat to refer the Petitioner for criminal prosecution unless he settled 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 been identified as a matter of concern to reviewing courts.[21]

The Petitioner risked his life serving as a law enforcement officer. He "hustled" working three jobs to provide a better life for his wife and family. He suffered two admitted, career ending injuries. Upon closer examination, Commissioner Barden's accusations 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 forfeit his

[21] *Mallett v. Mallett, 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)...

rights. He deserves better than to have his character and reputation unfairly attacked in retaliation.

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

The Appellate Panel thankfully reversed Commissioner Barden's shockingly inadequate award and that led 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 shockingly inadequate award may have saved the Petitioner and his family from financial ruin but it did not cure the prejudice suffered by the Petitioner.

The Appellate Panel and the Court of Appeals misunderstood money was 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 being deprived of his right to a fair and impartial hearing is just as important.[22] Being deprived of his right to judicial review based on a record untainted by untrue, unfounded, and speculative findings is just as important. And, most important of all, having his reputation as a former law enforcement officer impugned by the false and unfounded accusation he attempted to commit insurance fraud is intolerable.

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

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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).

> 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 been destroyed.

(A., Vol. I, pp. 275 – 276). It is why, 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., Vol. I, p. 2 – 3). The Appellate Panel decision neither afforded the Petitioner a fair and impartial hearing nor judicial review based on an untainted record. It is neither possible nor productive to attempt to determine whether Commissioner Barden's findings may have influenced the Appellate Panel or Court of Appeals.[23] That her decision was not ultimately dispositive does not lessen the unfairness to the Petitioner.[24]

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

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

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[23] *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909,195 L. Ed. 2d 132 (2016).

[24] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S.813, 831 – 832, 106 S. Ct. 580, 89 L. Ed. 2d 823 (1986).

Code of Judicial Conduct can have the unintended effect of allowing judicial misconduct to go unchecked. Cannon 3(E) of the Code, 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."[25] The plain language of the Code imposes an objective standard. Our Courts, however, have the added the additional requirement of proof of judicial prejudice for reversal on appeal 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.[26] It is not enough for a party seeking disqualification to simply allege bias. The party must show evidence of bias or prejudice.[27] 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.[28] If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.[29]

In the case of *Patel v. Patel*,[30] 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 could not consider the letters and provided copies of his correspondence to the parties' attorneys. He

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[25] *Roche v. Young Bros., Inc., supra.* 32 S.C. 75, 504 S.E.2d 311 (1998)
[26] *Id.*
[27] *Mallett v. Mallett, supra.*
[28] *Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct.App.1994).
[29] *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).
[30] *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004)

chastised the wife for her inappropriate attempt to influence the court at the hearing. Under those facts, the Court of Appeals found there was no evidence the Judge was prejudiced and affirmed his denial of the husband's recusal motion. This Court granted the husband's motion to argue against precedent for *de novo* review based upon an objective standard citing the United States Supreme Court's holding in *Lifeberg v. Health Services Acquistion Corp.*[31]

This Court, after carefully considering the husband's arguments and, assuming without deciding they had merit, declined to adopt *de novo* review based upon an objective standard "at this time" because the husband had demonstrated no 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 intermeddlers."[32] Such a holding would "invite the less scrupulous to employ this stratagem to eliminate any judge."[33]

None of these concerns are present. The Petitioner does not allege improper conduct by a third-party, he alleges improper misconduct by Commissioner Barden in violation of the Code of Judicial Conduct and statutes she was duty bound to

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[31] *Lifeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct 2194, 100 L.Ed.2d 855 (1988)(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).

[32] *Patel, supra.*, 599 S.E.2d at 119.

[33] *Id.*

enforce. Unlike the husband in *Patel*, the Petitioner can show prejudice from Commissioner Barden's personal attacks, her dismissal of uncontested allegations as false and frivolous, her combative and defensive attitude in denying the recusal motion, her communicating her opinions before deciding the merits, and her unfounded, unfair, and speculative findings besides her shockingly inadequate award reversed by the Appellate Panel.

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 Cannon 3(E) of the Code of Judicial Conduct, Rule 501, SCACR, help prevent judicial misconduct from being repeated occurring and help preserve public confidence in the fairness and impartiality of our tribunals.

CONCLUSION

The Petitioner was a client any lawyer would be proud to represent. Faithfully married and the father of three children. A 17 year veteran of the South Carolina Highway Patrol who earned the rank of lance corporal and was a member of the prestigious ACE team providing motorcycle escorts for visiting dignitaries. A small business entrepreneur who owned and operated a lawn care company and a fishing

[34] Model Code of Judicial Conduct, R. 1.2 cmt. 5 (2007).

and hunting guide service to supplement his law enforcement salary to better provide for his family. Before Commissioner Barden called him a liar who should be prosecuted for insurance fraud, his good name and reputation were beyond reproach.

Judicial review of administrative decision making is guaranteed by Art. I, § 22 of the South Carolina Constitution. Judicial review is never more necessary than when an administrative law judge violates the Code of Judicial Conduct and the statutes he or she is charged with enforcing. Cursory review by the administrative agency should not be allowed to defeat judicial review of a worker's compensation commissioner's denial of a recusal motion. The administrative review performed in this case was at best cursory because it failed to consider undisputed facts and performed no analysis of the legal issues. Adoption of the rule proposed by the Court of Appeals requiring showing prejudice attributable to the administrative reviewing body would impose a virtually impossible burden on the aggrieved party.

The Petitioner has shown judicial prejudice based on Commissioner Barden ignoring of the unanimous opinions of the medical doctors and objective radiographic findings in making her shockingly inadequate award, her combative and defensive denial of the recusal motion, her personal attacks on the Petitioner, his attorney and witnesses, her dismissal of the sworn and undisputed allegations of her misconduct as frivolous and false, and her other untrue, unfounded, unfair, and speculative findings. The emotional trauma resulting from being threatened with prosecution was not cured by the reversal of the 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, to prevent the misconduct alleged from reoccurring, and to help preserve public confidence in the fairness and impartiality of our courts.

This Court should decline to adopt the novel rule proposed by the Court of Appeals requiring that prejudice be attributed to the Appellate Panel, reverse the ruling denying the Petitioner's recusal motion, and grant the Petitioner his fundamental right to a fair and impartial hearing and judicial review untainted by biased and prejudiced findings of fact.

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January 11, 2019

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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

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

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 a copy of the Brief of the Petitioner by depositing it in the United States Mail, postage prepaid on October 4, 2018, addressed to Sarah C. Sutusky, Esquire, Willson, Jones, Carter & Baxley, PA, 3600 Forest Drive, Suite 204, Columbia, SC 29204.

January 11, 2019.

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