THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-03726
Appellate Case No. 2019-001382

Raquel Martinez, Employee, Respondent,

v.

Spartanburg County, Employer, and
S.C. Association of Counties
Self-Insurance Fund, Carrier, Appellants.

BRIEF OF APPELLANTS

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INDEX

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 7

Arguments 9

I. THE APPELLATE PANEL'S ORDERS FINDING MARTINEZ'S INVESTIGATION ON APRIL 4, 2005 WAS NOT AN UNUSUAL OR EXTRAORDINARY CONDITION OF HER EMPLOYMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE. 9

II. THE APPELLATE PANEL CORRECTLY FOUND MARTINEZ FAILED TO PROVE HER MENTAL CONDITION WAS PROXIMATELY CAUSED BY THE ACCIDENT INVESTIGATION ON APRIL 4, 2005 16

III. THE CIRCUIT COURT EXCEEDED ITS SCOPE OF REVIEW UNDER SECTION 1-23-380 IN ITS ORDERS FROM FEBRUARY 25, 2009; DECEMBER 3, 2015; AND JULY 15, 2019. 27

IV. THIS COURT'S INTERPRETATION OF SECTION 1-23-390 IN BONE V. U.S. FOOD SERVICE, 404 S.C. 67, 744 S.E.2d 552 (2013), OR SECTION 1-23-390 ITSELF, VIOLATES APPELLANTS' EQUAL PROTECTION AND DUE PROCESS RIGHTS 37

Conclusion 52

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo,
380 U.S. 545 (1965) 48-49

Bentley v. Spartanburg County,
398 S.C. 418, 730 S.E.2d 296 (2012) 13-14, 33

Bone v. U.S. Food Service,
404 S.C. 67, 744 S.E.2d 552 (2013) 1, 3, 5, 31, 35, 37-47, 49-52

Brown v. Peoplease Corp.,
402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013) 6

Clade v. Champion Laboratories,
330 S.C. 8, 496 S.E.2d 856 (1998) 8

Curiel v. Envtl. Mgmt Services,
376 S.C. 23, 655 S.E.2d 482 (2007) 41

Dangerfield v. State,
376 S.C. 176, 656 S.E.2d 352 (2008) 47

Denene, Inc. v. City of Charleston,
359 S.C. 85, 596 S.E.2d 917 (2004) 46

Etheredge v. Monsanto Co.,
349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) 7

Frame v. Resort Services, Inc.,
357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004) 9

Friends of the Earth v. Public Service Comm'n of S.C.,
387 S.C. 360, 692 S.E.2d 910 (2010) 8

Hamilton v. Board of Trustees,
282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) 44

Howard v. Owen Steel Co.,
303 S.C. 304, 400 S.E.2d 149 (1991) 40

Hoxit v. Michelin Tire Corp.,
304 S.C. 461, 405 S.E.2d 407 (1991) 8

Hunter v. Patrick Const. Co.,
289 S.C. 46, 344 S.E.2d 613 (1986) 7

In re Treatment and Care of Luckabaugh,
568 S.E.2d 338, 351 S.C. 122 (2002) 43

Joseph v. S.C. Dep't of Labor,
417 S.C. 436, 790 S.E.2d 763 (2016) 40, 46

Lark v. Bi-Lo, Inc.,
276 S.C. 130, 276 S.E.2d 304 (1981) 7-8

Marley v. Kirby,
271 S.C. 122, 245 S.E.2d 604 (1978) 46

Martinez v. Spartanburg County,
394 S.C. 224, 715 S.E.2d 339 (Ct. App. 2011), *vacated* 3, 31

Martinez v. Spartanburg County,
406 S.C. 532, 753 S.E.2d 436 (2014). 4, 31

McGuffin v. Schlumberger-Sangamo,
307 S.C. 184, 414 S.E.2d 162, 163 (1992) 8

McLeod v. Starnes,
396 S.C. 647, 723 S.E.2d 198 (2012) 40-41, 45

Medlin v. Upstate Plaster Serv.,
329 S.C. 92, 495 S.E.2d 447 (1998) 7

O'Banner v. Westinghouse Elec. Corp.,
319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995) 6

Powell v. Vulcan Materials Co.,
299 S.C. 325, 384 S.E.2d 725 (1989) 9

Ross v. American Red Cross,
298 S.C. 490, 381 S.E.2d 728 (1989) 7

Russell v. Wal-Mart Stores, Inc.,
426 S.C. 281, 826 S.E.2d 863 (2019) 50

Rylee v. Marett,
121 S.C. 366, 113 S.E. 483 (1922) 43

S.C. Coastal Conservation League v. S.C. Dep't. of Health and Envtl. Control,
380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). 47

S.C. Dep't of Social Services v. Wilson
352 S.C. 445, 574 S.E.2d 730 (2002) 48

S.C. Nat. Bank v. Central Carolina Livestock Market, Inc.,
345 S.E.2d 485, 289 S.C. 309 (1985) 48

Sharpe v. Case Produce, Inc.,
336 S.C. 154, 159, 519 S.E.2d 102, 105 (1999) 8

Shealy v. Aiken County,
341 S.C. 448, 535 S.E.2d 438 (2000) 7, 9, 13, 16, 28

Tiller v. Nat'l Health Care Ctr.,
334 S.C. 333, 513 S.E.2d 843 (1999) 8, 49

Town of Hollywood v. Floyd,
403 S.C. 466, 744 S.E.2d 161 (2013) 41, 46

Turner v. Campbell Soup Co.,
252 S.C. 446, 166 S.E.2d 817 (1969) 30

Wingfield v. S.C. Tax Comm'n,
147 S.C. 116, 144 S.E. 846 (1928) 44

STATUTES

S.C. Code Ann. § 1-23-350 (1977) 28

S.C. Code Ann. § 1-23-380 (Supp. 2008) 1, 6-7, 27, 30, 37, 49-50

S.C. Code Ann. § 1-23-390 (Supp. 2007) 1, 37-44, 47, 49-51

S.C. Code Ann. § 14-3-330 (1976) 39

S.C. Code Ann. §42-1-160 (2005) 13-14

S.C. Code Ann. § 42-17-60 (2006) 2

S.C. Code Ann. § 42-17-60 (Supp. 2012) 38, 41

OTHER AUTHORITIES

S.C. Const. Art. I, § 3 40

S.C. Const. Art. I, § 9 43

S.C. Const. Art. I, § 15 43

S.C. Const. Art. I, § 22 47

S.C. Const. Art. V, § 11 37

Rule 204(b), SCACR 7

Rule 59(e), SCRCP 6

STATEMENT OF ISSUES ON APPEAL

I. DOES THE RECORD CONTAIN SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S DECISION THAT THE CONDITIONS OF MARTINEZ'S EMPLOYMENT ON APRIL 4, 2005 WERE NOT UNUSUAL OR EXTRAORDINARY?

II. DOES THE RECORD CONTAIN SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S DECISION THAT THE CONDITIONS OF MARTINEZ'S EMPLOYMENT ON APRIL 4, 2005 DID NOT PROXIMATELY CAUSE HER MENTAL BREAKDOWN?

III. DID THE CIRCUIT COURT EXCEED ITS SCOPE OF REVIEW UNDER SECTION 1-23-380 IN ITS ORDERS FROM FEBRUARY 25, 2009; DECEMBER 3, 2015; AND JULY 15, 2019?

IV. IS THIS COURT'S INTERPRETATION OF S.C. CODE SECTION 1-23-390 IN BONE V. U.S. FOOD SERVICE, 404 S.C. 67, 744 S.E.2d 552 (2013), OR SECTION 1-23-390 ITSELF, UNCONSTITUTIONAL BY DENYING WORKERS' COMPENSATION DEFENDANTS EQUAL PROTECTION AND DUE PROCESS AS GUARANTEED BY THE SOUTH CAROLINA CONSTITUTION?

STATEMENT OF THE CASE

Respondent Raquel Martinez ("Martinez") was employed as a Master Deputy Forensic Investigator by the Spartanburg County Sheriff's Department. (R. p. 239, lines 23-24). On April 21, 2006, Martinez filed a Form 50 alleging she had suffered a mental injury as a result of investigating an accident in which a Greenville County Deputy Sheriff had accidentally backed over and killed his two-year-old daughter. (R. p. 226). On May 12, 2006, Spartanburg County Sheriff's Department and its carrier, the South Carolina Association of Counties Self-Insurance Fund (collectively "Appellants") filed a Form 51 denying, inter alia, that Martinez suffered a compensable mental injury as a result of any unusual or extraordinary condition of her employment. (R. p. 227).

A hearing was held before Commissioner G. Bryan Lyndon on September 6, 2006. (R. p. 228). At the hearing, Martinez alleged that while performing an investigation on April 4, 2005, as part of her duties with the Spartanburg County Sheriff's Department, she encountered an

unusual and extraordinary condition of her employment, which subsequently led to her mental breakdown and hospitalization. (R. p. 234). Martinez further alleged she was permanently and totally disabled and requested a lump sum payment of the award. Id. Appellants contended at the hearing that Martinez did not suffer a compensable mental injury as a result of an unusual or extraordinary condition of her employment. (R. p. 235). Appellants asserted that Martinez was employed as a forensic investigator, that it was her job to investigate homicide and death cases, and that she was performing her regular job when she investigated the child's accidental death on April 4, 2005. (R. pp. 235-236). Appellants further contended Martinez's investigation of the child's death on April 4, 2005 was not the proximate cause of her mental condition and that her mental condition was caused by a myriad of personal factors unrelated to her work. (R. pp. 236-237).

On November 20, 2006, Commissioner Lyndon issued his Decision and Order finding, inter alia, that the investigation of the accident on April 4, 2005 was not an unusual or extraordinary condition of Martinez's employment, nor was the investigation the proximate cause of her mental condition. (R. p. 22). Within the statutory period, counsel for Martinez filed a Form 30, Request for Commission Review, setting forth grounds for review. (R. p. 690). Oral arguments were presented before an Appellate Panel on April 23, 2007. (*See* R. p. 24). On May 22, 2007, the Appellate Panel issued its Order unanimously affirming the Single Commissioner's Order in its entirety. (R. p. 26).

Thereafter, Martinez filed an appeal with the Spartanburg County Circuit Court.[1] (R. pp. 692-694). On February 25, 2009, Judge J. Mark Hayes, II, issued an Order holding that the Appellate Panel's Order lacked sufficient detail to enable the Court to determine whether those

[1] Since the alleged date of injury was prior to the July 1, 2007 amendment of S.C. Code Ann. § 42-17-60 (2006), an appeal from the Commission was required to first be made to the circuit court.

findings were supported by substantial evidence. (R. pp. 29-30). In his Order, Judge Hayes specifically stated that "this Court is left to speculate if the proper analysis was applied by the Commission and whether the factual conclusions upon which the law was applied had a substantial basis in the record." (R. pp. 35-36). As such, Judge Hayes reversed the Appellate Panel's Order and remanded the case back to the Commission for additional findings of fact. (R. p. 45).

Appellants timely filed their Notice of Appeal with the South Carolina Court of Appeals on March 16, 2009. (R. p. 695). On June 15, 2011, the Court of Appeals filed its Order reversing the decision of the Circuit Court.[2] Judge Williams, writing for the majority, concluded that the Appellate Panel's Order was sufficiently detailed to enable appellate review and that the record contained substantial evidence to support the Commission's decision that Martinez did not suffer an unusual or extraordinary condition of her particular employment on April 4, 2005. (R. pp. 50 & 55). Because the Court of Appeals concluded that there was substantial evidence that Martinez did not suffer an unusual or extraordinary condition in her particular employment, the majority did not address the issue of "proximate cause."[3] (R. p. 55). Martinez timely filed a Petition for Rehearing, which was denied by the Court of Appeals on October 6, 2011. (R. pp. 63-64).

On November 2, 2011, Martinez filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, and the Petition was granted on February 7, 2013. (R. pp. 701-725; R. p. 65). The Supreme Court heard oral arguments on October 15, 2013. (*See* R. p. 66). On January 8, 2014, the Supreme Court filed its decision and held that pursuant to Bone v. U.S. Food

[2] (R. pp. 46-56); Martinez v. Spartanburg County., 394 S.C. 224, 715 S.E.2d 339 (Ct. App. 2011), *vacated*, 406 S.C. 532, 753 S.E.2d 436 (2014).

[3] In a separate opinion, Chief Judge Few concurred with the majority's holding that there was substantial evidence Martinez did not suffer an unusual or extraordinary condition in her particular employment, but he also opined that "the commission's determination that the claimant failed to prove proximate cause is supported by substantial evidence." Id. at 239-240, 715 S.E.2d 347-348; (R. p. 62).

Service, 404 S.C. 67, 744 S.E.2d 552 (2013), the circuit court's order was not a final judgment and therefore was not appealable.[4] As such, the Supreme Court vacated the Court of Appeals' Order and remanded the case to the Commission for further proceedings. (R. p. 67).

Pursuant to the Commission's Administrative Order, filed August 15, 2014, the case was remanded to an Appellate Panel to take such action and enter an Order consistent with this Court's directive. (R. pp. 69-70). The Appellate Panel heard oral arguments on December 15, 2014. (R. p. 338). On February 24, 2015, the Appellate Panel issued its Decision and Order and noted:

> Because the Circuit Court found that the Commission's Order lacked an "explicit statement of facts...sufficiently detailed to enable the reviewing Court to determine whether the findings are supported by the evidence," the Commission withdraws its previous Findings of Fact and hereby substitutes the following Findings of Fact for the Court's consideration.

(R. p. 75). The Appellate Panel again denied Martinez's claim and concluded Martinez failed to prove (1) that the work conditions on April 4, 2005 were unusual or extraordinary in comparison to her normal conditions of employment and (2) that the investigation on April 4, 2005 was the proximate cause of her mental breakdown. (R. p. 115). The Appellate Panel issued ninety-nine detailed findings of fact to support its decision. (R. pp. 76-115).

Subsequently, on March 11, 2015, Martinez filed an appeal to the Spartanburg County Circuit Court. (R. p. 726). The case was again assigned to Judge J. Mark Hayes, II. On December 3, 2015, Judge Hayes entered an Order reversing the Appellate Panel and remanding the matter to the Commission. (R. p. 143). Judge Hayes ruled that *he had* established causation of the mental health condition as a matter of law in his previous Order and directed the Commission to find the same. Id.

[4] (R. pp. 66-68); Martinez v. Spartanburg County, 406 S.C. 532, 753 S.E.2d 436 (2014).

On May 18, 2016, Appellants filed their Notice of Appeal with the South Carolina Court of Appeals. (R. p. 740). On May 20, 2016, Martinez filed a Motion to Dismiss contending the Circuit Court's Order was interlocutory and not immediately appealable. (R. pp. 741-742). On May 31, 2016, Appellants filed a Return to the Motion to Dismiss. (R. pp. 743-761). Citing Bone,[5] the Court of Appeals issued an Order on July 21, 2016 granting Martinez's Motion to Dismiss, and the case was subsequently remitted to the Commission.[6] (R. p. 159).

On September 19, 2016, the Commission's Chairman issued an Order assigning the case to the Appellate Panel. (R. p. 160). After reviewing and reconsidering the entire record, as well as the instructions from Judge Hayes's December 3, 2015 Order, the Appellate Panel filed its third Decision and Order in this case on August 22, 2017.[7] The Appellate Panel again concluded Martinez failed to prove she encountered unusual or extraordinary work conditions in her employment with the Spartanburg County Sheriff's Department on April 4, 2005. (R. pp. 164-191). The Appellate Panel specifically found Martinez's relationship with the father of the child-victim (whether by virtue that the father was a fellow law enforcement officer or otherwise) was insufficient to transform the condition of Martinez's employment on April 4, 2005 into the extraordinary and unusual. (R. pp. 169-171). In addition, the Appellate Panel found Martinez failed to prove that the accident investigation on April 4, 2005 proximately caused her mental breakdown. (R. p. 192). Instead, the Appellate Panel found her breakdown was proximately caused by multiple factors, including her "cousin's" death, the taking of Xanax followed by an abrupt cessation, her "overtaking" of Lortab, and her myriad of health issues. (R. p. 190).

[5] Bone, 404 S.C. 67, 744 S.E.2d 552 (2013)

[6] Appellants filed a Petition for Writ of Certiorari with the Supreme Court on August 10, 2016, but the Petition was withdrawn and dismissed by the Supreme Court on August 15, 2016. (R. pp. 762-782).

[7] The Appellate Panel initially issued a Decision & Order on August 4, 2017; however, a page was inadvertently excluded when it was served on the parties. As a result, the Appellate Panel vacated the August 4, 2017 Order and issued an Amended Decision & Order, dated August 22, 2017. (*See* R. p. 161; R. pp. 162-194).

On October 12, 2017, Martinez filed a Notice of Appeal and a Petition for Judicial Review with the Spartanburg County Circuit Court.[8] (R. pp. 787-795). For a third time, the case was assigned to Judge J. Mark Hayes, II, who heard the matter on March 12, 2018. (R. pp. 196 & 205). On October 3, 2018, Judge Hayes entered an Order reversing the Appellate Panel's August 22, 2017 Order and remanding the matter back to the Commission. (R. pp. 204-205). Judge Hayes ruled that he had established causation of the mental health condition as a matter of law in his previous Order and directed the Commission to find the same. (R. pp. 201 & 204). He also ordered the Commission to find whether the horrific death of an infant run over by her police officer father with whom Martinez had a law enforcement relationship made the crime scene investigation unusual and extraordinary. (R. pp. 204-205).

Appellants filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP with the Circuit Court on October 12, 2018, and a hearing on the Motion was held on December 20, 2018. (*See* R. p. 207; R. pp. 796-807). On July 15, 2019, Judge Hayes issued an Order denying Petitioner's Motion with the exception of two grounds.[9] (R. pp. 208-209). That same day, Judge Hayes filed his Amended Order again reversing the Appellate Panel's Order, ruling that he had established causation of the mental health condition as a matter of law in his previous Order, and directing the Commission to find the same. (R. pp. 217-218 & 220). He also ordered the Commission to find whether the horrific death of an infant run over by her police officer

[8] Prior to appealing to the Circuit Court, Martinez filed a Motion for Rehearing with the Appellate Panel, which was denied. (*See* R. p. 195).

[9] The two grounds from Petitioners Motion to Alter or Amend Judgment that the Circuit Court granted were:

> 8. The Circuit Court erred in holding that Captain Denton and [Martinez] were the only witnesses who testified at the hearing, the error being that Ramon Martinez (Martinez's father) and Caridad Martinez (Martinez's mother) also testified at the hearing.
>
> 9. The Circuit Court erred by finding Captain Denton and [Martinez] were "credible," the errors being that (a) this finding exceeds the Circuit Court's scope of review under Section 1-23-380, S.C. Code Ann. (1976) and (b) the determination of witness credibility is strictly reserved to the Commission. Brown v. Peoplease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013); O'Banner v. Westinghouse Electric Corp., 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995).

father with whom Martinez had a law enforcement relationship made the crime scene investigation unusual and extraordinary. (R. p. 221). Judge Hayes further admonished the Appellate Panel against failing "to follow the law and comply with [his] Order," and he threatened the Appellate Panel with the use of his "powers... to punish for civil or criminal contempt...and to refer offending members of the Commission to the appropriate bodies for judicial or professional sanctioning" for the perceived failure by the Appellate Panel to conform with his Orders. (R. p. 219).

On August 12, 2019, Appellants filed a Notice of Appeal with the Court of Appeals.[10] (R. p. 808). On January 15, 2020, this matter was certified for review by the Supreme Court of South Carolina pursuant to South Carolina Appellate Court Rule 204(b). (R. pp. 224-225).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act ("APA") establishes the "substantial evidence" standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); S.C. Code Ann. § 1-23-380 (Supp. 2007). In workers' compensation cases, the Commission is the ultimate finder of fact. Hunter v. Patrick Const. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Etheredge v. Monsanto Company, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998). Substantial evidence is not a mere scintilla; rather, it is evidence

[10] Appellants also filed a Petition for writ of certiorari in this Court's original jurisdiction on August 14, 2019. (*See* Appellate Case No. 2019-001388; R. pp. 811-855). On January 15, 2020, this Court issued an Order denying Appellants' Petition. (R. pp. 222-223).

which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency. Lark at 135-36, 276 S.E.2d at 306-07. In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Friends of the Earth v. Public Service Comm'n of S.C., 387 S.C. 360, 692 S.E.2d 910 (2010).

Whether a causal connection exists between employment and an alleged injury is a question of fact for the South Carolina Workers' Compensation Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 159, 519 S.E.2d 102, 105 (1999). Where the evidence is conflicting, "the Commission's findings of fact are conclusive." Sharp, 336 S.C. at 160, 519 S.E.2d at 105; *See also,* Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) ("Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive."). Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998). If reasonable minds could reach the conclusion reached by the Commission, the Commission's findings must be affirmed. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162, 163 (1992).

ARGUMENTS

I.

THE APPELLATE PANEL'S ORDERS FINDING MARTINEZ'S INVESTIGATION ON APRIL 4, 2005 WAS NOT AN UNUSUAL OR EXTRAORDINARY CONDITION OF HER EMPLOYMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mental injuries caused solely by emotional stress are compensable if the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989). In order to recover workers' compensation benefits, a claimant must prove both:

> (1) that he was exposed to unusual and extraordinary conditions in his employment; and (2) that these unusual and extraordinary conditions were the proximate cause of his mental breakdown.

Frame v. Resort Services, Inc., 357 S.C. 520, 529, 593 S.E.2d 491, 496 (Ct. App. 2004). Moreover, the requirement of "unusual or extraordinary conditions in employment" refers to the conditions of the particular job in which the injury occurs, not to the conditions of employment in general. Shealy, 341 S.C. at 458, 535 S.E.2d at 443. The standard to be applied is whether the work conditions at issue were unusual compared to the particular employee's normal strains. Id.

A. At the accident investigation on April 4, 2005, Martinez performed her ordinary job duties in an ordinary manner as a forensic investigator with the Spartanburg County Sherriff's Department.

The event giving rise to Martinez's allegations occurred on April 4, 2005, when Greenville County Deputy Sheriff Anthony Johnson ("Johnson") accidently backed his patrol car over his two-year-old daughter resulting in her death.[11] (R. p. 304, line 18-p. 305, line 3). Martinez, who was on duty as a Master Deputy Forensic Investigator when the accident

[11] Martinez did not witness the accident in question. (R. p. 278, lines 2-4).

occurred, was tasked with performing the investigation.[12] (R. p. 239, line 24; R. p. 243, line 4-p. 244, line 1). When questioned about the investigation she performed on April 4, 2005, Martinez testified numerous law enforcement and emergency personnel were already present when she arrived at the scene (R. p. 243, lines 9-13). Martinez and Captain Denton testified that Sheriff Chuck Wright was present, as well as probably 6-7 Spartanburg County deputies, 8-10 firefighters, 10 officers from the Greer Police Department, including the Police Chief, Captain Jolene Van Syl and Lt. Matt Hamby, the Greenville County Sheriff, several deputies from the Greenville County Sheriff's Department, and at least one ambulance. (R. p. 243, lines 9-20; R. p. 326, line 7-p. 327, line 16). Martinez's only knowledge of the accident when she arrived at the scene was that it involved a former Spartanburg County Sheriff's Department employee and it involved the death of a child. (R. p. 243, lines 20-23). Upon her arrival, she noticed Sheriff Wright in the garage with another person, who was very distraught. (R. p. 244, lines 12-16). Martinez could not identify the person in the garage with Sheriff Wright, but fellow officers told her it was Johnson. (R. p. 244, lines 16-21). The Sheriff spent 20-30 minutes in the garage talking with Johnson. (R. p. 244, lines 22-24). The other officers stayed away from the garage, and Martinez never talked with Johnson at the scene. (R. p. 245, lines 1-2).

Martinez testified she documented the accident scene extensively to determine if the accident had occurred as reported. (R. p. 258, line 13-p. 260, line 13). She took 100-150 photographs, including photographs of the front lawn of the house, the area around the child's body including underneath the car, and inside the house. (R. p. 258, line 13-p. 259, line 21). She also took measurements of the position of the body and collected any kind of DNA or fibers. (R. p. 259, line 22-p. 260, line 3). **Martinez admitted that taking photographs, measurements,**

[12] The accident was investigated by the Spartanburg County Sheriff's Department because the accident occurred in Spartanburg County and the City of Greer did not have a forensic unit. (R. p. 243, lines 13-18).

collecting evidence, and moving the body of the child were all part of her job as a forensic investigator. (R. p. 260, lines 14-16). Similarly, Captain Denton testified Martinez was doing her ordinary job when she was taking photographs, making measurements, and moving the body. (R. p. 322, lines 4-16). Martinez admitted each of the activities she performed during the investigation would have had to be performed by another forensic investigator had she not been dispatched to the scene. (R. p. 271, lines 2-5). Captain Denton testified he would have performed the investigation "if the shoe had been on the other foot." (R. p. 315, lines 1-3).

Martinez described the "overall" job as a forensic investigator with the Spartanburg County Sherriff's Department as "stressful" and "dangerous."[13] (R. p. 672). According to Martinez, her job as a forensic investigator required her to go to accident and crime scenes (including homicide and other violent crimes) and:

- Collect evidence;
- Take photographs of the area;
- Take measurements, including those of bullet holes;
- Process fingerprints or other forensic evidence including DNA;
- Take photographs of bodies;
- Move bodies for purposes of (a) determining whether there is a gunshot or stab wound and (b) photographing the bodies;
- Download photographs into a computer; and
- Write two different reports in two separate computers to document "everything."

(R. p. 240, lines 3-16; R. p. 258, lines 6-12; R. p. 259, lines 22-p. 260, line 13). Captain Steven L. Denton of the Criminal Investigative Division of the Spartanburg County Sheriff's office also testified that a forensic investigator must investigate the deaths of children. (R. p. 322, line 24-p. 323, line 1).

[13] Martinez, who was 47 years old at the time of the Single Commissioner hearing, had worked in law enforcement for around 28 years, including 6½ years with the Spartanburg County Sheriff's Department. (R. p. 239, lines 10-11; R. p. 242, lines 15-17; R. p. 257, lines 14-15).

Over the course of her career as a forensic investigator, Martinez had been involved in 100-150 death calls, including 24 cases involving suspicious deaths/homicides (R. p. 263, lines 3-22). She participated in approximately 24-26 autopsies where the pathologist removed organs from the body. (R. p. 263, lines 23-p. 264, line 8). She admitted it was not unusual for a forensic investigator to see "blood and guts." (R. p. 264, lines 9-11). She had also been to gruesome fire scenes in which bodies had been badly burned. (R. p. 264, lines 15-20). While working previously for the Greenville County Sheriff's Department, Martinez had gone to an accident scene where a dump truck had driven over a child's head. (R. p. 272, lines 4-19). She admitted that the scene did not bother her and she did not cry or have nightmares thereafter. (R. p. 276, lines 11-22). The sole difference, according to Martinez, was that the child was not run over by a fellow police officer with whom she was acquainted. (R. p. 277, lines 1-21).

Martinez also testified it was not uncommon for investigators to go to motor vehicle accidents in which the occupants had been decapitated or had lost an arm. (R. p. 281, lines 11-17). On one occasion, Martinez had investigated a motor vehicle accident in which two teenagers rolled a stolen vehicle, while attempting to escape capture. (R. p. 279, lines 11-25). The driver was ejected from the car and the car rolled over him. Id. On that occasion, the teenager died in Martinez's arms after she had moved him so that he could breathe. Id. She also remembered another instance in which a man had accidentally shot his leg off with a shotgun. (R. p. 281, lines 17-19).

Substantial evidence in the record, including Martinez's own testimony, clearly supports the Appellate Panel's finding that Martinez was performing her ordinary job duties in an ordinary manner as a forensic investigator at the scene of the child's death on April 4, 2005.

B. Martinez's relationship with Johnson was, at most, an acquaintance of a fellow law enforcement officer and was not such that would cause her employment condition on April 4, 2005 to be unusual or extraordinary.

Martinez contends that her relationship with Johnson, a *former* officer with the Spartanburg County Sheriff's Department, transforms her employment condition on the day of the investigation into the extraordinary and unusual. At the hearing, Martinez specifically explained exactly what she believed was "unusual or extraordinary" about April 4, 2005:

> Q. [Mr. Pye] Had you ever investigated a scene like the April 4th, 2005, scene before that day where a fellow officer was involved with the death of his own child?
>
> A. No. I've never -- like I said, I've never done anything that involves somebody that I know in any kind of violent crime.

(R. p. 255, lines 5-11). Martinez argues that because she had not previously investigated the accidental death of a child involving a fellow officer she knew, the investigation on April 4, 2005 was unusual or extraordinary. This logic fails. New and different experiences within the boundaries of a job title, career, or profession are commonplace and expected. A "first experience" is not by definition "unusual or extraordinary." If that was the standard, then an attorney's first trial or a surgeon's first operation would be considered "unusual or extraordinary." As pointed out by this Court, "in defining what constitutes unusual and extraordinary, the statute and our case law speak of *conditions* of employment and not the frequency of an event occurring." Bentley v. Spartanburg County, 398 S.C. 418, 730 S.E.2d 296 (2012) (citing S.C. Code Ann. § 42-1-160; Shealy v. Aiken County, 341 S.C. at 456, 535 S.E.2d at 442).

The mere fact that both Martinez and Johnson were law enforcement officers does not create a different standard for compensability of mental-mental injuries under the South Carolina

Workers' Compensation Act[14] and does not in itself make Martinez's investigation on April 4, 2005 unusual and extraordinary. Instead, the nature of the relationship between Martinez and Johnson must be examined, which is exactly what the Appellate Panel did.

The evidence established Martinez had only known Johnson for about 1-1½ years during the time he was employed by the Spartanburg County Sheriff's Department. (R. p. 266, lines 15-18). During that time, they were never partners. (R. p. 283, lines 12-14). While Martinez and Johnson had worked the same shift at the Spartanburg County Sheriff's Department, they were assigned to different platoons and worked different zones. (R. p. 282, line 8-p. 283, line 5). There were only two working days each week that Martinez and Johnson worked at the same time, and on those days, they might only see each other at roll call at the beginning or end of the shift. (R. p. 283, lines 5-11). Interestingly, Martinez testified she did not know whether her reaction would have been the same if the officer who had run over his child had worked on the second shift instead of the third shift. (R. p. 287, lines 7-12).

Martinez argues she and Johnson "backed each other up." (R. p. 282, line 20). Yet, neither Martinez nor Captain Denton testified regarding any specific instances where she had actually "backed up" Johnson, or vice versa. Further, Martinez ignores the fact that she and Johnson had not worked together for at least 3½ years prior to the April 4, 2005 investigation.[15] The only times Martinez saw Johnson after he left the department was when they would occasionally bump into each other while both were on duty, such as when Johnson might drop off a prisoner. (R. p. 267, lines 8-14). Martinez candidly admitted she and Johnson were not

[14] As noted in Bentley, "[the Courts] are interpreters not legislators and are bound by the language of section 42-1-160 as written." 398 S.C. at 426, 730 S.E.2d at 301. There is no provision in S.C. Code Ann. §42-1-160 (2005) that provides a special exception or different standard of proof for law enforcement officers.

[15] Martinez testified Johnson left the department while she was still in uniform patrol. (R. p. 265, lines 15-16). Since Martinez had been a forensic investigator for 3½-4 years (R. p. 242, lines 8-10), it is clear he left his Spartanburg County employment *at least* 3½-4 years before the accident investigation.

"best friends." (R. p. 286, lines 7-8). Martinez never socialized with Johnson, and she had never been to Johnson's house prior to the date of the investigation. (R. p. 267, lines 1-7). Martinez also had never met Johnson's child, and she testified she could not recall ever meeting Johnson's wife. (R. p. 266, lines 22-25).

Further, Captain Denton testified the Sheriff's Department had no policy prohibiting employees from investigating an accident scene where they knew the victim or a relative of the victim. (R. p. 314, lines 9-13). Captain Denton maintained that regardless of whether the officer had a relationship with the victim – even if the victim was the officer's own spouse – the officer had to work the investigation. (R. p. 314, lines 13-20). Captain Denton took the same position on April 4, 2005, even though Martinez and the victim's father had previously worked the same shift with the Spartanburg County Sheriff's Department years earlier. (R. p. 314, line 20-p.315, line 3). In fact, regarding his instruction to Martinez to process the April 4, 2005 incident, Captain Denton further testified:

> Q. [Mr. Kale] And when you made that decision, you were basically saying, "You've got to do your job," right?
> A. Yes.

(R. p. 332, lines 18-20).

Based on the foregoing, substantial evidence supports the Commission's finding that Martinez's "fellow law enforcement officer relationship" with Johnson was insufficient to make the April 4, 2005 investigation unusual or extraordinary.[16]

[16] The Appellate Panel noted in its findings of fact that "Although a friendship (something more abiding or meaningful than simply seeing/exchanging pleasantries with someone at work) or a present--or perhaps even former--law enforcement partnership might produce a different outcome with regard to compensability, those circumstances are not applicable in the case before us." (R. p. 170).

II.

THE APPELLATE PANEL CORRECTLY FOUND MARTINEZ FAILED TO PROVE HER MENTAL CONDITION WAS PROXIMATELY CAUSED BY THE ACCIDENT INVESTIGATION ON APRIL 4, 2005.

In South Carolina, even if a claimant can establish that her work conditions were unusual or extraordinary, she must also prove the unusual and extraordinary conditions of her employment were the proximate cause of the alleged mental injury. *See* Shealy, 341 S.C. 448, 535 S.E.2d 438 (2000). In Shealy, the claimant, like Martinez, was a police officer. Id. at 452, 535 S.E.2d at 440. The claimant, who had gone undercover as a narcotics agent, alleged his work as an undercover narcotics agent was an unusual and extraordinary condition of employment, which caused a mental injury. Id. However, the appellate panel found there were several other stressors in the claimant's life that contributed to his mental condition, including the fact he was seeking a divorce from his wife, was involved a bitter custody dispute, and was declaring bankruptcy. Id. at 453, 535 S.E.2d at 441. As such, the appellate panel found the claimant failed to meet his burden of proving that the conditions of his employment proximately caused his psychological condition. Id. at 454, 535 S.E.2d at 441. The appellate panel's decision was affirmed by the circuit court and Court of Appeals. Id. On appeal, the Supreme Court held that based on the non-job stressors, there was substantial evidence to in the record to support the appellate panel's finding that the claimant failed to meet his burden of proof that a proximate relationship existed between his mental condition and the unusual and extraordinary conditions of his employment. Id. at 459, 535 S.E.2d at 444.

Much like the claimant in Shealy, Martinez suffered from significant non-work-related outside stressors, including the death of her "cousin," the taking of Xanax followed by an abrupt cessation, the overtaking of Lortab, and unrelated medical conditions, which caused stress

regarding job security.[17] A review of the medical evidence in the record supports the Appellate Panel's decision that Martinez's mental breakdown was not proximately caused the accident investigation of April 4, 2005.

On April 7, 2005, *three days after the accident investigation*, Martinez saw her family physician, Dr. John R. Wieder, regarding her high blood pressure and headaches. (R. p. 372). Martinez also reported she was having stress at work, specifically mentioning having to work alternating shifts. Id. **However, there is no mention in this report of the accident investigation on April 4, 2005.** Id. Dr. Wieder diagnosed her with "Hypertension, no control," and adjusted her blood pressure medication. Id. There is no indication in Dr. Wieder's report that Martinez was upset or crying during this visit, and he did not prescribe her any psychotropic medication. Id.

On April 18, 2005, *two weeks after the investigation in question*, Martinez's "cousin" passed away from AIDS. (R. p. 250 lines 14-16; R. p. 272, line 25-p. 273, line 3). The date of her "cousin's" death is significant. Martinez testified:

> It affected me. Michael, my cousin, Michael Adger Roberts -- and forgive me, I call him my cousin, I'm so used to it. He's my ex-husband's cousin, but he lived with us every summer when -- after my husband and I got married, he and his brother would come and stay with us in the summer and during school breaks and things. So I considered him my cousin, but he is not flesh and blood. He's my ex-husband's cousin...
>
> I knew he had been H.I.V. positive. He had been gay for years. I knew he was H.I.V. positive and, and then he got AIDS, and from what I understand, the two most virulent ways of dying with AIDS is either certain cancers or with certain pneumonia. He had the problem with the cancers. So he had had off-and-on surgeries and treatment for the cancer, and he suffered for so long that it was -- we -- we spent as much time as we could together, but it was hard to see him suffering so much, and it hurt badly when he died. I mean, that's somebody that

[17] The "cousin" – actually Martinez's ex-husband's cousin – is described by Martinez herself in the medical records as her "cousin," "brother," "best friend," and "very close friend and relative." (*See* R. p. 171).

> I love, somebody that I half raised, but it was a relief, too, 'cause there had been so much suffering. So it bothered me. It would have been crazy not to let it bother me. But it didn't destroy my life or anything.

(R. p. 250, line 18-p. 251, line 18).

The first medical attention Martinez received for emotional stress was from Dr. Wieder on April 19, 2005, *the day after her cousin died.* Dr. Wieder recorded the following history:

> This 46-year-old, white female who is a sheriff's deputy here, comes today to have her blood pressure checked. She is on Lotrel 5/20 and Croeg 6.25 mg. She takes Lotrel in the morning, and the Croeg once a day at bedtime. **She is very upset and crying. A very close friend and relative, a cousin with whom she was very close over the years, passed away. She is very upset about it.** They were very close ever since they were little kids. She is very upset that she did not get to the hospital in time to say goodbye before he passed away.

(R. p. 372) (emphasis added). Dr. Wieder's assessment was "hypertension, chronic low back pain, and grief." Id. At that time, Dr. Wieder placed her on Xanax "to help her get through this trying time." (R. p. 374). He also took Martinez out of work for a few days because "she is going to be helping with the funeral arrangements, and will want to attend the funeral." (R. p. 372). **Significantly, there is no mention of the April 4, 2005 accident investigation in Dr. Wieder's report from April 19, 2005 – *15 days after the investigation.***

On April 24, 2005, Martinez was transported via EMS to Spartanburg Regional Medical Center after having a syncopal episode, and it was noted that she was unconscious for approximately 25 minutes. (R. p. 385). Martinez reported a history of "heart murmur, vasopressor syncope, and atrial tachycardia. Id. She also reported "increased stress this week *due to death in family.*" (R. p. 389) (emphasis added). Martinez was diagnosed with syncope and situation stress reaction, and the physician informed her that "It appears the cause of your fainting spell today is due to many factors: grief, medications, not eating." (R. p. 386). **There is**

no mention of the April 4, 2005 accident investigation in the Spartanburg Regional Medical Center medical records from April 24, 2005 – *20 days after the investigation.*

The next day, April 25, 2005, Martinez returned to Dr. Wieder with complaints of dizziness, headache, vomiting, and diarrhea, and Dr. Wieder sent her to Mary Black Memorial Hospital due to her elevated blood pressure. (R. p. 374). **There is no mention of the April 4, 2005 accident investigation in Dr. Wieder's April 25, 2005 report – *21 days after the investigation.*** Martinez was hospitalized on an inpatient basis at Mary Black Hospital from April 25, 2005 through April 27, 2005. (R. pp. 439-476). Again, **there is no reference to the April 4, 2005 investigation in these hospital records.** Id. Instead, the discharge instructions state that she was provided a "referral to mental health therapy *for grieving*." (R. p. 454) (emphasis added). The grieving in this report refers to Martinez's "cousin". (*See* R. p. 176).

Martinez returned to Dr. Wieder on April 29, 2005. (R. p. 375). Dr. Wieder noted Martinez had trouble focusing and thinking straight, which he believed was due to the Xanax "and the fact that she has been through a rough time the last few days." (R. p. 376). **Martinez did not mention the April 4, 2005 accident investigation to Dr. Wieder on April 29, 2005 – *25 days after the investigation.*** On May 5, 2005, Martinez followed up with Dr. Wieder for a recheck of her blood pressure. Id. Dr. Wieder noted her blood pressure was still uncontrolled and that she was still having some dizziness and balance problems. Id. **There is no mention of the accident investigation in Dr. Wieder's May 5, 2005 report – *one month after the investigation.*** Notably, while Dr. Wieder recommended she remain out of work for another week, he specifically stated: *"I would find no problems in her doing crime scene investigations*, but I certainly do not want her out patrolling where she might have to jump out of the car and chase down perps and wrestle with people in making an arrest." (R. p. 377) (emphasis added).

Martinez returned to Dr. Wieder on five separate occasions between May 12, 2005 and June 24, 2005; however, Martinez never mentioned that she had any stress related to the accident investigation of April 4, 2005 in any of these office visits. (*See* R. pp. 377-381). Rather, these records indicate that any stress she was having during this time was due to being out of work for her unrelated health conditions.[18] On May 12, 2005, Dr. Wieder noted Martinez's hypertension was still uncontrolled, and he instructed her to remain out of work for another two weeks. (R. p. 377). On May 26, 2005, Dr. Wieder noted Martinez presented as "very down, sad, and depressed as *she is missing a lot of work and fearful of loosing* [sic] *her job.*" (R. p. 378). At this point, Martinez had been out of work for approximately one month, and Dr. Wieder did not release her to return to work. Id. On June 2, 2005, Dr. Wieder noted her blood pressure looked good for the first time in months and that her emotional state was also better. (R. p. 380). Dr. Wieder opined Martinez would be able to return to full duty in the forensics department the following week if her blood pressure continued to improve. Id. On June 7, 2005, Dr. Wieder opined she could return to full duty work with no restrictions. Id. Martinez subsequently returned to work for the Sheriff's Department as a forensic investigator through August 6, 2005. (R. p. 239, lines 21-22).

In reaching its decision, the Appellate Panel appropriately gave the greatest weight to Dr. Wieder's medical records from the 2½ months following the April 4, 2005 accident investigation. (*See* R. p. 172). With regards to these records, the Appellate Panel made the following specific finding:

> The Commission cannot ignore--and gives great weight to--the fact that Claimant **did not mention the toddler's death, a death at work, a child's death, a child, a little girl, or any concern over any child or fellow law enforcement officer at a single one of the sequential visits with her family physician** set forth *supra*, even though

[18] It was not until May 3, 2006, *after she filed her workers' compensation claim* and *over a year after the investigation*, that Martinez advised Dr. Wieder about the incident with the child. (R. p. 382).

> Claimant visited her family physician 3 days after the toddler's death. By contrast, on April 19, 2005, Claimant cried and grieved over the death of her cousin, and was placed on Xanax to help deal with the cousin's death. In May 2005, Claimant was depressed over the amount of work she had missed, such that she feared that she would lose her job.

(R. p. 174).

At some point around the first week of August 2005, Martinez abruptly stopped taking the Xanax, which had been prescribed for her after her cousin's death. (*See* R. p. 395; R. p. 274, lines 1-4). On August 7, 2005, Martinez was transported by EMS to Spartanburg Regional because of "behavior suggesting psychiatric problems." (R. p. 548). A comprehensive assessment was performed at the hospital, and it was noted that Martinez's chief complaint was:

> I became psychotic last Sunday. I tore my home up and tore my police car up. I'm glad I didn't hurt anyone because I carry a gun. I stopped taking Xanax and became psychotic.

(R. p. 561). It was further noted in the assessment that *the precipitating event* had been:

> **My cousin died mid-April 2005 and I took Xanax for my nerves. I stopped taking Xanax 1-2 weeks ago and became psychotic.**

Id. (emphasis added).

Martinez was hospitalized on an inpatient basis at Spartanburg Regional from August 7, 2005 through August 9, 2005. During this hospitalization, Martinez was examined by a psychiatrist, Dr. Chris Caston. (R. pp. 395-397).[19] Dr. Caston noted that the reason for Martinez's admission was "delirium thought to be related to benzodiazepine withdrawal symptoms." (R. p. 395). It was noted that Martinez had not had Xanax in 3-5 days, and this resulted in bizarre behavior like breaking windows at her house and in her patrol car. Id. Under social history, Dr. Caston noted "[a]pparently the patient's friend recently died." Id. Dr. Caston's

[19] The Appellate Panel gave great weight to Dr. Caston's medical reports. (*See* R. p. 178).

diagnosis was clinical psychiatric disorders, Benzodiazepine withdrawal delirium, and anxiety disorder. (R. p. 396). In his discharge note of August 9, 2005, Dr. Caston stated:

> The patient is a 46 year old white female who has been admitted due to delirium thought to be related to benzodiazepine withdrawal symptoms. The patient has not had Xanax in 3 to 5 days.
>
> * * * * *
>
> The patient has no previous history of psychiatric care. The patient apparently had recent problems with uncontrollable hypertension and also had *problems with anxiety, insomnia and depression related to the death of her best friend who apparently was a male cousin.*

(R. p. 407) (emphasis added). **Importantly, there is no mention of the April 4, 2005 accident investigation in the records from Spartanburg Regional, dated August 7, 2005 through August 9, 2005 – *more than 4 months following the investigation.***

Shortly before she was discharged from Spartanburg Regional on August 9, 2005, Martinez reported she was "back to her old self," but she agreed to a referral for outpatient mental health care. (R. p. 431). As a result, Martinez was treated at Carolina Center for Behavioral Health on an out-patient basis from August 10, 2005, through August 22, 2005 (R. p. 644). In his initial psychiatric evaluation report, dated August 10, 2005, Dr. Ralph J. Castriotta, stated the reason for the admission as:

> The patient was admitted after being hospitalized briefly at SRMC. She ended up there after having a brief reaction, possibly psychotic in nature to abruptly stopping her Xanax. She started the Xanax 2mg a day six weeks ago after suffering an acute anxiety reaction to the death of a relative. She was vulnerable at the time due to stressors at work. She works as a police officer. She feels she was in an emotionally vulnerable state when the relative died.[20] This heightened her reaction to it. She was placed on Xanax. She did reasonably well. She felt that she needed to get off the medication. She did so basically by stopping it.

[20] As the Appellate Panel specifically found, "This statement demonstrates that Claimant herself believes that the 'final straw' was the death of the cousin—not the toddler's death." (R. p. 180).

(R. p. 481). (emphasis added). Additionally, the chief complaint "in patient's own words" was "I became psychotic last Sunday. I tore my home up and tore my police car up...I stopped taking Xanax and became psychotic." (R. p. 561). Martinez also reported the precipitating events were: **"My cousin died mid-April 05 and I took Xanax for my nerves. I stopped taking Xanax 1-2 weeks ago and became psychotic."** Id. Dr. Castriotta's diagnosis was psychosis secondary to withdrawal from Benzos and rule out bipolar versus OCD. (R. p. 482).

Notably, the first mention of the April 4, 2005 accident investigation was not until August 10, 2005, *over four months after the accident investigation*, when a nurse at Carolina Center for Behavioral Health Martinez noted the following under the "Lost Something/Someone You Loved" portion of the initial assessment form: "brother [i.e., cousin] – ***also*** saw 2 yr old child of friend & co-worker on case she worked in job as forensic police officer." (R. p. 560) (emphasis added). The fact that the child's death is mentioned ***after*** the death of her cousin demonstrates which event Martinez considered most important.

Of even greater significance is the fact Martinez did not mention the child's death until ***after*** she realized she would not be able to return to her job as a law enforcement officer due to her psychiatric admission. Records from Spartanburg Regional, dated August 8, 2005 – *two days before the first mention of the child's death* – note Martinez was worried about still having a job and that she **"believes that she'll be fired because of her [psych] admission."** (R. pp. 424 & 428). When she presented to Carolinas Center for Behavior Health on August 10, 2005, it was noted on the initial assessment form that she was **"applying for disability" due to "job concern."** (R. p. 560). On August 12, 2005, Martinez reported that the Sherriff's Department had "already secured her guns," that she was "unable to return to work," and that she would "have to go on disability or early retirement." (R. pp. 575-576). The Appellate Panel's finding that the

April 4, 2005 accident investigation was not the proximate cause of her mental condition is clearly supported by the fact that Martinez did not mention the child's death until over four months later, after she realized she would not be able to return to her job with the Sherriff's Department and after she applied for disability.

Additionally, Martinez's subsequent overtaking of Lortab and other pain medications was also factor in the development of her mental condition. Martinez had a history of significant physical problems prior to April 4, 2005: chronic migraine headaches, TMJ dysfunction, chronic plantar fasciitis, chronic low back pain, knee arthritis, etc. (*See* R. pp. 371-382). As a result of these conditions, she was prescribed a variety of pain medications, including Lortab, Flexeril, and Imitrex. Id. From August 22, 2005 through August 26, 2005, Martinez was admitted to Carolinas Center for Behavioral Health on an inpatient basis "secondary to questionable opiate abuse vs. medication reaction." (R. p. 582). It was noted that upon admission, she had slurred speech, was dizzy, was unsteady on her feet, and was confused. (R. p. 598). On August 23, 2005, Martinez's father reported that she was "hooked on prescription pain meds" and that her "*biggest problem* is patient taking too much medicine especially Lortab and Imitrex." (R. p. 610) (emphasis added). It was also noted she had been overtaking Depakote and Neurontin. (R. p. 488). Martinez's diagnoses included poly-substance dependence. (R. p. 486). By Martinez's own report to her psychologist, her overtaking of Lortab was related to the death of her cousin. On September 6, 2005, when Martinez was asked to describe her problem to Dr. Diehl on his intake sheet, she stated that she handled the case of the toddler's death, and that a week later her cousin died of AIDS, "***I then began*** ↑ **Lortab**". (R. p. 672) (emphasis added).

It is also important to note Martinez had suffered significant traumatic events throughout her life. During her childhood in Puerto Rico, Martinez was sexually assaulted for almost two

years by a male friend of her family. (R. p. 530). She also advised Dr. Abess she had been raped at age 19 by a friend of her youngest brother. (R. p. 531). Martinez also became depressed in 1996 and was prescribed Luvox, which she took for 1½ years. (R. p. 534). At that time, she went to an Employee Assistance Program. Id. Martinez advised she was unhappy during this period because of her separation and divorce from her husband. Id. Dr. Abess also noted Martinez's description of her job:

> She estimates having participated in about 2 or 3 dozen autopsies. If there was an attended death, she would have to determine if it was natural or if there was a crime. She estimates having been an investigator at 50-100 death scenes. 'It never bothered me.' 'I have always been able to take grizzly stuff.'

(R. pp. 532-533). Additionally, Dr. Abess noted in his mental status exam that when providing the details of her investigation into the child's death, Martinez did not demonstrate any difficulty talking about the event, and she did not manifest tears, falter in her speech, or show anger. (R. p. 541). In fact, Dr. Abess noted Martinez never cried during the entire interview, which he found "highly unusual." Id.

It was Dr. Abess' impression that Martinez had post-traumatic stress disorder by history of being sexually abused in childhood and being raped at age 19, as well as a pre-existing Bipolar Disorder. (R. pp. 539-542). In that regard, Dr. Abess stated in his report:

> Bipolar Disorder is a heredity or genetic disorder. It can appear de novo due to the individual's unique genetic coding, or it can be handed down from parents. The clinical expression of the illness or an exacerbation of the illness can be triggered by a variety of experiential and environmental factors. In Claimant's case, strong emotions associated with the work related accident investigation on 4 April 2005 and the death of her ex-husband's cousin in mid April 2005 were factors in the exacerbation of her pre-existing Bipolar illness. *The discontinuation of Xanax along with the initiation of the antidepressant Zoloft was the actual precipitant for the development of a manic manifestation of her Bipolar Disorder.* This psychotic reaction is better explained as a manic mood state than as a withdrawal

> delirium because at the time of her admission to the emergency room, her vital signs were normal. A withdrawal delirium from Xanax would be expected to cause tachycardia (false pulse) and hypertension (elevated blood pressure). Finally, Claimant is currently taking substantive anti-psychotic doses of Seroquel. If her psychotic mood state was attributable to a withdrawal Delirium from Xanax, the anti-psychotic medication would be needed for only a few days. Claimant, therefore, has a persisting effective disorder which the record shows revealed itself early in her life. Such disorders are genetically developed and the patient has one sibling with a similar disorder.[21]

(R. pp. 543-544) (emphasis added). Dr. Castriotta was also suspicious that Martinez may have a bipolar disease. In his evaluation of August 11, 2005, Dr. Castriotta's Axis I diagnosis was "psychosis secondary to withdrawal from Benzo's; rule out bipolar versus OCD." (R. p. 482). Dr. Shane Sherbondy, a psychiatrist with Carolina Center for Behavioral Health, also gave a discharge diagnosis of "Axis I: Bipolar Disorder, not otherwise specified. Post traumatic stress disorder." (R. p. 492).

All of the above evidence conflicts with Martinez's position that her psychological problems were proximately caused by the events of April 4, 2005. The circumstances leading to Martinez's mental breakdown are obviously multifactorial. In summary, the records from her family physician in the months after the investigation, the emergency room visit of April 24, 2005, the inpatient hospitalization in April 2005, and the inpatient hospitalization from August 7, 2005 to August 9, 2005 all demonstrate that the predominant stressors in this case were the death of her cousin, her taking of Xanax followed by abrupt cessation, and her overtaking of Lortab. These events, *all of which occurred after April 4, 2005*, clearly show the investigation into the child's death – if at all related – was not the proximate cause or the "final straw."

[21] Of all the expert opinions in the record, the Appellate Panel gave the greatest weight to Dr. Abess's opinion since he was the only psychiatrist to administer any tests and since he gave cogent reasons for his findings. (R. p. 185). The Appellate Panel also found that "the one salient deficiency in the report of Dr. Abess is a lack of exploration of the nature of the relationship between Claimant and her cousin/best friend, to whom Dr. Abess simply refers to as Claimant's 'ex-husband's cousin.'" (R. p. 186).

Accordingly, based on the foregoing, substantial evidence clearly supports the Appellate Panel's findings (1) that Martinez's mental breakdown was not proximately caused by the accident investigation on April 4, 2005 and (2) that the proximate causes of her breakdown were multifactorial, including her cousin's death, the taking of Xanax followed by abrupt cessation, the overtaking of Lortab, and her myriad health issues.

III.

THE CIRCUIT COURT EXCEEDED ITS SCOPE OF REVIEW UNDER SECTION 1-23-380 IN ITS ORDERS FROM FEBRUARY 25, 2009; DECEMBER 3, 2015; AND JULY 15, 2019.

This case has been heard by *six* different Commissioners of the South Carolina Workers' Compensation Commission, and all six Commissioners have determined the claim is not compensable under the South Carolina Workers' Compensation Act because Martinez's investigation of the accident on April 4, 2005 (1) was not an unusual or extraordinary condition of her employment and (2) was not the proximate cause of her mental condition. As indicated above, this case has been appealed to the circuit court on three separate occasions, and on each appeal to the circuit court, the case has been assigned to Judge Mark J. Hayes, II.

Despite the unanimous opinions of the Commissioners who have heard the case, following each appeal to the circuit court, Judge Hayes has issued Orders reversing and remanding the case to the Commission. Each of his three Orders reversing the Appellate Panel's decisions violates Section 1-23-380 because Judge Hayes exceeded his appellate jurisdiction and scope of review by reweighing the evidence, substituting his judgment for that of the Commission's, determining the credibility of witnesses, and making his own findings of fact.[22]

[22] Due to this Court's decision in Bone, Appellants have been denied the right to judicial review of any of Judge Hayes's previous Orders, and given Bone, it is unclear how, if, and when Appellants would ever be allowed judicial review of his previous Orders. In order to preserve the right to judicial review and to show the extent Judge Hayes has exceeded his appellate jurisdiction, Appellants believe it is necessary to outline each of Judge Hayes's three Orders reversing the Appellate Panel.

A. The Circuit Court's February 25, 2009 Order.

In his first Order, filed February 25, 2009, Judge Hayes held the Commission's finding that Martinez failed to prove she encountered an unusual or extraordinary condition in her employment on April 4, 2005 lacked sufficient detail to enable the Court to determine (1) whether its findings were supported by substantial evidence and (2) whether the Appellate Panel applied the proper analysis for determining compensability of her mental injury. (*See* R. pp. 35-36). As such, Judge Hayes reversed the Commission's finding regarding compensability and remanded the case back to the Commission for further review consistent with his Order. (R. pp. 40 & 45).

Appellants contend Judge Hayes exceeded his scope of review in his February 25, 2009 Order because he improperly substituted his own opinion and view of the evidence for that of the Commission and essentially re-wrote the Commission's findings of fact. In Footnote 3 of the Order, Judge Hayes improperly set out his own rendition of the facts. (*See* R. pp. 30-33). Regarding the issue of whether the accident investigation was unusual or extraordinary, Judge Hayes never discussed or examined any of the Commission's findings of facts under the substantial evidence rule. Rather, he engaged in re-weighing the evidence and making findings of fact, which was beyond his scope of review. Shealy, 341 S.C. at 455, 535 S.E.2d at 442 ("It is not the task of [the reviewing court] to weigh the evidence as found by the Full Commission.")

With regard to the Commission's finding that Martinez failed to prove that the accident investigation on April 4, 2005 was the proximate cause of her mental breakdown, Judge Hayes initially declared that the Commission's finding on causation was insufficient for judicial review under S.C. Code Ann. Section 1-23-350 (1977), and he specifically stated:

> Here, even though the orders from the Commission give a summary of some of the testimony presented during the hearing, **no basis for the**

> **Findings of Facts** 14, 15, and **16 is provided, and thus, *this Court is left to speculate* if the proper analysis was applied by the Commission and whether the factual conclusions upon which the law was applied has a substantial basis in the record.**[23]

(R. pp. 35-36) (emphasis added). Yet, despite his clear assertion that the Commission's finding regarding causation was not sufficient for judicial review, he then went on to perform a judicial review of the same. Judge Hayes stated:

> Again, *assuming* the Order is sufficient for judicial review... the Commission's finding is clearly erroneous, applying the substantial evidence standard of review, because the only conclusion that can be drawn from the medical information is that there exists the necessary showing of proximate cause to link the accident investigation of her friend's child's death and her mental breakdown."

(R. pp. 40-41) (emphasis added). He added that "The Commission's Order does not suggest, implicitly or expressly, that the proximate cause element of the claim fails because of some intervening or superseding act." (R. p. 41). After claiming that "the Commission's Order requires this Court to *speculate* as to how, factually, [Martinez] did not meet her 'burden of proof'," Judge Hayes concluded "the only causation conclusion that can be drawn from the record below is that [Martinez] established her burden of proof that her mental injuries were proximately caused by the stress from the accident investigation." (R. p. 43).

By making this conclusion regarding causation in his February 25, 2009 Order, Judge Hayes made multiple errors of law. First, since he initially determined the Commission's finding regarding causation was insufficient for judicial review, it was an error for him to then perform a

[23] The Single Commissioner's Finding of Fact #16, which the Appellate Panel adopted, stated "Claimant failed to prove that the accident investigation on April 4, 2005 was the proximate cause of her mental breakdown, said finding being based on all the evidence in the record." (R. p. 22; *See also* R. pp. 25-26).

judicial review. If the Appellate Panel's finding regarding causation was insufficient, he should have remanded the case to the Appellate Panel for further findings of fact regarding causation.[24]

Additionally, in reaching his conclusion regarding causation of Martinez's mental condition, it is obviously apparent from his Order that Judge Hayes did not consider the plethora of evidence contained in the initial medical records – previously outlined in detail in Argument II, *supra* – that clearly supported the Appellate Panel's decision that Martinez failed to prove the accident investigation on April 4, 2005 was the proximate cause of her mental breakdown. While Judge Hayes decided in his February 25, 2009 Order that "the only causation conclusion that can be drawn from the record below is that [Martinez] established her burden of proof that her mental injuries were proximately caused by the stress from the accident investigation,"[25] this is simply erroneous based on the initial medical records, which make no mention of the April 4, 2005 investigation and which clearly show the proximate causes of Martinez's mental breakdown were the death of her "cousin," her taking of Xanax due to the death of her cousin, and her abrupt cessation of Xanax. Not only does this show Judge Hayes failed to perform a proper judicial review (i.e., determine whether there was any competent evidence to support the Commission's findings), but it also shows he exceeded his authority by substituting his judgement for the judgement of the Commission as to the weight of the evidence and by making his own findings of fact. *See* S.C. Code Ann. §1-23-380(5) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

[24] *See* Turner v. Campbell Soup Co., 252 S.C. 446, 166 S.E.2d 817 (1969) ("Remand is proper where the Commission has failed to make essential findings of fact, or the findings made are so indefinite or general as to afford no reasonable basis upon which the appellate court can determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. To hold otherwise in such cases would ... require the appellate court to make the omitted findings of fact which the statute forbids.")

[25] (R. p. 43).

B. The Circuit Court's December 3, 2015 Order.

Judge Hayes's first Order was reversed by the Court of Appeals, which held the Commission's findings of fact were sufficient for judicial review and that substantial evidence supported the Commission's findings that Martinez did not suffer an "unusual or extraordinary" condition of her particular employment.[26] However, the Supreme Court later vacated the Court of Appeals' decision and remanded the case to the Commission on the grounds that the circuit court's order was not a final judgment and therefore was not appealable pursuant to Bone.[27]

On remand, oral arguments were held before an Appellate Panel, and on February 24, 2015, the Appellate Panel issued its Decision and Order and noted:

> Because the Circuit Court found that the Commission's Order lacked an "explicit statement of facts...sufficiently detailed to enable the reviewing Court to determine whether the findings are supported by the evidence," the Commission withdraws its previous Findings of Fact and hereby substitutes the following Findings of Fact for the Court's consideration.

(R. p. 75). The Appellate Panel again concluded (1) Martinez failed to prove she encountered unusual or extraordinary work conditions in her employment on April 4, 2005 as compared to her normal conditions of employment and (2) Martinez failed to prove her mental health condition was proximately caused by the investigation on April 4, 2005. (R. pp. 115-116). In support of its decision denying compensability, the Appellate Panel made numerous findings of fact that showed Martinez was performing her ordinary job duties in an ordinary manner as a forensic investigator at the scene of the toddler's death. While Martinez emphasized the "thin blue line" relationship and contended her relationship with Officer Johnson, a *former* officer with the Spartanburg County Sheriff's Department, transformed her employment condition on the day

[26] (R. pp. 46-62); Martinez v. Spartanburg County, 394 S.C. 224, 715 S.E.2d 339 (Ct. App. 2011), *vacated*, 406 S.C. 532, 753 S.E.2d 436 (2014).

[27] (R. pp. 66-68); Martinez v. Spartanburg County, 406 S.C. 532, 753 S.E.2d 436 (2014) (citing Bone, 404 S.C. 67, 744 S.E.2d 552 (2013).

of the investigation into the extraordinary and unusual, the Appellate Panel disagreed. The Appellate Panel found "[Martinez] only knew the toddler's father in a 'law enforcement way' as a fellow officer who formerly worked for [Spartanburg County]" and that her "relationship" with Officer Johnson "on the date of the toddler's death was, at most, as an acquaintance (or loosely defined 'friend') of a fellow law enforcement officer." (R. pp. 83 & 85). In support of its decision, the Appellate Panel found:

- Johnson only worked for Spartanburg County for approximately one year, and during that time, Martinez and Johnson were never partners and worked in different zones;
- Johnson left the Spartanburg County Sheriff's Office 2 to 3 ½ years prior to the toddler's death;
- Martinez and Johnson were not close friends;
- Martinez had never socialized with Johnson or been to his house prior to the date of the toddler's death;
- Martinez did not talk to/console Johnson when she arrived on scene on April 4, 2005;
- Martinez had never met Johnson's child, and there was no evidence Martinez had ever seen a picture of his child at any point during the child's life; and
- Martinez was not a friend of Johnson's wife, and Martinez could not recall ever meeting Johnson's wife.

(R. pp. 82-85). The Appellate Panel specifically found Martinez's "fellow law enforcement officer relationship" with Johnson was insufficient to make the investigation in question unusual or extraordinary.[28] (R. p. 83).

With regard to causation, the Appellate Panel again concluded Martinez failed to prove her mental health condition was proximately caused by the work incident on April 4, 2005 and that the proximate cause of her mental breakdown was multifactorial and included the death of her "cousin," the taking of Xanax followed by abrupt cessation, her "overtaking" of Lortab, and

[28] The Appellate Panel noted in its findings of fact that "Although a friendship (something more abiding or meaningful than simply seeing/exchanging pleasantries with someone at work) or a present--or perhaps even former--law enforcement partnership might produce a different outcome with regard to compensability, those circumstances are not applicable in the case before us." (R. pp. 83-84).

her myriad of health issues. (R. pp. 115-116). In support of its decision regarding causation, the Appellate Panel issued over sixty detailed findings of fact. (R. pp. 85-114).

This case was again appealed to the Circuit Court and for a second time heard by Judge Hayes. On December 3, 2015, Judge Hayes issued his Order, again reversing the Appellate Panel. Judge Hayes held that the Appellate Panel erred because it "did not include any of the quoted testimony supporting compensability" and "ignored the case law on compensability cited" in his previous Order. (R. p. 133). However, the Appellate Panel specifically cited to four of the six cases Judge Hayes noted in his prior Order. (*See* R. pp. 75 & 133). Furthermore, in its discussion about mental injuries, the Appellate Panel cited this Court's more recent decision in Bentley,[29] which was issued three years *after* Judge Hayes's first Order. (R. p. 75). Finally, regarding the testimony of the witnesses, the Appellate Panel clearly considered all the testimony and made several findings regarding the testimony of each witness who testified at the hearing. (*See* R. pp. 76-114). Judge Hayes's decision to reverse because certain testimony was not quoted in the Appellate Panel's Order is another example of him going beyond his scope of review and reweighing the evidence.

Importantly, Judge Hayes stated in his second Order, "The only witnesses who testified in this case were Deputy Martinez and Captain Denton, both of whom were law enforcement officers who were found to be credible." (R. p. 138). However, this was clearly erroneous on two grounds. First, Martinez's father and mother also testified at the single commissioner hearing. (*See* R. pp. 290 & 299). Second, and most notably, the Appellate Panel did not find Martinez or Captain Denton credible as Judge Hayes asserted. Instead, the Appellate Panel found the credibility of Martinez's testimony was diminished by the fact she attempted to downplay the

[29] 398 S.C. 418, 730 S.E.2d 296 (2012)

effect of her "cousin's" death.[30] (R. p. 111). The Appellate Panel further found Captain Denton had some interest in the compensability of Martinez's workers' compensation case because he had known Martinez through his sister for years before their law enforcement careers, he helped Martinez secure legal counsel for her workers' compensation claim, and Martinez described him in the medical records as part of her social support system and referred to him at the hearing as "Steve" until being asked by her attorney, "Who is Steve?" (R. p. 110). Judge Hayes's statement that Martinez and Captain Denton were both found to be credible was not only completely inaccurate, but also convincing proof he exceeded his scope of review by making determinations on witness credibility.

In addition, Judge Hayes determined the Appellate Panel's "finding that Deputy Martinez did not have a law enforcement relationship with Johnson is unsupported by the substantial evidence on the whole." (R. p. 139). However, this is completely inaccurate as the Appellate Panel never found Martinez and Johnson did not have a law enforcement relationship. Instead, as previously outlined, the Appellate Panel made multiple findings regarding the nature of their relationship and specifically found Martinez's "fellow law enforcement officer relationship" with Johnson was insufficient to make the investigation in question unusual or extraordinary. (*See* R. pp. 82-85). His decision to remand the case back to the Appellate Panel on an issue that Appellate Panel clearly addressed in its previous Order not only exceeded his scope of review, but also displays the results-oriented nature of his decisions and the unlawful efforts he has made to become the fact finder in this case.

Finally, Judge Hayes also reversed the Appellate Panel's new findings of fact regarding causation. (R. p. 143). Judge Hayes held the Appellate Panel did not have jurisdiction to

[30] As previously outlined, Martinez's "cousin" died two weeks after the April 4, 2005 investigation, and the medical records show that her psychological complaints were initially related to her "cousin's" death, not the toddler's death.

reconsider the issue of causation because his previous Order established causation as a matter of law, and he remanded the case to Commission to enforce his "previous Order ruling that causation was established as a matter of law." (R. pp. 126 & 143). Judge Hayes's decision regarding causation in his December 3, 2015 Order was unlawful because (1) it was based on the improper judicial review he performed when issuing his original order on February 25, 2009 and (2) it was a continuation of his previous errors of improperly weighing of the evidence and making findings of fact.

C. The Circuit Court's July 15, 2019 Order.

After Appellants' appeal to the Court of Appeals was dismissed, again pursuant to Bone, the case was remanded back to the Commission. On August 22, 2017, the Appellate Panel issued its third Decision and Order and specifically noted the instructions from Judge Hayes's December 3, 2015 Order:

> In light of these instructions, and after carefully reconsidering and reviewing the whole record, including but not limited to the testimony of the only witnesses who testified at the Hearing, and cognizant of our role as fact finders, we are unable to reach any other factual conclusions than those that were made in our Decision and Order of February 24, 2015. Because the Circuit Court found that the original Full Commission Order was deficient and not sufficiently detailed in its findings to allow appellate review, the Appellate Panel has complied with the Court's directive. Therefore, based on the entire record, and specifically including the testimony of the witnesses who testified at the Hearing, we make, based on the substantial evidence identified herein, the following findings of fact with our corrections and clarifications.

(R. p. 164). The Appellate Panel again concluded (1) Martinez failed to prove she encountered unusual or extraordinary work conditions in her employment on April 4, 2005 as compared to her normal conditions of employment and (2) Martinez failed to prove her mental health condition was proximately caused by the work incident on April 4, 2005. (R. pp. 191-192).

On July 15, 2019, Judge Hayes issued his Amended Order asserting the Appellate Panel's finding that Martinez had no law enforcement relationship with Johnson must be reversed as unsupported by substantial evidence on the whole record and ordering that "the Commission on remand shall decide whether the tragic and horrific death of the 2 year old infant run over by her police officer father with whom [Martinez] had a law enforcement relationship made the crime scene investigation unusual and extraordinary." (R. p. 221). In addition, Judge Hayes again ordered the Commission to delete all of its findings of fact regarding causation and to "substitute a ruling that the crime scene investigation performed by [Martinez] on April 4, 2005 caused [Martinez's] mental injury as a matter of law based on the unanimous opinions of the medical experts, including [Appellant's] medical expert." (R. p. 220).

Much like his second order, Judge Hayes's July 15, 2019 Order was unlawful since it was based on the improper judicial review he performed when issuing his original order on February 25, 2009 and was a continuation of his improper weighing of the evidence and making findings of fact. Under the guise of stating he had ruled on causation "as a matter of law" and instructing the Appellate Panel to ***delete*** its findings and substitute his ruling on causation, Judge Hayes has essentially made his own findings of fact, which is clearly beyond his appellate review authority.

Judge Hayes has made it abundantly clear that, in his opinion, this case is compensable. On not one, not two, but now three separate occasions Judge Hayes has remanded the case to the Commission. In his most recent Order, Judge Hayes admonished the Appellate Panel against failing "to follow the law and comply with [his] Order," and in what can only be viewed as an attempt to intimidate, Judge Hayes threatened the Appellate Panel with the use of his "powers... to punish for civil or criminal contempt...and to refer offending members of the Commission to the appropriate bodies for judicial or professional sanctioning" for the perceived failure by the

Appellate Panel to conform with his Orders. (R. pp. 217 & 219). Judge Hayes did not remand the claim for further proceedings, additional evidence, or even meaningful review. Instead, he has remanded the case for the Commission to make a different ruling of law on the same facts that have been in evidence since the Commission's first decision thirteen years ago.

This posture and demand by Judge Hayes prejudicially precludes Appellants from any further meaningful re-review by the Appellate Panel. Given his threats, the Commission cannot be reasonably expected to render any decision contrary to Judge Hayes's preordained and unlawful findings, despite its providence to do so. His declaration of criminal, civil, and professional peril against the individual members of the Commission if they fail to abrogate their statutory and ethical obligation to weigh the evidence and determine findings of fact, in favor of the his factual conclusions, deprives Appellants of any reasonable opportunity for a fair review on remand. Threats coerce, coercion compels, and compulsion under threat thwarts due process.

Based on the foregoing, Appellants assert all three of Judge Hayes's Orders reversing the Appellate Panel's Decision and Orders violate Article V, Section 11 of the South Carolina Constitution and Section 1-23-380 because Judge Hayes clearly exceeded his appellate jurisdiction and scope of review by reweighing the evidence, substituting his judgment for that of the Commission's, determine the credibility of witnesses, and making his own findings of fact.

IV.

THIS COURT'S INTERPRETATION OF SECTION 1-23-390 IN BONE V. U.S. FOOD SERVICE, 404 S.C. 67, 744 S.E.2d 552 (2013), OR SECTION 1-23-390 ITSELF, VIOLATES APPELLANTS' EQUAL PROTECTION AND DUE PROCESS RIGHTS.

Section 1-23-380 of the APA governs appeals from the administrative agency to the judiciary and provides that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to

judicial review..." S.C. Code Ann. § 1-23-380 (Supp. 2008).[31] Section 1-23-380 also provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id. However, Section 1-23-390 of the APA, which governs further appellate review within the judiciary, and provides:

> An aggrieved party may obtain review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil case."

S.C. Code Ann. § 1-23-390 (Supp. 2007).

This Court interpreted the meaning of a "final judgment" under Section 1-23-390 in Bone v. U.S. Food Services, 404 S.C. 67, 744 S.E.2d 552 (2013). In Bone, the claimant filed a workers' compensation claim alleging she injured her back while lifting two pallets inside a trailer. The employer denied the claim and asserted she had sustained an intervening injury. The single commissioner found the claimant failed to meet her burden of proving that she had sustained an injury by accident arising out of and in the course of her employment. The claimant filed an appeal to the appellate panel, which affirmed the single commissioner's findings and conclusions in full. The claimant then appealed to the circuit court. The circuit court concluded the evidence showed the claimant sustained a compensable injury, and as such, reversed the decision of the appellate panel and remanded the case to the commission for further proceedings. The defendants appealed to the Court of Appeals, and the claimant moved to dismiss the appeal on the grounds that the circuit court's order was not immediately appealable. The Court of Appeals dismissed the appeal finding the order remanding the matter to the Commission for

[31] Section 1-23-380 was amended in 2006 to provide direct appeals to the Court of Appeals, instead of the circuit court, but the workers' compensation amendment adopting this change (S.C. Code Ann. §42-17-60 (Supp. 2012)) only applies to injuries on or after July 1, 2007, which was after Martinez's alleged accident.

further proceedings did not constitute a "final judgment" and thus was not immediately appealable. The defendants then filed a petition for writ of certiorari, which this Court granted.

On appeal to this Court, the issue was the meaning of "final judgment" under Section 1-23-390. Justice Beatty, writing for the majority, first concluded that the meaning of "final judgment" as used in Section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, S.C. Code Ann. § 14-3-330(1), which grants the Supreme Court appellate jurisdiction of "[a]ny intermediate judgment...involving the merits." The majority defined "final judgment" as "something that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment." As such, the majority affirmed the Court of Appeals decision that the current order remanding the matter to the Commission for further proceedings did not constitute a final judgement as required by Section 1-23-390, and therefore, was not immediately appealable.

While Bone addressed the applicability of the APA and interpreted the meaning of a "final judgment" as used in Section 1-23-390, the Court did not consider workers' compensation employers' and carriers' equal protection rights or their due process rights. As such, Appellants believe the constitutional issues raised in the present case are issues of first impression for this Court.

In the present case, Appellants' current appeal of the Circuit Court's order is governed by Section 1-23-390 since Appellants are seeking further appellate review within the judiciary. However, as discussed in detail below, Appellants contend Bone's interpretation of "final judgment" under Section 1-23-390 violates workers' compensation employers' and carriers' constitutional rights to equal protection and due process, and as such Bone should be overruled.[32]

[32] Appellants acknowledge the role of *stare decisis* within the judicial system as it provides certainty and consistency; however, as this Court has previously noted "There is no virtue in sinning against light or persisting in

Appellants assert this Court should adopt the interpretation of "final judgment" that Justice Hearn provided in her dissenting opinion in Bone, which is that "the test ... to determine whether an appellate decision is a 'final judgment' eligible for further review under Section 1-23-390 is whether the order finally determines an issue affecting a substantial right on the merits." Alternatively, if Bone's interpretation of the meaning of "final judgment" as used in Section 1-23-390 is correct, then the statute itself violates the constitutional rights of employers and carriers to equal protection and due process, and it should be stricken as unconstitutional.

A. *Bone*'s application of Section 1-23-390 to Workers' Compensation Employers and Carriers violates their Equal Protection Right under the law.

Depending on the disposition of the issues by the Circuit Court, and Court of Appeals, Bone's application of Section 1-23-390 creates an impermissible distinction between claimants and defendants, which violates equal protection as provided by Article I, Section 3 of the South Carolina Constitution. First, equal protection is applicable in workers' compensation appellate proceedings. *See* Howard v. Owen Steel Co., 303 S.C. 304, 400 S.E.2d 149 (1991) (analyzing appeals to the Full Commission under equal protection). Therefore, Appellants' equal protection rights extend to the current proceeding.

The equal protection analysis has been set forth in multiple cases:

> The equal protection clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

palpable error, for nothing is settled until it is settled right...There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." Joseph v. S.C. Dep't of Labor, 417 S.C. 436, 451, 790 S.E.2d 763 (2016)(quoting McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012)).

McLeod v. Starnes, 396 S.C. 647, 723 S.E.2d 198 (2012) (Beatty, J., dissenting). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013).

In this claim, Bone requires that opposing litigants in the *same* litigation receive disparate treatment in a workers' compensation appeal. Specifically, in cases in which compensability is disputed, such as the instant case, Bone would *allow* a claimant's appeal when compensability is denied by the Court, but would *deny* defendants an appeal when compensability is decided in the claimant's favor. This inequity is the logical progression of Bone's requirement that the "final judgment" required by Section 1-23-390 be a "final judgment disposing of the *entirety of the action*." Bone, 404 S.C. at 78, 744 S.E.2d at 559.

As contemplated by Bone, workers' compensation claims often require multiple hearings to determine issues and entitlement to certain benefits: compensability, temporary disability, permanent disability, and medical treatment. This Court has recognized that "workers' compensation benefits accrue along a time continuum." Curiel v. Envtl. Mgmt. Services, 376 S.C. 23, 655 S.E.2d 482 (2007). Because of the nature of the benefits available, defining a final judgment as requiring the disposal of the whole action *impermissibly requires* the government to treat a defendant in the claim differently than a claimant. To illustrate, consider the following table in which the defendants to a workers' compensation claim dispute compensability, but the claimant asserts entitlement to benefits.[33] Assume that there is an injury, but the defendants assert a legal defense, such as in the instant case:[34]

[33] The Tables illustrate the prior law, which applies in this case, that required an appeal from the Commission to be made first to the circuit court. Such appeals are now directed to the Court of Appeals for all injuries occurring on or after July 1, 2007. S.C. Code Ann. § 42-17-60 (Supp. 2012).

[34] Appellants (1) deny Martinez's mental injury arose out of unusual or extraordinary conditions of her employment and (2) deny the investigation in question was the proximate cause of her mental injury.

Deciding Body	Standard of Review	Prevailing Party	All issues Decided	Can Aggrieved Party Appeal/Petition for Review?
Single Commissioner	Fact Finder	Defendants	Yes	Yes
Full Commission	De Novo	Defendants	Yes	Yes
Circuit Court	Substantial Evidence / Error of Law	Defendants	Yes	Yes
Court of Appeals	Substantial Evidence / Error of Law	Defendants	Yes	Yes

In the above example, where the defendants prevail at every level, the claimant has every chance to prove the claim, and then to have the claim reviewed by the next reviewing body for errors of law. No one would dispute the fairness of the judicial review as set forth in the above table. However, consider the following table, in which the defendants initially prevail on their legal argument that the claim is not compensable, but the circuit court remands, and, in doing so, makes an error of law:

Deciding Body	Standard of Review	Prevailing Party	All issues Decided	Can Aggrieved Party Appeal/ Petition for Review?
Single Commissioner	Fact Finder	Defendants	Yes	Yes
Full Commission	De Novo	Defendants	Yes	Yes
Circuit Court	Substantial Evidence / Error of Law	Claimant	No	No
Court of Appeals	Substantial Evidence / Error of Law			

The second chart represents what happened in this case. Appellants now assert the Circuit Court, sitting as an appellate court, has made several errors of law. However, even if the Circuit Court has in fact made a clear error of law in Martinez's favor, because of the nature of the proceeding, Bone deprives Appellants of a *reasonably timely* appeal. Timeliness of an appeal notwithstanding, when defendants are required to provide medical treatment and disability benefits until all issues are finally decided by the fact finder, significant deprivation of property arguments arise. (*See* Due Process Argument, *infra.*). Bone's interpretation of Section 1-23-390 essentially requires disparate treatment of litigants to the same workers' compensation claim.

This disparate treatment impermissibly infringes on a fundamental right guaranteed by the South Carolina Constitution: the right to access to the Courts. Article I, Section 9 of the South Carolina Constitution provides that "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." In Rylee v. Marett, the Supreme Court recognized that the right to a speedy remedy includes the right of a speedy appeal.[35]

The inequity of appealability in this case offends the constitutional guarantee in two ways. First, Article I, Section 9 guarantees the right to "every person." Therefore, if the right to court access is guaranteed to every person, it is guaranteed to every person equally. The inequity of the availability of the appeal cannot stand. Second, because the speedy remedy requires a speedy appeal, the equity of the parties should require an appeal of equal speed for both parties. A claimant has access to an immediate appeal; however, under the current construction of Bone, there is absolutely no speedy remedy or appeal for Appellants in the instant case. Moreover, Appellants could be subject to provide disability benefits and medical treatment until the time of maximum medical improvement and a hearing before the Commission to determine all issues. Only at that time are Appellants able to argue that the claim is not compensable for legal reasons that were readily available, and able to be litigated, prior to Appellants' provision of benefits.

Given that disparate treatment required by Bone implicates a constitutional right of access to the Courts, the appropriate equal protection analysis is strict scrutiny. Under the strict scrutiny standard, Bone's construction of Section 1-23-390 cannot stand. Legislation restricting or impairing a fundamental right "is subject to 'strict scrutiny' in determining its constitutionality." In re Treatment and Care of Luckabaugh, 568 S.E.2d 338, 351 S.C. 122

[35] "A lax observance of the very reasonable regulations prescribed by statute and the rules of court for perfecting appeals can but lead to unnecessary delay in the final disposition of causes in our courts, and thus work infringement of the constitutional guaranty (Section 15, Art 1, Const. 1895) that 'every person shall have speedy remedy therein for wrongs sustained.'" Rylee, 121 S.C. 366, 113 S.E. 483 (1922).

(2002) (citing Hamilton v. Board of Trustees, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984)). "To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest." Id. In the instant case, there is no *compelling* state interest. The primary discernable policy interest identified in Bone is "undue delay and waste of judicial resources caused by interlocutory appeals." Conserving judicial resources cannot be compared to a *compelling* interest such as national security, protecting the lives of citizens from threats of harm, etc. A matter of preference is not "compelling" when balanced with defendants' right to have the same appeal right as a claimant. A one-sided bar to appeal is insufficiently tailored to accomplish the stated goal of preventing "undue delay and waste of judicial resources" when there is no data or legislative history indicating that a contemporaneous appeal actually wastes judicial resources. Furthermore, as Justice Hearn specifically noted in her dissent in Bone, "the interests of judicial economy demand a rejection of the majority's view. Taken to its logical conclusion, the majority's position could have cases trapped in a cycle of remands for years." Bone, 404 S.C. at 92, 744 S.E.2d at 566. That is exactly what has happened in the present case. Nearly fifteen years have passed since the date of the alleged accident, and there is still no decision on compensability. Due to the application of Bone, this case has since been stuck in a perpetual cycle of remands, with no end in sight. Accordingly, Bone's interpretation of Section 1-23-390, and its application to Appellants, impermissibly burdens Appellants' constitutional right to a speedy adjudication of the issues.

Moreover, any order denying the right to appeal and subjecting Appellants to an undetermined period of benefit payments burdens a fundamental **property** right:

> [I]t is arguable that this case should be analyzed under the strict scrutiny test as the reduction of a parent's income clearly impinges upon a **fundamental property right**. *See* Wingfield v. S.C. Tax Comm'n, 147 S.C. 116, 152, 144 S.E. 846, 858 (1928) ("The court appreciates the

> earnest plea that every person is entitled to the enjoyment of life, liberty, and property, and to the equal protection of the laws guaranteed by the federal and state Constitutions, and will protect and safeguard these fundamental rights to the extent, if necessary, of declaring invalid any legislative enactment clearly shown to be in violation of them.").

McLeod, 396 S.C. 647, 723 S.E.2d 198 (2012) (emphasis added).

The application of Bone in the present case will clearly deprive Appellants of a fundamental property right. Consider the following:

- Appellants prevailed on compensability before the Commission, but the Commission's decision was reversed by the Circuit Court;
- Under Bone, Appellants are without recourse for immediate appeal, and the case is remanded to the Commission, which will have little choice but to adopt the Circuit Court's improper findings of fact and award benefits to Martinez;
- Appellants are forced to begin payment of temporary total disability benefits at a compensation rate of $462.92 and to provide Martinez with psychiatric treatment with no right of appeal under Bone until a "final judgement" is entered;
- Assume Martinez reaches maximum medical improvement ("MMI") 2.5 years later, and by then, Appellants have paid $60,000 in medical care and prescription drug costs pursuant to the unappealable Order requiring Appellants to provide medical care;
- Following MMI, another hearing is held before the Commission where permanency is determined. Following review by the Appellate Panel, a "final judgement" is finally entered entitling Appellants – for the first time –to a review on the issue of compensability by the Court of Appeals (following review by the Circuit Court);
- Assume further that the case eventually works its way to the Supreme Court, and shortly before oral argument, Appellants pay the 500th week of disability, totaling $231,460.00. Under this plausible hypothetical, Appellants will have paid nearly $300,000 in indemnity and medical benefits before Supreme Court review;
- Finally, following review by this Court, Martinez's claim is determined not compensable and the prior Orders are reversed.

Assuming this case unfolds as above, Martinez will have received a benefit of nearly $300,000, to which she was never entitled. That certainly implicates a significant property right, and, practically, there is no way for Appellants to recover this money through the workers' compensation claim that gave rise to the requirement to pay it. Bone would reason that the Appellants' $300,000 loss is merely the price of judicial economy. That outcome is untenable.

Fundamental rights aside, Bone cannot pass a rational basis test. "To prevail under the rational basis standard, a movant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." Town of Hollywood, 403 S.C. 466, 744 S.E.2d 161 (2013). Appellants assert there is *no legitimate* purpose in providing vastly different appeal rights to claimants and defendants in the *same* litigation. Other cases discussing rational basis review discuss issues such as insurance required to drive on public roadways,[36] regulating relationships between physicians and physical therapists,[37] and regulation of on-site alcohol sales and consumption on a commercial premises.[38] As a generalization, the legitimate purpose test broadly relates to the state's police power in protecting its citizens and promoting public order. Appellants assert there is *no legitimate* interest in parties to the same litigation having different appeal rights, as the appeal rights between two parties have no discernable impact on the public as a whole.

Bone states that depriving defendants of an immediate right to appeal may improve judicial economy by reducing appeals in individual cases. However, the evidentiary basis for this assertion is far from clear. The defendants shoulder the *entire* burden of this scheme, and, in a case like the present one, the state would essentially facilitate a transfer of assets from defendants to a claimant, without qualification of whether and how much this scheme truly impacts judicial economy. Furthermore, depriving a class of litigants of equal appellate access effectively allows a court to decide the outcome of a case regardless of the legality of the decision. In the present case and under the present scheme, the Circuit Court wields absolute, unchecked power. Bone has effectively transferred the fact-finding role of the Commission to one judge, who sits

[36] Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978) (finding contributory negligence statute failed rational basis review and impermissibly classified injured parties).
[37] Joseph v. S.C. Dep't of Labor, 417 S.C. 436, 790 S.E.2d 763 (2016).
[38] Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004)

immune to legal challenge. Whether right or wrong, this scheme has the potential to impugn the neutrality of the judiciary. Accordingly, there is no legitimate state interest, and this statutory interpretation fails a rational basis analysis. Bone's interpretation of Section 1-23-390 offends equal protection and cannot be saved.

B. *Bone*'s Application of Section 1-23-390 Violates the Due Process Rights of Workers' Compensation Employers and Carriers.

Article I, Section 22 of the South Carolina Constitution provides certain rights regarding procedures before administrative bodies:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he **shall have in all such instances the right to judicial review.**

(emphasis added). Judicial review of a workers' compensation proceeding is a constitutional right in South Carolina. The rights provided under Article I, Section 22 extend to the limits of due process. *See* S.C. Coastal Conservation League v. S.C. Dep't. of Health and Envtl. Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). Due process necessarily includes the right to *meaningful* judicial review:

> The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right **to meaningful judicial review.**

Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008) (emphasis added).

No South Carolina case has clearly defined what process is required for "meaningful" judicial review, but other cases discussing "meaningful" point to the *temporal* nature of due process. "The fundamental requirement of due process is the opportunity to be heard 'at a

meaningful time and in a meaningful manner.'" S.C. Nat. Bank v. Central Carolina Livestock Market, Inc., 345 S.E.2d 485, 289 S.C. 309 (1985) (citing Armstrong v. Manzo, 380 U.S. 545 (1965)). In Armstong, a father's parental rights were terminated without any notice to him, although his whereabouts were easily ascertainable. When the subsequent adoption was finalized and the natural father sought to set aside the proceedings, he had multiple burdens of proof placed on him that would not have been placed on him had proper notice been give. The Supreme Court of the United States noted that "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong, 380 U.S. at 552 (internal citations omitted). The Supreme Court held that the father's due process rights were violated because he was not provided timely notice and as a result, additional burdens were placed on him. Id. at 551.

In S.C. Dep't of Social Services v. Wilson, 352 S.C. 445, 574 S.E.2d 730 (2002), there was a litigated allegation of child abuse against the minor's father. The minor requested to testify outside of the presence of the father, over the objection of the father. The father was excluded from the courtroom but could still hear the testimony and had the opportunity to briefly conference with his lawyer prior to cross-examination. However, this Court found that this process did not comport with due process:

> [I]f the child testifies at an intervention proceeding, the due process right to confrontation requires the child testify in the presence of her parent/defendant unless special circumstances are established. Wilson's ability to hear the minor's testimony, discuss her testimony with counsel, and cross-examine her were insufficient to satisfy due process without the determination the minor would be traumatized by testifying in her father's presence. As conceded by DSS at oral argument, the minor was the key witness against Wilson and she may have been less credible if she had testified in his presence. Because Wilson did not have the opportunity to be heard in a meaningful manner, his due process right was violated.

Id. 352 S.C. at 458, 574 S.E.2d 730.

Armstrong illustrates meaningful (temporal) notice, and Wilson illustrates meaningful (temporal) opportunity to be heard. Therefore, the right to meaningful judicial review must include contemporaneity. This temporal requirement is reflected in Section 1-23-380, the companion statute of Section 1-23-390: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. 1-23-380. Looking at the plain language of 1-23-380, the provision for immediate appeal is provided when an appeal after the passage of time is not adequate. The policy embedded in Section 1-23-380 is what Appellants' seek here.

Appellants are further burdened because the application of the standard of review changes. The Appellate Panel issued its final order concluding Martinez did not sustain a compensable mental injury under the Act and that the proximate cause of her mental condition was not the investigation in question. Since the Appellate Panel's Order finally decided compensability, the issue on appeal should be whether substantial evidence supports the Commission's findings that Martinez did not sustain a compensable injury. However, if the appeal in this claim is deferred and the Appellate Panel is forced to adopt the unlawful "findings" of the Circuit Court and issue an Order finding the claim compensable, then the issue on appeal in the future becomes whether substantial evidence supports the Commission's findings that Martinez sustained a compensable injury. This clearly places an additional burden on Appellants. *See* Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999)(the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence).

Bone's interpretation of Section 1-23-390 violates Appellants' due process because it allows for potential of forcing them to pay benefits over the course of several years before

having a meaningful opportunity to be heard on appeal and because it changes the ultimate question on appeal once the case is finally before an appellate court.

C. Given the perpetual cycle of remands, Appellants are left without an adequate remedy on appeal from a final judgement under Section 1-23-390.

In reality, there is a final decision in this case. Despite Judge Hayes's continued reversals and remands, which Appellants maintain are unlawful, the Appellate Panel has repeatedly insisted that it has complied with the Circuit Court's directive. Most recently, the Appellate Panel specifically stated that "cognizant of our role as fact finders, we are unable to reach any other factual conclusions than those that were made in our Decision and Order for February 24th, 2015." (R. p. 164). At this point, the parties are trapped in a perpetual cycle of remands.

This case is analogous to this Court's recent decision in Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019). In Russell, this Court held that "repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers' Compensation Act" and left the claimant without an adequate remedy on appeal from a final decision under Section 1-23-380. As such, this Court held that a remand order from the Commission was immediately appealable. Appellants acknowledge that Russell dealt with an appeal under Section 1-23-380 and remands by the Commission, and not Section 1-23-390 and remands by the circuit court. However, Appellants contend that the same reasoning applied in Russell should be applied to the present case – and any other case where an appeal may fall under Section 1-23-390. If continuous remands and appeals over an eight-year period in Russell frustrated the goals of the Act, then it is more than obvious that those same goals are frustrated in the present case. leaving Appellants with no recourse or method to appeal.

While the Court in Bone held that the defendants had an "adequate remedy" because they could raise the issue of compensability on appeal from a final award from the Commission, that

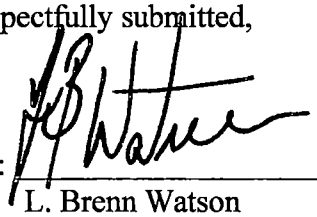
remedy is simply non-existent in this case. Despite the Circuit Court's attempts to unilaterally find the case compensable, the Appellate Panel has consistently held – with detailed findings supporting its decision – that it does not believe this case is compensable. This is clearly the Appellate Panel's final decision/judgment. Appellants only adequate remedy to challenge the Circuit Court's improper appellate review is to appeal the case to a higher court. By continually remanding a case back to the Commission, a circuit court judge, who wants a denied case found compensable, can continuously break the chain of appealability and can set an impenetrable bar to defendants having immediate access to a higher court for review of the lower court's improper appellate review. This is unconscionable, but it is exactly what has happened in this case.

Appellants assert Bone's interpretation and application of Section 1-23-390 violates the due process and equal protection rights of workers' compensation defendants *as a whole*. However, assuming arguendo that Bone's interpretation of Section 1-23-390 is not unconstitutional on its face, its application in the present case violates Appellants' due process and equal protection rights. The decision in Bone, and its application in this case, has locked this case into a continuous cycle of remands, prevented Appellants – as well as Respondent – from obtaining any type of finality, and spoiled any possible interest in judicial economy.

CONCLUSION

For the reasons stated above, Appellants respectfully ask the Court to reconsider this Court's previous decision in Bone and its application to the present case, and issue a decision holding: (1) the Circuit Court has repeatedly exceed its scope of review, (2) these errors nullify the Circuit Court's prior Orders, and (3) substantial evidence supports the Commission's consistent decision to deny the claim on the grounds that Martinez did not encounter an unusual or extraordinary condition in her particular employment on April 4, 2005 and that the events of April 4, 2005 did not proximately cause Martinez's mental condition.

Respectfully submitted,

BY: 

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