

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

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WCC File No. 0810152

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Patricia Fore, Employee ..... Appellant,

v.

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

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**RETURN IN OPPOSITION TO MOTION TO STRIKE**

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Appellant, Patricia Fore, hereby files her Return in Opposition to Respondents' Motion to Strike portions of her brief.

The basis for Respondents' Motion is that the Brief of Appellant and Record on Appeal refers to proffered testimony. There is no legal basis for striking proffered testimony from the Record on Appeal. If that were the case, then the appellate courts could never review the propriety of a trial court evidentiary rulings. The whole point of making a proffer of testimony is to preserve the issue for appellate review. See State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984) (failure to make an offer of proof precludes consideration of an issue on appeal); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979) (a reviewing court may not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been).

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Furthermore, without a proffer, the appellate court would be unable to determine whether the Appellant suffered prejudice from the Commission's evidentiary rulings. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (where there was no proffer of excluded testimony, the court was unable to determine whether complaining party was prejudiced by the refusal to admit the testimony into evidence).

The rules on proffered testimony apply to workers' compensation hearings in the same manner as the trial courts. See Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 498, 494 S.E.2d 630, 636-7 (1997). In Smith, this Court specifically found that a workers' compensation commissioner refusal to hear proffered testimony was prejudicial and remanded for additional testimony – including the option of a *de novo* hearing. The cases are similar in that the hearing commissioner was more concerned with shortening the hearing than with the rights of the parties. [Exhibit 2; Transcript Tr. page 68, lines 5-16].

This Court is reviewing the Decision and Order of the Appellate Panel. True to its name, the Appellate Panel sits as an appellate tribunal. In so doing, it reviews the entire record below – including proffered evidence. See Midlands Utility, Inc. v. South Carolina Dept. of Health and Environmental Control, 339 S.E.2d 862, 287 S.C. 483 (1986) (“In denying the request to submit testimony, the judge very properly allowed a proffer of evidence which has been made a part of the record.”).

The record shows Tony Owens was called as a witness. The Single Commissioner sustained Respondents' objection to his testimony, at which point Appellant made a proffer of his testimony. [Exhibit 2; Transcript page 65, line 3-page 69, line 7]. The transcript confirms that Owens' testimony was transcribed and made part of the record. [Exhibit 2; Transcript page 2; Exhibit 4].

The refusal to allow Owens to testify is a central issue in this appeal. The Statement of Issues on Appeal states:

Whether the Single Commissioner erred as a matter of law in excluding the testimony of Tony Owens, as such testimony was essential to rebut the incredible and biased testimony of Steve McGowan – the witness whose identity was provided to the Respondents by a Director of the Commission in an improper *ex parte* communication. [Brief of Appellant, page 2].

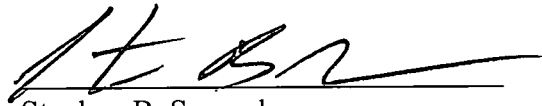
Exclusion of the proffered testimony would be incredibly prejudicial to Appellant, as well as precluding the Court's ability to rule on the issue.

As to the specifics of striking portions of Appellant's Brief, the testimony referenced is clearly delineated as proffered testimony. The Court needs to know what that testimony is and in what contest it applies; otherwise it would be unable to determine the prejudicial impact of the Commission's ruling. See Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 498, 494 S.E.2d 630, 636-7 (1997) ("the improper exclusion of testimony by the single commissioner amounted to an error of law that deprived Smith of his right to present his case and deprived the Commission of the evidence it needed to make its findings of fact.").

The evidence at issue was properly proffered. It is a basic rule of appellate procedure that proffered testimony must be made part of the Record on Appeal to preserve the issue. This Court (and the Appellate Panel) have the authority to consider proffered testimony in reviewing the decision below. Therefore, the Motion should be denied.

[Signature Page Follows]

Respectfully Submitted,



Stephen B. Samuels  
SAMUELS LAW FIRM, LLC  
1320 Richland Street  
Columbia, SC 29250  
(803) 779-4000

Peter P. Leventis  
McKAY, CAUTHEN, SETTANA &  
STUBLEY, P.A.  
P.O. Box 7217  
Columbia, SC 29211  
(803) 256-4645

ATTORNEYS FOR APPELLANT

Columbia, South Carolina  
April 29, 2013

# **Exhibit 4**

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
COLUMBIA, SOUTH CAROLINA  
WCC FILE NO. 0810152

 COPY

EMPLOYEE/CLAIMANT: PATRICIA FORE

EMPLOYER: GRIFFCO OF WAMPEE, INC.

INSURER: COMMERCE & INDUSTRY INSURANCE COMPANY

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SOUTH CAROLINA WORKERS' COMPENSATION HEARING

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PROFFERED TESTIMONY OF TONY LEE OWENS

JAN L. WHITWORTH  
VERBATIM REPORTER

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JAN L. WHITWORTH  
COURT REPORTING SERVICES  
POST OFFICE BOX 551  
ROEBUCK, S.C. 29376

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1 BY THE COURT REPORTER:

2 SIR, IF YOU COULD RAISE YOUR RIGHT HAND.

3 \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*

4 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE  
5 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE  
6 MATTER HEREIN:

7 TONY LEE OWENS

8 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

9 BY THE COURT REPORTER:

10 WOULD YOU STATE YOUR FULL NAME FOR THE RECORD.

11 BY THE WITNESS:

12 TONY LEE OWENS.

13 BY THE COURT REPORTER:

14 OKAY, THANK YOU.

15 DIRECT EXAMINATION BY MR. SAMUELS:

16 Q. MR. OWENS, JUST SO YOU UNDERSTAND, YOU'RE GOING TO  
17 TESTIFY AS IF THE COMMISSIONER WAS HERE, BUT HE HAS  
18 OBJECTED OR HE SUSTAINED MR. LICHTY'S OBJECTION TO  
19 YOUR TESTIFYING, AND WE ARE GOING TO HAVE YOU  
20 TESTIFY OUTSIDE THE PRESENCE OF THE COMMISSIONER.  
21 BUT YOU ARE STILL UNDER OATH. IT WILL BE LIKE  
22 REGULAR TESTIMONY. DO YOU UNDERSTAND?

23 A. NO, NOT REALLY, BUT OKAY.

24 Q. ARE YOU THE OWNER OF A-1 BAIL BONDS?

25 A. YES.

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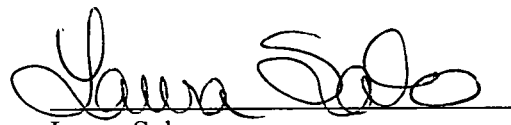
**PROOF OF SERVICE**

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I certify that I am paralegal to Stephen B. Samuels and I have served the **Return in Opposition to Motion to Strike** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **April 29, 2013**, addressed as follows:

James H. Lichty, Esquire  
Weston Adams, III, Esquire  
Attorneys for Respondents  
McAngus Goudelock & Courie  
Post Office Box 12519  
Columbia, South Carolina 29211

Helen F. Hiser, Esquire  
Attorney for Respondents  
McAngus Goudelock & Courie  
Post Office 650007  
Mount Pleasant, SC 29465

  
Laura Sabo

Columbia, South Carolina  
April 29, 2013

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