THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee,.....Appellant,

v.

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

REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF INITIAL BRIEF OF APPELLANT AND FOR CORRECTION OF APPELLANT'S DESIGNATION OF MATTER

Pursuant to Rules 208, 210 and 240, SCACR, Respondents Griffco of Wampee, Inc. and Commerce and Industry Insurance Company, c/o Chartis Claims, Inc. file this Reply in Support of their Motion to Strike Portions of Initial Brief of Appellant and for Correction of Appellant's Designation of Matter.

First, Appellant's Return in Opposition to Motion to Strike ("Return") should not even be considered by this Court, as Appellant failed to file it by the due date. Respondents filed their Motion to Strike on April 15, 2013. Pursuant to Rule 240(e), SCACR, Appellant's Return was due ten (10) days after the date of service of the Motion, in this case on April 25, 2013.[1] Appellant did not seek an extension of time in which to file her Return and she provided no explanation whatsoever

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[1] Under Rule 263(a), SCACR, weekends and holidays are only excluded for time periods shorter than seven (7) days. Under Rule 262(b), SCACR, service is complete upon mailing. Finally, Rule 263(a), SCACR, provides in pertinent part that, "[n]o additional time shall be allowed by reason of service by mail..."

of why she missed deadline to file her Return. Therefore, this Court should disregard her Return altogether.

In the event this Court does consider the substance of Appellant's Return, and out of an abundance of caution, Respondents reply to her Return as follows:

First, Appellant mistakes Respondents' arguments. Respondents do not take issue with the fact that she proffered Mr. Owens' testimony below or the requirement that the same be preserved in order to challenge the exclusion on appeal. She was entitled to, and in fact required to proffer this evidence if she wanted to raise this issue on appeal. What she cannot do, however, is cite to, rely on and direct this Court to consider the proffered testimony as though it was part of the Record below. It was not. (Exh. 2) (Exh. 6) (Exh. 7) (Exh. 8). As noted in Respondents' Motion, an appellate court cannot review or rely on evidence not considered below. City of Greenville v. Bryant, 257 S.C. 448, 453, 186 S.E.2d 236, 238 (1972); *see also* Rules 208(b)(4) and 210(c), SCACR. In addition, Section 1-23-380 specifies that appellate review "must be confined to the record." S.C. Code Ann. § 1-23-380(4).

In the event that this Court decides that Mr. Owens' testimony should have been included in the Record, which Respondents strenuously oppose, the only appropriate outcome would be for this Court to remand this matter to the Commission for consideration of Mr. Owens' testimony in light of the existing Record. It is not appropriate for Appellant to incorporate the substance of Mr. Owens' as part of her appellate arguments. In fact, in her Initial Brief to this Court, Appellant sought precisely that: a remand in order to have the Commission (or Circuit Court) hear the testimony of Mr. Owens. (Exh. 5). What she cannot do on appeal is have this Court consider the substance of Mr. Owens' testimony and make factual findings based on it, since it was not included in the Record before the Commission and, in any event, fact finding is not a proper role for an appellate forum.

Of the sections of Appellant's Brief that Respondents seek to have stricken, only the passage on page 37 pertains to Appellant's argument regarding whether Mr. Owens' testimony was improperly excluded. Because the portion on Page 37 of Appellant's Brief is part of her argument that Mr. Owens' proffered testimony should have been considered by the Commission, Respondents withdraw their objection to that paragraph, and to that paragraph only. As a result, Respondents hereby amend their Motion to Strike and move that the following be stricken from Appellant's Initial Brief:

1. Page 10, first full paragraph;

2. Page 27, the sentence starting on the fourth line down from the top of the page, that begins with, "Owens himself testified ..." and through the first full paragraph on that page, ending right before the beginning of Appellant's argument 2.A.

3. Page 28, the words "both" and "and Tony Owens" from the sixth line from the beginning of the paragraph starting "The mere fact Fore helped out ..."; and,

4. Page 34, the last full sentence of the first full paragraph.

Respondents also continue to object to any attempt by Appellant to include the proffered testimony in the Record on Appeal in this case for any purpose other than this Court's review of the issue of whether it was properly excluded or not.

Second, Appellant relies on Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997). The holding in Smith, however, was limited to "the particular circumstances of this case ...," 329 S.C. at 497, 494 S.E.2d at 636, and is readily distinguishable from the present case. First, in Smith, there was no indication that any of the witnesses who were not allowed to testify had not been properly and timely noticed. Thus, there was absolutely no justification for the exclusion of the witnesses. Second, in Smith, after two hours of testimony, the single commissioner simply and arbitrarily refused to allow any additional witnesses to testify. He merely stated that much of the testimony that had been

elicited had been "irrelevant or immaterial ..." Id. Third, because the claimant himself apparently had not yet testified, the single commissioner then proceeded to question the claimant but did not allow either the claimant's counsel or defense counsel to ask any questions. Id. Finally, the medical evidence the single commissioner relied on was over two years old at the time of the hearing. Smith, 329 S.C. at 499, 494 S.E.2d at 637. Here, by way of contrast, the only witness who was excluded was not timely noticed, with no good excuse as to why he had not been timely noticed. Here, all of the timely noticed witnesses were allowed to fully and completely testify, and there was no indication that the evidence put forth at the hearing was irrelevant or immaterial. In addition, here Appellant was allowed to testify fully, with proper direct, cross and re-direct examination by counsel for both sides. Finally, the testimony and evidence in this case was recent, and not out of date and, therefore, fully supports the Commission's Decision. The Single Commissioner clearly and properly excluded Mr. Owens' testimony because he was not timely noticed. *See* (Exh. 2).

Third, Appellant argues that, as an appellate forum, the appellate panel of the Full Commission reviewed the entire Record, including the proffered testimony of Mr. Owens, and that his testimony has, therefore, become part of the Record. However, as she is doing before this Court, she argued to the Full Commission that the testimony of Mr. Owens should be considered and made part of the Record, which the Commission clearly denied. (Exh. 6) (Exh. 7 at p. 6) (Exh. 8 at p. 7). Thus, the Full Commission – regardless of whether they reviewed it in order to determine whether it should be admitted into the Record – did not accept or rely on the proffered testimony of Mr. Owens.

Finally, Appellant misconstrues what was done in Midlands Util. v. South Carolina Dept. of Health & Envt'l Control, 287 S.C. 483, 339 S.E.2d 862 (1986). In Midlands, the issue was

whether the Circuit Court appropriately upheld the Department's denial of a stay of its order requiring extensive construction. The record before the Department had not been prepared and transmitted to the Circuit Court pursuant to S.C. Code Ann. § 1-23-380(d) at the time the motion was decided because the 30 days allowed for transmitting the record had not run. Because there was no record, the utility apparently wanted to call some or all of the witnesses who had testified at the Department hearing. The judge denied this request but, as an alternative, allowed a proffer of the evidence which then became part of the record. 287 S.C. at 486-487, 339 S.E.2d at 864. Thus, Midlands did not deal with proffered testimony of a late-noticed or excluded witness; instead, it was an attempt to recreate the record which simply had not yet been prepared and transmitted from the agency to the reviewing court.[2]

In the end, it is nonsensical to suggest that a party whose late-noticed witness is excluded, can simply appeal the decision to exclude and then use the substance of the proffered testimony as though it really was part of the record all along. In the unlikely event that this Court overturns the Commission, which exercises broad discretion over whether to include or exclude witnesses, *see, e.g.*, McGaha v. Mosley, 283 S.C. 268, 275-276, 322 S.E.2d 461, 465-466 (Ct. App. 1984), and holds that Mr. Owens' testimony should have been considered, then this case must be remanded for the Commission to evaluate the proffered testimony. Unless and until that time, Appellant simply cannot rely on the substance of Mr. Owens' testimony in her Brief.

CONCLUSION

As stated in their Motion and amended herein, Respondents request that this court strike the references to Mr. Owens' proffered testimony, and order that the only purpose for which the

[2] The Court noted that the Circuit Court also could have received affidavits on the issue but none had been submitted. 287 S.C. at 487, 339 S.E.2d at 864.

proffered testimony may be included in the Record on Appeal is to determine whether it was properly excluded by the Commission.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

Weston Adams, III
Meridian 10th Floor
1320 Main Street
PO Box 12519
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

Attorneys for Respondents

May 1, 2013

Exhibit 5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0810152

Patricia Fore, Employee ..... Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1527 Blanding St.
P.O. Box 50349
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Peter P. Leventis
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.
1303 Blanding St.
Columbia, SC 29201
(803) 256-4645
pleventis@mckayfirm.com

ATTORNEYS FOR APPELLANT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 6

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION FULL COMMISSION
WCC No. 0810152

Patricia Fore, Claimant/Appellant, v. Griffco of Wampee, Inc., Employer/Respondent, and Commerce & Industry Insurance Co., Carrier/Respondent.	)

FULL COMMISSION HEARING

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Monday, June 18, 2012
3:54 p.m. - 4:34 p.m.

The Full Commission Hearing before Commissioner T. Scott Beck; Commissioner Gene McCaskill; and Commissioner Derrick Williams, Chair, was taken at 1333 Main Street, Suite 500, Columbia, South Carolina on the 18th day of June, 2012 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES:

Stephen B. Samuels, Esquire
Samuels Law Firm, LLC
Post Office Box 50349
1527 Blanding Street
Columbia, South Carolina 29201
Attorney for the Claimant/Appellant

Peter P. Leventis, IV, Esquire
McKay, Cauthen, Settana & Stubley, PA
Post Office Box 7217
1303 Blanding Street
Columbia, South Carolina 29201
Co-counsel for the Claimant/Appellant

James H. Lichty, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 12519
Meridian, 10th Floor
1320 Main Street
Columbia, South Carolina 29201
Attorney for Defendants/Respondents

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Claimant's permanent partial impairment rating or her level of disability, but rather whether or not it was an insurance fraud case.

COMMISSIONER BECK: What tainted it?

MR. LEVENTIS: The first that the Employer/Carrier heard about -- heard about the allegations of insurance fraud were in the responsive APA submissions. This was said on a Form 50, the responsive APA submissions.

They did amend their APA's to provide a rebuttal witness who his testimony was proffered. Now, would -- that's one of the things that's on appeal is that Mr. Tony Owens' testimony be included.

And part of the reason I think that's the case is because the medical evidence is unrefuted, that she had a failed surgery, a two-level fusion in her lumbar spine, was awarded 20 percent whole person impairment, not refuted by another physician. And this was based on the fact that she had a nonunion in her spine. So I think that the credibility of the Claimant --

COMMISSIONER BECK: I assume the document you're talking about was an unsolicited call coming into our coverage folks --

MR. LEVENTIS: Subsequent to that, in 2011, after coming back out of work at the doctor's behest -- which I would argue is minimal work at best, and that's corroborated not only by the proffered testimony of Tony Owens, which I would strongly request be permitted for review of the Panel, but also the fact that during that time period -- what she did was, she was a bail bondsman and signed 19 bonds -- the court records have been provided -- which is very minimal work and, arguably, should not even receive any proceeds for that, I would say --

COMMISSIONER WILLIAMS: Your three minutes are up. Mr. Lichty?

COMMISSIONER BECK: I got one more question.

COMMISSIONER WILLIAMS: Okay. Go ahead.

COMMISSIONER BECK: The relief on the alleged ex parte, what are you asking us to do with that here today?

MR. LEVENTIS: That, Your Honor, would be to vacate the -- vacate the Single Commissioner's order and have it reset before either -- I mean, some examples were mentioned, but the same way it would be, for instance, perhaps, if a

Exhibit 7

APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0810152

PATRICIA FORE — EMPLOYEE, CLAIMANT/APPELLANT

VS.

GRIFFCO OF WAMPEE, INC. — EMPLOYER,

AND

CHARTIS CLAIMS, INC., — CARRIER, DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina, on June 18, 2012, per notices timely And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

8/27

APPEARANCES: Claimant/Appellant represented by Peter P. Leventis, IV, McKay Cauthen Settana & Stubley, PA, of Columbia, South Carolina and Stephen B. Samuel, Esquire of Columbia, South Carolina.

Defendants/Respondents represented by James H. Lichty, Esquire of McAngus Goudelock & Courie, LLC of Columbia, South Carolina.

STATEMENT OF CASE

This matter was heard before Commissioner G. Bryan Lyndon on September 27, 2011, in Myrtle Beach, South Carolina. On January 18, 2012, he issued the following Order:

> **IT IS HEREBY ORDERED** that the greater weight of evidence supports a finding that Claimant suffered an admitted injury by accident to the back. Claimant's injury resulted in a forty percent (40%) disability to the back.
>
> **IT IS HEREBY ORDERED** that the greater weight of evidence supports a finding that the Defendants are entitled to credit for overpayment of temporary total benefits from the date of maximum medical improvement, February 14, 2011 at a rate of $299.59 and credit for any wages earned while paying benefits during the prior disability period.
>
> **IT IS HEREBY ORDERED** that Defendants shall furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary.

By Form 30, Claimant submitted the following exceptions to the Single Commissioner's Findings of Fact and Conclusions of Law:

1. Whether the Single Commissioner erred as a matter of fact and law in denying Claimant's Motion for the Commission to recuse itself on the grounds that the Commission engaged in improper ex parte contact with Defendants in violation of the *Code of Judicial Conduct,* Canon 3 B (7) and others, by instructing the Attorney General's Office to forward a letter from the Commission's Compliance Director to the Defendants without copying the same to Claimant.

2. Whether the Single Commissioner erred as a matter of fact and law in failing to make specific findings for his refusal to recuse himself and the Commission, such refusal being an abuse of discretion mandating a new trial before an impartial and unbiased tribunal.

3. Whether the Single Commissioner erred as a matter of fact and law in

denying Claimant's Motion to exclude the ex parte letter from the Commission's Compliance Director on the ground that said letter:

A. Contained prejudicial ex parte communication between the Commission and a witness in a pending case;
B. Contained inadmissible hearsay;
C. Was more prejudicial than probative;
D. denied the Claimant the opportunity to conduct meaningful discovery to rebut evidence Defendants were able to develop without Claimant's knowledge based on the improper ex parte communication between the Commission and Defendants; and
E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.

4. Whether Claimant was denied a fair trial due to:

A. the Single Commission's refusal to recuse the Commission;
B. the admission and reliance on an improper ex parte communication between the Commission and Defendants;
C. the improper ex parte communication itself which denied the Claimant the opportunity to conduct meaningful discovery to rebut evidence Defendants were able to develop without Claimant's knowledge based on the improper ex parte communication between the Commission and Defendants;
D. allowing Defendants to improperly admit incompetent evidence of a potential criminal investigation initiated by the Commission, such evidence being unduly prejudicial, irrelevant, unsupported and offered for the improper purpose of intimidating and threatening Claimant; and
E. the Commission's Compliance Director's characterization of the instant case as "insurance fraud" which prejudicially tainted the entire proceeding resulting in an arbitrary decision based on bias, prejudice, passion and caprice rather than being founded on the evidence.

5. Whether the Single Commissioner erred as a matter of fact and 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 Defendants by a Director of the Commission in an improper ex parte communication.

6. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant sustained a loss of greater than 50% use of her back when the objective evidence of an undisputed 36% impairment rating, non-union of her surgery; and

permanent out of work restrictions by the authorized treating physician mandate such a result.

7. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant is permanently and totally disabled under § 42-9-30 based on the presumption of disability for greater than 50% loss of use of the back combined with her demonstrated inability to perform gainful employment in a competitive marketplace.

8. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant is permanently and totally disabled under § 42-9-10 based on her failed work attempt; unrefuted expert vocational opinion of Glenn Adams opining she is totally and permanently disabled; her testimony about her inability to sustain gainful employment; and Dr. Wolgin's opinion that she is to remain out of work indefinitely.

9. Whether the Single Commissioner erred as a matter of fact and law in the finding wherein, "I do not find her a credible witness and believe she can work," such finding being unsupported by the evidence and an application of an incorrect legal standard for determining disability.

10. Whether the Single Commissioner erred as a matter of fact and law in granting Defendants credit for overpayment past the date of MMI when:

    A. Defendants waived any claim for overpayment by their failure to submit a Form 17 to Claimant or to file a Form 21;
    B. Defendants are estopped from any claim for overpayment by their failure to submit a Form 17 to Claimant or to file a Form 21;
    C. Any credit for overpayment would be inequitable; and
    D. Claimant remained disabled at the time of the hearing and remains totally disabled.

11. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant worked an average of 30 hours per week for Al Bonding when such finding is unsupported by the evidence.

12. Whether the Single Commissioner erred as a matter of fact and law in assigning any weight to the testimony of Steve McGowan, and in failing to find McGowan was not a credible witness, when:

    A. McGowan admitted to engaging in tax fraud;
    B. McGowan blatantly lied about his conversation with a Director of the Commission denying on the record that any such conversation took place; and
    C. McGowan exaggerated, lied and displayed obvious bias with an intent to do

demonstrative harm both to Claimant and to his small-town business rival, Tony Owens.

13. Whether the Single Commissioner erred as a matter of fact and law in permitting Defense Counsel to add additional self-serving and inaccurate findings regarding credibility when the Commission's Preferences prohibit attorneys from making credibility findings in proposed orders unless explicitly instructed to do so by the Commission.

14. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant provided inaccurate information to her vocational assessor when she explained that Adams asked her to "guesstimate" and she gave him a "ballpark round figure." (Tr. at 59, APA at 98).

15. Whether the Single Commissioner erred as a matter of fact and law in finding Claimant "worked" for A 1 Bail Bonds when the only evidence is that she:

A. Helped out Tony Owens when he was in poor health by processing 19 bonds over a seven-month period for which she received no pay;

B. Found a replacement for herself because she was unable to engage in even that limited level of employment; and

C. Any work she might have done (even if she had been paid) was of such a *de minimus* level that it would not change the fact of her inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."

16. Whether the Single Commissioner erred as a matter of fact and law in making an award under the medical model when the *Doctrine of Most Munificent Remedy* mandated an award for total and permanent loss of earnings capacity.

17. Whether the Single Commissioner's Decision and Order should be vacated and the case set for a de novo hearing before an impartial trier of fact.

STANDARD OF REVIEW

In appellate review, the Panel shall, pursuant to S.C. CODE ANN. §42-17-50 review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and Conclusions of Law. The final determination of witness credibility and the weight to be accorded evidence in workers' compensation cases is

reserved to the Full Commission. Etheridge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (S.C.App 2002). After careful review in the instant case, the Commission affirms, with amendment, the Single Commissioner's Order of January 18, 2012, and issues the following Findings of Fact and Conclusions of Law and Final Order as the final determinations of the Commission.

FINDINGS OF FACT

Based upon the testimony and exhibits submitted, the Appellate Panel of the South Carolina Workers' Compensation Commission makes the following findings of fact:

1. Claimant injured back in an admitted work-related accident on February 24, 2008. The injury affects the left hip/leg (See Order of October 13, 2009.)
2. Defendant to pay all causally related authorized medicals.
3. Claimant had a two level fusion which was not successful. There is a non-union and Claimant is a candidate for another surgery; at present she chooses not to have the surgery.
4. Claimant testified that she attempted to work within her restrictions. Claimant stated she worked about 20 hours per week for $8.00 per hour. Claimant worked until January 2011 and stated she was unable to work anymore.
5. Claimant was placed at MMI on February 14, 2011, given a 36% impairment rating with restrictions of "unable to return to work" (APA 2 at 76).
6. Claimant stated she helped Tony at A1 Bail Bonding for about a month with bonding and according to Exhibit #1 worked a limited amount of time. She got another person to help because she physically was unable to meet the demands of the job.

7. Claimant stated she had earned money in spite of denying this in her deposition. She further stated that in order to keep her mind occupied she participated in social media.

8. Claimant admitted she was helping Tony but denied that she received any pay. This was for the same job she did prior for which she did receive pay. Claimant stated that she said she was not working in her deposition in May 2011, because she did not consider what she was doing work.

9. A surveillance photograph from September 2011 shows Claimant's vehicle with an advertisement on the back window promoting A-1 Bail Bonds with a 24 hour contact number. (Exhibit 4).

10. As of September 19, 2011, Claimant's Facebook profile showed that her employer was "Self Employed and Loving It!" as a Professional Bondsman in Leesburg, Georgia. It states, "bond you out of jail if you need me call me." (Exhibit 7).

11. Claimant stated she had received no certifications in her depositions but she did in fact have training as a bondsman. (Exhibit 5).

12. Claimant stated she could work as long as she did not have to bend over or do lifting. There was conflicting testimony as to what Claimant said she was working and what reports indicated she could work. The surveillance footage also showed Claimant squatting, bending, and lifting in a manner well-exceeding her self-reported limitations.

13. Claimant indicated to Dr. Wolgin that she took over as the primary caregiver for a toddler and engaged in regular bending, lifting, and twisting. He indicated he was concerned these activities could be exacerbating her symptoms.

14. Claimant stated she recruited a person to work for Tony who was paid. Claimant stated she did the same job but got no pay. She stated she did this because she felt sorry for Tony.

15. A witness for the Defendant, Mr. McGowan stated Claimant is currently working for another company and he took a video of Claimant in the jail house with a file in her hand bailing out someone.

16. Mr. McGowan estimated that Claimant worked for him from August 2010, to January 2011. He knew Claimant's husband and hired Claimant. Witness stated Claimant was good with computers and eventually got a certification for her license to write bail bonds. (Exhibit 5).

17. Witness stated Claimant left because she needed more hours and he paid her $8.00 per hour up to 30 to 40 hours per week. She averaged about 30 hours.

18. Based on this testimony and the Claimant's, I find Claimant did work for A1 Bail Bonding and provided an inaccurate account to her vocational assessor regarding the length of time she was employed with ABC, the amount she was paid per hour, and the amount of hours she was able to work.

19. The Claimant failed to disclose her second job with A1 Bail Bonding to her vocational assessor and at her deposition. Clearly a vocational assessor uses self-reported earning capacity, low hours, and meager recent work history as evidence to conclude that no viable employment was available.

20. Compensation Rate: $299.59.

21. After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work.

22. Defendant to receive credit for all wages paid during the disability period and a credit for temporary total disability benefits paid following maximum medical improvement on February 14, 2011.

23. Claimant to have lifetime replacement of any hardware.

24. There is no evidence of *ex parte* communication in this case. In this case, the communication complained of was a letter sent from the Commission to the Attorney General's office, noting that an allegation of fraud had been reported. The Attorney General's office then sent this communication to the insurance carrier. The Commission did not ever send this correspondence to either party. As the Commission did not send this correspondence to either party, there can be no argument that the Commission improperly initiated, permitted, or considered any *ex parte* communication or that the Single Commissioner improperly allowed any *ex parte* communication into evidence.

25. There is no evidence the Single Commissioner even considered the letter from the Commission to the Attorney General in reaching his decision, providing further basis for affirming the award of the Single Commissioner. There are no findings of fact, conclusions of law, or anything in the order section which even reference this letter. We would be speculating that the Single Commissioner was somehow prejudiced or tainted by reading this document, which was simply a transmittal of information to the Attorney General's office as required by the statute. Moreover, this Appellate Panel does not rely on any information contained in the letter from the Commission to the Attorney General in affirming, with amendment, the award of the Single Commission.

26. There is no evidence to suggest the Claimant did not receive a fair and impartial hearing before the Single Commissioner. The Claimant's grounds for asserting an unfair hearing stems from the argument the Single Commissioner refused to recuse the entire Workers' Compensation Commission from hearing the case because of improper *ex parte* communication. As no *ex parte* communication is found to exist in the matter, and as there is no evidence the Single Commissioner afforded any weight to the complained of communication, there are no grounds to recuse the Commission and no basis to assert the Single Commissioner did not proceed in a fair and impartial manner.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Pursuant to SEC. 42-1-40, Claimant had an average weekly wage of $449.36 and a corresponding compensation rate of $299.59.
2. Pursuant to SEC. 42-1-130, Claimant was an employee at the time of the alleged work injury.
3. Pursuant to SEC. 42-1-160, Claimant sustained an admitted injury by accident to the back, arising out of and in the course and scope of her employment with the Defendants on February 21, 2008.
4. Pursuant to SEC. 42-9-30, Claimant is entitled to forty percent disability for her injury to the back.
5. Pursuant to SEC. 42-15-60, Claimant achieved maximum medical improvement to the back on February 14, 2010 per the authorized treating physician, Dr. Mark A. Wolgin.

6. Pursuant to SEC. 42-9-210 and Curiel v. Env. Management Services, 655 S.E.2d 482 (2007), the date of maximum medical improvement signals the end of entitlement to temporary total benefits, the Defendants are entitled to a credit for overpayment of temporary total benefits from the date of maximum medical improvement, February 14, 2011, and credit for any wages earned while paying benefits during the prior disability period. That the Defendants are entitled to credit for any temporary total benefits after the Claimant reached maximum medical improvement is further validated by the holding of Watson v. Xtra Mile Driver Training, Op. No. 5013 (S.C. App. filed August 1, 2012).

7. According to Black's Law Dictionary 597 (7th ed. 1999) *ex parte* communication is defined as "prohibited communication between counsel and the court when opposing counsel is not present." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 (S.C. 2003). At no time did the Defendants' or the Defendants' counsel communicate with the Workers' Compensation Commission without notification of the other party. Additionally, at no time did the Defendants' or the Defendants' counsel receive communication from the Workers' Compensation Commission that was not also copied to the Claimant's Counsel. The complained of communication in this claim was from the Commission to the Attorney General's Office. The Attorney General's Office is, obviously, not counsel to any party to this case. Accordingly, there is substantial evidence and a legal basis for a finding no *ex parte* communication exists in this case.

8. The Claimant argues that the Commission should be disqualified based on an alleged *ex parte* communication, however, Claimant's argument is without merit and not supported by the record or the Judicial Canons. Canon 3(B)(7) states that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to

be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except" in certain circumstances. In this case, the communication complained of was a letter sent from the Commission to the Attorney General's office, noting that an allegation of fraud had been reported (as required by S.C. CODE ANN. SEC. 38-55-570). The Attorney General's office then sent this communication to the insurance carrier. The Commission did not ever send this correspondence to either party. Thus, there could be no argument that the Commissioner allowed any *ex parte* communication to take place. Claimant's attempt to plant a "fruit of the poisonous tree" argument through the Canons is off-base.

9. The Commission is not required to notify any party to a workers' compensation claim of an allegation of fraud under either S.C. CODE ANN. SEC. 38-55-570 or the Judicial Cannons. SEC. 38-55-570(A) requires the following: "[a]ny person, insurer, or authorized agency having reason to believe that another has made a false statement or misrepresentation or has knowledge of a suspected false statement or misrepresentation *shall*, for purposes of reporting and investigation, notify the Insurance Fraud Division of the Office of the Attorney General of the knowledge or belief and provide any additional information within his possession relative thereto." (emphasis added) SEC. 38-55-570(C) further states "[t]he Workers' Compensation Commission may refer such cases as provided in SECTION 42-9-440." SEC. 42-9-440 mandates "[t]he commission *shall* report all cases of suspected false statement or misrepresentation, as defined in SEC. 38-55-530(D), to the Insurance Fraud Division of the Office of the Attorney General for investigation and prosecution, if warranted, pursuant to the Omnibus Insurance Fraud and

Reporting Immunity Act." (emphasis added) The aforementioned sections are mandatory in nature and cannot be overlooked. Based on Claimant's arguments, the Commission would be violating the Judicial Canons anytime the Attorney General's office is contacted by the Commission without notifying both parties. This would be an absurd result, not possibly intended by the legislature. It is well-settled that "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-343 (S.C. 2011). Accordingly, we find neither the South Carolina Statutory Code nor the Judicial Cannons require the Commission to notify either party to a claim when it reports suspected fraud to the Attorney General's Office.

ORDER

IT IS HEREBY ORDERED that the Order of the Single Commissioner is affirmed, with amendment.

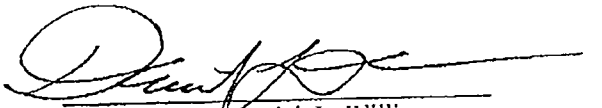
IT IS FURTHER ORDERED that the greater weight of evidence supports a finding that Claimant suffered an admitted injury by accident to the back. Claimant's injury resulted in a forty percent (40%) disability to the back.

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

IT IS FURTHER ORDERED that Defendants shall furnish any prosthetic devices

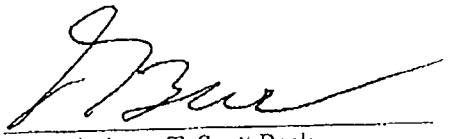
during the life of the Claimant or for so long as such devices are necessary.

AND IT IS SO ORDERED!



Commissioner Derrick L. Williams
For the Appellate Panel

WE CONCUR:



Commissioner T. Scott Beck

Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Doller on August 27, 2012

Exhibit 8

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0810152

PATRICIA FORE, Employee, Claimant, vs. GRIFFCO OF WAMPEE, INC., Employer, AND COMMERCE & INDUSTRY INSURANCE COMPANY c/o CHARTIS CLAIMS, INC., Carrier, Defendants.	**DECISION AND ORDER**

DATE OF HEARING:	Hearing held in Horry County, S.C. on September 27, 2011.
APPEARANCES:	Claimant appeared and represented by Stephen B. Samuels, Esquire of Samuels Law Firm of Columbia, South Carolina. Defendants represented by James H. Lichty, Esquire of McAngus Goudelock & Courie, L.L.C. of Columbia, South Carolina.
PURPOSE OF THE HEARING:	To determine all issues as set forth in Forms 50 and 51.
COMMISSIONER:	Commissioner G. Bryan Lyndon
FILED:	January 18, 2012

STIPULATIONS

1. Venue was proper in Myrtle Beach, South Carolina.
2. At the time of the alleged injury, Claimant earned an average weekly wage of $449.36 with a corresponding compensation rate of $299.59.
3. Notice of hearing was timely and properly served upon all parties of interest.
4. The South Carolina Workers' Compensation Commission has jurisdiction of this claim.
5. The Commission File becomes part of the record with the exception of self-serving declarations and unstipulated medical reports.

APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and Regulations of the South Carolina Workers' Compensation Commission, the following records and documents were submitted into evidence.

The Claimant submitted the following exhibits:

1. Loris Healthcare – Seacoast Medical Center, dated 02/24/2008, consisting of 5 pages. (APA 1)
2. Orthopaedic Associates f/k/a Albany Bone & Joint Clinic, dated 09/16/2008 to 02/14/2011, consisting of 73 pages. (APA 2)
3. Strand Regional Specialty Associates, dated 05/08/2008, consisting of 9 pages. (APA 3)
4. Phoebe Putney Memorial Hospital, dated 11/17/2008 to 12/05/2008, consisting of 4 pages. (APA 4)
5. Midlands Orthopaedics, dated 07/07/2009, consisting of 2 pages. (APA 5)

The Defendants submitted the following exhibits:

1. Correspondence from S.C. Attorney General's Office, dated 07/20/2011, consisting of 4 pages. (Exhibit 1) *Page one is omitted as per Claimant's objection.*
2. *Omitted as per Claimant's objection.*
3. Surveillance Video, consisting of 2 discs. (Exhibit 3)
4. Surveillance photograph of Claimant's vehicle, consisting of 1 page. (Exhibit 4)
5. Training Certification of Georgia Assoc. of Professional Bondsmen, dated 08/26/2010, consisting of 1 page. (Exhibit 5)
6. Documentation supporting Claimant's employment with ASAP Towing, consisting of 5 pages. (Exhibit 6)
7. Claimant's Facebook Profile, dated 09/19/2011, consisting of 2 pages. (Exhibit 7)

STATEMENT OF THE CASE

This matter arises to determine the issues raised in the parties' Forms 50 and 51. Claimant alleges that she sustained an injury to the back which resulted in a fusion surgery and a recommendation for additional surgery which she currently declines. A previous order states the Claimant suffered injury to her back and hip that affects her right leg. She alleges that she is entitled to permanent and total disability utilizing two body parts under §42-9-10 or based on greater than fifty percent disability to the back under §42-9-30. She sought lifetime medical treatment and an award paid in lump sum with James v. Anne's language. She admits that she worked for a period of time, but denies that she can continue working. Claimant points to a vocational evaluation and page 77 of the APA's as evidence that she can no longer work.

The Defendants allege that Claimant can work and may continue to be working as evidenced by video surveillance, testimony, and other evidence. Defendants' admit that

Claimant has been rated at 36 percent to the back, but point out that is based on the AMA Guides 6th Edition and the fact she had surgery. They allege that Claimant can work regardless of any reports and argue that the actual impairment should not actually exceed the rating. Defendants request a credit for overpayment of benefits and object to lump sum payment if Claimant were to be found totally disabled. Defendants requested a finding on credibility due to numerous inconsistencies. Finally, Defendants allege Claimant is only entitled to compensation under §42-9-30 and that *Singleton* would apply because she has no ratable impairment other than the back.

Claimant objected to the inclusion of a letter from the Attorney General's office in Defendants' Exhibit 1. This objection was granted and page one was removed from the record.

Claimant objected to the inclusion of a letter from Garry Smith in Defendants' Exhibit 1 into evidence based on allegations that it constituted improper ex parte communication, hearsay, and threat of criminal prosecution. The Claimant additionally argued that the entire Workers' Compensation Commission should recuse themselves from hearing this claim. The Defendants countered that it is not a threat, but simply evidence that a fraud investigation is ongoing. Furthermore, neither the Defendants' Attorney, the Employer, or Carrier was engaged in the communication; it was between the Attorney General's Office, the Workers' Compensation Commission, and the complainant. The Claimant's objections were denied.

Claimant objected to the inclusion of Defendants' Exhibit 2 which is a surveillance report. The objection was granted and Exhibit 2 was removed from the record.

Claimant objected to Defendants' Exhibit 3 which is surveillance footage of the Claimant as being unduly prejudicial. The objection was denied and the surveillance footage was made a part of the record.

EVIDENCE OF THE CASE

Testimony of the Claimant

Claimant is a 46 year old married woman with two minor children. (Tr. at 16-17). She has an associates degree in business management and has experience working in restaurants, construction, meat cutting, and as a bail bondsman. (Tr. at 17). Claimant worked as a meat cutter at the time of her injury and does not believe she can return to this employment field. (Tr. at 18).

Claimant testified she treated with Dr. Wolgin, who performed fusion surgery at L4-5 and L5-S1. She stated that surgery resolved her sciatic pain but that bending coming off the floor remains difficult. (Tr. at 19). She testified that her surgery resulted in a non-union and prospects of a second surgery's success were only 50/50. She declined the additional surgery and stated that she was placed on "extreme light duty." (Tr. at 20-21). Claimant stated that her pain is about 6/10 and can worsen with activity. (Tr. at 39).

Claimant testified that she worked for Steve McGowan at ABC Bail Bonding during the summer of 2010 and worked 20 or more hours per week. (Tr. at 21-22). Claimant testified regarding a calendar that purported to list hours and dates she worked for ABC. Defendants objected to the inclusion of the calendar based on the fact it had not been produced until the Hearing and contained no evidence of pay and did not reference Claimant's name anywhere in the document. The objection was denied. (Tr. at 24). The calendar contains numerous notations, appointments, and work schedules.

Claimant testified that as of November 30, 2010, Claimant's pain was aggravated by the several months of work and noted that she requested additional medications from Dr. Wolgin, which were denied. (Tr. at 26). Claimant stopped working for ABC on January 21, 2011. (Tr. at 28). Claimant was placed at MMI on February 14, 2011.

Claimant testified that she was approached by a competitor, A1 Bail Bonding, about changing her license to its business, place advertising on her truck, and using her name for marketing purposes. (Tr. at 29-30). She alleged that she completed one bond in February 2011 to change the license but did no other work and received no payment. (Tr. at 29-30). According to her testimony, the Claimant entered bonds and advertised for A1 Bail Bonding without compensation. Claimant testified she began doing more bonds in July, August, and September 2011 and was reported by her former employer. (Tr. at 31, 34, 35). Claimant indicated that she arranged for Mary Weaver to work at A1 so that she would not have to get up at all hours of the night. (Tr. at 34-35). Claimant testified regarding an entry on her Facebook page indicating she was "Self Employed and Loving It!" as a bondsman and "bond you out of jail if you need me call me." (Exhibit 7). Claimant testified she took a stalking order out against her former employer because she was aware he was investigating the work she was doing for her competitor. (Tr. at 39-41). On cross-examination, she admitted that the order prohibited her from contacting Mr. McGowan as well. (Tr. at 61).

Claimant testified on cross-examination that she performed the same work for A1 Bail Bonding *for free* as the work she did for pay at ABC Bail Bonding. (Tr. at 49). Claimant was asked why she didn't admit she was working for A1 Bail Bonding when her deposition was taken in August 2011. (Tr. at 49-50; Deposition at 7). She testified that, although she had performed numerous bonds between February and September 2011, she did not consider it work. (Tr. at 50). Claimant admitted that her response at her deposition to whether she was working was "no" and at the Hearing her answer was "yes." (Tr. at 53). Claimant denied that she had time cards when she worked for Steve McGowan at ABC. (Tr. at 53).

Claimant testified that she also worked for ASAP Towing, Steve McGowan's other business. (Tr. at 54). Claimant worked there with her husband and denied that she would affix her husband's name to work she performed. (Tr. at 54).

She also testified at her deposition that she had no further education or certification since the date of injury. However, she admitted at the Hearing that she received certification as a bail bondsman in August 2010. (Tr. at 50). Claimant also admitted that she received a diploma in accounting in 2010 that she did not previously report. (Tr. at 51). Claimant admitted that her response at her deposition to whether she received additional certification or education was "no" and at the Hearing her answer was "yes." (Tr. at 53).

Surveillance footage of Claimant was referenced and Claimant admitted that she could work as long as there was not repetitive bending and twisting involved. (Tr. at 55). Claimant would not confirm or deny that she could repetitively bend based on footage of her bending to pick up items from the bottom shelf at Walmart. (Tr. at 56). She admitted she could pick up light things. (Tr. at 56-57). The Claimant testified she worked twenty hours a week for ABC during September 2010. (Tr. at 57). The September 30, 2010, medical report of Dr. Wolgin states "she is able to continue with her work which is three hours per day three days a week." (APA at 61). Moreover, the vocational report of Glenn Adams states the Claimant reported working an average of twelve hours a week, which is also less than her testimony would suggest. (Tr. at 59, APA at 98).

Claimant requested to call Tony Lee Owens. Defendants' objection to this testimony was granted and the testimony was taken as Proffered Testimony outside of the presence of the Commission and is not part of the record. (Tr. at 67).

Testimony of Steve McGowan

Steve McGowan was called by the Defendants. Mr. McGowan is the owner of ABC Bail Bonds and employed Claimant for about six months. (Tr. at 70). He hired Claimant as a result of the recommendation of her husband, an employee in his towing company. (Tr. at 72). She initially just worked on computers, but wanted to work more and more hours. (Tr. at 74). She went to Atlanta to receive her certification as a bail bondsman soon after in late-August 2010. (Tr. at 74). He stated that Claimant left his employment because she wanted more money. (Tr. at 78). He also indicated that he paid her under the table and under her husband's name because she requested it that way. (Tr. at 78). She began working about 10 hours a week but eventually began working 30-35 hours per week, and sometimes over 40 if she worked on a weekend. (Tr. at 79). Of note, documented work of as much as 29 hours per week was reflected in Claimant's personal calendar, but was not reflected in her deposition testimony or medical records. Mr. McGowan indicated he has observed Claimant working for A-1 Bail Bonds and has surveillance footage of her performing duties at the jailhouse bonding an individual from jail. (Tr. at 80-81).

On cross-examination, Mr. McGowan agreed that he knew Claimant had back pain and stiffness "every now and then." (Tr. at 83).

Medical Evidence

Claimant first presented to Loris Healthcare on February 24, 2008 complaining of right leg and hip pain from bumping her right hip against a table saw three days earlier. (APA 1 at 1, 4).

Claimant next presented to Strand Regional Specialty Associates on May 8, 2005. She was diagnosed with traumatic right trochanteric bursitis with possible mild sciatica. (APA 3 at

83). Claimant received an injection and was recommended to engage in physical therapy. (APA 3 at 84).

Claimant next treated with Dr. Wolgin and Orthopaedic Associates in Albany, Georgia. She first presented on September 16, 2008, complaining of persistent right hip pain with radiation all the way down the leg. (APA 2 at 6). MRI testing revealed mild degenerative and facet changes in the lower lumbar spine with an L4-5 small right neural foraminal disc protrusion. (APA 2 at 8). MRI testing of the right hip was normal. (APA 2 at 10). Based on the mild findings, Claimant was referred to physical therapy. (APA 2 at 11). After several weeks of physical therapy ending in October 2008, Claimant reported little relief. (APA 2 at 20, 21). She received brief pain management treatment in November and December 2008 with Dr. Lamar Moree. (APA 4 at 88-91).

At Claimant's next appointment on April 17, 2009, Dr. Wolgin opined that Claimant's injury was due to her back and not her hip. (APA 2 at 21). Based on her continued complaints and low benefit through therapy and injections, Dr. Wolgin recommended consideration of a one or two level fusion surgery. (APA 2 at 22). Dr. O'Leary provided a second opinion on July 7, 2009 and recommended injection therapy rather than surgery, but deferred to Dr. Wolgin. (APA 5 at 92-93). Claimant returned on February 2, 2010 complaining of the same low back and right leg pain. Due to the gap between treatment, Dr. Wolgin ordered additional MRI imaging to assess any changes. (APA 2 at 23).

Claimant's MRI's came back showing a possible tiny protrusion at L4-5 with mild facet arthropathy and no nerve root compression; L5-S1 showed mild changes as well. (APA 2 at 25). Claimant returned to Dr. Wolgin to discuss the tests and decided to move forward with surgery. (APA 2 at 26). A peer review was conducted on these findings and Dr. Wolgin and suggested a

psychosocial evaluation and a provocative discography. (APA 2 at 29; APA 6 at 94-95). Additional testing was not performed prior to surgery. (APA 2 generally).

Claimant underwent an L4-5, L5-S1 transforaminal lumbar interbody fusion on May 19, 2010. (APA 2 at 38-40). As of May 25, 2010, Claimant continued to complain of pain at an 8/10 level, but noted some improvement of leg complaints by May 27, 2010. (APA 2 at 42, 44). Claimant returned complaining of increased pain on June 22, 2010 and was given an injection. (APA 2 at 47). Dr. Wolgin anticipated that she would be written completely out of work for at least another month. (APA 2 at 47).

Claimant's leg pain improved as of July 20, 2010 but she complained that she still could not lay down in a bed and could not swim because of increased pain kicking her legs; she remained written completely out of work. (APA 2 at 53). Claimant was allowed to return to limited sedentary work as of August 27, 2010 and was recommended to begin physical therapy. (APA 2 at 57).

As of October 19, 2010, Claimant had been through a month of physical therapy with little benefit and reported an increase in her hip and back pain due to sleeping in a bed. (APA 2 at 64). Repeat injections completely relieved the hip pain and partially relieved the back. (APA 2 at 64). Seven days later a prescription note from Dr. Wolgin was prepared, writing her back out of work. (APA 2 at 66). On November 23, 2010, Claimant noted slow improvement, increased walking ability, and little to no leg pain or numbness. (APA 2 at 67). According to Dr. Wolgin's notes, sometime prior to December 21, 2010, Claimant began taking care of a 3-year old and began engaging in frequent bending, lifting, and twisting. (APA 2 at 70).

A CT scan on February 9, 2011 showed no evidence of hardware failure but did show evidence of non-union in places. (APA 2 at 72-76). As of February 14, 2011, Claimant stated

that she felt about the same in the right buttocks area, but did report relief of her prior leg complaints; she did not wish to undergo additional surgery. (APA 2 at 76). Claimant was released from care with a 36 percent impairment rating using the AMA Guides, 5th Edition. (APA 2 at 76, 78). Claimant reported that she continued to care for a toddler full time. (APA 2 at 76).

Claimant's Attorney referred her to Glen Adams for a vocational assessment on September 12, 2011. She reported that she worked for ABC Bail Bonding during January 2011 but only worked 12 hours a week. (APA 7 at 96-106). She reported that Dr. Wolgin supported a trial return to work in January, however, there are no records reflecting this and he continued to place her completely out of work at that time. Claimant was found to be totally disabled; however, she did not disclose any additional employment other than minor, part-time work during January 2011.

FINDINGS OF FACT

Based upon the testimony and exhibits submitted, the undersigned Commissioner makes the following findings of fact:

1. Claimant injured back in an admitted work-related accident on February 24, 2008. The injury affects the left hip/leg (See Order of October 13, 2009.)
2. Defendant to pay all causally related authorized medicals.
3. Claimant had a two level fusion which was not successful. There is a non-union and Claimant is a candidate for another surgery; at present she chooses not to have the surgery.

4. Claimant testified that she attempted to work within her restrictions. Claimant stated she worked about 20 hours per week for $8.00 per hour. Claimant worked until January 2011 and stated she was unable to work anymore.

5. Claimant was placed at MMI on February 14, 2011, given a 36% impairment rating with restrictions of "unable to return to work" (APA 2 at 76).

6. Claimant stated she helped Tony at A1 Bail Bonding for about a month with bonding and according to Exhibit #1 worked a limited amount of time. She got another person to help because she physically was unable to meet the demands of the job.

7. Claimant stated she had earned money in spite of denying this in her deposition. She further stated that in order to keep her mind occupied she participated in social media.

8. Claimant admitted she was helping Tony but denied that she received any pay. This was for the same job she did prior for which she did receive pay. Claimant stated that she said she was not working in her deposition in May 2011, because she did not consider what she was doing work.

9. A surveillance photograph from September 2011 shows Claimant's vehicle with an advertisement on the back window promoting A-1 Bail Bonds with a 24 hour contact number. (Exhibit 4).

10. As of September 19, 2011, Claimant's Facebook profile showed that her employer was "Self Employed and Loving It!" as a Professional Bondsman in Leesburg, Georgia. It states, "bond you out of jail if you need me call me." (Exhibit 7).

11. Claimant stated she had received no certifications in her depositions but she did in fact have training as a bondsman. (Exhibit 5).

12. Claimant stated she could work as long as she did not have to bend over or do lifting. There was conflicting testimony as to what Claimant said she was working and what reports indicated she could work. The surveillance footage also showed Claimant squatting, bending, and lifting in a manner well-exceeding her self-reported limitations.

13. Claimant indicated to Dr. Wolgin that she took over as the primary caregiver for a toddler and engaged in regular bending, lifting, and twisting. He indicated he was concerned these activities could be exacerbating her symptoms.

14. Claimant stated she recruited a person to work for Tony who was paid. Claimant stated she did the same job but got no pay. She stated she did this because she felt sorry for Tony.

15. A witness for the Defendant, Mr. McGowan stated Claimant is currently working for another company and he took a video of Claimant in the jail house with a file in her hand bailing out someone.

16. Mr. McGowan estimated that Claimant worked for him from August 2010, to January 2011. He knew Claimant's husband and hired Claimant. Witness stated Claimant was good with computers and eventually got a certification for her license to write bail bonds. (Exhibit 5).

17. Witness stated Claimant left because she needed more hours and he paid her $8.00 per hour up to 30 to 40 hours per week. She averaged about 30 hours.

18. Based on this testimony and the Claimant's, I find Claimant did work for A1 Bail Bonding and provided an inaccurate account to her vocational assessor regarding the length of time she was employed with ABC, the amount she was paid per hour, and the amount of hours she was able to work.

19. The Claimant failed to disclose her second job with A1 Bail Bonding to her vocational assessor and at her deposition. Clearly a vocational assessor uses self-reported earning capacity, low hours, and meager recent work history as evidence to conclude that no viable employment was available.

20. Compensation Rate: $299.59.

21. After considering all of the evidence I find Claimant has suffered a 40% PPD to the back. I did not find her a credible witness and believe she can work.

22. Defendant to receive credit for all wages paid during the disability period and a credit for temporary total disability benefits paid following maximum medical improvement on February 14, 2011.

23. Claimant to have lifetime replacement of any hardware.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Pursuant to § 42-1-40, Claimant had an average weekly wage of $449.36 and a corresponding compensation rate of $299.59.
2. Pursuant to § 42-1-130, Claimant was an employee at the time of the alleged work injury.
3. Pursuant to § 42-1-160, Claimant sustained an admitted injury by accident to the back, arising out of and in the course and scope of her employment with the Defendants on February 21, 2008.
4. Pursuant to § 42-9-30, Claimant is entitled to forty percent disability for her injury to the back.

5. Pursuant to § 42-15-60, Claimant achieved maximum medical improvement to the back on February 14, 2010 per the authorized treating physician, Dr. Mark A. Wolgin.

6. Pursuant to § 42-9-210 and *Curiel v. Env. Management Services*, 655 S.E.2d 482 (2007), the date of maximum medical improvement signals the end of entitlement to temporary total benefits), the Defendants are entitled to a credit for overpayment of temporary total benefits from the date of maximum medical improvement, February 14, 2011 and credit for any wages earned while paying benefits during the prior disability period.

ORDER

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

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

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

AND IT IS SO ORDERED.

G. Bryan Lyndon, Commissioner
South Carolina Workers' Compensation Commission

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
January 18, 2012

By: Tamara Morris, Administrative Assistant to Commissioner Lyndon

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee,.....Appellant,

v.

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

PROOF OF SERVICE

I certify that on the 1st day of May 2013, I served the Respondents' **Reply in Support of Motion to Strike Portions of Initial Brief of Appellant and for Correction of Appellant's Designation of Matter** on Patricia Fore by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record:

Stephen B. Samuels, Esq.
Samuels Law Firm, LLC
1527 Blanding Street
P.O. Box 50349
Columbia, SC 29250

Peter P. Leventis, Esq.
McKay, Cauthen, Settana & Stubley, PA
1303 Blanding Street
Columbia, SC 29201

Gayle C McDaniel

Gayle McDaniel
Assistant to Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2900

Attorneys for Respondents