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**Sep 19 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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ON PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS

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Appellate Case No. 2022-001095

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Samuel Paulino, Claimant.....Petitioner

v.

Diversified Coatings, Inc., Employer, and AmGuard Insurance Company,  
Carrier.....Respondents

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**RESPONDENT'S RETURN TO PETITION FOR WRIT OF *CERTIORARI***

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## ARGUMENTS

Pursuant to SCACR 242 (f) Respondents hereby file the ensuing Return to Samuel Paulino's (Petitioner) Petition for Writ of *Certiorari* following the Court of Appeals' dispositional Opinion in this matter filed on March 9, 2022. Respondents respectfully submit the Petition should be denied because it fails to meet the general standards for review of the Court of Appeals' Opinion set forth in SCACR 242, including, but not limited to, the following: a) this case does not present a novel question of law as it primarily involves application of the well-established "substantial evidence rule" governing worker's compensation awards; b) there are no discernible constitutional issues or federal questions presented; and c) the Court of Appeals' decision is in perfect accord with this Court's holding in Clemmons v. Lowe's Home Centers, Inc., 420 S.C. 282, 803 S.E.2d 268 (2017). There are simply no other compelling reasons for the Court to hear this case unless it desires to reverse or cement its holding in Clemmons that a medical impairment rating is determinative of a scheduled disability award under S.C. Code § 42-9-30, or simply limit its application to the facts of that specific case. Nevertheless, for the sake of clarity and completeness, Respondents offer the following points supporting the Court of Appeals' decision on the merits.

**I. THE COURT OF APPEALS PROPERLY HELD THAT THE COMMISSION'S FINDING OF GREATER THAN 50% LOSS OF USE OF THE BACK WAS NOT SUPPORTED BY "MEDICAL EVIDENCE" IN THE RECORD.**

Relying on Clemmons v. Lowe's Home Centers, Inc., 420 S.C. 282, 803 S.E.2d 268 (2017), the Court of Appeals held "the Commission erred in affirming the single commissioner's determination that Claimant's back is impaired greater than fifty percent because "there is no medical evidence in the record that supported" that finding. Paulino v. Diversified Coatings, Inc., Unpublished Op. No. 2022-UP-096 at p. 2. "Medical evidence" is defined under the Act as "expert

opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider.” S.C. Code §42-1-160 (G).

Clemmons holds that “medical evidence” of impairment is virtually outcome determinative of a claimant’s entitlement to PPD compensation under § 42-9-30 (21). 803 S.E.2d 268 at p. 271. In that case, the claimant had a multi-level cervical fusion and was assigned a 25% whole person impairment rating by the authorized treating physician. That rating converted to a 71% regional impairment to the cervical spine per the *AMA Guides to the Evaluation of Permanent Impairment*. The Commission awarded claimant PPD benefits based on 48% loss of use of the back. Despite evidence in the record confirming claimant returned to full duty work as a cashier at Lowes performing tasks indicative of *less than* fifty-percent loss of use of his back, the Supreme Court reversed the Commission’s award, finding “there is *no* evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. **Every doctor and medical professional** who assigned an *AMA Guides* impairment rating indicated Clemmons lost more than seventy percent of the use of his back.” (emphasis added).

In the instant case, the Court of Appeals correctly noted that the undisputed “medical evidence” confirms back impairment ratings of only 13% from Dr. McHenry and 12% from Dr. Math. These impairments are obviously significantly less than 50%. Even if the medical impairment rating alone is not outcome determinative of “loss of use” under § 42-9-30 (21), there can be no doubt that the rating is the paramount factor for the Commission’s consideration in light of this Court’s emphasis on the impairment rating in Clemmons, particularly this Court’s reference to the term “medical evidence” on no less than four occasions throughout its Opinion. As such, Respondents submit that the Commission clearly erred as a matter of law in this case by ignoring the primacy

of the medical impairment rating commanded by Clemmons, which is certainly grounds for the Court of Appeals' reversal.

Further, the Court of Appeals correctly rejected the Commission's finding that the impairment ratings in the instant case were "low based on a poor surgical result" as being unsupported by competent "medical evidence." See Burnette v. City of Greenville, 401 S.C. 417, 428-429, 737 S.E 2d 200, 206-207 (Ct. App. 2012)(a commission finding regarding a medical issue that does not originate from a medical provider is not supported by substantial evidence as a matter of law). Petitioner's appeal to the primacy of Commission's "administrative expertise" [Pet. For Writ of Cert. p. 8] in medical matters is a red herring argument. The Court of Appeals correctly recognized that general administrative expertise cannot usurp the actual "medical evidence" presented in any given case. For these reasons, the Court of Appeals properly held that the medical impairment ratings in this case are unrefuted; thus, the Commission's award of total disability based on greater than 50% loss of use of the back was unfounded based on the "medical evidence."

The question now becomes what other "medical evidence," if any, justifies a scheduled disability award higher than the medical impairment rating denotes? An appellate court must affirm the findings made by the Commission if they are supported by substantial evidence, in this case "medical evidence." See Clemmons supra. However, "[a]n appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." Pierre v. Seaside Farms, 386 S.C. at 540, 689 S.E.2d at 618. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence [that], considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627

S.E.2d 751, 752 (Ct. App. 2006) (quoting S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (Ct. App. 2005)). For the sound reasons cited in its Opinion, the Court of Appeals correctly determined there was not sufficient medical evidence supporting an award of greater than 50% loss of use of the back. In sum, “reasonable minds” cannot justify an award of total disability based on greater than 50% to the back that is over FOUR TIMES GREATER than the medical impairment ratings and given the dearth of other supporting medical evidence in the record. As such, the Petition for Writ of *Certiorari* must be DENIED.

**II. THE COURT OF APPEALS PROPERLY HELD THERE IS NO OTHER SUBSTANTIAL EVIDENCE IN THE RECORD REGARDING THE “CHARACTER” OF CLAIMANT’S INJURY SUPPORTING THE COMMISSION’S FINDING OF GREATER THAN 50% LOSS OF USE OF HIS BACK.**

Under the “medical model” of compensation per § 42-9-30, the nature and character of the injury to a statutorily scheduled member controls and constrains the award to presumed period of disability. See Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (SC 1996) (with scheduled disability injuries the compensation depends on the “character of the injury” rather than loss of earnings). Moreover, a permanent disability award pursuant to S.C. Code § 42-9-30 “need not be shown with mathematical exactness,” but it still must only be founded on evidence of sufficient substance to afford a reasonably determinable basis for it. See Bundrick v. Powell’s Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (SC 1966) (the award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it).

In the instant case, the Court of Appeals correctly noted that Petitioner presented only sparse testimony regarding the nature and extent of his physical injuries. There is no testimony or other subjective evidence that refutes the objective “medical evidence” confirming impairment of

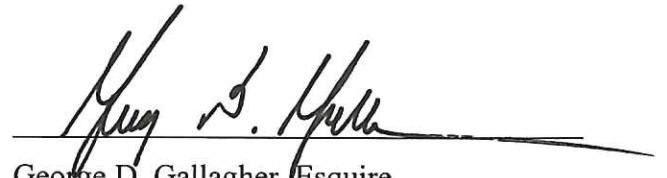
less than 50% of the back. As such, the speculative nature of the Commission's finding that Petitioner sustained a greater than 50% loss of use of the back is self-evident. The Commission never even determined what Petitioner's actual loss of use of his back was; it merely found the impairment was some unknown factor **over four times greater** than the impairment ratings. This is clearly erroneous because there is no evidence of "sufficient substance" to support it. See Bundrick *supra*. Although this Court in Clemmons found there was no evidence of impairment/loss of use *less* than 50%, thus suggesting that claimant was presumed to be totally disabled, the Court still nevertheless remanded the case to the Commission with instructions to determine the actual impairment. Clemmons, 420 S.C. at pp. 489-490. A finding of the actual impairment/loss of use is clearly required. Otherwise, the award is nothing but conjecture and cannot stand. For these reasons, the Court of Appeals correctly reversed the Commission's generic finding that Claimant's impairment is simply greater than the threshold for a presumption of total disability.

Finally, if the medical impairment rating must be the paramount factor for purposes of permanent disability compensation under the "medical model" as this Court holds in Clemmons, then other non-medical evidence regarding the character of the injury cannot logically supersede the proportion the impairment rating bears to the Commission's ultimate total loss of use award under S.C. Code § 42-9-30 (21), or at least not to the extent exercised here. Although the award need not be shown with "mathematical exactness," the Commission's untenable award of permanent and total disability based on an undetermined loss of use of the back over **FOUR TIMES GREATER than the medical impairment ratings**, and unsupported by other medical evidence and/or lay testimony regarding the character of the injury, stretches the limits of that premise beyond any useful application. The Commission's "administrative expertise" is not a

license to render permanent disability awards contrary to medical and other evidence presented in a particular case. Although an award of permanent disability may not be definable with mathematical precision, it must make some modicum of sense based on the evidence as a whole.

**CONCLUSION**

For all the aforementioned reasons, the Court of Appeals did not err and the Petition for Writ of *Certiorari* should be DENIED.



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