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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Order

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WCC File No. 0100434

Appellate Case No.: 2022-000655

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Emitt R. Gunnells, Claimant, ..... Appellant,

vs.

Galey & Lord Industries, Employer, and Arrowpoint Capital  
Corporation, Carrier, ..... Respondents.

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**RECORD ON APPEAL**

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DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0100434

Emitt Gunnells, Employee,

Claimant,

Vs.

Galey & Lord, Employer, and Royal  
Indemnity Company, Carrier,

Defendants.

HEARING: Held in Florence, South Carolina, on May 1, 2002

APPEARANCES: Claimant represented by Stephen J. Wukela, Esquire,  
Florence SC

Defendants represented by Steven Rudisill, Charlotte, NC

PURPOSE OF HEARING: To determine issues set forth in Forms 50 and 51 and  
any other issues which may have timely come before  
the Commission.

DECISION AND ORDER: By: Holly Saleeby Atkins, Commissioner

FILED: January 7, 2002

**STIPULATIONS**

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51 and any other issues which may timely come before the Commissioner;
2. Notice of the hearing was timely and properly served upon all parties of interest;
3. Venue, set in Florence County, is proper;
4. The Claimant's average weekly wage is Seven Hundred Sixty-Five and 97/100 (\$765.97) Dollars and his compensation rate is Five Hundred Ten and 65/100 (\$510.65) Dollars.

**APA SUBMISSIONS**

<u>NAME OF PHYSICIAN/OTHER</u>	<u>DATE OF REPORT</u>	<u>PAGES</u>	
McLeod Regional Medical Center	01/14/01	1-3	APA #1
	01/15/01	4	
	10/09/01	5-6	
McLeod Occupational Health Dr. Andrew Floren	01/16/01-01/18/01	7-9	APA #2
Florence Neurological Clinic Dr. Marc D'Angelo/Dr. Ashley Kent	01/23/01-04/01/02	10-66	APA #3
Stokes Regional Eye Center	01/19/01	67-68	APA #4
Dr. Sasha Federer	03/09/01-09/13/01	69-100	APA #5
Carolina Pines	06/05/01	101-110	APA #6
	10/27/01	111-119	
Florence Neurosurgery & Spine Dr. Andrew Rhea	09/27/01-02/08/02	120-140	APA #7
Dr. W.S. Edwards, Jr.	11/06/01	141-144	APA #8
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Termination Record	08/24/01-08/29/01	153-155	APA #12
Salary Employee Check Register	01/01/01-12/31/01 01/01/00-12/31/01	156-161	APA #13
Deposition of Dr. Sasha Federer taken on April 9, 2002.			APA #14
Deposition of Dr. Marc D'Angelo to be taken on April 25, 2002.			APA #15
Dr. Kenneth Evans	07/06/92-03/29/02	162-189	APA #16
Dr. Andrew Rhea	06/26/92	190	APA #17
Dr. Ashley Kent	07/10/92-01/12/93	191-193	APA #18

#### CLAIMANT BIOGRAPHICAL

SEX: Male

AGE: 45

MARITAL STATUS: Married

WORK HISTORY: Claimant began work at Galey & Lord in 1992 after honorable discharge from the military. (Tr. p. 9, ll. 9-21). Claimant received a GED in the military. Claimant served in the military from February 2, 1976, until he was honorably discharged at the rank of Staff Sergeant. Claimant's military service included combat service in Desert Storm. (Tr. p. 8, l. 15 – p. 9, l. 13).

#### STATEMENT OF THE CASE

This matter is before the Commission on the Form 50 filed by the Claimant on March 5, 2002, alleging a closed head injury to his brain, neck, shoulders, back and psyche on January 14, 2001. Claimant contends that he is permanently and totally disabled as a result of that physical brain injury. Defendants' Form 51 admits the Claimant sustained an "injury by accident in the

form of a blow to the top of Claimant's head, with resulting post concussive syndrome, cervical spine injury and subsequent depression. Defendants deny any other alleged injuries." (Form 51) In particular, Defendants deny that Mr. Gunnells suffered a physical brain injury. (Tr. p. 7, ll. 17-18). The parties agree that Claimant suffered an injury by accident in the form of a blow to the top of his head on January 14, 2001. (Tr. p. 4, ll. 13-15).

The parties agree that Claimant is temporarily totally disabled by that injury from January 14, 2001, until he returned to work on April 18, 2001. (Tr. p. 4, ll. 15-17). The parties also agree that during that period of time between January 14, 2001, and April 18, 2001, Claimant was paid salary continuation by the Employer and also paid temporary total at the rate of Five Hundred Seven and 34/100 (\$507.34) Dollars. (Tr. p. 4, ll. 17-21). The parties agree that on April 18, 2001, Claimant returned to work at his normal salary and remained at work until he was fired on August 29, 2001, as a result of an explosive emotional outburst. (Tr. p. 5, l. 25 – p. 6, l. 2).

The parties agree that upon Claimant's return to work on April 18, 2001, he signed an agreement, attached to the brief as APA No. 10, page 150, wherein Claimant agreed to reimburse the Employer the temporary total paid in the amount of Five Thousand Four Hundred Ninety-Nine and 29/100 (\$5,499.29) Dollars at the rate of Two Hundred (\$200.00) Dollars per month. Claimant did so until his termination on April 18, 2001. (Tr. p. 5, ll. 1-5).

The Employer claims an outstanding credit of Four Thousand Two Hundred Ninety-Nine and 29/100 (\$4,299.29) Dollars as reimbursement for temporary total mistakenly paid along with salary during the period of January 14, 2001, through April 17, 2001. (Tr. p. 5, ll. 1-9). The Employer concedes that under the Workers' Compensation Act §42-9-210 they are not entitled

to obtain the additional reimbursement until the Workers' Compensation case is concluded. (Tr. p. 5, ll. 4-9).

The Claimant contends that the reimbursement agreement was not valid as it was not approved by the Commission as required pursuant to §42-17-10. Claimant agrees with the Defendants that, to the extent that the Employer is entitled to credit, that deduction should be made by shortening the period during which compensation must be paid pursuant to §42-9-210. (Tr. p. 2, ll. 20-25).

The parties agree that upon Claimant's termination on August 29, 2001, the Employer paid the Claimant severance in the form of Claimant's salary through October 31, 2001, and the Employer takes the position that during that period Claimant was not entitled to temporary total benefits. (Tr. p. 5, l. 24 – p. 6, l. 9). Claimant contends that pursuant to Muir v. C.R. Bond, Inc., 336 S.C. 266, 529 SE2d 583 (1999 SC App.), because that severance was not paid in lieu of compensation, the Claimant is entitled to temporary total compensation from September 1, 2001, and continuing.

The parties agree that the Claimant is currently receiving temporary total benefits and has since November 12, 2001. (Tr. p. 7, ll. 1-2).

In summary, the Claimant's position is that he suffered a physical brain injury and he is totally and permanently disabled as a result. Claimant contends that he is entitled to medical benefits and compensation at the rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week from January 14, 2001, through April 18, 2001, and September 1, 2001, and continuing for his lifetime pursuant to §42-9-10.

The Defendants' position is that the Claimant suffered a blow to the top of his head resulting in post concussion syndrome, cervical spine injury and subsequent depression, but did not suffer a physical brain injury. (Tr. p. 7, ll. 3-18).

Defendants contend that they are entitled to a credit of Four Thousand Two Hundred Ninety-Nine and 29/100 (\$4,299.29) Dollars for temporary total mistakenly paid during the period between January 14, 2001, and April 17, 2001. Defendants concede that the Claimant is entitled to temporary total at the rate of Five Hundred Ten and 65/100 (\$510.65) Dollars for the period of November 12, 2001, and continuing, however, they contend that Claimant has not reached maximum medical improvement and has not suffered a physical brain injury entitling him to lifetime benefits pursuant to §42-9-10. (Tr. p. 7, ll. 3-16). Defendants also contend that no temporary total is owed for the period of September 1, 2001, through November 11, 2001, because, they contend, they paid severance benefits to Claimant during that period.

### EVIDENCE

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Claimant offered the above listed APAs and depositions which were admitted without objection, (Tr. p. 1, ll. 15-18), along with the testimony of the Claimant, Emitt Gunnells, and Claimant's wife, Julie Gunnells. The Defendants offered no testimony. The evidence reveals the Claimant was injured on January 14, 2001, when, while the Claimant was trying to thread a cloth machine, a weighted compensation arm flew into the air and slammed down onto the top of the Claimant's head, knocking him unconscious. (Tr. p. 9, l. 22 – p. 12, l. 10). Claimant was immediately transported to McLeod Regional Medical Center's Emergency Room and subsequently followed up with McLeod Occupational Health on January 16 and 18 complaining of headaches, his eyes bothering him, irritability, blurred vision, being "in a fog", and neck pain. (APA No. 2, pp. 7-8). Dr. Andrew Floren at Occupational Health noted that the Claimant had

prior neck surgery in 1992 by Dr. Andrew Rhea secondary to ruptured disc and has been okay since. He indicated that the injury was work-related and diagnosed him with post concussion syndrome and blurry vision. (APA No. 2, p. 8). Dr. Floren referred Claimant to Dr. Marc D'Angelo, a neurologist. (APA No. 2, p. 8). Dr. D'Angelo saw the Claimant on January 23, 2001, and noted, among other things, he was irritable, agitated, and very moody since the injury. He also noted Claimant's complaints of ringing in his ears, gait unsteadiness, nausea and vomiting. (APA No. 3, pp. 12-13). He noted:

... CT of the cervical spine 01/14/01 showed fairly prominent spondylosis with a large osteophyte anteriorly at C5-6 with neuroforaminal stenosis with significant osteophyte posteriorly, mild foraminal stenosis at C4-5 on the right, mild lateral foraminal stenosis at C3-4. .. (p. 14)... (APA No. 9, p. 145).

Dr. D'Angelo diagnosed:

1. Post concussion syndrome. Injury 01/14/01. This injury was an axial load injury. It is expected that it has caused exacerbation of previous symptoms involving the brain, inner ear and cervical spine and cord. Symptoms include post traumatic migraine, dizziness, possible hearing loss, and neck pain with radicular symptoms in both hands.
2. Previous repetitive injury to the head, suffered as he bounded in the Humby (sic) during the Desert Storm period. This injury consisted of several mechanisms back then. One was repeated flexion and extension of the neck and the other was the repeated hitting of the helmet upon the top of his head as the vehicle jumped over irregularities in the desert. Symptoms that date to the Desert Storm include dizziness, neck pain, and headaches. However, on his medications, he was able to accommodate those symptoms until the closed head injury of 01/14/01.
3. Hyperactivity/Anxiety. ... (p. 15)

(APA No. 9, p. 145).

He further recommended, "The patient is asked to stay off from work and not to drive until his irritability, impulsivity, headaches, and dizziness improve." (APA No. 3, p. 15). Dr.

D'Angelo again saw Claimant on February 13, 2001, and assessed, "1. Postconcussion syndrome. ... headaches, nausea, and dizziness. Some of these symptoms are improving with the passage of time as expected but his anxiety level is at a point that he cannot focus sufficiently to do work or even to try. His inability to focus on his task and his anxiety and agitation levels are also expected to cause problems in the time constrained environment of the work place. For that reason, he is still unable to do any work of any type at this point. ... 2. Cervical spondylosis. 3. Tinnitus." (APA No. 3, p. 18). On March 8, 2001, Dr. D'Angelo kept Claimant out of work and referred him for neuropsychological evaluation by Dr. Sasha Federer. (APA No. 3, p. 21).

Dr. Federer's evaluation revealed,

... Mr. Gunnells demonstrated significant discrepancy between the performance on his right dominant hand (30%) and his left nondominant hand (74%). This is one of the indications of lateralization of his functioning indicating that there are possible impairments in the left hemispheric functioning ... Following the injury, there is an increase in his dizziness but also decrease in his anger control ... no indications of significant cognitive deficits that would limit his capacity to perform on the job. The most significant problem is his affective functioning with increased explosiveness, mood change and difficulty controlling his explosive temper. (APA No. 5, pp. 82-83).

On April 17, 2001, Dr. D'Angelo permitted the Claimant to return to work stating, "...8. The patient is to return to full duties for half days for the remainder of this week starting tomorrow, April 18<sup>th</sup>, 2001, and to do to full time duties without restrictions as of April 23<sup>rd</sup>, 2001. This is a trial return to work and we will observe how successful this is on follow-up..." (APA No. 3, p. 25). On June 21, 2001, Dr. D'Angelo noted that Claimant was "still very irritable since he went back to work. He had a run in with his supervisor at work and during the time his right eye started twitching, he had a severe headache and he later calmed down." (APA No. 3, p. 28). Dr. D'Angelo diagnosed post concussion syndrome, neck pain, headache and irritability, noting that irritability is one of the consequences of the post concussion syndrome

exacerbating his previous lifestyle. (APA No. 3, p. 28). On visits on July 24, 2001, and August 24, 2001, Dr. D'Angelo continued to treat Claimant for post concussion syndrome, post traumatic syndrome, cyclothymic disorder, and neck pain, and recommended continued counseling with Dr. Sasha Federer. (APA No. 3, pp. 30-31). On August 24, 2001, Dr. D'Angelo noted Claimant's nausea and dizziness and Claimant's complaints of losing his temper more easily. Dr. D'Angelo assessed:

1. Postconcussion syndrome. The anxiety that is part of this syndrome has exacerbated preexisting hypertension to the point that the hypertension is difficult to control. The anxiety has also exacerbated his ability to get along with others. While there has been preexisting cyclothymic factors present in this patient, the ability to cope has significantly and definitely worsened since the head injury. Headaches have increased since the head injury. Irritability has also contributed to problems with quality of sleep which in turn contributes to the factor of exhaustion to his daytime irritability.

2. Neck pain and cervicogenic contribution to his headaches. He had previous cervical spine surgery in 1992 but was relatively symptom free from 1992 until the closed head injury. This closed head injury was an axial injury causing the head to be pushed down upon the cervical spine. Such a mode of injury would be expected to cause and/or exacerbate preexisting cervical spine injury. This neck pain has not improved with conservative management and so needs to be further evaluated.

3. While some of the problems were preexisting such as cyclothymic disorder, anger control, hypertension, headaches, and neck pain, all of them were significantly exacerbated by the closed head injury and neck injury and the subsequent postconcussion syndrome. Therefore, it is felt that all of the treatment needed to address these issues comes under Worker's Compensation.

(APA No. 3, pp. 33-34)

Further, Dr. D'Angelo ordered MRIs of the brain and cervical spine. (Id.).

On August 29, 2001, the Claimant was fired by Galey & Lord after an altercation with one of his supervisors. Dr. D'Angelo and Dr. Federer agree that the Claimant suffered a physical brain injury as the result of the accident of January 14, 2001. (D'Angelo dep. p. 18, ll. 18-21;

Federer dep. p. 16, ll. 12-18). Dr. D'Angelo and Dr. Federer agree that, as the result of his physical brain injury, the Claimant suffered increased irritability, explosive behavior, and decreased anger control. (D'Angelo dep. p. 14, l. 7- p. 15, l. 1; p. 19, ll. 7-12; Federer dep. p. 16, l. 12 – p. 17, l. 1; APA No. 3, pp. 33-37). They further agree that Mr. Gunnells' explosive conduct on August 29, 2001, and his resulting termination were the result of the brain injury the Claimant suffered on January 14, 2001, and the consequent post concussive syndrome symptoms of increased irritability, explosive behavior and decreased anger control. (D'Angelo dep. p. 29, l. 11 – p. 31, l. 19; Federer dep. p. 14, l. 17 – p. 15, l. 14; p. 19, ll. 7-18).

On October 3, 2001, Dr. D'Angelo noted:

1. MRI of the cervical spine, 09/19/01, showed fusion at C6-7 and disc osteophyte complex, both anterior and posterior, at C5-6. The anterior portion is rather large and disrupts the surrounding tissue. Disc osteophytic complex causes moderate spinal stenosis at C3-4. There is some faint signal change within the cervical spinal cord at this level.

2. MRI of the brain, 09/19/01, revealed questionable draining vein vs. enlarged artery in the left posterior parietal regions; otherwise the study was unremarkable, with and without contrast. M

3. MRI of the lumbosacral spine, 09/19/01, showed tarlov cyst in the sacral area with degeneration of the L4-5 disc, bulging disc at L3-4, and L4-5 levels. No lateral recess stenosis or spinal stenosis are identified.

**ASSESSMENT:**

1. Post concussion syndrome.
2. Cervical spondylosis. Possibly symptomatic cervical myelopathy. He had previous cervical spine surgery but his cervical spine condition has been aggravated by the axial injury to his head and neck which he suffered at work on January 14, 2001.
3. Hypertension. This has been exacerbated by the anxiety caused by his injury.
4. Previous problems with cyclothymia, aggravated by his closed head injury.

5. All of his problems represent the exacerbation of his previous condition by the closed head injury on January 14, 2001, and so are under the auspices of Workman's Compensation.

(APA No. 3, p. 42)

Dr. D'Angelo then referred Claimant to Dr. Andrew Rhea, a neurosurgeon, for evaluation and treatment of Claimants' cervical myelopathy. On October 12, 2001, Dr. Rhea noted:

This patient was seen 9-27 for neck pain and headaches. He also has a myelopathy. His MRI an shows fairly high grade stenosis at C3-4 and I believe he has a mildly abnormal cord signal at that level. In addition, his plain films have some suggestion of abnormal motion at C3-4. I have recommended anterior cervical disc excision, allograft fusion, and internal fixation...

(APA No. 7, p. 126).

On November 6, 2001, Dr. D'Angelo saw Claimant and noted:

...1. Worsening compressive cervical myelopathy. This is due to the progressive deterioration precipitated by the axial head injury suffered on January 14, 2001, superimposed upon a preexisting cervical spondylosis which had been asymptomatic since surgery in 1992.

2. Headaches. These have been a combination of the posttraumatic migraine and the cervicogenic component secondary to the cervical spine dysfunction.

3. Postconcussion syndrome. He had previous problems with cyclothymia but these have been aggravated by the closed head injury.

4. Hypertension. This has been exacerbated by the anxiety caused by the injury.

5. The present problem has progressed to the point that decompression of the cervical spinal cord is urgent. He has gone from intermittent giving away of his left leg to loss of sexual function to a spastic gait. If surgery is not done as soon as possible, the patient is at risk for permanent paralysis and complete disability...

(APA No. 12, pp. 147, 148).

On November 6, 2001, Dr. D'Angelo reviewed the situation with the Carrier who refused to authorize surgery until the patient had a second opinion with Dr. W.S. Edwards, an orthopaedic surgeon. (APA No. 3, p. 46). Dr. D'Angelo felt the situation was so urgent that he sent Claimant directly to Dr. Edwards' office who saw Claimant that day. Dr. Edwards' note of that day indicates that Claimant's "left leg shaking uncontrollably and has since progressed to the point where he now basically drags his leg when he is trying to walk." (APA No. 8, p. 141). Dr. Edwards concluded "given the magnitude of symptoms and radiographic evidence of focal stenosis at C3-4 level, it was recommended that he undergo surgical treatment..." (APA No. 8, p. 143). Dr. Edwards further noted:

... I find him to have severe cervical stenosis with myelopathy and have recommended that he undergo urgent surgical decompression. I have spoken with Dr. Rhea personally regarding this gentleman and surgical intervention is being scheduled. This gentleman's condition is deteriorating and any further delays would be inappropriate...

(APA No. 8, p. 144).

Dr. Rhea saw Claimant again on November 8, 2001, and found:

...clear-cut myelopathy in all four extremities with positive Hoffman's, hyperactive reflexes, increased tone, gait instability, and clonus. He has evidence of a disc bulge at C3-4 with some stenosis and probably abnormal cord signal there from central cord injury related to his accident in January, 2001 at work when some weights hit him on top of the head. Clearly, this is a work-related accident and certainly needs to be treated. I had recommended this in October. Apparently workers' comp. wanted a second opinion. He was seen by Dr. Edwards who has also recommended surgical treatment for him. I plan to proceed with this right away. We will certainly make every effort to get workers' comp. approval but I don't feel like we can afford to delay this any more than a few days. We are planning surgery for Monday.

(APA No. 7, p. 129).

On November 12, 2001, Dr. Rhea performed anterior cervical disc excision and spinal canal decompression, allograft fusion, internal cervical spine locking plate fixation. (APA No. 7, p. 133). On January 29, 2002, Dr. D'Angelo saw Claimant and noted:

7. The patient remains medically unable to work at any job and his disability, previously partial and now complete, dated to the work injury of January 14, 2001. The injury caused new problems as well as exacerbation of previous problems which had become asymptomatic prior to the accident...

(APA No. 3, p. 50)

After the surgery, Claimant continued treatment with Dr. Marc D'Angelo and Dr. Federer for cervical myelopathy and post concussion syndrome.

On March 6, 2002, Dr. D'Angelo noted "6. The patient continues to be totally disabled for any type of work secondary to a combination of his headaches, spastic diplegia, postconcussion syndrome with anxiety." (APA No. 3, p. 53).

On March 22, 2002, Dr. Sasha Federer saw Claimant and noticed numerous contusions on his arm and chest which the Claimant had done to himself a day or two prior. Dr. Federer consulted with Dr. D'Angelo and the two agreed the Claimant needed to be psychiatrically hospitalized to treat increased depression, whereupon he was admitted to Greenland Park on March 25, 2002. (APA No. 5, p. 99). On April 1, 2002, Dr. D'Angelo noted "45-year-old right-handed white male has become very anxious and felt his head was going to explode. He was afraid he was going to hurt someone or himself. He scratched his arms with the point of a knife." (APA No. 3, p. 62).

On March 29, Dr. Mark Weinberg of Greenland Park treated Claimant and noted:

...With his deteriorating impulse control, he is at risk for harming himself or others. This is evidenced by the fact that he has begun self-mutilating in the last week as a means of releasing pressure or tension... (APA No. 3, p. 56)

IMPRESSION: Generally healthy white male with hypertension and post-traumatic injuries that have produced chronic pain and affected his ability to walk normally.

DIAGNOSES:

- AXIS I        1. Major depressive episode, severe, without psychotic features.  
                 2. Mood disorder with mixed features, due to traumatic brain injury.  
                 3. Intermittent explosive disorder, due to traumatic brain injury.
- AXIS II        Rule-out organic personality disorder due to traumatic brain injury.
- AXIS III       Closed head injury with a variety of neurologic sequelae.
- AXIS IV       Problems in the areas of employment, self-esteem, sexual functioning, and health.
- AXIS V        41.  
(APA No. 3, p. 57)

Claimant was subsequently released to continue therapy with Dr. Federer. (Id.).

In summary, Dr. D'Angelo concluded that the Claimant suffered a physical injury to his brain on January 14, 2001, (D'Angelo dep. p. 18, ll. 18-21), and that Claimant's condition is a permanent one. (D'Angelo dep. p. 42, ll. 15-17). Dr. D'Angelo has also opined that he agrees with Dr. Sasha Federer that the increased irritability and explosiveness, dizziness, headaches and blurred vision that the Claimant complains of were a result of Claimant's physical injury to the brain. (D'Angelo dep. p. 18, l. 18 – p. 19, l. 12). Dr. D'Angelo further opined that the cervical disc problems that the Claimant suffered and that had to be surgically repaired on November 12 were the result of the accident of January 14, 2001. (D'Angelo dep. p. 33, ll. 20-25).

Dr. Federer testified that prior to the accident of January 14, 2001, Claimant suffered from a cyclothymic disorder which is a mood fluctuation in which the patient becomes at times depressed and at times elated. (Federer dep. p. 14, ll. 7-13).

Dr. Federer further testified that following the Claimant's injury of January 14, 2001, he had an increase in depression and decrease in his anger control. (Federer dep. p. 12, ll. 7-15). Dr. Federer further testified that, in his opinion, Claimant's increased irritability, explosive behavior, dizziness, headaches, and blurred vision, were the result of Claimant's physical brain injury on January 14, 2001. (Federer dep. p. 16, l. 21 – p. 17, l. 3). Dr. Federer further opined that Claimant's emotional and behavioral status prevent him from returning to work. (Federer dep. 17, ll. 16-18).

Similarly, Dr. Marc Weinberg of Greenland Park diagnosed Claimant's mood disorder with mixed features due to traumatic brain injury and intermittent explosive disorder due to traumatic brain injury, among other things. (APA No. 3, p. 57).

#### **FINDINGS OF FACT**

After the hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals,

**1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Emitt Gunnells being the Claimant, Galey & Lord being the Employer, and Royal Indemnity Company being the Carrier.**

This finding is based upon stipulation of the parties at the commencement of the hearing. (Tr. p. 1, ll. 7-14).

**2. I find that pursuant to §42-1-40 the Claimant's average weekly wage is Seven Hundred Sixty-Five and 97/100 (\$765.97) Dollars a week, resulting in a compensation rate of Five Hundred Ten and 65/100 (\$510.65) Dollars a week.**

This finding is based on the stipulations of the parties at the commencement of the hearing (Tr. p. 1, ll. 8-10).

3. I find that pursuant to §42-1-160, on January 14, 2001 the Claimant sustained a physical injury to his brain and an injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis. These injuries were sustained when a weighted compensation bar slammed down onto the top of the Claimant's head while the Claimant was trying to thread a cloth machine.

This finding is based on the Claimant's testimony (Tr. p. 9, l. 22 – p. 12, l. 21), on the Form 51 admission by the Defendant that the Claimant sustained an injury by accident in the form of a blow to the top of Claimant's head with resulting post concussion syndrome, cervical spine injuries, and subsequent depression, (See Form 51), and on the above set out medical records and testimony.

As to the physical brain injury, both Dr. D'Angelo, the Claimant's treating neurologist, and Dr. Federer, the treating neuropsychologist, opined that the Claimant sustained a physical injury to the brain on January 14, 2001. (D'Angelo dep. p. 18, ll. 18-21; Federer dep. p. 16, ll. 12-18). This conclusion is supported by the evidence of hemispheric lateralization in Claimant's brain which was revealed in neuropsychological evaluation. (Federer dep. p. 12, l. 19 - p. 13, l. 14; D'Angelo dep. p. 15, l. 7 – p. 17, l. 4).

Further, this finding is supported by the diagnoses of Dr. Marc Weinberg who conducted the Claimant's inpatient psychiatric evaluation at Greenland Park and concluded, among other

things, that Claimant suffered from “mood disorder with mixed features due to traumatic brain injury” and “intermittent explosive disorder due to traumatic brain injury.” (APA No. 3, p. 57).

As to the injury to the cervical discs, CT scans of the Claimant’s cervical spine conducted on the date of the accident at the emergency room revealed:

... CT of the cervical spine 01/14/01 showed fairly prominent spondylosis with a large osteophyte anteriorly at C5-6 with neuroforaminal stenosis with significant osteophyte posteriorly, mild foraminal stenosis at C4-5 on the right, mild lateral foraminal stenosis at C3-4. .. (p. 14)... (APA No. 3, p. 14).

Claimant continued to complain of neck pain and radicular symptoms in both hands. (See, e.g. APA No. 3, p. 15). Claimant later developed low back pain and intermittent weakness in the lower extremities. (APA No. 3, p. 35). Dr. D’Angelo ordered MRI scans of the cervical and lumbar spine on September 19, 2001 which revealed :

MRI of the cervical spine, 9/19/01 showed fusion at C6-7 and disc Osteophyte complex, both anterior and posterior, at C5-6. The anterior portion is rather large and disrupts the surrounding tissue. Disc osteophyte complex causes moderate spinal stenosis at C3-4. There is some faint signal change within the cervical spinal cord at this level...

MRI of the lumbosacral spine, 9/19/01, showed tarlov cyst in the sacral area with degeneration of the L4-5 disc, bulging disc at L3-4 and L4-5 levels. No lateral recess stenosis or spinal stenosis identified. (APA No. 3, p. 42)

Dr. D’Angelo then referred the Claimant to Neurosurgeon Dr. Andrew Rhea. Dr. Rhea ordered repeat MRIs and on October 12, 2001, Dr. Rhea noted:

This patient was seen 9-27 for neck pain and headaches. He also has a myelopathy. His MRI an shows fairly high grade stenosis at C3-4 and I believe he has a mildly abnormal cord signal at that level. In addition, his plain films have some suggestion of abnormal motion at C3-4. I have recommended anterior cervical disc excision, allograft fusion, and internal fixation...

(APA No. 7, p. 126).

On November 6, 2001, Dr. D’Angelo saw Claimant and noted:

...1. Worsening compressive cervical myelopathy. This is due to the progressive deterioration precipitated by the axial head injury suffered on January 14, 2001, superimposed upon a preexisting cervical spondylosis which had been asymptomatic since surgery in 1992.

2. Headaches. These have been a combination of the posttraumatic migraine and the cervicogenic component secondary to the cervical spine dysfunction.

3. Postconcussion syndrome. He had previous problems with cyclothymia but these have been aggravated by the closed head injury.

4. Hypertension. This has been exacerbated by the anxiety caused by the injury.

5. The present problem has progressed to the point that decompression of the cervical spinal cord is urgent. He has gone from intermittent giving away of his left leg to loss of sexual function to a spastic gait. If surgery is not done as soon as possible, the patient is at risk for permanent paralysis and complete disability...

(APA No. 3, p. 45).

At this point, Dr. D'Angelo reviewed the situation with the Carrier who refused to authorize surgery until the patient had a second opinion with Dr. W.S. Edwards, an orthopaedic surgeon. (APA No. 3, p. 46). Dr. D'Angelo felt the situation so urgent he sent Claimant directly to Dr. Edwards' office who saw Claimant that day. Dr. Edwards noted that Claimant's "left leg shaking uncontrollably and has since progressed to the point where he now basically drags his leg when he is trying to walk." (APA No. 8, p. 141). Dr. Edwards concluded "given the magnitude of symptoms and radiographic evidence of focal stenosis at C3-4 level, it was recommended that he undergo surgical treatment..." (APA No. 8, p. 143). Dr. Edwards further noted:

... I find him to have severe cervical stenosis with myelopathy and have recommended that he undergo urgent surgical decompression. I have spoken with Dr. Rhea personally regarding this gentleman and surgical intervention is being scheduled. This gentleman's

condition is deteriorating and any further delays would be inappropriate...

(APA No. 8, p. 144).

Dr. Rhea saw Claimant again on November 8, 2001, and found:

...clear-cut myelopathy in all four extremities with positive Hoffman's, hyperactive reflexes, increased tone, gait instability, and clonus. He has evidence of a disc bulge at C3-4 with some stenosis and probably abnormal cord signal there from central cord injury related to his accident in January, 2001 at work when some weights hit him on top of the head. Clearly, this is a work-related accident and certainly needs to be treated. I had recommended this in October. Apparently workers' comp. wanted a second opinion. He was seen by Dr. Edwards who has also recommended surgical treatment for him. I plan to proceed with this right away. We will certainly make every effort to get workers' comp. approval but I don't feel like we can afford to delay this any more than a few days. We are planning surgery for Monday.

(APA No. 7, p. 129).

On November 12, 2001, Dr. Rhea performed anterior cervical disc excision and spinal canal decompression, allograft fusion, internal cervical spine locking plate fixation. (APA No. 7, p. 133). On January 29, 2002, Dr. D'Angelo saw Claimant and noted:

7. The patient remains medically unable to work at any job and his disability, previously partial and now complete, dated to the work injury of January 14, 2001. The injury caused new problems as well as exacerbation of previous problems which had become asymptomatic prior to the accident...

(APA No. 3, p. 50)

Dr. D'Angelo indicated numerous times in his records and at deposition that the Claimant's cervical myelopathy was the result of the injury of January 14, 2001. (APA No. 3, p. 45; D'Angelo dep. p. 33, ll. 20-25).

The medical records also contain numerous other resulting medical conditions which I find have resulted from the injury including headaches and shoulder pain, (APA No. 3, p. 50),

hypertension (APA No. 3, p. 64), anxiety and depression (APA No. 3, p. 54) and sexual dysfunction (APA No. 3, p. 45).

**4. I find that, pursuant to §42-15-20, the Employer received notice of the accidental injuries within ninety (90) days of the accident.**

This finding is based on the above set out testimony and evidence as well as the Employer's Form 51 admission.

**5. I find that the injury to the cervical discs of Claimant's spine that Claimant suffered on January 14, 2001, aggravated the Claimant's pre-existing cervical spondylosis, which had been asymptomatic since surgery in 1992.**

This finding is based on the medical records and testimony. Dr. D'Angelo noted that Claimant had cervical spine surgery in 1992 at the hands of Dr. Andrew Rhea, neurosurgeon, and that after the surgery his neck pain had resolved so completely that he did not need physical therapy postoperatively. In fact, Dr. D'Angelo noted, the Claimant had no significant neck pain from 1992 until his closed head injury of January 14, 2001. (APA No. 3, p. 32; APA 7, p. 120). Dr. D'Angelo indicated numerous times in his records and at deposition that the Claimant's cervical myelopathy was the result of the injury of January 14, 2001. (APA No. 3, p. 33, 45, 65; D'Angelo dep. p. 33, ll. 20-25). Dr. D'Angelo also opined that the closed head injury of January 14, 2001, would be expected to cause and/or exacerbate the pre-existing cervical spine injury. (APA No. 3, p. 33, 45).

**6. I find that the physical brain injury that Claimant suffered on January 14, 2001, aggravated the Claimant's pre-existing cyclothymic condition.**

This finding is based on the medical records and testimony. In particular, Dr. Federer testified that prior to the accident of January 14, 2001, Claimant suffered from a cyclothymic

disorder which is a mood fluctuation in which the patient becomes at times depressed and at times elated. (Federer dep. p. 14, ll. 7-13).

Dr. Federer further testified that following the Claimant's injury of January 14, 2001, he had an increase in depression and decrease in his anger control. (Federer dep. p. 12, ll. 7-15). Dr. Federer further testified that, in his opinion, Claimant's increased irritability, explosive behavior, dizziness, headaches, and blurred vision, were the result of Claimant's physical brain injury on January 14, 2001. (Federer dep. p. 16, l. 21 – p. 17, l. 3).

Dr. D'Angelo also noted the Claimant's pre-existing anxiety disorder. (D'Angelo dep p. 12, l. 15 - p. 13, l. 12; APA No. 3, pp. 32–37). He opined that the pre-existing symptoms had been worsened by the injury of January 14, 2001. (D'Angelo dep. p. 13, ll. 6-12). Dr. D'Angelo agreed with Dr. Federer that the Claimant's explosiveness, headaches and irritability were the result of the physical brain injury sustained on January 14, 2001. (D'Angelo dep. p. 19, ll. 7-12; p. 14, ll. 18-23; APA No. 3, pp 33, 36). Dr. D'Angelo specifically noted "while there has been pre-existing cyclothemic factors present in this patient, the ability to cope has significantly and definitely worsened since the head injury." (APA No. 3, p 33).

**7. I find that the Claimant has reached maximum medical improvement on April 25, 2002, and is totally and permanently disabled, pursuant to §42-9-10, as a result of the January 14, 2001, physical injury to his brain and injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothyemic condition, and aggravation of pre-existing cervical spondylosis.**

This finding is based upon the testimony of the Claimant along with the medical records and testimony. Dr. D'Angelo and Dr. Federer agree that the Claimant suffered a physical brain

injury as the result of the accident of January 14, 2001. (D'Angelo dep. p. 18, ll. 18-21; Federer dep. p. 16, ll. 12-18). Dr. D'Angelo's notes contain numerous entries relating to his evaluation and treatment of the Claimant's increased irritability and explosive behavior, (e.g. APA No. 3, pp. 32-34), as do the records of Dr. Federer, the neuropsychologist to whom Dr. D'Angelo referred Claimant for treatment. (See, e.g., APA No. 5, p. 83). Dr. D'Angelo and Dr. Federer agree that as the result of his physical brain injury, the Claimant suffered increased irritability, explosive behavior, decreased anger control, dizziness, blurred vision, and headaches among other symptoms. (D'Angelo dep. p. 14, l. 7- p. 15, l. 1; p. 19, ll. 7-12; Federer dep. p. 16, l. 12 – p. 17, l. 1; APA No. 3, pp. 33-37).

On April 17, 2001, having treated the Claimant since January 23, 2001, for these symptoms of agitation and explosiveness which he defined "post concussive syndrome", (APA No. 3, pp. 10-25), Dr. D'Angelo permitted the Claimant to return to work on a trial basis. (APA No. 3, p. 25). Dr. D'Angelo's note of June 21, 2001 indicates that the Claimant was "still very irritable, more since he went back to work. He had a run in with his supervisor recently. Around that time, his right eye started twitching and he had a severe headache then he calmed down." (APA No. 3, p. 28). Dr. D'Angelo further noted "Irritability is one of the consequences of his postconcussion syndrome exacerbating his previous life-style." (Id.).

On June 25, 2001, the Claimant was reprimanded at work after an altercation with a co-worker in which he "went ballistic" and made threats to kill the co-worker. (APA No. 11, p. 151). On the employee statement portion of the reprimand form, the Claimant wrote "I'm going to therapy about my aggressiveness (sic), sometimes I can control it but other times not. I'm doing the best I can." (Id.)

Dr. D'Angelo's note of August 24, 2001, again indicated that the Claimant "notes that he has been upset at work over the last few days, losing his temper more easily." (APA No. 3, p. 32). On August 29, 2001, the Claimant was fired as the result of an explosive outburst of profanity aimed at a co-worker. (APA No. 12, p. 155). On Claimant's termination record the employer noted that it would not re-hire the claimant because he was "prone to losing temper." (Id.).

Dr. D'Angelo and Dr. Federer agree that, as the result of his physical brain injury, the Claimant suffered increased irritability, explosive behavior, and decreased anger control. (D'Angelo dep. p. 14, l. 7- p. 15, l. 1; p. 19, ll. 7-12; Federer dep. p. 16, l. 12 – p. 17, l. 1; APA No. 3, pp. 33-37). They further agree that Mr. Gunnells' explosive conduct on August 29, 2001, and his resulting termination were the result of the brain injury the Claimant suffered on January 14, 2001, and the consequent post concussive syndrome symptoms of increased irritability, explosive behavior and decreased anger control. (D'Angelo dep. p. 29, l. 11 – p. 31, l. 19; Federer dep. p. 14, l. 17 – p. 15, l. 14; p. 19, ll. 7-18). Moreover, they agree that Mr. Gunnell's condition prevents him from working. (D'Angelo dep. p. 41, ll. 8-12; Federer dep. p. 17, l. 4 – p. 19 l. 18; APA No. 3, pp. 53, 65).

In fact, by March 22, 2002, the Claimant's impulse control had deteriorated to the point that he engaged in self-mutilation. Dr. D'Angelo noted Claimant "has become very anxious and felt his head was going to explode. He was afraid he was going to hurt someone or himself. He scratched his arms with the point of a knife." (APA No. 3, pp. 62-66; APA No. 5, p. 99). Drs. D'Angelo and Federer immediately admitted the Claimant to Greenland Park Psychiatric Hospital for inpatient psychiatric evaluation and treatment. (APA No. 3, pp. 54, 56, 62-66; APA No. 5, p. 99). At Greenland Park, the treating psychiatrist, Dr. Marc Weinberg, concluded,

among other things, that Claimant suffered from “mood disorder with mixed features due to traumatic brain injury” and “intermittent explosive disorder due to traumatic brain injury.” (APA No. 3, p. 57).

At his deposition of April 25, 2002, Dr. D’Angelo testified that Mr. Gunnells is unable to work, (D’Angelo dep. p. 41, ll. 8-12) and that his condition is permanent. (D’Angelo dep. p. 42, ll. 15-17). Moreover, Dr. D’Angelo notes numerous times in his records that Claimant’s cervical myelopathy and resulting spastic gait contribute to the Claimant’s total disability. (See, e.g. APA No. 3, pp. 50, 53, 65).

Although Dr. D’Angelo has optimistic hope for Claimant’s condition, he continues to prescribe medication and long term physical and psychiatric therapy, (D’Angelo dep. p. 41, ll. 16-18; APA No. 3, p. 65), and Dr. D’Angelo opined on April 25, 2002 that Claimant’s physical condition is a permanent one. (D’Angelo dep. p. 42, ll. 15-17).

Although Claimant has been released from Greenland Park, it is obvious that he may need to be institutionalized in the future. I find that the Claimant has reached maximum medical improvement on April 25, 2002, the date Dr. D’Angelo opined that his condition is permanent. I find that the Claimant is as good as he can get with all of his problems. It is clear from the above set out medical records and testimony and the Claimant’s testimony on the stand as observed by this Commissioner, that the Claimant is totally and permanently disabled, pursuant to §42-9-10, as the result of physical injury to his brain and injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis.

Therefore, Claimant is entitled to lifetime medical benefits, along with weekly benefits at the rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period commencing November 12, 2001, and continuing for his lifetime.

8. Given the Claimant's total and permanent disability as a result of physical injury to his brain and injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis, I find that, pursuant to §42-15-60 Defendants are responsible for all medical treatment rendered to Claimant including medical treatment rendered by Dr. Andrew Floren, Dr. Marc D'Angelo, Dr. Sasha Federer, Dr. Marc Weinberg, Dr. Andrew Rhea, Dr. W.S. Edwards, including treatment for physical injury to his brain, injury to the cervical discs of his spine, post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis, from the date of the injury, January 14, 2001, until the date of this Order and continuing for the Claimant's lifetime.

This finding is based upon the above set out medical records and testimony.

9. I find that, given the Claimant's total and permanent disability as a result of the January 14, 2001, physical injury to his brain and injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis, Claimant is entitled to weekly benefits at the rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period

commencing November 12, 2001, and continuing for Claimant's lifetime, subject to credit in the amount of Four Thousand Two Hundred Ninety-Nine and 29/100 (\$4,299.29) Dollars for temporary total benefits paid to the Claimant during the period between January 14, 2001, and April 18, 2001, when Claimant was also receiving salary continuation. I further find that, pursuant to §42-9-210 a deduction from the Claimant's award for that credit shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

This finding is based upon the above set out medical records and testimony.

#### RULINGS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. Under §42-1-130, the Claimant was a covered Employee at the time in question; and under §42-1-140, the Defendant-Employer was a covered Employer under the Act.
2. Under §42-1-160 and §42-9-10, the Claimant did sustain a physical injury to his brain and injury to the cervical discs of his spine with resulting post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis, by accident arising out of and in the course of his employment.
3. Under §42-15-20, the Claimant gave proper notice of the accident to the Employer.
4. Under §42-15-60 and §42-9-10, the Employer is required to furnish adequate and proper medical care for the Claimant's lifetime.

5. Under §42-9-10 and §42-9-200, the Claimant is entitled to weekly benefits at the rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period commencing November 12, 2001, and continuing for Claimant's lifetime.

6. Under §42-9-210, Defendants are entitled to credit in the amount of Four Thousand Two Hundred Ninety-Nine and 29/100 (\$4,299.29) Dollars for temporary total benefits paid to the Claimant during the period between January 14, 2001, and April 18, 2001, when Claimant was also receiving salary continuation. I further find that, pursuant §42-9-210, a deduction from the Claimant's award for that credit shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

#### ORDER

IT IS, THEREFORE, ORDERED that the Form 50 regarding the injury of January 14, 2001, under Workers' Compensation File No. 0019882 is found to be a compensable accident. It is,

FURTHER ORDERED that the Employer, Galey & Lord, and the Carrier, Royal Indemnity Company, shall pay all medical treatment rendered to Claimant, including medical treatment rendered by Dr. Andrew Floren, Dr. Marc D'Angelo, Dr. Sasha Federer, Dr. Marc Weinberg, Dr. Andrew Rhea, Dr. W.S. Edwards, including treatment for physical injury to his brain, injury to the cervical discs of his spine, post concussion syndrome, anxiety, depression, cervical myelopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis, from the date of the injury, January 14, 2001, until the date of this Order and continuing for the Claimant's lifetime. It is,

FURTHER ORDERED that, pursuant to S.C. Code Ann. §42-15-60, the Employer, Galey & Lord, and the Carrier, Royal Indemnity Company, shall pay for reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care during the life of the Claimant, without regard to any limitation in Title Forty-Two (42) of the Worker's Compensation Act, including the maximum compensation limit. It is,

FURTHER ORDERED that the Claimant reached Maximum Medical Improvement on April 25, 2002. It is,

FURTHER ORDERED that the Employer/Carrier pay the Claimant temporary total benefits at the compensation rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period between November 12, 2001, and April 25, 2002, which payments have already been made and for which the Employer/Carrier is hereby granted a credit. It is,

FURTHER ORDERED that commencing April 25, 2002, the Employer/Carrier is required to pay a permanent award of lifetime weekly benefits pursuant to S.C. Code Ann. §42-9-10 at the compensation rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period commencing April 25, 2002, and continuing for Claimant's lifetime, provided that the Employer/Carrier shall receive a credit for temporary total payments made after April 25, 2002. It is,

FURTHER ORDERED that the Defendants are entitled to credit in the amount of Four Thousand Two Hundred Ninety-Nine and 29/100 (\$4,299.29) Dollars for temporary total benefits paid to the Claimant during the period between January 14, 2001, and April 18, 2001, when Claimant was also receiving salary continuation. Pursuant to §42-9-210 a deduction from the Claimant's award for that credit shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

No hearing costs are assessed in this instance.

SC WORKERS' COMPENSATION COMMISSION

*[Handwritten Signature]*  
HOLLY SALEEBY ATKINS, COMMISSIONER

Columbia, South Carolina

Dated: 1-4 2002

S.W.  
S.R.

CERTIFICATE OF SERVICE

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

This 7 day of January, 2003

By Michael H. [Signature]  
Administrative Assistant to the Commissioner



on the matter at that time, via telephone, and off the record, and that they were prepared to proceed. Accordingly, the hearing went forward and the parties were heard.

Petitioner, Stephen J. Wukela, argued that he prosecuted the above captioned contested brain injury case on behalf of the claimant and, after hearing, obtained an Order of permanent and total disability due to cervical spine and brain injury; with the resulting award of lifetime benefits. Petitioner further argued that based on the calculations made by the Commission's claims examiner using the claimant's age, life expectancy, and compensation rate, the petitioner's one-third attorney's fee commuted to a present day value of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars.

Defense indicated that it had no objection to the calculations prepared by the Commission and presented by the petitioner, and that there was no dispute as to the amount of the fee. Defense indicated, however, that it opposed the petition based on the fact that the employer was self-insured up to a certain retention level and was in financial hardship.

Having given consideration to the petition and the arguments of the parties, the undersigned finds as follows:

**FINDINGS OF FACT:**

**1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.**

This finding is based upon the stipulations of the parties at the hearing on the merits conducted in the underlying matter before Commissioner Atkins on May 1, 2002.

**2. I find that the telephone hearing on the instant Petition and Motion conducted before the undersigned via telephone and off the record on September 11, 2003, satisfies the**

requirements of the Administrative Procedures Act and the Workers' Compensation Act, specifically § 42-17-20 et. seq., R. 67-601 et. seq., and R. 67-1207(B)(3).

This finding is based upon the stipulations of the parties at the hearing conducted via telephone before the undersigned on September 11, 2003.

3. I find that the petitioner, Stephen J. Wukela, successfully prosecuted a contested physical brain injury case on the behalf of claimant, Emitt Gunnells, against defendants Galey & Lord, employer, and Royal Indemnity Company, carrier which resulted in an Order finding claimant "totally and permanently disabled pursuant to § 42-9-10 as a result . . . of physical injury to the brain and injury to the cervical discs of his spine . . ." (Order of January 7, 2003, (hereinafter "Order"), p. 21), and further resulting in the claimant's entitlement to lifetime benefits. (Order, p. 28).

This finding is based on the evidence in the record as follows: Claimant was injured on January 14, 2001, when while the Claimant was trying to thread a cloth machine a weighted compensation bar flew into the air and slammed down onto Claimant's head, knocking him unconscious. (Order, p. 6; Tr. p. 9, l. 22 – p. 12, l. 10). Claimant was out of work from January 14, 2001, through April 18, 2001, during which time he received Workers' Compensation benefits. He returned to work on a trial basis on April 18, 2001, at the direction of his treating neurologist, Dr. Marc D'Angelo, and he worked until August 29, 2001, at which time he was fired after an explosive outburst which Dr. D'Angelo later related to his injury. (Order pp. 8, 10). Claimant received no further Workers' Compensation benefits and on September 10, 2001, Claimant retained the undersigned Petitioner, Stephen J. Wukela.

The Petitioner, Stephen J. Wukela, has been representing the Claimant, Emitt Gunnells, since September 10, 2001, in the matter of a Worker's Compensation claim for an accident that

occurred on January 14, 2001. (See copy of Representation Agreement attached as Exhibit "A" to Motion.)

The Petitioner, Stephen J. Wukela, filed a Form 50 on September 14, 2001, alleging closed head injury and injury to Claimant's neck, shoulders, back and legs, and requesting a hearing. (See Form 50 attached as Exhibit "B" to Motion). By October 12, 2001, the Claimant still was not receiving temporary total benefits and Claimant's treating neurosurgeon, Dr. Andrew Rhea, was recommending surgery on Claimant's neck. (APA No. 7, p. 126). The Defendants did not respond to Claimant's Form 50 claiming temporary total benefits, whereupon Petitioner scheduled the deposition of the adjuster and case manager. Defendants ultimately commenced temporary total and agreed to pay for Claimant's surgery in exchange for Claimant cancelling the depositions.

In preparation for a hearing on brain injury and permanency, Petitioner took the deposition of Claimant's treating neurologist, Dr. Marc D'Angelo and his treating neuropsychologist, Dr. Sasha Federer, who both opined that Claimant had sustained a brain injury. (D'Angelo dep. p. 18, ll. 18-21; Federer dep. p. 16, ll. 12-18).

On March 5, 2002, Petitioner filed an Amended Form 50 alleging closed head injury, and injury to the brain, neck, shoulders, back, legs and psyche. (See Form 50 attached as Exhibit "C" to Motion). On April 4, 2002, Defendants filed a Form 51 wherein they alleged that "Defendants admit injury by accident in the form of a blow to the top of Claimant's head with resulting post concussive syndrome, cervical spine injury and subsequent depression. Defendants deny any other alleged injuries and further deny that the Employee is permanently disabled." (See Form 51 attached as Exhibit "D" to Motion)(emphasis added).

A hearing was held on May 1, 2002 before Commissioner Holly Saleeby Atkins. At the hearing, Petitioner contended that the Claimant had suffered a physical brain injury within §42-9-10 and was permanently and totally disabled. (Tr. p. 2, ll. 2-5; p. 4, ll. 7-9). At the hearing, Defendants specifically denied that Claimant had suffered a physical brain injury, (Tr. p. 7, ll. 17-18), and further contended that Claimant had not reached maximum medical improvement. (Tr. p. 7, l. 10).

The Single Commissioner issued an Order on January 7, 2003, finding, among other things, that the Claimant was “totally and permanently disabled pursuant to §42-9-10 as a result ... of physical injury to the brain and injury to the cervical discs of his spine...” (Order p. 21).

The Employer, Galey & Lord, and the Carrier, Royal Indemnity Company, were ordered to pay all medical treatment rendered to Claimant, including medical treatment rendered by Dr. Marc D’Angelo, Dr. Sasha Federer, Dr. Marc Weinberg, Dr. Andrew Rhea, Dr. W.S. Edwards, including treatment for post concussive syndrome, cervical myleopathy, hypertension, depression, anxiety, cyclothymia, and sexual dysfunction from the date of the injury, January 14, 2001, until the date of the Single Commissioner’s Order and continuing for the Claimant’s lifetime; and the Employer/Carrier was ordered to pay to the Claimant benefits at the compensation rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period commencing November 12, 2001, and continuing for Claimant’s lifetime.

On January 21, 2003, the Defendants appealed the Order of the Commissioner asking for a Commission review on, among other things, the issue of whether “the hearing Commissioner erred in finding that as a fact and ruling as a matter of law that Claimant suffered a physical injury to his brain and the other injuries set forth in said finding and conclusion, ...” and “Whether the hearing Commissioner erred in finding ... that Claimant reached maximum

medical improvement on April 25, 2002, and is totally and permanently disabled ...” (See Defendant’s Form 30).

On March 6, 2003, at the Defendants request, Claimant agreed to hold the appeal in abeyance until May 19, 2003, and on May 21, 2003, Claimant requested the Commission schedule the appeal for hearing. (See letters of March 6, 2003, and May 21, 2003, attached as Exhibit “F” to Motion). A review hearing was scheduled for July 29, 2003. On July 16, 2003, the Defendants withdrew their appeal. (See July 16, 2003, letter attached as Exhibit “G” to Motion).

**4. I find that the attorney’s fee in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars was calculated properly and correctly.**

This finding is based upon the stipulations of the parties at the commencement of the hearing. The Claimant was born on July 17, 1956. The Claimant’s life expectancy pursuant to §19-1-150 is twenty-eight and 76/100 (28.76) years or one thousand four hundred ninety-five and 52/100 (1,495.52) weeks. The attorney fee contract is based on a one-third (1/3) contingency fee. (See Exhibit A and J to Motion). The compensation rate is Five Hundred Ten and 65/100 (\$510.65) Dollars, which would be a total of Seven Hundred Sixty-Three Thousand Six Hundred Eighty-Seven and 29/100 (\$763,687.29) Dollars for the one thousand four hundred ninety-five and 52/100 (1,495.52) weeks. Pursuant to the computations of Cathy Dean, Claims Examiner at the South Carolina Workers’ Compensation Commission, one-third (1/3) of that amount would be Two Hundred Fifty-Four Five Hundred Sixty-Two and 17/100 (\$254,562.17) Dollars, and using a five (5%) percent discount per annum, the commuted value of the attorney fees would be Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41)

Dollars. (See copy of letter of SC Workers' Compensation Commission dated August 11, 2003, attached as Exhibit "H" to Motion.)

5. I find that the attorney's fee in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars is fair, equitable, reasonable, and commensurate with the amount of effort that was involved in this case within the meaning of the Workers' Compensation Act, Rule 67-1205, and Rule 1.5 of the Rules of Professional Conduct.

The undersigned finds that at the outset of the hearing the Defense indicated that it had no objection as to the calculation of the fee totaling Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars.

I further find that the fee is fair, equitable, reasonable, and commensurate with the amount of effort that was involved in this case, and the results obtained, within the meaning of the Workers' Compensation Act, Rule 67-1205, and Rule 1.5 of the Rules of Professional Conduct.

Rule 67-1205(B) provides the standard for determining a reasonable fee in the Workers' Compensation context. It provides that:

[i]f the parties agree to a contingent fee contract, the fee is deemed reasonable when the following requirements are met and the requested fee does not conflict with the South Carolina Supreme Court Disciplinary Rule on determining a reasonable fee [Rule of Professional Conduct 1.5].

- (1) The attorney fully explains the fee agreement to the client and informs the client of the total dollar amount of the fee that will be deducted from the clients benefits; and
- (2) The client agrees to the fee by signing a completed form 61; and
- (3) The attorney calculates the fee according to C below.

Rule 1.5 of the Rules of Professional Conduct goes on to provide that:

The factors to be considered in determining the reasonableness of a fee include  
The following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

I find that the requirements of Rule 67-1205 and Rule 1.5 are satisfied in that Claimant's attorney entered into a contingent fee contract dated September 10, 2001, and that Julie Gunnells, as Guardian *ad litem* for Emitt Gunnells, and Claimant, Emitt Gunnells, are in agreement that the attorney's fees are fair, just and equitable and appropriate in this case and in accordance with the contingent fee contract. Both the claimant and the claimant's guardian ad litem signed a completed form 61, the Motion To Approve Commuted Lump Sum Payment of Attorney's Fees as well as separate affidavits testifying to the one-third (1/3) contract, their understanding and agreement with the contents of the motion and, specifically, the amount of the fee and the fact that claimant's permanent disability benefits in the amount of Five Hundred Ten and 65/100 (\$510.65) Dollars will continue for the remainder of claimant's life or the balance of five hundred (500) weeks, whichever is greater. (See Exhibit J to Motion).

Moreover, the calculation of attorney's fees in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars is undisputed and correct as described above.

I further find that the Rule 1.5 factors are satisfied in that attorney's fees in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars is commensurate with the amount of time, labor and effort that was involved in this case, to include representation for twenty-three (23) months, filing of a Form 50, preparation for and attendance at taking of depositions of Dr. Marc D'Angelo and Dr. Sasha Federer, preparation for and participation at a Form 50 hearing involving Claimant's entitlement to lifetime benefits arising out of permanent disability involving brain damage, and preparation for an appeal.

The undersigned finds that a case such as this involving brain injury, and cervical injury is novel, and the questions involved are difficult, particularly given the large amounts involved and the unique nature of Workers' Compensation law. Both attorneys and their respective firms are well known to this Commission as being exceptionally skilled in the processing and litigation of Workers' Compensation claims. This case demanded a significant knowledge of legal, medical and psychological issues and I find that the skill and experience of the lawyers on both sides is evidenced by their handling of this complicated and highly contested case.

I further find that a one-third (1/3) contingent fee is customarily charged by Workers' Compensation plaintiffs' lawyers for similar legal services. The prosecution of such a case, especially on a contingent fee, requires that the lawyer forego other employment and defer payment, in this case for two years, in the hopes of a successful outcome. In this case, the results obtained were lifetime benefits, the maximum available under the Workers' Compensation Act.

In contesting the Motion for lump sum payment of Attorney's fee, the Defense argues that the employer is in financial difficulty, and is, in fact, in Chapter 11 reorganization. Although they advise the Commission that their reorganization provides for the payment of Workers' Compensation claims, and they continue to pay the claimant's weekly checks, the employer argues that it is self-insured up to a certain retention level and that the payment of this lump sum attorney's fee would place hardship on them financially.

The undersigned is sympathetic with the employer's plight and concerned about the well being of the company. However, the employer voluntarily chose to self-insure up to a certain level and in so doing it undertook the claims risks associated, as well as the obligation to maintain adequate reserves to cover those risks. Consequently, if any party should bear the risk of the employer's insolvency, it should be the employer. Therefore, I hereby grant the Petition for Attorney's fees and the Motion for Payment of Attorney's Fees in a Lump Sum.

**6. I find that costs in the amount of One Thousand Three Hundred Forty-Eight and 50/100 (\$1,348.50) that have been incurred by Claimant's Attorney are waived by Claimant's attorney.**

**7. The Petition for Attorney's fees and Motion to Approve Commuted Lump Sum Payment of Attorney's fees are appropriate within the South Carolina Workers' Compensation Act and are, therefore, approved.**

#### **RULINGS OF LAW:**

**1. The parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.**

2. Venue is proper in that the telephone hearing on the instant Petition conducted before the undersigned via telephone and off the record on September 11, 2003, satisfies the requirements of the Administrative Procedures Act and the Workers' Compensation Act, specifically § 42-17-20 et. seq., R. 67-601 et. seq., and R. 67-1207(B)(3).

3. The petitioner, Stephen J. Wukela, successfully prosecuted a contested physical brain injury case, within the meaning of §42-9-10 and R. 67-1205, on the behalf of claimant, Emitt Gunnells, against defendants Galey & Lord, employer, and Royal Indemnity Company, carrier which resulted in an Order finding claimant "totally and permanently disabled pursuant to § 42-9-10 as a result . . . of physical injury to the brain and injury to the cervical discs of his spine . . ." (Order, p. 21), and further resulting in the claimant's entitlement to lifetime benefits. (Order, p. 28).

4. The attorney's fee in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars was calculated properly and correctly, within the meaning of R. 67-1207.

5. The attorney's fee in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars is fair, equitable, reasonable, and commensurate with the amount of effort that was involved in this case within the meaning of the Workers' Compensation Act, Rule 67-1205, and Rule 1.5 of the Rules of Professional Conduct.

6. Costs in the amount of One Thousand Three Hundred Forty-Eight and 50/100 (\$1,348.50) that have been incurred by Claimant's Attorney are waived by Claimant's attorney.

7. The Petition for Attorney's fee and Motion to Approve Commuted Lump Sum Payment of Attorney's fee are appropriate within the South Carolina Workers' Compensation Act, including R. 67-1204, 67-1205, 67-1207, and Rule 1.5 of the Rules of Professional Conduct, and are, therefore, approved.

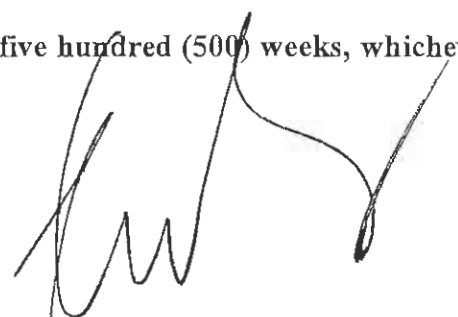
8. Pursuant to §42-15-90; R. 67-1207(B)(2), and Glover by Cauthen v. Suitt Const. Co., 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995), the amount of each temporary total payment the Claimant receives shall not be interrupted and the attorney's fee shall be deducted from the end of the award.

ORDER

IT IS THEREFORE ORDERED that pursuant to §42-15-90, R.67-1207(B) Collection of Attorney's Fee in a Lump Sum, and R.67-215, and Glover by Cauthen v. Suitt Const. Co., 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995), the Employer, Galey & Lord, the Carrier, Royal Indemnity Company, shall pay to Stephen J. Wukela lump sum attorney fees in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (\$202,231.41) Dollars, with costs being waived.

IT IS FURTHER ORDERED that the Carrier shall continue permanent disability payments to the Claimant in the amount of Five Hundred Ten and 65/100 (\$510.65) Dollars for the remaining years of his life or the balance of five hundred (500) weeks, whichever is greater.

AND IT IS SO ORDERED.



Columbia, South Carolina  
\_\_\_\_\_, 2003

COMMISSIONER, SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

CERTIFICATE OF SERVICE  
This is to certify that the undersigned has personally served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 23rd day of September, 2003  
By C. Mason  
Administrative Assistant to the Commissioner

STW  
SMR

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0100434

EMITT R. GUNNELLS,

Employee,

Claimant,

vs.

GALEY & LORD INDUSTRIES,

Employer,

AND

ARROWPOINT CAPITAL CORORATION,

Carrier,

Defendants/Petitioners.

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**DECISION AND ORDER**

**DATE OF HEARING:** Telephonic conferences/hearings were held on November 4, 2020 and March 29, 2021.

**APPEARANCES:** Claimant is represented by Steve Wukela, Jr., Esquire of Wukela Law Firm of Florence, South Carolina.

Defendants/Petitioners represented by Vernon F. Dunbar, Esquire of McAngus Goudelock & Courie, L.L.C. of Greenville, South Carolina.

**PURPOSE OF THE HEARING:** To determine issues as raised in Defendants'/Petitioners' Motion and Petition Requesting Credit for Overpayment of Weekly Permanent Disability Benefits.

**COMMISSIONER:** The Honorable Melody L. James, Commissioner

**FILED:** August 16, 2021

## STIPULATIONS

The parties stipulated to the following facts and issues:

1. The purpose of the hearing is to determine the issues as raised in Defendants'/Petitioners' Motion and Petition regarding credit for the overpayment of lifetime permanent partial disability benefits.

2. Notice of the hearings were timely and properly provided to all parties of interest.

3. The established compensation rate is \$510.65.

4. On January 14, 2001, Emmitt Russell Gunnells, Claimant, suffered compensable injuries to his brain, cervical discs of his spine, with resulting post concussive concussion syndrome, depression, anxiety, cervical myopathy, sexual dysfunction, hypertension, aggravation of pre-existing cyclothymic condition, and aggravation of pre-existing cervical spondylosis.

5. By Order dated January 7, 2003, former Commissioner Holly Saleeby Atkins adjudicated Claimant permanently and totally disabled and awarded Claimant lifetime indemnity and medical benefits. Claimant has been receiving weekly compensation since November 12, 2001.

6. Claimant has been overpaid \$22,619.19 in permanent disability benefits due to a clerical error adjusting and increasing the previously established compensation rate.

7. Without objection, the Commission file is made a part of the record, excluding unstipulated medical reports, self-serving statements and hearsay testimony.

### STATEMENT OF THE CASE

By Order dated January 7, 2003, former Commissioner Holly Saleeby Atkins found and concluded Emitt Russell Gunnells, Claimant, was entitled to lifetime medical and indemnity benefits pursuant to Sections 42-9-10(C) and 42-15-60.

The un-appealed Order of Commissioner Atkins reflect the parties stipulated to an average weekly wage of \$765.97 and a corresponding compensation rate of \$510.65. Pursuant to the Order, Claimant was ordered to be paid a compensation rate of \$510.65 per week for life.

Subsequent to Claimant being adjudicated permanently and totally disabled and entitled to lifetime indemnity and medical benefits, Stephen J. Wukela, Esquire, attorney for Claimant, filed a Form 61 and a Motion to approve a commuted lump sum payment of attorney's fees and costs. In the Motion dated August 13, 2003, Claimant and his attorney asserted the following:

1. Claimant was born on July 17, 1956.
2. Pursuant to the life expectancy tables contained in Section 19-1-150, Claimant's life expectancy was 28.76 years or 1,495.52 weeks as of August 13, 2003.
3. Claimant agreed that the attorney fee contract entitled his attorney to one-third contingency fee.
4. Utilizing the established compensation rate of \$510.65, the total calculated award as of August 13, 2003 was \$763,687.29.
5. The South Carolina Workers' Compensation Commission Claims Examiner calculated the attorney's fee award as totaling \$202,231.41.

6. By Order dated September 23, 2003, the Commission approved the Form 61 Attorney Fee Petition and Motion for the Payment of Attorney's Fees and promulgated an Order approving the requested attorney's fees. The attorney fee payment was deducted from Claimant's lump sum disability award of \$763,687.29 by shortening the period in which disability payments are owed.

7. The Order approving the requested attorney's fees specifically states in Ruling of Law No. 8 that:

**Pursuant to §42-15-90; R. 67-1207(B)(2), and Glover by Cauthen v. Suitt Const. Co., 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995) (sic), the amount of each temporary total payment the Claimant receives shall not be interrupted and attorney's fee shall be deducted from the end of the award.**

Later, through a clerical error and inadvertence, Claimant began receiving weekly permanent partial disability compensation benefits in the amount of \$537.77. As a result, Galey & Lord and Arrowpoint Capital Corporation, Defendants/Petitioners have overpaid Claimant \$22,619.16 in permanent indemnity benefits.

Upon discovery of the error, August 3, 2020, Petitioners began paying Claimant the correct compensation rate of \$510.65 on August 3, 2020, pursuant to the Order and the law of the case. Arrowpoint Capital Corporation, Petitioner, respectfully requested the Commission order and award reimbursement of the overpayment by reducing Claimant's weekly benefits from an amount ranging from \$50.00 to \$150.00 per week until the overpayment of indemnity benefits in the amount of \$22,619.16 has been fulfilled or reimbursed.

In the alternative, Petitioners requested that the overpayment is factored into the amount of benefits which are to be paid over Claimant's life expectancy in accordance with Section 19-1-150, which in turn would permit Petitioners to shorten and terminate Claimant's indemnity benefits from the designated permanent disability award.

Two motion hearings were conducted in this matter. As a result, the Commission file was thoroughly reviewed along with appellate court holdings and rulings regarding the issues raised.

### **LEGAL ARGUMENTS**

Petitioners first argued that its request for credit for the inadvertent overpayment of weekly disability benefits is governed by Regulation 67-1603. Specifically, Petitioners argue Regulation 67-1603 allows the Commission to reduce Claimant's future weekly benefits by no more than 25% of the current weekly benefits (\$510.65) in order to recover the overpayment from Claimant. *See, Regulation 67-1603(C)(3)(b)(i) (2021)*. Petitioners argue that a weekly reduction of 25% or \$127.66 would be less of an onerous burden on Claimant rather than shortening the period of compensation in order to recover the overpayment. As a matter of fact, Petitioners asserted it was willing to accept a weekly reduction of \$50.00 in order to recover the overpayment.

Claimant objected to the applicability of Regulation 67-1603. Claimant argues Regulation 67-1603 is only applicable when there is an error in calculating the Form 20.

Petitioner then argued that pursuant to the law of the case as established in the Commission's Orders and by virtue of the position taken by Claimant's counsel with respect to payment of the award of attorney's fees, the recovery of the credit for the overpayment can be accomplished by shortening the period for which Claimant is entitled to benefits.

Petitioner expressed reservations and concerns about the financial impact of shortening the period during which compensation must be paid pursuant to Section 42-9-210. Claimant, however, has previously agreed to shorten the period with respect to credit for temporary total disability compensation that had been paid that was not due during 2001. The amount of that credit is \$4,299.29. In the same manner, Claimant also agreed to shorten the period of his designated disability in order to pay attorney fees and costs. The \$4,299.29 credit coupled with the advancement of attorney's fees and costs in the amount of \$202,231.41 and the recent overpayment in the amount of \$22,619.16 equates to 448.74 weeks of credit.

In Claimant's Motion for approval of attorney's fees, he stipulated his life expectancy pursuant to Section 19-1-150 was 28.76 years or 1,495.52 weeks on August 13, 2003. According to Section 19-1-150, Claimant is entitled to payment of benefits to age 75.76 years. As of March 29, 2021, Claimant is 64 years of age. Hence, Defendants are statutorily obligated to pay benefits through 2032 until he reaches 75.76 years of age. Thus, the credit must be taken before the end of the award, which is 2032, in order to be fully repaid. Accordingly, Petitioners argue that in order to recoup the 448.74 weeks of benefits, the deduction or termination of benefits must begin once Claimant reaches 67 years of age, or specifically on December 31, 2023.

Claimant then objected to Petitioner's request that the recovery for the overpayment should be made by shortening the period in which compensation must be paid pursuant to Section 42-9-210. Claimant argues that because lifetime benefits are payable for life, no deduction can be taken for the credit for attorney's fees, overpayment of temporary total, or overpayment for permanent and total disability benefits.

Claimant argues that the Commission is not empowered to convert the Claimant's lifetime award to an award for a fixed period of time from which a deduction can be taken. That is to say, the Claimant argues that the Order requires that he receive benefits for his "lifetime", i.e. his natural life, not his "statutory life expectancy" pursuant to S.C. Code §19-1-150. In support, the Claimant points to the Court of Appeals case in Floyd v. C.B. Askins and Co. 382 S.C. 84 (Ct. App. 2008). There, Claimant received the lifetime award pursuant to SC §42-9-10 for physical brain damage. He died from an unrelated cause before reaching his statutory life expectancy. Beneficiaries sought an award of the balance of his benefits through his statutory life expectancy. The Court of Appeals disagreed finding that the award under S.C. Code §42-9-10 was for the Claimant's natural life not his statutory life expectancy and, therefore, his benefits abated upon his death.

Claimant argues that the Floyd case makes it clear that the benefits under S.C. Code §42-9-10 are for natural life not statutory life, and that the Commission cannot alter that award by substituting Claimant's statutory life expectancy for his natural life so that the period can then be shortened pursuant to S.C. Code §42-9-210 to recoup overpayments.

On page 5 of Commissioner Atkins' order, Claimant stipulated credit could be taken by shortening the period in which compensation must be paid pursuant to Section 42-9-210. Moreover, in the un-appealed Order and Finding of Fact No. 9 as is reflected on pages 25 and 26 of the Order, Commissioner Atkins found Petitioners were entitled to credit for an overpayment of temporary total disability compensation benefits "by shortening the period during which compensation must be paid and not by reducing the amount of the weekly benefit." This finding was further reiterated in Ruling of Law No. 6 on page 27 of the Order.

Accordingly, Petitioner argues Claimant is judicially estopped from arguing that the period in which compensation payments must be paid cannot be shortened based upon the unappealed Order and testimony set forth in the transcript as is reflected in Commissioner Atkins' Order. As a matter of fact, in the September 23, 2003 Order of the Commission approving the attorney's fees, in Ruling of Law No. 8, the Commission determined as a matter of law the attorney's fees paid "shall be deducted from the end of the award."

There is no doubt that the permanent lifetime indemnity award was calculated based upon the life expectancy tables and Claimant living until approximately 75.76 years of age. This calculation constitutes the lifetime indemnity award of \$763,687.29; and the award is the basis of the award of attorney's fees and costs. Therefore, Petitioners argue the additional credit stemming from the overpayment of permanent disability benefits can be taken from the award by shortening the period in which disability benefits are due.

Upon a review of the Commission file, legal authorities and arguments of legal counsel, the following Findings of Fact are made:

#### **FINDINGS OF FACT**

1. By virtue of an inadvertent clerical error, Arrowpoint Capital Corporation increased Claimant's permanent disability weekly award from \$510.65 to \$537.77. Claimant's weekly benefits were placed upon an automatic payment plan so as not to cause any undue hardship as a result of missed or untimely payments. As such, the amount of weekly benefits or compensation rate was automatically increased through an error in programing. Thus, the \$27.12 per week in overpayment was not discovered until later. As a result, Claimant has been overpaid \$22,619.16 in benefits.

2. Petitioner is entitled to credit for the overpayment of permanent disability benefits which have been previously established by Order of this Commission. Moreover, pursuant to the theory of unjust enrichment, Section 42-9-210 and Regulation 67-1603(C)(3)(b) provides for the recovery for any overpayment or benefits that were paid and were not owed.

3. Regulation 67-1603 is not applicable with respect to Petitioners' request for relief. Specifically, Regulation 67-1603 requires an agreement by Claimant to the reduction with respect to a compensation rate erroneously paid. Although the undersigned Commissioner finds this theory of recovery for the overpayment or credit from Claimant to be less onerous and more desirable, the language of the Regulation reflects that it is not applicable to the case at bar. To this end, because Claimant does not consent to any deduction of any amount from his permanent disability checks, the undersigned is without recourse to resolve the issue of credit by deducting even the most de minimis amount from his weekly checks.

4. Claimant's objection to a deduction from the end of his lifetime award is barred by judicial and equitable estoppel. Claimant stipulated Petitioners were entitled to credit for the overpayment of temporary total disability compensation benefits in a prior workers' compensation hearing. Also, Claimant's requested the advancement of a lump sum to satisfy attorney's fees and costs; and he agreed Petitioners could deduct from the end of the lifetime award the credit extended for the advancement of attorneys' fees and costs.

5. The case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) held that the South Carolina Workers' Compensation Commission could approve a lump sum award from a lifetime benefits case, which is to be deducted from the end of the Claimant's award. The Court ruled that "the mortality tables provide an adequate basis upon which to determine the present-day value" of a lifetime indemnity award. *Id.* at 467 n. 3, 458 S.E.2d at 537 n.3.

6. Claimant's award for lifetime benefits is properly predicated upon his life expectancy pursuant to Section 19-1-150 (life expectancy tables). In the Motion for approval of attorney's fees dated August 13, 2003, the life expectancy tables reflected Claimant's life expectancy was 28.76 years. Based upon Claimant's date of birth of July 17, 1956, Claimant was 47 years of age in 2003. Thus, the lifetime award is based upon Claimant living until 75.76 years. The Commission calculated the lifetime indemnity award as totaling \$763,687.29, predicated upon payment of 1,495.52 weeks of compensation benefits.

7. Because the award with respect to calculating a lump sum award is predicated upon Claimant surviving until age 75.76, credit must be taken from the end of the award. The lifetime indemnity award ends on or about December 31, 2032, according to the mortality or life expectancy tables.

8. Petitioners have credits of \$4,299.29; \$202,231.41; and \$22,619.16 for a total of \$229,149.86. This amount equates to a credit for which Petitioners are owed which totals 448.74 weeks or 8.629 years. Using a rounded figure of 8 years and 6 months, Petitioners will be able to begin collecting its credit for the advancement of lump sums and the overpayment of temporary and permanent disability benefits once Claimant reaches 67½ years of age. Thus, on or about December 31, 2023, Petitioners can cease payment of benefits until the debt for the credit is fully

satisfied. Thereafter, if Claimant is still living, Petitioners are to resume payment of permanent disability benefits until his death.

9. Deducting payment at the end of the award and restarting such in the event Claimant is still alive is equitable, prevents unjust enrichment and is in accordance with the Supreme Court's ruling in the case of *Glover by Cauthen v. Suitt Const. Co., supra*.

#### **RULINGS OF LAW**

1. South Carolina Code Ann. §42-9-10 (2021) governs lifetime indemnity awards based upon physical brain damage, paraplegia or quadriplegia.

2. South Carolina Code Ann. §42-9-210 (2021) governs deduction from compensation payments paid when not due and payable.

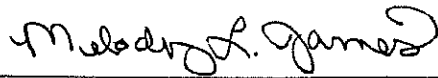
3. The erroneous increase in weekly payments to Claimant was not gratuitously made but was made in reference to the legal obligation of continued payment of benefits. The increase was the result of an inadvertent error and constitute grounds for providing Petitioners with repayment for the overpayment of indemnity compensation by shortening the period during which compensation must be paid rather than by reducing the weekly payment amount absent Claimant's consent. *See, South Carolina Code Ann. §42-9-210 (2021) and Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 127 S.E.2d 884 (1962).*

**ORDER**

**IT IS HEREBY ORDERED** that Petitioners shall cease payment of permanent disability benefits beginning on December 1, 2023, until credit for the advancement of the attorney's fees and costs, credit for the overpayment of temporary total and permanent disability benefits are fully paid.

**IT IS FURTHER ORDERED** that if Claimant is living past the calculated award or after Petitions have been fully reimbursed, Petitioners shall resume payment of weekly indemnity benefits in the amount of \$510.65 until Claimant's death.

**AND IT IS SO ORDERED.**



\_\_\_\_\_  
Commissioner Melody L. James

**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.  
August 16, 2021

By: Tamara Morris, Administrative Assistant to Commissioner James

APPELLATE PANEL DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0100434

Emitt R. Gunnells

EMPLOYEE/CLAIMANT,  
APPELLANT

VS.

Galey & Lord Industries

EMPLOYER,

AND

Arrowpoint Capital Corporation

CARRIER,  
DEFENDANTS/RESPONDENTS,

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Appellate Panel Review held in Columbia, South  
Carolina, on November 23, 2021 per notices timely  
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

May 9, 2022

Claimant/Appellant is represented by Stephen J. Wukela,  
Wukela Law Firm.

Defendants/Respondents represented by Vernon F. Dunbar,  
McAngus, Goudelock & Courie LLC.

### STATEMENT OF THE CASE

Emitt Russell Gunnells, Claimant/Appellant, (hereinafter "Appellant") was employed with Galey & Lord Industries, Employer/Respondent, when he suffered a compensable accidental brain injury on January 14, 2001.

Appellant was in the process of threading a cloth machine when a weighted compensation bar struck his head. Appellant suffered permanent physical brain damage. Appellant also suffered compensable injuries to his cervical spine and shoulders.

Prior to the accident, Appellant had suffered with post-traumatic stress disorder as a result of his military service. The Commission determined Appellant's post-traumatic stress disorder was aggravated by the work-related accident.

By Order dated January 7, 2003, former Commissioner Holly Saleeby Atkins adjudicated Appellant permanent and totally disabled due to permanent physical brain damage. Appellant was awarded lifetime indemnity and medical benefits pursuant to Sections 42-9-10(C) and 42-15-60.

The un-appealed Order of Commissioner Atkins reflect the parties stipulated to an average weekly wage of \$765.97 and a corresponding compensation rate of \$510.65. Pursuant to the Order, Appellant was ordered to be paid a compensation rate of \$510.65 per week for life.

Subsequent to Appellant being adjudicated permanently and totally disabled and entitled to lifetime indemnity and medical benefits, Stephen J. Wukela, Esquire, attorney for Appellant, filed a Form 61 and a Motion to approve a commuted lump sum payment of attorney's fees and costs. In the Motion dated August 13, 2003, Appellant and his attorney asserted the following:

1. Appellant was born on July 17, 1956.

2. Pursuant to the life expectancy tables contained in Section 19-1-150, Appellant's life expectancy was 28.76 years or 1,495.52 weeks as of August 13, 2003.

3. Appellant agreed that the attorney fee contract entitled his attorney to one-third contingency fee.

4. Utilizing the established compensation rate of \$510.65, the total calculated award as of August 13, 2003 was \$763,687.29.

5. The South Carolina Workers' Compensation Commission Claims Examiner calculated the attorney's fee award as totaling \$202,231.41.

6. By Order dated September 23, 2003, the Commission approved the Form 61 Attorney Fee Petition and Motion for the Payment of Attorney's Fees and promulgated an Order approving the requested attorney's fees. The attorney fee payment was deducted from Appellant's lump sum disability award of \$763,687.29 by shortening the period in which disability payments are owed pursuant to Appellant's request.

7. The Order approving the requested attorney's fees specifically states in Ruling of Law No. 8 that:

Pursuant to §42-15-90; R. 67-1207(B)(2), and *Glover by Cauthen v. Suitt Const. Co.*, 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995) (sic), the amount of each temporary total payment the Appellant receives shall not be interrupted and attorney's fee shall be deducted from the end of the award.

Later, through a clerical error and inadvertence, Appellant began receiving weekly permanent partial disability compensation benefits in the amount of \$537.77. As a result, Galey & Lord and Arrowpoint Capital Corporation, Defendants/Respondents have overpaid Appellant \$22,619.16 in permanent indemnity benefits.

Upon discovery of the error, August 3, 2020, Respondents began paying Appellant the correct compensation rate of \$510.65 on August 3, 2020, pursuant to the Order and the law of the case. Arrowpoint Capital Corporation respectfully requested the Commission order and award reimbursement of the overpayment by reducing Appellant's weekly benefits from an amount ranging from \$50.00 to \$150.00 per week until the overpayment of indemnity benefits in the amount of \$22,619.16 has been fulfilled or reimbursed.

In the alternative, Respondents requested that the overpayment is factored into the amount of benefits which are to be paid over Appellant's life expectancy in accordance with Section 19-1-150, which in turn would permit Respondents to shorten and terminate Appellant's indemnity benefits from the designated permanent disability award.

Two motion hearings were conducted in this matter. As a result, the Commission file was thoroughly reviewed along with appellate court holdings and rulings regarding the issues raised.

By Order dated August 16, 2021, Commissioner Melody L. James determined that due to Respondents' inadvertent error, which led to Appellant being overpaid \$22,619.16 in indemnity benefits, Respondents are entitled to receive credit from the end of the disability award. Commissioner James ruled Appellant's objection to obtaining a credit by virtue of deduction from the end of his lifetime award was barred by judicial and equitable estoppel. *Quinn v. Sharon Corp.* 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000)

Commissioner James found that because Appellant had previously stipulated Respondents were entitled to a previous credit for the overpayment of temporary total disability compensation benefits in the initial award by virtue of deducting such from the end of

Appellant's lifetime award, his objection to the very same method he previously used was inconsistent and untenable. *Id.*

In reliance upon the initial Order promulgated by Commissioner Atkins dated January 7, 2003, in which credit for overpayment was granted to Respondents by shortening the period of expected payment of lifetime benefits [Exhibit 1]; the arguments made in support of the advanced lump sum payment of attorney's fees as set forth in a Motion dated August 13, 2003 [Exhibit 2]; and the South Carolina Supreme Court's ruling in the case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995), Commissioner James determined the credit of \$22,619.16, could be deducted along with the other credits referenced in the unappealed orders. Specifically, the previous orders have afforded Respondents credits for overpayments of indemnity benefits and advanced lump sum payments at the end of Appellant's lifetime award.

As such, Commissioner James ruled Respondents are entitled to begin taking credit for the advanced payment of attorney's fees and overpayment of indemnity benefits beginning on December 31, 2032, in accordance with the lifetime award as previously established by the Order of Commissioner Atkins and the award and order of attorney's fees in 2003.

Appellant filed a Form 30 dated August 23, 2021, appealing the Decision and Order of Commissioner James to this Honorable Tribunal. On November 23, 2021, this matter was heard by the South Carolina Workers' Compensation Full Commission Appellant Panel [hereinafter "Appellant Panel"]. The Commissioners considered all issues raised on appeal and hereby affirm the Decision and Order of the Hearing Commissioner.

### **GROUND OF APPEAL**

By letter dated August 23, 2021, Appellant filed an appeal asserting the following factual and legal issues and grounds for review:

1. The Single Commissioner erred as a matter of fact and conclusion of law in finding that the Claimant's "lifetime indemnity award ends on or about December 31, 2032; according to the mortality or life expectancy tables."

2. The Single Commissioner erred as a matter of fact and conclusion of law in finding that the Defendants may cease payment of benefits of Claimant's lifetime award on or about December 1, 2023, in order to recoup a credit.

### **HEARING COMMISSIONER'S FINDINGS OF FACTS**

#### **AND CONCLUSIONS OF LAW**

1. By virtue of an inadvertent clerical error, Arrowpoint Capital Corporation increased Claimant's permanent disability weekly award from \$510.65 to \$537.77. Claimant's weekly benefits were placed upon an automatic payment plan so as not to cause any undue hardship as a result of missed or untimely payments. As such, the amount of weekly benefits or compensation rate was automatically increased through an error in programming. Thus, the \$27.12 per week in overpayment was not discovered until later. As a result, Claimant has been overpaid \$22,619.16 in benefits.

2. Petitioner is entitled to credit for the overpayment of permanent disability benefits which have been previously established by Order of this Commission. Moreover, pursuant to the theory of unjust enrichment, Section 42-9-210 and Regulation 67-1603(C)(3)(b) provides for the recovery for any overpayment or benefits that were paid and were not owed.

3. Regulation 67-1603 is not applicable with respect to Petitioners' request for relief. Specifically, Regulation 67-1603 requires an agreement by Claimant to the reduction with respect to a compensation rate erroneously paid. Although the undersigned Commissioner finds this theory of recovery for the overpayment or credit from Claimant to be less onerous and more desirable, the language of the Regulation reflects that it is not applicable to the case at bar. To this end, because Claimant does not consent to any deduction of any amount from his permanent disability checks, the undersigned is without recourse to resolve the issue of credit by deducting even the most de minimis amount from his weekly checks.

4. Claimant's objection to a deduction from the end of his lifetime award is barred by judicial and equitable estoppel. *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000). Claimant stipulated Petitioners were entitled to credit for the overpayment of temporary total disability compensation benefits in a prior workers' compensation hearing. Also, Claimant's requested the advancement of a lump sum to satisfy attorney's fees and costs; and he agreed Petitioners could deduct from the end of the lifetime award the credit extended for the advancement of attorneys' fees and costs.

5. The case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) held that the South Carolina Workers' Compensation Commission could approve a lump sum award from a lifetime benefits case, which is to be deducted from the end of the Claimant's award. The Court ruled that "the mortality tables provide an adequate basis upon which to determine the present day value" of a lifetime indemnity award. *Id.* at 467 n. 3, 458 S.E.2d at 537 n.3.

6. Claimant's award for lifetime benefits is properly predicated upon his life expectancy pursuant to Section 19-1-150 (life expectancy tables). In the Motion for approval of

attorney's fees dated August 13, 2003, the life expectancy tables reflected Claimant's life expectancy was 28.76 years. Based upon Claimant's date of birth of July 17, 1956, Claimant was 47 years of age in 2003. Thus, the lifetime award is based upon Claimant living until 75.76 years. The Commission calculated the lifetime indemnity award as totaling \$763,687.29, predicated upon payment of 1,495.52 weeks of compensation benefits.

7. Because the award with respect to calculating a lump sum award is predicated upon Claimant surviving until age 75.76, credit must be taken from the end of the award. The lifetime indemnity award ends on or about December 31, 2032, according to the mortality or life expectancy tables.

8. Petitioners have credits of \$4,299.29; \$202,231.41; and \$22,619.16 for a total of \$229,149.86. This amount equates to a credit for which Petitioners are owed which totals 448.74 weeks or 8.629 years. Using a rounded figure of 8 years and 6 months, Petitioners will be able to begin collecting its credit for the advancement of lump sums and the overpayment of temporary and permanent disability benefits once Claimant reaches 67½ years of age. Thus, on or about December 31, 2023, Petitioners can cease payment of benefits until the debt for the credit is fully satisfied. Thereafter, if Claimant is still living, Petitioners are to resume payment of permanent disability benefits until his death.

9. Deducting payment at the end of the award and restarting such in the event Claimant is still alive is equitable, prevents unjust enrichment and is in accordance with the Supreme Court's ruling in the case of *Glover by Cauthen v. Swift Const. Co.*, *supra*.

#### **RULINGS OF LAW**

1. South Carolina Code Ann. §42-9-10 (2021) governs lifetime indemnity awards based upon physical brain damage, paraplegia or quadriplegia.

2. South Carolina Code Ann. §42-9-210 (2021) governs deduction from compensation payments paid when not due and payable.

3. The erroneous increase in weekly payments to Claimant was not gratuitously made but was made in reference to the legal obligation of continued payment of benefits. The increase was the result of an inadvertent error, and constitute grounds for providing Petitioners with repayment for the overpayment of indemnity compensation by shortening the period during which compensation must be paid rather than by reducing the weekly payment amount absent Claimant's consent. See, *South Carolina Code Ann. §42-9-210 (2021)* and *Brittle v. Raybestos-Manhattan, Inc.*, 241 S.C. 255, 127 S.E.2d 884 (1962).

#### **LEGAL ANALYSIS**

By Order dated August 16, 2021, Commissioner Melody L. James determined that due to Respondents inadvertent error which led to Appellant being overpaid \$22,619.16 in indemnity benefits, Respondents were entitled to credit for such. Commissioner James ruled that Appellant's objection to obtaining a credit by virtue of deduction from the end of his lifetime award was barred by judicial and equitable estoppel. *Quinn v. Sharon Corp.* 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000)

Because Appellant had previously stipulated Respondents were entitled to a previous credit for the overpayment of temporary total disability compensation benefits in the initial award by virtue of deducting such from the end of Appellant's lifetime award, Commissioner James concluded his objection was inconsistent and untenable. *Id.*

In accordance with the South Carolina Supreme Court's ruling in the case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995), Commissioner James determined the credit of \$22,619.16, could be deducted along with the previously un-appealed

orders, which had afforded to Respondents credits for overpayments and advanced lump sum payments at the end of Appellant's lifetime award.

Respondent argued that pursuant to the law of the case as established in the Commission's Orders and by virtue of the position taken by Appellant's counsel with respect to payment of the award of attorney's fees, the recovery of the credit for the overpayment can be accomplished by shortening the period for which Appellant is entitled to benefits.

Respondent had expressed reservations and concerns about the financial impact of shortening the period during which compensation must be paid pursuant to Section 42-9-210. Appellant, however, had previously requested and agreed to shorten the period in which he is to receive indemnity benefits with respect to payment of credit for the overpayment of temporary total. The amount of that credit is \$4,299.29.

In the same manner, Appellant also agreed to shorten the period of his designated disability in order to pay attorney fees and costs. The \$4,299.29 credit, coupled with the advancement of attorney's fees and costs in the amount of \$202,231.41 and the recent overpayment in the amount of \$22,619.16 equates to 448.74 weeks of credit.

In Appellant's Motion for approval of attorney's fees, he stipulated his life expectancy pursuant to Section 19-1-150 was 28.76 years or 1,495.52 weeks on August 13, 2003. According to Section 19-1-150, Appellant is entitled to payment of benefits to age 75.76 years. As of March 29, 2021, Appellant is 64 years of age. Hence, Defendants are statutorily obligated to pay benefits through 2032 until he reaches 75.76 years of age. Thus, the credit must be taken before the end of the award, which is 2032, in order to be fully repaid. Accordingly, Respondents argue that in order to recoup the 448.74 weeks of benefits owed, the deduction or termination of

benefits must begin once Appellant reaches 67 years of age, or specifically on December 31, 2023.

Appellant then objected to Respondent's request that the recovery for the overpayment should be made by shortening the period in which compensation must be paid pursuant to Section 42-9-210. Appellant argues because lifetime benefits are payable for life, no deduction can be taken for the credit for attorney's fees, overpayment of temporary total or overpayment for permanent and total disability benefits.

Appellant argues the Commission is not empowered to convert the Appellant's lifetime award to an award for a fixed period of time from which a deduction can be taken. That is to say, the Appellant argues the Order requires he receive benefits for his "lifetime," i.e. his natural life, not his "statutory life expectancy" pursuant to S.C. Code §19-1-150. Appellant relies Court of Appeals decision in the case of *Floyd v. C.B. Askins and Co.*, 382 S.C. 84 (Ct. App. 2008) in advancing this argument.

In *Floyd*, the injured worker received the lifetime award pursuant to section 42-9-10 for physical brain damage. *Id.* Mr. Floyd died from an unrelated cause before reaching his statutory life expectancy. Mr. Floyd's beneficiaries sought an award of the balance of Floyd's non-vested benefits through his statutory life expectancy. The Court of Appeals disagreed finding the award under S.C. Code §42-9-10 was for Mr. Floyd's natural life not his statutory life expectancy and, therefore, Mr. Floyd's non-vested benefits which had not accrued and abated upon his death.

Appellant argues the Court's holding in *Floyd* makes it clear that the benefits under S.C. Code §42-9-10 are for natural life not statutory life; and therefore, the Commission cannot alter a lifetime award by substituting Appellant's statutory life expectancy for his natural life so that the period can then be shortened pursuant to S.C. Code §42-9-210 to recover overpayments

and advance payments. Appellant's argument simply ignores the fact that the holding of this decision involves payment of non-vested indemnity benefits.

On page 5 of Commissioner Atkins' Order, Appellant stipulated credit could be taken by shortening the period in which compensation must be paid pursuant to Section 42-9-210. Moreover, in the un-appealed Order and Finding of Fact No. 9 as is reflected on pages 25 and 26 of the Order, Commissioner Atkins found Respondents were entitled to credit for an overpayment of temporary total disability compensation benefits "by shortening the period during which compensation must be paid and not by reducing the amount of the weekly benefit." This finding was further reiterated in Ruling of Law No. 6 on page 27 of the Order.

There is no doubt the permanent lifetime indemnity award was calculated based upon the life expectancy tables and Appellant living until approximately 75.76 years of age. This calculation constitutes the lifetime indemnity award of \$763,687.29; and the award is the basis of the award of attorney's fees and costs. Therefore, Respondents argue the additional credit stemming from the overpayment of permanent disability benefits can be taken from the award by shortening the period in which disability benefits are due.

**A. Legal Precedence Supports the Hearing Commissioner's Findings of Fact and Conclusions of Law.**

The case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) held that the South Carolina Workers' Compensation Commission could approve a lump sum award from a lifetime benefits case, which is to be deducted from the end of the Appellant's award. The Court ruled that "the mortality tables provide an adequate basis upon which to determine the present day value" of a lifetime indemnity award. *Id.* at 467 n. 3, 458 S.E.2d at 537 n.3.

Appellant's award for lifetime benefits is properly predicated upon his life expectancy pursuant to Section 19-1-150 (life expectancy tables). In the Motion for approval of attorney's fees dated August 13, 2003, the life expectancy tables reflected Appellant's life expectancy was 28.76 years. Based upon Appellant's date of birth of July 17, 1956, Appellant was 47 years of age in 2003. Thus, the lifetime award is based upon Appellant living until 75.76 years. The Commission calculated the lifetime indemnity award as totaling \$763,687.29, predicated upon payment of 1,495.52 weeks of compensation benefits.

Because the award with respect to calculating a lump sum award is predicated upon Appellant surviving until age 75/76, credit must be taken from the end of the award. The lifetime indemnity award ends on or about December 31, 2032, according to the mortality or life expectancy tables.

#### **APPELLATE PANEL'S FINDINGS OF FACT**

The Appellate Panel hereby affirms the findings of the Hearing Commissioner and makes the following findings of fact:

1. By virtue of an inadvertent clerical error, Arrowpoint Capital Corporation increased Appellant's permanent disability weekly award from \$510.65 to \$537.77. Appellant's weekly benefits were placed upon an automatic payment plan so as not to cause any undue hardship as a result of missed or untimely payments. As such, the amount of weekly benefits or compensation rate was automatically increased through an error in programming. Thus, the \$27.12 per week in overpayment was not discovered until later. As a result, Appellant has been overpaid \$22,619.16 in benefits.

2. Respondent is entitled to credit for the overpayment of permanent disability benefits which have been previously established by Order of this Commission. Moreover,

pursuant to the theory of unjust enrichment, Section 42-9-210 and Regulation 67-1603(C)(3)(b) provides for the recovery for any overpayment or benefits that were paid and were not owed.

3. Regulation 67-1603 is not applicable with respect to Respondents' request for relief. Specifically, Regulation 67-1603 requires an agreement by Appellant to the reduction with respect to a compensation rate erroneously paid. Although the undersigned Commissioners find this theory of recovery for the overpayment or credit from Appellant to be less onerous and more desirable, the language of the Regulation reflects that it is not applicable to the case at bar. To this end, because Appellant does not consent to any deduction of any amount from his permanent disability checks, the undersigned are without recourse to resolve the issue of credit by deducting even the most de minimis amount from his weekly checks.

4. Appellant's objection to a deduction from the end of his lifetime award is barred by judicial and equitable estoppel. *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E. 2d 474 (Ct. App. 2000). Appellant stipulated Respondents were entitled to credit for the overpayment of temporary total disability compensation benefits in a prior workers' compensation hearing. Also, Appellant's requested the advancement of a lump sum to satisfy attorney's fees and costs; and he agreed Respondents could deduct from the end of the lifetime award the credit extended for the advancement of attorneys' fees and costs.

5. The case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) held that the South Carolina Workers' Compensation Commission could approve a lump sum award from a lifetime benefits case, which is to be deducted from the end of the Appellant's award. The Court ruled that "the mortality tables provide an adequate basis upon which to determine the present day value" of a lifetime indemnity award. *Id.* at 467 n. 3, 458 S.E.2d at 537 n.3.

6. Appellant's award for lifetime benefits is properly predicated upon his life expectancy pursuant to Section 19-1-150 (life expectancy tables). In the Motion for approval of attorney's fees dated August 13, 2003, the life expectancy tables reflected Appellant's life expectancy was 28.76 years. Based upon Appellant's date of birth of July 17, 1956, Appellant was 47 years of age in 2003. Thus, the lifetime award is based upon Appellant living until 75.76 years. The Commission calculated the lifetime indemnity award as totaling \$763,687.29, predicated upon payment of 1,495.52 weeks of compensation benefits.

7. Because the award with respect to calculating a lump sum award is predicated upon Appellant surviving until age 75.76, credit must be taken from the end of the award. The lifetime indemnity award ends on or about December 31, 2032, according to the mortality or life expectancy tables.

8. Respondents have credits of \$4,299.29; \$202,231.41; and \$22,619.16 for a total of \$229,149.86. This amount equates to a credit for which Respondents are owed which totals 448.74 weeks or 8.629 years. Using a rounded figure of 8 years and 6 months, Respondents will be able to begin collecting its credit for the advancement of lump sums and the overpayment of temporary and permanent disability benefits once Appellant reaches 67½ years of age. Thus, on or about December 31, 2023, Respondents can cease payment of benefits until the debt for the credit is fully satisfied. Thereafter, if Appellant is still living, Respondents shall resume payment of permanent disability benefits until his death.

9. Deducting payment at the end of the award and restarting such in the event Appellant is still alive is equitable, prevents unjust enrichment and is in accordance with the Supreme Court's ruling in the case of *Glover by Cauthen v. Suitt Const. Co.*, *supra*.

#### **APPELLATE PANEL'S CONCLUSIONS OF LAW**

1. South Carolina Code Ann. §42-9-10 (2021) governs lifetime indemnity awards based upon physical brain damage, paraplegia or quadriplegia.

2. South Carolina Code Ann. §42-9-210 (2021) governs deduction from compensation payments paid when not due and payable.

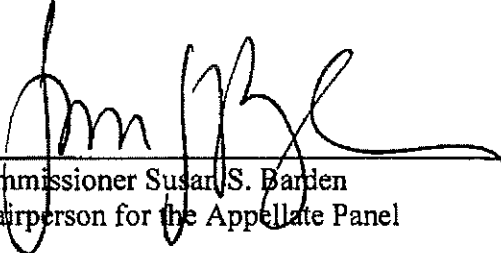
3. The erroneous increase in weekly payments to Appellant was not gratuitously made but was made in reference to the legal obligation of continued payment of benefits. The increase was the result of an inadvertent error, and constitutes grounds for providing Respondents with repayment for the overpayment of indemnity compensation by shortening the period during which compensation must be paid rather than by reducing the weekly payment amount absent Appellant's consent. *See, South Carolina Code Ann. §42-9-210 (2021) and Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 127 S.E.2d 884 (1962).*

**ORDER**


**IT IS HEREBY ORDERED** that Respondents shall cease payment of permanent disability benefits beginning on December 1, 2023, until credit for the advancement of the attorney's fees and costs, credit for the overpayment of temporary total and permanent disability compensation benefits are fully paid.

**IT IS FURTHER ORDERED** that if Appellant is living past the date of the calculated award for credit or after Respondents have been fully reimbursed, Respondents shall resume payment of weekly indemnity benefits in the amount of \$510.65 until Appellant's death.

**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
Commissioner Susan S. Barden  
Chairperson for the Appellate Panel

WE CONCUR:

  
\_\_\_\_\_  
Commissioner T. Scott Beck  
\_\_\_\_\_  
Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Valerie Deller on May 9, 2022***

State of South Carolina

1612 Marion Street  
P.O. Box 1715  
Columbia, S.C. 29202-1715



TEL: (803) 737-5700  
FAX: (803) 737-5788

Workers' Compensation Commission

August 11, 2003

Stephen J. Wukela  
Attorney At Law  
Post Office Box 13057  
Florence, South Carolina 29405-3057

RE: Emitt Gunnels vs. Galey & Lord  
WCC #0100434  
Carrier File #2900282256

Dear Attorney Wukela:

Per your request, the following information is provided. The claimant is a 46 year-old male and according to the life expectancy table, he will live 28.76 years. This will give you 1,495.52 weeks. The compensation rate is \$510.65, which would you a total of \$763,687.29 for the 1,495.52 weeks. Per your letter, you are entitled to one-third (1/3) attorney fees of the commuted value, which would be \$254,562.17. Using a 5% discount per annum, the commuted value of your attorney fees would be 202,231.41.

It should be noted that these are unofficial figures offered for your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Cathy Dean".

Cathy Dean, Claims Examiner  
Division Claims  
(803) 737-5720

/cd

cc: Steven M. Rudisill, Esquire  
400 South Tyron Street, Suite 1500  
Charlotte, NC 28285

**South Carolina Workers' Compensation Commission**  
 P. O. Box 1715 · 1612 Marion Street  
 Columbia, South Carolina 29202-1715  
 (803)737-5700

File # 0100434  
 Carrier File # \_\_\_\_\_  
 Carrier Code # \_\_\_\_\_  
 Employer FEIN \_\_\_\_\_

Claimant's Name Emitt Gunnells SSN 437-06-8556  
 Address 1026 Westlake Drive Hartsville SC 29550  
 City State Zip  
 Home Phone # \_\_\_\_\_ Work Phone # \_\_\_\_\_  
 Preparer's Name Stephen J. Wukela Address \_\_\_\_\_ Phone # \_\_\_\_\_

Employer's Name Galey & Lord Industries, Inc.  
 Address 670 North Main Street Society Hill SC 29553  
 City State Zip  
 Insurance Carrier Royal Indemnity Company  
 Phone # ((843) 669-5634

Compensation Rate: \$ 510.65

Does this conclude the case?  Yes  No

Date attorney was employed: 09/10/01

A. 33 1/3% percent fee of the award or settlement (excluding medical costs) and the costs of this action as shown by the attached statement are requested for approval. The exceptions set out in R.67-1205C (1) through (7) do not apply to the fact this case.

B. The subsection of R.67-1205C applicable to this claim is \_\_\_\_\_ A fee of \$ 202,231.41 is request ed for approval based on the following: (Include the date, percentage of first impairment rating, authorized health care providers nam and disability rating or amount of first written settlement offer when R.67-1205C(1 ) or R.67-1205C(7) apply.)

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Client Emitt Gunnells and GAL Julie Gunnells  
 Attorney for Client Stephen J. Wukela  
 PO Box 13057  
 Attorney's Address  
Florence SC 29504  
 City State Zip

Summary	
Total Amount of Compensation	\$ <u>763,687.29</u>
Life expectancy of 28.76 (1,495.52 weeks)	
Attorney's Fee	\$ <u>202,231.41</u> (08/11/03 ltr of Cathy Dean attached)
1/3 of commuted value less 5% per annum	
Costs	\$ <u>waived</u>
Total Fees and Costs	\$ <u>202,231.41</u>
Client Will Receive	\$ _____
Claimant will continue to receive \$510.65 per week for remainder of Claimant's life or balance of 500 weeks, whichever is greater.	

**RESERVED FOR COMMISSION'S USE:**

Approved  Rejected  Set for Hearing

COMMISSIONER

DATE 9/23/03

Attach a statement of costs. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. Refer to R.67-1203, R.67-1204, R.67-1205, and R.67-1206.

*GA-24*  
 ATTORNEY FEE PETITION

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0100434

Julie Gunnells, as Guardian *ad litem* of )  
Emitt Gunnells, Employee, )  
 )  
Claimant, )  
 )  
VS )  
 )  
Galey & Lord, Employer, and )  
Royal Indemnity Company, Carrier, )  
 )  
Defendants. )

**MOTION TO APPROVE COMMUTED  
LUMP SUM PAYMENT OF  
ATTORNEY FEES**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND STEVEN  
RUDISILL, ESQUIRE, ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Petitioner, Stephen J. Wukela, Julie Gunnells, as Guardian *ad litem* for Emitt Gunnells, and Claimant, Emitt Gunnells, hereby move before the South Carolina Workers' Compensation Commission for the approval of the commuted lump sum payment of attorney fees.

1. Claimant was injured on January 14, 2001, when while the Claimant was trying to thread a cloth machine a weighted compensation bar flew into the air and slammed down onto Claimant's head, knocking him unconscious. (Tr. p. 9, l. 22 -- p. 12, l. 10). Claimant was out of work from January 14, 2001, through April 18, 2001, during which time he received Workers' Compensation benefits. He returned to work on a trial basis on April 18, 2001, at the direction of his treating neurologist, Dr. Marc D'Angelo, and he worked until August 29, 2001, at which time he was fired after an explosive outburst which Dr. D'Angelo later related to his injury. (Order pp. 8, 10). Claimant received no further Workers' Compensation benefits and on September 10, 2001, Claimant retained the undersigned Petitioner, Stephen J. Wukela.

2. The Petitioner, Stephen J. Wukela, has been representing the Claimant, Emmitt Gunnells, since September 10, 2001, in the matter of a Worker's Compensation claim for an accident that occurred on January 14, 2001. (See copy of Representation Agreement attached as Exhibit "A".)

3. The Petitioner, Stephen J. Wukela, filed a Form 50 on September 14, 2001, alleging closed head injury and injury to Claimant's neck, shoulders, back and legs, and requesting a hearing. (See Form 50 attached as Exhibit "B"). By October 12, 2001, the Claimant still was not receiving temporary total benefits and Claimant's treating neurosurgeon, Dr. Andrew Rhea, was recommending surgery on Claimant's neck. (APA No. 7, p. 126). The Defendants did not respond to Claimant's Form 50 claiming temporary total benefits, whereupon Petitioner scheduled the deposition of the adjuster and case manager. Defendants ultimately commenced temporary total and agreed to pay for Claimant's surgery in exchange for Claimant cancelling the depositions.

In preparation for a hearing on brain injury and permanency, Petitioner took the deposition of Claimant's treating neurologist, Dr. Marc D'Angelo and his treating neuropsychologist, Dr. Sasha Federer, who both opined that Claimant had sustained a brain injury. (D'Angelo dep. p. 18, ll. 18-21; Federer dep. p. 16, ll. 12-18).

On March 5, 2002, Petitioner filed an Amended Form 50 alleging closed head injury, and injury to the brain, neck, shoulders, back, legs and psyche. (See Form 50 attached as Exhibit "C"). On April 4, 2002, Defendants filed a Form 51 wherein they alleged that "Defendants admit injury by accident in the form of a blow to the top of Claimant's head with resulting post concussive syndrome, cervical spine injury and subsequent depression. Defendants deny any other alleged injuries and further deny that the Employee is permanently disabled." (See Form 51 attached as Exhibit "D").

A hearing was held on May 1, 2002. At the hearing, Petitioner contended that the Claimant had suffered a physical brain injury within §42-9-10 and was permanently and totally disabled. (Tr. p. 2, ll. 2-5; p. 4, ll. 7-9). At the hearing, Defendants specifically denied that Claimant had suffered a physical brain injury, (Tr. p. 7, ll. 17-18), and further contended that Claimant had not reached maximum medical improvement. (Tr. p. 7, l. 10).

The Single Commissioner issued an Order on January 7, 2003, finding, among other things, that the Claimant was "totally and permanently disabled pursuant to §42-9-10 as a result ... of physical injury to the brain and injury to the cervical discs of his spine... (Order p. 21).

The Employer, Galey & Lord, and the Carrier, Royal Indemnity Company, were ordered to pay all medical treatment rendered to Claimant, including medical treatment rendered by Dr. Marc D'Angelo, Dr. Sasha Federer, Dr. Marc Weinberg, Dr. Andrew Rhea, Dr. W.S. Edwards, including treatment for post concussive syndrome, cervical myelopathy, hypertension, depression, anxiety, cyclothymia, and sexual dysfunction from the date of the injury, January 14, 2001, until the date of the Single Commissioner's Order and continuing for the Claimant's lifetime; and the Employer/Carrier was ordered to pay to the Claimant benefits at the compensation rate of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the period commencing November 12, 2001, and continuing for Claimant's lifetime.

4. On January 21, 2003, the Defendants appealed the Order of the Commissioner asking for a Commission review on, among other things, the issue of whether "the hearing Commissioner erred in finding that as a fact and ruling as a matter of law that Claimant suffered a physical injury to his brain and the other injuries set forth in said finding and conclusion, ..." and "Whether the hearing Commissioner erred in finding ... that Claimant reached maximum medical improvement on April 25, 2002, and is totally and permanently disabled ..." (See Defendant's Form 30 attached as Exhibit "E").

At the Defendants request, Claimant agreed to hold the appeal in abeyance until May 19, 2003, and on May 21, 2003, Claimant requested the Commission schedule the appeal for hearing. (See letters of March 6, 2003, and May 21, 2003, attached as Exhibit "F"). A review hearing was scheduled for July 29, 2003. On July 16, 2003, the Defendants withdrew their appeal. (See July 16, 2003, letter attached as Exhibit "G").

6. The Claimant was born on July 17, 1956. The Claimant's life expectancy pursuant to §19-1-150 is twenty-eight and  $76/100$  (28.76) years or one thousand four hundred ninety-five and  $52/100$  (1,495.52) weeks. The attorney fee contract is based on a one-third ( $1/3$ ) contingency fee. (See letter of Stephen J. Wukela attached as Exhibit "F"). The compensation rate is Five Hundred Ten and  $65/100$  (\$510.65) Dollars, which would be a total of Seven Hundred Sixty-Three Thousand Six Hundred Eighty-Seven and  $29/100$  (\$763,687.29) Dollars for the one thousand four hundred ninety-five and  $52/100$  (1,495.52) weeks. Pursuant to the computations of Cathy Dean, Claims Examiner at the South Carolina Workers' Compensation Commission, one-third ( $1/3$ ) of the commuted value would be Two Hundred Fifty-Four Five Hundred Sixty-Two and  $17/100$  (\$254,562.17) Dollars, and using a five (5%) percent discount per annum, the commuted value of the attorney fees would be Two Hundred Two Thousand Two Hundred Thirty-One and  $41/100$  (\$202,231.41) Dollars. (See copy of letter of SC Workers' Compensation Commission dated August 11, 2003, attached as Exhibit "H".)

7. The amount of each temporary total payment the Claimant receives shall not be altered or interrupted. The attorney fee is deducted from the end of the award, pursuant to Glover by Cauthen v. Suitt Const. Co., 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995). Costs in the amount of One Thousand Three Hundred Forty-Eight and  $50/100$  (\$1,348.50) Dollars that have been incurred by Claimant's attorney are listed as follows and are being waived by Claimant's attorney.

Workers' Comp. Commission	20.00
Workers' Comp. Commission	4.50
Dr. Marc D'Angelo	306.00
Laura Little	259.00
Bruce Reporting	580.50
C&D Reporting	<u>178.50</u>
Total	\$1,348.50

8. A properly executed Form 61 is attached as Exhibit "I" to this Motion for Approval of Commuted Lump Sum Payment of Attorney Fees and is incorporated by reference as if fully set out herein.

9. The Claimant, and his Guardian *ad litem*, Julie Gunnells, are agreeable to the payment of attorney fees owed to your Petitioner based upon his contract of employment to be made in a lump sum. (See Affidavit of Julie Gunnells, as Guardian *ad litem* of Emitt Gunnells, and Affidavit of Emitt Gunnells attached as Exhibit "J".)

10. Defendants were forwarded the August 11, 2003, letter of Cathy Dean computing attorney fees and they have not objected.

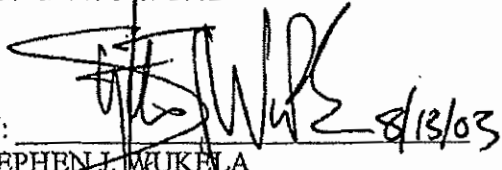
WHEREFORE, pursuant to §42-15-90, R.67-1207(B), Collection of Attorney's Fee in a Lump Sum and R.67-215, your Petitioner respectfully prays that you inquire into the matters set out in this Motion, award attorney fees to your Petitioner in the amount of Two Hundred Two Thousand Two Hundred Thirty-One and 41/100 (202,231.41) Dollars, costs of One Thousand Three Hundred Forty-Eight and 50/100 (\$1,348.50) Dollars being waived, and continue permanent disability payments to the Claimant in the amount of Five Hundred Ten and 65/100 (\$510.65) Dollars per week for the remaining years of his life or the balance of five hundred (500) weeks, whichever is greater.

This Motion is joined in by the Claimant, Emitt Gunnells, and by Claimant's Guardian *ad*

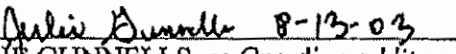
*Litem*, Julie Gunnells.

ISO MOVE.

WUKELA LAW FIRM

  
BY: \_\_\_\_\_ 8/13/03  
STEPHEN J. WUKELA  
Petitioner and Attorney for Claimant  
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843-669-5634

  
EMITT GUNNELLS, Claimant 8-13-03

  
JULIE GUNNELLS, as Guardian *ad litem*  
For Emitt Gunnells, Claimant 8-13-03

Florence, SC

August 13<sup>th</sup>, 2003

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## S.C. Code Regs. 67-1603

### Copy Citation

This document is current through State Register Volume 46, Issue 9, effective September 23, 2022.

**SC - South Carolina Code of Laws, Regulations Chapter 67 South Carolina Workers' Compensation Commission Article 16 Average Weekly Wage, Compensation Rate, and Payment**

### 67-1603. Calculating the Compensation Rate.

**A.** The employer's representative shall calculate the claimant's compensation rate by completing a Form 20, Statement of Earnings of Injured Employee. When using a Form 20 results in a compensation rate that is not fair and just to either the employer or the claimant, an alternative method of computing the average weekly wage may be used which will most nearly approximate the amount the injured employee would be earning were it not for the injury.

**B.** Wage information shall be provided by the employer. The employer shall report gross wages, not net, and shall include gross pay allowed for vacations, bonuses, overtime, and allowances of any character made to an employee in lieu of wages as specified in a wage contract.

**C.** Completion of Form 20 for claims involving temporary compensation.

**(1)** The employer's representative shall prepare a Form 20 and serve the claimant a copy of the Form 20 according to R.67-211 within thirty days after temporary compensation begins.

**(2)** If the claimant disagrees with the compensation rate on the Form 20, he or she should contact the employer's representative in an effort to reconcile the differences. If a fair and just amount cannot be agreed upon, the employer's representative shall refer the question to the Commission's Claims Department for an administrative recommendation. If the claimant does not agree with the administrative recommendation, the claimant may request a hearing to determine the correct compensation rate by filing a Form 50 according to R.67-207.

**(3)** When the compensation rate on the Form 20 differs from that previously reported on the Form 15, the employer's representative shall adjust temporary compensation payments to reflect the compensation rate on the Form 20. The employer's representative shall file and serve a new Form 15 according to R.67-503 within thirty days. Check "corrected compensation rate" on the new Form 15.

**(a)** When the compensation rate on the Form 20 is higher than previously reported on the Form 15, the employer's representative immediately shall pay the accrued compensation to the claimant and begin paying the claimant the revised compensation rate.

**(i)** The claimant agrees to the reduction, the employer's representative may deduct no more than twenty-five percent from the weekly payments to recover the overpayment. The employer's representative may not stop temporary compensation payments unless otherwise ordered by the Commission.

**(ii)** During the first one hundred fifty days, when the claimant does not agree to the reduction, the employer's representative shall adjust the compensation rate to that reported on the Form 20. The claimant may request a hearing by filing a Form 50 according to R.67-207.

**(iii)** After the first one hundred fifty days, when the claimant does not agree to the reduction, the employer's representative shall continue paying the compensation rate reported on the Form 15 and may file a Form 21 to request a reduction in compensation.

**D. Completion of Form 20 when no temporary compensation has been paid.**

**(1)** The employer's representative shall prepare and file with the Judicial Department a Form 20 with its request for an informal conference or hearing when no Form 15 or Form 20 has been previously filed or when salary is paid in lieu of temporary compensation. The employer's representative shall serve the claimant a copy of the Form 20 according to R.67-211.

**(2)** The employer's representative shall prepare and file a Form 20 with the Judicial Department within thirty days of the claimant's request for a hearing or informal conference when no Form 15 or Form 20 has been previously filed or when salary is paid in lieu of temporary compensation. The employer's representative shall serve the claimant a copy of the Form 20 according to R.67-211.

**E.** When the parties stipulate the maximum compensation rate applies, the employer's representative shall complete Section C of the Form 20. File and serve the Form 20 as set forth above.

**F.** The employer's representative may use an alternative method to calculate the compensation rate when the Form 20 results in a compensation rate that is not fair and just to the claimant or the employer's representative. The employer's representative shall complete Section A(1)(4) of the Form 20 and calculate the compensation rate by the alternative method. Serve the Form 20 on the claimant according to R.67-211 within the times set forth above and attach documentation to the Form 20 showing how the compensation rate was calculated. Refer to section C(2) above when the claimant does not agree with the calculated compensation rate.

**G.** Failure to file and/or serve the Form 20 as set forth above may result in a fine and/or the commissioner or claims mediator determining the average weekly wage and compensation rate from information in the Commission's file and statements or evidence presented at the hearing or conference.

**H.** If the claimant alleges he or she worked for two or more employers when the injury occurred, the claimant may request the additional wages be included as part of his or her average weekly wage. The claimant shall obtain a completed Form 20 from each of the other employers and file the Forms 20 with the Claims Department. The claimant shall provide a copy of each Form 20 to the employer's representative. The Commission will calculate the new compensation rate and notify the parties. If the employer's representative does not agree to pay the new compensation rate, the claimant may request a hearing to determine the proper compensation rate by filing a Form 50 pursuant to R.67-207.

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## Statutory Authority

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### Statutory Authority:

1976 Code §§ 42-3-30 and 42-3-80

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## History

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Amended by State Register Volume 16, Issue No. 4, eff April 24, 1992; State Register Volume 21, Issue No. 4, eff April 25, 1997.

South Carolina Code of Laws, Regulations

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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WCC File No.0100434

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Emitt R. Gunnells, ..... Appellant,

vs.

Galey & Lord Industries, Employer,  
and Arrowpoint Capital Corporation, Carrier, ..... Respondents.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that the Record on Appeal complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Appellant's Record on Appeal, or they have been redacted where necessary.

WUKELA LAW FIRM

BY:   
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**RECEIVED**

**Nov 14 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

WCC File No. 0100434

Emitt R. Gunnells, ..... Appellant,

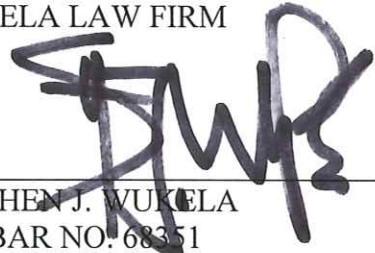
vs.

Galey & Lord Industries, Employer,  
and Arrowpoint Capital Corporation, Carrier, ..... Respondents.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

WUKELA LAW FIRM



BY: \_\_\_\_\_  
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FLORENCE SC 29504  
843-669-5634

October 20<sup>th</sup>, 2022