THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2022-000282

Michael K. Crowley, Employee, ...Appellant,

v.

Darlington County, Employer, and
SC Association of Counties SIF, Carrier, ...Respondents.

FINAL REPLY BRIEF OF APPELLANT

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I. **THE SUBSTANTIAL EVIDENCE IN THE RECORD DOES NOT SUPPORT THE COMMISSION'S FINDING THAT APPELLANT SUSTAINED 25% PERMANENT PARTIAL DISABILITY TO HIS BACK PURSUANT TO SC CODE §42-9-30(21) AS A RESULT OF HIS JANUARY 3, 2018, WORK ACCIDENT AS THAT WAS NOT THE ESSENTIAL ISSUE FOR DECISION UNDER THAT CODE SECTION AND UNDER THE EVIDENCE ON LOSS OF USE, THE CLAIMANT SUSTAINED 50% OR GREATER LOSS OF USE OF HIS BACK AS A RESULT OF THE WORK-RELATED INJURY.**

The Defendants try to infuse wage loss into SC Code §42-9-30(21) and misstate the definition of total and permanent disability that applies under that Code Section, which has two totally different meanings in the Act.

Total and permanent disability is defined under SC Code §42-9-10**(A)** as a total loss of earning capacity/total disability as defined in §42-1-120.

Whereas under SC Code §42-9-10**(B)** total and permanent disability means and is defined as "the character of the injury". Thus, total and permanent disability under §42-9-30(21) means and is defined as and is based on §42-9-10**(B)**, "the character of the injury", not wage loss under §42-9-10**(A)**. Thus, the presumption to be rebutted is the "character of the injury". In other words, whether or not the Claimant has lost 50% or more of the use of his back.

Next, to reiterate and in reference to the evidence in the Record, the essential issue before the Commission under §42-9-30(21) has always been, was, and is, "loss of use". As set forth more fully in the Initial Brief, the word "impairment" has

absolutely no meaning under the Workers' Compensation Act and as set forth in the AMA Guides, the Guides only estimate the impairment to do the Activities of Daily Living and have absolutely nothing, and again the Appellant reiterates nothing, to do with the ability to work or even disability. American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition, pp.4-5.

The Court will find by referencing to the AMA Guides to the Rating of Permanent Physical Impairment 5th Edition that the absolute highest, and again the absolute highest, impairment rating that can be given for impairment of the lumbar spine is 28% to the whole person, found at p. 384. When converted to a regional impairment rating found at p. 427, the highest, and the Appellant would reiterate again to the Court the highest, regional impairment rating that can given to the lumbar spine is 37.3333%. What the Court in Clemmons v. Lowe's Home Centers, Inc. - Harbison, 412 S.C. 366, 772 S.E.2d 517 (SC App. 2015) reh. den.; rev. 2017 WL 920730, withdrawn and superseded on rehearing, 420 S.C. 282, 803 S.E.2d 268 (2017, noted and what the Respondents mistakenly try to read into the decision, is that Mr. Clemmons was given whole person impairment ratings to the cervical spine which were converted to regional ratings to the cervical spine, but which have nothing to do with the evidence or holding on "loss of use". This conversion of lumbar

versus cervical whole person ratings also points out the absurdity of relying on AMA "impairment" ratings. For example, the conversion of a cervical spine whole person rating of 28% which is the maximum whole person rating to the lumbar spine of 28% converts to 80% as a cervical regional spine rating whereas it is absurdly only 37.3333% to the lumbar spine.

Again, as set out in Appellant's Initial Brief, there is absolutely no evidence, and again no evidence, in the Record that the Claimant has lost anything less than 50% "**use of**" his back to do work requiring the use of his back. Note: Mr. Clemmons was working so that aspect of Respondents' argument when they ask this Court to disregard all the prior decisions of this Court and the Supreme Court does not hold water and is a red herring as to the essential issue for decision. The character of the injury was and is the issue in a "loss of use" Award.

II. THE SUBSTANTIAL EVIDENCE IN THE RECORD DOES NOT SUPPORT THE COMMISSION'S FINDING THAT THE CLAIMANT IS NOT TOTALLY AND PERMANENTLY DISABLED PURSUANT TO SC CODE ANN. §42-9-10(A) FOR LOSS OF EARNING CAPACITY.

The Respondents do not seek to argue against precedent but do not cite this Court's decision in Dent v. East Richland County Public Service Dist., 423 S.C. 193, 813 S.E.2d 886 (SC App. 2018), reh. den., and for good reason because they cannot explain it. The Dent case simply restates and applies the Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961)

principles and all the other cases decided by the Supreme Court and this Court in reference to that standard. They also do not refer to the case of Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (1996) because they cannot explain it. To the contrary, Appellant would simply beg the question of the Court: Does eleven (11) jobs possibly available and possibly within his restrictions within 50 miles of his home and a makeshift job to accommodate his extreme restrictions so as to allow him to keep working with the title and benefits of a Sheriff's Deputy, which was not available after the new Sheriff came into office, constitute a sufficient enough job market to where it is not a job market that is so limited in quality, dependability **or** quantity that a reasonable stable job market for the residual services he can perform does not exist. The insurance industry constantly tries to beat this Court and the Supreme Court into submission and to try to make all of us forget about the plethora of cases similar to this one decided in favor of the injured worker; and they fail to cite to the actual original case setting out the standard; Colvin v. E.I. Dupont DeNemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955). In Colvin the Supreme Court detailed numerous cases, and again numerous cases, from jurisdictions all across the country that have applied that standard and found that there was not a reasonably stable job market for the Claimant's residual services of sufficient

quality, dependability, **or** quantity to constitute a reasonable stable market. This argument is specious at best.

III. THE COMMISSION ERRED BY ADMITTING INTO EVIDENCE AND CONSIDERING THE DECEMBER 17, 2020 MEDICAL REPORT OF DR. JAMES BETHEA AS PART OF THE EVIDENCE IN THE RECORD WHICH ADMISSION VIOLATED SC CODE §42-15-95.

The Appellant would submit that the Respondents' argument is really trying to put lipstick on a pig. On p. 13 of their Brief the Respondents literally say and argue,

> "**other than the October 27, 2020, letter from the Respondents to Dr. Bethea**, Appellant fails to cite or identify any other specific **improper** communications by Respondents."

Really? The October 27, 2020 letter attached hundreds of pages of medical records sent to Dr. Bethea and Appellant will leave the reading of the letter to the Court. They violated the Act and the restrictions on communication with a doctor seeing an employee, and the remedy is the same for that as for fruit of the poisonous tree; must be excluded. SC Code §42-15-95(B)(1).

> "The employee **must be ... notified...**. This notification **must** occur **prior to** the actual discussion or **communication**...."

That is the entire intent and purpose of the Amendment to the Act so that there are no ex parte communications by the insurance industry with doctors without the knowledge of the injured worker upon whose opinions their livelihood and ability to provide for their family may depend.

IV.

A. THE COMMISSION ERRED IN MAKING FINDING OF FACT #22 INVOLVING THE INTRODUCTION OF APPELLANT'S PRE-ACCIDENT MEDICAL RECORDS.

In reply, the Appellant will simply rely on the arguments made in his Initial Brief but again point out the arguments made by the Respondents as a basis for the admission; versus the actual objection made. Appellant would only ask and argue again is there any medical opinion evidence allowing the Commissioner to rely on those without delving into surmise, speculation, or innuendo?

B. THE COMMISSION ERRED BY MAKING FINDING OF FACT #23 AND AS A BASIS RELYING ON POST HEARING PRECEDENT NOT CITED TO THE COMMISSIONER BY THE PARTIES.

Let us think about this. A lay Commissioner cites in his Order legal precedent decided after this case was heard and not cited to him by either party as justification for his ruling at the Hearing. That is wrong on so many levels and the Appellant will stand on his Initial Brief, but also would most respectfully point out to the Court something the Court knows and please accept Appellant's apology for making this statement, but decisions are supposed to be made based on the Record. There are plenty of cases on that principle and there is a Judicial Code of Conduct to which the Commissioners are subject. A lay Commissioner found and cited this post-Hearing precedent?

Finally, in reference to due process, quite frankly the

Appellant is tired of having to make this argument and will simply ask the Court to name for the Appellant one other tribunal, Court, or Administrative Hearing Panel, or anywhere else a party has to pay to cross examine his accuser. So, is it due process where the insurance industry can go out and spend their billions and hire all the experts they want and like in this case, pay a doctor $5,000.00 for an evaluation to gut the injured worker and then that worker, unlike in any other forum or Hearing, has to pay to cross-examine his accuser? This is just a matter of whether or not this Court thinks that that violates fundamental due process which our country holds so dear.

C. THE COMMISSION ERRED IN MAKING FINDINGS OF FACT #23, #24, #25, AND #27.

In addition to the argument raised under IV.B., the Appellant will rely on his Initial Brief but would only point out in addition thereto and ask the Court to again read the US Supreme Court decision in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971), which holds that where the Appellant requests that the Commission issue a Subpoena to exercise his right to cross-examination, under its authority to issue a Subpoena that authority becomes mandatory in reference to protecting the Appellant's due process rights to cross-examine his accuser.

CONCLUSION

Based on the arguments made in the Appellant's Initial Brief and as set forth hereinabove in the Initial Reply Brief, the Decision of the Commission should be reversed and for the benefit of the Bar and the injured workers of our State, the critical issues involved in reference to the submission of a report, the consideration of evidence, and due process should be addressed and which were not waived in this Record.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the FINAL REPLY BRIEF OF APPELLANT contains all material proposed to be included by any of the parties and not any other materials.

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