

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

69228

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 0809635

Denise Thomas, Claimant, Appellant,


vs.

NVR Building Products/Ryan Homes,
Employer, and New Hampshire Insurance
Co., Carrier, Respondents.

NOTICE OF APPEAL

Pursuant to S.C. Code Ann. § 42-17-60, Denise Thomas appeals the Order of the Appellate Panel of the S.C. Workers' Compensation Commission, filed June 24, 2013. Appellant received written notice of the entry of the original Order on June 24, 2013. A copy of the Order, along with previous related Orders, is attached.

July 23, 2013


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SC Court of Appeals

As S.C. Code Ann. § 42-17-60 provides that the “[n]otice of appeal must state the grounds of the appeal or the alleged errors of law,” the following is provided as an attachment to the Notice of Appeal:

1. The Commission erred in failing to make sufficient findings of fact and conclusions of law, the error being that the Commission’s findings and conclusions are insufficient to enable a reviewing court to determine whether its decisions are supported by the evidence and the applicable law.
2. The Commission erred in affirming the Hearing Commissioner’s Order where the Hearing Commissioner failed to follow the directive of the Appellate Panel on remand; the error being that a lower body is charged solely with following the directive of the appellate body on remand, the Commissioner failed to follow that directive, and such is error as a matter of law.
3. The Commission erred in failing to make any specific Findings of Fact as to whether claimant has sustained partial wage loss under § 42-9-20 as directed by the Appellate Panel; the error being that while the Commissioner made findings concerning the Appellate Panel’s directive that she evaluate the merits of a wage loss claim under § 42-9-20 and several findings discussing some of the evidence on the record, the Commissioner failed to make any specific findings as to whether claimant has in fact sustained partial wage loss under § 42-9-20 as directed by the Appellate Panel, and such is error as a matter of law .
4. The Commission erred in finding that after reviewing all the evidence, she is unable to locate any vocational evidence speaking to the specific issue of partial wage loss and instead claimant relies on her previously-submitted vocational report, and contends that she is permanently and totally disabled or alternatively that she has sustained significant wage loss; the error being that specific vocational evidence is not required in order for the Commission to find total or partial wage loss or loss of earning capacity, that in fact there is both expert and lay evidence on the record concerning both total and partial loss of earning capacity, and that such evidence supports a finding of permanent total disability or, in the alternative, significant permanent partial loss of earning capacity/wage loss and the Commissioner should have so found.
5. The Commission erred in finding that the Full Commission affirmed Commissioner Beck’s 40% award based on the Full Commission Order dated July 2012, Finding of Fact #17; the error being that the Appellate Panel Order dated July 2012 specifically remanded “the claim to the next jurisdictional Commissioner for an analysis of the merits of an award of wage loss under § 42-9-20 and appropriate findings,” merely reiterated the Commissioner’s findings below, and preserved the issues on appeal pending such remand.
6. The Commission erred in finding “claimant has sedentary restrictions but they more than appear to the undersigned to be based upon claimant’s subjective complaints to treating physicians” based on “the fact that claimant’s objective findings (MRI) do not show pathology (“mild” stenosis “without involving the exiting nerve roots,” mostly a “shallow” protrusion with no compression, and no appreciable difference between claimant’s pre-accident MRI and post-accident MRI) which would warrant the use of a cane, walker, or

crutch" (as claimant has used with her providers), there is no evidence that any of these devices were prescribed for claimant; the error being that this is not a complete statement of the evidence on the record and there is no evidence on the record to support this finding(s) but the Commissioner is instead impermissibly inserting her own medical opinions in place of those of the medical experts and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.

7. The Commission erred in failing to make any findings concerning whether claimant is able to return to work in any capacity considering the permanent restrictions placed by the medical experts; the error being that a determination of permanent total or partial loss if earning capacity/wage loss requires such a determination with specific related findings, and in fact the evidence on the record here overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
8. The Commission erred in failing to make any findings concerning whether claimant is able to return to work in any capacity considering the fact that she now uses a cane, walker, or crutch for ambulation; the error being that a determination of permanent total or partial loss if earning capacity/wage loss requires such a determination with specific related findings, and in fact the evidence on the record here overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
9. The Commission erred in finding that claimant (described as "very well educated") has a master's degree in guidance and counseling, and a bachelor's degree in sociology," "at some point attended an all-French school," and "further, claimant has (a) worked as a regional sales manager (generating 20 million dollars a year for her assigned account), (b) successfully sold advertising in the Yellow Pages, (c) sold real estate (4 years), and (d) formerly owned her own clothing store, which she ultimately closed because of an ill parent – not because her business failed"; the error being that this is not a complete statement of the evidence on the record, there is no evidence on the record to support this finding(s), the Commissioner fails to indicate how this information relates to the issue before her, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
10. The Commission erred in failing to make any findings concerning whether claimant is able to return to any work similar to her previous work experience considering her injury by accident and current condition, including her medically-assigned permanent work restrictions and her difficulty with ambulation; the error being that a determination of permanent total or partial loss if earning capacity/wage loss requires such a determination with specific related findings, and in fact the evidence on the record here overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity such that she

has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.

11. The Commission erred in finding claimant's intellectual functioning is characterized in the "average to high-average," based on claimant's vocabulary usage and overall presentation at an evaluation; the error being that this is not a complete statement of the evidence on the record, the evidence this was drawn from did not include a full evaluation of same and there is better/more probative evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
12. The Commission erred in finding that even claimant's own vocational expert test claimant's word reading at a 12.5 grade level and that given claimant's prior job experience/responsibilities as referenced supra, [the Commissioner] cannot help but question a 4.5 grade math score, particularly when claimant testified at Commissioner Beck's hearing that she has experience dealing with significant sums of money and has never (including now) had trouble doing so; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
13. The Commission erred in finding that given the fact that no physician – at least not Drs. Bruce (claimant's own expert), Rollins, or Scott – has found objective evidence of radiculopathy, she likewise declines to make a separate award to the leg; the error being that this is not a complete statement of the evidence on the record concerning this issue, objective evidence is not required in order to make an award for permanent partial disability under § 42-9-30, there are unappealed findings in this case establishing an effect on the lower extremity as a result of this injury by accident and the injury to claimant's back, and evidence on the record overwhelmingly shows that claimant has sustained loss of use of her lower extremity as a result of her injury by accident and the injury to her back such that she is entitled to a finding of permanent partial disability to the lower extremity under § 42-9-30.
14. The Commission erred in finding that (a) claimant's own expert (Dr. Bruce) could not find any objective evidence of radiculopathy when he examined claimant; (b) Dr. Rollins likewise found "no objective evidence" of nerve damage in either leg; (c) Dr. Scott noted negative straight leg raising without a clear-cut dermatomal sensory deficit; (d) Dr. Holdren found negative straight leg raising; (e) on October 2009 and August 2010, claimant had muscle strength bilaterally was 5/5 with no atrophy; (f) claimant gait is noted to be improved on August 2010, and other later visits show improved mobility and therefore I find that claimant leg condition is not significant but rather minor and peripheral; the error being that this is not a complete statement of the evidence on the record concerning this issue, there are unappealed findings in this case establishing an effect on the lower extremity as a result of this injury by accident and the injury to claimant's back, and evidence on the record overwhelmingly shows that claimant has sustained loss of use of her lower extremity as a result of her injury by accident and the

injury to her back such that she is entitled to a finding of permanent partial disability to the lower extremity under § 42-9-30.

15. The Commission erred in merely mentioning and failing to actually make any finding on the issue of the application of § 42-9-35 in this case; the error being that the evidence overwhelmingly demonstrates that based on the Commission's previous finding that claimant's preexisting psychological problems are aggravating her pain, which was not appealed and is now the final law of the case, claimant is entitled to consideration of such aggravation under § 42-9-35 and a finding that her injury is not limited to a single body part or member injury and that she is not limited to § 42-9-30 when considering the extent of her permanent disability.
16. The Commission erred in making any credibility findings; the error being that the Appellate Panel's instructions on remand were simply to make a determination on the merits of whether claimant is entitled to an award of wage loss based on § 42-9-20, and the Commissioner's findings and preoccupation with credibility determinations is beyond the scope of that directive.
17. The Commission erred in finding that claimant is inconsistent in salient ways which call into question the veracity of her complaints/statements/testimony: (a) claimant's statements to providers that she has gained significant weight (35 lbs to one provider and 40 lbs to another) since the date of the accident are refuted by medical evidence and in fact claimant weighed 188 just a few days after the date of accident and now weighs 175 (report of Randy Adams) – a weight loss of 13 lbs. and an alleged weight gain versus an actual 13-lb. weight loss speaks for itself regarding significant exaggeration, however, I further note that for someone who allegedly "can't move at all" and lies in bed most of the day (as claimant's presentation and statements to providers are documented), a 13-lb. weight loss would be remarkable; (b) claimant states in her testimony that as to leg pain, "it's usually my left leg," but then almost immediately and inconsistently states " my right leg hasn't given me any problem so far"; (c) claimant states that she does stretches on a "good day," but then inconsistently states that she only has "bad days and very bad days"; (d) claimant will admit to driving 2-3 times a week ("does drive short trips around town" according to Dr. Mullen) but inconsistently states that she does not get out much "because of my condition"; (e) Dr. Scott points out that claimant required assistance to move on and off the examining table, yet was independent in rising and sitting in a chair; and (f) as to previous history of anxiety or depression, claimant told ER physicians that she had none; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
18. The Commission erred in her Finding of Fact #15, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, claimant readily admits that she gets around some on her better days, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.

19. The Commission erred in her Finding of Fact #16, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, claimant readily admits that she gets around some on her better days, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
20. The Commission erred in her Finding of Fact #17, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner appears to fail to take into account the different times these statements were made and the waxing and waning of symptoms, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this compensable accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss because to this compensable injury by accident.
21. The Commission erred in her Finding of Fact #18, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner appears to fail to take into account the different times these statements were made and the waxing and waning of symptoms, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this compensable accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss because to this compensable injury by accident.
22. The Commission erred in her Finding of Fact #19, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner appears to be impermissibly stating her own medical opinion.
23. The Commission erred in her Finding of Fact #20, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.

24. The Commission erred in her Finding of Fact #21, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner appears to be impermissibly stating her own medical opinion, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
25. The Commission erred in her Finding of Fact #22, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
26. The Commission erred in her Finding of Fact #23, referred to as if reiterated entirely herein; the error being the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, claimant readily admits that she gets around some on her better days, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
27. The Commission erred in her Finding of Fact #24, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
28. The Commission erred in her Finding of Fact #25, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.

29. The Commission erred in her Finding of Fact #26, referred to as if reiterated entirely herein and specifically to the extent she found the Full Commission affirmed the finding that Comm'r Beck award encompasses any increased pain from claimant's preexisting psychological condition; the error being that the Appellate Panel Order dated July 2012 specifically remanded "the claim to the next jurisdictional Commissioner for an analysis of the merits of an award of wage loss under § 42-9-20 and appropriate findings," merely reiterated the Commissioner's findings below, and preserved the issues on appeal pending such remand and did not affirm Comm'r Beck's finding as found.
30. The Commission erred in her Finding of Fact #26, referred to as if reiterated entirely herein; the error being that the evidence overwhelmingly demonstrates that based on the Commission's previous finding that claimant's preexisting psychological problems are aggravating her pain, which was not appealed and is now the final law of the case, claimant is entitled to consideration of such aggravation under § 42-9-35 and a finding that her injury is not limited to a single body part or member injury and that she is not limited to § 42-9-30 when considering the extent of her permanent disability.
31. The Commission erred in her Finding of Fact #27, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
32. The Commission erred in her Finding of Fact #28, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to consider the point that claimant is unable to work in a job that would use such education since she has not worked in that field in 30-35 years, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
33. The Commission erred in her Finding of Fact #29, referred to as if reiterated entirely herein; the error being that the evidence overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as her earning capacity existed at the date of accident and that she is therefore entitled to permanent total disability as a result of her injury by accident or, in the alternative, that she has sustained substantial permanent partial loss of earning capacity as her earning capacity existed at the time of this injury by accident and is entitled to a substantial award of partial wage loss based on § 42-9-20.
34. The Commission erred in her Finding of Fact #29, referred to as if reiterated entirely herein and specifically as to her statement that she thinks Dr. Bruce's qualifying phrase "as this patient presents today"; the error being that this statement is completely nonsensical in the context of the issue before the Commissioner, the statement fails to take into account the fact that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the evidence in fact overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as her earning

capacity existed at the date of accident and that she is therefore entitled to permanent total disability as a result of her injury by accident or, in the alternative, that she has sustained substantial permanent partial loss of earning capacity as her earning capacity existed at the time of this injury by accident and is entitled to a substantial award of partial wage loss based on § 42-9-20.

35. The Commission erred in her Finding of Fact #30, referred to as if reiterated entirely herein; the error being that the vocational evidence on the record in fact fully proves that claimant has sustained total or partial wage loss or loss of earning capacity as a result of this injury by accident, that in fact there is both expert and lay evidence on the record concerning both total and partial loss of earning capacity, that the Commissioner seems to be impermissibly stating her own vocational opinion of which she is not an expert, and that the expert vocational evidence on the record in fact supports a finding of permanent total disability or, in the alternative, significant permanent partial loss of earning capacity/wage loss and the Commissioner should have so found.
36. The Commission erred in failing to make an award under § 42-9-20 as directed by the Appellate Panel; the error being that a lower body is charged solely with following the directive of the appellate body on remand, the Commissioner failed to follow that directive, and such is error as a matter of law, furthermore claimant clearly made claim in her original form 50 to any all benefits she is entitled to under the Act, the Commission is empowered to make any award supported by the evidence, the evidence here overwhelmingly demonstrates claimant has sustained wage loss as a result of her injuries and is entitled to a determination of disability based on such wage loss as a matter of law, that an award under § 42-9-20 as directed by the Appellate Panel and even under § 42-9-10 is supported by the evidence, and as such the Commissioner's award under § 42-9-30 is not consistent with the facts of this case and is error.
37. The Commission erred in her Finding of Fact #33, referred to as if reiterated entirely herein; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to such lump-sum payment, that such lump-sum payment is in her best interest, and that the Commissioner should have reached this issue and made a finding that claimant is entitled to a lump-sum payment of her award.
38. The Commission erred in her Finding of Fact #34, referred to as if reiterated entirely herein; the error being that this is not a complete statement of the evidence on the record, the Commissioner fails to indicate how this information relates to the issue before her, the Commissioner fails to take into account that defendants take claimant as they found her with preexisting conditions that had already worked to limit her ability to function, and the record overwhelmingly shows that claimant has been medically assigned permanent work restrictions as a result of this injury by accident which foreclose or substantially limit her ability to return to gainful work activity, including her past work, such that she has sustained total or at least substantial partial loss of earning capacity and is entitled to permanent total disability or substantial permanent partial disability based on wage loss.
39. The Commission erred in her Finding of Fact #34, referred to as if reiterated entirely herein; the error being that the Commissioner appears to be substituting her own medical opinions for those of the physicians in this matter.
40. The Commission erred in failing to find claimant is entitled to permanent total disability as a result of her injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to permanent total disability as a result of her injury by accident.

41. The Commission erred in failing to find claimant has sustained complete loss of earning capacity as a result of her injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as a result of her injury by accident and is thus entitled to permanent total disability.
42. The Commission erred in failing to find claimant is entitled to a determination of permanent disability based on loss of earning capacity; the error being that the Commission earlier determined claimant sustained injury to her back and left lower extremity, in addition to psychological problems that are aggravating her pain, those findings were not appealed and became the final law of the case, and thus, claimant's injury is not limited to a single scheduled member and she is entitled to a determination of permanent disability based on loss of earning capacity as a matter of law.
43. The Commission erred in failing to make any finding concerning claimant's contention that he should consider her psychological condition under § 42-9-35; the error being that the evidence overwhelmingly demonstrates that based on the Commission's previous finding that claimant's preexisting psychological problems are aggravating her pain, which was not appealed and is now the final law of the case, claimant is entitled to consideration of such aggravation under § 42-9-35 and a finding that her injury is not limited to a single body part or member injury and that she is not limited to § 42-9-30 when considering the extent of her permanent disability.
44. The Commission erred in failing to find claimant has sustained permanent partial disability to her left lower extremity as a result of the injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant has sustained permanent partial disability to her left lower extremity as a result of the injury by accident and is entitled to compensation for same .
45. The Commission erred in failing to make any finding on claimant's request for lump-sum payment of any award; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to such lump-sum payment, that such lump-sum payment is in her best interest, and that the Commissioner should have reached this issue and made a finding that claimant is entitled to a lump-sum payment of her award.
46. The Commission erred in failing to make any finding on claimant's request for a lifetime allocation of her award; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to such lifetime allocation and that the Commissioner should have reached this issue and made a finding that claimant is entitled to a lifetime allocation of her award.
47. The Commission erred in finding that the injury to the left leg is in the form of radiculopathy; the error being that to the extent the Commissioner intended this finding to indicate that claimant sustained something less than compensable injury to her left lower extremity and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant sustained such compensable injury to her left lower extremity in the form of aggravation of her preexisting condition and thus, claimant's injury is not limited to a single scheduled member and she is entitled to a determination of permanent disability based on loss of earning capacity as a matter of law.
48. The Commission erred in finding claimant's preexisting psychological problems were not aggravated by the compensable accident, however claimant's psychological problems are aggravating her pain (Commissioner Roche's Decision and Order dated September 10, 2009, affirmed by appellate panel on February 25, 1010); the error being that to the extent

the Commissioner intended this finding to indicate that claimant's psychological problems play no role in her current injury by accident and that and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity.

49. The Commission erred in finding that § 42-9-35(A)(2) is not cited in Commissioner's Roche's Decision and order dated September 10, 2009, as a ruling of law, but is asserted by claimant at this proceeding; the error being that this finding is not sufficient for review as the Commissioner merely cites the issue and fails to actually make any finding on the issue before him.
50. The Commission erred in finding that § 42-9-35(A)(2) is not cited in Commissioner's Roche's Decision and order dated September 10, 2009, as a ruling of law, but is asserted by claimant at this proceeding; the error being that to the extent the Commissioner intended this finding to indicate that claimant's psychological problems play no role in her current injury by accident and that and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity.
51. The Commission erred in finding Dr. Gerald Rollins opined on May 13, 2009 that there is no objective evidence to indicate claimant is worse than she was prior to the date of injury, June 30, 2008; the error being that this finding is directly contrary to the Commission's earlier finding that claimant has sustained compensable aggravation of her low back and left lower extremity condition as a result of her injury by accident and such findings were not appealed and are now the law of this case.
52. The Commission erred in finding that on May 25, 2010, Dr. Scott assessed maximum medical improvement, assigned a 4% impairment rating to claimant's back, and placed claimant in a sedentary level; the error being that there is no evidence to support this finding but that the evidence on the record overwhelmingly demonstrates that Dr. Scott opined claimant has a 7% whole person impairment which he apportioned to 3% preexisting and 4% as affects of the injury itself.
53. The Commission erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that there is no evidence to support this finding as the evidence actually overwhelmingly demonstrates that Dr. Bruce merely stated that claimant does not describe a true radicular pain below her knee at this point and no definite radiculopathy findings but also clearly found that claimant continues experience injury and an adverse effect on her left lower extremity as a result of the injury by accident and the injury to her back in left lower extremity pain, a significant limp on her left lower extremity, and left lower extremity atrophy secondary to disuse due to pain in her left lower extremity originating from the low back.
54. The Commission erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that this finding is in directly contrary to the Commissioner's Finding of Fact #18 in which he awards claimant continued medical treatment for radiculopathy in her left leg consistent with the recommendations of the authorized treating physicians.

55. The Commission erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that this finding is directly contrary to the Commission's earlier finding that claimant has sustained compensable aggravation of her low back and left lower extremity condition as a result of her injury by accident and such findings were not appealed and are now the law of this case.
56. The Commission erred in finding claimant's vocational report by Randy Adams opines that claimant is permanently and totally disabled but relies heavily on claimant's psychological condition to arrive at that conclusion; the error being that there is no evidence to support this finding as the evidence overwhelmingly demonstrates that in addition to opining that "considering the psychological factors alone, it is my vocational opinion that Ms. Thomas is not employable in any capacity" and that "her psychological issues would prohibit her from performing any of her past relevant work or from utilizing any of her skills that she developed in her work history," Mr. Adams also recognized that Dr. Scott limited claimant to sedentary work as a result of her physical injuries alone and completed a pain questionnaire opining that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and he opined that "physically she is limited to sedentary level of functioning" and is not employable at a sedentary level.
57. The Commission erred in finding claimant's vocational report by Randy Adams opines that claimant is permanently and totally disabled but relies heavily on claimant's psychological condition to arrive at that conclusion; the error being that the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity, and as such Mr. Adams report considering both psychological and physical factors is overwhelming evidence that claimant has sustained complete loss of earning capacity as a result of her injury by accident and is entitled to permanent total disability.
58. The Commission erred in failing to find that Dr. Scott opined in his June 8, 2010 Clinical Assessment of Pain that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and that such supports claimant's contention that she has sustained complete loss of earning capacity and is entitled to permanent total disability; the error being that the evidence overwhelmingly demonstrates that Dr. Scott opined in his June 8, 2010 Clinical Assessment of Pain that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and that such supports claimant's contention that she has sustained complete loss of earning capacity and is entitled to permanent total disability.
59. The Commission erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that this award takes into account claimant's radiculopathy in her left leg (Commissioner Roche's Decision and Order dated September 10, 2009) and increased pain resulting from her preexisting (non-compensable) psychological condition; the error being that there is no evidence to support this finding but the evidence rather overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as a result of her injury by accident entitling her to permanent total disability or in the alternative demonstrates that claimant has sustained far greater permanent partial disability to her back and even 50% or more loss of use of the back under § 42-9-30(21) entitling her to total and permanent disability compensated under § 42-9-10(B).

60. The Commission erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that this award takes into account claimant's radiculopathy in her left leg (Commissioner Roche's Decision and Order dated September 10, 2009) and increased pain resulting from her preexisting (non-compensable) psychological condition; the error being that this finding is contradictory in that the fact that claimant's injury involves her back, her left lower extremity, and increased pain resulting from her preexisting psychological condition under § 42-9-35, claimant is not limited to the scheduled member section as a matter of law and is entitled to a determination of permanent disability based on loss of earning capacity.
61. The Commission erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that this award takes into account claimant's radiculopathy in her left leg (Commissioner Roche's Decision and Order dated September 10, 2009) and increased pain resulting from her preexisting (non-compensable) psychological condition; the error being that in describing claimant's psychological condition as non-compensable the Commissioner fails to consider § 42-9-35 and its directive that such aggravation along with claimant's other compensable injuries entitles claimant to a determination of permanent disability based on loss of earning capacity.
62. The Commission erred in finding and ruling defendants are entitled to control future medical care; the error being that such is a misstatement of the law and in fact defendants are merely entitled to choose a physician to provide continued medical care to claimant and are not entitled to "control" such medical care.
63. The Commission erred in finding and ruling defendants are to receive credit for temporary total disability compensation paid since August 9, 2010, the date of filing of the Form 21; the error being that there is no evidence to support this finding but that the evidence in fact overwhelmingly demonstrates that claimant is entitled to permanent total disability benefits making such credit moot.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 0809635

Denise Thomas, Claimant, Appellant,

vs.

NVR Building Products/Ryan Homes,
Employer, and New Hampshire Insurance
Co., Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents and the S.C. Workers' Compensation Commission by mailing copies by U.S. Mail, postage prepaid, on 7/23/13, addressed as shown below.

Ms. Virginia L. Crocker
Judicial Director
S.C. Workers' Compensation Comm'n
P.O. Box 1715
Columbia, SC 29202-1715

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JUL 26 2013

SC Court of Appeals

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July 23, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **Denise Thomas v. NVR Building Products/Ryan Homes, et al.**
SCWCC File No.: 0809635

Dear Ms. Kitchings:

Enclosed herein please find the following items for filing in the above-referenced matter:

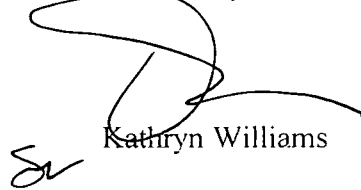
1. Notice of Appeal;
2. Certificate of Service by Mail;
3. Copy of the appealed Order;
4. Filing fee in the amount of \$100.00.

By copy of this letter, we are also serving defendants' attorney and the Workers' Compensation Commission with copies of the Notice of Appeal.

Should you have any questions, please feel free to contact me.

Kindest regards,

Yours truly,



Kathryn Williams

KW:d
Enclosures

cc: John R. Blythe, Esq.
S.C. Workers' Compensation Comm'n, Judicial Department

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JUL 26 2013

SC Court of Appeals

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