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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Trial Court Case No. 1015200

RECEIVED

AUG 01 2013

SC Court of Appeals

Henton T. Clemmons, Jr., Appellant,

v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, Defendants/Respondents.

NOTICE OF APPEAL

Appellant Henton T. Clemmons, Jr. appeals the Decision of the Hearing Commissioner filed December 6, 2012 and the Appellate Panel Order of the South Carolina Workers' Compensation Commission filed July 2, 2013. Appellant received notice of entry of the Appellate Panel Order (the final Agency Decision) according to an unsigned "Affidavit of Service" by email on July 2, 2013.

Pursuant to SC Code §42-17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

I.

The following issues were presented for decision by the Full Commission from the Decision of the Hearing Commissioner which are

hereby appealed to this Court:

1. That pursuant to S.C. Code of Laws §42-17-40, the Appellant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. Where the Appellant was back at work and had already signed a Form 17 stopping temporary disability benefits and where the Form 21 filed with the Commission requesting a hearing was filed under SC Code §42-9-260 and the stop payment provisions of the Act but only requested a determination of the Appellant's entitlement to an Award in this matter, did the Hearing Commissioner err by holding a hearing where the Appellant had made no request for an Award pursuant to the Workers' Compensation Act and objected to an Award being made?

3. Where the Defendants forced the Appellant to a premature determination of his right to benefits and where the Appellant had made no request for benefits under the Workers' Compensation Act either for loss of use of a member, organ or bodily part or for wage loss under SC Code §42-9-10 and §42-9-20 and where such entitlement to benefits is a property right of the Appellant, did the Commissioner deny the Appellant due process of law by forcing a determination of his property rights where no

such right or entitlement to a determination at the request of the Defendants is provided for under the Act and where the Defendants have absolutely no right to force a claimant to a decision on his entitlement to benefits without his request? The request for benefits under the Workers' Compensation Act is the course of action belonging to the Appellant and is the same as the right to file a Complaint in Court for a determination of benefits to which the Plaintiff is entitled. It is a right created as a matter of law under the Workers' Compensation Act.

4. Where the Defendants had withdrawn a previous request for a Form 21 hearing which was filed after the Appellant was already back at work on the basis that they agreed to provide an evaluation by the original treating neurosurgeon as to whether or not anything further from a neurological standpoint needed to be done and where the Defendants also indicated that they would agree to a, "full second opinion" by another physician as to all other issues including the issues with the neck, back, right arm, neuropathy, right leg and possible central neurological and/or brain damage and based on the Commission policy of generally granting a claimant a second opinion, where requested timely, prior to a determination of benefits being made, did the Hearing Commissioner err by not ordering a second opinion and/or reimbursing the Appellant for the second opinion obtained by a neurologist and also from an orthopaedic surgeon and did the Commissioner err by not at least addressing the findings of these

two doctors whose findings are uncontested in the medical records and medical evidence presented?

5. Did the Commissioner err by failing to make an Award for the Appellant's low back and for his myelopathy, which is a central neurological problem where there is absolutely no evidence to the contrary that the Appellant sustained these injuries as a result of his work related accident? The authorized treating neurosurgeon, Dr. Randall Drye, in both his evaluation in 2011 and 2012 found that he, "does have some mild hyperreflexia in the lower extremities relative to the upper extremities with perceived sensation." These same problems were noted in the physical examination of Dr. Howard Mandell, a neurologist who saw the Appellant, and by Dr. Leonard Forrest, the orthopaedic surgeon who saw the Appellant. The only rating given by the authorized treating physician was that due to the Appellant's surgery to the cervical spine wherein he gave a 25% whole person impairment. Note: he did not address the lumbar spine as far as permanent residual impairment nor the central neurological impairments. Dr. Leonard Forrest addressed these and gave a 30% whole person impairment due to the cervical spine and an additional 10% whole person impairment due to the lumbar spine. Dr. Howard Mandell in addition gave a whole person 15% neurological impairment due to the Appellant's documented myelopathy and neurologic dysfunction. Therefore, there is absolutely no substantial evidence in the Record either from the lay testimony or in the medical records and medical opinion

evidence. Thus, the Commissioner also erred as a matter of law by failing to make Awards and/or to make specific Findings of Fact on these issues based on the substantial evidence in the Record and making detailed Findings of Fact and Conclusions of Law concerning these issues from the Record.

6. Based on the uncontested medical opinion evidence in the Record, the uncontested testimony from the Appellant and lay witnesses in the Record, and based upon the fact that at the Hearing the Appellant only requested an Award for having lost more than 50% of the use of his back and where there is absolutely no contrary medical or lay evidence to that of the lay opinion evidence submitted into the Record and the medical opinion evidence submitted into the Record without objection as to the functional loss of use of the Appellant's back, and where all medical doctors addressing that issue and where the lay testimony addressing that issue was to the effect that the Appellant had lost more than 50% of the functional use of his back, did the Hearing Commissioner err as a matter of law based on the reliable, probative and substantial evidence in the Record by not awarding the Appellant benefits for loss of use of the back in excess of 50%? Further, where the uncontested medical evidence and lay opinion evidence is that the Appellant had lost more than 50% of the functional use of his back, did the Commissioner err as a matter of law by failing to award the Appellant an Award for the maximum Award which is the residual value of the residual number of weeks left for an Award under the

Act, generally referred to as an Award for total and permanent disability and by failing to award the Appellant lifetime medical benefits for having lost more than 50% of the functional use of his back?

7. Did the Hearing Commissioner err as a matter of law by including Findings of Fact on wage loss where the Appellant at the Hearing had limited his request for an Award to that of having lost more than 50% of the functional use of his back which is a scheduled member and wherein our Courts have held that wage loss and whether or not there is any wage loss involved in a case is a totally improper consideration concerning an Award under a request for an Award in reference to the loss of use of the back or any other scheduled member, organ or bodily part as is set out under SC Code §42-9-30 and Rule 67-1101?

8. Did the Hearing Commissioner err as a matter of law by placing greater weight in the authorized treating neurosurgeon's reports where there is an absolute unbelievable inconsistency in that doctor's reports wherein there is absolutely no evidence in the Record to substantiate that the Appellant was having any neurological problems prior to the accident and where that doctor himself in fact states that fact in his subsequent reports up to and including his final report in 2011? Then for some unknown reason the doctor states that the Appellant had longstanding preexisting neurological problems when the Appellant was returned to him for further evaluation in 2012 and reported that he was having substantial problems with balance and gait, which were

noted in his evaluation at that time but which for some unknown reason he decided to attribute to long standing neurological problems, again which are not substantiated anywhere in the Record as having existed prior to this injury?

9. Did the Hearing Commissioner err as a matter of law specifically in reference to Finding of Fact No. 7 in his notes and Findings of Fact No. 10, 11 and 12, which together indicate without question that the Hearing Commissioner considered wage loss in his Award under §42-9-30 which is a clear violation of law and the Commissioner's responsibility to apply the law as dictated to this Commission by the SC Court of Appeals and SC Supreme Court? The Supreme Court has repeatedly held that wage loss is not a factor to be considered in Awards made under §42-9-30. The question simply is, was and always will be the functional loss of use that the Appellant has and in this case, the Hearing Commissioner erred in an improper consideration of wage loss and also by failing to address and/or make Awards for the myelopathy and injury to the central nervous system, to the low back and to the leg. The Hearing Commissioner did not even address the fact that the Appellant's authorized treating neurosurgeon while noting these problems on examination did not even address ratings to the low back and the leg or the arm, or the central neurological problems which he again specifically diagnosed as a myelopathy in his own records.

10. Where the Appellant submitted evidence of 50% functional loss of use of the back, did the Commissioner err as a

matter of law by not making detailed Findings of Fact and Conclusions of Law setting out the evidence relied on, if any exists, to rebut the presumption and by failing to address the applicable law in reference to the presumption?

11. Based on the Supreme Court's directive to the Commission to apply a liberal construction of the Act and based on the Oath of Office taken by the Commission, did the Commissioner err by not making detailed Findings of Fact and Conclusions of Law and by not awarding the Appellant an Award for having sustained a 50% of loss of use to the back based on the undisputed evidence on that issue in the Record?

12. Where the treating physician's impairment evaluation was performed under the AMA Guidelines which state that the impairments in the Guides are in reference to the ability to perform the activities of daily living (ADLs) and have nothing to do with the ability to do work or perform work activities, can an impairment estimate under those Guides constitute the basis for an Award for loss of use under SC Code §42-9-30 which is contrary to the evidence in the Record on loss of use of the back?

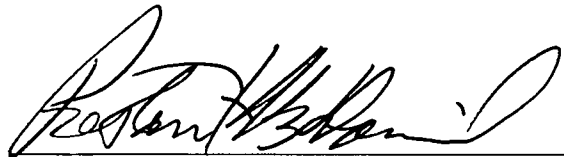
II.

As to the appeal procedure and the appeal before the Full Commission (which is actually a request for review under SC Code §42-17-50) and as to the Full Commission Decision, the following issues in addition to the issues presented to the Full Commission as to the Hearing Commission's Decision, are raised:

1. The Full Commission erred as a matter of law by failing to make its own detailed Findings of Fact and Conclusions of Law as required by the Workers' Compensation Act, SC Code §42-1-10 et. seq., the Administrative Procedures Act, SC Code §1-23-310 et. seq., SC Workers' Compensation Commission Regulations, and our Appellate Court decisions.

2. The Full Commission erred as a matter of law by failing to make a decision on each issue appealed to it for review under SC Code §42-17-50 and our Appellate Court decisions.

3. The Full Commission erred as a matter of law by making only a conclusory decision in violation of our Appellate Court decisions.



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July 30, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Trial Court Case No. 1015200

Henton T. Clemmons, Jr., Appellant,

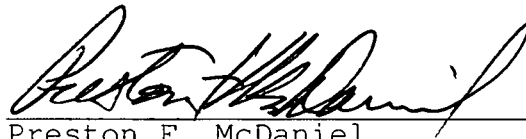
v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, Defendants/Respondents.

PROOF OF SERVICE

I certify that I have served the **NOTICE OF APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on July 30, 2013 addressed to: Ms. Virginia L. Crocker, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 **AND** also serving a copy upon Kelly F. Morrow, Attorney, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

Dated: July 30, 2013



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Proudly representing injured workers
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July 30, 2013

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AUG 01 2013

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**RE: Henton T. Clemmons, Jr., Appellant, v. Lowes Home
Centers, Inc.-Harbison, Employer, and Sedgwick Claims
Management Services, Inc., Carrier,
Defendants/Respondents.
Trial Court Case No. 1015200**

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case.
Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents;
2. A copy of the Order which is to be challenged on appeal.
3. A Filing fee of \$100.00.

Sincerely yours,

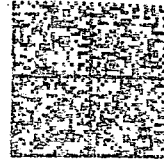


Preston F. McDaniel

PFM/kth
Enclosures

cc: Kelly F. Morrow, Attorney
Ms. Virginia L. Crocker, SCWCC

Priority Mail
CompassPrice



UNITED STATES POSTAGE
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