

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

RECEIVED
JUL 25 2024
SC Court of Appeals

Michael K. Crowley, Employee, Appellant,

v.

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

PETITION FOR REHEARING
PURSUANT TO RULE 221, SCACR

Pursuant to Rule 221, SCACR, the Appellant hereby petitions the Court for rehearing and would respectfully submit that the Court overlooked or misapprehended the following points and/or issues in reference to its Opinion and would respectfully show unto the Court as follows:

1. In "B. Loss of Earning Capacity" the Court misapprehended and/or overlooked that it did not cite and did not apply the definition of total and permanent disability for wage loss, which was the essential issue before the Court for decision wherein there was a lack of substantial evidence to deny benefits; and misapprehended the Opinion of the Supreme Court in Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 550 S.E.2d 100 (2003).

In the first paragraph on loss of earning capacity, the Panel actually confabulates and misjoins two (2) separate quotes. What appears to be a quote from SC Code §42-9-10(A) is in fact two quotes; one from that section and one from Wigfall. Not addressed is the definition of total "disability", the essential issue before the Commission which was established in Colvin v. E.I. DuPont de Nemours, 327 S.C. 465, 88 S.E.2nd 581 (1955) and enshrined in Wynn v. People's National Gas. Co. of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961). Citing from Colvin and Wynn, the definition of total disability is:

"The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" (emp. add.)

The quotation from Wigfall is taken out of context and which cherry-picked from the second of three (3) examples of how under SC Code §42-9-10 an injured worker may obtain an award for total and permanent disability; whereas number (3) deals with §42-9-10(A) awards. In Wigfall, the issue before the Supreme Court was simply a challenge to the Young v. Singleton decision providing that even though a claimant may be totally disabled, if the injury is limited to a single scheduled member, under SC Code §42-9-30 the claimant is limited to an award for loss of use to that member.

All of the Appellate Court Opinions decided under §42-9-10(A) for wage loss are under the third example. In fact, it is that subsection, "(A)", that applies to a total and permanent disability award for wage loss. The whole purpose of establishing the involvement of a second scheduled member is to get outside of the scheduled member statute and entitle the claimant to a greater award for disability for wage loss.

Quoting the third section from Wigfall:

"Third, a claimant may establish total disability to multiple physical injuries. Under this scenario, a claimant who has a §42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCullough v. Singer Co., 300 S.C. 103, 286 S.E.2d 471 (Ct. App. 1989) (Court found claimant totally disabled due to combined partial impairments to the back, stomach and leg).

Singleton stands for the exclusive rule that a claimant with one scheduled injury is limited to a recovery under §42-9-30 alone. **The case also stands for the rule** that an individual is not limited to scheduled benefits under §42-9-30 if he can show additional injuries beyond a lone scheduled injury. This principle recognizes 'the common sense fact that when two or more scheduled members [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the scheduled allowances added together'." (emp. add.)

Thus, the essential issue for decision under SC Code §42-9-10(A) is the substantial evidence rule applied to the definition of total disability. This issue was overlooked by Judge Thomas in her dissent in Dent and was repeated by the Panel in this

Opinion. For the Commission to deny an award to an injured worker based on wage loss, there must be substantial evidence in the Record that based on a claimant's age, education, background and experience, and the physical facts of the injury that instead of being unable

"to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable job market for them **does not** exist",

he can perform such services that a reasonably stable job market for them does exist. So, what substantial evidence is in the Record he can perform jobs of sufficient quality, dependability, or quantity that there is a reasonably stable job market for them? It is undisputed Deputy Crowley cannot return to his job as a Deputy or any job in which he has a past experience. Everyone agreed on the extreme accommodations that had been made to allow him to work in Courthouse Security and at the time of the hearing he was not working nor had Respondents offered or procured him employment under §42-9-190. Both vocational experts applied the sedentary physical demand classification in determining what jobs he could do. Ms. Fowler opined he could not maintain employment within the sedentary work category. The only evidence in the Record the Claimant can return to work is the opinion of Respondents' vocational expert who did a records review and found at most twelve (12) possible jobs within a 50

mile radius of the Claimant's home. Under Colvin, Wynn, and every Opinion since, that is not a sufficient "quantity of jobs" to deny an award.

2. In "A Total and Permanent Disability Based on Loss of Use of the Back", the Panel misapprehended the meaning under law of loss of use of the back, the essential issue in a scheduled member award; and the application of the substantial evidence rule to the loss of use evidence in the Record.

First, the Opinion fundamentally misstates Claimant's argument on the essential issue under the Act:

"In addition, Crowley argues the loss of use is to the activities of daily living rather than to loss of earning capacity." (emp. add.)

That is absolutely wrong! While the Court is absolutely correct that the essential issue for decision under statute, SC Code §42-9-30 is "loss of use", it is **not** to do activities of daily living, it is **to do work**, and the Court does not actually apply the substantial evidence rule to the evidence on "loss of use". What the Panel misapprehended or overlooked (caused somewhat by the loosey goosey/interchangeable use in our Opinions of "impairment", "disability", and "loss of use"), is that evidence on "loss of use" is the essential issue under §42-9-30 and medical "impairment" ratings under the American Medical Association's **Guides to the Rating of Permanent Physical Impairment** have nothing to do with nor are they evidence of the amount of loss of use **to do work**. The AMA Guides make it perfectly clear they have **absolutely nothing** to do with the

inability (loss of use) to do work. Page 5 of the AMA Guide 5th Edition sets out that the Guides are not tied to work activities but are tied only to "impairment" to do "the activities of daily living". Quoting the example from p. 5:

"For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability." (emp. add.)

Since the back became a scheduled member in 1974, the insurance industry has continually attacked awards for loss of use of the back on two bases. First, they have tried to infuse wage loss into a scheduled member award and second, most prominent in this case, they argue under the AMA Guides that medical "impairment" equates to loss of use. Neither the Supreme Court nor this Court have ever bought that argument before now. While the Court extensively cites to the Supreme Court's decision in Clemmons v. Lowe's Home Centers, Inc., supra, which reversed this Court's decision in Clemmons, the Court should review the Supreme Court's original Clemmons decision which was withdrawn which specifically addressed the meaning of and

evidence on "loss of use" the essential issue. That decision was superseded simply because Justice Pleicones felt the Court did not need to enter the Opinion on "loss of use" because of the substantial evidence in the Record. The Opinion, had it not been withdrawn, would have ended this argument, whereas the substituted Opinion deleted all the discussion concerning loss of use. However, one part of that discussion remained and is quoted appropriately by this Panel. Justice Hearn set out the essential evidentiary issue and quoting this Court and the Opinion of the Supreme Court:

"While there is medical evidence that Clemmons whole person was impaired less than 50%, the issue under the scheduled member statute is not impairment as to the whole body, but rather it is loss of use of a specific body part - in this case, Clemmons' back." (emp. add.)

Thus, the Supreme Court clearly held that it is not medical impairment, but it is "loss of use" of the back and thus it is the evidence on that essential issue that is to be reviewed under the substantial evidence standard. There is absolutely no substantial evidence in this Record on that essential issue, loss of use of the back, other than Appellant had lost 50% or more of the use of his back to do work.

The Panel did not have available, but by the grace of God, there is a wonderful analysis of "loss of use" evidence versus medical "impairment" evidence contained in the recent Supreme

Court decision in Paulino v. Diversified Coatings, Inc., 2024 WL 3169928, Op. No. 28212 filed June 26, 2024. In Paulino, there were low medical impairment ratings and this Court specifically reversed the decision of the Commission awarding total and permanent benefits for loss of use of the back because, "there is no medical evidence in the Record that supports the Commission's Findings". The Supreme Court held in making that Finding this Court misapplied the substantial evidence standard.

The Supreme Court specifically held that while the claimant has the burden of proof of demonstrating he lost 50% or more of the use of his back, once that evidence is presented the defendants bore the burden of rebutting the presumption of total and permanent disability under subsection 42-9-30(21) and §42-9-10(B), (← Note importance of this cite re: Appellant's argument.)

As Appellant argued initially to the Panel reemphasized here in reference to the medical opinion evidence in the Record, this Court in Clemmons and in Dent, and the Supreme Court in Clemmons had in those Records before the Court for the first time ever, specific medical opinion evidence on the essential issue "loss of use".

In this case, Dr. Forrest gave his medical opinion that the claimant had lost 50% or more of the functional use of his back. There is absolutely no other medical opinion evidence on loss of use in the Record, there are only impairment ratings which have

nothing to do, as stated in the AMA Guides, with the disability to use the back to do work.

In Paulino, the Court reviewed all of the cases concerning the various attempts by the insurance industry to infuse wage loss or to substitute medical "impairment" for "loss of use".

Then, Paulino addresses the questions which were repeatedly asked by this Panel of the Appellant during oral argument about what evidence constitutes "loss of use" evidence. The Court went over the evidence it considered evidence on "loss of use" presented by Mr. Paulino. The Court referenced the functional capacity evaluation, its findings and how they established loss of use. In this case, the functional capacity evaluation established Deputy Crowley due to his back could not do the full range of sedentary work, the lightest of the physical demand classifications into which all jobs in the US are categorized. (US Dept. of Labor's Dictionary of Occupational Titles, Physical Demand Classification system: sedentary, light, medium, heavy and very heavy duty work).

Paulino then cited the vocational evaluation as evidence of loss of use. In this case, Ms. Fowler, the vocational expert, in addition to addressing loss of earning capacity, addressed the physical ability because of his back injury to do only sedentary work under that Physical Demand Classification system, used in all functional capacity evaluations; and opined Deputy Crowley

from a physical standpoint was excluded from 89% of the jobs available in the economy. (ROA p. 931). Respondents' vocational expert agreed he is limited to sedentary work. All doctors restricted him to sedentary work. (ROA pp. 856, 913, 949). Deputy Crowley testified he had lost 80% of the functional use of his back to do work with his back.

Again, like Clemmons and Dent and unlike every other Record before this Court and the Supreme Court, there is specific medical opinion evidence on the essential issue "loss of use"; wherein in Dr. Forrest's opinion Deputy Crowley had lost more than 50% of the functional use of his back to do work with his back. What other substantial evidence is in the Record on the essential issue for decision - "loss of use"? None.

Paulino is further instructive in two regards. First, medical impairment evidence cannot prevail over other "loss of use" evidence in the Record, which in Paulino was: claimant's opinion, the doctors' work restrictions, the functional capacity evaluation, and the vocational evidence. But unlike this case there was no medical opinion evidence on the essential issue of "loss of use". Thus, this Court has before it all the evidence in Paulino and specific medical opinion evidence on loss of use of the back. No other doctor expressed an opinion on loss of use, but they agreed he was restricted to sedentary work. Medical opinion evidence concerning medical impairment cannot

constitute substantial evidence where the essential issue before the Commission is loss of use and there is specific medical opinion evidence in the Record on loss of use.

The second is that in this case, there is: no lay testimony; no vocational expert evidence; no functional capacity evaluation evidence; or medical opinion evidence, Appellant has lost less than 50% of the use of his back to do work. In other words, on the essential issue "loss of use" there is no evidence to the contrary. This Court, as in Clemmons, and in Dent, is presented with specific medical opinion evidence on loss of use of the back and there is no other contradictory evidence on that issue in the Record.

Finally, something specifically addressed in Paulino is the premise and assertion under the AMA Guides, Respondents' position in this case, the impairment ratings which are less than 50% in reference to the lumbar spine, are substantial evidence on loss of use because they could have been higher than 50%; which is wrong. Under the AMA Guides the maximum whole person impairment for the lumbar spine that can be given to any injured worker is 28% to the whole person. A 28% whole person impairment converts to 37.3333% as a lumbar spine regional impairment rating. (AMA Guides 5th Edition 15.13 Criteria for Converting Whole Person Impairment to Regional Spine Impairment, p. 427). It is a false and impossible premise that a worker can

be given a medical impairment lumbar rating of more than 50% even on a regional basis under the AMA Guides. This again points out the fallacy in any reliance on the AMA Guides and impairment ratings in reference to the issue of loss of use and substantial evidence on that issue.

3. In section C. Admissibility of Evidence, the Court misapprehended the importance of the exclusion of evidence being under the mandatory provisions of SC Code §42-15-95 and overlooked that the Court's decision that the evidence from Dr. Bethea while obtained in violation of SC Code §42-15-95 was harmless error eviscerates the Legislature's intent of the exclusion of such evidence.

The Panel overlooked and misapprehended the distinct difference in the situation here involving the violation of a mandatory statutory requirement versus a mere evidentiary decision admitting evidence that should not have been admitted and relying on the harmless error rule because there was other substantial evidence to justify affirmance. To not at least require a new hearing eviscerates and excuses compliance by the Respondents with the mandatory provisions of SC Code §42-15-95. In every other opinion by this Court and Supreme Court involving violation of a mandatory statutory requirement the Courts have required strict compliance and exacted significant punishment for the violation.

In Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002), the Supreme Court was faced with a situation under the uninsured motorists insurance coverage provisions of the Code where the

plaintiff had not obtained an Affidavit from a corroborating witness as required by the statute, but a corroborating witness was called at trial. After trial, the Circuit Court granted defendants' directed verdict motion. The Supreme Court reversed this Court's decision that the sworn testimony "substantially" met the requirements of the Act. The Supreme Court in Collins found that where the provisions of the statute are mandatory if they are not strictly complied with the plaintiff cannot even proceed with their cause of action. In his dissent to this Court's decision, Judge Goolsby noted he would affirm the Circuit Court's decision because there was not strict compliance with the mandatory provision of the statute noting the Legislative intent that there must be a signed Affidavit; and if one is not provided, "there is no right of action or recovery". In Martin v. Rapid Plumbing, Inc., 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006) this Court mandated strict compliance and exacted the maximum penalty for the violation.

As this Court in its decision properly noted, prior to Brown v. Bi-lo, Inc., 354 S.C. 436, 81 S.E.2d 836 (2003), an injured worker enjoyed the same privileges and sanctity of their medical records as does every other patient and the only way defendants could communicate with a doctor was through a deposition or the express consent of the injured worker. The Supreme Court noted there were occasions where it would be good

for defendants to be able to speak with the doctors and asked the Legislature to make allowances in that regard. This is exactly what the Legislature did in the amendment to SC Code §42-15-95, but the Legislature to protect the injured worker mandated strict compliance or the evidence was to be excluded.

This Court held Respondents violated the mandatory provision of the Act but applied the harmless error rule because there was other evidence upon which the Commissioner could rely. As Judge Goolsby said in dissent, and as the Supreme Court reiterated in Collins, it would be supplanting "form over substance" to say the Commissioner relied on other evidence in the Record as opposed to the evidence from Dr. Bethea. In addition to the violation being of a statutory mandatory provision, Judge Thomas' opinion in Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (SC App. 2014) is instructive as to why the harmless error rule should not be applied here. In Fore after finding the Commissioner's Order was affected by an error of law but applying the harmless error rule because there was other evidence in the Record on credibility, one of the Court's main considerations was the Appellate Panel made a finding in its Order it did not rely on "any information contained in the letter from the Commission to the Attorney General". There is no such finding on Bethea either by the Hearing Commissioner or Appellate Panel in their decisions or as

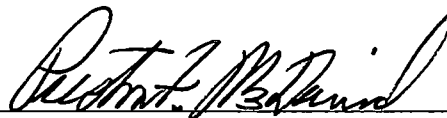
to what evidence was relied on. Antithetically, as cited by this Court, the Hearing Commissioner did make a specific finding that he did not consider and gave no weight to the opinions of Dr. Freeman; Finding of Fact #27. (ROA p. 33).

The Court should reverse the decision applying harmless error and at a minimum remand for a de novo hearing. Otherwise, the Court has eviscerated the mandatory requirements of §42-15-95 and the harmless error ruling will allow for a whole myriad of attempts to get around the requirement and excuses justifying the statutory violation if there is no penalty imposed.

CONCLUSION

For the foregoing reasons, Rehearing should be granted.

Respectfully submitted,



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July 25, 2024

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
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Appellate Panel

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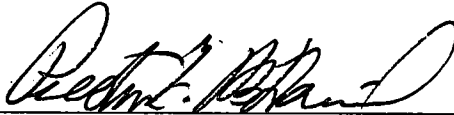
PROOF OF SERVICE

I hereby certify that I have served the following:

- 1) PETITION FOR REHEARING EN BANC PURSUANT TO RULE 219(a)(1)(2), SCACR; and
- 2) PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR

on this date, July 25, 2024, addressed as follows:

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July 25, 2024

VIA HAND DELIVERY

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Columbia, South Carolina 29201

RECEIVED

JUL 25 2024

SC Court of Appeals

**RE: Michael Crowley v. Darlington County
Appellate Case No. 2022-000282**

Dear Ms. Kitchings:

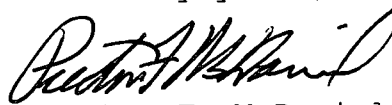
Please find enclosed the original and required copies of our Petition for Rehearing En Banc pursuant to Rule 219(a)(1)(2), SCACR and our Petition for Rehearing regarding the Opinion in the above-referenced matter pursuant to Rule 221(a). The required filing fees for both Petitions are enclosed. By copy of this letter, I am notifying and serving Counsel for the Respondents with copies of the Petitions.

I particularly look forward to hearing from the Court, based on the Supreme Court's decision in Paulino v. Diversified Coatings, Inc., Op. No. 28212, filed June 26, 2024, the same day that this Unpublished Opinion was filed by the Panel.

Finally, Mr. Baxley has just filed a Petition for Rehearing on behalf of the Respondents and since Mr. Baxley was so kind to grant me a 15 day extension on my behalf to file the Petition for Rehearing, and while the Court granted me extensions for filing Petitions for Rehearing, I have no objection to Mr. Baxley's Petition which was filed within the time of the extensions granted to me.

As always, I appreciate all of the courtesies and kindnesses shown to me by you, your office and the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Gerald Malloy, Esquire
Johnnie W. Baxley, Esquire