THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE
SC WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2024-UP-225
(SC Ct. App. heard May 8, 2024 -
filed June 26, 2024)

Michael Crowley, Claimant,..... Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 13, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in having found the Respondents violated the mandatory provisions of SC Code §42-15-95 in procuring the evidence from Dr. James F. Bethea, as the statute mandates it be excluded from any proceeding in the workers' compensation claim, and thus the Court of Appeals should have reversed the decision as a matter of law?

IIA. Did the Court of Appeals err in its decision on an award under §42-9-30(21), which is in direct conflict with the prior decisions of this Court and is wrong under the reliable, probative, substantial evidence in the Record on the essential issue before the Commission; which is loss of use of the back, not medical impairment?

IIB. Should the Court close the loop on medical impairment versus loss of use?

III. Did the Court of Appeals err by not reciting and applying this Court's definition of total and permanent disability under SC Code §42-9-10(A) and under that definition and the substantial evidence, declaring Petitioner was not entitled to an award for total and permanent disability?

IV. Did the Court of Appeals err by not reversing the decision based on the admission of the Petitioner's past medical records?

STATEMENT OF THE CASE

There are many inaccuracies in the Facts set out in the Opinion of the Court of Appeals. Petitioner would refer the Court to Petitioner's Statement of the Case and Statement of Facts in Appellant's Brief to the Court of Appeals. Under the Argument of each issue raised, Petitioner will include a citation of authority and specific reference to the pertinent portions of the Record on Appeal. In general, as to the issues presented to the Court:

1. The Commissioner allowed into evidence the evaluation report of Dr. James F. Bethea [not the evaluation agreed upon by Consent Order (ROA pp. 1-2; p. 1268)], with whom Respondents had numerous communications without Petitioner's knowledge. Petitioner requested but was not given a prehearing conference to determine whether the evidence was obtained in violation of §42-15-95 and was inadmissible. At hearing, over objection the Commissioner admitted Dr. Bethea's report. The Court of Appeals ("COA") found "there was a violation of section 42-15-95" which requires the **mandatory** exclusion for a violation but held that since there was other "possible" evidence the Commissioner could have relied on, "thus any error in its admission was harmless".

2. The COA sustained the denial of an award based on having lost 50% or more of the use of his back basing its decision **solely** on medical "impairment" ratings under the AMA Guides as substantial evidence on "**loss of use**". That decision is in

derogation of this Court's decisions concerning the evidence that constitutes evidence of "**loss of use**" of the back, which is the essential issue before the Commission in a scheduled member award. As in this Court's previous decision in Clemmons v. Lowe's Home Improvement Centers, Inc. - Harbison, 420 S.C. 282, 803 S.E.2d 268 (2017) the only evidence in the Record concerning the essential issue before the Commission, "**loss of use**", was that Petitioner had lost 50% or more of the functional use of his back to do work requiring the use of his back. Even in light of this Court's decision in Paulino v. Diversified Coatings, Inc., 2024 L.W. 319928, Op. No. 28212, filed June 26, 2024, the COA refused to grant rehearing of its decision on whether medical "impairment" ratings constituted substantial evidence in the Record to deny an award for having lost 50% or more of the use of his back. The evidence on "loss of use" in the Record is set out in Argument IIA.

STATEMENT OF FACTS

An extensive and accurate statement of necessary facts is contained in Appellant's Court of Appeals Brief.

ARGUMENTS

I. Having found the Defendants violated the mandatory provisions of SC Code §42-15-95 in procuring the evidence from Dr. James F. Bethea, the statute **mandates** it be excluded from any proceeding in the workers' compensation claim, and thus the Court of Appeals should have reversed the decision as a matter of law.

SC Code §42-15-95 was amended after and at the suggestion of this Court in its decision of Brown v. Bilo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003). In Brown, the Court held the defendants in a workers' compensation claim could not talk to a claimant's doctor except in one of two ways; either with the permission of the injured worker or by taking the doctor's deposition. The Court suggested that the Legislature consider a limited right of the defendants to talk to the claimant's doctors but safeguarding the claimant's rights. Based on that suggestion the Legislature amended the statute so as to allow the defendants a limited right to communicate with the medical providers on certain specific issues but added a **mandatory** exclusionary clause. Quoting from the statute:

> "(C) any discussions, communications, medical reports, or opinions obtained in violation of this section **must be excluded from any proceedings under the provision of this Title**." (Emp. add.).

Quoting this Court:

> "Under the Rules of statutory interpretation, use of the words such as 'shall' or '**must**' indicate the Legislature's intent to enact **a mandatory requirement**." Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (2007). (Emp. add.).

After the evaluation in response to Petitioner's Subpoena (ROA pp. 1024-29), the documents show Respondents had multiple communications with Dr. Bethea without the knowledge of the Petitioner including a detailed letter of what they wanted addressed in the evaluation, and over a hundred pages of medical

records for review. (ROA pp. 1054-1055). The Petitioner requested a prehearing conference to determine whether the evidence would be admitted. (ROA p. 1269).

The COA found the defendants had violated the provisions of §42-15-95 in the procurement of the evidence submitted from Dr. Bethea but held that since there was "other" evidence in the Record to support the decision any error in its admission was "harmless error".

To the knowledge of Petitioner, in no other Opinion entered by this Court or the COA where the Court has found a violation of a **mandatory** statutory provision has our Appellate Courts found the error to be harmless and in all of those decisions our Appellate Courts have imposed severe consequences. See for example: Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002); Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (SC App. 2006).

Unlike a jury as the fact finder in a jury trial, our General Assembly and this Court have mandated that the Workers' Compensation Commission must make detailed findings of fact and conclusions of law that are sufficiently definite and detailed enough to allow for judicial review to make sure that the findings of fact are supported by evidence and that the law has been properly applied. Drake v. Raybestos-Manhattan, Inc., 341 S.C. 116, 127 S.E.2d 288 (1962). That law has not changed. There

are numerous references to Dr. Bethea's report and opinions throughout the Hearing Commissioner's Findings of Fact confirmed in toto by the Full Commission Panel, and there are specific Findings of Fact on Dr. Bethea's report:

Finding of Fact #5 (ROA p. 41), Finding of Fact #16 (wherein the Commissioner finds Dr. Bethea gave the claimant no restrictions, needed no additional medical treatment and assigned a 3% whole person impairment rating), Finding of Fact #21 (ROA p. 44), and then Findings of Fact #23 thru #27 are all detailed Findings of Fact concerning Dr. Bethea and the admission of his report. The Commission then makes Conclusions of Law #6 and #7 concerning the admission of Dr. Bethea's report and unbelievably cites as support Barr v. Darlington County School District without citation. That Opinion had not been issued at the time of the hearing.[1] (ROA pp. 44, 47).

The provisions of §42-15-95 are mandatory concerning the exclusion of evidence and they were put in for the protection of the injured worker because the injured worker does not have the ability or financial resources to countermand the defendants. In this case, the Respondents paid Dr. Bethea $5,000.00 for the evaluation.[2] (ROA pp. 1038 & 1039).

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[1] That Opinion was withdrawn, and after an Amicus Brief on the §42-15-95 issue, was substituted without a decision on that issue as not being preserved for review. WL 1287586, 2021 WL 3779508.

[2] The Defendants by Consent Agreement had agreed to a second opinion with the Medical University of South Carolina (MUSC). (ROA pp. 1&2). On 01/13/21 the

The Petitioner would ask the Court to review this and reverse the decision by the COA finding the statute was violated but at the same time finding it to be harmless error. The Record on Appeal establishes why severe consequences must be brought upon the Defendants for failure to comply with the statute; otherwise the employers, and more importantly their insurance carriers, who have the wherewithal are going to continue to pay $5,000.00 and violate the statute with impunity. The whole purpose of the mandatory provisions requiring the exclusion of evidence is to ensure that there will be compliance with the statute and to uphold the finding that:

> "there was substantial evidence in the Record without it to support the Commission's Award ...."

will gut the mandatory provision requiring the exclusion of such evidence. It will embolden the defendants to violate the Act and to find other evidence in the Record to support the decision. Obviously, this issue presents a viable question of law specifically in reference to the consequences for violating a mandatory, statutory provision.

IIA. <u>The Court of Appeals decision on an award under §42-9-30(21) is in direct conflict with the prior decisions of this Court and is wrong under the reliable, probative, substantial evidence in the Record on the essential issue</u>

Petitioner wrote a letter to the Commissioner who signed the Consent Agreement requesting a conference (not granted) to clarify whether the Defendants had complied with the agreement. In his APA Submissions, the Petitioner provided a listing of MUSC Dept. of Orthopaedics and Physical Medicine and noted that Dr. Bethea was not part of the faculty and staff of the Dept. of Orthopaedics. (ROA p. 1268 & pp. 1063-1067).

before the Commission; which is "loss of use" of the back, not medical impairment.

The COA appropriately quotes from this Court's opinion in Clemmons v. Lowe's Home Improvement Centers, Inc. - Harbison, supra, but then goes on to misapply the Court's holding and compounds the error by not reconsidering its decision based on this Court's decision in Paulino. The Petitioner would submit the evidence found to be substantial in Clemmons and the evidence on the essential issue before the Commission, "loss of use" of the back, is almost identical and just as in Clemmons, this Court should grant certiorari and reverse both the COA's and the Commission's decision on "loss of use" of the back.

Beginning in 1941 and consistently ever since and quoting from Ferguson v. State Hwy. Dept., 197 S.C. 520, 15 S.E.2d 775 (1941) in reference to scheduled awards:

> "The right to compensation for serious facial or head disfigurement is **not dependent on diminution of earning capacity** ... If the condition exists, compensation under the Act is mandatory." (Emp. add.)

In Ripley v. Anderson Cotton Mills, 209 S.C. 401, 40 S.E.2d 508 (1946), the Court specifically applied that principle to an Award for "**loss of use**" to a scheduled member without any showing of any loss of earning capacity and noted the claimant was earning as much or more than he was earning at the time of injury and affirmed the Award awarding Claimant:

> "Twenty-five (25%) percent **functional loss of use** of the right eye, ten (10%) percent **functional loss of**

> **use** of the left eye, and One Thousand ($1,000.00) Dollars for disfigurement." (Emp. add.)

Those fundamental principles have been applied ever since: Hoke v. Cherokee County, 215 S.C. 376, 58 S.E.2d 330 (1950); Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957); G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958). The last decision on this issue prior to the "back" becoming a scheduled member, was Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974). In Dykes, the Court reaffirmed that under a scheduled member Award:

> "**Compensation** depends upon **functional loss** rather than the loss of earnings."

In 1974 the back was added as a scheduled member and our Appellate Courts have consistently applied those same principles to the back as a scheduled member; that is to say, the decision to be made is an award for "**functional loss of use**" of the back and it is an error of law for the Commission to infuse and to consider wage loss in a loss of use to the back Award. Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985); Bateman v. Town and Country, 287 S.C. 158, 336 S.E.2d 890 (SC App. 1985); McCollum v. Singer, 300 S.C. 103, 386 S.E.2d 471 (S.C. App. 1989); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993), reh. den., cert. den.; Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) (citing as authority Lyles v. Quantum Chemical Co., supra); Clemmons v.

Lowe's Home Improvement Centers, Inc. - Harbison, supra:

> "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."

When the back was added the General Assembly put in the statute a presumption that where the "loss of use" of the back, so critical to physical work, is 50% or more due to the "character" of the injury the worker is entitled to an award for permanent and total disability. **Most importantly**, as again recognized by this Court in Paulino, the presumption is tied to **paragraph (2) now paragraph (B)** of SC Code §42-9-10, which provides for permanent and total disability awards based strictly on the severe "character" of certain injuries. The Award under §42-9-30 is based on the "character" of the injury for functional "loss of use".

In Paulino v. Diversified Coatings, Inc., supra, in light of which the COA failed to reconsider its decision, this Court addressed head on the issue of medical impairment evidence versus evidence on loss of use. The Defendants argued in Paulino that because there were no "medical impairment" ratings over 50% to any section of the spine, there was not substantial evidence in the Record to justify an award for total and permanent disability. This Court held to the contrary that it was not necessary to have medical impairment evidence and reiterated the specific difference between impairment and "loss of use" evidence reaffirming Clemmons

v. Lowe's Home Improvement Centers, Inc. - Harbison, supra. Clemmons stands for the principle that where the reliable, probative, and substantial evidence in the Record on "the essential issue" before the Commission "**loss of use**" is that the Claimant has lost 50% or more of the use of his back, the Commission must make that award. While the Court need not go so far as to enter a decision that "medical impairment" opinions have nothing to do with "loss of use", it should go one step further in this case and reverse the Commission's decision and award total and permanent disability for having lost 50% or more of the use of the Petitioner's back, because as in Clemmons not only is there substantial evidence but all of the evidence on "**loss of use**" is that Petitioner lost more than 50% of the use of his back to do work. As in Paulino, all of the medical impairment ratings in this case are lower than 50%. (The absurdity of the argument that AMA Guide medical impairments correlate to loss of use is found in the AMA Guides. It is absolutely impossible to get even a regional rating greater than 50% of the lumbar spine under the AMA Guides. AMA Guides to the Rating of Permanent Impairment, 5th Ed., pp. 384 & 427; 6th Ed. pp. 574 & 583.)

Regardless of that red herring, in this case as in Clemmons you have specific medical opinion evidence on the essential issue of **functional loss of use**. Dr. Forrest gave a specific

medical opinion that Petitioner had lost 50% or more of the functional use of his back. So the question is simply where there is specific medical opinion evidence on **"functional" loss of use** and all of the other loss of use evidence is the same, can medical impairment evidence constitute substantial evidence to deny benefits to a worker based on **"loss of use"** the essential issue before the Commission.

All the evidence in the Record is that the Petitioner has lost 50% or more of the use of his back:

A. The CORA Functional Capacity Evaluation:

> "The Claimant demonstrated a 'CONSISTENT' effort during this evaluation. DIAGNOSIS: CHRONIC PAIN SYNDROME." "Based on results obtained, the Claimant demonstrates the ability to perform within the **SEDENTARY** physical demand category. The Claimant lifted zero pounds below waist height, 10 pounds to chest height and 10 pounds overhead. ...". (ROA p. #886).

B. Dr. Leonard Forrest, MD:

> "to a reasonable degree of medical certainty, Deputy Crowley has lost more than 50% function of his back as a result of the two work-related incidents (5/5/17 and 1/3/18)." (ROA p. 913).

C. Ms. Harriet Fowler, M.Ed., CRC, Vocational Rehabilitation Manager, expressed the opinion based specifically on Petitioner's physical limitations due to his back(lifting, etc.) on the use of his back:

> "Based on the client's valid FCE, the Client is actually excluded from all physical demand categories including very heavy, heavy, medium, light, and sedentary. In the US economy 92 job titles fall into the very heavy category, 1,165 in the heavy category, 3,373 in the medium category, 6,326 in the light duty,

> and 1,405 job titles in the sedentary category. Only 11% of the 12,761 job titles that exist in the US economy fall into the sedentary category; and **the client is excluded from 89% of the job titles in the US economy based on his physical capacities** and can only work from 2.67 to 5.28 hours total in an eight-hour day even in the sedentary physical demand category and would have to have an accommodation of sitting and standing every 30 minutes even in the sedentary category ...". (Emp. add.) (ROA p. 931).

D. Petitioner testified he had lost "80%" of the use of his back to do work requiring his back. (ROA p. 1222, ll. 2-21).

E. Defendants' vocational evaluator found based on doctors' restrictions and the FCE, Deputy Crowley was functioning at a sedentary demand level (ROA P. 855); i.e., excluded from 89% of jobs because of his back.

There is simply "no loss of use" evidence to the contrary.

This Court and the COA have repeatedly affirmed total and permanent disability Awards under §42-9-30(21) made by the Commission under facts identical to the ones here. Lyles v. Quantum Chemical Co., supra; Bateman v. Town & Country Furniture, supra; **BUT MORE IMPORTANTLY** in Clemmons v. Lowe's Home Centers, Inc. - Harbison, supra, where the Commission denied a Claimant benefits under facts identical to the ones here, **which included medical opinion evidence on "loss of use"**, this Court reversed that decision.

IIB. The Court should close the loop on medical impairment versus loss of use.

Further, based on the COA's misunderstanding or misapplication of this Court's decision in Clemmons and failure

to address Paulino, this Court should close the loop and address what constitutes substantial evidence on the issue of loss use of the back to deny benefits. While this Court can simply not grant certiorari on every case to protect the injured workers of our State due to the restricted application of the law by the current Commission and the application of the law by some Panels of the COA, it should in this case on this issue.

In Clemmons v. Lowe's Home Improvement Centers, Inc. - Harbison, supra, this Court found there was no substantial evidence in the Record to deny an award to the injured worker for having lost 50% or more of the functional use of his back. After Clemmons, the Defendants and the COA latched onto medical impairment ratings as the issue on which to deny benefits because in Clemmons all of the AMA Guides Impairment Ratings to the Whole Person when converted under the AMA Guides to Regional Ratings were greater than 50% impairment to the cervical spine. [Which is not actually accurate because in Clemmons, one of the ratings given by a doctor was 25% to the back and it was not converted.] The Defendants in workers' compensation cases have been trying to sell reliance on impairment ratings to limit awards for loss of use since the Guides came into existence in 1957 and particularly since the back became a rated member in 1974.

In Paulino, this Court reiterated that the testimony of the

claimant concerning loss of use of the back constituted substantial evidence for an award based on 50% loss of use of the back; and that the doctors "work restrictions"; the functional capacity evaluation results; and the vocational expert's opinion all constituted substantial evidence on the loss of use of the back. Correctly, the Court rebuked the defendants' argument that since none of the medical impairment ratings were greater than 50% the Commission could not award total and permanent disability for having lost 50% or more of the functional use of the back.

While the Petitioner hopes the Court will close the loop and definitively hold that medical impairment ratings cannot serve as an evidentiary basis standing alone to deny or reduce a loss of use award, the Court need not do that and can simply hold that, as in Clemmons, where you have not only the claimant's opinion; objective functional capacity evaluation evidence; vocational opinion evidence; and severe "work restrictions" by all doctors **but** you have specific medical opinion evidence on "loss of use", the essential issue before the Commission, that the Claimant has lost 50% or more of the functional use of his back, that "medical impairment" opinions do not constitute substantial evidence to deny that worker benefits. This is exactly what was argued before this Court in Clemmons and which this Court thought it had put to bed. The

essential issue is loss of use.

If the Court decides to close the loop with Clemmons and Paulino, the Court need go no further than the words of the American Medical Association's Guides to the Rating of Permanent Physical Impairment itself to establish that the Guides have absolutely nothing, nothing to do with "functional loss of use" of the back or any member to do work requiring the use of the back or that member. Quoting from the 5th Edition of the AMA Guides, P. 4:

> "**Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect ... an individual's ability to perform common **Activities of Daily Living (ADL), *excluding* work.**" (both emp. add. and the italics is used in the Guides).
>
> P. 5:
>
> "medical judgment used to determine the original impairment percentages **could not account for** the diversity or complexity of work but could account for daily activities, to most people. ... **impairments interact with such other factors** as a workers' age, education, and prior work experience to determine the extent of work disability ...."
>
> "For example, ... a 30% whole person impairment for pericardial heart disease ... 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 a 30% impairment due to pericardial disease may be completely unable to do his or her regular job and, thus, **may have a 100% work disability**."

Thus, there is presented both novel questions of law concerning medical impairment evidence versus medical opinion evidence on loss of use under the substantial evidence rule where the essential issue for decision is loss of use, and also

whether the COA followed the decisions of this Court as required by SC Const., Jud. Dept. Art. V. §9.

III. The Court of Appeals erred by not reciting and applying this Court's definition of total and permanent disability under SC Code §42-9-10(A) and under that definition and the substantial evidence, declaring Petitioner entitled to an award for total and permanent disability.

The COA's entire review of whether the Commission failed by not awarding the Petitioner total and permanent disability under §42-9-10 for loss of earning capacity consists of four (4) sentences. The Petitioner veribly believes that this Court upon reading that decision and with its knowledge and repeated citation of Wigfall v. Tideland Utility, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), will find the misjoinder of the quotations from Wigfall taken out of context to be confounding. The paragraph disjoins the law on two (2) totally different types of awards: the one being for "wage loss", either total or partial under §42-9-10(A) or §42-9-20 and the other being a scheduled award for loss of use under §42-9-30. Unlike a "wage loss" award to which this Court's definition of total and permanent disability for wage loss applies, the disability is presumed in a loss of use award.

The Court will not find in the COA's Opinion even the mention of this Court's wage loss definition applied since the inception of the Act as set out in: Colvin v. E.I. DuPont de Nemours, 327 S.C. 465, 88 S.E.2d 581 (1955) and definitively

established in Wynn v. Peoples Natural Gas Co. of SC, 238 S.C. 1, 118 S.E.2d 812 (1961). That definition followed by this Court and the COA until now is:

> "Total disability in compensation law is not to be interpreted **literally** as utter and adject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful employment does not necessarily rule out a finding of total disability or require it to be reduced to partial ... The rule followed by most modern courts has been well summarized ... in the following language: 'an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, **or** quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled ...." 88 S.E.2d 581, 585. (Emp. add.)

In Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (1996), applying the Colvin and Wynn definition, Mr. Stephenson was working in an accommodated job and this Court agreed with the employer he was already totally disabled:

> "If the work that the claimant is capable of performing or is performing is so limited in quality, dependability, or quantity that no reasonably stable job market exists for that kind of work, then the employee should be considered totally disabled ... We agree with the employer. The Court of Appeals analysis does not take into account the substantial evidence in the Record indicating the work that Stephenson was capable of performing was so limited in quality, dependability or quantity that no reasonably stable market existed for his skills." (Emp. add.).

Thus, as this Court has made clear since the inception of the Act and as it made clear in the Stephenson case, the question is not whether the Claimant is or is not capable of working, the question is whether the jobs which he can perform

are so limited in quality, dependability or quantity that a reasonably stable job market for them does not exist. That is the question of law to be reviewed and the facts upon which a decision is to be made. Here, the COA while noting Petitioner remained a Deputy Sheriff in his "post-injury **accommodated** position as a security guard for the Court", did not address whether there was a reasonably stable job market for his services or the change made in that accommodated position. Deputy Crowley was working as a security guard but as a Deputy Sheriff with an assigned patrol car and at a Deputy Sheriff's pay. In November 2020, he applied for Police Officer Disability Retirement due to his back problems and in January 2021 retired quoting the COA:

> "in part because the DCSO reduced his pay, no longer provided a vehicle, and required him to report to the Detention Center rather than DCSO." (ROA pp. 1214-1215; p. 1221).

Thus, even his job was no longer accommodated.

The substantial evidence in the Record establishes that he is entitled to an award for total and permanent disability for wage loss. Deputy Crowley testified he had a 12th grade education, attended the Police Academy and Fire Service. (ROA p. 1182).

Past work experience: first job Marley Electrical Heating production line with a lot of bending, stooping and lifting;

general layoff. Galey & Lord, a cloth printing plant working on the line requiring lifting 50-100 lb. rolls and bending and stooping; Plant shut down. Delta Mills, a cloth print/dying mill requiring heavy lifting, pushing, pulling and loading; left to attend the Police Academy/Society Hill Police Dept. In his opinion, due to the condition of his back and leg he could no longer do any of those jobs because of bending, stooping, and heavy lifting requirements. (ROA p. 1182, ll. 20-22; p. 1183, ll. 1, 9-14, 22-24, p. 1184, l. 6; p. 1185, ll. 10, 14, 16-p. 1186, ll. 10-15, 19-23; p. 1186, l. 1-p. 1187, l. 2).

He worked as a Police Officer for the town of Society Hill for approximately eight (8) or nine (9) years. He could not return to that job because of the job requirements including, "calls with wrestling - and fighting - with people and handcuffing - and sitting in the - and everything that is involved, it would be too much for me." He also testified he can only sit for 10-15 minutes before his back begins to hurt really bad and he has to move around because of irritation, particularly in his leg. (ROA p. 1187, l. 8-p. 1189, l. 1).

In January 2021 he was medically retired on Police Officer's Disability Retirement due to the condition of his low back and leg. (ROA pp. 1214-1215).

Physically, the FCE established Petitioner was only capable of sedentary work and he could not even meet the full range of

jobs in the sedentary category. (ROA pp. 869-870).

Ms. Harriet Fowler, Claimant's vocational expert opined without the "extensive" accommodations being provided at the courthouse and with his limitations even in the sedentary category, which requires him to make positional changes at least every thirty (30) minutes, in reference to job market access, it was more likely than not the Claimant would not be able to obtain/maintain substantial gainful employment. (ROA pp. 930-932).

Defendants records review vocational analyst found eleven (11) job openings in the sedentary physical demand level within fifty (50) miles of Mr. Crowley's home in Bennettsville with most being in the Florence area. After noting the accommodations being made at the courthouse; that he "should be able to return to work"; and that the jobs identified were in the sedentary category, he noted:

> "sedentary work involves sitting most of the time but may involve walking or standing for brief periods. Jobs are sedentary if walking and standing are required only occasionally, **and all other sedentary criteria are met**."

He then concluded:

> "It is this CRC's opinion that Mr. Crowley is a viable candidate for vocational rehabilitation services and will benefit from his continued participation with those services." (ROA pp. 845-849; p. 855).

The evaluator found "with a reasonable degree of certainty Mr. Crowley cannot return to work in his pre-injury occupation as a

Deputy." (ROA p. 856). Thus, there is no evidence in the Record Deputy Crowley could return to any job in which he has a background and experience.

There is no evidence that any of the few jobs their vocational expert found would provide the "extensive accommodations" being made for Deputy Crowley at the Courthouse. Since the Respondents say he can possibly do these jobs, there is also no evidence under SC Code §42-9-190 they have offered or procured any job for him within his residual capacity. Colvin v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). There is simply no evidence in the Record that he can perform any kind of services other than one job in an extremely "accommodated" position at the Courthouse from which he had to retire due to his physical condition.

IV. The Court of Appeals should have reversed based on the admission of the Petitioner's past medical records.

The past medical records served in part as a basis for, and are repeatedly referred to in, the Findings of Facts and Conclusions of Law of the Commissioner. ("Pre-existing Medical Evidence", ROA pp. 10-12; Findings of Fact #18, 19, 22, ROA p. 31). Both the COA and the Commission misunderstood Petitioner's objection and basis for the objection to the admission of those records. While Finding of Fact #22 is actually a legal position

statement; it is wrong as to the objection made by the Claimant.

Finding of Fact #22 in pertinent part:

> "... Claimant asserts that prior physicians' opinions are not credible because they allegedly fail to address causation ...
> The issue in this case is what weight to assign to medical records that may or may not state 'to a reasonable degree of medical certainty' that Claimant's pre-existing conditions are or are not related to his work injuries ...
>
> Additionally, the records may be admitted for impeachment purposes, and it is necessary so that a party will not know whether or not the Records will be used for that purpose until a witness testifies at the Hearing." (ROA p. 31).

To the contrary, as set out in Petitioner's letter submitting additional authority to support the objection:

> "You will recall that we objected to medical records for past treatment being submitted into evidence without any supporting medical opinion establishing a causal relationship between any of that medical care to any of Deputy Crowley's current medical problems stemming from the accident and for which benefits are sought. **Without such expert opinion evidence, the submission calls for speculation by the Commission on a causal relationship**. As part of Defendants response to our objection, the Defendants position was, in part, that the Records were being submitted concerning the Claimants credibility."

From the Hearing Transcript, the objection:

> "Mr. McDaniel: Now... another group of objections ... **there is no ..., no medical opinion that relates any of his current existing problems. ... that they are in any way related to any of those past medical treatments -- it would be asking you to speculate as to the relationship of those records to his current condition without such medical testimony. As I said earlier, ... if Counsel shows me any medical opinion that blames any of his current problems with his low back and his leg on those past existing problems then I will ... you can let them in. But otherwise, they are irrelevant, immaterial and --- and call for**

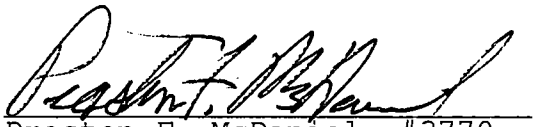
speculation on your behalf as to what the meaning are of those records." (ROA p. 1164, l. 17 - p. 1165, l. 8; p. 1166, l. 16 - p. 1167, l. 9).

For the medical records to be relevant and material and admitted; and for the Commissioner's decision based on those records not to be arbitrary and capricious, there has to be medical testimony linking those past medical records to the Claimant's current medical problems. Expert medical testimony is needed to establish a causal connection between the past medical care and the Claimant's current medical problems for which he sought compensation. Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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