THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2022-000282

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

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COMMISSION ERR AS A MATTER OF LAW, BY NOT MAKING AN AWARD TO DEPUTY CROWLEY OF TOTAL AND PERMANENT DISABILITY FOR HAVING LOST 50% OR MORE OF THE FUNCTIONAL USE OF HIS BACK TO DO WORK WITH HIS BACK BASED ON 1) THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD ON THE "ESSENTIAL ISSUE" FOR DECISION UNDER SC CODE §42-9-30(21), "LOSS OF USE" OF THE BACK, AND 2) BY FAILING TO ADDRESS THAT ESSENTIAL ISSUE IN ITS FINDINGS OF FACT?

II. DID THE COMMISSION ERR AS A MATTER OF LAW AND FACT BY FAILING TO AWARD THE CLAIMANT TOTAL AND PERMANENT DISABILITY UNDER SC CODE §42-9-10 FOR LOSS OF EARNING CAPACITY?

III. DID THE COMMISSION ERR BY ADMITTING AND NOT EXCLUDING THE MEDICAL OPINION AND EVALUATION REPORT OF DR. JAMES BETHEA WHERE THE DEFENDANTS VIOLATED AND FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF SC CODE §42-15-95?

IV. DID THE COMMISSION ERR AS A MATTER OF LAW BY MAKING FINDINGS OF FACT 22, 23, 24, 25, 26 & 27, WHICH ARE NOT FINDINGS OF FACT BUT CONTAIN LEGAL ARGUMENTS, POSITIONS, OPINIONS AND CITATIONS NOT PRESENTED TO THE COMMISSION BY EITHER PARTY WHICH THUS CONSTITUTES THE COMMISSION GOING OUTSIDE OF THE RECORD AND ARGUMENTS MADE BY THE PARTIES AND THE DECISION BEING BASED ON A LEGAL ANALYSIS NOT PRESENTED BY THE PARTIES?

STATEMENT OF THE CASE

This matter arises out of two accidents, both accepted, in part for medical care; with the second resulting in disability. May 2, 2017 (WCC #1716288), Deputy Crowley and another Deputy were transporting juveniles and were involved in an altercation restraining one juvenile. He was taken by ambulance to the ER and provided medical care for his low back and right leg; thereafter his leg. After returning to regular duty, January 3, 2018 (WCC #1801098) Deputy Crowley was assisting a motorist during an ice storm and while pushing a stranded vehicle sustained a severe fall and was taken by ambulance to the ER. Dr. Nigel Watt was then authorized to treat his right leg and requested medical care for his low back, which was denied. After January 2018 Deputy Crowley worked at the courthouse in a sedentary position. After continued refusal of low back treatment, a Form 50 was filed on February 5th (R. p. 67)) and hearing set. (R. p. 69). After authorized evaluations but no treatment hearing was reset January 28, 2019. Before hearing, Respondents agreed to provide medical care.

On December 16, 2019, Respondents filed a Form 21 to pay compensation per the Form 14B completed by the authorized treating physicians with restrictions per the Functional Capacity Evaluation ("FCE") of sedentary work only. (R. 86). Appellant filed a Response that he was entitled to an Award for

total and permanent disability for having lost 50% or more of the use of his back and/or a total loss of earning capacity. (R. p. 93). A hearing set for March 25, 2020, due to COVID and mandatory mediation, was cancelled. Mandatory mediation resulted in an impasse and a Form 70 directed the matter be reset on all issues (R. p. 96). Hearing on the Respondents' Forms 21 was reset October 22, 2020, before Commissioner Beck. Pre-Hearing Briefs and Amended Pre-Hearing Brief was filed by the Claimant. (R. 97). At a pre-hearing conference on October 22nd due to a worsening of his problems, Claimant requested, and Respondents agreed to a "second opinion for the low back" with a "specialist" at the Medical University of South Carolina by Consent Order. (R. p. 1).

On January 4, 2021 Respondents refiled a Form 21 which included a report from Dr. James F. Bethea dated 12/17/20 with MUSC, "Health West Orthopaedics" (R. p. 103). January 13th Claimant filed a request for a conference with Commissioner Beck or to file Claimant's Counsel's Affidavit concerning the pre-hearing conference; and a response to the Form 21. (R. p. 1268). Hearing was set for March 4, 2021, and Pre-Hearing Briefs/APA Submissions were filed. (R. p. 113, p. 866, p. 1151).

January 28th Claimant requested a pre-hearing conference to exclude the report of Dr. Bethea or to ensure Claimant's right

to cross-examine him by Subpoena or deposition at Respondents' expense. (R. pp. 1070-1076).

After hearing March 19th Claimant submitted additional legal authority concerning Hearing objections. (R. p. 1275).

April 13th request for a proposed Order and notes on findings of fact and directives (R. p. 1283) was filed and a Decision filed July 6th awarding Appellant 10% disability to his right leg, and 25% permanent partial disability to his back. (R. p. 3). A Motion for Reconsideration was filed July 7th (Motion, 7/7/21), and denied July 23rd. (R. p. 3). A Request for Full Commission Review was filed August 6th (R. p. 38). Briefs were filed and a review hearing was held December 20, 2021. (R. p. 1288, p. 1106, p. 1134, p. 1245). The Full Commission affirmed without any additional Findings or Conclusions of Law on February 1, 2022. (R. p. 40). A Notice of Appeal attaching both Orders and Full Commission Exceptions was filed. This appeal follows.

STATEMENT OF FACTS

Deputy Crowley worked with the Society Hill Police Dept. from 2005 to 2013 when he went to Darlington County as a Road

Deputy with rotating night and day shifts, 12 hours per day, two weeks each. (R. p. 1187, p. 1189). In 2015 at his superior officers' recommendations, he was promoted to the Fox Trot Unit, an all-day shift job and in 2016 was promoted to Corporal. (R. p. 1163, p. 1164, pp. 1172-1174, p. 1189, p. 1190, p. 1191). After an automobile wreck in 2015 he had cervical spine surgery due to bad headaches following the wreck after which his headaches were greatly improved but he continued to take pain medication for headaches through Integrated Pain Solutions ("IPS") in Laurinburg, North Carolina; <u>importantly</u> with the complete knowledge and cooperation of the Darlington County Sheriff's Dept. and was on those pain medications at the time of the first accident. (R. p. 1191, p. 1194).

On May 5, 2017 while transporting juveniles and during a scuffle to restrain one, he twisted his knee and injured his <u>low</u> back to the degree he was taken by ambulance to Carolina Pines Hospital. Medical care was then authorized with Hartsville Primary Care for knee and <u>low</u> back sprain (Tr. p. 44, l. 10-p. 45, l. 22) and then because of continuing knee problems with Dr. Nigel Watt. Both of their records clearly note he was under pain medication/management for his <u>neck</u> through IPS. (R. p. 1194, l. 11-p. 1197, l. 2; p. 135). After light duty he returned to <u>regular duty November 5, 2017 in the Fox Trot Unit</u>. (Emp. add.) (R. p. 142).

On January 3, 2018 during an ice storm he was called to Society Hill where several cars were stuck on a hill with one vehicle turned sideways in the road. While assisting in trying to turn the car, he fell on the ice. His recollection of exactly what happened is limited but remembers his hands on the car, slipping and falling, and then remembers his back and right leg both hurting and again being taken by EMS to Carolina Pines Emergency Room. Follow-up care with Dr. Nigel Watt in Florence (R. p. 1199, l. 1-p. 1200, l. 25) was authorized for the leg but when he ordered an MRI of the low back, Defendants denied authorization even though Dr. Watt in his records stated his opinion the problems with the Claimant's lumbar spine (low back) were a direct result of the January 3, 2018 accident. February 23, 2018 Dr. Watt restricted Deputy Crowley to sedentary work only with no jumping or lifting. (R. p. 1200, l. 10-p. 1201, l. 14). Only after a hearing request were low back evaluations by Dr. Joseph Cheatle in Myrtle Beach, August 15 and November 14, 2018 authorized. In August Dr. Cheatle noted Claimant had a remote history of back and leg symptoms but nothing recently and agreed with Dr. Nigel Watt that his problems with his lumbar spine stemmed from his work-related injury on January 3, 2017. (R. p. 1001). After an MRI of the lumbar spine in November he referred him for a spinal cord stimulator trial with Dr. Barbara Sarb, neurologist in Florence. (R. p. 998). Only after filing

for a hearing was care finally authorized through Dr. Sarb and Florence Neurosurgery & Spine Center. (R. p. 1201, l. 14-p. 1202, l. 21; pp. 987-988). Dr. Watt, Dr. Cheatle and Dr. Sarb **all** recorded his continuing medications for his neck and headaches, through IPS. (R. pp. 987, 995, 997, 1000).

He was first evaluated on December 11, 2018 and treated by Dr. Sarb and Dr. Naso through November 21, 2019, with treatment including injections; referral for psychological testing for a spinal cord stimulator; two (2) spinal cord stimulator trials; and EMG/NCS studies which confirmed a right "L5 radiculopathy". (R. p. 1007, p. 1010). The first spinal cord stimulator trial was in February 2019; L5-S1 epidural steroid injection, 6/28/19; continuing treatment and second spinal cord stimulator trial, September 2019. (R. p. 922, pp. 962-963).

Throughout the entire course of treatment, he was continued on the same sedentary only work restrictions including no: jumping, lifting, repetitive bending, running, repetitive stooping, continual walking. (R. p. 979). At release November 21, 2019 he was prescribed a TENS Unit, future periodic physical therapy; continuing medications from IPS were recorded and per the FCE was placed at sedentary work only. (R. pp. 949, 953, 961, 967, 971, 972, 975, 978-980, 982, 986, 989; emp. add.).

Defendants chosen FCE October 25, 2019 found Deputy Crowley gave valid and consistent effort; could lift zero pounds below

waist height; 10 pounds chest height and overhead; carry 15 pounds; push and pull 20 pounds; noted his lumbar spine limitations on range of motion; he could only occasionally tolerate walking, stooping, crouching, and climbing; he could not kneel; and could only perform within the "sedentary physical demand category". (R. p. 886).

From the time Dr. Watt placed the Claimant on sedentary work duties only following the January 2018 accident until disability retirement in January 2021, Deputy Crowley was transferred from the Fox Trot Unit to courthouse security at the Darlington County Courthouse but in a Deputy Sheriff's position. On February 13th 2020, he obtained a statement from Dr. Naso requested by the Sheriff so he could remain in the Deputy Sheriff position but working courthouse security. Dr. Naso's statement stated he was to comply with the restrictions of the FCE but that he could carry a weapon and taser so as to accompany and provide a Judge security throughout the Courthouse including lunch. (R. p. 1206, l. 4-p. 1210, l. 5).

On December 16, 2019, Defendants filed a Form 21 to pay compensation to which Claimant responded he was entitled to an Award for total and permanent disability. (R. p. 80; p. 93).

After an impasse at mandatory mediation, the claim was set for hearing on October 22nd and APA Submissions filed, including a report from IPS that their most recent treatment reports confirmed, both the change in his reported problems and in their objective findings, that the need for treatment was now mainly the low back and right leg. (R. p. 97). At the October 22nd pre-hearing conference Claimant due to recent worsening problems with the right leg and low back, requested an evaluation by a "specialist". By Consent Order Defendants agreed to send Claimant for a "second opinion for his low back" to the Medical University of South Carolina ("MUSC") with a doctor of their choosing. (R. p. 1). (Emp. add.)

Without notice to the Claimant between October and the date of the examination in December of 2020 Defendants had numerous communications with Dr. Bethea, (not MUSC Dept. of Orthopaedics faculty), (Cl. APA Submissions pp. 154-170) which included a detailed letter on October 27, 2020 requesting the evaluation and attaching hundreds of pages of medical records and listing numerous issues Defendants wanted addressed outside of treatment, including maximum medical improvement, an impairment rating, and his opinion on restrictions. (R. pp. 1054-1055). The communications included correspondence concerning payment for the "Independent Medical Evaluation (IME)" totaling $5,000.00. (R. pp. 1036-1037).

January 4, 2021 Defendants refiled the Form 21 to pay compensation which attached a previously unknown report of Dr. Bethea. (R. p. 103). The first notice Claimant had of the communications and that records had been forwarded to Dr. Bethea and the letter setting forth the issues Defendants wanted addressed was in response to his January 6, 2021 Subpoena for records served on Dr. Bethea. In his January 13th Form 21 Response objected to Dr. Bethea's report being admitted as a violation of SC Code §42-15-95. (R. pp. 1020-1024). Also, after knowledge of the letter and records Claimant scheduled the de bene esse deposition of Dr. Bethea,

> "for purposes of cross-examination pursuant to, and including, but not limited to, SC Code §1-23-320; §1-23-330(3); §42-3-160..."

(R. pp. 1056-1061); rescheduled by agreement to January 27th at his office. On January 22nd Dr. Bethea's office notified Claimant's Counsel he would not appear without prepayment of a fee. On January 26th because Dr. Bethea would not appear without prepayment of the deposition fee, scheduled to exercise Claimant's right of cross-examination, and Defendants' refusal to pay the fee, Claimant cancelled the deposition. (R. p. 1037).

On January 28th Claimant requested a preliminary hearing to exclude Dr. Bethea's report from evidence for failure to comply with SC Code §42-15-95; or barring exclusion, a Commission Subpoena for him to appear or requiring Defendants pay for a

deposition for Claimant to exercise his right of cross-examination. Claimant cited US and SC Supreme Court cases holding a litigant in any adjudicatory administrative hearing under due process is guaranteed the right of cross-examination. (R. pp. 1070-1071). No preliminary hearing was held, no Commission Subpoena was issued, nor were Defendants required to pay for a deposition.

Pre-Hearing Briefs/APA Submissions were filed. Claimant's Pre-Hearing Brief position: entitlement to an Award for total and permanent disability based on: 1) a total loss of earning capacity under §42-9-10(A); and/or 2) due to the character of his injury under SC Code §42-9-30(21) wherein he had lost 50% or more of the functional use of his back to do work with his back. (R. p. 866).

At hearing over objection, Defendants were allowed to submit medical records from medical providers including IPS for dates prior to the first <u>May 9, 2017</u> injury. Among numerous objections made, Claimant specifically objected to the prior medical records being admitted <u>without medical opinion</u> establishing any relevance/causal relationship between the past medical treatment and his current problems in reference to his low back and right leg as calling for speculation on behalf of the Commissioner; and that he would withdraw any objection if Defendants showed any such opinion in the Record. (R. p. 1165,

ll. 2-7). The following specific objection was made:

> "But there is no doctor, no medical opinion, that relates any of his current existing problems. There is no medical opinion that they are in any way related to any of those past medical treatments and so it would be calling -- it would be asking you to speculate as to the relationship of those records to his current condition without such medical testimony ... otherwise, they are irrelevant, immaterial, and all -- and call for speculation on your behalf as to what the meaning are of those records." (R. p. 1166, ll. 16-24, p. 1167, l. 8). (Emp. add.)

Defendants' response was the past medical records go to the issue of credibility and to show the history of his pain complaints. (Tr. p. 17, ll. 17-20).

On both essential issues for decision, wage loss and loss of use of the back, Deputy Crowley testified he had a 12th grade education, attended the Police Academy and Fire Service.

Past work experience: first job Marley Electrical Heating on the production line which required a lot of bending, stooping and lifting; left after approximately two (2) years due to a general layoff. Next job Galey & Lord, a cloth printing plant working on the line dying and printing cloth requiring lifting 50-100 lb. rolls, and bending, stooping and lifting; left due to Plant shut down. Next job Delta Mills, a cloth print/dying mill operating a dye machine requiring heavy lifting, pushing, pulling and loading; after seven (7) years left to attend the Police Academy and to work for the 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. (R. 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 where his job duties included running radar, answering calls, doing a lot of riding, checking property, domestic relations calls, drunks, and normal police work of restraining and detaining suspects. 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. (R. p. 1187, l. 8-p. 1189, l. 1).

In January 2021 he was medically retired on Police Officer's Disability Retirement from the Darlington County Sheriff's Dept. due to the condition of his low back and leg.

From a physical standpoint in reference to his ability to work, the FCE established the Claimant was only capable of sedentary work and he could not even meet the full range of jobs in the sedentary category and has restrictions on his ability to bend, stoop, and lift, and even to sit and to stand. (R. pp. 869-870).

Ms. Harriet Fowler, Claimant's vocational expert opined that 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 that the Claimant would not be able to obtain and maintain substantial gainful employment. (R. pp. 930-932). Defendants records review vocational analysis found eleven (11) jobs available 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, 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." (R. 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." (R. 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.

In reference to the other essential issue for decision **"loss of use"** of the back to do work requiring the use of the back, Deputy Crowley testified that due to the condition of his back and leg he could not return to any of the jobs in which he has a background and experience and in his opinion in reference to the percentage of loss of use of the back he would, "say probably about 80"; i.e., he had lost 80% of the use of his back to do work. (R. p. 1222, l. 2-21).

The FCE established that out of the five (5) physical demand classification categories of the US Dept. of Labor into which all jobs in the economy are classified Deputy Crowley was only physically qualified for "some" jobs within the sedentary duty classification. Because he was unable to perform the physical requirements of lifting from floor to waist and 12" to knuckle, he would not qualify for some jobs in the sedentary category. (R. pp. 868-870).

Ms. Harriet Fowler, M.Ed., CRC and certified vocational rehabilitation manager, opined based on the FCE and the DOT's Physical Demand Classification System, wherein he is excluded from all jobs in the very heavy duty, heavy duty, medium duty, and light duty categories that from a physical demand classification standpoint due to his low back injury he was excluded from 89% of the jobs available in the economy and thus was only capable of performing at a maximum 11% of the jobs

available in the US economy. (R. p. 931).

Dr. Leonard Forrest, Board Certified orthopaedic surgeon, stated that in his medical opinion 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 incidences (5/5/17 & 1/3/18)." (R. p. 913).

There is no other evidence in the Record concerning that essential issue for decision, **the loss of use** of the Claimant's back to do work requiring the use of his back.

Subsequent to the hearing, Claimant submitted additional authority concerning the submission of records for past medical treatment prior to the accidents involved and medical records in reference to the issue of Claimant's "credibility." (R. p. 1275).

The Notes for Decision issued April 13th and a final Decision filed July 6, 2021 contain no Findings of Fact in reference to wage loss, his age, education, background and experience and whether the jobs he can perform on a residual basis are so limited in quality, quantity, or dependability that a reasonably stable job market for them does/does not exist. There are also no Conclusions of Law on wage loss under SC Code §42-9-10 and §42-1-120.

There are no Findings of Fact or Conclusions of Law on the loss of use of the back to do work requiring the use of the back

and only three (3) conclusory Findings of Fact, 29, 30 & 31, as to the Claimant's entitlement to permanent partial disability to his back and right leg, and nothing as to whether the presumption under SC Code §42-9-30(21) was rebutted. (R. p. 1283; p. 3).

The Claimant filed a Motion for Rehearing/Reconsideration. First as to future medical care, the Commissioner did not include his medications and did not designate a physician to follow the Claimant; second there were no Findings of Fact or Conclusions of Law citing the evidence submitted by Claimant on loss of use of the back, and the lack of evidence to rebut the presumption that he had lost 50% or more of the use of his back; third, the Commissioner went outside of the law and Regulations cited by either party by referencing appellate decisions not referred to by either party and by citing appellate decisions **decided after** the hearing. (R. p. 1078).

Claimant filed a Request for Full Commission Review to review all Findings of Fact, Conclusions of Law, the Order and Award, and rulings at and prior to the hearing; and listing twenty-two (22) specific grounds for review. (R. p. 1095). Before the Full Commission, all Grounds as raised were argued. The Full Commission affirmed the Hearing Commissioner's Decision as written and did not address any of the legal issues specifically raised in reference to the lack of Findings of Fact

and Conclusions of Law or the failure to comply with SC Code §42-15-95. (R. p. 40).

WORKERS' COMPENSATION CLAIMS STANDARD OF REVIEW AND APPLICABLE FUNDAMENTAL LEGAL PRINCIPLES

Fundamental Statutory Interpretation Principles

First:

> "It is the established law of this state that any reasonable doubt as to the construction of the workmens compensation law must be resolved in favor of the claimant, its provisions reconciled if possible, its purposes effectuated, and its presumptions and penalties directed towards the end of providing coverage ... Compensation laws ... were enacted for the benefit, protection and welfare of working men and their dependents... such laws **shall be liberally construed in favor of the employees and their dependents.**" Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emp. add.); Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 922 (SC App. 1988).

This Court has repeatedly reaffirmed this principle. See for example: Hutson v. South Carolina Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2014).

Second:

> "Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the Court must strictly construe such statutes, **leaving it to the legislature to amend and define any ambiguities.**" Wigfall v. Tideland Utility, Inc., 354 S.C. 100, 580 S.E.2d 100, (2003), reh. den.; Cox v. Bellsouth Telecommunications, Inc. 356 S.C.468, 589 S.E.2d 766 (SC App. 2003). (Emp. add.)

Third, where a statute's language is plain, unambiguous and conveys a clear meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning. Wigfall v. Tideland Utility, Inc., supra; Hodges v. Rainey, 341

S.C. 79, 533 S.E.2d 578 (2000). Therefore, SC Code §42-9-30(21) must be liberally construed in favor of the injured worker and its language must be strictly construed leaving it to the Legislature to amend and define any ambiguities.

STANDARDS OF REVIEW

The SC Administrative Procedures Act establishes the substantial evidence standard for judicial review of the Decisions of the Workers' Compensation Commission. SC Code Ann. §1-23-380 (5)(e) and an Appellate Court may reverse or modify a Decision of the Commission that is 1) affected by an error of law or 2) is clearly erroneous in view of the reliable, probative, and substantial evidence in the Record as a whole. Clemmons v. Lowe's Home Centers, Inc. - Harbison, 412 S.C. 366, 772 S.E.2d 517 (SC App. 2015) reh. den.; reversed 2017 WL 920730, withdrawn and superseded on rehearing, 420 S.C. 282, 803 S.E.2d 268 (2017). (Reversed, substantial evidence on "loss of use"). Dent v. East Richland County Public Service Dist., 423 S.C. 193, 813 S.E.2d 886, reh. den. (SC App. 2018). (Reversed, substantial evidence on disability due to back injury).

Under SC Code §42-17-40 the Commission must make Findings of Fact and Rulings of Law on "questions at issue". Under SC Code §1-23-350 the final Agency Decision shall include Findings of Fact and Conclusions of Law separately stated. SC Code §42-9-5 requires any Award made must be based upon, "specific and written detailed

Findings of Fact substantiating the Award". By mirror, our judicial precedents which, while recognizing the factual determination is the responsibility and duty of the Commission, hold that duty to make Findings of Fact requires that "(1) not only **must** Findings of Fact" be made upon **all** essential factual issues for decision but (2) they must be sufficiently definite and detailed" to enable the Appellate Court properly to determine whether (the) Findings of Fact are supported by evidence" and that (the) "law has been properly applied to them". Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Baldwin v. James River, 304 S.C. 485, 405 S.E.2d 421 (SC App. 1991). (Emp. add.)

ARGUMENTS

I. THE COMMISSION ERRED AS A MATTER OF LAW, BY NOT MAKING AN AWARD TO DEPUTY CROWLEY OF TOTAL AND PERMANENT DISABILITY FOR HAVING LOST 50% OR MORE OF THE FUNCTIONAL USE OF HIS BACK TO DO WORK WITH HIS BACK BASED ON 1) THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD ON THE "ESSENTIAL ISSUE" FOR DECISION UNDER SC CODE §42-9-30(21), "LOSS OF USE" OF THE BACK, AND 2) BY FAILING TO ADDRESS THAT ESSENTIAL ISSUE IN ITS FINDINGS OF FACT.

Under the scheduled member statute, SC Code §42-9-30(21), "**loss of use**" is the "**essential issue**" for decision, and under the substantial evidence in the Record, the Commission erred by not making an Award based on the "character" of the injury of 50% or more loss of use of Deputy Crowley's back. For 48 years (1974 to 2022) the insurance industry has sought to infuse wage loss into the statute and to shift the presumption from loss of

use of the back to wage loss.

Also, from a precedent and statutory construction principles standpoint, we must stop the indiscriminate and loosey-goosey use of the terms "disability", "loss of use", and impairment. "Disability" and "loss of use" have specific meanings in the Act and in our precedents. Impairment has no meaning, **and** the AMA Guides clearly state they have nothing to do with disability and the ability to work. A clear understanding of this is precatory to understanding and applying the law and the evidence in the Record.

The scheduled member statute was a part of the original 1936 Act and its **"loss of use"** wording has not changed in over eighty-six (86) years. Since 1936 the Act has provided for Awards for the functional **"loss of use"** of a scheduled member, organ or bodily part regardless of wage loss; i.e., based on the "character" of the injury. 1936 Acts and Joint Resolutions (39), p. 1231, Section 31(t). (Emp. add.) This author frequently uses the example that he is a left-handed lawyer and if he sustained a total loss of use of his right arm and right leg in a work-related accident he would be entitled to an Award of total disability regardless of whether he lost a dime of earning capacity.

While our Act enacted in 1936, contains Awards for "loss of use", the first national guide for the rating of "medical

impairment" was not published until 1957 as a Special Edition of the Journal of the American Medical Association. In other words, from 1936 until 1957, almost twenty-one (21) years, there was no Guide concerning anatomical medical impairment or as to what medical impairment means. Since the publication of that first Guide, the Guides have made it very clear that the Guides do not evaluate and have nothing to do with the ability to do work; in other words, functional loss of use. The medical impairment ratings contained within the Guides are in reference to the impairment to do the **ADL's** (activities of daily living), not work. 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." (Emp. add., 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 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**."

Based on the wording of the Act since 1936 our Appellate

Courts have always held, in reference to scheduled member Awards currently SC Code §42-9-30, that the Award to be made is for the functional **loss of use** of the organ, member or bodily part; and loss of earning capacity has absolutely nothing to do with that Decision.

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):

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

Restated in Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945), and in 1946 in Ripley v. Anderson Cotton Mills, 209 S.C. 401, 40 S.E.2d 508 (1946), the Court applied that principle to an Award for "**loss of use**" to a scheduled member without any showing of any loss of earning capacity. In fact in Ripley the Court found 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."

and again held that diminution of earning capacity is not a consideration in a loss of use/scheduled member Award. That fundamental principle has 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), (fact that claimant after injury was regularly employed at greater wages than before was totally immaterial). The last decision, to the knowledge of this author, 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 that same principle 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 wage loss has absolutely nothing to do with that decision. Our Courts have consistently held that 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, which is so critical to the ability to work, is 50% or more of the use of the worker's back due to the "character" of the injury the worker is entitled to an award for permanent and total disability. **Most importantly** the presumption was tied to **paragraph (2) not paragraph (1)** of SC Code §42-9-10 which provides for permanent and total disability awards based strictly on the severe "character" of certain injuries. The only effect of the 2007 Amendments as to the presumption was to change the codification in reference to the Award from **paragraph 2** to **paragraph (B)** and to provide that the presumption of 50% or more loss of use was rebuttable. The Award under §42-9-30 in reference to the back, whether under pre-2007 subparagraph (19) or post-2007 subparagraph (21) is the same and is still based on the "character" of the injury for "loss of use"; and loss of earnings/earning capacity is not a factor.

While constantly reiterating the Opinion that wage loss is not a factor, since 2007 neither Court has addressed that wage loss is not to be considered in a scheduled member award. In the

final substituted Opinion in Clemmons, supra, while basing its Opinion on the evidence in the Record on "**loss of use**", and most importantly dismissing the evidence on wage loss, the Supreme Court did not specifically address whether the Commission had improperly infused wage loss as a consideration into the scheduled member statute, 420 S.C. 282 at p. 290, fn. 2. However, in the Withdrawn majority Opinion of the Court [dissent no need to go beyond substantial evidence and presumption in SC Code §42-9-30(21)] cited its decisions on wage loss.

> Wigfall v. Tidelands Utilities, Inc., supra:
>
> "in the context of scheduled injuries South Carolina recognizes a claimant's entitlement to be deemed disabled and to receive compensation for an injury **even though the claimant is able to work**." (Emp. add.)
>
> Stephenson v. Rice Services, 323 S.C. at 118, fn. 1, 473 S.E.2d at 701, fn. 1:
>
> "Even after being adjudged totally disabled, many employees receiving benefits under one of the specific statutory presumptions of total disability continued to work either in the same or a different field. **An employer may not refuse to pay the total disability benefits simply because an employee retains earning capacity after the accident.**" (Emp. add.)

In accordance with the statutory language, the Court went on to hold that the Legislature had not intended to infuse wage loss into a scheduled member award and that whether a claimant was working was insufficient to defeat the presumption created by SC Code §42-9-30(21) for loss of use of the back. The key, both under this Court's decisions and the Supreme Court's decisions, both before and after the 2007 Amendment, remains the same: 1)

the wording of the scheduled member statute and 2) the definition of total and permanent disability to which the back is tied under the statutory scheme, that is to say the second paragraph of §42-9-10, not the first. The presumption to be rebutted is whether the Claimant has lost 50% or more of the functional use of his back; the "**character**" of the injury.

Prior to the 2007 Amendment making that presumption rebuttable, total and permanent disability was tied to the **second paragraph** of SC Code §42-9-10; i.e. the "**character**" of the injury subsection. Prior to the 2007 Amendment, the back subsection, SC Code §42-9-30(19), tying the Award to the character of the injury stated:

> "Where there is fifty percent or more loss of use of the back the injured employee shall be deemed to have suffered total and permanent disability and compensated therefore under **paragraph 2** of §42-9-10."

Contrary to what the insurance industry and Respondents want to and have always argued, when the presumption was made rebuttable it remained tied to the "**character**" of the injury subsection **(B)**, not subsection (A) wage loss, SC Code §42-9-30(21):

> "The injured employee shall be presumed to have suffered total and permanent disability and compensated under section **42-9-10(B)**." (Emp. add.)

Subsection (21) remains based on the character of the injury under the second paragraph. Had the Legislature intended to infuse wage loss into the determination they would have tied it to the first paragraph of SC Code §42-9-10 subsection (A)

which entitles a claimant to total and permanent disability for having a total loss of earning capacity.

While the presumption under SC Code §42-9-30(19) was always rebuttable, the 2007 amendment simply set out in Statutory Language that it was rebuttable. The effect of any presumption is stated in the SC Rules of Evidence, §301:

> "In all civil actions ..., a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of non-persuasion which remains throughout the trial upon the party on whom it was originally cast."

In other words, the Claimant always has the burden of proof by a preponderance of the evidence to put forth evidence that the injured worker has lost 50% or more of the functional use of the worker's back to do work requiring the use of the back. When the claimant meets his burden on the character of the injury Defendants must put up evidence to rebut that evidence.

Again, the misperception that the injured worker has to prove wage loss has been put to rest repeatedly by our Appellate Courts. Bateman, McCollum, and Lyles, supra.

> "The Workers' Compensation Commission properly ruled that a Claimant is entitled to benefits even though the injury did not affect his performance in his subsequent job because compensation is based on the **character and extent** of the injury and not whether the Claimant lost earnings or is otherwise employable in another occupation." Lyles, supra.

* * *

> "any reasonable doubt as to a construction of the workman's compensation law must be resolved in favor of

the claimant ...." Cokely v. Robert Lee, Inc., supra. (Emp. add.)

Wigfall v. Tideland Utilities, Inc., supra:

"The Legislature is presumed to be aware of the Supreme Court's interpretation of its statutes."

Wage loss is not a consideration and the presumption to be rebutted is whether the Claimant has suffered 50% or more loss of use of his back. The remedy for Respondents and the insurance industry is to change the legislation, not ask for a contorted version infusing wage loss into a scheduled member award.

A.

BASED ON THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON "LOSS OF USE" THE COMMISSION ERRED BY NOT AWARDING THE CLAIMANT TOTAL AND PERMANENT DISABILITY UNDER §42-9-30(21).

Unlike other Records in cases that have been decided by our Appellate Courts with the exception of Clemmons and Dent, this Record contains specific vocational, objective medical testing, lay opinion, and medical opinion on the essential issue for decision "loss of use" of the back all tied to the US Labor Dept.'s DOT Physical Demand Classification System.

Like Clemmons, the **only** reliable, probative and substantial evidence in the Record on "loss of use" establishes Deputy Crowley 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. ...". (Cl. APA p. 2).

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)." (Cl. APA p. 29).

C. Ms. Harriet Fowler, M.Ed., CRC, Vocational Rehabilitation Manager, in addition to expressing the opinion that the Claimant was totally disabled from gainful employment in reference to a loss of earning capacity, she expressed the opinion based specifically on his physical limitations (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 and would have reaching limitations even in this category ...". (Cl. APA p. 47, pp. 31-48).

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

E. Defendants' vocational evaluator found based on all of the objective evidence from the doctors and the FCE, Deputy Crowley was functioning at a sedentary demand level; i.e., excluded from 89% of jobs re: his back.

There is simply no evidence to the contrary.

This Court and the Supreme Court have repeatedly affirmed total and permanent disability Awards under §42-9-30(21) made by the Commission under facts identical to the ones here. Bateman v. Town & Country Furniture, supra; Lyles v. Quantum Chemical Co., supra; **BUT MORE IMPORTANTLY** recently where the Commission denied a Claimant benefits under facts identical to the ones here as in Clemmons v. Lowe's Home Centers, Inc. - Harbison, supra; reversed that decision. In Dent v. East Richland County Public Service District, supra, this Court did not reach the less stringent back standard but under the evidence, which is on all fours with the evidence here on loss of use of the back, found the Commission erred by denying Mr. Dent benefits for total and permanent disability under the higher wage loss standard.

B.
THE COMMISSION ERRED AS A MATTER OF LAW UNDER SC CODE §1-23-380(5)(a, b and d) BY NOT MAKING DETAILED FINDINGS OF FACT ON THE ESSENTIAL ISSUE OF LOSS OF USE.

One essential issue before the Commission, was entitlement to an Award under SC Code §42-9-30(21) for **loss of use**.

The Commission must make under law detailed Findings of Fact and Conclusions of Law on **all** essential issues presented to it for decision. SC Code §42-17-40, §42-9-5, and §1-23-350 all require detailed Findings of Fact and Conclusions on law on the questions at issue. Our Appellate Courts have always required detailed Findings of Fact and Conclusions of Law on every essential issue which must be sufficiently detailed and definite enough to allow for appellate review and have reversed where they are not made. Drake v. Raybestos-Manhattan, Inc., supra; Baldwin v. James River, supra, and also have consistently reversed decisions where the Commission only sets out, "conclusory" Findings of Fact on the essential issues, Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970).

Based on a review here of the Findings of Fact in the Commission Orders, there are no detailed Findings of Fact and Conclusions of Law on "loss of use". There is only cursory reference to evidence concerning loss of use and the Findings do not include the Claimant's testimony, nor the vocational expert's opinion on Mr. Crowley's exclusion from the workforce due to his back. The only actual Findings of Fact on the issue of "loss of use" which are conclusory at best (see Hill, supra) are Findings of Fact #31 and #33 awarding 25% permanent partial disability to his back. (R. p. 46).

The Commission must make specific Findings on each

essential issue for decision and it's decision cannot be based upon surmise, conjecture or speculation. The evidence in the Record concerning "loss of use", the "essential issue", was that the Claimant had lost 50% or more of the use of his back, and the Commission's decision to the contrary is based on rank speculation. Hutson v. South Carolina Ports Authority, supra.

Here there was specific lay, medical, vocational, and FCE evidence Mr. Crowley had 50% or greater loss of use of the back and the Commission's decision should be reversed based on that undisputed loss of use evidence. Bartley v. Allendale School District, 392 S.C. 300, 709 S.E.2d 619 (2011).

II. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT BY FAILING TO AWARD THE CLAIMANT TOTAL AND PERMANENT DISABILITY UNDER SC CODE §42-9-10 FOR LOSS OF EARNING CAPACITY.

Deputy Crowley is entitled to an Award under SC Code §42-9-10(A) for a total loss of earning capacity as defined in the Act and by our Courts. Colvin v. E.I. DuPont de Nemours & Co., 227 S.C. 465, 88 S.E.2d 581 (1955):

> "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 Dent v. East Richland County Public Service Dist.,

supra, this Court held where a man had worked in a heavy physical back work job his entire life and where he had a similar educational background to that of Deputy Crowley, that the substantial evidence in the Record established he was entitled to an Award under §42-9-10**(A)** due to the injury to his back affecting his leg, and did not reach §42-9-30(21). This Court found there was no substantial evidence in the Record he could perform jobs that were of sufficient quantity, quality, or dependability that a reasonably stable job market for them existed. This Court also noted that,

> "a finding that a claimant can perform sedentary or medium duty work does not constitute evidence that such work is available to the claimant." 813 S.E.2d 886, 891.

In this case the undisputed evidence from all experts including the Defendants' vocational expert, who did a records review/labor market analysis, **agreed Deputy Crowley cannot return to work in his job as a Deputy Sheriff nor to work in any of the jobs in which he has a past work experience**. (Emp. add.) He is limited to doing "some" sedentary work jobs. If the Court looks just at the Defendants' vocational expert's analysis, their expert was only able to find 12 jobs for which former Deputy Crowley may be qualified within a 50-mile radius of his home, mostly in Florence and he lives in Bennettsville, SC. To qualify for a total loss of earning capacity one does not need to be totally helpless nor be unable to perform any and all

jobs. While our Appellate opinions speak in the alternative of either quality, quantity, **or** dependability, in this case he is entitled to an Award based simply on the **"quantity"** of jobs. Here the only evidence he can work in any capacity, outside of the Courthouse job wherein they made "very special accommodations" to allow him to continue to work, but not as a Deputy, is he may possibly qualify for 12 other jobs within a 50-mile radius. There is no evidence of any "accommodations" in any of those job openings **nor** that the Defendants have offered or procured such work for him as required by SC Code §42-9-190. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965).

III. THE COMMISSION ERRED BY ADMITTING AND NOT EXCLUDING THE MEDICAL OPINION AND EVALUATION REPORT OF DR. JAMES BETHEA WHERE THE DEFENDANTS VIOLATED AND FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF SC CODE §42-15-95.

SC Code §42-15-95 provides that an employer/carrier representative **may** communicate or discuss a worker's claim without the worker's consent with any Provider that either provides examination or treatment, provided the employee **must be** given notice and this notification **must** comply with Section (B):

> "The employee must be:
>
> (1) notified by the employer, carrier or its representative ... this notification **must** occur prior to the actual discussion or communication" ...
>
> (2) advised by the employer, carrier or its representative ... of the nature of discussion or communication prior to discussion or communication ...

> (3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider...."
>
> If Section (B) is not complied with, section (C) provides:
>
> (C) Any discussions, communications, **medical reports**, or **opinions** obtained in violation of this section **must be excluded from any proceedings under the provisions of this title**."
>
> * * *
>
> "Under the rules of statutory interpretation, use of 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.)

The evidence establishes Defendants had multiple communications with Dr. Bethea between October 2020 and January 2021 including a detailed letter attaching hundreds of pages of medical records on October 27, 2020 (R. pp. 1054-1055); none of which were copied to nor was Claimant made aware of any of these **and** only became aware of such communications with Dr. Bethea in the response to Claimant's Subpoena issued January 6, 2021 to Dr. Bethea. (R. pp. 1032-1055).

The Commission committed an error of Law by admitting Dr. Bethea's report requiring reversal since that evidence was obtained in violation of the mandatory requirements of §42-15-95, that notice to the Claimant of any communication by the Defendants, "**must**" occur prior to the communication with an evaluating physician. The report is the fruit of the poisonous tree and the statute mandates that:

> "any medical reports or opinions obtained in violation of this section **must be excluded** from any proceedings under the provisions of this title."

IV. THE COMMISSION ERRED AS A MATTER OF LAW BY MAKING FINDINGS OF FACT 22, 23, 24, 25, 26 & 27, WHICH ARE NOT FINDINGS OF FACT BUT CONTAIN LEGAL ARGUMENTS, POSITIONS, OPINIONS AND CITATIONS NOT PRESENTED TO THE COMMISSION BY EITHER PARTY WHICH THUS CONSTITUTES THE COMMISSION GOING OUTSIDE OF THE RECORD AND ARGUMENTS MADE BY THE PARTIES AND THE DECISION BEING BASED ON A LEGAL ANALYSIS NOT PRESENTED BY THE PARTIES.

A.

THE COMMISSION ERRED IN MAKING FINDING OF FACT #22.

Finding of Fact #22 is actually a legal position based on a review of Law; and is contrary to the argument/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."

Whereas, the objection made at Hearing and in Claimant'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:

"Mr. McDaniel: Now... another group of objections ... **<u>But there is no doctor, no medical opinion that relates any of his current existing problems. There is no medical opinion that they are in any way related to any of those past medical treatments and so it would be calling -- it would be asking you to speculate as to the relationship of those records to his current condition without such medical testimony. And ... that's the reason as I said earlier, my objection, that 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 in relation to his current file.</u>**" (R. p. 1164, l. 17 - p. 1165, l. 8; p. 1166, l. 16 - p. 1167, l. 9).

For the medical records to be admitted, to be relevant and material, and for the Commissioner's decision based on those records not to be arbitrary and capricious, there had 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. <u>Cross v. Concrete Materials</u>, 236 S.C. 440, 114 S.E.2d 828 (1960).

As to credibility being a basis for admission, in Finding #18, in reference to the prior medical history the Commissioner found the Claimant credible. (R. p. 3). So, there is no finding Claimant's testimony was not credible.

From the additional authority cited to the Commission, <u>Clark v. Phillips Electronics</u>, 433 S.C. 186, 857 S.E.2d 378 (SC

App. 2021):

> "Phillips contends the panel rightfully treated all the medical evidence as suspect because Clark did not disclose his 2006 injury. But Dr. Storick deflated this theory when he testified that learning of the 2006 injury did not change his opinion that the 2011 injury caused Clark's injuries. **Phillips could have offered contrary evidence**; without any, the panel had no basis to discount the objective medical evidence and **Crane tells us a vague nod to credibility cannot close the gap**." (Emp. add.)

In this case, while credibility is not directly at issue in the decision because the Commission found Mr. Crowley credible, the unexplained use of the credibility issue to gain admission without supporting medical evidence made the fact-finders' consideration of the evidence the basis of being arbitrary rather than as this Court said in Clark v. Phillips Electronics, supra, "**rational**". The Commission erred by admitting these medical records without any medical opinion evidence stating they were in any way relevant concerning the Claimant's current injuries to his low back (not neck). You cannot un-ring the bell; the decision should be reversed.

B.
THE COMMISSION ERRED AS A MATTER OF LAW BY MAKING FINDING OF FACT #23 WHICH IS NOT A FINDING OF FACT BUT IS LEGAL ARGUMENT CONTAINING PRECEDENT NOT CITED TO THE COMMISSIONER BY THE PARTIES AND THUS OUTSIDE OF THE RECORD.

The Commission is bound by the SC Code of Judicial Conduct, Rule 501, SCACR, and must base its decisions on the Record, the law and legal arguments made by the parties. SC Code §42-3-250 (as amended 2022); Hargrove v. Titan Textiles Co., 360 S.C. 276,

599 S.E.2d 604 (SC App. 2004). Under Rule 501, Canon 3 (7) a Judge shall not consider ex parte communications or other communications made outside of the presence of the parties concerning the pending proceeding but may obtain the advice of a disinterested expert on the law applicable to a proceeding before the Judge:

> "**if** the Judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond."

This matter was heard on **March 4, 2021** by a lay Commissioner. In Finding of Fact #23 (and others) the Commissioner in finding that Claimant's due process rights to cross-examine Dr. Bethea had not been violated cited this Court's first Opinion in Barr v. Darlington County School District, Opinion No. 5815 filed **April 7, 2021**, withdrawn and superseded by Unpublished Opinion, 2021 WL 3779508; **and made specific reference** to Appellant's Counsel being the same Counsel that argued that case. He further cited Gadsden v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (SC App. 2006), as being the basis of the Barr decision in rejecting the argument being made by Counsel. The Court will find that the Barr decision was not referenced by either party at the hearing nor in any document or additional precedent cited to the Commissioner, or in any argument made by any party; nor was there any reference to the Gadsden v. Mikasa Corp. decision. The parties were not notified of the Commissioner seeking any legal

advice or opinion at any time. A Commissioner's decision must be based on the Record, and it is improper for a Commissioner to seek legal advice or opinion or to cite legal opinion not presented by the parties or cited during discussion with the parties without providing the parties notice such legal advice is being sought and giving the parties an opportunity to respond. It is improper to make a decision outside of the Record. Ledford v. Dept. of Public Safety, 428 S.C. 387, 835 S.E.2d 509 (2019).

C.
THE COMMISSION ERRED BY MAKING FINDINGS OF FACT #23, #24, #25 AND #27 IN REFERENCE TO APPELLANT'S OBJECTIONS TO THE ADMISSION OF DR. BETHEA'S MEDICAL REPORT AND OPINIONS AND BY MAKING DECISIONS IN THOSE "FINDINGS OF FACT" ON LEGAL ISSUES AND VIOLATING HIS DUE PROCESS RIGHT TO CROSS-EXAMINATION.

Although requested, the Commission did not issue a Subpoena for Dr. Bethea to appear so the Claimant could exercise his due process right of cross-examination, but Dr. Bethea's report was admitted into evidence over objection.

First, the Commissioner interpreted the Statute which allows him to subpoena witnesses, to hold that he did not have to subpoena a witness, but at the same time admitted and relied on the documentary evidence in limiting benefits. While a Commission Subpoena under SC Code §42-3-140 and 150 is discretionary, where a specific request is made for issuance of a subpoena to exercise the right of cross-examination under our

US and SC Supreme Court decisions that discretion is taken away. In addition, the right of cross-examination is specifically preserved as to any written documentation put into evidence under SC Code §1-23-330(1) and (3).

Next, the Commission shifted the cost of introducing the Defendants' evidence to the Claimant by requiring him to pay to exercise his right of cross-examination wherein the Defendants had paid Dr. Bethea a fee of $5,000.00 to conduct an Independent Medical Evaluation, and to answer questions far beyond a treatment evaluation. Defendants introduced his report over objection to support a limitation of the Award. This not only violated due process but the fundamental principles of the Act, including that the Act is to be interpreted in favor of the injured worker to provide swift and sure benefits.

Next, in Finding of Fact #27 the Commission found, "Dr. Bethea, who is a private citizen, is not a State actor as contemplated by our Laws. He may charge appropriate fees for his time in testifying at a deposition." There is no law, Regulation or Court decision referencing a physician as a "private citizen" versus a State actor and what that has to do with whether a Claimant has to pay to cross-examine **a Defense Expert** is arbitrary and capricious.

The US Supreme Court has held that in an administrative hearing where the claimant specifically asks for subpoenas be

issued to exercise his right of cross-examination, it is a violation of due process by failing to do so. Richardson v. Perales, 91 Sup.Ct. 1420 (1971). Our SC Supreme Court has affirmed that decision holding that where a document is entered into evidence in an administrative hearing concerning the important issue before the administrative body for decision that it is a denial of a party's fundamental due process right to cross-examine his accuser by failing to provide that opportunity. In City of Spartanburg v. Parris, 351 S.C. 187, 161 S.E.2d 228 (1968) the Court specifically held:

> "The right to cross-examine witnesses in quasi-judicial adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, and it exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit it if there is no explicit authorization therefore."

Since Regulations were first adopted by the Commission, those Regulations have provided either that where objection is made to the submission of documentary evidence the party offering it has the burden of properly placing it into evidence by taking a deposition or producing the witness for cross-examination. This is embodied both in the Regulations of the Commission and the Administrative Procedures Act.

Appellant requested a preliminary hearing to decide whether the report of Dr. Bethea should be excluded or at a minimum the Claimant guaranteed his right of cross-examination by either

Defendants being required to take his de bene esse deposition or him testifying at the hearing. **In no other forum** where a party objects to documentary evidence being admitted is that evidence admitted without the party offering it being required to afford the opposing party the right of cross-examination. The right of cross-examination and to confront his accuser is a fundamental right in regards to any serious matter. City of Spartanburg v. Parris, supra.

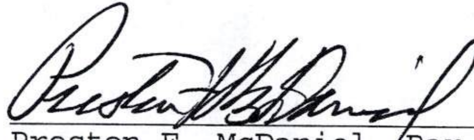
Finally, by interpreting the Regulations, in light of the objections made as discretionary and by stating, not based on law or Regulation, that Dr. Bethea is a private citizen who can charge fees to be cross-examined makes the holding arbitrary and capricious in violation of the Claimant's due process right to cross-examine a defense expert upon whose report they rely on to defeat his claim.

CONCLUSION

The Court should reverse the Decision of the Commission and enter a decision awarding Appellant total and permanent disability under law and the substantial evidence on the "essential issues" before the Commission for decision "**loss of use**" of the back which establishes Appellant has lost 50% or more use of his back, and/or in accordance with the Dent decision, involving a back injury, based on a total loss of earning capacity under SC Code §42-9-10(A), and/or the numerous

egregious errors of law including admitting evidence in violation of SC Code §42-15-95; considering outside legal opinion and precedents; and by violating the Claimant's due process right of cross-examination. This Court exercises freedom and independence in deciding an issue of law in a workers' compensation case and under the Administrative Procedures Act may simply reverse a Decision based on an error of law. There is no requirement that the case be remanded for a new hearing or further proceedings. Houston v. DeLoache & DeLoache, 378 S.C. 543, 663 S.E.2d 85 (SC App. 2008).

Respectfully submitted,



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March 14, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2022-000282

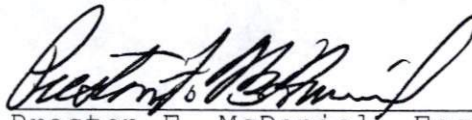
Michael K. Crowley, Employee, ...Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



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