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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Appellate Case No.: 2024-001519

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Michael K. Crowley, Employee, ..... Petitioner,

vs.

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

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# RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE FACTS

This matter involves workers' compensation claims stemming from two work accidents sustained by Michael Crowley (hereinafter "Petitioner") arising out of and in the course and scope of his employment with Defendant Darlington County (hereinafter "Respondents"). Petitioner's first accident occurred on May 5, 2017, when he was attempting to restrain a combative juvenile and injured his right knee. Respondents provided Petitioner with appropriate medical treatment with Dr. Nigel Watt, who released Petitioner at maximum medical improvement (hereinafter "MMI") on October 5, 2017, with permanent physical impairment of

5% to the right lower extremity for his knee injury and no permanent work restrictions. (R. p. 142). By Form 14B, dated December 4, 2017, Dr. Watt also indicated that Petitioner did not require any additional or future medical treatment for his knee injury that would tend to lessen his period of disability or maintain his current level of function. (R. p. 144).

Shortly after his release at MMI for the May 2017 injury, Petitioner was involved in a second admitted accident on January 3, 2018, wherein he reinjured his right knee while assisting in the removal of a car from an icy road. He also sustained a new injury to his lumbar spine. For the right knee, Respondents again provided appropriate medical treatment with Dr. Watt. On January 31, 2019, Dr. Watt opined that Petitioner would not require further orthopedic care for his right knee as he was already established with a pain management physician for his right lower extremity. (R. p. 105). Dr. Watt did not assign any additional impairment as a result of Petitioner's second work accident. Respondents provided a second opinion for Petitioner's right knee injury with Dr. Richard Friedman. On October 1, 2020, Dr. Friedman indicated that Petitioner was at MMI, sustained no permanent impairment, had no permanent limitations, and would not require any future medical treatment. (R. pp. 858–859).

With respect to his back, Respondents initially authorized an evaluation of Petitioner's lumbar spine with Dr. Joseph Cheatle on August 15, 2018. (R. pp. 365–367). Dr. Cheatle causally related Petitioner's symptoms to his January 3, 2018, work accident and referred him for an MRI of his lumbar spine. (R. p. 367). On November 14, 2018, Dr. Cheatle stated that Petitioner's MRI was negative for stenosis and referred him for an evaluation as to the medical necessity and feasibility of a spinal cord stimulator (hereinafter "SCS"). (R. p. 369). Petitioner underwent two SCS trials at the direction of Dr. Barbara Sarb, but both were unsuccessful and permanent implantation was not pursued. (R. pp. 372–374, 379, 959). Respondents provided

neurosurgical treatment with Dr. William Naso, who released Petitioner at MMI on November 21, 2019, and stated, "[h]e completed his FCE which placed him at a sedentary job description. I think he can continue to work at his current capacity which he says he is tolerating." (R. pp. 949–950). On December 1, 2019, Dr. Naso completed a Form 14B, wherein he assigned an 8% whole person impairment rating, or 10.7% to the lumbar spine. (R. p. 428). He also assigned permanent work restrictions per the FCE and recommended future medical treatment to include a TENS unit and physical therapy. Id. On February 13, 2020, Dr. Naso provided a letter to Petitioner's employer, stating:

> From a neurosurgical standpoint, [Petitioner] can continue to work in his current capacity, which includes being able to carry a weapon and taser. He can also accompany a judge, providing the judge security inside and outside a court room, including at lunch. Otherwise, his restrictions as outlined in his functional capacity evaluation remain. (R. p. 429).

Following his release at MMI for the lumbar spine, Petitioner requested a second opinion for his lumbar spine, which Respondents agreed to provide. On December 17, 2020, Petitioner presented to Dr. Bethea, who diagnosed him with chronic lumbar syndrome and stated that Petitioner's subjective complaints were out of line with his objective findings. (R. pp. 860–862). Dr. Bethea released Petitioner at MMI with 3% permanent medical impairment to the whole person and no permanent work restrictions. (R. pp. 861–862). He further opined that Petitioner would not require any future medical treatment. Id.

Petitioner was also sent by his attorney for one-time independent medical evaluation with Dr. Leonard Forest on January 30, 2020. In a letter from Dr. Forest to Petitioner's attorney, Dr. Forest stated:

> With regard to impairment rating for[Petitioner]'s back, his condition is best fit into DRE category 3 as defined by the Fifth Edition of the AMA Guides. For this, I would assign a 13% whole person impairment rating. Using the conversion as

> defined in the Fifth Edition of the AMA Guides. This would equate to a 17% regional impairment rating. (R. p. 913).

In addition to the medical treatment described above, Respondents obtained a vocational evaluation and labor market survey with James Myers, MA, QRP, CCM, CRP at Corvel. On April 10, 2020, Mr. Myers prepared a vocational assessment report wherein he opined that Petitioner should be able to return to work in a sedentary to light physical demand level based on the recommendations of Petitioner's physicians and the Functional Capacity Evaluation (hereinafter "FCE"). (R. p. 855). Mr. Myers prepared an accompanying "Labor Market Survey" wherein he identified a specific list of jobs Petitioner could perform based on his background, transferrable skills, and physical limitations, including desk officer; fraud investigator; management aid; dispatcher; surveillance system monitor; customer service representative; collection manager; code inspector; service advisor; information clerk; telephone solicitor; and file/office clerk. (R. p. 844). Mr. Myers conducted a labor market survey of twelve (12) employers within a 50-mile radius of Bennettsville, South Carolina, and of the twelve (12) employers contacted, 100% reported they were either hiring or would be hiring in the near future. (R. pp. 844–849).

Throughout the course of both of his claims, Petitioner continued working for Respondents, who accommodated his work restrictions, until his resignation on January 5, 2021. At the hearing, Petitioner testified that his resignation was voluntary and was, in part, due to issues he was having with the Sheriff's Department. (R. p. 1236, lines 10–19).

On January 4, 2021, Respondents filed a request for hearing seeking an adjudication of Petitioner's entitlement to permanent partial disability (hereinafter "PPD") and a determination of Petitioner's entitlement to future medical treatment, if any. (R. pp. 103–104).

Both Petitioner's May 2017 claim and January 2018 claim were heard by the Single Commissioner on March 4, 2021. In a single Decision and Order addressing both claims, filed July 6, 2021, the Single Commissioner found that Petitioner reached MMI on November 21, 2019. (R. p. 33). The Single Commissioner awarded Petitioner 10% permanent partial disability (hereinafter "PPD") to his right lower extremity as a result of both the May 2017 and January 2018 accidents. (R. pp. 33–34). The Single Commissioner awarded Claimant 25% PPD to his back as a result of his January 3, 2018, work accident. (R. p. 34). The Single Commissioner further found that Claimant was entitled to future medical treatment for the back to include physical therapy and a TENS Unit in order to maintain his level of disability as set forth by his authorized treating physician, Dr. Naso. (R. p. 34).

Petitioner filed a request for Full Commission review. (R. pp. 1095–1105). On February 1, 2022, the Appellate Panel of the Workers' Compensation Commission issued a Decision and Order affirming the decision of the Single Commissioner. (R. p. 65). Petitioner filed a Notice of Appeal with the Court of Appeals, who affirmed the decision of the South Carolina Workers' Compensation Commission on June 26, 2024.

## ARGUMENT

### I. PETITIONER STATES NO GROUNDS UPON WHICH THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

The South Carolina Appellate Court Rules state that a writ of certiorari "will be granted only where there are 'special and important reasons'." SCACR Rule 242. Rule 242 sets forth five main reasons that the Supreme Court will grant a writ of certiorari: (1) Where there are novel questions of law, (2) where there is a dissent in the decision of the Court of Appeals, (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, (4)

where substantial constitutional issues are directly involved, and (5) where there is a federal question.

None of these reasons apply to the instant case. While Petitioner has stated no grounds upon which a writ of certiorari should be granted, it is specifically unquestionable that no dissent, constitutional issue, or federal question is involved in this case.

Additionally, Petitioner has raised no novel questions of law. All of the legal issues cited by the Court of Appeals are long-standing legal principles. The near entirety of Petitioner's Petition for Writ of Certiorari discusses issues of fact, not law. Petitioner wishes to create unclarity and novelty where none exists. An unfavorable factual decision does not inherently make for a "special or important reason" upon which this Court should grant certiorari.

Finally, the decision of the Court of Appeals does not conflict with prior decisions of this Honorable Court. In fact, the decision of the Court of Appeals cites and follows long-standing legal principles set forth by this Court. Contrary to the assertions of Petitioner, the Court of Appeals in this claim specifically analyzed and properly quoted the case law surrounding 42-9-10. The decision under Law/Analysis (B) specifically refers to 42-9-10 loss of earning capacity and correctly cites the standard that a claimant is entitled to permanent and total disability benefits when the incapacity for work resulting from an injury is total and that a claimant may establish total disability by showing that an injury has caused sufficient loss of earning capacity to render him totally disabled. This is the exact same standard in the long-standing case law from this Court. The Court of Appeals goes on to find that there is substantial evidence in the record to support the Commission's decision not to find Petitioner permanently and totally disabled under section 42-9-10.

Furthermore, the Court of Appeals cites and follows the long-standing principles set forth by this Court in its analysis of 42-9-30. The Court of Appeals found that there was ample evidence in the record to support the finding that Petitioner had sustained permanent disability or loss of use of less than 50% to the back and therefore affirmed those factual findings. Petitioner argues that, because this Court and the Court of Appeals have previously found that substantial evidence did not exist in some other cases, but found that substantial evidence did exist in this case, the decisions must not be uniform. This argument is without merit and entirely discounts the factual differences between the various cases. The Court of Appeals in the instant case has uniformly quoted the law on both total and partial permanent disability; in fact, these concepts are black letter law in South Carolina. The application of facts to that legal standard will necessarily be different in every case since the facts of an individual claim are always going to be different. When one set of facts results in a finding that an injured employee is totally disabled when applied to the legal standard, and another set of facts results in a finding that an injured employee is *not* totally disabled when applied to the same legal standard, this does not mean that the legal standards are in conflict or not uniform. This is simply the result of the different facts in this case, where Petitioner was actively working at the time of the hearing and whose doctors indicated could work in the future, as compared to the facts in other cases which support different conclusions when using the exact same legal standard. Different results from application of different facts to a uniform legal standard does not equal dereliction of uniformity in decisions. Petitioner's argument confuses factual distinguishment with precedential departure.

At the heart of Petitioner's argument is his disagreement with the factual findings of the Commission; Petitioner believes that the preponderance of the evidence shows that he is totally disabled, but the Commission found otherwise. Petitioner has mischaracterized those factual

differences as novel issues of law or conflicting legal standards. There are no novel issues of law or conflicting legal standards in this case; there are, however, significant issues of fact which are controlled by the substantial evidence standard and which do not warrant review by this Court.

With regard to the factual findings, which is the crux of Petitioner's Petition for Writ, it is well-established that it is within the sole discretion of the Commission to adjudicate and weigh this evidence. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel of the Workers' Compensation Commission). The Commission is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. The Court will not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). Appellate review of factual findings made by the Commission is done under the substantial evidence standard of review. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Murphy v. Owens Corning, 393 S.C. 77, 81-82, 710 S.E.2d 454, 456 (Ct. App. 2011). In discussing substantial evidence, this Court has stated: "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Lark, 276 S.C. at 135, 276 S.E.2d at 306 (quoting Laws v. Richland Cnty. Sch. Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)).

Whether or not there is substantial evidence in the record to support factual findings is not an issue that would require review by this Court. The Single Commissioner and the full Appellate Panel of the Commission made the exact same factual findings regarding the extent of disability/loss of use in this case. There is ample evidence to support those factual findings.

## II. THE COURT OF APPEALS INTERPRETATION OF SECTION 42-15-95 WAS INCORRECT BUT DOES NOT RISE TO THE LEVEL OF REQUIRING REVIEW BY THIS COURT.

### A. The decision of the Court of Appeals in Section C appears to be internally inconsistent and contradictory.

The first sentence of the Order of the Court of Appeals on this issue states, "Crowley argues the Commission erred in admitting the medical opinion and evaluation report of Dr. James Bethea because Respondents failed to comply with the mandatory provisions of Section 42-15-95 of the South Carolina Code. We disagree." However, in that same section, two pages later, the Court of Appeals states, "We find there was a violation of section 42-15-95...." The first sentence correctly notes that Petitioner argued that Respondents failed to comply with 42-15-95 with which the Court of Appeals disagreed. But later in that same section, the Court of Appeals specifically states that Respondents violated 42-15-95. Both statements cannot be true. On their face, these sentences appear to be contradictory.

### B. The Court of Appeals misapprehended and misapplied Section 42-15-95

Petitioner erroneously asserts that the Commission erred in allowing the December 17, 2020, medical report of Dr. James Bethea into evidence on the grounds that it was obtained in violation of S.C. Code Ann. § 42-15-95(B), which states,

> A health care provider who provides examination or treatment for any injury, disease, or condition for compensation is sought under the provisions of this title may discuss or communicate an employee's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys, or certified rehabilitation

> professionals, or the commission without the employee's consent. The employee must be:
>
> (1) notified by the employer, carrier, or its representative requesting the discussion or communication with the healthcare provider in a timely fashion, in writing or orally, of the discussion or communication and may attend and participate. This notification must occur prior to the actual discussion or communication if the healthcare provider knows the discussion or communication will occur in the near future;
> (2) advised by the employer, carrier, or his representative requesting the discussion or communication with the healthcare provider of the nature of discussion or communication prior to the discussion or communication; and
> (3) provided with a copy of the written questions at the same time the questions are submitted to the healthcare provider. The employee must also be provided with a copy of the response by the healthcare provider.
>
> Any discussion or communication must not conflict with or interfere with the employee's examination or treatment. S.C. Code Ann. § 42-15-95(B) (emphasis added).

Respondents sent a letter to Dr. Bethea attaching hundreds of pages of medical records on October 27, 2020, so that Dr. Bethea could review the necessary medical records and perform an independent medical evaluation. The letter included a copy of Petitioner's complete medical records for review, a brief synopsis of Petitioner's treatment to date, and identified specific medical issues/questions to be addressed should Dr. Bethea agree to perform the requested evaluation. (R. pp. 1054-1055). The letter asked Dr. Bethea to give his medical opinion on Petitioner's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments. Dr. Bethea did not examine or meet with Petitioner until December 17, 2020.

Nothing in Respondents' October 27, 2020, letter to Dr. Bethea could be construed as a "discussion or communication that would conflict with or interfere with the employee's examination or treatment," as set forth in S.C. Code Ann. § 42-15-95(B), which is the purpose of the statute's limitation on unilateral communication with health care providers. In fact, the letter

was sent to facilitate and assist Dr. Bethea with complete records for his examination, as well as to ensure that Dr. Bethea would address all necessary questions during the examination with regard to Petitioner's diagnosis, medical needs, limitations, and impairment.

Respondents acknowledge that once Dr. Bethea provided examination or treatment of Petitioner, a statutory duty to notify Petitioner and his attorney of the communication in advance and give them the opportunity to participate in any ongoing discussions or communications is triggered; however, that requirement does take effect until the doctor "provides" examination or treatment of Petitioner, as stated in the clear and unambiguous language of § 42-15-95(B). Unless and until Dr. Bethea "provides" examination or treatment, the statute is not applicable. As such, Respondents' October 27, 2020, letter to Dr. Bethea was not a violation of § 42-15-95(B). If the legislature intended for this statute to apply to doctors who may provide an examination in the future or to apply in situations where independent medical examinations are being conducted, it could have easily stated this. However, the statue clearly states that it only applies to a "provider who provides examination or treatment...." Based upon the plain language of the statute, it only applies to providers who have provided examination or treatment, not providers who might examine or treat the injured worker at some point in the future nor providers who do not examine or treat the injured worker at all.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). If 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." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In codifying § 42-15-95, the Legislature clearly intended to provide an injured worker with a means to actively

participate in his medical care – it did not intend to deprive an employer/carrier of its right and ability to consult with an expert prior to engaging that expert.

### C. Reliance upon Brown v. Bi-Lo is improper, and the Court of Appeals misunderstood and overlooked the amendments to section 42-15-95.

The Court of Appeals cites and relies upon the Supreme Court decision in Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003) regarding its interpretation of section 42-15-95 of the Act; the version of 42-15-95 reviewed by the Supreme Court in that case was amended by Act 468 in 1994. This reliance is misplaced, and Respondents assert that the Court of Appeals misunderstood and overlooked the fact that section 42-15-95 that applies in the instant case is a different version of the statute examined in Brown v. Bi-Lo.

Brown v. Bi-Lo was decided by the SC Supreme Court in 2003. Notably, the Supreme Court stated that section 42-15-95 only contemplated the disclosure of existing written records and documentary materials, but that the statute did not authorize other "*ex parte*" methods of communication between an insurance carrier, employer, or their representatives and the health care provider. That version of 42-15-95 was passed by the Legislature in 1994. However, section 42-15-95 at issue in this case was completely rewritten and passed by the Legislature in 2007 specifically in response to this decision in Brown v. Bi-Lo and to provide a mechanism and roadmap for communications between a carrier, employer, or their representatives and the health care provider. 2007 Act. No. 111, Pt I, Section 29. The reasoning and logic of the Supreme Court's decision in Brown v. Bi-Lo is no longer applicable since the version of 42-15-95 it examined no longer exists and was replaced by the current 42-15-95 which specifically addressed the issues/concerns raised by the Court in that decision. Section 42-15-95(B) as cited by the Court of Appeals in its decision did not even exist when Brown v. Bi-Lo was decided, and

it was improper and imprudent to rely upon the holding in that case to examine the statue at issue in this matter.

The current iteration of section 42-15-95 was passed in 2007 specifically to address the issues raised in Brown v. Bi-Lo. In that decision, the Supreme Court stated the statute did not authorize communications between a carrier, employer, or their representatives and a health care provider. The legislature amended 42-15-95 in 2007 to provide a mechanism for communication between a carrier, employer, or their representatives and the health care provider. That mechanism places certain requirements on a carrier or employer for communicating with any health care provider who provides examination and treatment for a workers' compensation claim. As fully stated above, that mechanism and its requirements and penalties do not apply to communications with health care providers who have not yet provided examination and treatment. Therefore, the Court of Appeals should have found that the letter to Dr. Bethea dated October 27, 2020, did not constitute a violation of section 42-15-95(B).

**D. This incorrect interpretation of Section 42-15-95 is in an unpublished decision which carries no precedential weight for future cases and is inconsequential to the results of this case.**

Notwithstanding the above, review by this Court is not required on this issue. The question is whether judicial interpretation of the statute is a question of exceptional importance. Generally speaking, questions of exceptional importance are landmark legal issues where decisions will significantly affect persons and entities other than the litigants. The interpretation of section 42-15-95 is of importance to the parties on this particular claim and could be a decision which affects other litigants in workers' compensation claims. However, the decision by the Court of Appeals is unpublished, so it carries no precedential weight. Therefore, it is a decision which has no binding affect on other litigants in future workers compensation claims.

Nonetheless, the Court of Appeals in the instant case found any supposed violation to be harmless error given there is ample evidence in the record to support the factual findings of the Commission, so this issue also does not affect the final outcome of the this case. For these reasons, review by this Court is not required on this issue despite Respondents' belief that the Court of Appeals is wrong in their analysis of 42-15-95.

## III. THE COURT OF APPEALS DECISION ON 42-9-30 IS NOT IN CONFLICT WITH PRIOR CASE LAW AND THEY PROPERLY FOUND THAT SUBSTANTIAL EVIDENCE SUPPORTED THE FACTUAL FINDINGS OF THE COMMISSION.

Petitioner argues that the decisions in Paulino v. Diversified Coatings, Inc., Op. No. 28212 (S.C. filed 6/26/24) and Clemmons v. Lowe's Home Centers, Inc.-Harbison, 420 S.C. 282, 803 S.E.2d 268 (2017) are somehow in conflict with the decision in this case and that the Court of Appeals failed to understand the difference between medical impairment and loss of use. These arguments are without merit.

In Clemmons, this Court noted that the degree of a claimant's loss of use to a scheduled member is a question of fact for the commission. Clemmons, 420 S.C. at 288, 803 S.E.2d at 271. In Clemmons, however, this Court reversed the commission's factual finding that the claimant suffered less than a fifty percent loss of use of his back based primarily on the very high numerical impairment ratings given to him by multiple medical professionals. Id. Specifically, this Court stated, "[e]very doctor and medical professional who assigned an AMA Guides impairment rating indicated Clemmons lost more than seventy percent of the use of his back, including Dr. Drye, whom the Commission particularly relied on in making its findings." Id. Thus, the medical evidence in Clemmons was overwhelming, leaving what we called "no evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back." Id.

In Paulino, this Court found that the Court of Appeals had overread Clemmons and misapplied the substantial evidence standard in reviewing a decision of the Commission. The Supreme Court stated that factual decisions from the Commission should be affirmed if they are supported by substantial evidence when considering the record as a whole, and that there is nothing in the standard of review that requires a claimant to establish his claim by "medical evidence." This Court cautioned that it did not hold that a claim for benefits under 42-9-30 must be proven by medical evidence or that medical evidence is conclusive; medical evidence can be very important but all evidence in the record must be considered as a whole. Id. The Supreme Court stated, "when considering the record as a whole – both medical evidence and non-medical evidence – if substantial evidence supports the Commission's findings, the Court must affirm." Id. This is true even where it is a "close call", which does not exist in this case. Id. Paulino states that a claim for benefits under section 42-9-30 must be proved by considering the evidence in the record as a whole as opposed to the medical evidence being conclusive.

In the instant case, the Court of Appeals properly cited the Clemmons decision (Paulino was decided after the Court of Appeals decided this case) and properly analyzed all of the evidence in the record when determining whether there is substantial evidence in the record to support the Commission's finding of less than 50% loss of use to the back. While the Court of Appeals certainly refers to the various medical opinions from a variety of medical experts, the decision specifically states that they considered the record as a whole. There was a healthy discussion of non-medical evidence during oral arguments and as cited in the decision. This non-medical evidence considered by both the Commission and the Court of Appeals includes the testimony of Crowley regarding his active work providing judicial security at a courtroom, Crowley's testimony regarding his retirement/resignation of employment, the conclusions of two

contradictory vocational reports, the functional capacity evaluation, Crowley's testimony as to what he could and could not do, and testimony from Crowley regarding his pre-existing issues and the nature of his ongoing complaints. This non-medical evidence was clearly considered in conjunction with the large amounts of medical testimony by the Court of Appeals in order to determine that substantial evidence exists to affirm the Commission's findings.

The Court of Appeals' decision closely follows the legal standards and rulings enunciated by this Court. The decision properly considers the record as a whole and finds that there is substantial evidence to support the finding of 25% permanent partial disability to the back as determined by the Commission. There is no legal standard or evidentiary requirement by the Court of Appeals in this matter that conflicts with anyprevious ruling from this Court; in fact, the decision follows the established case law quite carefully. Again, the mere fact that Petitioner disagrees with the factual conclusions of the Commission and does not agree with the Court of Appeals decision that substantial evidence supports those factual findings does not mean that the legal analysis is wrong or in conflict with prior decisions of this Court.

## IV. THERE IS NO LEGAL ISSUE OR CONTROVERSY THAT EXISTS BETWEEN MEDICAL IMPAIRMENT AND LOSS OF USE.

Petitioner erroneously argues that this Court should "close the loop" between medical impairment and loss of use, and Petitioner specifically requests that this court address what constitutes substantial evidence on the issue of loss of use. The case law on this issue could not be clearer, and this Court has already defined what must be examined when applying the substantial evidence doctrine in the Paulino case.

Petitioner requests that this Court definitively hold that medical impairment ratings cannot serve as an evidentiary basis standing alone to the exclusion of other competent evidence to determine loss of use. This Court has already done that and made it abundantly clear. In

Paulino, this Court specifically states that it does not "discount the importance of medical impairment ratings given by the professionals treating an individual Claimant, particularly when the Commission finds those professionals to be credible", but that a claim for benefits under section 42-9-30 does not need to be proved by medical evidence nor is medical evidence dispositive. Id. pp. 6-7. This Court noted that, when considering the Paulino case, the Court of Appeals correctly recognized that, although medical evidence is entitled to great respect, the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. Id. p. 7. This Court has already issued a decision addressing this very issue raised by Petitioner.

Petitioner also argues that there is a novel issue of law regarding medical impairment versus loss of use. This is simply not accurate. It is axiomatic that medical professionals determine medical impairment and that the Commission as fact-finder determines permanent disability or loss of use based upon consideration of impairment and other evidence in the record.[1] Petitioner correctly notes that the AMA Guide defines impairment as a medical determination that can be addressed by a physician, whereas disability/loss of use is a concept that requires consideration of other non-medical factors in addition to impairment. In fact, the long-standing case law in South Carolina recognizes this distinction as well. See, e.g., Paulino p. 6-7 ("We do not discount the importance of medical impairment ratings given by the professionals treating an individual… both medical evidence and non-medical evidence" must be considered when determining if substantial evidence exists to affirm disability awards); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) ("Although medical

[1] The South Carolina Workers' Compensation Act and the case law uses the terms "permanent disability" and "loss of use" in the context of 42-9-30 almost interchangeably. Both terms describe the same determination by the Commission, which is determination of the percentage of permanent disability or loss of use of a scheduled member body part per 42-9-30.

evidence 'is entitled to great respect,' the commission is not bound by the opinions of medical experts and that disregard medical evidence in favor of other competent evidence in the record); Lyles v. Quantum Chem. Co., 315 S.C. 440, 445-46, 434 S.E.2d 292, 294-95 (Ct. App. 1993) (Appellate Panel is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony."); Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999) ( Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion); Sanders v. Meadwestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) (finding evidence supported an award of 40% loss of use to the back even though medical impairment rating was only 22% and rejecting argument that only opinions of medical experts can be used to address loss of use or disability).

There is no need for this Court to further address medical impairment versus loss of use or permanent disability. This Court has already defined the proper use of medical impairment ratings in consideration of determinations of loss of use/disability, and the long-standing case law in the state clearly defines the difference between medical impairment ratings as determined by physicians and loss of use/disability as determined by the Commission as factfinder.

## V. THE COURT OF APPEALS CORRECTLY CITED THE CASE LAW ON TOTAL AND PERMANENT DISABILITY AND PROPERLY FOUND THAT THE SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSION'S FINDINGS.

Petitioner erroneously argues that the Court of Appeals failed to properly apply the definition of total disability per 42-9-10. This is inaccurate. The law defining total disability in workers' compensation cases is black letter law. The case law and rules have been in place for 60 years and have been cited exhaustively by the Court of Appeals and this Court. The fact that the Court of Appeals did not go through a lengthy dissertation of that well-established case law is not evidence that it applied a wrong legal standard.

Like many of the arguments above, Petitioner disagrees with the factual conclusion of the Commission that he was not totally and permanently disabled, and the Court of Appeals' finding that substantial evidence supports that finding, and now argues that the Court of Appeals must have applied the wrong legal standard. The legal standard applied by the Court of Appeals was correct, and there is substantial evidence to support the factual findings. As noted by the Court of Appeals, there was ample evidence to support the Commission's findings.[2]

## VI. THE COURT OF APPEALS PROPERLY AFFIRMED THE COMMISSION'S ADMISSION OF PREVIOUS MEDICAL RECORDS INTO EVIDENCE.

Petitioner's argument involving the Commission's Finding of Fact #22 is essentially Petitioner's effort to reverse the Commission's finding that Respondents had the right to submit medical records that pre-dated Petitioner's work accident. Petitioner mistakenly argues that for medical records to be admitted, to be relevant and material, and for the Commission's decision based on those records not to be arbitrary and capricious, there is a requirement for medical testimony linking those past medical records to the injured worker's current condition. Again, Respondents contend this argument is unsupported by law and without merit.

Simply put, there is no legal basis for Petitioner's argument that a commissioner should not be allowed to review prior medical evidence and assign whatever weight he or she deems appropriate as it relates to an injured workers' current condition and request for benefits. SCRE Rule 402 states that all relevant evidence is admissible and that only evidence which is not relevant is not admissible. Petitioner presented no case law or other authority to support his arguments. Petitioner's argument regarding causal connection is the standard that a claimant must

[2] As the issue for this Return is whether the Supreme Court should grant certiorari to review the decision of the Court of Appeals, Respondents have focused on the legal issues as opposed to the lengthy factual discussions which are contained in briefs to the Court of Appeals.

meet in order to prove medical causation in certain cases[3]; this is not the standard for general admissibility of evidence. The case cited by Petitioner, Cross v. Concrete Materials, stands for the proposition that medical opinion testimony regarding causation between an injury and an accident which is stated as being "possible" but not "most probable" is insufficient to sustain the finding of causal connection; Cross has nothing to do with admissibility of previous medical records.

Evidence of a claimant's pre-accident medical history enables the Commission to evaluate the veracity of the claimant's testimony and current complaints, and identify any pre-existing problems he may have to determine whether his current complaints are related to his work injuries and resulting disability. In this case, Petitioner alleged total and permanent disability, more than 50% loss of use to the back, and entitlement to permanent disability under the scheduled member statute. Consequently, Petitioner's previous medical problems could be quite relevant, especially with regard to any prior medical problems, evaluation, or treatment of his back. The previous medical records submitted in this case specifically detailed 15 years of medical treatment for his low back which included diagnostic films, conservative medical treatment, and pain management. Certainly, those records are relevant and probative when examining Petitioner's claims for total disability.

Petitioner's admissibility argument is without merit and would certainly not rise to the level of review by this Court.

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[3] See Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012) (Medical evidence, in the form of "expert opinion or testimony [to be] stated to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172(C)); Hartzell v. Palmetto Collision, 419 S.C. 870, 796 S.E.2d 145 (Ct. App. 2016) (expert medical evidence is required to receive additional medical treatment beyond 10 weeks).

## CONCLUSION

For the foregoing reasons stated above, Respondents respectfully request that this Court deny Petitioner's Writ for Certiorari.

Respectfully Submitted,

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October 11, 2024

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Appellate Case No.: 2024-001519

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Michael K. Crowley, Employee, .....Petitioner,

vs.

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

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**CERTIFICATE OF COUNSEL**

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Respondents, by and through their undersigned counsel, certify that their Return to Petition for Writ of Certiorari complies with Rules 242, SCACR.

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October 11, 2024
North Charleston, South Carolina