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Aug 28 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2025-000026

Evaristo Verdugo Morales, Claimant,.....Respondent-Appellant,

v.

Insulation by Cohen, LLC, Employer, and
Builders Premier Insurance Co., Carrier,...Appellants-Respondents.

MOTION TO SUPPLEMENT THE RECORD AND TO FILE AMENDED INITIAL BRIEF OF RESPONDENT-APPELLANT AND FOR A STAY PENDING A DECISION ON THE MOTION PURSUANT TO RULE 240(b); AND EN BANC HEARING REQUEST

YOU WILL PLEASE TAKE NOTICE that the Respondent-Appellant hereby moves for an Order of the Court allowing the Respondent-Appellant to supplement the Record pursuant to Rules 240, 212(B), and Rule 209(b), SCACR; for a Stay pending a decision on the Motion pursuant to Rule 240(b); and

En Banc Hearing Request.

Pursuant to Rule 219(a), SCACR, and pursuant to Rule 240(h), because consideration by the full court is necessary "to secure and maintain uniformity of its decisions", and because this Motion involves a question of "exceptional importance" to the hearing of appeals from the Workers' Compensation Commission, the Movant, the Respondent-Appellant in this matter, respectfully requests that the Court direct that a hearing be held on this Motion and that the Motion be heard en banc by the Court. The Movant would respectfully show unto the Court:

1. That one of the bases of the Respondent-Appellant asking that the Court reverse the decision of the Commission, is that: "The Record Establishes The Actual Bias And Prejudice Of The Hearing Commissioner And A Formed Intent To Deny Benefits And That The Decision Was Arbitrary And Capricious". Initial Brief Argument IA.

2. That in the matter of Clemmons v. Lowe's Home Centers, Inc. - Harbison (SC App. 2015), 412 S.C. 366, 772 S.E.2d 517, reh. den., reversed 2017 WL 920730, withdrawn and superseded on rehearing, 420 S.C. 282, 803 S.E.2d 268 (September 5, 2017), the Supreme Court reversed the decision of the Commission denying the claimant an award for having lost 50% or more of the use of his back. The Respondents filed for rehearing of the March 8, 2017 Decision reversing the decision of the Commission which request was denied on June 27, 2017. However, on June 28th, the Supreme Court withdrew that Opinion and issued its substituted

Opinion reversing and remanding the claim. Counsel for the Appellant, Counsel for the Respondent-Appellant in this appeal, timely filed a Petition for Rehearing to the refiled Opinion of the Court filed June 28, 2017. Thereafter, on September 5, 2017 the Supreme Court denied that request. Within fifteen (15) days on September 12, 2017, Counsel for the Appellant hand delivered to the Court a Motion to Stay the Remittitur and asked the Court to appoint a special Commissioner for hearing the case upon remand due to the Commissioners in July having discussed and having made prejudicial comments concerning the Clemmons Opinion, which was still pending Rehearing before the Supreme Court, at the Defense Trial Lawyers Association meeting in Asheville, NC. The Commissioners' comments, statements, and opinions concerning that decision and their recommendations on how to "circumvent" the decision were restated/published July 17, 2017 in a Blog of a defense attorney who attended that conference which was held before July 17th at Grove Park in Asheville, NC. During that meeting according to the Blog from the defense firm, the Commissioners met with the defense attorneys present at the convention and stated to the effect according to the Blog that they did not like the Clemmons decision; they did not agree with the Clemmons decision; and provided the insurance carriers'/employers' defense counsel bases and recommendations on how to get around, "circumvent", the Clemmons decision. A copy of that Blog Article and Counsel's

Affidavit were attached to that Motion and are attached to this Motion as Exhibit "A".

3. That the Supreme Court denied the Motion on the basis it lacked jurisdiction even though the Motion was filed within fifteen (15) days of the Opinion because the Opinion was issued by the Court after a Petitioner Rehearing and not the original Opinion filed June 28th, thus the fifteen (15) day Rule did not apply and the Court did not have jurisdiction over the Motion.

4. That as set forth in that Motion and our statutory law, the SC Workers' Compensation Commissioners are subject to the Judicial Canons of Ethics, SC Code §42-3-250. As set forth in that Motion and as reiterated here, Canon 3(B) states that the Commissioner(s) shall conduct their judicial duties without bias or prejudice and shall avoid the appearance of impropriety and the Commissioner shall conduct him or herself in such a manner such that their impartiality might not reasonably be questioned. Under Canon 3(B)(9), a judge, Commissioner, shall not make any comment concerning a pending or impending action in any court that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially "**interfere with a fair trial or hearing**", and under the commentary that Ethics Rule includes that a judge/Commissioner should not and should refrain from any public comment regarding a pending or impending proceeding, including "**during any appellate process and until a final disposition**" is made.

5. That the SC Workers' Compensation Commissioners are required by law and the decisions of this Court and the Supreme Court, to provide a liberal interpretation of the Act in favor of benefits to the injured worker and are required by law to faithfully rule on workers' compensation claims in a fair and impartial manner and pursuant to the statutory law and the case law decisions of this Court and the Supreme Court. The comments as reflected in the Blog attributed to the Commissioners clearly reflect a bias and prejudice in reference to the decisions of the Supreme Court and this Court in reference to awards for 50% or more loss of use of the back, and were made during the pendency of the Clemmons decision before the SC Supreme Court. Their comments were diametrically opposed to and show a total disrespect for the decisions of this Court and the Supreme Court, and establish a formed intent to not follow the law. As stated in the Blog, the Commissioners literally stated they disagreed with the decision and provided counsel for the employers and insurance companies/carriers in this State with ways to get around that decision in cases pending before them. For example, quoting from the Blog:

> "It does not make sense for a claimant to be totally and permanently disabled while they are still working **especially to the group of people charged with overseeing the compensation paid to injured workers**". (Emp. add.)

That statement alone is totally contradictory to and constitutes a violation of the Judicial Code of Conduct wherein a Judge and Commissioner "**shall be faithful to the law**". It is contrary to

both the Statutes of the State of South Carolina in the Workers' Compensation Act and it is contrary to multiple decisions by the Supreme Court and this Court.

In reference to decisions by this Court and the Supreme Court concerning awards for 50% loss of use of the back based on the "character" of the injury, in Bateman v. Town & Country Furniture Co., 287 S.C. 158, 336 S.E.2d 890 (SC App. 1985), Mr. Bateman was working; Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993), reh. den., cert. den. 1994, Mr. Lyles was working; in Clemmons v. Lowe's Home Center, Inc. - Harbison, supra, Mr. Clemmons was working in an accommodated position.

Under SC Code §42-9-10(B), due to "the character of the injury" (Bateman, supra) if a worker loses both hands or both arms, or both shoulders, or both feet, both legs, both hips or the vision in both eyes or any two thereof, the worker is entitled to total and permanent disability the same as he is under §42-9-30(21), which is tied to that same subsection (B) of 42-9-10 no matter if they miss a days work or not. Counsel for the Respondent-Appellant in this case is a left handed lawyer. If he were to lose his right arm and right leg, except for the time for healing, he would have no permanent disability as far as his ability to earn a living as a lawyer and could function in many occupations. The comments and position of the Commission as set forth in the Blog are not only contrary to the law, but they are abhorrent and show a total disrespect "**of the law**" as

established by our Courts and our Legislature, and are contrary to the Judicial Code of Ethics.

> "If we do not maintain justice, justice will not maintain us." Francis Bacon

For the foregoing reasons and based on Respondent-Appellant's argument that the Commissioner was bias and prejudiced and was predisposed against making an award for having lost 50% or more of the functional use of the Respondent-Appellant's back, the Respondent-Appellant should be allowed to amend the Record to contain the Affidavit and the Blog as additional evidence substantiating his position and argument of the bias and prejudice and the **preformed intent** of the Commission to deny this worker benefits in this case.

Respectfully submitted,

Preston F. McDaniel, Bar #3770
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and

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North Charleston, SC 29419
(843) 744-1887

Attorneys for Respondent-Appellant

August 28, 2025

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SEP 1 2 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

Henton T. Clemmons, Jr., Employee,.....Petitioner,

v.

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

AFFIDAVIT OF PRESTON F. MCDANIEL

The affiant, Preston F. McDaniel, having been duly and properly sworn, do depose and state:

1. That I am Counsel for the Petitioner in the above-referenced matter.

2. That during the week of August 28th, 2017, while a Petition for Rehearing was pending before the SC Supreme Court, Petitioner's Counsel became aware on or about Tuesday, August 29th, of certain comments, statements, positions and advice that had been given by members of the SC Workers' Compensation Commission in reference to the above-referenced matter which was

pending decision by the SC Supreme Court in reference to the Petitioner's Petition for Rehearing.

3. That on or about August 31, 2017, Counsel for the Petitioner was provided with a copy of an article written by an attendee of that conference confirming the information as to the comments, statements, opinions, position and tips that had been given by the Commission in reference to this Court's Opinion and decision in the above-referenced matter reversing and remanding this case to the Commission for a new hearing on specific issues. A copy of that article is available on the Internet at: www.yrclaw.com/YCR-Blog/July-2017/Clemmons-Wars-A-New-Hope.aspx and is attached hereto and incorporated herein by reference as Exhibit "A".

4. That the Petitioner received a copy of this Court's decision denying the Petition for Rehearing on Tuesday, September 5, 2017.

FURTHER THE AFFIANT SAYETH NOT.

Preston F. McDaniel

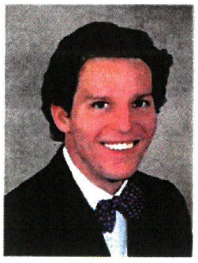
SWORN TO BEFORE ME this
12th day of September, 2017.

Notary Public for South Carolina (L.S.)
My Commission Expires: 4/26/20

YCR YOUNG CLEMENT RIVERS, LLP | 25 CALHOUN ST. SUITE 400
CHARLESTON, SC 29401 | 843.577.4000

Clemmons Wars: A New Hope?

I attended the summer meeting of the South Carolina Defense Trial Attorneys Association in Asheville this past weekend. Five of our seven commissioners attended as well, and the Clemmons case dominated every aspect of every discussion. It was sort of like being at the Twelve Oaks BBQ right before the Civil War started, except instead of talking about "war, war, war," we talked about "Clemmons, Clemmons, Clemmons." We did get some insight from our commissioners.



Post By Robert P. Gruber

First of all, the Commission does not like the Clemmons decision nor do they like the position that they have been put in with this recent remand Order. It does not make sense for a claimant to be permanently and totally disabled while they are still working, especially to the group of people charged with overseeing the compensation paid to injured workers. Second of all, the Commission does not know how it will address regional spine ratings. Regional spine ratings do not exist in our South Carolina Workers' Compensation statute, and the issue of regional spine ratings did not appear in the Clemmons case until the oral arguments before the Supreme Court. These two anomalies will create a population of the "Working Disabled" to rival the "Walking Dead" if left unchecked! But necessity being the mother of all invention, the Commission gave some tips on how to comply with (or circumvent) the Clemmons decision:

1. We must make sure that any back ratings we send to the Commission are ratings to the spine and not to any region of the spine. This is particularly important for cervical spine injuries where a 25% impairment of the whole person would end up being a 71% rating to the cervical spine. A claimant who has had a cervical fusion would end up receiving a 25-28 percent impairment of the whole person under the *5th Edition of the AMA Guides*. There are many, many people working and performing their activities of daily living just fine with a cervical fusion. But if the 25% rating is converted to a regional spine rating that person would be presumed permanently and totally disabled under the Clemmons decision. Therefore, it may be necessary for your defense lawyers to depose the doctors who assigned the impairment ratings in back cases – at least until either the Appellate Courts or our legislature address the issue of regional spine ratings. This will increase the cost of defending back cases, but the increase in cost will pale in comparison to the increased exposure associated with a regional spine rating.
2. Stop talking about "work." This seems counter intuitive in the context of "workers' compensation," but the Commission and the defense bar have long recognized that a claimant's employability or wage earning ability really aren't relevant to a determination of

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permanent partial disability schedule loss cases — including back cases. This is because the legislature defined the disability levels for each body part when it assigned each body part a maximum number of weeks. However, the physical and mental tasks that a claimant must perform in order to work are certainly relevant to a determination of permanent partial disability for scheduled loss injuries. Therefore, the Commission recommends that we present our evidence of a claimants' ability to work in terms of when they have to get out of bed in the morning to get to work, how many hours a day they work, how many days a week they work and all of the specific physical and mental tasks a claimant has to perform each and every day to do their job effectively. Detailed job descriptions are very helpful in this regard.

3. The problems caused by the Clemmons decision will most likely require a legislative fix. The section 42-9-30(21) was not written very clearly and our statute simply does not address the issue of regional spine ratings, but perhaps it should. The broader legislative issue may be whether or not our state needs a presumption of permanent and total disability at all. Remember that our statute was written in the early 1930s at a time when our state's economic base was supported by agriculture and textiles. A serious back injury in an economy like that probably would end the career of a doffer or a millwright, but our economy has changed substantially since then and perhaps our concept of "disability" should change as well.

Please contact the lawyers at YCRLAW if you have any questions about your back cases. We are always happy to help you.

Posted: 7/20/2017 by **Annette Massarotto** | with 0 comment(s)

Comments

Blog post currently doesn't have any comments.

News

YCRLAW 2017 Firm Update

On behalf of YCRLAW, thank you to all of our clients for putting your trust in us for another year. **CONTINUE READING »**

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YCRLAW is pleased to announce that the following YCRLAW attorneys have been selected as part of the 2018 edition of

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Evaristo Verdugo Morales, Claimant,.....Respondent-Appellant,

v.

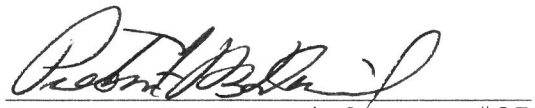
Insulation by Cohen's, LLC, Employer, and
Builder's Premier Insurance Co., Carrier,...Appellant-Respondents.

PROOF OF SERVICE

I certify that I have served the **MOTION TO SUPPLEMENT THE RECORD AND TO FILE AMENDED INITIAL BRIEF OF RESPONDENT-APPELLANT AND FOR A STAY PENDING A DECISION ON THE MOTION PURSUANT TO RULE 240(b); AND EN BANC HEARING REQUEST** on August 28, 2025 via email only addressed as follows:

Stephen L. Brown, Esquire (sbrown@ycrlaw.com)
Robert P. Gruber, Esquire (rgruber@ycrlaw.com)
Russell G. Hines, Esquire (rhines@ycrlaw.com)
Graydon V. Olive, IV, Esquire (golive@ycrlaw.com)
Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402

Respectfully submitted,



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August 28, 2025

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Proudly representing injured workers for over 45 years.

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SC Court of Appeals

August 28, 2025

VIA EMAIL: ctappfilings@sccourts.org
AND US MAIL
Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Evaristo Verdugo Morales v. Insulation by Cohen's, LLC
Appellate Case No. 2025-000026

Dear Ms. Kitchings:

Please find attached the **MOTION TO SUPPLEMENT THE RECORD AND TO FILE AMENDED INITIAL BRIEF OF RESPONDENT-APPELLANT AND FOR A STAY PENDING A DECISION ON THE MOTION PURSUANT TO RULE 240(b); AND EN BANC HEARING REQUEST** in the above-referenced matter for filing with the Court, along with the required filing fee. I would appreciate you returning a clocked-in copy to me via email.

By copy of this letter with enclosures, I am hereby serving Counsel of Record with a copy of same.

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: Don C. Gibson, Esquire (via email only)
Stephen L. Brown, Esquire (via email only
Robert P. Gruber, Esquire (via email only)
Russell G. Hines, Esquire (via email only)
Graydon V. Olive, IV, Esquire (via email only)