

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Full Commission Order Dated December 19, 2013 Affirming Commissioner Melody L. James
orders dated January 04, 2013 And September 30, 2013

Case No: 2014-000186

John McDaniel, Employee, Appellant

v.

Career Employment Professional D/B/A Snelling Staffing, Employer and United Wisconsin
Insurance Co., Carrier, Respondents

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I DID THE COMMISSION ERR IN FAILING TO ACCEPT APPELLANTS AMENDED FORM 30?
- II DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT'S DISABILITY?
- III DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPELLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND LOSS OF EARNING CAPACITY?
- IV DID THE COMMISSION ERRED IN DETERMINING THE APPELLANT'S DISABILITY UNDER SCHEDULED LOSS; THE ERROR BEING THAT ONLY WHEN INJURY IS CONFINED TO A SCHEDULED MEMBER AND THERE IS NO IMPAIRMENT OF ANY OTHER PART OF THE BODY IS A SCHEDULED LOSS WARRANTED.
- V DID THE COMMISSION ERR IN FINDING THAT THE RESPONDENTS SHOULD RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MMI PURSUANT TO *CURIEL*?
- VI DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?
- VII DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?
- VIII DID THE COMMISSION ERR IN FINDING THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD NOT CONTINUE WORKING AT ALSIDE REVERE?
- IX IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42?
- X DID THE COMMISSION ERR IN FINDING THAT THE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK WERE RESPECTIVELY \$492.85; \$506.88; \$618.50 AND \$533.41; THE ERROR BEING ALL THE WAGE CALCULATIONS INCLUDED PARTIAL WEEKS AS FULL WEEKS AND ARE NOT CORRECTLY CALCULATED UNDER THE DEFINITION OF AVERAGE WEEKLY WAGE.
- XI DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS AGAINST THE RESPONDENTS?
- XII DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION?

Statement of the Case

This is a Workers Compensation case in which the Appellant was injured on November 21, 2011 while working through a professional staffing agency for a building supply company. The Appellant's foot was crushed by a 9,000 pound forklift while working in the warehouse. On November 28, 2012 a hearing was held with the Single Commissioner to determine the issues on the Form 50 (ROA____ (Form 50)). The Single Commissioner issued her decision and order on January 4, 2013 (ROA____ (Order)). The Appellant filed a Form 30 Appealing this order (ROA____ (Form 30)). Appellant filed a Motion for Additional Evidence to Complete the Record, Motion for Additional Testimony to Complete the Record and a Motion to Enforce Penalties after the first hearing, which were denied by the judicial committee. (ROA____ Motions) Appellant's former attorney filed a Motion for Additional and Newly Discovered Evidence pursuant to 67-707. (ROA____ (Motion)) This motion was granted by the Judicial Committee. On April 15, 2013 Appellant objected to the way in which the Motion was granted. (ROA____ (Email)). The Commission granted the objection of the Appellant, which asked for remittance of the file to the Single Commissioner as outlined in 67-707. A remand hearing was held on July 8, 2013. At the remand hearing the Appellant attempted to submit records, enforce subpoena upon parties to appear, enforce compliance with records subpoenas, compel medical treatment and submit deposition testimony. (ROA____ (6/8/13 Transcript)) On August 6, 2013 the Single Commissioner issued a request for proposed order and directives. (ROA____ (Request for Proposed Order)). On August 30, 2013 Appellant submitted Proposed Findings of Facts for this Order. (ROA____ Email w/ attachment). On September 30, 2013 the Single Commissioner issued her Order from the remand hearing. (ROA____ (Order dated 9/10/2013)). This Order did not contain a ruling on Appellants proposed Findings of Fact. On October 3, 2013 the Appellant received Notice of Appellant Hearing. (ROA____ Notice of Appellant Hearing)). On October 4, 2013 the Appellant informed the Commission that he was not in receipt of the Order from the remand hearing and had conversation with the Judicial Director regarding the bifurcation of Appellant's case. (ROA____ (Emails & Tape Recordings)). Later on October 4, 2013 Appellant received the Decision and Order dated September 30, 2013 via Certified Mail.

On October 9, 2013 Appellant submitted an Amended Form 30 (ROA_____ (Email w/ attachments)). The Full Commission Panel Hearing was held on October 14, 2013. At this hearing Commissioner Barden stated that the Appellant's Amended Form 30 was in front of the Full Commission Panel. (ROA_____ (Transcript 10/14/2013 pg. 5)). At this hearing, the Appellant attempted to submit evidence and enforce subpoenas requiring parties to attend the hearing. (ROA_____ (Transcript 10/14/2013 pgs. 3-6, 10-11)). On December 2, 2013, Appellant submitted proposed findings of fact to be ruled on by the full commission. (ROA_____ (Email)). Appellant objected to Respondents being charged to author the full commission decision and order. On December 16, 2013 Appellant notified the Commission that the Respondents proposed order contained errors and misrepresentations of the case. On December 19, 2013 the commission signed and filed the Decision and Order. The remand hearing (July 8, 2013) is not reflected and/or referenced in the Decision and Order dated Dec. 19, 2013.

ARGUMENT

D) DID THE COMMISSION ERR IN FAILING TO ACCEPT APPELLANTS AMENDED FORM 30?

§42-17-50 “If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, the Commission **shall** review the award”

“An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” Fields v. Reg’l. Med. Ctr. Orangeburg, (2005) 363 S.C. 248, 609 S.E.2d 506 “The Workmen’s compensation act is remedial legislation which is entitled to a liberal construction to accomplish the ends and purposes for which it was enacted.” Flemon v. Dickert-Keowee, Inc. (1972) 259 S.C. 99, 190 S.E.2d 751

1) Does the appellant have the right to amend forms and/or pleadings after a remand hearing?

R.67-211 C.(2) “When the claimant does not serve the form or document, the Commission will serve it by depositing the form or document in the United States Postal Service first class postage, addressed to the opposing parties per R.67-210.”

The remand hearing was held July 8, 2013 pursuant to R. 67-707 which states that the evidence must be sufficient for a new trial. At this hearing additional testimony was offered and wage records of Jared Lampkin were entered into the record as APA’s. On October 3, 2013 Appellant received via U.S. mail “Notice of Appellate Review” setting a full commission review hearing for October 14, 2013. On October 4, 2013 at 3:52 pm Appellant received via Certified Mail both the Decision and Order from the July 8, 2013 remand hearing and the “Notice for

appellate review.” On October 9, 2013 Appellant delivered to the Commission the “Amended Form 30” via Email.

2) Did the Appellant err in not timely serving the amended form 30?

R.67-701 A.” The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the hearing Commissioner’s order.” R.67-701 B. states for pro se claimants “the judicial department will prepare the additional copies of the Form 30 and serve the Form 30 on the opposing party.” R.67-701 B. places the duty of service of the Form 30 with the Commission. The Commission was provided with the Amended Form 30 within five (5) days of the receipt of the Decision and Order from the (July 8, 2013) remand hearing. The Full Commission review was held on the tenth (10th) day after receipt of the remand order by the Appellant. This is within the jurisdictional time limit for filing a request for full commission review. To disallow the Appellant the right of review is beyond the scope and latitude of the Commission’s discretion, is based on error of law and substantially prejudices the appellant.

3) Is the Commission barred from retroactively excluding the Amended Form 30?

R.67-708 “A review hearing may be postponed for the reasons in R.67-613.” R.67-613 B.(4) “If the nature of the claim or the relief requested changes, file a new hearing request according to R.67-207 unless R.67-610 applies.” R.67-610 C. “An amended form must be timely filed and served. The Commission will determine at the hearing whether to allow a party to rely on new facts or defenses.” § 1-23-320 (E) “Opportunity must be afforded all parties to respond and present evidence and argument on all issue involved.”

At the remand hearing the Appellant was notified by the Full Commission Panel that “We have that [amended form 30] in front of us, yes, sir.”(ROA_____ Oct 14, 2013 Transcript p.5:15-19) The Appellant relied on this statement as an express declaration that the Form 30 would be considered and the facts would be allowed. On Dec. 19, 2013 the commission signed an order stating “the Form 30 was not timely served, so no documents outside the record were considered.”

To allow the Commission to exclude facts and/or forms after the hearing, that were relied on during the hearing is highly prejudicial to the Appellant, by not allowing him to present argument on all issues involved. If the commission had informed the Appellant that the Amended Form 30 was not before the panel, an argument could have been mounted to convince the panel that in the interest of justice the Amended Form 30 should be allowed. When the commission determines that the new facts and defenses can be relied on, they, in accordance with R.67-610 (C), must be bound by that decision.

II) DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT’S DISABILITY?

Outlaw v. Johnson Services Co. (S.C. 1970) 254 S.C 486, 176 S.E.2d 152. “the loss of earning capacity alone is the criterion for compensation under the Act.” Coleman v. Quality Concrete Products, Inc. (1965) 245 S.C. 626, 142 S.2d 43. “Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment

Did the Commission err in finding the Appellant has a disability to the left leg of thirty-four percent (34%); the error being that the Appellant’s loss of use and disability greatly

exceeded this amount based upon the permanent vocational impact and the Appellant's decrease in earning capacity?

The Appellant was released to sedentary work with restrictions. Prior to the Appellant's injury he was performing Heavy work and all the Appellant's past job experience would constitute light work to heavy work according to the US Department of Labor, Dictionary of Occupational Titles (4th Ed., Rev. 1991 -- APPENDIX C.) Appellant is permanently restricted to working in "less than sedentary" jobs according to the appendix. Appellant is restricted to lifting no more than 10 pounds (ROA _____ Form 14-b). Appellant is restricted to no more than 1 hour standing in an 8 hour day (Form 14-b). Appellant has to take multiple medications for pain. (ROA _____)

Peoples v. Henry Co., (2005) 364 S.C. 123, 611 S.E.2d 527 " He takes medication, but his leg remains swollen and painful. He now has difficulty walking and standing for long periods of time. Peoples stated that he is unable to participate in sports, cannot lift heavy objects, and climbs stairs with difficulty. The single commissioner held that Peoples had undergone a sixty-eight percent permanent partial disability to his right lower extremity and awarded benefits accordingly." "The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995)

An award of 34% to the leg is arbitrary and not supported by substantial evidence. Peoples had difficulty walking or standing for long periods of time, was able to return to his previous position, walked with a limp but did not rely on an assistive device to walk and estimated his loss to be seventy percent (70%). In contrast, the Appellant has lost his license on

which his employment was based, has been unable to return to work since reaching MMI, has trouble standing and walking for short periods of time, walks with a limp, relies on a cane and has a total vocational loss. The inability to work in even the lowest physical qualification class equates to a total loss of earning capacity for the Appellant.

III) DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPELLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND LOSS OF EARNING CAPACITY?

Pursuant to the US Department of Transportation, 49 CFR Part 391.41(b)(2) states that a person is physically qualified for a Commercial Drivers Licenses if that person has no impairment of an arm, foot or leg, or any other significant limb defect. Due to the Appellant's injury, impairment and his physical restrictions, the Appellant is no longer able to utilize his class A CDL. The primary qualification depended upon by Snelling to staff the Appellant was his Class A Commercial Drivers Licenses. (ROA_____ (Exhibit to Motion bate #127) Since the Appellant's injury, the Appellant has attempted to be hired for multiple positions that do not require a CDL and fit within the Appellant's work restrictions. (ROA_____ Exhibit to Motion bate #166-195) This equates to a loss of earning capacity for the Appellant. Therefore, the loss of the Appellant's Class A CDL Drivers Licenses should be compensated for under Title 42.

IV) DID THE COMMISSION ERR IN DETERMINING THE APPELLANT'S DISABILITY UNDER §42-9-30; THE ERROR BEING THAT ONLY WHEN INJURY IS CONFINED TO A SCHEDULED MEMBER AND THERE IS NO IMPAIRMENT OF ANY OTHER PART OF THE BODY IS A SCHEDULED LOSS WARRANTED.

Pursuant to *Lee v. Harborside Café* (S.C. App. 2002) 350 S.C. 74, 564 S.E.2d 354 which states that claimant may proceed under either Workers Compensation Act's general disability

section in order to maximize recovery and only when schedule loss is not accompanied by additional complications affecting other parts is scheduled loss exclusive, the Commissioner should have awarded disability compensation under 42-9-10 and/or 42-9-20. The single commissioner awarded for permanent loss of use of leg and toes. However, complications include but are not limited to:

- 1) Dependence on a walking device,
- 2) Loss of use of sural nerve (Ohlson 8/13/12),
- 3) Loss of use of superficial paraneal nerve (Ohlson 8/13/12),
- 4) Loss of use of lesser MTP joints (Ohlson 8/13/12),
- 5) Loss of use of skin (6 months for a wound to close),
- 6) Loss of use of vascular system,
- 7) Loss of use of nervous system (dysthesias, Ohlson 8/13/12),
- 8) Loss of use of bone density (diffuse osteopenia),
- 9) Ankylosed position of the toe (5th toe),
- 10) Hammertoe deformation (2nd-5th toes),
- 11) Disfigurement of foot (large scar),
- 12) Severe antalgic gate,
- 13) Continued medical care to correct flat foot deformity and pes planus (orthopedic shoe inserts),
- 14) Likely future surgery,
- 15) Weight gain and muscle loss/atrophy,
- 16) Permanent work restrictions,

17) Lack of congruity in medical opinions (due to the need for multiple specialists in different fields).

The Appellant has multiple complications affecting other parts of the body and thus scheduled recovery is NOT exclusive. Therefore the Commission erred in strictly construing 42-9-30.

In conclusion, due to restrictions, work qualifications, education level, medical complications, injury to multiple scheduled loss body parts as well as non-scheduled body parts, impairment rating of multiple scheduled loss body parts and other applicable factors, the Appellant should receive general disability under permanent total disability or partial disability under 42-9-10 or 42-9-20 and/or a finding of total and permanent disability under 42-9-30.

V) DID THE COMMISSION ERR IN FINDING THAT THE RESPONDENTS SHOULD RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MMI PURSUANT TO *CURIEL*?

Curiel v. Environmental Services Inc., (2007) 376 S.C. 23, 655 S.E.2d 482 "Appellant was not entitled to Temporary total benefits because Appellant had exaggerated the degree of his vision loss. The commission found: Had the Appellant been honest with his physicians concerning the sight in his right eye, a corrective lens could have been provided, and the Appellant could have worked."

The Commissioner erred in the application of *Curiel v. Environmental Management Services*. In *Curiel*, the Appellant failed to cooperate with his physician which resulted in his inability to return to work. Thus, the award was based on his earning capacity.

Commissioner James (ROA _____ Nov. 28, 2012 p.6:8-21)“My understanding of the decision of *Curiel* is at the date of maximum medical improvement, whatever that date is, that that is the date the temporary total and/or temporary partial has to stop.”

The Commissioner’s understanding of *Curiel* amounts to an error of law. To award the carrier a credit based on the understanding that any payments of support MUST be credited to the carrier supplants the legislative intent of the Act.

Outlaw v. Johnson Services Co., “the loss of earning capacity alone is the criterion for compensation under the Act.”

Fields v. Reg’l. Med. Ctr. Orangeburg, (2005) 363 S.C. 248, 609 S.E.2d 506, “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.”

Swinton v. South Carolina Dept. of Mental Health (S.C. App. 1994), 314 S.C. 202, which states that since the finding of MMI did not establish the Appellant was no longer disabled, disability was presumed to continue.

Smith v. Daniel Construction Co., (1969) 253 S.C. 248, 169 S.E.2d

State v. Williams, 13 S.C. 546, “When the court is asked to follow the line marked out by a single precedent case, it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated.” *Daughty v. Northwestern R. Co. of S.C.* (1912) 92 S.C. 361, 75 S.E. 553, “The doctrine of stare decisis should not stand in the way. That doctrine has no application, where there is conflict in the decisions of the court. In that event the court is at liberty to adopt those decisions which are

sound in principle and in accord with right and justice and the statute law, and, overrule those which are contrary thereto." "This Court has always attached great importance to the doctrine of stare decisis, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application." Bulova Watch Company, Inc. v. Brand Distributors of North Wilkesboro, Inc., (1974) 285 N.C. 467, 206 S.E.2d 141. "Nonetheless, stare decisis will not be applied when it results in perpetuation of error or grievous wrong," State v. Ballance, (1949) 229 N.C. 764, 51 S.E.2d 731," since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible." Spitzer & Co. v. Commissioners of Franklin County, (1924) 188 N.C. 30, 123 S.E. 636

In summary, *Curiel* is off-point with the current case in the following ways: (1) no evidence exists, nor has the defense asserted that the appellant has been dishonest with his physicians. (2) No substantial corrective treatment exists for the appellant's injury that would instantly return him to work. (3) It is disability resulting from injury that has precluded him from employment.

In conclusion, where the only reason given for an award is based on error of law, that award must not be upheld. *Curiel* did not have the effect of overturning *Swinton*. The Appellants disability was presumed to continue. This presumption was not rebutted. The credit must not be awarded to the carrier in this case.

VI) DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

The term "maximum medical improvement" means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006) Cagle v. Clinton Cotton Mills (1949) 216 S.C. 93, 56 S.E.2d 747. Dukes v. Daniel Const. Co. (SC 1974) 262 SC 98, where the commission found that further medical care was necessary and should be furnished, implicit in such award is the finding that additional medical treatment will tend to lessen the period of disability, for on no other grounds could liability for additional treatment be based under 42-15-60.

The Appellant reached maximum medical improvement according to Dr. Ohlson "from an orthopedic standpoint" on Aug. 13, 2012 but stated appellant would need further treatment (ROA ____ APA p.21-55), Dr. Brilliant opined that Appellant could still be up to a year away from MMI (ROA ____ APA p.59-60), Dr. Tavel found Appellant to be at MMI on July 22, 2013 (ROA ____ APA p.340-351), and Dr. Gudas judged MMI to be premature (ROA ____ APA p.56-58).

VII) DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

The Commission erred in finding that a fair and just method to calculate the wages of the Appellant was to take an average of his wages from a previous job along with the three other employee wages provided; the error being that it was not fair and just to the Appellant as it did not reflect the earnings of the injured employee and the error being that the amount that should have been used should be the actual earnings in the employment at time of injury with the ultimate objective being to fairly reflect the Appellant's probable future earnings.

The appellate relies heavily on *Sellers v. Pinedale Residential Center* (S.C.App. 2002) 350 S.C. 183. “The disability of a workers compensation claimant reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, for the purposes of calculating the claimant’s average weekly wage.” “The workers compensation statute, which sets forth several different methods for calculating the claimants AWW, provides an elasticity or flexibility with a view towards always achieving the ultimate objective of reflecting fairly a claimant’s probable future earnings loss.”

1) Did the commission err in relying on a Form 20 from a different “employment?”

Whether or not an employer-employee relationship exists within the meaning of the workers compensation law is a jurisdictional question for which the reviewing court can take its own view by a preponderance of the evidence.” Collins v. Charlotte (S.C.App. 2012) 2012 WL 3323345, “

“Unless claimant knew of and agreed to a new employer-employee relationship replacing the one thereto existing, his rights under the Workman’s Compensation Act against his regular employer were unabridged.” *Chavis v. Watkins* (S.C. 1971) 256 S.C. 409

On May 13, 2011 the Appellant became initially employed with Snelling Staffing working with Ben Arnold. The pay rate for this employment was \$11.50/hr. This employment was Tuesday thru Friday with an arrival time of approximately 6:00 am and a departure time varying from noon till 8:00 pm. This job required a Class B CDL (commercial driver’s license). This job required constant lifting up to 50lbs, driving a class B vehicle, minimal warehouse work, delivery, stocking and merchandising of beer and wine to various locations for Ben Arnold.

When this employment ended there was no guarantee of future employment, no timetable given for return and for all intents and purposes the appellant was no longer employed.

Unless claimant knew of and agreed to a new employer-employee relationship replacing the one thereto existing, his rights under the Workman's Compensation Act against his regular employer were unabridged. Chavis v. Watkins (S.C. 1971) 256 S.C. 409

On November 11, 2011 the appellant entered into a subsequent employee/employer relationship with Snelling Staffing to work for Alside Revere. This employment was for a construction distribution company. The pay rate for this employment was \$13/hr. This position was for Monday thru Friday work from 7:00 am till 4:00 pm with the understanding that there would be regular overtime. Requirements for employment involved possessing a Class A CDL and the ability to lift over 50 lbs constantly. This job included several hours of warehouse work daily and irregular delivery routes, twice a week going within 5 miles of the Georgia border.

To base AWW on wages from a previous employment, that included lower wages, a different scope of work, in a different industry, with different hours, needing a different license with less dangerous conditions does not comply with §42-1-40 which states AWW must be determined "in the employment working at the time of injury" and warrants reversal. Due to the fact that disability reaches into the future and not the past, loss must be calculated upon probable future earnings.

Jared Lampkin's earnings most accurately reflect what the appellant would be earning were it not for the injury.

On Nov. 22, 2011, Jared Lampkin replaced the Appellant at Alside Revere. Lampkin was the only person to work this job for the following year. Taking into account pay records from

Alside Revere and Snelling, The period from Nov. 22, 2011 to Nov. 10, 2012 included forty-nine (49) full weeks and two (2) partial weeks. During this period Lampkin earned wages equal to \$36,544.61.

Lampkin's AWW excluding the partial weeks are equal to:

$(\text{Total wages} - \text{partial week wages}) / \text{full weeks worked} = \text{AWW}$ or $(\$36,544.61 - \$916.50) / 49 \text{ full weeks} = \727.10

In conclusion, AWW should reflect probable future earnings which in this case would be a minimum of \$727.10 a week.

VIII) DID THE COMMISSION ERR IN FINDING THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD NOT CONTINUE WORKING AT ALSIDE REVERE?

Appellant testified "Dan Cobb said they liked my work and that if I was on board, that he would like to hire me.(ROA____ Nov. 28, 2011 Transcript p.24:1-2)" I was looking for long term stability so I could finish school.(ROA____ Nov. 28, 2011 Transcript p.24:13-14)" "They [snelling] try to put you with someone that would be a good long term fit for you to be hired on for (ROA____ Nov. 28, 2011 Transcript p.44:24-45:1)" "Snelling does not take you on a daily basis to go to different places. They are – their mission is to place people to be hired on at companies rather than filling day labor needs.(ROA____ Nov. 28, 2011 Transcript p.43:7-11)" "me and Dan Cobb had had a conversation regarding... bring me on before the 550 hours because its an exhorbanant cost for the company to outlay for the staffing agency.(ROA____ Nov. 28, 2011 Transcript p.49:21-25)" "Alside Revere did try to re-employ me simply as a driver

until I was healed enough to take over full duties again...I believe that would speak to their intent of wanting to hire me.(ROA____ Nov. 28, 2011 Transcript p.50:19-51:1)

Dan Cobb Testified that ultimately he would make the final (hiring) decision (Cobb Deposition p.7) “We brought him on to be full time (pg.10.)” “would receive at least 40 hours a week (pg.10.)” “he was the only one” employed to make deliveries (pg.11.) “that he [appellant] was working out” and had performed “so far so good (pg.12.)” That “It’s a permanent position” and “No, it’s permanent (pg.16.)” “He was a very good employee. He did very well in the limited time he was there (pg.13.)” That there was overtime ranging from two (2) to ten (10) hours of overtime a week.” “If he worked out we would make him a permanent employee” and “If they do well that is my intention.”

In conclusion, no substantial evidence exists to conclude that the Appellant would not have continued his assignment at Alside Revere.

IX) IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42?

South Carolina is an at-will employment state. *Prescott v. Farmers Telephone Cooperative, Inc.*, (1999) 335 S.C. 330, 516 S.E.2d 923 “A contract for permanent employment, ...is terminable by either party. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all.”

To lower the AWW in this case, on this basis, would substantially prejudice the rights of the Appellant. 42-1-160 defines injury, and includes a non-inclusive list (42-1-160 (C)) of “events which are incidental to normal employer/employee relations including but not limited

to...terminations..." Any reference to what "might" have happened would be based on speculation, conjecture or surmise, and no award shall be based on speculation, conjecture or surmise.

In conclusion, there is no basis for the applicability of whether or not employment was guaranteed as consideration of guarantees are not accounted for under S.C. Code Ann. (1976) Title §42.

X DID THE COMMISSION ERR IN FINDING THAT THE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK WERE RESPECTIVELY \$492.85; \$506.88; \$618.50 AND \$533.41; THE ERROR BEING ALL THE WAGE CALCULATIONS INCLUDED PARTIAL WEEKS AS FULL WEEKS AND ARE NOT CORRECTLY CALCULATED UNDER THE DEFINITION OF AVERAGE WEEKLY WAGE.

In Accordance with §42-1-40 If the time worked does not exceed 52 weeks the proper method to calculate AWW is to take earnings and divide them by actual number of weeks worked and *parts thereof*. The commission did not calculate the AWW in accordance with §42-1-40 in the following instances.

The 20 weeks used to determine the Appellant's average weekly wage on the Form 20 was from a different scope of employment with a different statutory employer and improperly accounts for one week which the Appellant did not perform any work and counts all partial weeks as full weeks. The one week and one day the Appellant performed work in the employment in which he was injured was never accounted for.

The combination of the other employees' wages includes Lampkin (13 weeks), Clark (16 weeks) and Atkins (15 weeks) and equals 44 weeks. This is less than 52 weeks in the

employment in which the Appellant was injured. When an employee works less than 52 weeks, weeks *and* parts thereof must be accounted.

Jared Lampkin's Average Weekly Wage while employed through Snelling

Jarod Lampkin's (Lampkin) wage determination does not take into account any partial weeks in accordance with §41-1-40. The result of failing to properly account for partial weeks is prejudicial to the Appellant. Lampkin's average wage was determined by dividing gross pay (\$8,040.52) by number of checks received (13) which equates to \$618.50 (which is equal to approx. 5 hours of overtime per week.) Lampkin worked 78 hours of overtime over 11 full weeks resulting in 7.09 hours of overtime per week on average. Excluding partial weeks Lampkin averaged wages of \$658.25. Lampkin worked a partial week the week ending 11/25/11 (32 hours). Lampkin worked a partial week the week ending 2/17/12 (31 hours)(ROA _____ (APA)).

In conclusion, the Commission should not have used \$618.50 for Lampkin's AWW, \$658.25 at the minimum should be utilized as this calculation properly accounts for weeks and parts thereof.

Alvin Clark's Average Weekly Wage

Alvin Clark's (Clark) wage determination does not take into account any partial weeks. This is also a violation of §42-1-40. Clark worked a partial week the week ending 7/29/11 (32 hours worked). Clark worked a partial week ending 11/11/11 (8 hours worked). Both of these weeks are clearly fractional. Clark's average wage accounts both of the above weeks as full weeks. The operational hours of Alside Revere were from 7a.m. till 4p.m. which equals a 45 work week. Allowing for a one hour lunch break daily, Clark worked less than 40 hours on five

other checks (check numbers 195610, 197218, 197725, 199271, 200533). This indicates that these weeks were fractional. Clark's average wage was determined by dividing gross pay (\$8,534.51) by number of checks (16) and equates to \$533.41 (which is equal to less than 2 hours of overtime). Clark worked 50.50 hours of overtime over a 16 week period. This results in an average overtime per week of 3.16 hours or wages of \$581.62 including partial weeks. Excluding the partial weeks results in 50.5 hours over 9 weeks or 5.61 hours of overtime or wages of \$629.40. As an award may not be based upon conjecture, speculation or surmise the fractional weeks or weeks in doubt should be excluded. This results in the \$629.40 of wages to be the most accurate reflection of Clark's earning capacity.

In conclusion, the Commission determining Clark's AWW at \$533.41 instead of \$629.40 is clearly prejudicial to the Appellant and based on error of law.

Wayne Atkins' Average Weekly Wage

The "Employee Pay Summary" for Wayne Atkins indicates week ending 4/8/11 the wages paid were for 8 hours. The above referenced check (check # 186808) was calculated as a full week in the determination of Atkins average wage. The "Employee Pay Summary" for Wayne Atkins indicates a pay rate of \$8 an hour the last week of his employment (week ending 7/15/11). During the above referenced week Wayne Atkins worked 45 hours (check # 192500). The \$8 an hour wage was levied as a punishment against Atkins for not giving proper notice when he quit. Wayne Atkins average wage determination in regards to the above week relies on gross earnings and not on hours worked multiplied by his normal wage. The result of the above equate to wages his last week of employment equal to \$344.35 (\$8 an hour x 45 hours) instead of his normal pay rate equal to \$606.25 (\$13 an hour x 45 hours). The "Employee Pay Summary"

for Wayne Atkins reflects three additional weeks in which hours worked were less than 40 hours. The above weeks are accounted for in the determination of Wayne Atkins average wage as full weeks. Wayne Atkins average wage was determined by dividing his gross pay (\$7,603.24) by paychecks received (15 checks) resulting in an average wage of \$506.88 (which is equal to less than 40 hours a week at \$13 an hour). Over the period Atkins worked for Alside Revere he earned 35.25 hours of overtime. Excluding the first week Atkins worked 35.25 hours of overtime over a 14 week period which results in an average overtime worked of 2.51 hours per week or a wage of \$568.95.

In conclusion, the Commission determining Clark's AWW at \$506.88 instead of \$568.95 is clearly prejudicial to the Appellant and based on error of law.

The weeks accounted for by the Commission includes, 44 weeks of various statutory employees working in the same employment in which the Appellant was injured (Alside Revere) and 20 weeks, 19 of which the Appellant actually performed work, in a different scope of employment for a different statutory employer (Ben Arnold). The calculations used do not take into consideration any partial weeks and includes weeks in which work was not performed.

XI) DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS AND/OR AN INCREASE OF COMPENSATION AGAINST THE RESPONDENTS?

1) Is the Appellant due penalties and/or sanctions and/or an increase in compensation?

The Commission erred in failing to find that the Respondents should be subject to fines and penalties for late payments of Temporary Total Disability and Temporary Partial Disability

Benefits; the error being that the record reflects payments were made at least 14 days after they were due, the records reflect that Respondent's failed to make timely payments on multiple occasions and the fine is mandated by §42-9-90.

The first check paid to claimant has a received date stamp on it reflecting it was received 12/27/11, this is over one month after claimants injury 11/21/11. There is no record of payment of the mandatory increase in compensation of 10% for the period of benefits from 11/22/11 till 12/02/11. There were multiple occasions of late payments (ROA____(APA p.91-109)) No increase in compensation or penalties or fines were applied to these late payments, as mandated, and this is prejudicial to the Appellant.

The Commission err in failing to find Respondents be subject to fines and penalties for not authorizing Appellant's treating physicians' prescribed medical care and not authorizing treating physicians' medical care in a timely manner; the error being that the record reflects the Appellant did not receive all treatment and did not receive all treatment in a timely manner and the motion for penalties should have been granted.

Dr. Olson initially recommended and prescribed Physical Therapy on 1/9/12. Claimant's first visit to Physical Therapy was on 2/27/13. Dr. Olson initially recommended and prescribed wound debridement/therapy on 1/27/12. Wound care was never approved or provided. The Claimant's recovery was hindered due to the gross delay in approving physical therapy. "Potential barriers to patient's ability to reach maximum rehab potential: delayed attendance to PT" (ROA____RCC report dated 2/27/12) Physical therapy was delayed for a second period from 4/10/12 till 5/1/12. Dr. Olson's reported dated 4/2/2012 states that there is no longer need for wound therapy. Rehabilitation Centers of Charleston's physical therapy notes from 6/26/12

state that the wound is nearly healed. The Claimant's wound remained open at least until 6/26/12 resulting in Dr. Olson not proceeding with surgery as stated in RCC records and Dr. Olson's medical reports. Dr. Olson's report dated 5/14/12 recommends and prescribes Chronic Pain Management. The Claimant attempted to facilitate and receive Chronic Pain Management as prescribed by Dr. Olson. The Claimant first received Chronic Pain Management on 10/30/12. Dr. Ohlson first recommended and prescribed orthotics on 7/2/12, United Heartland delayed approval of this until, on or after, 11/1/12. (ROA_____Motion for penalties) The record contains substantial evidence that the carrier has failed to provide medical care as directed.

To not enforce penalties and/or sanctions against the Respondents for failing to provide medical care as ordered, recommended and prescribed, by the treating physicians encourages carriers to disregard the law. This violation of the simple trade-off of swift medical care and sure compensation for limited liability must not be upheld. To do so would tip the scale of justice away from protecting the injured worker and undermine the concept of workers compensation. In an exclusive recovery setting penalties must be applied as the legislator's intended.

The concept is elementary, if the injured worker endures additional loss and the carrier is responsible for it, additional compensation is due.

2) Is the Commission barred from granting a credit to Respondents if penalties are due?

The commission should have awarded at the minimum the mandatory penalties, thus, an application for suspension of benefits should not have been entertained by the commission on November 28, 2012. Pursuant to 42-9-260 (F) "Further, the commission may not entertain any application to terminate or suspend payments unless and until the employer or carrier is current with all payments due."

XII DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN THE FOLLOWING WAYS:

The Administrative Procedures Act (APA) requires that, in a contested case, all parties must be afforded the opportunity for a hearing. S.C.Code Ann. § 1-23-320(A) (2005 & Supp. 2011). The APA additionally requires: "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved." S.C.Code Ann. § 1-23-320(E) (2005 & Supp.2011). Moreover, the APA provides that, in a contested case, "[a]ny party may conduct cross-examination." S.C.Code Ann. § 1-23-330(3) (2005).

Pursuant to *Adams v. HR Allen, Inc.*, (2012) 397 S.C. 652, 726 S.E.2d 9 procedural due process requirements are not technical and the procedures before administrative agencies must provide adequate notice of a hearing, provide adequate opportunity for hearing, afford the right to present evidence and afford the right to cross examine witnesses. *Adams v. HR Allen* further states;

*In State v. Mouzon, the South Carolina Supreme Court distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). In LaSalle Bank Nat'l Ass'n v. Davidson, the court held that the failure of a judge to attend a mortgage foreclosure proceeding was a structural defect that violated the Appellants' "constitutional guarantee to procedural 658*658 due process." 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009). There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. The judge's absence from the*

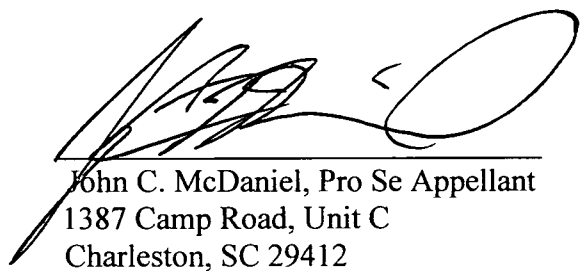
hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process." Id. at 281, 688 S.E.2d at 123; see also U.S. v. Marcus, ___ U.S. ___, 130 S.Ct. 2159, 2164, 176 L.Ed.2d 1012 (2010) (stating that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

Appellant raised numerous issues related to the procedural handling of his claim which the SC Commission failed to address. (ROA_____ Amended Form 30) (ROA_____ Transcript 10/14/13) (ROA_____ Transcript 7/8/13 p.) (ROA_____ Email &Tape Recording) (ROA_____ Amended Form 30).

CONCLUSION

Title 42 was authored and implemented with the sole purpose to protect the injured worker, the goal of keeping injured workers from becoming charges on society and an exclusive remedy in exchange for swift care and limited compensation. The Appellant is permanently disabled and must be protected by this court.

The Appellant prays that this court will seek justice and uphold the law by: remanding the case back to the South Carolina Workers Compensation Commission for a rehearing with specific instructions to at a minimum; accept the amended form 30, calculate AWW excluding partial weeks and reflect future and not past earnings, to reconsider disability and find no less than 68% to the leg, to apply mandatory penalties and reconsider discretionary penalties, deny the Respondents credit, accept evidence, enter appellants deposition into the record, rule on the Appellants proposed findings of fact, find MMI no earlier than July 22, 2013, or in the alternative, overturn all of the appealed issue and enter an award fair and just to the Appellant, and/or whatever other action the court may deem fair and just.



John C. McDaniel, Pro Se Appellant
1387 Camp Road, Unit C
Charleston, SC 29412
843-425-3000
Jmcdaniel1982@gmail.com

March 11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM South Carolina
Workers Compensation Commission

Full Commission Order Dated December 19, 2013 Affirming
Commissioner Melody L. James orders dated
January 04, 2013 And September 30, 2013

Case No.: 2014-000186

John C. McDaniel.....Appellant,

v.

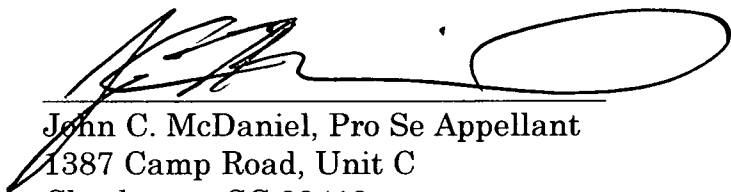
Snelling Staffing Services and United Wisconsin Insurance
Company c/o United Heartland Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief by depositing a copy in
the U.S. Mail, postage paid on March 11, 2014 addressed to the below:

R. Mark Davis
Alison Nussbaum
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Mt. Pleasant, SC 29465

S.C. Workers Compensation Commission
PO Box 1715
Columbia, SC 29292-1715



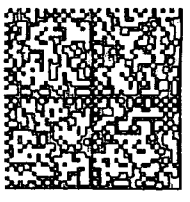
John C. McDaniel, Pro Se Appellant
1387 Camp Road, Unit C
Charleston, SC 29412
843-425-3000
Jmcdaniel1982@gmail.com

March 11, 2014

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John McDaniel
V387 Comp Rd
Unit # C
Cherokee SC
29412

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Senny Kitchings
Clerk for SC Court of Appeals
P.O. Box 11629
Columbia SC
29211

