

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

173127

W.C.C. File No. 1116275

John McDaniel, Employee,.....Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier, ... Respondents.

**MOTION TO STRIKE AND/OR AMEND
APPELLANT'S REVISED INITIAL BRIEF AND
REVISED DESIGNATION OF MATTER**

Pursuant to Rules 208, 209, 210 and 240, SCACR, Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Co. move this Court to strike and/or order Appellant to amend certain portions of his revised Initial Brief of Appellant, dated July 18, 2014 ("Revised Initial Brief") (Att. L), and to strike and/or order Appellant to amend or clarify or provide Respondents with copies of certain items listed in his revised Designation of Matter to be Included on Appeal ("Revised Designation") (Att. O).

This Court's order filed July 3, 2014 ordered Appellant to "file an amended initial brief, which contains intelligible references to the materials cited in the designation of matter pursuant to Rule 208(b)(4), SCACR," and to strike the personal recordings from his Designation of Matter. Appellant was not given leave to substantively rewrite major portions of his Initial Brief and/or to add materials to his Designation of Matter. He has done both. To allow him to

substantively redraft his Initial Brief and Designation of Matter now would be to reward his procedural errors by providing him a second chance to “perfect” his Initial Brief.

In particular, Appellant’s Revised Initial Brief contains 16 separate issues on appeal and 16 separate arguments, (Att. L), whereas his first Initial Brief filed with this Court contained only 12 issues and 12 separate arguments. (Att. A). In his Revised Initial Brief, issues/arguments one through four and 16 are new – they were not contained in his first Initial Brief. Furthermore, issue/argument number five in his Revised Initial Brief is substantively revised.

In addition, the table of authorities in Appellant’s Revised Initial Brief lists new authority and materials. Specifically, he cites:

- S.C. Code Ann. § 1-23-350;
- S.C. Code Ann. § 42-9-260;
- S.C. Code Ann. Regs. § 67-207;
- S.C. Code Ann. Regs. § 67-607; and,
- S.C. Code Ann. Regs. § 67-704.

These are not contained in the table of authorities in Appellant’s first Initial Brief and should be stricken from his Revised Initial Brief.¹

There are substantive revisions throughout Appellant’s Revised Initial Brief, too numerous to be listed in exhaustive detail here. This Court should strike Appellant’s Revised Initial Brief and order Appellant to refile his Initial Brief in conformance with this Court’s July 3, 2014 Order.

¹ Respondents note that “US Department of Labor, Dictionary of Occupational Titles (4th Ed., Rev. 1991 – APPENDIX C.)” was not included in the table of authorities for Appellants first Initial Brief; however, it is contained in the text. (Att. A, p. 12).

In addition, Appellant has designated material for inclusion in the Record on Appeal in his Revised Designation, (Att. O), that were not listed in his initial Designation of Matter. (Att. M). The following items appear in Appellant's Revised Designation that were not previously designated:

- 13.² Form 13 with attached Form 15-S Dated September 6, 2012;
- 15. Form 21 dated September 17, 2012;
- 18. Dan Cobb Deposition Aug. 20, 2012;
- 29. Email chain about "Proposed Findings of Fact RE:SCWCC File #1116275" dated Aug. 30 2013 and dated Dec. 2, 2013;
- 34. Email chain about "re: Proposed order language" dated Sept. 13, 2013; and
- 36. Rehabilitation Centers of Charleston Report dated June 26, 2012.

These items should be stricken from Appellant's Revised Designation.

In addition, there are a number of items listed in Appellant's Revised Designation that are unclear. For example, No. 9 lists, "Claimant's Motion for Additional Evidence to Complete the Record and Notice of," and No. 10 lists, "Additional APA Submissions with attachments dated March 6, 2013 filed May 09, 2013." (Att. O, p. 2). It appears that Nos. 9 & 10 may have been intended to be one designation, but it is not entirely clear. Appellant should be ordered to clarify what he intends to designate here. Respondents point out that, in Appellant's Response to Respondents' Motion to Strike and/or Amend Claimants Initial Brief and Designation of Matter, dated May 31, 2014, ("Appellant's Response to Motion to Strike"), he clarified that he was designating only APA pp. 127, and 166-195. (Att. N, p. 4). To the extent Appellant intends to designate more than the materials he identified in his Initial Designation, as clarified in his Appellant's Response to Motion to Strike, (Att. N), this Court should order him to conform his

Revised Designation to the materials previously designated. Again, Appellant should not be allowed two bites at the apple based on his own failure to follow this Court's appellate briefing rules.

Number 11 on Claimant's Revised Designation which lists, "Claimant's Motion for Additional Evidence and Deposition Testimony dated March 10, 2013 and Exhibit including Deposition Testimony of John C. McDaniel," (Att. O, p. 2), is also unclear. In his first Designation, Appellant listed "Motion for Additional Evidence and Deposition Testimony and Exhibits (Deposition Testimony of John C. McDaniel)." (Att. M, p. 2). In his Appellant's Response to Motion to Strike, he clarified that the Motion for Additional Evidence he intended to designate was dated May 14, 2013. (Att. N, p. 4, item/paragraph 13) *see also* (Respondents' Motion to Strike and/or Amend Portions of Appellant's Initial Brief and Designation of Matter, dated May 20, 2014 ("First Motion to Strike"), p. 5, item/paragraph 13).

Similarly, No. 23 on Claimant's Revised Designation is unclear. He lists, "Claimant's Full Commission Hearing Brief dated Jan. 14, 2012," (Att. O, p. 2); however, in his clarification in response to Respondents' First Motion to Strike, he indicated that he was designating a document dated March 26, 2013. (Att. N, p. 4, item/paragraph 8) (First Motion to Strike, p. 4, item/paragraph 8).

No. 17 on Appellant's Revised Designation refers to "Form 58 Claimant's Briefs dated Oct. 31, and Nov. 15, 2013 and APAs submitted (APA p.1-119)." No. 19 lists "Letter from Tom White supplemental APAs 120-122 with attachments Nov. 17, 2013 APA's p.340-351." These dates appear to be incorrect. Respondents believe the correct dates may be Oct. 31, 2012, Nov. 15, 2012 and Nov 17, 2012, respectively, and ask that Appellant confirm.

² All numbered references herein are to Appellant's revised Designation of Matter, filed July 18, 2014, unless otherwise indicated.

In No. 30 of Appellant's Revised Designation, Appellant has designated "Letter submitting three (3) Affidavits to SC Workers Compensation Commission dated Oct 7, 2013 with attachments (Affidavit, Affidavit II and Affidavit III)," and in No. 31, he has designated "Letter dated October 4, 2013 submitting additional medical records to include Dr. Tavel's MMI dated 7/22/2013." (Att. O, p. 3). Although Appellant provided the referenced cover letters in his Appellant's Response to Motion to Strike, (Att. N), he did not attach and has never clarified what Affidavits he is referencing. Furthermore, as Respondents noted previously, we have no record of having received the referenced medical records from Dr. Tavel. Respondents request that this Court order him to clarify which Affidavits are indicated in No. 30, and to provide them with the medical records referenced in No. 31.

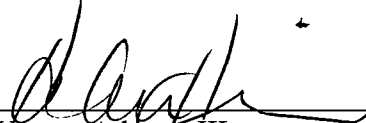
Finally, Respondents request that the briefing schedule in this appeal be suspended until the Court decides this Motion.

CONCLUSION

For the reasons stated herein, Respondents move this Court to strike Appellant's Revised Initial Brief and Revised Designation, both dated July 18, 2014, and to order Appellant to conform both filings with his Court's July 3, 2014 Order. In addition, Respondents request that this Court order Appellant clarify and/or to provide Respondents with certain materials that he has designated that are unclear and/or not contained in our files. Finally, Respondents request that the briefing schedule be stayed while the Court considers this Motion.

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Attachment L

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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8. DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPELLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND/OR LOSS OF EARNING CAPACITY?
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11. 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.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ENFORCE SUBPOENAS?
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16. IS THE COMMISSION BARRED FROM GRANTING A CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

Statement of the Case

This is a Workers Compensation case in which the Appellant was injured on November 21st, 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 a building supply warehouse. The Employer, Career Employment Professionals (Snelling), admitted injury by accident that arose out of and in the scope of employment, but denied the extent and duration of disability, argued preexisting conditions, the amount of compensation for Average Weekly Wage and for a credit for Temporary Total Disability payments paid after August 13th, 2012.

Three Hearings were held on this case. The first hearing was held November 28th, 2012. The hearing was then remanded and reconvened on July 8th, 2013. The November 28th, 2012 and July 8th, 2013 hearings were presided over by Commissioner James. On October 14th, 2013 a Review Hearing was held by Commissioners Barden, Roche, and McCaskill.

The Single Commissioner issued her decision and order on January 4, 2013 (ROA____ Order Dated Jan. 4, 2013). The Appellant filed a Form 30 Appealing this order (ROA____ Form 30 dated Jan. 14, 2012).

Thereafter, Appellant's former attorney filed a Motion for Additional and Newly Discovered Evidence pursuant to S.C. Code Ann. Regs. § 67-707. (ROA____ Motion dated Mar. 8, 2013) 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 "re: motion for new evidence" dated Apr. 15, 2013). The Commission granted the objection of the Appellant, which asked for remittance of the file to the Single Commissioner as outlined in § 67-707.(ROA____ ORDER dated May 20, 2013)

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, all of which were denied by the judicial committee. (ROA_____ Motions dated Mar. 6, 2013, Mar. 10, 2013, Jul. 1, 2013)

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_____ Transcript dated Jul. 8, 2013)

All of the above actions were denied or disallowed.

On August 6, 2013 the Single Commissioner issued a request for proposed order and directives. (ROA_____ Request for Proposed Order dated August 6, 2013). On August 30, 2013 Appellant submitted Proposed Findings of Facts for this Order. (ROA_____ Email w/ attachments dated August 30, 2013). On September 30, 2013 the Single Commissioner issued her Order from the remand hearing. (ROA_____ Order dated September 30, 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 Appellate Hearing dated Oct. 1, 2013). On October 4, 2013 the Appellant informed the Commission that he was not in receipt of the Order from the remand hearing and had a conversation with the Judicial Director regarding the bifurcation of Appellant's case. (ROA_____ Email dated Oct. 4, 2013).

Later that day, on October 4, 2013, Appellant received the Decision and Order dated September 30, 2013 via Certified Mail. On October 12, 2013 Appellant submitted an Amended Form 30 (ROA_____ (Email w/ attachments dated Oct. 9, 2013).

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 Oct. 14, 2013 pg. 5). At this hearing, the Appellant attempted to submit evidence and enforce subpoenas requiring parties to attend the hearing, however the subpoenas were quashed and the evidence was denied. (ROA_____ Trans. Oct. 14, 2013 pgs. 3-6, 10-11) & (ROA_____ Order dated Dec. 19, 2013).

On December 2, 2013, Appellant submitted proposed findings of fact to be ruled on by the full commission. (ROA_____ Email dated Dec. 2, 2013). On December 16, 2013 Appellant notified the Commission that the Respondents proposed order contained errors and misrepresentations of the case (ROA_____ Email dated Dec. 16, 2013).

The Full Commission unanimously affirmed the Single Commissioners order dated January 4th, 2013, however, the remand hearing held on July 8, 2013, is not reflected and/or referenced in the Decision and Order dated Dec. 19, 2013.

Notice of appeal was served January 24th, 2014.

ARGUMENT

1. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION FAILING TO ENFORCE SUBPOENAS?

Pursuant to *Adams v. HR Allen, Inc.*, 397 S.C. 652, 726 S.E.2d 9 (2012) 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.

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. There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. ...the hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process."... (stating that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

Appellant served appearance and document subpoenas for both the remand hearing and the review hearing.

Respondents successfully motioned to Quash the production of documents and the appearances of Jim Pascutti, Angela Baldwin and Nicole Service at both hearings. (ROA____ Hearing trans. Oct. 14, 2013 p.11-17) & (ROA____ Order Dated Sept. 30, 2013) (ROA____ Full Comm'n Order dated Dec. 19, 2013)

Appellant believes this denies him his right to question and cross examine witnesses and/or parties, and warrants a new trial.

2. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO ACCEPT APPELLANTS DEPOSITION AND ADDITIONAL RECORDS AT THE REMAND HEARING?

On July 8, 2012, a Remand Hearing was held under § 67-707 which establishes that the evidence sought to be admitted must be of such importance that a new trial is warranted. At the Commission's discretion, the original hearing was reconvened.

Under § 1-23-320 (E) and R. §67-613 Appellant tried repeatedly to present his deposition and additional evidence to the commissioner at the remand hearing. (ROA_____ hearing Oct. 14, 2013 p.27-30, 32:15-24, 40:22-23, 47:3-24) The Commissioner would not allow the entering of evidence into the record. (ROA_____ Order dated Sept. 30, 2013)

When the Commission denied the Appellant the right to enter evidence into the record the result is an award based on an incomplete record and warrants a new trial.

3. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN PROVIDING SUFFICIENT NOTICE OF THE REVIEW HEARING?

S.C. Code Ann. § 1-23-320 (A)-(B), R. § 67-607 and 67-704, among others, lay out that sufficient notice includes at least 30 days prior; notice of date, place, time, purpose of the hearing, and date for filing Appellant's brief.

Appellant only received ten (10) days notice of the Review Hearing. (ROA_____ Notice of review hearing dated Oct. 1, 2013)

Appellant objected to the Review Hearing going forward with only 10 days notice but the commission did not postpone the hearing. (ROA____ Email "RE: receipt of order "scwcc # 1116275) Dated Oct. 4, 2013)

Instead of administratively postponing the hearing, the judicial director sent an office wide email saying that the Appellant was lying about receipt of the order.(ROA____ Email from Virginia Crocker dated Oct. 4, 2013).

The Appellant believes 10 days is insufficient notice in this case, and warrants remand.

4. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACT?

S.C. Code Ann. § 1-23-350 states if findings of facts are submitted after a hearing that they shall be ruled on individually.

After the Remand Hearing and after the Full Commission Hearing, the Appellant submitted Proposed findings of Fact. Appellant received confirmation that the findings were received and would be reviewed. (ROA____ Email chain about "re: Proposed order language" dated Sept. 13, 2013) & (ROA____ Email chain about "Proposed Findings of Fact RE:SCWCC File #1116275" dated Aug. 30 2013 and dated Dec. 2, 2013)

Appellants proposed findings of fact were not ruled upon by the single Commissioner or the full commission and warrants remand, so that the Commission may enter a ruling on each of the proposed findings.

**5. 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, 363 S.C. 248, 609 S.E.2d 506 (2005) "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. 259 S.C. 99, 190 S.E.2d 751(1972)

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

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."

After receipt of the Decision and Order on Oct 4, 2012 the Appellant tried to Amend the Form 30 to reflect a change in the nature of the relief requested on his request for review. (ROA_____ Email "Amended Form 30" with attachments dated October 12, 2013)

2) Did the Appellant timely serve the Amended Form 30?

The original hearing was held Nov. 28, 2012 and then a Form 30 was timely served. (ROA_____ Form 30 dated January 14, 2012)

Thereafter, a Motion for Additional evidence was granted under R. 67-707. (ROA_____ Motion for additional evidence dated March 8, 2013)

The remand hearing was held July 8, 2013. On October 3, 2013 Appellant received via U.S. mail "Notice of Appellate Review" setting a full commission review hearing for October 14, 2013.(ROA_____ Email about bifurcation Oct 7, 2013) On October 4, 2013 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 12, 2013 Appellant delivered to the Commission the "Amended Form 30 with attachments" via Email. (ROA_____ Email about Amended Form 30 dated October 12, 2013)

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."

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) and R. 67-211 (C)(2) places the duty of service of the Form 30 with the Commission. The Commission was provided with the Amended Form 30 within eight (8) 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 review 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 Hearing Trans. p.5:15-19) The Appellant relied on this statement as an express declaration that the Amended Form 30 was accepted and relied upon portions of that pleading in his argument.

The Respondents objected to the "Amended Form 30" and its attachments but failed to motion for postponement. (ROA _____ Oct 14, 2013 Transcript p.14:9-17)

There-after the Commission excluded the Amended Form 30 and its attachments. (ROA _____ Dec. 19, 2013 Order p.6)

To allow the Commission to exclude pleadings 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, the Appellant would have motioned for postponement upon this ground.

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.

In conclusion, when the Commission excluded the Amended Form 30 they denied the Appellant of his right to due process. This error must not be held to be harmless, as exclusion of a pleading must amount to a structural defect, making the review hearing a nullity.

6. DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT'S DISABILITY?

1) 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?

Outlaw v. Johnson Services Co. 254 S.C 486, 176 S.E.2d 152 (1970) "the loss of earning capacity alone is the criterion for compensation under the Act." Coleman v. Quality Concrete Products, Inc. 245 S.C. 626, 142 S.2d 43 (1965) "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."

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: lifting no more than 10 pounds, no more than 1 hour standing in an 8 hour day, and has to take multiple medications for pain. (ROA____ Form 14-b Sept. 6, 2012)

Appellant is permanently restricted to working in "less than sedentary" jobs according to the D.O.T. appendix.

Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527(2005) " 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 and fails to provide equal protection under the law.

The injured worker in *Peoples, supra*, 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.

Appellant cannot perform any job he has held in the past.(ROA_____ Nov.28, 12 hearing p. 18:12-13)

In accordance with *Coleman, supra*, the inability to work in even the lowest physical qualification class equates to a total loss of earning capacity for the Appellant, and the Commission should have awarded at a minimum 100% loss of use of leg, and/or awarded under § 42-9-10 or § 42-9-20.

7. DID THE COMMISSION ERR 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?

Pursuant to *Lee v. Harborside Café* 350 S.C. 74, 564 S.E.2d 354 (S.C. App. 2002) 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 34% permanent loss of use of leg.

However, complications include but are not limited to:

- 1) Dependence on a walking device (ROA_____ Transcript 11/28/12 hearing p.37:4-7),
- 2) Loss of use of sural nerve (ROA_____ Ohlson Report 8/13/12),
- 3) Loss of use of superficial paraneal nerve (ROA_____ Ohlson Report 8/13/12),
- 4) Loss of use of lesser MTP joints (ROA_____ Ohlson Report 8/13/12),
- 5) Balance Problems ((ROA_____ Transcript 11/28/12 hearing p.39:22-24),
- 6) Loss of use of skin, 6 months for a wound to close, (ROA_____ RCC note 6/26/12)
- 7) Loss of use of nervous system "dysthesias" (ROA_____ Ohlson Report 8/13/12),
- 8) Ankylosed position of the toe (5th toe) (ROA_____ Ohlson Report 8/13/12),,
- 9) Hammertoe deformation (2nd-5th toes) (ROA_____ Ohlson Report 8/13/12),,
- 10) Disfigurement of foot (large scar)(ROA_ Claimant's exhibits from Nov. 28, 2012, 1 and 2),
- 11) Severe antalgic gate (ROA_____ Ohlson Report 8/13/12),
- 12) Continued medical care to correct flat foot deformity and pes planus (orthopedic shoe inserts), (ROA_____ Ohlson Report 8/13/12),
- 13) Likely future surgery (ROA_____ Ohlson Report 8/13/12),
- 14) Permanent work restrictions (ROA_____ Ohlson Report 8/13/12),
- 15) Lack of congruity in medical opinions, due to the need for multiple specialists in different fields (ROA_____ Ohlson Report 8/13/12)&(ROA_____ Tavel Report 7/22/13).

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 maximum partial disability under §42-9-10 or §42-9-20 and/or a finding of total and permanent disability under §42-9-30.

8. DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPEALLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND/OR 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 for Additional Evidence Bate #127dated May 9, 2013) & (ROA____ Cobb Depo. p.11:15-17 dated August 20, 2012) 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 for

Additional Evidence Bate #166-195 dated May 9, 2013) 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 § 42-9-20.

9. 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)

Dukes v. Daniel Const. Co. 262 SC 98 (SC 1974,) 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. Tavel found Appellant to be at MMI on July 22, 2013 (ROA____APA p.340-351), Dr. Brilliant opined that Appellant could still be up to a year away from MMI (ROA____APA p.59-60), and Dr. Gudas judged MMI to be premature (ROA____APA p.56-58).

Dr. Ohlson was clear in two aspects of finding "MMI" on August 13, 2013; 1) further treatment would be necessary 2) his opinion was limited in scope to his specialty and did not account for any further impairments or treatments

. To only take into consideration one out of four medical opinions fails to reach the threshold of substantial evidence

10. 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. The credit was based on his earning capacity.

"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." Commissioner James (ROA _____ Nov. 28, 2012 p.6:8-21)

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, supra, "the loss of earning capacity alone is the criterion for compensation under the Act."

Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 248, 609 S.E.2d 506(2005), "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 314 S.C. 202, (S.C. App. 1994), 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., 253 S.C. 248, 169 S.E.2d (1969)

"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." ... "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." "Nonetheless, stare decisis will not be applied when it

results in perpetuation of error or grievous wrong," ... "since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible."

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.

11. 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*.

None of the employees had worked 52 weeks and the calculations used do not take into consideration any partial weeks.

The commission did not calculate the AWW in accordance with §42-1-40 in the following instances.

A) Appellants Form 20

Appellant's average wage was determined by dividing gross pay (\$9,856.96) by number of checks received (20) which equates to \$492.85 (which is approx. \$28 less than 40 hours per week at \$13 an hour.) (ROA_____ Full Commission Order p.11 Fact #2)

Respondents listed 20 weeks as the number of weeks worked. (ROA_____ Form 20 undated / attachment to motion for additional evidence bated # 155)

Commissioner James used their calculation. (ROA_____ Full Commission Order p.11 Fact #2)

Appellant only worked 19 weeks during the period. (ROA_____ APAs pay stubs from 1-1-11 through 9-30-11)

This calculation is contrary to § 42-1-40, and using \$492 instead of \$518.79 does not properly account for actual number of weeks worked, and warrants reversal.

B) Wayne Atkins' Average Weekly Wage

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). (ROA_____ Full Commission Order p.11 Fact #2)

Wayne Atkins wage the week ending 4/8/11 was for 8 hours but calculated as a full week (ROA_____ APA p.120-121)

Wayne Atkins worked 45 hours at \$8 an hour instead of \$13 an hour the last week of his employment, resulting in wages of \$344.35 (\$8 an hour x 45 hours) instead of his normal pay rate equal to \$606.25 (\$13 an hour x 45 hours)(ROA____APA p.120-121).

Atkins worked 3 other fractional weeks that the commission counted as full weeks. (APA p.120-121)

Excluding his first week Atkins actually worked 2.51 hours of overtime and earned actual wages of \$568.95 weekly.

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, thus it warrants reversal.

C) Jared Lampkin's Average Weekly Wage while employed through Snelling

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.) (ROA____Full Commission Order p.11 Fact #2)

Lampkin worked 78 hours of overtime over 11 full weeks resulting in 7.09 hours of overtime or actual 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 p.122). Jarod Lampkin's wage determination does not take into account any partial weeks in accordance with §41-1-40.

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.

D) Alvin Clark's Average Weekly Wage

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). (ROA____ Full Commission Order p.11 Fact #2)

Alvin Clark's wage determination does not take into account any partial weeks. This is a violation of S.C. Code Ann. §42-1-40 (1976).

Clark worked partial weeks the weeks ending 7/29/11 (32 hours worked) and 11/11/11 (8 hours worked). (ROA__APA p. 120-122) Both of these weeks are clearly fractional. Clark's average wage accounts both of the above weeks as full weeks.

Clark worked five other fractional weeks. (ROA____APA p.120-122) Excluding the partial weeks result in 5.61 hours of overtime or actual wages of \$629.40 weekly.

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, thus it warrants reversal.

12. 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.*, 335 S.C. 330, 516 S.E.2d 923 (1999) "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."

The Single Commissioner penalized the injured worker by finding there was "No guarantee he would have continued with the assignment at Alside Revere." (ROA_____ Full Commission Order p.11 Fact #2)

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, , thus it warrants reversal.

13. DID THE COMMISSION ERR IN FAILING TO FIND THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD HAVE CONTINUED TO WORK 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 exorbitant 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.” (ROA____ Dan Cobb Depo. August 20, 2012)

The Appellant believes it is more likely than not that he would have been hired at Alside Revere, and that substantial evidence supports that contention, that his wages should be looked at as if he was hired permanently, and those wages would most accurately reflect likely earnings going forward.

14. 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 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, a building supply company) and 20 weeks, only 19 of which the Appellant actually worked, in a different scope of employment for a different statutory employer (Ben Arnold, a wine distributor).

The appellate relies heavily on *Sellers v. Pinedale Residential Center* 350 S.C. 183(S.C.App. 2002). *"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“

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 theretofore existing, his rights under the Workman's Compensation Act against his regular employer were unabridged. Chavis v. Watkins 256 S.C. 409(S.C. 1971).

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. Requirement for employment involved possessing a Class A CDL. (ROA____ Cobb Depo. P.13dated August 20, 2012) 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.

2) Do 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.

15. DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS against THE RESPONDENTS?

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, and the record reflects no payment was made the week of (ROA_____APA check # 21333748) & (ROA_____Form 15-S dated Sept. 6, 2013)

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)

There was no increase in compensation nor penalties applied for multiple late payments, as mandated by law, and this is prejudicial to the Appellant.

The Commission erred 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.(ROA_____Motion for Penalties dated July 1, 2103)

Dr. Olson initially recommended and prescribed Physical Therapy on 1/9/12. Claimant's first visit to Physical Therapy was on 2/27/13. (ROA_____Motion for Penalties July 8, 2013)

Dr. Olson initially recommended and prescribed wound debridement/therapy on 1/27/12.

Wound care was never approved or provided. (ROA _____ Motion for Penalties July 8, 2013)...

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 February 27, 2012) 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 (ROA _____ RCC Report June 26, 2012). 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 dated July 1, 2013) 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 under the law.

16. Is the Commission barred from granting a credit to Respondents for overpayment of temporary total and/ or temporary partial disability benefits 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."

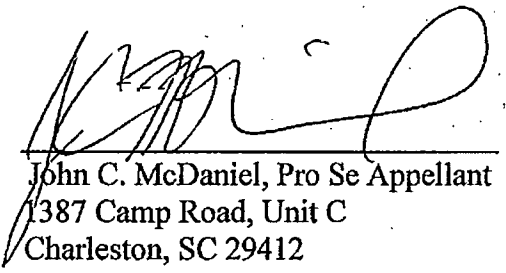
If Appellant was due penalties for late payments of temporary disability payments can the Commissioner grant an application to terminate benefits and then give a credit while outstanding penalties are due?

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 Average Weekly

Wage 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 and 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

July 18, 2014

Attachment M

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.

DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

Form 20

Notice of Hearing scheduled for November 28, 2012

Notice of Remand Hearing dated June 19, 2013

Notice of Full Commission hearing dated October 1, 2013

Single Commission Transcript dated November 28, 2012

Remand Hearing Transcript dated July 8, 2013

Full Commission Hearing Transcript dated October 14, 2013

Form 58 Claimant's Brief and APAs submitted

Form 58 Defendant's Brief and APAs submitted

Commissioner Melody James' Original Order dated January 4, 2013

Commissioner Melody James' Remand Hearing Order dated September 30, 2013

Full Commission Order dated December 19, 2013

Emails regarding objection to Request for Full Commission Order & Proposed Finding of Fact
w/ Attachment

Form 30

Email with Attachments submitting Amended Form 30 with Index of Exhibits & Exhibits (A-K)

Claimant's Full Commission Hearing Brief

Defendant's Full Commission Response Brief

Claimant's Full Commission Reply to Response Brief

Motion for New and Additional Evidence under 67-707 dated March 8, 2013 filed March 12,
2013

Email Objecting to deviation of procedures under 67-707 dated April 15, 2013

Letter submitting records of Jarred Lampkin and APAs

Motion for Additional Evidence to Complete the Record with Attachments (APAs 11-23)

Motion for Additional Evidence and Deposition Testimony and Exhibits (Deposition Testimony
of John C. McDaniel)

Form Order-Judicial Conference Decision and Order dated May 20, 2013

Form Orders- (2) Judicial Conference Decision and Orders dated June 17, 2013 (Affidavit II,
Exhibit A)

Email dated June 20, 2013 requesting specific finding on Judicial Conference Decisions
(Affidavit II, Exhibit B)

Motion for Penalties filed July 1, 2013 with Exhibits

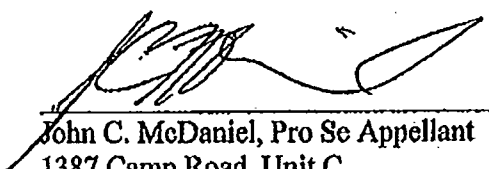
Motion to Quash Subpoenas

Recorded Conversation with Virginia Crocker regarding bifurcation and remand hearing

Recorded Conversation with SC Workers Compensation Judicial Dept. & Keith Roberts
regarding Remand Order

Letter submitting Affidavits to SC Workers Compensation Commission dated October 7, 2013

Letter dated October 4, 2013 submitting additional medical records to include Dr. Tavel's MMI
dated 7/22/2013



John C. McDaniel, Pro Se Appellant
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March 21, 2014

Attachment N

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.

**APPELLANT'S RESPONSE TO RESPONDENTS'
MOTION TO STRIKE AND/OR
AMEND CLAIMANTS INITIAL BRIEF
AND DESIGNATION OF MATTER**

PLEASE TAKE NOTICE that the Appellant hereby replies to Respondents' Motion
to Strike and/or Amend Portions of Appellant's Initial Brief and Designation as follows:

As to Paragraphs 1 and 2: The recordings are communications with an
administrative agency in execution of its public functions. These recordings support the
claims of the Appellant that the SCWCC actively and aggressively suppressed
constitutional guarantees of Due Process and Equal Protection. The Appellant will supply
the Respondents with copies of the two recordings in question.

As to Paragraph 3: The "Amended Form 30" was ruled on so it must necessarily be
part of the record that can be reviewed.

It is the Appellants responsibility to place evidence into the Record on Appeal to sufficiently allow for judicial review.

For justification to exclude Appellant's "Amended Form 30" Respondents site Rule 210 (c), SCACR, "[t]he Record shall not...include matter which was not presented to the lower court or tribunal."

The SC Workers Compensation addressed the acceptance of Appellant's Amended Form 30 During the hearing as reflected in the full commission hearing transcript from October 14, 2013 p.5:15-19 where Commissioner Barden said, "We have that [amended form 30] in front of us, yes, sir."

Then on November 1, Appellant received drafting instructions that stated "the Form 30 was not timely served, so no documents outside the record were considered."

Then on Dec. 16, 2013 Appellant notified the commission of his objection to the form 30's exclusion, among various other defects. (Exhibit A) None of the defects were addressed and the commission signed a order on December 19, 2013.

Following the Decision and Order of the Commission the Appellant notified the court of the intent to seek review with the first topic in the "Statement of Issues on Appeal" was:

"I. DID THE COMMISSION ERR IN FAILING T ACCEPT THE APPELLANTS AMENDED FORM 30?"

When a document is presented to the lower court, the matter decided upon, the appellant has a right to judicial review of the decision.

Terry v. SC DEPT. OF HEALTH 377 S.C. 569, 660 SE 2d 291 (Ct. App. 2008) After an aggrieved party has exhausted all administrative remedies, the party is entitled to judicial review by the South Carolina Court of Appeals. *See* S.C.Code Ann. § 1-23-380(A) (Supp.2007). Judicial review is confined to the record and is governed by South Carolina Code section § 1-23-380(A)(5), which provides:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. [However,] [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A) Disallowing the Appellant his right of review would suppress his right to due process and equal protection under the South Carolina and United States Constitutions.

B) S.C. Code Ann. §1-23-320 prohibits an administrative agency from excluding relevant evidence.

C) The Original Form 30 and Review hearing was stayed by the SCWCC "appellate panel" to admit additional and newly discovered evidence pursuant to R. 67-707 (C)(2)(e) and remanded to the original commissioner for further proceedings. After the remand hearing Appellant retains the right of judicial review regarding rulings of law and findings of fact from both hearings.

D) Lack of exercise of discretion amounts to an abuse of discretion, and when the SCWCC denies an injured worker the RIGHT to introduce evidence it is in contradiction of *Watson v. Extra Mile Trucking*, 399 SC 455, 732 SE 2d 190 (Ct App. 2012) where the court clearly established that the commission in exercise of its authority was not bound by the strict rules of evidence and was given wide latitude to accept additional evidence.

In lay terms, the Amended Form 30 clearly and concisely states errors of law and fact alleged by the appellant that were not ruled on by the Commission, to allow this document to be excluded from the review process would severely prejudice the appellants right to review.

As to Paragraph 4 and 5: Upon information and belief these records are dated as proposed. I will clarify when the SC Worker Compensation Commission complies with my records request for the forms that were filed on my behalf by my former counsel.

As to Paragraph 6: Appellant agrees.

As to Paragraph 7: Appellant clarifies a date of October 12, 2013.

As to Paragraph 8: Appellant clarifies record dated and received March 26, 2013.

As to Paragraph 10: Appellant clarifies date of service of May 15, 2013 by Virginia Crocker.

As to Paragraph 12: Appellant clarifies date filed of May 09, 2013.

As to Paragraph 13: Appellant clarifies date filed of May 14, 2013

As to Paragraphs 9, 11, 14, 15: Appellant agrees.

As to Paragraphs 16 and 17: I have attached copies of the letters as requested.

As to Paragraph 18: the appellant would clarify that the notation should have read "(ROA____Form 14-b Dated September 6, 2012.)"

As to Paragraph 19: Appellant further clarifies: (ROA____Exhibit/APA submission to Claimant's Motion for Additional Evidence and Notice of Additional APA Submissions filed May 09, 2013 APA p.# 127)

As to Paragraph 20: Appellant further clarifies: (ROA____Exhibit/APA submission to Claimant's Motion for Additional Evidence and Notice of Additional APA Submissions filed May 09, 2013 APA p.# 166-195)

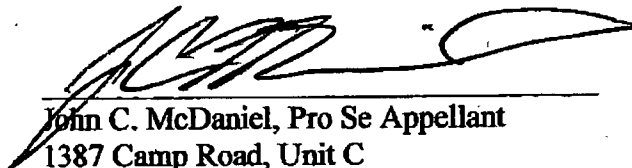
As to Paragraph 21: See "Exhibit C" letter Dated October 4, and Filed 10/10/13 which included APA p.# 340-351

As to Paragraph 22: Appellant further clarifies (ROA____Wages of like employees APA exhibit 9 p. 120-122)

As to Paragraph 23: Appellant further clarifies (ROA____RCC report Dated 2/27/12 attached to and referenced in paragraph 9 in Claimants Motion for penalties Filed June 14, 2013)

Appellant admits the oversight of failing to address the Columbia office of MG&C and will address all further correspondence to that office.

WHEREFORE, based on all of the above, the Appellant respectfully requests that the Respondents' Motion be denied or that the Appellant be given the opportunity to Amend both his initial brief and designation of matter.



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

May 31, 2014

John McDaniel v. Career Employment Professionals d/b/a Snelling (Claim No.: 041100021048)

john mcdaniel <jmcdaniel1982@gmail.com>

Mon, Dec 16, 2013 at 7:09 PM

To: "Hollmon, Eugenia" <EHollmon@wcc.sc.gov>, "Cannon, Gary" <gcannon@wcc.sc.gov>
Cc: Allison Nussbaum <allison.nussbaum@mgclaw.com>, "WCC Appeals," <wccappeals@wcc.sc.gov>, "Crocker, Virginia" <vcrocker@wcc.sc.gov>, "Heather M. Sherrill" <heather.sherrill@mgclaw.com>

Good Evening and Happy Holidays to All,

I am in receipt of defendants proposed order, please let this serve as notice of the following :

Attached please find my proposed Findings of Fact to be ruled upon by the SC Workers Compensation Full Commission Panel, specifically Commissioners Bearden, McCaskill and Roche, for my claim and a synopsis of evidence for the Proposed Order previously submitted by the Defendants and Objected to by the Claimant (Me).

Although I am confident that this email will be discarded by the SCWCC and that my proposed finding of fact will not be ruled upon as required by Title 1 of SC Code of LAW by the SCWCC. I am again submitting findings of fact, after a hearing in front of an Administrative Agency (SC WCC), in an effort to seek resolution and actuality of this claim.

I further would request and have previously requested, clarification and findings of facts on multiple administrative rulings on Claimant's motions (specifically the Claimant's Motion for Additional Evidence & APA Submissions, Motions for Additional Evidence & Testimony and Motion for Penalties to be Enforced) filed prior to the Full Commission Hearing, so that these decisions may be reviewable in a court for error of law.

I object to the Proposed Order submitted by the Defendants on multiple grounds. Please see below.

I object to the Proposed Order submitted by the Defendants, which is not consistent with the original order signed by Commissioner Melody James on January 4th, 2013.

I object to the Proposed Order drafted and submitted by the Defendants on the ground that there is MATERIAL MISREPRESENTATION OF NUMERICAL DATA in the Proposed Order that is inconsistent with the record on file and the orders dated November 28, 2012 and July 8, 2013.

I object to the Defendants Summary of Evidence which is void of the entirety of the APA's submitted from the first hearing and remand hearing.

I object to the sufficiency of notice of the remand hearing.

I object to the sufficiency of notice of the full commission hearing.

I object to the exclusion of the amended form 30 dated October 9, 2013.

I object to being told at the hearing that the form 30 had been accepted only to have it excluded at a later date.

I object to the statement that the Amended form 30 was not timely served.

I object to the Full Commission Hearing proceeding without an opportunity to submit briefs on the issues to be raised.

I object to the issuance of the appeal hearing notice (October 1, 2013) prior to reception of the remand hearing order by Claimant (received October 4th, 2013).

I object to defendants' request for an extension being granted to draft the proposed order.

I object to having my inquiries not addressed by the SCWCC.

I object to the defendants non adherence to the proposed decision directive to include " Amended Form 30 was not timely served. So, no documents outside the record were considered." was changed to say "In reaching this Decision, the appellate panel did not consider any documents outside the record because the claimants's Amended form 30 was not timely served; therefore, any records submitted with the amended form 30 were not considered by the panel."

I object to the Defendant's summarizing the deposition testimony of Dan Cobb and ask that any reference to Dan Cobb's testimony be directly quoted.

I further request that the Defendants do not summarize my testimony in their "Summary of Evidence" as a summarization of testimony depends on an individual's interpretation. I would request that any reference to my testimony be directly quoted, as only I can speak directly to the intent of my statements.

I object to the statement by defendants that claimant was "ultimately referred to a wound facility" no wound care or treatment was EVER provided for by the defendants.

I object to the allegation by defendants that claimant has "alleged malunited fracture." As the record indicates that claimant has malunited fractures.

Sincerely,

John C. McDaniel

[Quoted text hidden]

 **proposed-findings.docx**
25K

John C. McDaniel

1387 Camp Road, Unit C, Charleston SC 29412
Phone Number: 843-425-3000
Email: jmcDaniel1982@gmail.com

October 7, 2013

Via US Mail

Virginia Crocker, Judicial Director
S.C. Workers Compensation Commission
Post Office Box 1715
Columbia, SC 29292-1715

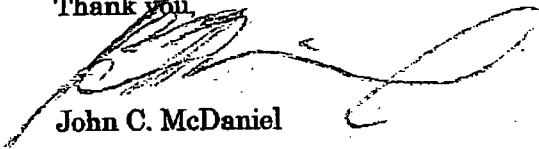
RE: John C. McDaniel v. Career Employment Professional d/b/a Snelling Staffing
DOI: 11/21/2011
WCC File: 1116275

Dear Ms. Crocker,

Enclosed please find the originals and copies of three affidavits for the above referenced claim. Please file the originals and return the filed stamped copies in the self-addressed stamped envelope.

If you have any questions, please do not hesitate to call. Thank you in advance for your assistance in this matter.

Thank you,



John C. McDaniel

John C. McDaniel

1387 Camp Road, Unit C, Charleston SC 29412
Phone Number: 843-425-3000
Email: jmcDaniel1982@gmail.com

October 4, 2013

Via US Mail

Virginia Crocker, Judicial Director
S.C. Workers Compensation Commission
Post Office Box 1715
Columbia, SC 29292-1715

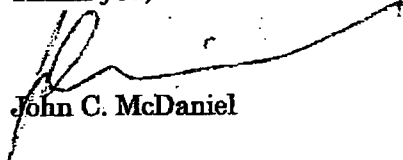
RE: John C. McDaniel v. Career Employment Professional d/b/a Snelling Staffing
DOI: 11/21/2011
WCC File: 1116275

Dear Ms. Crocker,

Enclosed please find additional medical records, to include two copies of Dr. Tavel's MMI dated 7/22/2013 for completion of the file. Please return a filed stamped copy in the self-addressed stamped envelope.

If you have any questions, please do not hesitate to call. Thank you in advance for your assistance in this matter.

Thank you,


John C. McDaniel

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.

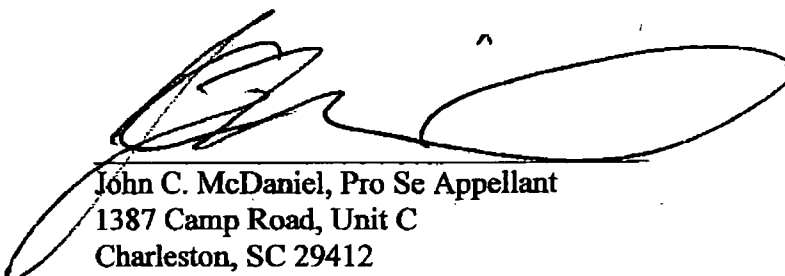
Snelling Staffing Services and United Wisconsin Insurance
Company c/o United Heartland Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Reply to Respondents' Motion by depositing a
copy in the U.S. Mail, postage paid on March 31, 2014 addressed to the below:

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

Weston Adams, III
PO Box 12519
Columbia, SC 29211-2519



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

Attachment O

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.

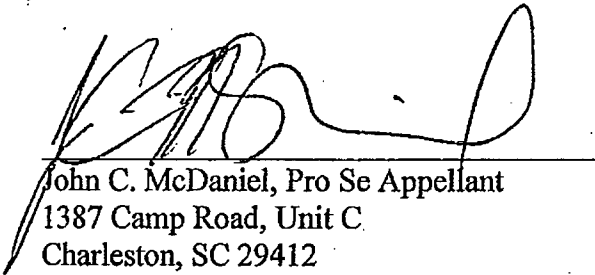
**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

1. Commissioner Melody James' Original Order dated January 4, 2013.
2. Commissioner Melody James' Remand Hearing Order dated September 30, 2013
3. Full Commission Order dated December 19, 2013
4. Form Order-Judicial Conference Decision and Order dated May 20, 2013
5. Form Orders- (2) Judicial Conference Decision and Orders dated June 17, 2013 (Affidavit II, Exhibit A)
6. Notice dated November 14, 2012 of Hearing scheduled for November 28, 2012
7. Notice dated June 19, 2013 of Remand Hearing scheduled for July 8, 2013
8. Notice dated October 1, 2013 of Full Commission hearing scheduled for October 14, 2013

9. Claimant's Motion for Additional Evidence to Complete the Record and Notice of
10. Additional APA Submissions with attachments dated March 6, 2013 filed May 09, 2013
11. Claimant's Motion for Additional Evidence and Deposition Testimony dated March 10, 2013 and Exhibit including Deposition Testimony of John C. McDaniel
12. Form 14-b Dated September 6, 2012
13. Form 18 with attached Form 15-S Dated September 6, 2012
14. Form 20 undated
15. Form 21 dated September 17, 2012
16. Claimant's Form 30 dated 1/14/2013
17. Form 58 Claimant's Briefs dated Oct. 31, and Nov. 15, 2013 and APAs submitted (APA p.1-119)
18. Dan Cobb Deposition Aug. 20, 2012
19. Letter from Tom White supplemental APAs 120-122 with attachments Nov. 17, 2013 APA's p.340-351
20. Letter Submitting records of Jarod Lampkin and APA's Dated May 17, 2013
21. Email chain from October 7th through October 12th, 2013 regarding bifurcation and submitting Amended Form 30 & Attachments including Amended Form 30 dated 10/09/2013, Index of Exhibits & Exhibits (A-K)
22. Claimant's Motion for Penalties filed July 1, 2013 and Exhibits
23. Claimant's Full Commission Hearing Brief dated Jan. 14, 2012
24. Claimant's Full Commission Reply to Response Brief filed May 14, 2013
25. Claimant's Motion for New and Additional Evidence under 67-707 dated March 8, 2013
26. Single Commission Hearing Transcript dated November 28, 2012
27. Remand Hearing Transcript dated July 8, 2013

28. Full Commission Hearing Transcript dated October 14, 2013
29. Email chain about "Proposed Findings of Fact RE:SCWCC File #1116275" dated Aug. 30 2013 and dated Dec. 2, 2013
30. Letter submitting three (3) Affidavits to SC Workers Compensation Commission dated Oct. 7, 2013 with attachments (Affidavit, Affidavit II and Affidavit III)
31. Letter dated October 4, 2013 submitting additional medical records to include Dr. Tavel's MMI dated 7/22/2013
32. Email Objecting to deviation of procedures under 67-707 dated April 15, 2013
33. Email dated June 20, 2013 requesting specific finding on Judicial Conference Decisions
34. Email chain about "re: Proposed order language" dated Sept. 13, 2013
35. Rehabilitation Centers of Charleston Report dated February 27, 2012
36. Rehabilitation Centers of Charleston Report dated June 26, 2012



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

July 18, 2014



Reply To

HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

August 5, 2014

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: John McDaniel v. Career Employment Professionals d/b/a Snelling Staffing
Services and United Wisconsin Insurance Company c/o United Heartland
Date of Accident: November 21, 2011
WCC File No.: 1116275
Our File No.: 20638.12027
Claim No.: 041100021048
Appellate Tracking No.: 2014-000186

Dear Ms. Kitchings:

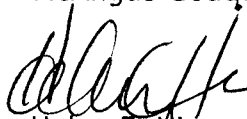
Enclosed please find the original and seven (7) copies of Respondents' Motion to Strike and/or Amend Portions of Appellant's Revised Initial Brief and Revised Designation of Matter, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

Also enclosed is our firm's check in the amount of \$25 for filing the motion.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC



Helen F. Hiser

RECEIVED

Enclosures

cc: John C. McDaniel, *Pro Se*

AUG 07 2014

SC Court of Appeals

735 JOHNNIE DODDS BLVD, SUITE 200
POST OFFICE BOX 650007
MT. PLEASANT, SC 29465
843.576.2900 PHONE
843.534.0605 FAX
WWW.MGCLAW.COM

McANGUS GOUDELOCK & COURIE LLC