THE STATE OF SOUTH CAROLIONA

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

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APPELLANTS RESPONSE BRIEF TO RESPONSDENTS REPLY

Table of Authorities

STATEMENT OF ISSUES IN RESPONDENTS' BRIEF

1. Whether the Commission properly held that the Claimant was at Maximum Medical Improvement and awarded Respondents credit for Total Temporary Disability benefits paid after that date.
2. Whether the Commission properly determine Claimant's disability rating
3. Whether the Commission properly calculated Claimant's Average Weekly Wage
4. Whether the Commission correctly rejected Claimant's Amended Form 30 as untimely filed?
5. Whether the Commission properly rejected Claimant's request for penalties and/or sanctions?
6. Whether Claimant's remaining arguments regarding alleged Due Process rights violations are meritless?

ARGUMENT

The Appellant is dismayed and outraged at the overall tone of the Respondent's initial brief. Respondents brief approaches the threshold of incivility. The Respondents continually try to cast the Appellant in a negative light. The Respondents would never take this overall tone with anyone other than a pro se Appellant. They attempt to belittle my understanding of the law and my ability to read. They continually assert that I misconstrue, or misunderstand, or misread, the law or applicable statutes, however a disagreement in the meaning of the law is the essence of almost all Appellant cases. The Respondents hold one position as to the meaning of the law and the Appellant holds a contrary one so we find ourselves here. This respectable court is the one that we lay these concerns in front of. The Appellant pleads that this court seek out justice and repudiate the Respondents tone and the commission holdings in this case.

Although the Appellant concisely stated 16 issues on appeal the Respondents in order to obfuscate the issues have reduced that to six issues hoping that this court would overlook their omissions. The order of this reply brief will substantially follow the order of the Respondents brief in order to address the issues.

I. WHETHER THE COMMISSION PROPERLY HELD THAT THE CLAIMANT WAS AT MAXIMUM MEDICAL IMPROVEMENT AND AWARDED RESPONDENTS CREDIT FOR TOTAL TEMPORARY DISABILITY BENEFITS PAID AFTER THAT DATE.

Respondents argue that the date of MMI is not preserved for judicial review because it was not raised in the initial Form 30. After the initial form 30 was filed, a motion for additional evidence was granted pursuant to R. 67-707(B). This motion asked for the case be remanded to

the original hearing commissioner. When the full commission granted this motion they deviated from R. 67-707 (B). Thereafter, the Appellant objected to the way in which the motion was granted as it was not an adherence with R. 67-707 (C)(2)(d). Thereafter, the commission granted the objection and set a date for remand. That remand hearing was held after which an amended form 30 was filed. This amended form 30 raised the exception to the original hearing commissioner's order in regards to the date of MMI among numerous other exceptions. Additionally, the Appellant raised the MMI issue of both reaching MMI and the date of MMI at the remand hearing and the full commission hearing. (See 7th issue on Appellants Amended Form 30) Thus, the Respondent's argument that the date of MMI as a point of contention is not preserved for appellate review is unfounded.

The only concession Appellant has ever made concerning MMI is that Dr. Ohlson placed the Appellant at MMI from an orthopedic standpoint on Aug. 13, 2012. Although the Respondents argue repeatedly that the Appellant conceded MMI on Aug. 8, 2012 where this is untrue. Respondents cite the commissioners summary of stipulations on page 5 of the initial hearing transcript for that date," there is an agreement that the claimant is at maximum medical improvement" however the commissioner contradicts herself and the Respondent's assertions on lines 17 and 18 of the same paragraph which state "the defendants are requesting credit from the date of MMI, which is **alleged** to be August the 13, 2012."

The Appellant has never claimed to be at MMI. The Appellant is not a medical professional and has only ever stipulated that Dr. Ohlson found MMI from an orthopedic standpoint on August 13, 2012. Read together Dr. Ohlson's report dated August 13, 2012 and his immediately preceding report. (Order from Jan 4, 2013 & full commission hearing testimony)

In fact the issues to be heard at the initial hearing included "Has the claimant reached MMI?" (Form 58) The inaccuracy of this assertion is further reflected when Respondents argue the date of MMI as August 13, 2012 during the first hearing. (hr'g tr. 10-11, lines 21-25,1)

Respondents further argue that these "concessions" bind the Appellant to an MMI date of August 13, 2012. This assertion is patently false as the Full Commission has the Authority to take their own view of the merits of the case under S.C. Code Ann. § 42-17-50 and the Appellant clarified repeatedly how he had not conceded to being at MMI.

Further Respondents argue that the Finding of MMI on Aug. 13, 2012 is supported by substantial evidence and site one line from one medical report. The multitude of medical reports are not conflicting as Respondents state, they are all supportive of an MMI of on or after Aug. 13, 2012. The delay in receiving a pain specialist to try to treat the chronic pain now suffered as a result of this injury lead to an incomplete picture for the commission to rely on. In short, if the injury is not fully treated the injured worker should not be found to be at MMI.

The law that clearly outlines that the hearing commissioner may issue a credit for payments made after the Date off MMI, and that this award is in the discretion of the commissioner. A lack of exercise of discretion is an abuse of discretion, (as an analogy an employee can be fired for a legal reason, or for no reason, but if they are fired for a protected reason than there is a recovery at law.) So, if the commissioner grants the credit using her discretion than that is legal but if she states that the credit was given because she is required to give it pursuant to *Curiel* then that is an error of law. *Curiel* is totally inapplicable in this case, and its use as a bright line to be followed must not be supported.

Of note, the Respondents entire second argument address the timeline of benefits and not the granting of a credit for overpayment of benefits and hence is inapplicable.

As to Respondents' footnote #8: Respondents erroneously argue that the claimant repeatedly attempt to rely on evidence that was never admitted into the record for the commission. This simply is not true as without objection the entire commission file was made part of the record. (Hearing transcript page 5) Also, Respondents' multitude of lengthy footnotes could be seen as an attempt to circumvent this Appellant Courts Rules concerning the length of principal briefs and their designated format. (Please see footnotes seven and eight on page 20, together with the fact that Respondents brief is numbered to page 50 these footnotes are sustentative arguments put forth in fine print that if made in regular format would exceed the maximum length.)

As to Respondents' footnote #9: Respondents argue they do not understand which case Appellant believes should not be followed, then correctly guess it is *Curiel* that the *Staire Decisis* argument was in reference to, Appellant is not quite sure the purpose of their footnote, other than to cast the Appellant in further negative light and dilute the issues at hand.

Respondents continually read permissive actions as mandatories when siting *Curiel* and *Watson* among others, if every credit should be given than the statute should no longer read, that it is the commissioners approval. Approval of commission for deduction is required by this section and its conclusions thereabout are binding on appeal unless there is **absence of competent evidence to support them.**" *Brittle v. Raybestos-Manhatten, Inc.,* (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884.

Here the only evidence supporting the granting of credit is the use of Curiel, and the Appellant has proved this inapplicable in this case, thus the credit should not be upheld.

II. WHETHER THE COMMISSION PROPERLY DETERMINE CLAIMANT'S DISABILITY RATING

Respondents argue that the commission's determination of the Appellant's disability supported by substantial evidence however, substantial evidence is not a mere scintilla of evidence. The AMA guide Dr. Olson used produces an impairment rating that does not take into account experience or training, or type of employment. Dr. Brilliant did not cite any guide but gave a 50% impairment rating to the left foot. This results in two of the four doctors there were consulted about the Appellant's injury to opine 17% to extremity and 50% to foot. The commissioner just averaged the two and called the resulting impairment to the leg of 34%, or (17+50)/2=33.5%. This does not amount to substantial evidence, and completely disregards the medical restrictions placed on Appellant to include not being a lift more than 10 pounds and not being to stand for more than one hour in an eight hour day. The Appellant once again asserts that these physical restrictions amount to total disability. Whether the court of the commission determines the disability should be found under S.C. Code Ann. § 42-9-10 or § 42-9-20 or § 42-9-30, the court must not lose sight of the fact that in an industrial capacity a physical labor loses 100% industrial use of his injured leg if his physical restrictions placed him in a less than sedentary work restriction category.

Respondents argue Appellant should not be allowed to proceed under § 42-9-10 or § 42-9-20 because only amount of disability was challenged. The Respondents are once again trying to limit the Appellants position to strict phrasing when the SCWCC is a remedial act and must be construed liberally to protect the injured worker. Of note the Respondents entire argument is based on a form that was amended later.

Although Respondents assert that new issues were raised in the reply brief for the commission review, the Appellant tried very hard to only refute the assertions of the Respondents

from their reply brief.

Respondents assert that Appellant failed to prove injury/impairment to multiple body parts and this is simply untrue. It does not take the testimony of the doctor to prove impairments to other body parts.

Also Respondents quote Appellant as saying that only left foot was hurt in the accident. This is correct that only my foot was struck during the accident and should not be misconstrued or perverted to mean that I suffered no other injuries as a result of this accident.

Further, All 15 conditions are supported by the record.

A 17% impairment rating, contrary to Respondents argument, did not include all of the injuries to Appellants leg only the ones sited by the doctor in his determination as the AMA guides specifically allotted for and impairment rating for having to depend on an assistive walking device. It is the commissioner's role to take these impairment rating and know the difference between Daily Living Activity impairments and "impairment" in a workers comp context.

Complication 11 is actually on the Form 14-b and throughout the record and visible when the Appellant walks. This is highly offensive for the Respondents to now allege that I don't even limp.

III. WHETHER THE COMMISSION PROPERLY CALCULATED CLAIMANT'S AVERAGE WEEKLY WAGE?

The Respondents try to argue a number of issues from page 30 through page 39 in their initial brief, with the applicable issues being initially issues set forth by the Appellant numbered 11, 12, 13 and 14 and here renumbered 1 through 4 1) 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. 2) IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42? 3) DID THE COMMISSION ERR IN FAILING TO FIND THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD HAVE CONTINUED EMPLOYMENT AT ALSIDE REVERE? 4) DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

In further attempt to confuse the issues the Respondents simplify these four points into three and address them as below.

Respondents argue that the commission properly calculated the Appellant's average weekly wage and address three of the Appellant's arguments as follows 1) argues the wages he was earning at the time of the work-related injury should be used in the wages he earned previously well working for Snelling staffing should be disregarded 2) challenging the commission's finding with regard to the possibility that he may have become a permanent employee of also revere and how that possibility should affect the determination of his average weekly wage 3) the actual wage calculation of Lampkin, Clark and Adkins.

Respondents' state "claimant erroneously argues his aww should be calculated on the wages he was earning at the job with Alside Revere at the time of his injury." § 42-1-40 AWW defined: "AWW" means the earnings of the injured employee in the employment in which he was working at the time of the injury. The Appellant does not believe this argument is erroneous. The

wages earned during that period working for also revere are not take into account in any way shape or form in calculating the Appellant's average weekly wage.

Respondents reliance on *Pilgrim v. Eaton* is overly broad as the *Pilgrim* court pointed out that no other evidence of been given in regards to his average weekly wage in the Pilgrim did not work regularly and had found the enough file taxes for multiple years prior. Respondents assert that the instant case is similar to Pilgrim however a multitude of evidence was presented as to the hours that would've been worked had the claimant not been injured. Testimony was given that only one person replaced the injured worker and that the one and only position was worked by that person and he regularly received overtime. The Pilgrim court rejected the hourly rate argument as unfair based on lack of evidence where in this case an entire remand hearing was had to address roughly 1 year of wage records by a person of the same grade and character employed in the same class of employment in the same locality or community.

"There is no evidence that claimant had trained and planned for a career at Alside Revere." (Dan Cobb through his deposition testified to the fact that Appellant had been hired due to his class a CDL, for the Respondents to say the Appellant had not planned and trained for this career, although a commercial license was a requirement for it, is akin to saying Mr. Adams, Ms. Hiser and Ms. Nussbaum, have not trained and planned for their careers in law, although, they too, have successfully been licensed by their states licensing body for their chosen profession.)

Respondents' assertion that the Appellants school schedule may once again interfere with his work schedule is unfounded and not supported by the record as he was enrolled in school at the time he was hired by Alside Revere.

The Respondents argue that there is no guarantee the Appellant would have been permanently hired on at Alside Revere. This apparently is an attempt to argue against the

Appellant's 12th issue on appeal." Is the guarantee of continued employment relevant for recovery under title 42?" The Respondents tone once again takes a patronizing approach when they assert "certainly, the legislator, commission and courts are aware of the nature of employment in South Carolina and have developed the statutes, regulations and jurisprudence governing how a WW is calculated with that reality in mind." What the Appellant loves most about this argument, is how the Respondents correctly point out that the justice system had this in mind while developing the statutes. The Appellant would add they had this in mind specifically when they drafted S.C. Code Ann. § 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..."

The Appellant claims that this is clear evidence that possible termination should not be taken into account when calculating average weekly wage.

Respondents argue, "Claimant's arguments about whether an employer-employee relationship existed are misdirected and irrelevant." The Appellant believes he may have confused the Respondents the purpose of pointing out that a new employer employee relationship had been formed between Snelling staffing and John McDaniel is important is because that relationship establishes "the employment working at the time of injury" S.C. Code Ann. § 42-1-40. The right to recover compensation based on the payment the Appellant was receiving at the time of the injury based on the increase in risk associated with an increase of hours worked in a new and more dangerous job.

Omissions: the Respondents fail to address that when a week that only 1 day was worked is counted as a full week in the aww calculation that that results in a substantially lower AWW

than that which would most nearly approximate the amount the worker would be earning were it not for the injury, and how this portion of the calculation is in conflict with § 42-1-40.

Also, Respondents fail to address how the Form 20 calculation that was used as a factor included a week that was not worked at all and a check that was used to correct an underpayment was counted as its own pay period.

The Court must look at the two above omissions as concessions. Respondents argument apparently is that the commission does not have to look at the evidence "The reported wages are the reported wages for the relevant periods of time." and that "the commission does not perform an autopsy on each on each wage report." The Court must find in the Appellants favor by taking its own view of the evidence and finding an AWW of no less than $727 (Lampkin's AWW)

The Respondents make a curious argument that the Appellant is bound to the concession of Jared Lampkin's wage being $618.50 and completely disregard that an entire remand hearing was held where the Appellant argued the Jared Lampkin's wages are reflected by the average weekly wage of $727 and that those wages most accurately reflect what the Appellant would be earning were it not for the injury.

IV WHETHER THE COMMISSION CORRECTLY REJECTED CLAIMANT'S AMENDED FORM 30 AS UNTIMELY FILED.

This issue is a non sequitur as the entire argument put forth by the Respondents is in reference to the amended form 30 being untimely filed and/or defective. Worker's Compensation commission did not find that the form 30 was not timely filed or that it's filing was deficient. Nor were these points raised by the Respondents at the time of the hearing before the full commission. The order is clear "the amended form 30 was untimely served" and the onus of service in this case

lies with the South Carolina Worker's Compensation commission pursuant to 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."

Further Respondents argue that the Appellant's reliance on R. 67-613 and R. 67-610 are misplaced as neither of them are dealing with full commission hearings. These regulations are incorporated via reference under R. 67-708, thus the court should find that this argument has no weight.

V. WHETHER THE COMMISSION PROPERLY REJECTED CLAIMANT'S REQUEST FOR PENALTIES AND/OR SANCTIONS?

The Respondents put forth that the only evidence of late payment of TTD or TPD are date stamps on Appellant's checks which are unidentified and therefore lack any probative value then state, "without any support for his argument that he is entitled to penalties, claimant's assertion that he is entitled to a 10% increase in compensation under SC code and§ 42-9-90 is misplaced and also should be rejected."

Although Respondents have attempted to muddy the issues through 50 pages of rhetoric claiming that the Appellant's issues are all meritless, luckily, sometimes things speak for themselves.

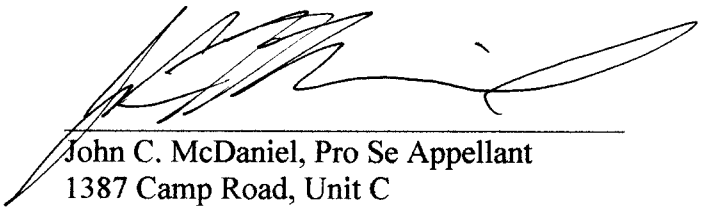
APA p.107 "Check # 21433899....Date:06/11/12....Check Amount: $896.56

Service Period FROM 04/21/12 THRU 05/25/12" this service period, along with the payment amount is clear evidence of the Respondents failed to pay these benefits in accordance with title 42.

APA pg. 113 shows that As of May 21, 2012 the Respondents had not paid TTD and/or

unwieldy" (these hearings are allotted limited time in a limited recovery scheme and the burden rests on the Claimant/Appellant to place enough material in the record to allow for substantial judicial review, this material includes judicially noted matters, findings of fact and conclusions of law, etc.,) where quite simply none of these holdings are correct.

In closing, the Appellant prays this court takes its own view of the case before it and finds in the Appellant's favor on all 16 Issues. The Respondents brief lacks substantial legal foundation and their tenuous positions must not be supported or affirmed by this court.



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October 27, 2014

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APPEAL FROM South Carolina
Workers Compensation Commission

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PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief to Respondents by depositing a copy in the U.S. Mail, postage paid on October 27, 2014 addressed to the below:

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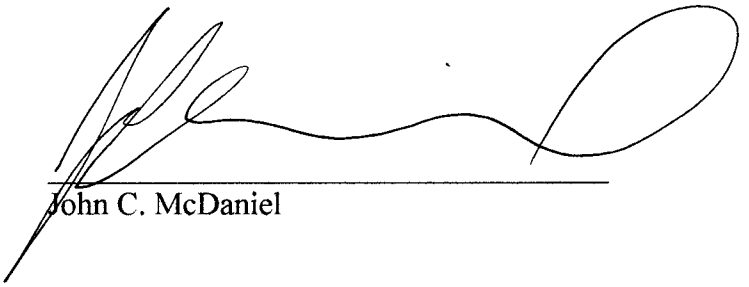

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RE: John C. McDaniel v. Career Employment Professional d/b/a Snelling Staffing
DOI: 11/21/2011
WCC File: 1116275
Appellant Case No: 2014-000186

Dear Ms. Kitchings,

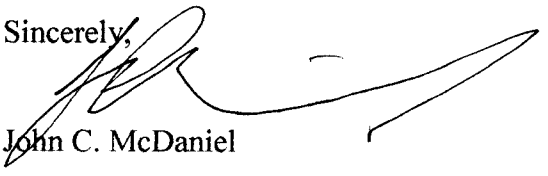
Enclosed for filing, please find

1. Original and One Copy of Appellant's Reply Brief
2. Original and One Copy of Appellant's Proof of Service
3. Originals and Copies of Proof of Service

At your earliest conveniences please file the originals and return the file-stamped copies in the enclosed, self-addressed, stamped envelope.

Please call me if you have any questions about the enclosed. Thank you in advance for your consideration on this matter.

Sincerely,



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