THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals
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Appellate Case No. 2013-001668

Henton T. Clemmons, Jr., ... Appellant/Petitioner,

v.

Lowe's Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services, Inc.,
Carrier, ... Defendants/Respondents.

PETITION FOR REHEARING
AND/OR REHEARING EN BANC

Pursuant to SCACR 221(a), the Appellant hereby petitions the Court for rehearing on the following points that the Appellant would respectfully submit to the Court that the Court overlooked or misapprehended in its decision in this matter as set forth hereinafter. [pursuant to SCACR Rule 219(a and b), the Appellant would request Rehearing en banc after review of the Court for the reasons that: 1) based on the Opinion of the Panel this en banc review is necessary

to secure uniformity of the Court's decisions and 2) a review of the Record and the Petition will clearly indicate to the members of the Court the exceptional importance of a decision on these issues to all workers in the State, present and future, with severe back issues.]

1. That as to the issues that the Appellant would submit were misapprehended or overlooked by the Court and due to the importance of this issue to this worker; to all current workers with severe back injuries pending a decision before the Commission and/or in our Appellate Courts; and to all future injured workers with severe back injuries; and because the current Opinion of the Court is contrary to over sixty (60) years of judicial precedent, this issue decided under **II. Permanent Total Disability, B. Wage Loss** will be addressed first in this Petition for Rehearing. Under the Opinion of the Court the Court contrary to over sixty (60) years of precedent has infused wage loss into and has made it a factual consideration where an award of total and permanent disability, is sought by the worker based on the character of the injury and not based on a loss of earning capacity:

> "The Appellate Panel addressed whether Clemmons was entitled to permanent total disability under **§42-9-30 and** §42-9-10."

Conspicuously absent from the Court's Opinion on this issue under **II. Permanent Total Disability, B. Wage Loss**, but conspicuously present under **II. Permanent Total Disability A. 50% or more loss of use of the back,** is specific reference to

the two applicable subsections of SC Code §42-9-10, subsection (A) and subsection (B).

The Court first misapprehends the issue by starting its analysis on the assumption that the Appellant made two separate requests for an Award for permanent total disability, one based on the character of the injury and one based on wage loss. The Court then, based on that assumption, divides up the Findings of Fact and Conclusions of Law and applies them to 50% or more loss of use to the back (character of injury) and to a total loss of earning capacity (wage loss). [This misreading/misunderstanding in part is due to a classic example of where trial counsel knows what issue was presented and what the basis for the decision was on that issue but on appeal is so focused in on appeal in presenting the unquestionable, uncontradicted sixty (60) years of precedent on that issue, which the Commissioner did not apply, that he leaves the Court to review a cold Record based legal argument. Appellant's Counsel was the only one in the room at oral argument that knew anything about this case at the trial level and while he thought he had presented the issue, he obviously failed by allowing this Court to think there was more than one issue and basis for the Decision.]

While Counsel for the Appellant can readily understand where the Court misapprehended the Decision of the Hearing Commissioner, as affirmed by the Full Commission wherein in

his final Order Findings of Fact concerning loss of use of the back is separated from his Finding and Conclusion of Law concerning not being totally and permanently disabled under §42-9-10 based on wage loss since he had been working for two years, the Court overlooked the fact that the Commissioner was making one decision based on the one issue presented for decision based on the position of the parties and specifically the position of the Claimant and the response to that position by the Defendants at the hearing. The Claimant was not, did not, and is not requesting an award for total and permanent disability based on wage loss but was and is requesting an award for total and permanent disability **based only** on having lost 50% or more of the use of his back. When the Court reviews the Findings based on that singular issue that was presented, there is absolutely no question that the Commissioner considered wage loss in reference to his denial of the Claimant benefits for total and permanent disability under §42-9-30 (21). Quoting from the Record:

> "**By Commissioner Williams:**
>
> There is no credit issue but they would seek the permanency in this case to the back and a permanency award of less than 50% loss of use. The Claimant would allege -- first alleges that he is entitled to a second opinion in this case that he has not yet reached M.M.I.; however if he has reached M.M.I., **Claimant would allege he is permanently and totally disabled for a greater than 50% loss of use to his back**. He would seek lifetime causally related medical treatment under Dodge, a lump sum, and I would guess Utica language under James v. Ann's.

That being said, do the parties want to state anything else for the Record, Ms. Morrow?

By Ms. Morrow:

Your Honor, I just want to add that the basis of the rebuttal presumption obviously is his return to work for almost two full years in response to the Claimant's position that he's perm total based on greater than 50% permanent loss of use of the back."

(ROA, p. 296, l. 19- p. 297, l. 14)

Then in response, Claimant's Counsel made specific reference to the position of the Defendants and stated:

"**By Mr. McDaniel:**

But wage loss has absolutely nothing to do with an award under §42-9-30."

Therefore, there is no question from the Record and it is undeniable from the Record that the **only** request for an award for total and permanent disability at the hearing was based on the character of the injury under SC Code §42-9-30 (21) and it is unquestionable and undeniable that the position of the Defendants was that all it took for them to rebut the presumption was to establish the fact that he was working and in the words of defense counsel at the hearing, again:

"Your Honor, I just want to add that **the basis of the rebuttal presumption obviously is his return to work for almost two full years** in response to **the Claimant's position** that **he's perm total based on greater than 50% loss of use of the back**." (Emphasis added).

Therefore again, there is absolutely no question the

Claimant was only requesting an award and asked the Commissioner based on a review the evidence to make an award for having lost more than 50% of the use of the back and to grant him an award for total and permanent disability due to the character of his injury. There is no question that the position of the Defendants was that because he was working they asked the Commissioner to deny him benefits. Appellant's Counsel would respectfully submit to the Court that there is absolutely no contrary evidence other than it is from that perspective that the Hearing Commissioner reviewed the Record before him and that he based his Decision based on that Record and he made all of his specific findings in reference to the position of the parties. That is undeniable and unquestionable from the Record. While in the final Order Counsel for the Defendants divided the Commissioner's Decision into separate findings on loss of use and permanent disability, in his notes for decision the Commissioner made **one** Finding, Finding #7 on the **one** issue presented to him for decision. (ROA, p. 209; Appellant's Brief, p. 14). The Commissioner as affirmed specifically took into consideration wage loss in making his determination as to the Award under SC Code §42-9-30 (21) which is an error of Law.

Further based on the way this Opinion will be read and applied by the insurance industry to deny and strip the injured workers of our State of benefits under the Workers'

Compensation Act, if this Court will not grant rehearing, the Appellant would request that the Opinion be withdrawn and be rewritten as to address the issues under current sections II. A. and B., under one heading and to make it absolutely clear that while the Commission was presented with one issue, a request for an Award under SC Code §42-9-30(2), because the Court was dealing with two separate Findings of Fact and Conclusions the Court had to interpret one Finding of Fact, where the Commissioner found that the Claimant had sustained a 48%, "disability" to the back in light of another Finding of Fact wherein the Commissioner appeared to be addressing total and permanent disability under the concept of wage loss.

The Court must then make it abundantly clear that under a request for benefits under §42-9-30 (21) wage loss and whether a worker is working are not considerations. If the Court does not do this, it is Counsel's hope and belief that upon rereading the Court will see where this section of the Opinion will be read to allow a Commissioner to deny a Claimant benefits for a severe back injury based on the fact that he is working. This is what the insurance industry has been wanting for decades and is the same exact position that they took in this case before the Hearing Commissioner in response to the request for benefits due to the character of the injury to this Claimant's back. With the trial experience of the Panel Members of the Court, the Court

knows that in every case, make-shift jobs will be created until after the workers' compensation hearing.

Next, the cardinal rule of statutory interpretation is to determine the intent of the legislature and in 1972 the legislature enacted and listed the back as a separately rated scheduled member under SC Code §42-9-30 and provided that where a claimant had lost 50% or more of the functional use of his back to do work that he should be entitled to the same award as if he had both lost both legs or both feet or both arms, or a combination of the two. Because the, "character" of these injuries to a working man or woman are so devastating the legislature recognized that there will be a substantial effect on their ability to earn wages to feed their families. Again, Counsel would implore the Court to look at this and make sure that it separates the line of cases that hold that it is a totally improper consideration in a functional loss of use case in reference to the back to consider whether or not the Claimant is working versus a wage loss claim based on a loss of earning capacity.

As to the precedents that this Opinion can be read to specifically reverse they begin in 1957 with the case of Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99, S.E.2d 52 (1957)[1]:

[1] While this quotation in 1957 represents almost sixty (60) years of jurisprudence, actually the insurance industry began as early as 1946 (seventy (70) years ago) trying to argue that an injured worker should not be entitled to an award of money for loss of use where he had no diminution of earning capacity or loss of earnings. However, that argument was specifically rejected at that time in the case of Ripley v. Anderson Cotton Mills, 209 S.C. 401, 40 S.E.2d 508 (1946) and in the case of Hoke v. Cherokee County, 216 S.C. 378, 58 S.E.2d 330 (1950).

> "It is well settled that award may be made, . . . for loss, or loss of use, of a specific member, though there be no showing that the injured employee has suffered loss of earnings or of earning capacity."

Then after the back became rated in 1972, the attack continued and this Court in the case of Bateman v. Town and Country Furniture, 287 S.C. 158, 336 S.E.2d 890 (S.C. App. 1985) soundly again rejected the insurance industry's attempt to inject wage loss into a scheduled member award and an award for total and permanent disability specifically based on having lost 50% or more of the use of the back. (SC App. 1985). Quoting from Bateman:

> "We hold a claimant who suffers a 50% or more loss of use of the back need not show a loss of earning capacity to recover permanent total disability under §42-9-10 (1976)." (Emphasis added).

Again, the insurance industry continued the assault and in 1993 the Defendants came before this Court and asked this Court to reconsider Bateman, supra, specifically on the basis that Mr. Lyles was working and there had been no effect on his earning capacity. Quoting from the Lyles Opinion:

> "The Appellants contend the Circuit Court erred in applying SC Code Ann. §42-9-30, which presumes Lyles has suffered a loss of earning capacity, because his injury has not affected his job performance. . . they urged this Court to reconsider Bateman, which allows the payment of total and permanent disability benefits to a claimant who has not lost earnings."

After quoting the time honored Decision on this issue and what the Court referred to as being, "it is well settled that

an award" under the, "scheduled loss statute" is based on the character of the injury, not a loss of earning capacity and after an extensive footnote referring to the previous decisions of our Appellate Courts under a back claim for loss of use, the Court stated:

> "Accordingly, we decline to disregard the command of SC Code Ann. §42-9-30 or to reconsider Bateman."

Therefore again, the Appellant would submit that the Court misapprehended and misconstrued the position of the parties and the award that was requested and that all of the Findings of Fact of the Hearing Commissioner were made in reference to that claim for benefits and most importantly in making that decision the Commissioner specifically considered the fact that, "the Claimant had been working for almost two years," a consideration that cannot be made in a scheduled member award case.[2]

Finally in reference to the Court's misapprehension and overlooking of the position of the parties (which only concerned one issue, total and permanent disability based on the character of the injury - 50% or more loss of use of the back) and the Findings of Fact and Conclusions of Law made by the Commissioner which were in reference to that position but which the Court bifurcated, assuming arguendo that the

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[2] During oral argument of this case, Chief Judge Few (the Record of Argument will show) asked Counsel for the Respondents as to whether or not Mr. Clemmons was still working. Respondents' Counsel who was not Counsel for the Respondents before the Commission responded that he was. Appellant's Counsel was not asked this question and based on the question of the Court, did not have a chance to address this issue in reply argument. Since this question was asked, Counsel would hereby notify the Court that after the Full Commission Decision and during the pendency of this appeal, Mr. Clemmons was fired from his job with Lowe's.

Finding of Fact and Conclusion of Law made by the Hearing Commissioner that Mr. Clemmons was not entitled to an award for total and permanent disability under a claim for wage loss under §42-9-10 and assuming that it was the position of the Appellant that he was entitled to an Award for total and permanent disability based on wage loss, let's apply our jurisprudence to that finding.

First, the one Finding of Fact and Conclusion of Law on this issue is totally inadequate to allow for judicial review and this case at a minimum would have to be remanded. Because a claimant's right to trial by jury was taken away, the Commission is charged with the responsibility (since they are the fact-finder and so that this Court may properly review whether or not their Findings of Fact are based on the evidence presented and whether their Conclusions of Law are in accordance with the law) to make detailed Findings of Fact and Conclusions of Law which are sufficiently definite enough to allow for a review of this one man/one woman fact-finder decision that is binding on the parties after review by a three-member panel of their fellow Commissioners.

Next and regardless of inadequacy, let's apply the law to it. While the definition of total disability for loss of earning capacity has been the law since at least 1955 when the Supreme Court made the decision in Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955), this Court applied and restated that time-honored definition, in

the case of McCullum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (SC App. 1989) wherein this Court quoted from the cases concerning the definition and meaning of total disability under the Workers' Compensation Act:

> "A question arose as to whether employability meant the ability to be hired or the ability to actually perform the work. Under the Workers' Compensation Law 'total disability' does not require complete, abject helplessness. Rather it is the inability to perform services other than those that are so limited in quality, dependability, **or** quantity that no reasonably stable job market exists for them. . . . evidence that the claimant has been able to earn occasional wages **or perform certain kinds of gainful work does not necessarily rule out a finding of total disability** or require that it be reduced to partial." (Emphasis added).

In Colvin as this Court well knows, the Supreme Court did a survey of the law across the United States and found that there were many cases where an injured worker had been given an award for total disability under this definition wherein in fact he was able to work in certain limited jobs. See also: Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). So, assuming that the Commissioner was trying to find and rule that Mr. Clemmons was not entitled to an award for total and permanent disability due to wage loss, his conclusion not only begs the question where is there any substantial evidence recited to support that finding but more importantly where is a legally sufficient finding? The Commissioner does not set out the evidence to support it so he has violated the very principle that has been laid out for

review under a wage loss concept in making his decision. If this Court is going to sanction this and say that this Commissioner made the decision that Mr. Clemmons was not entitled to an award for total and permanent disability due to wage loss then the Court must require the Commission to make adequate Findings of Fact and must set out the Conclusion of Law that he applied to that Finding. This Court will not find one reference in the Order to the definition to be applied and in fact will only find the following Conclusion of Law which is:

> "9. Pursuant to SC Code Ann. §42-9-10, the claimant is not permanently and totally disabled as claimant has returned back to work with the employer for almost two years." (ROA, p. 42).

This is absolutely inadequate to allow for judicial review, much less constituting substantial evidence under the definition. That is both an error of law and an error of fact in reference to substantial evidence in the Record. The evidence is that the claimant was only able to work for Lowe's with substantial accommodations. There is simply no substantial evidence in the Record that he could perform without those substantial accommodations made by Lowe's. Regardless there is no conclusion of law setting forth the facts and applying those facts concerning wage loss to our definition of total disability under the Act. The fact that he is working is totally insufficient even under wage loss. It is a mere assumption not based on evidence on behalf of

the Commissioner in the Order as written and this Court is bound to apply and to review just the specific Findings and Conclusions of Law made.

2. That the Court under **I. Form 21 Request for Hearing; A. Due Process; and under B. Authority to Hear Claim**, misapprehended and/or overlooked: the uniqueness of the Workers' Compensation Act in reference to due process protections; that the Claimant/Appellant was in fact alleging both substantive and procedural due process violations in the setting of a hearing at the Defendants' request in reference to a determination of the Appellants property interest; the lack of any constitutionally protected property interests in the Defendants/Respondents created by the Workers' Compensation Act; and that the Act creates no right on behalf of the Defendants/Respondents to bring an action for a determination of the Claimant's protected property right and entitlement to benefits under the Act.

First, in 1936 the Legislature enacted a statutory scheme for the provision of workers' compensation benefits payable for injuries on the job which Act provided for an exclusive compensatory system which replaced and was in derogation of the injured worker's rights to trial by jury under the common law. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d, 889 (1941). Under that mandatory compensation system, which is a statutorily governmentally created system of benefits, those benefits are not paid by

the Government but are actually required to be paid by the employer and/or its insurance carrier, and are thus paid by private entities. The Court will find almost no similar type of law in our Nation to the Workers' Compensation Acts and because of that the vast majority of the decisions ranging from the decisions of the United States Supreme Court to our own Supreme Court and other State and Federal Appellate Court decisions have applied the concepts of and due process protections under, the 5th and 14th Amendments of the U.S. Constitution and Article I §3 of our State Constitution, to the deprivation of individual property rights based on governmental action. For example, in both of the cases cited by the Court in its analysis Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (SC App. 2009) and Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9, not only do both of these cases arise out of governmental action but all of the authority in those decisions trace back to decisions by the United States Supreme Court applying the concepts of due process to actions taken by the Federal or State governments. See for example: Matthews v. Eldridge, 424 U.S. 319, 96 S.C. 893, 47 L.Ed.2d 18 (1976). However, there is a line of cases which is the appropriate line of cases that should be applied in this case which are cases decided by the United States Supreme Court and other Courts that apply due process protections to private action taken under the color of State law by private parties. See for example: Sniadacker v. Family

Finance Corp., 395 S.C. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Since at least 1940, our State Supreme Court has held that all of the due process safeguards both procedural and substantive apply to hearings and proceedings under the Workers' Compensation Act. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

The Court in its opinion does not challenge the fact that the injured worker has a constitutionally protected property right in his entitlement to benefits under the Workers' Compensation Act. The Appellant never challenged the constitutionality of SC Code §42-17-20 but challenges both its interpretation and its application to allow a private party (the Respondents) under the color of State law who has no protected property right or interest to bring an action for a premature determination of the Appellant's constitutionally protected property rights especially whereas here the Appellant objected to that determination.

The very purpose of substantive due process is to prohibit the government from engaging in arbitrary or wrongful acts, "regardless of the fairness of the procedures used to implement them". Sloan v. SC Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). In the case of Moore v. Moore, 376 S.C. 467. 657 S.E.2d 743 (2008), the Supreme Court held that where an emergency hearing was requested on a petition for protection under a State law by a private individual, the husband's wife in that

case, that the husband's substantive due process rights were implicated by the proceedings. In this case as set forth herein below, the Commission and now this Court in its Opinion has interpreted SC Code §42-17-20 in such a way as to allow the Respondents in this case to bring an action to determine the constitutionally protected property rights of the Appellant, where the Appellant has made no such request, thereby allowing the Respondent, a private party, to deprive or force a pre-mature determination of the Appellant's constitutionally protected property rights under color of State law. Again, as argued previously, the Respondents have no property right or interest in the Appellant's entitlement to benefits and the determination of what those benefits are and therefore they have no right to bring an action and/or to decide when a determination will be made as to those property rights. Those property rights are owned by the injured worker, the Appellant in this case.

From a procedural standpoint, the Court in reciting the time honored rendition of rights to which one is entitled under procedural due process left out some very important words and entitlements from that definition. Again citing from Sloan v. SC Board of Physical Therapy Examiners, supra, which simply refers to the previous Decisions of the Supreme Court on this issue in administrative hearings, what is left out is the highlighted part of the definition where it is a:

> "contested case or hearing which effects an individual's property or liberty interest (due process), generally include adequate

> notice, the opportunity to be heard **at a meaningful time and in a meaningful way**, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts and the right to meaningful judicial review."

The Court left out of its consideration the requirement of procedural due process that the Appellant must be heard at, "a meaningful time" and in a, "meaningful way" in reference again to his constitutionally protected property rights. These are the injured worker's, the Appellant's, property rights in this case; not the Respondents. The requirements of due process in any particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur. Referring to the very fundamental principle and basis behind workers' compensation from Cokely:

> "its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage . . ."
>
> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws **shall be liberally construed in favor of the employees and their dependents**, in furtherance of the beneficent purposes for which they were enacted and to avoid any

incongruous or harsh results." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emphasis added).

The Appellant would submit that his entitlement to benefits to have some commodity of compensation to compensate he and his family for his inability to work involves one of the most fundamental rights that exists under our Constitutional form of government. He cannot work and/or his ability to earn wages to feed his family is extremely limited by the severe injury that the worker, Mr. Clemmons, has sustained and the purpose of the compensation laws are to partially compensate those workers' for that loss. The party that owns that constitutionally protected property right under our Constitution is the injured worker and his constitutionally protected rights should not be determined whenever somebody else decides that there needs to be a determination of those rights. Again, as previously argued there is no other situation where a defendant or a person responsible to pay an individual or who may be responsible/liable to pay an individual can prematurely bring an action to force a determination of that person's entitlement to benefits or damages.

Further the Court misinterprets SC Code §42-17-20 as giving a right to the Respondents to file for a determination of benefits. In the Court's quotation from the statute the Court either misapprehended or overlooked the very limiting language as to the limited right the Respondents have to file

for a hearing, so to quote SC Code §42-17-20 fully as to include the pertinent part:

> "If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this Title within fourteen (14) days after the employer has knowledge of the injury *or after death, or if they have reached such an agreement which has been signed and filed with the Commission and compensation has been paid or is due in accordance therewith and the parties thereto then disagree* **as to the continuance of weekly payments** under such agreement, either party may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon. . . ." (***Language not included in Court's quote***).[3]

Prior to the enactment of SC Code §42-9-260, the specific stop payment provision, §42-17-20 was the only stop payment statute that existed under the Act from the inception of the Act and as noted above, it is limited to a hearing on the, "continuance of weekly payments".

One of the two fundamental principles of construction of the Workers' Compensation Act that was overlooked or misapprehended by the Court in its Decision interpreting S.C. Code §42-17-20 is that since this statute is in derogation of common law rights, the Court must strictly construe the language of the statute and leave it to the Legislature to amend and define any ambiguities. Wigfall v. Tideland Utility, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). Also recited in Wigfall in addition to holding that the

[3] While the Respondents intentionally left this language out of their quote in the Brief to the Court, the Appellant is sure this language was accidently overlooked by the Court.

compensation statutes must be strictly construed, this Court held that where a statute's language is plain, unambiguous and conveys a clear meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. Wigfall v. Tideland Utility, Inc., supra; Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). (Emphasis added) In this case, the Statute is specifically limited to the right of the parties to ask for a hearing for a determination as to whether or not the injured worker, the Appellant, is entitled to, "**a continuance of** weekly payments". There is **no** language that says that the Respondents are entitled to a hearing to determine benefits.

3. That under that part of the argument, **II. B. Wage Loss**, the Court misapprehended or overlooked and applied the wrong section and the wrong definition of total and permanent disability under SC Code §42-9-10. Outside of the fact that no request was made to either the Single Commissioner or the Full Commission for an Award based on wage loss (see Argument 2. as set forth above) and irrespective of the fact that under the Court's decision there is no reference to the various subsections of SC Code §42-9-10, the Court sets forth the legal premise that:

> "we find no error in the Appellate Panel's analysis because loss of earning capacity is generally a prerequisite to a finding of total and permanent disability under §42-9-10."

This is patently a wrong reading of the statute. Under SC

Code §42-9-10 there are two definitions to be applied for total and permanent disability. Under subsection A the Court is correct in that one way a Claimant can obtain an Award for total and permanent disability is based on a total loss of earning capacity as defined by the Act. However, under subsection B there is a second definition and way that a Claimant can be declared entitled to an Award for total and permanent disability and it is the same as the one that is found under subsection §42-9-30(21) which is that the Claimant is entitled to an Award for total and permanent disability based strictly on the character of the injury. Since no issue of wage loss was presented to either the Hearing Commissioner or the Full Commission and no decision was made on that basis and more importantly, because there are two definitions of total and permanent disability or ways that a Claimant can be entitled to an Award for total and permanent disability, the Court should grant rehearing or at a minimum must modify the Opinion to clearly set forth the subsections of SC Code §42-9-10 to which the Court is referring. The way the Court's Opinion is currently written, it gives a total, inappropriate, inaccurate and wrong definition as far as the way that a Claimant may be awarded total and permanent disability under SC Code §42-9-10 which has in fact four (4) specifically, separate and distinct subsections. Under subsection B, this left-handed lawyer could lose his right leg and right arm and not have a dime's

loss of earning capacity but is still entitled to an Award for total and permanent disability.

4. That the Court misapprehended or overlooked the impairment rating given by Dr. Drye which served as the basis for the Court's sustaining the Decision of the Commission of not addressing a separate rating for the Claimant's myelopathy.

Dr. Drye gave the Claimant an impairment rating based on his referral,

> "to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and would assign him a DRE cervical category IV resulting in a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and myelopic residual symptoms."[4]

There is no question that Dr. Drye diagnosed Mr. Clemmons with a, "myelopathy" (ROA, pp. 102, 103, 106-111) and that every other physician that has seen or evaluated him diagnosed him with a separate condition of myelopathy. Myelopathy as compared to radiculopathy is a specific injury to the spinal cord whereas a radiculopathy is a

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[4] At oral argument there was a discussion about the AMA Guides and those containing no reference to or applying to loss of use and disability which Counsel assumes the Court reviewed since it looked up the definition of the back in the dictionary. Regardless quoting p. 4 and 5 of the AMA Guides 5th Edition:

P. 4
"Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect . . . an individual's ability to perform common activities of daily living (ADL), excluding work.

The whole person impairment percentages listed in the 'Guides' estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work."

P.5
"The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is not included in the clinical judgment for impairment purposes. . . . As a result, impairment ratings are not intended for use as direct determination of work disability."

disease/condition of a spinal nerve root where the spinal nerve exits the spinal cord. Stedman's Medical Dictionary, 28th Ed. Not only did Dr. Drye not convert his whole person rating to a cervical spine rating but since Mr. Clemmons has an agreed upon spinal cord injury consisting of a myelopathy, he failed to provide him with a separate rating as required by the AMA Guides to the Rating of Permanent Physical Impairment, Fifth Edition, Chapter 13 that he used. The Appellant would specifically reference p. 336, subsection 13.5, "Criteria for Rating Impairments of Station, Gait, and Movement Disorders". Dr. Drye's rating was given under Chapter 15, "The Spine", subsection 15.6, "DRE: Cervical Spine, Table 15.5". However at the conclusion of that Chapter (15) concerning the impairment ratings to the, "The Spine", section 15.15, "Spine Evaluation Summary" specifically provides that any ratings to the spine is to be combined with other impairments including neurological impairments. Thus, there is no question if Dr. Drye is referencing an impairment under the AMA Guides which is what he did, those Guides require and the Commission should have taken into consideration the fact that he did not give a separate rating for that specific spinal injury. The only substantive evidence on this issue, that is to say the separate spinal cord injury which is what a myelopathy is, is that coming from Dr. Howard Mandell, a board certified neurologist. In that regard, one must also look at what the

Appellant would submit the Court overlooked which is Dr. Mandell's complete statement in reference to the myelopathy wherein right before that part quoted in the Opinion, Dr. Mandell states, "he still has spasticity in his legs, brief hyperreflexia, difficulty with coordination, inability to run and difficulty with balance." He then says, "I would say he . . . still has this 15% neurological injury left over." This is in exact accordance with all of the findings of all of the physicians that evaluated and/or treated Mr. Clemmons, even Dr. Drye. Therefore the very Guides used by Dr. Drye to establish his impairment rating require him to address the myelopathy separately as a separate neurological injury and the only substantial evidence in the Record is that from Dr. Mandell on that issue.

The law requires the Commission to address every body part affected and issue presented. There is no mention of the myelopathy or the neurologic injury in the Findings of Fact or Conclusions of Law. Wigfall, supra; Lail v. Georgia Pacific Corp., 285 S.C. 234, 328 S.E.2d 911 (1985). This Court has repeatedly rejected "implicit rulings" by the Commission so why is it sanctioning this now in this case? Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 535 S.E.2d 146 (2000). Why also is the Court sanctioning and actually itself criticizing the medical opinion of Dr. Mandell on the basis he does not use the word "impairment"? The word "impairment" is not used in the Veterans

Administration Disability Rating Guide nor in the Act and is not used by many of the doctors' opinions found in the thousands of cases decided by our Appellate Courts.

5. That in the section of the Opinion **IV. Low Back Injury**, the Court misapprehended the argument being made by the Appellant and overlooked the evidence on this issue.

From a medical impairment standpoint, a review of Dr. Drye's final evaluation before release on June 7, 2011 will show no reference to any problem with nor any evaluation or rating to the lumbar spine, commonly referred to as the low back, and that his rating was specifically only in reference to the cervical spine, including a 25% whole person impairment rating due to the, "cervical category IV" rating table. (The Appellant would ask the Court to take note that Dr. Drye's rating was 25% to the, "whole person" under section 15.13 "Criteria for Converting Whole Person Impairment to Regional Spine Impairment" converts to a 71% rating to the cervical spine; See page 427, AMA Guides 5th Edition). When Dr. Drye saw Mr. Clemmons again to see if he had undergone a change of condition on June 18, 2012, he made no change in his impairment rating.

Ms. Tracy Hill, RPT who performed the Functional Capacity Evaluation noted increased lumbar pain in reference to: floor to waist lift, 12 inch to waist lift, dynamic two-handed carry, dynamic push and pull and sitting tolerance. (ROA, pp. 154-162). She noted increased lumbar and cervical

pain in reference to waist to shoulder lift. She also did an AMA Guide valid range of motion evaluation which showed significant lumbar range of motion limitations. (ROA, p. 149).

Dr. Forrest who performed an Independent Medical Evaluation on Mr. Clemmons found that Mr. Clemmons had sustained a 30% impairment to the neck, related symptoms and problems and concerning the low back related symptoms and problems, he defined a 10% whole person impairment. (30% would convert to 86% as a regional rating to the cervical spine and 10% would convert to 13.33% regional rating to the lumbar spine.)

In reference to the Findings of Fact which are supposed to be sufficiently detailed and definite enough to allow the Court to determine whether or not they are based on the evidence and whether or not the law has been properly applied, in Finding of Fact #8 the Commissioner stated that, "Dr. Drye's reports and conclusions are most persuasive. In Finding of Fact #10, the Hearing Commissioner found that the Claimant had a 48% permanent partial disability to his back and in Finding of Fact #11, he stated that the permanent partial disability includes any radicular symptoms to his right leg. There is simply no Finding that either the myelopathy (neurological injury) or the low back injury/impairment/loss of use was considered. Dr. Drye simply did not address the low back impairment and never

addressed whether or not there was an impairment to the low back stemming from the injury in his opinion and neither did the Commissioner.

The Appellant in making the argument that the low back was not considered does not seek a separate Award for the low back versus for the upper back, but there should be a Finding of Fact and the Commission should have taken into consideration in making whatever Award he was going to make the low back and the myelopathy wherein there is simply no Finding of Fact that that was in fact done or considered. The Court cites the case of Lyles v. Quantum Chemical Co., 315 S.C. 440, 334 S.E.2d 292 (SC App. 1993) with authority and approval which the Court will note was also cited by the Appellant in his argument. As part of that Decision the Court cited with approval the Finding by the Hearing Commissioner which noted that, "the only injury with which this case is concerned [about] is the low[er] back." The Appellant would also ask the Court to take into consideration it's Decision in reference to this issue in Nettles v. Spartanburg School Dist., supra, and the Finding of Facts in that case wherein the Commission talked about the neck as part of the back. In this case in its Form 51 in response to the Form 50 requesting benefits, "the employer/carrier admits the Claimant sustained a compensable injury to the low back and right knee. (ROA, p. 68). In their Pre-Hearing Brief filed as a result of the Form 21 filing by the Respondents the

employer/carrier specifically agreed that the, "injured worker sustained compensable injuries to the back, neck and right knee. (ROA, p. 78). In the Consent Agreement that resulted in an Order of the Commission confirming the agreement, the Defendants, Respondents in this Court, agreed, "to accept the back, neck and right knee as compensable injuries and agreed to reinstate the Claimant's medical treatment on December 30, 2010." As referred to above, while there is constant referral to separate injuries to the low back and to the neck, there is simply no reference to any separate consideration for the low back by the Commissioner. While this Court may not reverse a Decision or remand a Decision where there **is** substantial evidence in the Record to support the decision, where there simply **is no** substantial evidence in the Record to support the decision; the Court cannot affirm a decision. In Nettles wherein the Commission's Findings of Fact and Conclusions had, "implicitly" considered the hip and this Court found that those implicit rulings concerning the hip in that case were, "to indefinite for this Court to review," the Court held that the Commission must make specific Findings of Fact on all issues upon which a Claimant's right to compensation are based and that:

> "this Court cannot make Findings of Fact when the Commission has failed to do so, because, in doing so, this Court would improperly assume the Commission's role as fact finder." Nettles, supra.

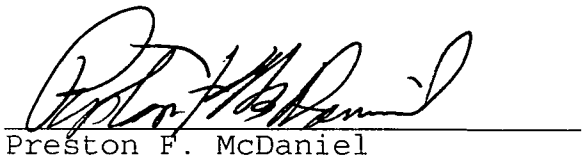
Like Nettles, The Appellant would ask the Court to reconsider its Opinion in this regard because the Court is here again justifying, "implicit" Findings made by the Commission and at a minimum, this case should be remanded to make specific Findings of Fact concerning the low back and also in reference to the myelopathy. Query: Based on this Court's repeated recognition of the separate parts of the back (in layman's terms low back and neck) why is there a criticism of this recognition by the Court in this case?

CONCLUSION

For all the foregoing reasons, the Appellant would respectfully request reconsideration and in fact rehearing en banc and would truly appreciate the opportunity to re-argue this case to the Court Panel or en banc with any amount of time that the Court will give to Appellant's Counsel so that we can thoroughly go over all the issues and the Record. Again, as cited in the Petition for Rehearing as worded, this Opinion will have a devastating effect and will open the doors to many claimants with very serious back conditions resulting from work-related injuries being denied substantial benefits and will require in every case that the claimant prove they have sustained a total wage loss in order to receive the maximum benefits awardable under the Act. (Which is only 9 and 2/3rds years of compensation at a claimant's current compensation rate and does not take into consideration future wage increases and the claimant's age).

Mr. Clemmons, for example, in this case is 43 years old and but for this injury would have at least 23 years of earning capacity to only the age of Social Security retirement and the benefits allowable under the Workers' Compensation Act even at the maximum amount will nowhere near compensate him for his loss.

Respectfully submitted,



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Attorney for Appellant/Petitioner

April 16, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED
APR 16 2015
SC Court of Appeals

Appellate Case No. 2013-001668

Henton T. Clemmons, Jr., ... Appellant/Petitioner,

v.

Lowe's Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services, Inc.,
Carrier, ... Defendants/Respondents.

PROOF OF SERVICE

I certify that I have served the **PETITION FOR REHEARING AND/OR REHEARING EN BANC** on the Defendants/Respondents by depositing a copy of it in the United States Mail, postage prepaid, on **April 16, 2015**, addressed to its attorneys of record: Weston Adams, III, Esquire and Kelly F. Morrow, Attorney, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211, Helen F. Hiser, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 650007, Mt. Pleasant, SC 29465 and M. McMullen Taylor, Attorney at Law, Post Office Box 8567, Columbia, SC 29202.

Dated: April 16, 2015

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Proudly representing injured workers
for over 25 years.

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April 16, 2015

RECEIVED
APR 16 2015
SC Court of Appeals

HAND DELIVERED
Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Henton T. Clemmons, Jr., Employee, Appellant v. Lowe's Home Centers, Inc.-Harbison, Employer, and Sedgwick Claims Management Services, Inc., Carrier, Respondents. Appellate Case No. 2013-001668

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant's **PETITION FOR REHEARING AND/OR REHEARING EN BANC** in the above-referenced matter, along with the required filing fee of $25.00. Please file the original and return a clocked-in copy to me in the enclosed, self-addressed, stamped envelope.

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

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: Weston Adams, III, Esquire
Helen F. Hiser, Attorney
M. McMullen Taylor, Attorney
Mr. Henton T. Clemmons