THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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.

REPLY TO RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR REHEARING AND/OR REHEARING EN BANC

Pursuant to SCACR 221 and 240, by way of Reply to the Respondents' Return in Opposition to the Petition for Rehearing, the Appellant would respectfully submit unto the Court:

1. By way of Reply to the Respondents' argument, **I., "Claimant presents no valid reason why this Court should rehear its ruling that Claimant failed to prove he was permanently and totally disabled under either §42-9-10 or**

§42-9-30" (emphasis added), the Appellant would submit that:

'The Claimant readily admits as to Respondents' reference as to what is in his Pre-Hearing Brief. However the Respondents try to divert the Court's attention from the issues that were actually presented for decision at the hearing. What Respondents continue to try to get the Court to ignore is that there is no question that both Counsel for the Claimant and Counsel for the Defendants placed the Commissioner on notice that the only issue before him for decision was whether or not the Claimant was entitled to an Award for a scheduled member loss under §42-9-30(21) and due to character of the injury of having sustained more than 50%, **"loss of use"** of the back that he was entitled to an award for total and permanent disability under SC Code §42-9-10(**B**). Due process requires that the parties receive notice of the issues to be met on trial, hearing or appeal but it is also the requirement that the Hearing Commissioner to stay within the Record and make a decision on just the issues presented at trial and make his decision based on the issues that are presented him for decision. Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (SC App. 1993). When the Findings of Fact made by the Hearing Commissioner which this Courts bifurcated are reconsidered in light of the issue that was presented to the Commissioner for decision, i.e., total and permanent disability due to the scheduled member injury to the back, in other words, an entitlement to total and

permanent disability due to the character of the injury and not wage loss, the Court will readily see how the Court overlooked that that was the only issue before the Commission and should not have bifurcated the Findings of Fact and should have reversed the Commission for considering wage loss.

Next, the Respondents try to twist the evidence submitted from a vocational standpoint under the United States Department of Labor's Dictionary of Occupational Titles and its physical demand work classification system. The Court has read many vocational evaluations in its decisions of cases and the Court will readily note that this vocational report is not focused on a wage-loss analysis but is focused on the limitation on his labor market access based on and due to **his physical limitation caused by the functional loss of use of his back to do work requiring the use of his back.** The Court will note that the functional capacity evaluation found that the Claimant was limited to, "limited light work" applying the Dictionary of Occupational Titles Physical Demand Classification system. The Court will readily see and the vocational evaluation found at pp. 194, 195 that the vocational expert was applying the physical demand classification system and his physical functional loss of use of his back, or in other words, the physical limitation he has to be able to do work because of the injury to his back. He cannot perform three entire categories of

physical demand work classifications due strictly to his **physical limitations from his work-related injury to his back**.

Again, under this argument the Respondents refer to the bifurcated findings which simply were not made by the Hearing Commissioner in his original notes. The Commissioner made one finding containing both his opinion on the limitation of the use of the back and wage loss, i.e., he is not totally disabled because he is working.

Next, there is no question that the Respondents again are trying to infuse wage loss into a §42-9-30(21) claim which is based purely and simply on loss of use of the back. There is no way the Court's current Decision can be reconciled with its previous decisions under a scheduled member loss of use to the back claim for total and permanent disability. Their argument like the Court's decision stated the Commission did not err by finding the Claimant not totally disabled under "42-9-10 and 42-9-30". The basis is totally and exclusively different: wage loss vs. character of injury.

As previously argued and will not be reargued here other than a brief statement, words are always important in the law but they are particularly important in the Workers' Compensation Act. One of the fundamental principles that this Court is duty bound to apply to the provisions of the Act is that the Court will leave it to the Legislature to

resolve any discrepancies. The Court will not find the word "disability" in SC Code §42-9-30(21) or in fact anywhere in the entire scheduled member award statute. The Commission under that statute is to determine, "loss of use" and that is exactly the evidence that the Appellant presented and that the Respondents did not present or refute in this case. They chose to do that and that is their error. Words are important and we must stop the indiscriminate misuse of words in reference to the Workers' Compensation Act because it is giving a warped meaning to what the Act is supposed to be about and the wording that has been chosen by the Legislature. For example, the Supreme Court specifically found that the Legislature's failure to include the word "partial" and to include the word "total" in reference to lump sum awards under §42-9-10(C) allowed for, "partial" lump sum awards in lifetime benefits cases. Glover by Cauthen v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995). The same is true and this Court must review the Supreme Court's decision in Stone v. Roadway Express, Employer, 367 S.C. 575, 627 S.E.2d 695 (2006) in which the Court again found wording extremely important and denied benefits based specifically on the wording of the statute. In Stone, the Court also drew a clear distinction between total and permanent disability based on wage loss under paragraph 1 of §42-9-10 and total and permanent disability under §42-9-10, paragraph 2, and **also** under the scheduled member statute, which is what this

case is all about, §42-9-30.

In reference to the Respondents' response to the Appellant's argument of the effect of the Opinion upon injured workers and what the Respondents characterize as the Appellant's "forecast of doom", after the 2007 Amendments, appeals are directly to this Court instead of to the Circuit Court under SC Code §1-23-380. That Code Section specifically allows the Court reviewing the Record to remand the case for additional evidence. If granted, Counsel for the Appellant would welcome the opportunity to take the deposition of the Executive Director of the SC Workers' Compensation Commission as to the number of Awards for total and permanent disability for having lost more than 50% of the use of the back and also where the Claimant has been given a job.

Next, Counsel for the Respondents makes the argument and Appellant's Counsel agree that Counsel is exactly correct, the decision of this Court is to be made based on the Record on Appeal. SC Code §42-9-30(21) provides that the determination that is to be made by the Commissioner and the Award and decision to be made is for **"loss of use"** to the back. It does not contain the word "disability" and it does not contain the word "impairment". The only evidence submitted on the functional loss of use of the Claimant's back to do work requiring the use of his back was that of the Claimant and two (2) doctors. That is a fact that the

Respondents have to live with. The Appellant readily believes that the Court when it compares its prior decisions in Bateman v. Town and County Furniture, 287 S.C. 158, 336 S.E.2d 890 (SC App. 1985). Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993) and McCullom v. Singer, 300 S.C. 103, 386 S.E.2d 471 (SC App. 1989) to the Record, will see that these cases are totally irreconcilable with the Court's current decision which infuses wage loss again into an award request under §42-9-30(21) and will grant rehearing en banc.

Finally, as to Respondents response contained in footnote 6 and footnote 4, first as to footnote 6 and what the insurance industry has been fighting for, based on a review of all the cases cited in reference to the back and scheduled member awards, and as previously argued, at least beginning with Roper v. Kimbrell's in 1957, Appellant's Counsel stands by that statement. In reference to footnote 4, as previously noted by Appellant's Counsel, Counsel thought the question at oral argument was outside of the Record that was asked by the Court. Since Counsel for the Respondents chose to refer to Appellant's Counsel's comment in the Petition about this question asked by the Court as being both, "irrelevant and highly inappropriate", Counsel for the Appellant would simply query the Court: If it was an inappropriate question outside the Record, why did Respondents' Counsel not simply say I cannot answer that

because it is outside of the Record before you. Instead Counsel readily admits to responding something along the line that, "Counsel simply responded that she did not know for certain but that she presumed Claimant was still working." It is always hard when Counsel is placed in such a situation involving a question outside of the Record as to how to respond and Counsel for the Appellant does not think that Counsel for the Respondents response was inappropriate but she did give an evidentiary response or at least took the opportunity to indicate that the employee was still working. Counsel for Appellant does not think her response was inappropriate but he also does not think his is either.

2. In response to **"II. Claimant presents no valid reason why this Court should rehear its ruling that Claimant's due process rights were not violated and the Commission had jurisdiction to hear and decide this claim",** Counsel in reply would submit:

A summary review of the vast majority of the argument will show that it refers to whether or not the Claimant has a vested right in, "TTD", obviously referring to temporary total disability benefits. At no time did or has the Claimant/Appellant ever challenged the right of the Defendants to stop temporary total disability benefits and that the Statute gives the Respondents the right both under SC Code §42-17-20, which is the old Stop Payment Statute, and under §42-9-260 to request a hearing to stop temporary weekly

compensation payments. The Claimant/Appellant's problem is with the determination of whether or not he or any worker is entitled to an award for either having sustained permanent wage loss or loss of use of a member, organ or bodily part under the Act. The Respondents in making their initial argument, and again here, have tried to compare apples to oranges. They cited the wrong parts of the Statute to the Court leaving out the specific language under SC Code §42-17-20 that specifically limits their right to request a hearing strictly to the termination of weekly compensation benefits and not to be able to request a hearing on the Claimant's property right to permanent disability or loss of use benefits under the Act.

Next, the Supreme Court of South Carolina, not Appellant's Counsel has determined that the Appellant has a vested property interest in workers' compensation benefits as is required for under due process requirements to apply as defined by the United States Supreme Court, all of our Federal Courts, and the South Carolina Appellate Courts.

The Respondents miss the whole purpose of the referral to Sniadach v. Family Finance Corp., 305 U.S. 337, 89 S.Ct. 1820 (1969). The Respondents had argued that concepts of substantive due process do not apply and referred to a litany of cases referring to state action. The Appellant was pointing out that substantive due process and procedural due process apply to any private party taking action under State

Law. Matthews and that whole line of cases is talking about State action not actions by private parties. Again, Counsel for the Appellant would specifically assert that our system of workers' compensation laws across the United States are unique and are one of the few areas wherein a private party is responsible to pay benefits to another party under the basis of a State law that requires him to do so. Again in making this argument in reference to the Federal cases and our State decisions, Respondents' Counsel again confuses apples and oranges and makes the statement that, "to say that an employer can never file to terminate temporary benefits when a Claimant reaches MMI, as the Claimant argues in this case, would unfairly burden employers." Counsel for Appellant has never argued and does not argue here that they cannot file for a hearing to stop temporary total disability benefits. They have no right to pick the time and force the Claimant into a situation where his rights to compensation for permanent injury is determined by the Commission without the worker having made a request for that determination. This Court only needs to look to the provisions concerning occupational diseases, repetitive trauma in reference to notice and the time for filing under §42-15-40 to see that the time limitations for asking for such determination can start 20 or more years later. Thus, the Act specifically recognizes the right of the Claimant to bring an action. Otherwise, the Defendants/Respondents could file for a

premature determination of benefits and avoid entirely or at least greatly limit the benefits of the injured worker. Also, this Court and the Supreme Court have applied the doctrine of laches, estoppel and waiver to both sides of the fence in a workers' compensation case on making long, delayed demands. The Defendants/Respondents simply have no right under any statute under the Workers' Compensation Act to force a Claimant to a premature decision when he doesn't choose to make a request for benefits for permanent injury and permanent disability or loss of use. The various parts of SC Code §42-17-20 have been highlighted by both parties ad nauseum and now the Claimant will simply allow the Court to read that section in light of the fundamental principles of the Act that it shall be liberally construed in favor of benefits to the injured worker and it must be strictly construed as to the language and when that is done, the Court will find §42-17-20 provides no right for the Respondents to do anything other than request to stop temporary total disability weekly compensation benefits.

3. By way of reply to Respondents' response, "**III. The Claimant presents no valid reason why this Court should rehear its ruling that the Commission properly did not make a separate Award for myelopathy.**", the Appellant would submit that:

First, a simple reading of the Respondent's response will show a clear misunderstanding of the difference between

radiculopathy and myelopathy. Please see the Petition for Rehearing and refer to Dr. Drye's report of June 18, 2012 found at pp. 111 and 112; Dr. Mandell's findings concerning myelopathy in both legs found at p. 139; the registered physical therapist's findings at p. 141 concerning myelopathy and Dr. Leonard Forrest, M.D.'s findings finding myelopathy affecting both legs found at p. 173 of the Record. All doctors agree that the Claimant has myelopathy that is affecting both lower extremities involving both balance and strength (weakness) issues. There are simply no Findings of Fact on the myelopathy.

The admitted references to the admitted injuries to the Claimant's back, neck and right knee have nothing to do with the Commission's responsibility to review the evidence and make an award for or at least address all affected body parts. The Claimant is entitled to an award for all body parts, organs and members under the Act which are affected and have sustained permanent loss of use. See Roper v. Kimbrell's of Greenville, supra; and the plethora of cases requiring the Commission to address all affected body parts, organs and members.

4. By way of reply to Respondents' Response, "**IV. The Claimant presents no valid reason why this Court should rehear its ruling that the Commission properly did not make a separate Award for low back injury.**", the Appellant would submit that:

All of the doctors found the Claimant to have involvement and loss of use of the low back. Yes; Claimant's Counsel did ask the Commissioner to address an award for the lumbar spine, the cervical spine and the neurological deficit. However, the Commissioner failed to make Findings of Fact and Conclusions of Law, here again, concerning the low back that are sufficiently detailed and definite enough to allow this Court to properly review those and determine if the law has been properly appealed. That is the Commission's responsibility and the Commission failed to fulfill that responsibility.

Counsel for the Claimant/Appellant readily agrees with the Respondent in the Response that everybody agreed that the Claimant has sustained injury to his neck, low back and right leg. However, there is simply no evidence in the Record that Dr. Drye ever addressed the low back. Outside of throughout his general records wherein it is unequivocal that Dr. Drye was specifically treating Mr. Clemmons only for his cervical spine problems in his Evaluation Report found at p. 110 of the Record, he specifically only rates the Claimant's cervical spine. There is simply no reference to Dr. Drye ever addressing whether or not the Claimant had any impairment to his low back or his lumbar spine. It is one thing to say he evaluated his low back and found no impairment under the AMA Guides but it is another where there is no evidence that he ever evaluated it. There must

be evidence addressing the low back and there is no conflict in nor any evidence in that regard. At the least this requires a remand due to the failure to make Findings of Fact and Conclusions of Law that address these issues in reference to the low back.

CONCLUSION

For all of the foregone reasons, this Court should grant rehearing and because of the conflict between its previous decisions concerning total disability under S.C. Code §42-9-30(21) and this decision, this matter should be heard en banc so that the Bar may receive a consensus opinion from the whole Court in reference to this very important issue in reference to substantial injuries to the back sustained by this and other injured workers of our State.

Respectfully submitted,

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Attorney for Appellant/Petitioner

May 7, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2013-001668

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

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PROOF OF SERVICE

I certify that I have served the Appellant's **REPLY TO RESPONDENTS' RETURN IN OPPOSITION TO 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 **May 7, 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: May 7, 2015

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May 7, 2015

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 **REPLY TO RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR REHEARING AND/OR REHEARING EN BANC** in the above-referenced matter. Please file the original and return a clocked-in copy to me in the enclosed, self-addressed, stamped envelope.

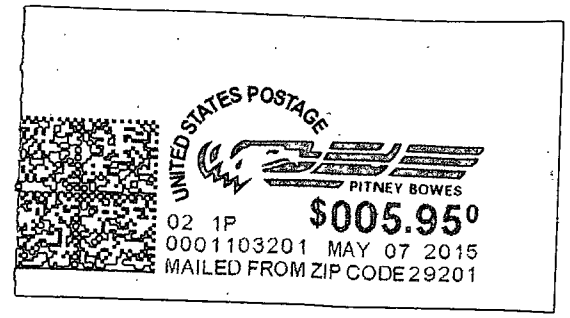
By copy of this letter, I am serving Counsel of Record with a copy of same.

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



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