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In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Opinion No. 5308
(SC Ct. App. heard November 5, 2014;
filed April 1, 2015)

Henton T. Clemmons, Jr., Employee, ...Petitioner,

v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, ... Respondents.

APPENDIX Volume 2

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1 TO WORK. HERE AGAIN, NOT LYNN, BUT WHAT HAPPENED
2 WITH HUMAN RESOURCES AND THE STOOL?

3 A. WELL, IT WASN'T ACTUALLY HUMAN RESOURCE, BUT IT WAS
4 ANOTHER HEAD CASHIER THAT I APPROACHED. AND I TOLD
5 HER, I SAID, "I NEED TO GET A STOOL FOR ME THIS
6 AFTERNOON." SHE SAID -- SHE TOLD ---

7 BY MS. MORROW:

8 YOUR HONOR, I OBJECT TO HEARSAY TESTIMONY OF A
9 NON-SUPERVISING WITNESS WHO IS NOT IN ATTENDANCE AT
10 THE HEARING TODAY.

11 BY COMMISSIONER WILLIAMS:

12 I'LL LET HIM TESTIFY TO IT. GO AHEAD.

13 THE WITNESS RESUMES ANSWER:

14 A. AND IT WAS ANOTHER CASHIER. AND I WENT TO HER AND -
15 - A HEAD CASHIER, AND I SAID, "I NEED A STOOL 'CAUSE
16 THE DOCTOR WANTS ME TO USE IT." AND SHE SAID, "I
17 DON'T THINK LOWE'S WILL ALLOW THAT." AND I JUST
18 WANTED TO KEEP MY JOB. I NEVER PURSUED IT FROM THEN
19 ON.

20 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

21 Q. AND, I MEAN, YOU'VE HEARD LYNN'S TESTIMONY. YOU TRY
22 TO DO YOUR JOB?

23 A. YES, SIR.

24 Q. DO YOU COMPLAIN A LOT, TOMMY?

25 A. NO, SIR.

1 Q. TELL THE COMMISSIONER JUST THE PROBLEMS YOU HAVE
2 THROUGHOUT THE DAY. DO YOU HAVE ANY?

3 A. I DO.

4 Q. WELL, TELL HIM ABOUT THAT.

5 A. EVEN -- JUST WHEN A CUSTOMER COMES AND WANTS THE
6 SMALLEST THING. LIKE A CUSTOMER DROPPED SOMETHING
7 THE OTHER DAY, AND SHE SAID, "SIR, WOULD YOU PICK
8 THAT UP?" AND IT WAS JUST A SMALLEST ITEM. AND I -
9 - I WAS THINKING, HOW AM I GOING TO GET DOWN THERE
10 TO GET THAT UP 'CAUSE THERE'S NOTHING -- THERE'S
11 NOTHING THERE FOR ME TO HOLD ONTO AT THE TIME. IT'S
12 JUST STIFFNESS THROUGHOUT MY BACK AND MY LEGS AND MY
13 NECK.

14 Q. HOW DO YOU ACCOMMODATE FOR THE -- SINCE THERE'S NOT
15 A STOOL THERE AT YOUR WORK STATION, HOW DO YOU
16 ACCOMMODATE FOR THAT, SITTING AND STANDING?

17 A. I LEAN AGAINST THE POST. THERE'S A METAL POST
18 OUTSIDE, AND I USUALLY LEAN AGAINST THAT OR ADJUST
19 AROUND TO THE -- THE COUNTER.

20 Q. DO YOUR FELLOW EMPLOYEES OUT THERE, DO THEY HELP YOU
21 OUT A LOT?

22 A. YES, SIR.

23 Q. WHAT'S -- WHAT'S A CODE -- WHAT'S A CODE 50?

24 A. WHENEVER A CUSTOMER NEEDS SOMETHING LOADED, WE -- WE
25 CALL THEM -- WE CALL FOR A CODE 50.

1 Q. ALL RIGHT. DO YOUR FELLOW EMPLOYEES -- HOW MUCH --
2 HOW MUCH HELP DO THEY GIVE YOU?

3 A. THEY GIVE A LOT. I MEAN, KNOWING MY LIMITATIONS, I
4 -- I TELL THEM, THE CUSTOMER, I CANNOT DO THAT, AND
5 THEY'LL COME AND LOAD IT.

6 Q. IF -- IF LOWE'S WAS -- IF ALL YOUR FELLOW EMPLOYEES
7 WERE NOT HELPING YOU OUT, AND YOU DIDN'T HAVE
8 SOMEBODY AVAILABLE TO DO THESE CODE 50s, AND I
9 BELIEVE YOU WORK OUT IN THE GARDEN CENTER, THAT'S
10 WHERE ALL THE TREES ARE IN THE BUCKETS, RIGHT?

11 A. YES, SIR.

12 Q. AND WHERE ALL THE ROCK -- BAGS OF ROCKS ARE AND ALL
13 THOSE KIND OF THINGS?

14 A. YES, SIR.

15 Q. THOSE BIG OL' CLAY POTS AND THAT KIND OF STUFF.
16 THAT'S WHERE ALL THE CHAIRS -- GARDEN CHAIRS, WHEEL
17 BARROWS AND ALL THAT STUFF IS, RIGHT?

18 A. YES, SIR.

19 Q. AND THAT'S WHAT A LOT OF PEOPLE CHECK OUT IN THE
20 GARDEN CENTER; ISN'T THAT RIGHT?

21 A. YES, SIR.

22 Q. IF LOWE'S -- IF YOU DIDN'T HAVE THESE PEOPLE
23 AVAILABLE, CODE 50s AND YOUR FELLOW EMPLOYEES, COULD
24 YOU DO THE NORMAL JOB OF A CASHIER IF THOSE
25 ACCOMMODATIONS WEREN'T BEING MADE?

1 A. NO, SIR.

2 Q. WHY -- WHY NOT -- WHAT -- WHAT KIND OF PROBLEMS
3 WOULD YOU HAVE?

4 A. BECAUSE THE CUSTOMER WOULD BE RELYING ON ME TO DO
5 IT, AND THERE'S NO WAY I COULD LIFT THAT.

6 Q. TOMMY, IF A -- ASSUMING -- ASSUMING YOU LOST YOUR
7 JOB AT LOWE'S, NOT ANY FAULT TO THEIRS OR YOUR FAULT
8 OR ANYTHING LIKE THAT, JUST YOU DIDN'T HAVE THAT JOB
9 AT LOWE'S, THEY CLOSED IT DOWN FOR WHATEVER, A BIG
10 RECESSION, THEY CLOSED IT DOWN, WHAT YA GOING TO DO?
11 WHAT -- WHAT CAN -- WHAT JOB OUT THERE DO YOU THINK
12 -- DO YOU KNOW YOU CAN DO?

13 BY MS. MORROW:

14 YOUR HONOR, I JUST OBJECT BECAUSE IT CALLS FOR
15 SPECULATION.

16 BY COMMISSIONER WILLIAMS:

17 ALL RIGHT. IT'S NOTED. I'M GOING TO LET HIM
18 TESTIFY IF HE CAN.

19 THE WITNESS ANSWERS:

20 A. PROBABLY -- PROBABLY A JOB THAT I WOULD NOT HAVE TO
21 STAY ON MY FEET ALL DAY.

22 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

23 Q. ALL RIGHT. WHAT DO YOU DO FOR THE PAIN NOW?

24 A. JUST THE STRETCHES THAT MY THERAPISTS HAVE SHOWED ME
25 -- SHOWN ME TO DO.

1 Q. I KNOW YOU TALKED ABOUT YOUR BIKE. DID YOU ALSO
2 LIKE TO DO ANYTHING ELSE ACTIVITY WISE BEFORE THIS -
3 - AND YOU GOLF, I KNOW THAT, BUT...

4 A. NO, SIR.

5 Q. DID YOU LIKE TO WALK THE DAM?

6 BY MS. MORROW:

7 YOUR HONOR, I OBJECT TO THE LEADING FORM OF THE
8 QUESTION.

9 BY COMMISSIONER WILLIAMS:

10 ALL RIGHT. SUSTAINED.

11 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

12 Q. I WASN'T LEADING THE QUESTION, BUT GO AHEAD.

13 A. YES, SIR, I DID WALK IT.

14 Q. DO YOU DO THAT NOW?

15 A. NO, SIR.

16 Q. WHY NOT?

17 A. 'CAUSE -- WELL, I GUESS I COULD WALK THE -- HALF THE
18 DISTANCE, BUT BY THE END OF THE DAY MY -- MY LEGS
19 ARE JUST SHAKING OR WEAK, SO I JUST DON'T TRY IT.

20 Q. ALL RIGHT. TOMMY, I WANT TO ASK YOU ONE FINAL
21 QUESTION. BEFORE THIS -- THIS ACCIDENT AT LOWE'S,
22 OF COURSE YOU WORKED AT A SERVICE STATION, YOU
23 WORKED IN SHIPPING AND DELIVERY AT STEIN MART, AND
24 YOU DID ALL THE WORK OF A CASHIER AND LOADING,
25 SHIPPING, DELIVERY, AND A NIGHT STOCKER AT LOWE'S,

1 DID YOU HAVE BASICALLY A HUNDRED PERCENT USE OF YOUR
2 BACK?

3 A. YES, SIR.

4 Q. ABLE TO DO ANYTHING, ANY BENDING, STOOPING, LIFTING,
5 SQUATTING, THAT REQUIRED THE USE OF YOUR BACK?

6 A. I DID.

7 Q. ALL RIGHT. AND NOW YOU'VE DESCRIBED THE PROBLEMS
8 YOU'VE GOT.

9 A. UH-HUH.

10 Q. IN YOUR OPINION, ZERO MEANING YOU GOT ZERO PERCENT
11 LOSS OF USE OF YOUR BACK, AND I'M TALKING ABOUT THE
12 FUNCTIONAL LOSS OF USE OF YOUR BACK TO DO WORK
13 REQUIRING THE USE OF YOUR BACK. ASSUMING ZERO MEANS
14 YOU'VE GOT ZERO LOSS OF USE AND A HUNDRED PERCENT
15 MEANS YOU'VE LOSS A HUNDRED PERCENT USE OF YOUR
16 BACK, IN YOUR OPINION -- YOUR OPINION, WHAT
17 PERCENTAGE OF LOSS OF USE OF YOUR BACK TO USE YOUR
18 BACK TO DO WORK REQUIRING THE USE OF YOUR BACK AND
19 YOUR ARMS ---

20 BY MS. MORROW:

21 YOUR HONOR, I JUST OBJECT BECAUSE IT CALLS --
22 ITS CALLS FOR A STANDARD THAT THE CLAIMANT IS NOT
23 QUALIFIED TO TESTIFY TO.

24 BY MR. MCDANIEL:

25 I DON'T THINK THERE'S ANYBODY MORE IMMINENTLY

1 QUALIFIED IN REFERENCE TO THE OPINION, AND I THINK
2 HE'S IMMINENTLY QUALIFIED.

3 BY MS. MORROW:

4 I MEAN, HAVE WE ESTABLISHED THAT HE UNDERSTANDS
5 THE DETERMINATION OF LOSS OF USE AS IT'S USED IN THE
6 CAPACITY OF WORKERS' COMP AS AN EXPERT TO PROVIDE
7 THAT TESTIMONY?

8 BY COMMISSIONER WILLIAMS:

9 I'LL LET HIM ANSWER THAT IF HE CAN.

10 THE WITNESS ANSWERS:

11 A. ABOUT 80 PERCENT.

12 DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

13 Q. ALL RIGHT. NOW, WHAT'S YOUR UNDERSTANDING ABOUT DR.
14 DRYE AS FAR AS WHEN YOU NEED TO SEE HIM?

15 A. WHEN I NEED TO SEE HIM?

16 Q. IF YOU NEEDED TO -- HOW DID Y'ALL LEAVE IT WHEN YOU
17 LEFT DR. DRYE?

18 A. HE WAS BASICALLY SAYING IF I -- IF I NEEDED TO COME
19 BACK, TO CALL AND HE WOULD TAKE ME BACK.

20 Q. ALL RIGHT. DO YOU REMEMBER YOU TALKED TO DR.
21 MANDELL, YOU TALKED TO DR. FORREST. DID THE
22 PHYSICAL THERAPY THAT DOCTOR -- I BELIEVE LAST TIME
23 AROUND DOCTOR -- DOCTOR -- EXCUSE ME, DR. DRYE GAVE
24 YOU AN ADDITIONAL ROUND OF PHYSICAL THERAPY. DID
25 THAT HELP?

1 A. YES, SIR.

2 Q. WOULD YOU LIKE TO HAVE THAT AVAILABLE IF YOU NEEDED
3 IT?

4 A. THAT WOULD -- I BELIEVE THAT WOULD BE HELPFUL.

5 Q. ALL RIGHT. IN REFERENCE TO PAIN MEDICATION, DO YOU
6 LIKE TAKING PAIN MEDICATION?

7 A. NO, SIR.

8 Q. DO YOU TRY TO AVOID IT?

9 A. I DO.

10 Q. WOULD YOU LIKE TO HAVE PAIN MEDICATIONS AVAILABLE?

11 A. SURE, YES, SIR.

12 Q. ALL RIGHT. DO YOU FEEL LIKE YOU NEED TO BE UNDER --
13 TO BE ABLE TO GO BACK TO SEE DR. DRYE IN REFERENCE
14 TO YOUR INJURY OR ANOTHER -- OR A DOCTOR IN
15 REFERENCE TO YOUR PROBLEMS? NOT NOW, BUT, I MEAN,
16 WOULD YOU LIKE TO HAVE ACCESS AVAILABLE -- IF THE
17 COMMISSIONER AWARDED IT, WOULD YOU LIKE TO HAVE THAT
18 ACCESS?

19 A. YES, SIR.

20 BY MR. MCDANIEL:

21 COMMISSIONER, I HAVE NO FURTHER QUESTIONS.

22 BY COMMISSIONER WILLIAMS:

23 MS. MORROW.

24 CROSS EXAMINATION BY MS. MORROW:

25 Q. MR. CLEMMONS, HOW ARE YOU DOING?

1 A. DOING FINE.

2 Q. GOOD. I WANT TO ASK YOU A COUPLE OF THINGS IN
3 FOLLOWUP TO WHAT YOUR ATTORNEY JUST ASKED YOU.
4 SINCE YOU'VE BEEN BACK AT LOWE'S IN SEPTEMBER OF
5 2011 -- THAT'S ROUGHLY WHEN YOU CAME BACK TO WORK
6 FOR US, CORRECT?

7 A. CORRECT.

8 Q. OKAY. CAME BACK TO DOING A CASHIER JOB AGAIN,
9 CORRECT?

10 A. CORRECT.

11 Q. CAME BACK 40-HOUR WEEKS?

12 A. YES.

13 Q. EIGHT HOURS PER DAY?

14 A. YES.

15 Q. YOU STAND PRIMARILY DURING THAT ENTIRE EIGHT-HOUR
16 PERIOD, DON'T YOU?

17 A. I DO.

18 Q. OKAY. AS A CASHIER YOU ALSO HAVE ACCESS TO A
19 PRICING GUN SO THAT YOU DO NOT HAVE TO LIFT ITEMS,
20 CORRECT?

21 A. THAT'S CORRECT, YES.

22 Q. OKAY. IN YOUR CAPACITY, YOU'RE ALSO DUMPING THE
23 TRASH, PUTTING UP SODAS IN THE COOLERS THAT ARE
24 LOCATED OUTSIDE THE CASHIER'S STATION, CORRECT?

25 A. CORRECT.

1 Q. YOU'RE ABLE TO DO ALL THOSE ACTIVITIES DURING THE
2 COURSE OF YOUR DAY, CORRECT?

3 A. UH-HUH, YES, CORRECT.

4 Q. IS THAT A "YES"? I JUST NEED YOU TO VERBALIZE FOR
5 US. YOU WERE ASKED A SERIES OF QUESTIONS ABOUT THE
6 JOBS THAT YOU HAVE HAD PREVIOUSLY AND WHETHER OR NOT
7 YOU FEEL LIKE YOU COULD GO BACK TO DOING THOSE JOBS.
8 BUT YOU HAVE NOT TRIED TO GO BACK TO DOING ANY OTHER
9 TYPE OF JOB OTHER THAN GOING BACK TO WORK FOR LOWE'S
10 AS A CASHIER, CORRECT?

11 A. CORRECT.

12 Q. SO, YOU HAVE NOT PHYSICALLY ATTEMPTED TO DO ANY
13 OTHER TYPES OF WORK AT THIS POINT, CORRECT?

14 A. NO.

15 Q. SO, YOU DON'T KNOW FROM AN ACTUAL PERFORMANCE
16 STANDPOINT WHETHER OR NOT YOU CAN ACTUALLY PERFORM
17 THOSE JOBS, CORRECT?

18 A. IF THEY REQUIRE STANDING, I DON'T KNOW, AND LIFTING,
19 I DON'T THINK I COULD.

20 Q. STANDING AND LIFTING OUTSIDE OF WHAT YOU'RE
21 CURRENTLY DOING THOUGH, CORRECT?

22 A. NOT -- I'M FOLLOWING THE GUIDELINES NOT OVER 25
23 POUNDS, 20 POUNDS.

24 Q. OKAY. AND ALL WE KNOW AS OF RIGHT NOW -- OR YOU
25 DON'T KNOW AFFIRMATIVELY 'CAUSE YOU HAVEN'T APPLIED

1 FOR ANY OTHER JOBS WHETHER OR NOT ANYBODY ELSE WOULD
2 BE WILLING TO ACCOMMODATE YOUR RESTRICTIONS,
3 CORRECT?

4 A. THAT'S CORRECT.

5 Q. SO, WE COULD JUST AS EQUALLY ASSUME THAT THERE ARE
6 OTHER PEOPLE OUT THERE THAT MIGHT BE WILLING TO
7 ACCOMMODATE YOUR RESTRICTIONS IN OTHER JOBS THAT YOU
8 COULD DO; IS THAT FAIR?

9 A. YES.

10 Q. OKAY. DO YOU KNOW THAT YOU'RE ACTUAL RESTRICTIONS
11 FROM DR. DRYE ALLOW YOU TO LIFT UP TO 30 POUNDS
12 OCCASIONALLY, NOT A LIMITATION OF 20 POUNDS?

13 A. FROM WHAT I WAS TOLD, IT WAS 20.

14 Q. OKAY. WELL, ACCORDING TO HIS MEDICAL RECORDS,
15 YOU'RE LIMITATION IS ACTUALLY 30 POUNDS. SO THAT'S
16 IN EXCESS OF WHAT YOU'RE CURRENTLY LIMITING YOURSELF
17 TO RIGHT NOW; IS THAT CORRECT?

18 A. YES.

19 Q. OKAY. AS FAR AS A CODE 50, WHICH HAS BEEN DISCUSSED
20 TODAY, AT LOWE'S, YOU HAVE -- ANY EMPLOYEE AT ANY
21 TIME HAS THE RIGHT TO CALL A CODE 50, WHICH IS
22 LIFTING ASSISTANCE, NO MATTER WHAT THEIR DEPARTMENT
23 LIMITATIONS OR RESTRICTIONS, CORRECT?

24 A. CORRECT.

25 Q. LOWE'S POLICY IS THAT AT ANY TIME IF YOU FEEL LIKE

1 YOU'RE UNABLE TO LIFT AN ITEM, NO MATTER WHAT THE
2 WEIGHT, SIZE, WHATEVER, YOU WANT TO CALL IT, SHAPE,
3 YOU'RE ALLOWED TO REQUEST ASSISTANCE, CORRECT?

4 A. CORRECT.

5 Q. SO, THERE'S NEVER ANY LIMITATION FOR YOU NO MATTER
6 WHETHER WE'RE TALKING ABOUT BEFORE YOUR ACCIDENT OR
7 AFTER YOUR ACCIDENT THAT YOU CAN ASK ANYBODY FOR
8 HELP LIFTING?

9 A. THAT'S CORRECT.

10 Q. AND EVERY TIME YOU'VE EVER ASKED FOR ASSISTANCE
11 LIFTING, IT'S BEEN GIVEN TO YOU, CORRECT?

12 A. RIGHT.

13 Q. OKAY. AND THAT HOLDS TRUE PRIMARILY FOR ANY OTHER
14 EMPLOYEE, CORRECT?

15 A. RIGHT.

16 Q. OKAY. WHEN YOU WERE TALKING ABOUT THE STOCKING AND
17 LIFTING THAT YOU INITIALLY CAME TO LOWE'S DOING AND
18 YOUR ATTORNEY WAS ASKING YOU ABOUT SOME OF THE HEAVY
19 ITEMS, I THINK YOU TALKED ABOUT BUCKETS OF PAINT,
20 TILE, THINGS THAT ARE FAIRLY HEAVY. WHEN YOU DO
21 THAT JOB IN OUR WAREHOUSE DEPARTMENT OR LOADING OR
22 UNLOADING, YOU HAVE ACCESS TO PALLET JACKS, CORRECT?

23 A. CORRECT.

24 Q. YOU HAVE ACCESS TO FORKLIFTS?

25 A. RIGHT.

1 Q. AND YOU HAVE ACCESS TO TEAM MEMBERS TO PERFORM THOSE
2 LIFTS, CORRECT?

3 A. CORRECT.

4 Q. SO, AT NO POINT WHEN YOU'RE DOING THAT TYPE OF JOB
5 IS SOMEBODY ASKING YOU TO WORK OUTSIDE OF WHAT YOUR
6 STATED ABILITIES ARE NO MATTER WHETHER YOU HAVE
7 RESTRICTIONS OR NOT, CORRECT?

8 A. THAT'S CORRECT.

9 Q. OKAY. THERE WAS SOME DISCUSSION ABOUT THE PINE
10 STRAW, AND YOU SAID THAT YOU DON'T THINK THAT YOU
11 COULD ACTUALLY DO THAT ACTIVITY EIGHT HOURS A DAY,
12 BUT AS A CASHIER YOU'RE NOT ASKED TO LIFT PINE STRAW
13 EIGHT HOURS A DAY, EVERY DAY, CORRECT?

14 A. NOT EIGHT HOURS, NO.

15 Q. RIGHT. IN FACT, THERE'S NEVER BEEN AN INSTANCE
16 WHERE YOU'VE BEEN IN THE STRAW TRAILER LIFTING
17 NOTHING BUT PINE STRAW FOR EIGHT HOURS A DAY,
18 CORRECT?

19 A. SOMETIMES IT WASN'T EIGHT HOURS. SOMETIMES IT WAS
20 FOUR HOURS A DAY OR HALF MY DAY I WAS ASKED TO STAY
21 OUT THERE.

22 Q. BUT AS FAR AS WHEN YOU WERE ASKED IF YOU COULD DO
23 PINE STRAW A DAY, THERE'S NEVER BEEN A CIRCUMSTANCE
24 WHERE YOU'VE HAD TO DO THAT FULLY WITHIN AN EIGHT-
25 HOUR TIME FRAME AT YOUR JOB, CORRECT?

1 A. NOT -- NOT EIGHT HOURS, NO.

2 Q. OKAY. AND AGAIN, EVEN IF YOU FELT LIKE YOU COULDN'T
3 LIFT A PINE STRAW BALE, YOU HAVE THE RIGHT TO
4 REQUEST ASSISTANCE OR HAVE SOMEBODY ELSE GO TO THE
5 PINE STRAW TRAILER AND DO THAT ACTIVITY FOR YOU,
6 CORRECT?

7 A. CORRECT.

8 Q. OKAY. I'M INTERESTED TO KNOW THE PERSONAL PROBLEMS
9 THAT YOU HAVE. WHEN WE TALKED AND WE MET AT YOUR
10 DEPOSITION, THE ONE LIMITATION YOU TOLD ME YOU HAD
11 AS FAR AS PERSONAL ACTIVITIES WAS JUST PAINTING. IS
12 THERE A REASON WHY AT THAT TIME WHEN WE MET AND WE
13 HAD YOUR DEPOSITION YOU DIDN'T REFERENCE THIS
14 WALKING OR RIDING A BIKE?

15 A. I JUST DIDN'T THINK ABOUT IT AT THE TIME.

16 Q. ADDITIONALLY WHEN WE TALKED ABOUT THE WORK THAT YOU
17 PERFORM FOR YOUR PARENTS AT THE B.P. STATION, I
18 SPECIFICALLY HAD ASKED YOU WHETHER OR NOT YOU DID
19 ANY AUTO-REPAIR WORK, AND AT THE TIME YOU TOLD ME
20 "NO." TODAY YOU'RE TELLING US THAT YOU WERE
21 CHANGING TIRES AND THINGS OF THAT NATURE.

22 A. BUT I WAS MEANING I DIDN'T DO ANY MAJOR REPAIRS,
23 JUST MINOR.

24 Q. OKAY. AND THAT WOULD BE OCCASIONAL?

25 A. YES.

1 Q. YOUR DAD, I THINK, WAS MORE PRIMARILY RESPONSIBLE
2 FOR THAT WORK; IS THAT FAIR?

3 A. HIM -- HE AND OTHER EMPLOYEES.

4 Q. OKAY. AND YOUR PRIMARY FUNCTION FOR THEM AT THE
5 B.P. STATION WAS MORE OR LESS BEING THE CASHIER,
6 CORRECT?

7 A. CORRECT.

8 Q. OKAY. AS FAR AS THE DISCUSSION WE HAD ABOUT THE
9 STOOL, THE ACTUAL PLACEMENT OF THE STOOL, THE
10 DISCUSSION YOU HAD YOU SAID WAS WITH A CO-EMPLOYEE
11 ABOUT THE STOOL?

12 A. YES.

13 Q. AT NO POINT HAVE YOU EVER PRESENTED THIS ISSUE TO A
14 SUPERVISOR, HAVE YOU?

15 A. NO.

16 Q. OKAY. AND NOBODY AT LOWE'S HAS EVER TOLD YOU SINCE
17 YOU CAME BACK TO WORK FOR US IN SEPTEMBER OF 2011 TO
18 DO ANY ACTIVITIES OUTSIDE OF YOUR RESTRICTIONS,
19 CORRECT?

20 A. NO COWORKERS, NO.

21 Q. OKAY. YOUR FIRST RELEASE BY DR. DRYE WAS JUNE OF
22 2011, CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND HE'S THE PHYSICIAN THAT ACTUALLY DID THE SURGERY
25 ON YOUR BACK; IS THAT RIGHT?

1 A. YES.

2 Q. OKAY. AND AT THAT POINT, HE TOLD YOU YOU COULD GO
3 BACK TO WORK AND PROVIDED YOU WITH WORK
4 RESTRICTIONS, CORRECT?

5 A. CORRECT.

6 Q. ALL RIGHT. YOU'RE STILL IN THE EXACT SAME POSITION
7 YOU CAME BACK TO IN SEPTEMBER OF 2011?

8 A. YES.

9 Q. ALL RIGHT. AND YOU'VE GOTTEN GOOD PERFORMANCE
10 EVALUATIONS?

11 A. YES.

12 Q. OKAY. AND YOU'RE A GOOD EMPLOYEE?

13 A. AS FAR AS I KNOW.

14 Q. YOU LIKE YOUR JOB?

15 A. YES.

16 Q. I THINK YOUR SUPERVISORS LIKE YOU, ---

17 A. AS FAR AS I KNOW.

18 Q. --- THAT'S FAIR TO SAY? YOU'VE GOTTEN GOOD
19 EVALUATIONS; YOU'RE ALWAYS ON TIME?

20 A. YES.

21 Q. THEY CAN RELY ON YOU; IS THAT FAIR?

22 A. YES.

23 Q. ROUGHLY A YEAR AFTER YOU WENT BACK TO WORK, WE SENT
24 YOU BACK TO DR. DRYE, YOU RECALL, JUNE OF THIS YEAR

25 ---

1 A. YES.

2 Q. --- YOU'VE GONE BACK TO SEE HIM? WHEN YOU SAW DR.
3 DRYE FOR THE SECOND TIME, Y'ALL SPECIFICALLY TALKED
4 ABOUT WHAT SYMPTOMS, PROBLEMS, DIFFICULTIES YOU WERE
5 HAVING AT THAT POINT; IS THAT -- DO YOU RECALL THAT?

6 A. YES, I DO.

7 Q. DO YOU RECALL TELLING DR. DRYE THAT YOU DID NOT HAVE
8 ANY PAIN OR PROBLEMS RADIATING INTO EITHER OF YOUR
9 ARMS?

10 A. I DO.

11 Q. OKAY. DO YOU ALSO REMEMBER TELLING HIM THAT YOU
12 DIDN'T HAVE ANY KIND OF RADIATING PAIN OR PROBLEMS
13 DOWN INTO YOUR LEGS?

14 A. I DON'T RECALL THAT, NO.

15 Q. ALL RIGHT. HE EVALUATED YOU AT THAT -- AT THAT
16 MEETING?

17 A. YES.

18 Q. OKAY. AND HE RELEASED YOU FROM HIS CARE AT THAT
19 POINT?

20 A. HE DID.

21 Q. AND YOU'VE NOT BEEN BACK TO SEE HIM SINCE THEN?

22 A. I HAVE NOT.

23 Q. OKAY. HE DIDN'T PUT YOU ON ANY LONG-TERM
24 MEDICATIONS, PAIN MEDICATIONS, PRESCRIPTIONS, OR
25 ANYTHING LIKE THAT, DID HE?

- 1 A. NO.
- 2 Q. OKAY. AND JUST RECENTLY YOU WENT THROUGH A SERIES
- 3 OF EVALUATIONS THAT WERE SET UP OR GIVEN TO YOU AT
- 4 THE DIRECTION OF YOUR ATTORNEY; IS THAT FAIR?
- 5 A. YES.
- 6 Q. YOU SAW A DR. MANDELL?
- 7 A. I DID.
- 8 Q. HOW MUCH TIME DID YOU SPEND WITH DR. MANDELL?
- 9 A. PROBABLY ABOUT AN HOUR.
- 10 Q. OKAY. AND YOU'VE ONLY SEEN HIM ONE TIME, CORRECT?
- 11 A. CORRECT.
- 12 Q. HE DIDN'T PROVIDE YOU WITH ANY MEDICAL TREATMENT,
- 13 HASN'T SCHEDULED YOU TO COME BACK OR ANYTHING LIKE
- 14 THAT?
- 15 A. NO.
- 16 Q. YOU REPORTED TO DR. MANDELL WHEN YOU SAW HIM THAT
- 17 YOUR PROBLEMS AS FAR AS THIS ACCIDENT IS CONCERNED
- 18 ARE STABLE?
- 19 A. CORRECT.
- 20 Q. YOU THEN -- OR YOU ALSO SAW DR. GAIL MARLET; IS THAT
- 21 -- DO YOU REMEMBER THAT?
- 22 A. YES.
- 23 Q. HOW MUCH TIME DID YOU SPEND WITH DR. MARLET?
- 24 A. ABOUT THE SAME, ABOUT AN HOUR.
- 25 Q. AND YOU SAW HIM ALSO ONE TIME?

1 A. I DID.

2 Q. AND NO TREATMENT WAS PROVIDED TO YOU?

3 A. NO.

4 Q. DID HE PUT YOU THROUGH ANY TYPE OF PHYSICAL
5 EVALUATIONS?

6 A. YES.

7 Q. OKAY. YOU THEN DROVE ALL THE WAY DOWN TO CHARLESTON
8 TO SEE DR. FORREST; DO YOU REMEMBER THAT?

9 A. I DO.

10 Q. ALL RIGHT. HOW LONG DID YOU SPEND WITH DR. FORREST?

11 A. ABOUT AN HOUR, AN HOUR AND A HALF, SOMEWHERE IN
12 THERE.

13 Q. DID HE PUT YOU THROUGH ANY TYPE OF TESTING OR
14 EVALUATION, OR DID HE JUST TALK TO YOU ABOUT YOUR
15 PROBLEMS?

16 A. HE PUT ME THROUGH EVALUATIONS.

17 Q. ALL RIGHT. YOU THEN -- OR ALSO MET WITH HARRIET
18 FOWLER. HOW LONG DID YOU SPEND WITH MS. FOWLER?

19 A. ABOUT THE SAME.

20 Q. ROUGHLY AN HOUR?

21 A. CORRECT.

22 Q. ACCORDING TO HER REPORT, SHE DIDN'T PUT YOU THROUGH
23 ANY TYPE OF STANDARDIZED TESTING OR ANYTHING LIKE
24 THAT; IS THAT FAIR?

25 A. YES.

1 Q. ALL YOU DID WAS JUST TALK TO HER?

2 A. CORRECT.

3 Q. AND EVEN DURING ALL OF THESE EVALUATIONS, YOU STILL
4 WERE WORKING AT LOWE'S, STILL WORKING UNDER THE SAME
5 RESTRICTIONS THAT YOU ALWAYS HAD, CORRECT?

6 A. THAT'S CORRECT.

7 Q. ALL RIGHT. AND THE SURGERY THAT YOU HAD THAT DR.
8 DRYE PROVIDED TO YOU, IT HAS HELPED YOUR CONDITION,
9 HAS IT NOT?

10 A. IT HAS -- IT HAS BROUGHT BACK THE FEELING IN MY
11 LEGS, BUT AS FAR AS THE PAIN, NO, IT HAS NOT.

12 Q. WHEN DID YOU HAVE MORE PAIN OR CONTINUED PAIN?

13 A. I'VE HAD IT EVER SINCE I GOT OUT FROM THE SURGERY.

14 Q. DO YOU REMEMBER WHEN I DEPOSED YOU IN DECEMBER OF
15 2010 AFTER YOU HAD HAD THE SURGERY?

16 A. YES.

17 Q. OKAY. LOOKING AT YOUR DEPOSITION AT PAGE 41, I
18 SPECIFICALLY ASKED YOU IF YOU WERE HAVING ANY PAIN
19 IN YOUR BACK AND YOU SAID, "NO." SO ARE YOU TELLING
20 ME THAT THAT'S CHANGED, IF IT WAS -- DIDN'T EXIST IN
21 DECEMBER 2010 AFTER YOUR SURGERY?

22 A. I DON'T RECALL TELLING YOU THAT, BUT I HAVE HAD THE
23 PAIN.

24 Q. DO YOU WANT ME TO SHOW YOU SPECIFICALLY WHERE I
25 ASKED YOU THE QUESTION, AND YOU INDICATED TO ME THAT

1 YOU DID NOT HAVE ANY PAIN IN YOUR BACK?

2 A. THAT'D BE FINE.

3 Q. I'M LOOKING AT YOUR DEPOSITION, PAGE 41. WE'RE JUST
4 LOOKING AT THIS SUBSECTION HERE. IT'S LINE FOUR AND
5 FIVE WHERE I DISCUSSED WITH YOU ABOUT YOUR BACK
6 PAIN.

7 A. (WITNESS VIEWS DOCUMENT). WELL, I HAVE HAD THE
8 PAIN.

9 Q. OKAY.

10 A. SORRY ABOUT THAT.

11 Q. ALL RIGHT. I ALSO -- EXCUSE ME. I'LL REPHRASE THAT
12 QUESTION. AND WHAT ABOUT -- I'LL WITHDRAW THAT
13 QUESTION AS WELL; I'M SORRY. AS FAR AS THE PROBLEMS
14 YOU TALKED ABOUT WITH BENDING OR STOOPING OR
15 SQUATTING, ARE YOU AWARE THAT YOU DON'T HAVE ANY
16 RESTRICTIONS FROM DR. DRYE THAT LIMIT YOUR ABILITY
17 TO BEND, STOOP, OR SQUAT?

18 A. I -- NO, SIR -- NO, MA'AM, I DO NOT KNOW THAT.

19 Q. OKAY. IN FACT, DR. DRYE ADVISED YOU THAT YOU SHOULD
20 NOT BE CLIMBING HEIGHTS REPETITIVELY, CLIMBING STEPS
21 AND AVOID ANY REPETITIVE OVERHEAD REACHING, LIFT OR
22 CARRY LESS THAN 30 POUNDS OCCASIONALLY IN TERMS OF
23 THE RESTRICTIONS THAT HE PROVIDED TO YOU. DOES THAT
24 -- DO YOU UNDERSTAND THAT YOU HAVE MORE RESTRICTIONS
25 THAN THAT, OR IS THAT FAIRLY CONSISTENT WITH WHAT

1 YOU THOUGHT WERE YOUR STANDARD RESTRICTIONS?

2 A. THAT'S CONSISTENT WITH WHAT I THOUGHT.

3 BY MS. MORROW:

4 YOUR HONOR, I DON'T HAVE ANY FURTHER QUESTIONS.

5 BY COMMISSIONER WILLIAMS:

6 ALL RIGHT. ANY RE-DIRECT?

7 BY MR. MCDANIEL:

8 A COUPLE, COMMISSIONER, IF I CAN HAVE JUST A
9 MOMENT?

10 BY COMMISSIONER WILLIAMS:

11 OKAY.

12 RE-DIRECT EXAMINATION BY MR. MCDANIEL:

13 Q. TOMMY, DID YOU KNOW THAT DR. DRYE HAD GIVEN A
14 DOCUMENT TO LOWE'S, REFERENCED -- IT'S CALLED A
15 FUNCTIONAL CAPACITY ASSESSMENT. IT SAID THAT YOU
16 HAD RESTRICTIONS ON BENDING AT THE WAIST
17 OCCASIONALLY ON A LONG-TERM BASIS, HANDLING ON
18 OCCASIONAL BASIS, SQUATTING -- OR EXCUSE ME,
19 CROUCHING, YOU SHOULD ONLY DO THAT OCCASIONALLY, YOU
20 SHOULD STAND FOR MORE -- NO MORE THAN AN HOUR, YOU
21 SHOULD WALK FOR NO MORE THAN AN HOUR, AND YOU SHOULD
22 BE RESTRICTED FROM ANY HEAVY LIFTING; DID YOU KNOW
23 HE'D GIVEN ---

24 A. NO.

25 Q. --- GIVEN THAT TO LOWE'S?

1 A. I HAD RECALLED THE -- THE STANDING, BUT -- BUT NOT
2 THE STOOPING.

3 BY MS. MORROW:

4 AND WHAT APA ARE YOU CITING FROM?

5 BY MR. MCDANIEL:

6 I'M NOT CITING FROM AN APA. I'M CITING FROM A
7 DOCUMENT GIVEN TO LOWE'S.

8 BY MS. MORROW:

9 YOUR HONOR, I OBJECT, THIS IS NOT INTO
10 EVIDENCE. HE'S READING MATERIALS THAT ARE NOT
11 PRESENTLY IN EVIDENCE AND HAVEN'T BEEN ESTABLISHED
12 TO BE ENTERED INTO EVIDENCE FOR BASIS OF REBUTTAL.

13 BY COMMISSIONER WILLIAMS:

14 IS THAT IN THE APAs?

15 BY MR. MCDANIEL:

16 NO, IT'S NOT, COMMISSIONER, BUT I WAS ASKING --
17 I WAS ASKING DID I -- HE KNOW THAT LOWE'S -- HE HAD
18 GIVEN A DOCUMENT TO LOWE'S. I'M ON RE-DIRECT ON
19 REBUTTAL. THEY'RE INDICATING THAT -- THEY'RE
20 INDICATING THAT DR. DRYE DID NOT GIVE HIM
21 INDICATIONS, AND THAT IS A MISSTATEMENT OF RECORD.
22 THEY'VE GOT THIS DOCUMENT IN THEIR FILE. THEY CAN
23 PULL IT RIGHT NOW.

24 BY COMMISSIONER WILLIAMS:

25 I DON'T THINK EITHER PARTY SUBMITTED THIS TO

1 ME, SO I'LL SUSTAIN THAT. ANY OTHER QUESTIONS FOR
2 MR. CLEMMONS?

3 RE-DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

4 Q. TOMMY, IN REFERENCE TO DR. DRYE ---

5 BY MR. MCDANIEL:

6 AND COMMISSIONER, I'M GOING TO ASK YOU TO REFER
7 TO DR. MANDELL'S REPORT UNDER SECTION EIGHT.

8 RE-DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

9 Q. DID I SEND YOU A COPY OF DR. DRYE'S LAST REPORT AND
10 ASK YOU AND YOUR MOTHER TO GO OVER THE HISTORY THAT
11 HE RECORDED?

12 A. YES, SIR.

13 Q. DID YOU -- DO YOU AGREE WITH WHAT HE RECORDED AS
14 BEING WHAT YOU TOLD HIM?

15 A. YES, SIR.

16 Q. YOU DO?

17 A. I'M SORRY, ---

18 Q. DO YOU AGREE WITH WHAT HE RECORDED; WAS THAT
19 ACCURATE, OR DID YOU -- DID -- IS -- IS HIS HISTORY
20 THAT HE RECORDED IN THAT LAST REPORT INACCURATE; IS
21 IT NOT CORRECT?

22 A. RIGHT.

23 Q. OKAY. FOR EXAMPLE, WERE YOU HAVING ANY PROBLEMS
24 WITH WEAKNESS IN YOUR LEGS BEFORE THIS ACCIDENT?

25 A. NO, SIR.

1 Q. OKAY.

2 BY MR. MCDANIEL:

3 AND COMMISSIONER, I'D ASK YOU TO COMPARE DR.
4 DRYE'S INITIAL EVALUATION WHEN HE RELEASED MR.
5 CLEMMONS AS COMPARED TO THE ONE IN 2012, WHICH I
6 BELIEVE, AND I'D ASK THE COMMISSIONER TO LOOK AT THE
7 READING OF THAT HISTORY AND YOU'LL SEE A DISTINCT
8 DIFFERENCE IN IT'S RECORDING OF DR. MANDELL'S
9 RECORDS.

10 BY COMMISSIONER WILLIAMS:

11 OKAY, I'LL READ IT.

12 RE-DIRECT EXAMINATION RESUMED BY MR. MCDANIEL:

13 Q. TOMMY, ALSO YOU WERE ASKED HOW LONG DID YOU SPEND
14 WITH MS. FOWLER. HOW MANY HOURS DID YOU SPEND WITH
15 MS. FOWLER? I BELIEVE YOU ORIGINALLY SAID, "ONE."
16 HOW MANY HOURS WAS IT; DO YOU HAVE ANY IDEA?

17 A. NO, SIR.

18 Q. DID SHE DO ANY TESTING?

19 A. SHE -- SHE PROBABLY JUST TESTED MY BALANCE, BUT
20 THAT'S ABOUT...

21 Q. I'M TALKING ABOUT THE VOCATIONAL LADY, THE LADY YOU
22 MET WITH; DID SHE DO ANY TESTING?

23 A. YES, SIR, SHE DID.

24 Q. OKAY. DO YOU REMEMBER WHAT TYPES OF TESTS?

25 A. SHE -- LIKE SPELLING, BASIC TESTS LIKE MATH.

1 BY MR. MCDANIEL:

2 I THINK THAT'S ALL I HAVE FOR YOU.

3 BY COMMISSIONER WILLIAMS:

4 MS. MORROW, ANY OTHER QUESTIONS?

5 BY MS. MORROW:

6 I DON'T HAVE ANYTHING FURTHER.

7 BY COMMISSIONER WILLIAMS:

8 YOU CAN STEP DOWN, MR. CLEMMONS. ANYTHING ELSE
9 FOR THE CLAIMANT?

10 BY MR. MCDANIEL:

11 NOTHING FURTHER, COMMISSIONER.

12 BY COMMISSIONER WILLIAMS:

13 OKAY. ANYTHING ELSE FOR THE EMPLOYER/CARRIER?

14 BY MS. MORROW:

15 NO, YOUR HONOR.

16 BY COMMISSIONER WILLIAMS:

17 ALL RIGHT. THAT BEING THE CASE, THAT'LL
18 CONCLUDE THIS HEARING.

19 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
20 CONCLUDED AT THE HOUR OF 12:21 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1015200

EMPLOYEE/CLAIMANT: HENTON T. CLEMMONS

EMPLOYER: LOWE'S HOME CENTERS, INCORPORATED

INSURER: LOWE'S COMPANIES, INCORPORATED

I, SHEILA ROBISON, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 66 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF HENTON T. CLEMMONS WAS TAKEN THE 25TH OF SEPTEMBER, 2012.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 10TH DAY OF OCTOBER, 2012.

SHEILA ROBISON
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4-20-2019

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1015200

Henton T. Clemmons,)
)
Employee,)
)
v.)
)
Lowe's Home Center,)
)
Employer,)
)
and)
)
Lowe's Companies Incorporated,)
)
Carrier/Defendants.)
-----)

(COPY)

FULL COMMISSION PANEL HEARING

Tuesday, April 16, 2013
9:17 a.m. - 9:41 a.m.

The Full Commission Panel Hearing was held before the South Carolina Workers' Compensation Commission, 1333 Main Street, 5th Floor, Columbia, South Carolina, on the 16th day of April, 2013 before Jill H. Vickers, Certified Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES:COMMISSION PANEL:

Melody James, Chair
 Susan Barden
 Scott Beck

Preston F. McDaniel, Esquire
 McDaniel Law Firm
 1315 Elmwood Avenue
 Columbia, South Carolina 29201
 Attorney for the Claimant

Kelly F. Morrow, Esquire
 McAngus, Goudelock & Courie
 1320 Main Street, 10th Floor
 Columbia, South Carolina 29201
 Attorney for the Defendants

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EXHIBITS

(There were no exhibits marked during this hearing.)

1 COURT REPORTER: Today is April 16th, 2013. This is
2 South Carolina Workers' Compensation Case
3 Number 1015200. This is the case of Henton T.
4 Clemmons, Jr. versus Lowe's Home Center,
5 Employer, and Lowe's Companies Incorporated is
6 the Carrier. The Appellant is the Claimant
7 represented by Preston F. McDaniel. The
8 Respondent is represented by Kelly F. Morrow.

9 MR. MCDANIEL: Thank you, Commissioners. I'm going
10 to hand up a couple of documents that are in
11 the record. One of the, I believe, keys to
12 this case and what I'm going to ask from the
13 Commission is, in reference to the
14 Commissioner's reliance upon Dr. Randall Drye's
15 opinions. In the findings of fact and in the
16 conclusions of law, you're going to find that
17 Dr. Drye's reports and conclusions are the most
18 persuasive. You're going to find also a
19 statement in the conclusions of law that
20 necessary medical treatment in Dr. Drye's
21 reports and conclusions are controlling as the
22 authorized treating physician. What you're
23 going to find and what I would ask you to look
24 at in those two pages I've handed you are
25 Dr. Drye's report. The first report is a

1 report that was issued on November 30th, and
2 I've highlighted the sentence I want you to
3 look at, and that is, it says, "We met in the
4 office initially and when he generated his
5 history, he clearly reported no prior history
6 of significant neck or neurological problems
7 prior to this fall at work". This goes along
8 with Dr. -- where he was initially sent for
9 initial medical care. It goes along with
10 Dr. Armsey's report. It goes along with every
11 report you're going to see until the final
12 report that you see when he was sent back to --
13 Mr. Clemmons was sent back to Dr. Drye. And at
14 that point, in looking at the second page of
15 the document, you're going to see -- I've
16 highlighted on that one, also, "At this point,
17 he had recovered nicely from surgery, though he
18 still had symptoms referable to his
19 pre-operative cord injury and myelopathy".
20 You go on down further, and you're going to see
21 "altered gait from his previous myelopathy, as
22 well as longstanding pre-injury inversion of
23 the right foot and an ankle. His mother
24 confirms that he has forever been a problem
25 with wearing out his shoes. He has no bowel,

1 bladder, incontinence problems. He arrives
2 today having undergone cervical and lumbar MRIs
3 to check for possible changes in condition.
4 Dr. Drye in the end gives my client a 25
5 percent whole person impairment. We had
6 repeatedly requested a second opinion. Counsel
7 agrees that we had repeatedly requested that
8 for almost seven months. They agreed to send
9 him back to Dr. Drye, wherein this evaluation
10 comes from, and in addition to that -- but they
11 would never agree to a second opinion. Within
12 30 days of the filing of this report, less than
13 that when we actually received it, they filed
14 a stopped payment. My client is back at work.
15 He was working for the employer. He has
16 balance problems. Everybody agrees he has
17 balance problems. Dr. Drye says he has
18 myelopathy problems. They are making all kind
19 of special considerations for him to allow him
20 to continue working. He has lifting
21 assistance, if he has to have it. We wanted a
22 second opinion. They refused to give it to us.
23 We then sent him to Dr. Mandell. Dr. Mandell
24 says that he needs ongoing treatment for his
25 low back as well as his neck. Dr. Drye does

1 not address the low back problems in
2 referencing -- he addressed them. He evaluated
3 him. There was treatment throughout. However,
4 the major problem was the myelopathy and the
5 problems it was causing to the back. And I say
6 that to simply say this, we would request that
7 this Commission remand this case and direct
8 that my client be sent for another opinion
9 concerning his ongoing need for medical care
10 which will hopefully allow him to continue
11 working. Dr. Drye was noncommittal as to any
12 type of medical care that would continue to be
13 needed. Three other doctors that have seen him
14 all said that he will need ongoing medication
15 and ongoing medical treatment to try to allow
16 him to continue working. We ask this so that
17 we can get a second opinion to see if anything
18 further can be done that can decrease the
19 degree of disability at this time, and if not,
20 to allow him to continue working. At this
21 point, this man, when he stands up, he has
22 balance problems, even residual balance
23 problems which he has. Dr. Mandell states he
24 has balance problems. Dr. Mandell says he has
25 a permanent neurological deficit that was not

1 addressed by the Commission. The first thing,
2 therefore, we would ask you is to give little
3 weight to Dr. Drye's opinions, and the second
4 thing we would ask you to do is, we'd ask you
5 to grant -- that this case be reversed or
6 remanded to allow us a second opinion to see if
7 anything further can be done to decrease his
8 degree of disability. In lieu of that, we
9 would ask that you either increase the award in
10 two ways. One, the only testimony in the
11 record about the loss of use of this man's back
12 comes from the claimant who testified that he
13 had about an 80 percent loss of use of the
14 back. He can no longer ride a bicycle. He can
15 no longer do the types of activities that he
16 used to do prior to this injury. The other
17 testimony comes from Dr. Forest who testified
18 in his opinion that the claimant had a 50
19 percent loss of use of the back, and the other
20 doctor is Dr. Margalit who testified he had 50
21 percent loss of use of the back. The
22 impairment ratings rate from everybody giving
23 him a 25 to 28 percent whole impairment. One
24 person gives him 30 percent whole person
25 impairment to the cervical spine alone. The

1 lumbar spine, those physicians that rate him,
2 impairment-wise, not loss-of-use-wise, but give
3 him 8 to 10 percent impairment of the lumbar
4 spine. In addition to that, Dr. Mandell, of
5 course, gives him an additional whole person,
6 15 percent neurological deficit. This man,
7 even looking at the most recent case, if you
8 want to consider wage loss, which the
9 Commission improperly under the conclusion of
10 law says that "Under Section 42-9-10, the
11 claimant is not totally and permanently
12 disabled as he returned back to work with the
13 employer for almost two years". Obviously, he
14 considered wage loss. The award was requested.
15 Even if their 21 was for a scheduled member
16 award. We requested an award for the back
17 under 42-9-30 Subsection 21, and that's tied to
18 Section 42-9-10, Subsection B, which is due to
19 the character of the injury. Wage loss has no
20 place in a back award. However, going forward
21 with that, this man is excluded, if you look at
22 even the most recent caselaw, the vocational
23 expert who saw this man said that with his
24 condition, with his problems, he is excluded
25 from approximately 99 percent of the jobs out

1 there. I would ask you to increase it to an
2 award for total and permanent disability based
3 on having a loss of more than 50 percent use of
4 the back. In lieu of that, the only testimony
5 in evidence submitted in reference to loss of
6 use of the back is that to which I've just
7 referred, Dr. Forest, Dr. Margalit and my
8 client. I would ask you to find that he has
9 sustained a greater than 50 percent loss of use
10 of the back and give him an award that fairly
11 represents the amount of loss of use, less than
12 100 percent, but that represents a loss of use
13 that this man has to do jobs requiring the use
14 of his back that fairly represents the amount
15 of loss of use and the labor access that this
16 man has. Even under the best circumstances,
17 this man is excluded from 76 percent of the job
18 title classifications in the United States. At
19 worst case and under the actual FCE and all
20 that and the findings of the vocational expert,
21 he's excluded from 99 percent. Please, grant
22 him an award for loss of use for greater than
23 50 percent in an amount that you believe is
24 fair and appropriate to represent the amount of
25 loss that he's lost, not only to his cervical

1 spine, but to his lumbar spine, but in addition
2 to that, to his neurological deficit. This
3 man's gait is altered. Everybody -- he's got
4 permanent -- he was here. He stood up. He
5 would wobble. And look at the evidence from
6 Lowe's itself, the accommodations that they're
7 making. He's allowed to sit down if he needs
8 to. He's allowed to have lifting assistance.
9 That is what is required for this man to even
10 keep working. I am asking you to grant us the
11 medical care so that he can try to stay
12 working, and in addition to that, to give him
13 an award that's going to compensate him. If
14 Lowe's fires him tomorrow or if he loses that
15 job for some reason, where is he going to find
16 a job? Where is he going to find a job?
17 Please, compensate him for his back to the
18 degree to which he is entitled. In addition to
19 that, I would ask you for an award looking at
20 lumbar spine, looking at the cervical spine and
21 also at the neurological deficit and would ask
22 you for at least a separate award for the
23 cervical spine, for the lumbar spine and for
24 the neurological deficit. Commissioners, I
25 would be glad to answer any questions that you

1 may have. Thank you for listening to me, and
2 I appreciate your consideration.

3 **MS. MORROW:** Good morning. May it please the
4 Commission. I think there are three primary
5 issues that were presented by the claimant in
6 his brief that I want to touch on this morning.
7 First and foremost, with the hand-ups that you
8 were given, you would also read on a June 18,
9 2012 note from Dr. Drye at the bottom of that
10 page, he states that "The symptoms are more
11 consistent with axial myofacial pain in a
12 pattern strongly suggestive of arthritic type
13 symptoms". At no time did he conclude that
14 those arthritic type symptoms were in any way
15 causally related to the accident itself, nor
16 were they aggravated or exacerbated by the
17 accident itself. The three primary issues in
18 this claim were the claimant's request for a
19 second opinion, due process rights and a 48
20 percent impairment that was assigned to the
21 back by the single commissioner. As it relates
22 to the second opinion, the defendants returned
23 the claimant to work in November of 2011. They
24 placed him at a cashier position and offered
25 him a stool at any time that he needed it and

1 assistance that he would be entitled to if he
2 required it. If you look at the testimony in
3 the record, his direct supervisor who came to
4 testify said that he never used the stool.
5 They asked him did he want it, and he said
6 "no". They said, "At any time, if you want it,
7 please let us know, and we'll give it to you".
8 He continues to work for us in that same job.
9 He continues to do so without any
10 accommodations while he performs this job. He
11 works 40 hours a week. He works 8 hours a day.
12 Our supervisor came and testified that he's a
13 very valued employee. He's one of the ones
14 that they rely on to come in and perform work
15 for them. He has also received a raise since
16 he's returned to work. He's very valued
17 employee, and he is putting forth good effort
18 and doing well within the job that has been
19 provided to him. I think the only reason Gal
20 Margalit said 99 percent is because Gal
21 couldn't discount the fact of the one percent
22 of the job that he currently holds. We
23 returned him to Dr. Drye after he returned to
24 work at their request for a return evaluation.
25 He was originally released at maximum medical

1 improvement June 7 of 2011 which at our APA
2 Page 30. He was given a 25 percent impairment
3 to the back almost a year to the day we
4 returned him to Dr. Drye for reconsideration
5 and evaluation. Dr. Drye in June of 2012 on
6 June 18th -- returned to him, and he said that
7 there was no change in the impairment, no
8 change in his functional capabilities. And
9 remember, this is after he's already undergone
10 six months for the employer, does not change
11 the impairment rating or restrictions in any
12 type of way which is at our APAs Page 31 and
13 32. At that point, the defendants did not
14 provide any additional evaluations for the
15 claimant. However, if you at the claimant's
16 brief, he then took it upon himself to send his
17 client or to go to Dr. Forest and Dr. Mandell.
18 By doing so, he obviated the need for a second
19 opinion because he received his own second
20 opinion and a third opinion. So, by the time
21 this matter came to the single commissioner,
22 that would have been offering him what amounted
23 to a fourth opinion at that point.
24 Additionally the claimant selected his own
25 doctors for his second opinion, so he set forth

1 the best opportunity he had to relay to those
2 doctors what his concerns, conditions,
3 limitations were. If you look at Dr. Forest
4 and Dr. Mandell, in large part, they agree with
5 Dr. Drye. They agree with the restrictions
6 that were provided to him and the conclusions
7 that he made. Bear in mind, too, that at the
8 inception of this claim, this guy was
9 originally seen by Doctor's Care, then by Dr.
10 Armsey and then by Dr. Drye before this ever
11 became a litigated issue. So, bear in mind the
12 claimant himself followed along on that
13 referral pattern and selected to treat with Dr.
14 Drye. It's interesting that he comes now
15 trying to say that Dr. Drye is not providing
16 him what he wants when he trusted Dr. Drye in
17 order to provide him the surgery and treatment
18 that he needed in this case. Based on that as
19 a whole, the single commissioner rightfully so
20 did not provide him with a second opinion
21 request at the hearing. The second issue that
22 they raise in their brief is a due process
23 issue which I'll only touch on briefly since
24 they didn't raise it so much today which is
25 just that due process by way of jurisdiction

1 was raised for the first time in the brief, and
2 while that can be raised for the first time on
3 appeal, it certainly begs the question as to
4 whether or not the strength of that argument
5 really should prevail as far as this claim is
6 concerned. The claimant was not deprived of
7 his right of due process. He was afforded a
8 full trial with cross examination and the
9 presentation of evidence, of which he took full
10 opportunity. At no time was he ever told that
11 he was not unable to put into the record or not
12 allow to disclose any additional evidence that
13 would have otherwise been provided at the
14 hearing. It's well founded in the Act based on
15 Form 21, Regulation 67-208(b). There are
16 multiple avenues for which a defendant can
17 request a hearing properly under the Act.
18 Based on that, I don't believe that the
19 argument of jurisdiction or due process would
20 be appropriate in this appeal in terms of
21 reversing or remanding the claim. And in terms
22 of the third fact, as far as to permanent
23 partial disability that was assigned in this
24 case, it's a well-known recognized fact,
25 42-9-30 recognizes the back as a single unit.

1 We don't assign impairments or awards based on
2 cervical, lumbar and thoracic. Those awards
3 are given in the totality of the back. Any
4 request for consideration or reconsideration
5 that should have been made would have been done
6 before the hearing itself. The claimant had
7 every opportunity to Dr. Drye by deposition or
8 questionnaire to ask for an additional
9 impairment rating reconsideration, whether or
10 not that impairment rating included the
11 cervical spine and lumbar spine, and the record
12 does not have any of that evidence in it. The
13 rating that is appropriate under the AMA Guides
14 is the 25 percent. If you look at Dr. Forest's
15 notes, he simply gives a ballpark rating and
16 does not cite where in the AMAs that the rating
17 actually comes from. He just gives generalized
18 ratings as far the back is concerned, yet also
19 agrees with Dr. Drye as far as the restrictions
20 and impairments in a general sense. Also, if
21 you look at one of the things that they
22 discussed today that they raised as far as
23 Dr. Forest and the Dr. Mandell is the -- what
24 they gave was a disability comment in terms of
25 greater than 50 percent loss of use of the

1 back. However, that's a determination that's
2 made by the Commission, the difference between
3 disability and impairment. The doctor's
4 purpose and information as far as providing to
5 the Commission is to provide an impairment, and
6 then the Commission obviously weighs the
7 factors in terms of disability. Their comments
8 in terms of disability don't necessarily have
9 any bearing on the commission. The single
10 commissioner was correct in looking at those in
11 that respect and then weighing, of course, the
12 value of those impairment ratings that were
13 provided that in large part line up with the
14 authorized treating physician. He also
15 appropriately weighed the evidence given the
16 fact these were one-time evaluations by IME
17 doctors, and their impairment ratings in
18 contrast with the authorized treating physician
19 who provided the surgery and followed the
20 claimant for well over two years. As a result,
21 they also received the vocational assessment by
22 Harriet Fowler who again said 99 percent
23 primarily because the claimant continues to
24 work, bearing in mind that he has worked for us
25 since November of 2011. He continues to work

1 for us. He's a valued employee. He certainly
2 had an impairment rating, but the commissioner
3 got it right, that he has less than 50 percent
4 loss of use of the back because of his
5 demonstrated abilities which completely
6 contrast the vocational assessment that the
7 claimant had done in his claim. It doesn't
8 correlate with his actual demonstrated
9 abilities that he set forth that he testified
10 to at the hearing, that his supervisor
11 testified to at the hearing. They want to
12 completely ignore that aspect and assume that
13 sometime in his life, he may otherwise become
14 permanently and totally disabled. That does
15 not make him permanently and totaled disabled
16 as far as this claim is concerned, as far as
17 the facts are concerned and the facts that were
18 presented to the commission. It would be
19 improper to remand this in back to the single
20 commissioner for further consideration and
21 future medical as requested by the claimant
22 because that could have been obtained from
23 Dr. Drye prior to the hearing, and it was not.
24 The single commissioner left in the order that
25 he's entitled to future medical care pursuant

1 to Dr. Drye. It would revert back to the last
2 record of Dr. Drye and his comments as far as
3 future medical care is concerned for the
4 claimant. If there was any concern in terms of
5 what exact future medical treatment the
6 claimant was entitled to, the claimant had
7 every opportunity prior to the hearing to
8 secure that evidence in black and white and
9 submit it to the commission. He made no motion
10 to leave the record open in order to clarify.
11 He did not depose Dr. Drye. He did not submit
12 any questionnaire to Dr. Drye to clarify that
13 issue. The order is clear what the referral
14 back for medical care is, and it should stand
15 on its own based on the evidence as a whole.
16 The fact that they want to go back and retry
17 the case and take a second bite of the apple is
18 not appropriate in terms of a request for
19 reconsideration or an increased award as far as
20 permanent and total disability. It defies the
21 Act unto itself that a single member injury,
22 permanent partial disability under 42-9-30
23 would otherwise allow somebody to be
24 permanently and totally disabled and then also
25 continue to work for the same employer. For

1 those reasons, Your Honors, we would ask that
2 the single commissioner's decision be affirmed
3 in its entirety, and that it is, in fact,
4 proper. Thank you.

5 **MR. MCDANIEL:** Thank you, Commissioners. I'm very
6 fortunate to have three attorneys I'm appearing
7 before today. There is no section in the Act
8 that allows for the defendants to bring a
9 hearing to determine disability. There's
10 absolutely -- I would ask this in your wealth
11 of knowledge and background and experience to
12 name me one other area of law wherein a
13 claimant or a plaintiff is not the one that
14 determines when and if they're going to bring
15 the cause of action to determine whether or not
16 they're entitled to benefits. You know, it's
17 very appropriate that counsel was talking about
18 we didn't take the deposition, and we didn't do
19 this. Unfortunately, the way the rules are
20 currently set up, you know, the medical records
21 go in, and the person that wants to challenge
22 those, they have to take the deposition. I've
23 always found that ironic as compared to any
24 other forum of which I appear, in that, you
25 know, if you want to exercise your due process

1 rights, you have to go out and pay somebody
2 \$1,500.00 and then pay the deposition fee and
3 all that. I submit that there's absolutely no
4 opportunity within the act for them to bring or
5 force a claimant for a pre-determination or
6 rush him to judgment so that he can have to go
7 out and obtain evidence and all this type of
8 thing when he didn't want his rights
9 determined, and that's what we have here. As
10 soon as they got that report, they didn't want
11 to talk about a second opinion. They didn't
12 even want to give us time to even file with
13 this commission and request a second opinion,
14 even though we had been talking about one and
15 begging for one for six months. I want to go
16 from that, however, and go on to this. Counsel
17 brought up something about the low back in
18 reference to Dr. Drye. You're not going to
19 find one bit of evidence where the low back was
20 not accepted, and in fact, look at the very
21 first Consent Order. In the very first Consent
22 Order, they accepted the low back. They
23 accepted the right leg. They just didn't
24 accept the neck, because all of a sudden, they
25 were dealing with myelopathy and a guy that

1 couldn't stand and couldn't walk. Also, they
2 sent him to Doctor's Care. After that,
3 Doctor's Care sent him to Dr. Armsey, and when
4 they were dealing with a difficult case, then,
5 all of a sudden, they decided to deny the neck.
6 You're going to see the low back mentioned from
7 the very get-go, and it's what he was sent
8 there for treatment for initially. So, those
9 issues just completely do not fly. Next, no
10 claimant should have to be required to beg.
11 Every Commissioner I'm looking at right now,
12 you've all granted any claimant I've ever
13 represented a second opinion. That's all we've
14 ever wanted. We had to go out -- Dr. Mandell
15 -- look at his report. He says he needs
16 further treatment. Look at Dr. Forest. I
17 appreciate your time and consideration.

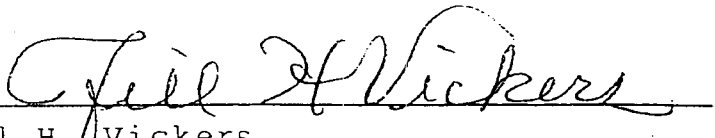
18 (Whereupon, the Full Commission Panel Hearing
19 concluded at 9:41 o'clock a.m.)
20
21
22
23
24
25

CERTIFICATE

This is to certify that the within hearing consisting of twenty-two (22) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenotype with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on August 12, 2013.


Jill H. Vickers
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: July 5, 2016



ATTORNEYS AT LAW

Reply To
KELLY F. MORROW
Direct Dial: (803) 227-2238
kmorrow@mgclaw.com
COLUMBIA

September 16, 2011

Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201

RE: Henton T. Clemmons, Jr. v. Lowe's Home Centers, Inc. and Sedgwick Claims
Management Services, Inc.
Date of Accident: September 12, 2010
WCC File No.: 1015200
Our File No.: 2073.10044
Claim No.: 30101077878-0001

Dear Preston:

Enclosed herewith please find the Form 17 in the above-referenced case. Your client has returned to work for my employer for two weeks, thereby triggering the need for the execution of the Form 17. I kindly ask that you have your client execute this and return it to me as quickly as possible so I may terminate the weekly benefits at this time. If your client is unwilling to sign the Form 17, please advise me immediately so I may file a Form 21 with the Commission to terminate benefits. Additionally, my employer is more than happy to have Claimant sign the Form 17 at work if that is easier for you and you are agreeable to the same. If you would prefer that, simply let me know and I will be in contact with my employer to achieve the same and provide you with a copy of the executed Form 17. As always, I look forward to hearing from you on this matter. Also, once the Form 17 is executed, I would certainly like to talk to you about resolution of this case and would ask that you discuss that with your client and provide me with a settlement demand at your convenience.

Very truly yours,

Kelly F. Morrow

KFM/sso
Enclosure

cc: Jennifer Taylor, Sedgwick Claims Management Services, Inc. (via facsimile)

South Carolina Workers' Compensation Commission
P.O. Box 1715 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1015200
Carrier File # 30101077878-0001
Carrier Code # 00946
Employer FEIN 560748358

HENTON T. CLEMMONS

Claimant's Name SSN

Address City State Zip

Home Phone # Work Phone #

Jennifer Taylor

Preparer's Name

Lowe's Home Centers, Inc.

Employer's Name

390 HARBISON BLVD. COLUMBIA, SC 29212

Address City State Zip

Lowe's Home Centers, Inc.

Insurance Carrier

(704)717-7714

Phone #

Date of Injury: 09/12/2010
month day year

1. Temporary Compensation Paid:

Number of Weeks	From	To	Amount
46 wks 4 days	10/19/2011	09/09/2011	\$12,556.14

2. The claimant returned to work on 09/10/2011
month day year

☒ With restrictions but at a salary not less than before the injury.
☐ Without restrictions.

3. The claimant agrees he or she was able to return to work on 09/10/2011
month day year

I agree that I was disabled for the period(s) indicated and I was paid compensation as shown above. I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHT TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT, OR MEDICAL CARE. The effect of this form has been fully explained to me, and I have received a copy of it. I understand that I should not sign this form until 15 days after I have returned to work or agree I was able to return to work.

Claimant's Signature

Employer's Representative Signature

(Check one) ☐ Witness ☐ Claimant's Attorney

Date Agreement Signed

File this form with the Claims Department no later than 31 days from the date the claimant returned to work to terminate temporary compensation after the first 150 days after employer's notice of the injury according to R.67-505. Within the 150 day period, obtain a Form 17 to document that claimant agrees he or she is able to return to work.



ATTORNEYS AT LAW

Reply To
KELLY F. MORROW
Direct Dial: (803) 227-2238
kmorrow@mgclaw.com
COLUMBIA

January 26, 2012

VIA HAND DELIVERY

Gene McCaskill
S. C. WORKERS' COMPENSATION COMMISSION
Post Office Box 1715
Columbia, South Carolina 29202-1715

RE: Henton T. Clemmons, Jr. v. Lowe's Home Centers, Inc. and Sedgwick Claims
Management Services, Inc.
Date of Accident: September 12, 2010
WCC File No.: 1015200
Our File No.: 2073.10044
Claim No.: 30101077878-0001

Dear Commissioner McCaskill:

Please accept this correspondence as the Defendants withdrawal of the Form 21, Hearing Request, in this case. The Claimant has requested a return evaluation to the authorized treating physician which the Defendants are going to authorize. Until that evaluation takes place, a hearing to address permanent partial disability would be premature. Upon completion of that evaluation, the Defendants reserve the right to re-file the Form 21 and request a hearing again on the previously stated grounds. By copy of this letter to Preston F. McDaniel, Esquire, the Claimant's attorney, I am notifying him of our correspondence with you as well as our request for cancellation of the upcoming hearing currently scheduled on February 13, 2012 in Columbia, South Carolina.

With kindest regards,

Very truly yours,

Kelly F. Morrow

KFM/jmm

cc: Jennifer Taylor, Sedgwick Claims Management Services, Inc. (via facsimile)
Preston F. McDaniel, Esquire, The McDaniel Law Firm



ATTORNEYS AT LAW

Reply To
KELLY F. MORROW
Direct Dial: (803) 227-2238
kmorrow@mgclaw.com
COLUMBIA

July 24, 2012

Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201

RE: Henton T. Clemmons, Jr. v. Lowe's Home Centers, Inc. and Sedgwick Claims
Management Services, Inc.
Date of Accident: September 12, 2010
WCC File No.: 1015200
Our File No.: 2073.10044
Claim No.: 30101077878-0001

Dear Preston:

Enclosed herewith please find the most recent evaluation with Dr. Drye in the above-referenced case. As you know, we agreed to return Mr. Clemmons to Dr. Drye due to his ongoing complaints as a result of his work-related injuries. As you will see, Dr. Drye continues to say that he is at maximum medical improvement and continues to endorse the previously stated work restrictions. He has not made any additional recommendations in terms of medical treatment. At this point, it would appear that Mr. Clemmons remains at maximum medical improvement with no additional medical intervention needed. Because of this, I am writing to request that you please discuss settlement with your client again on a Form 16 basis and provide me with a settlement demand at your earliest opportunity. I will otherwise be filing a Form 21 again asserting maximum medical improvement to seek an award of permanent partial disability benefits, if appropriate, in the event that we cannot reach an agreement. I look forward to hearing from you and working with you on resolving this claim.

With kindest regards,

Very truly yours,

Kelly F. Morrow

Enclosure
KFM/jmm

cc: Jennifer Taylor, Sedgwick Claims Management Services, Inc. (via facsimile)

COLUMBIA NEUROSURGICAL ASSOCIATES, P.A.

www.columbianeurosurgical.com

Spine & Neurological Surgery

Thomas J. Holbrook, Jr., MD Scott B. Boyd, MD
William M. Rambo, Jr., MD Brett C. Gunter, MD
Randall G. Drye, MD Karl A. Lozanne, MD

720 Rabon Road
Columbia, SC 29203
(803) 462-0423 (F) 462 0432

Pain Medicine
Steven B. Storick, MD
Eva J. Rawl, MD

132 Sunset Court
W. Columbia, SC 29169
(803) 794-3700 (F) 794-0322

OFFICE VISIT

Patient: Hanton T. Clemmons, Jr.
Chart: 95744 WC
Date: 6/18/12

SURGERY: ACDF, C5-6, C6-7 with BBB and Trinica for HNP with myelopathy, 11/9/10.

Mr. Clemmons returns today accompanied by his mother having been last seen and released approximately a year ago. At that point he had recovered nicely from surgery though he still had some symptoms referable to his preoperative cord injury and myelopathy. Nonetheless we were able to return him to work with some physical restrictions and he is back at work primarily as a cashier. Mr. Clemmons reports that he has some persistent stiffness and pain in the base of the neck which does not radiate into the upper extremities. In fact, he denies any recurrent symptoms in the arms or hands. The neck pain as well as an element of back pain are worse in the morning and seemed to improve as he moves about. Even at work he will often do the previous stretching exercises and changing of posture that he learned in physical therapy. He denies any radicular symptoms down the leg and continues to have some altered gait from his previous myelopathy as well as a long-standing, pre-injury inversion of the right foot and ankle. His mother confirms that this has forever been a problem as he wears out shoes in the lateral aspect. He has no bowel or bladder incontinence or retention and otherwise is doing well. He arrives today having undergone cervical and lumbar MRIs for a check for possible change in condition.

On physical exam, he is quite comfortable in the seated position. He has some mild tenderness in the posterior cervical and lumbar region with no active spasm. He does appear to have gained considerable weight, however. He has a negative SLR bilaterally at 90 degrees and has negative Lhermitte's and Spurling's sign. His strength appears to be 5/5 bilaterally throughout, including all muscle groups of the upper and lower extremities. He does have some mild hyperreflexia in the lower extremities relative to the upper extremities with preserved sensation. There is no evidence of dorsiflexion weakness although his eversion is perhaps diminished on the right which again is a long-standing preinjury problem.

IMAGING STUDIES: Cervical MRI as well as lumbar study done at LMC were reviewed and the results shared with the patient. He appears to have healed beautifully from his surgery with what appears to be a stable operative construct with instrumentation. There was no residual high degree of canal stenosis, no obvious impingement of the cord. There is CSF surrounding the cord at the operative levels. At the adjacent levels above, C3-4 and C4-5, there is some spondylitic change and broad based disc bulge which has not progressed significantly from his previous study. There is CSF surrounding the cord with no evidence of new pathology. The lumbar study demonstrates a disc protrusion at L1-2 eccentric to the left with some effacement of the CSF around the conus. At L5-S1 there is a very advanced degenerative disc with disc space collapse, associated Modic changes within the endplates and a generalized bulge. The canal, however, is otherwise patent and I see no evidence of any direct nerve root impingement or large disc herniation.

IMPRESSION/PLAN: Mr. Clemmons, his mother and I have discussed the findings which for the most part are reassuring. His symptoms are more consistent with axial and myofascial pain and the pattern is strongly suggestive of arthritic-type symptoms. I have encouraged him to continue with what he is doing in terms of stretching and movement and I have advised him to try and lose some weight as this would likely help with the lumbar problem. We have discussed the natural history of

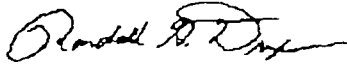
COLUMBIA NEUROSURGICAL ASSOCIATES, P.A.

Page 2

Re: Henton T. Clemmons, Jr.

6/18/12

such changes and at this stage I think there is nothing in need of neurosurgical intervention. The above was all discussed and I see no reason for any change in terms of his permanent work restrictions, rating or no additional intervention or treatment is required. He is being released today with the above conclusions.



Randall G. Drye, MD

THIS DOCUMENT HAS BEEN ELECTRONICALLY SIGNED

RGD/MAH

CNAWT: 4020

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
OF COUNSEL:

Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

October 3, 2012

VIA EMAIL dwilliams@wcc.sc.gov

Commissioner Derrick L. Williams
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Henton T Clemmons v. Lowe's Home Centers Inc
WCC File Number: 1015200

Dear Commissioner Williams:

I am in receipt of the reply filed by Ms. Morrow to my request for reconsideration and your decision on that request.

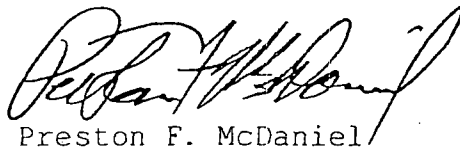
However, I would request that the order be strictly limited to your findings as Ms. Morrow went outside of your findings in her Reply and refers to evidence that there is absolutely no indication that you referred to in your decision. I would specifically ask that the finding that you made that my client was not totally and permanently disabled but in that same finding awarding 48% PPD be set out just like that since you did not grant my request for further explanation of that finding as that will be a specific issue on appeal. Also there is no mention of my client's diagnosed myelopathy or his low back problem and I would request that not be addressed.

Finally I apologize for not being a good enough advocate to have secured a better award for this worthy and valued employee or at least an explanation of your finding that he is not totally and permanently disabled when our only request was for an award under 42-9-30. I look forward to receiving your

Commissioner Derrick L. Williams
October 3, 2012
Page 2 of 2

decision and proceeding with the appeal in this matter and by copy of this letter I am notifying Kelly Morrow of this submission.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Preston F. McDaniel", written in a cursive style.

Preston F. McDaniel

PFM/bre

cc: Kelly F. Morrow, Attorney-at-Law
(via email Kmorrow@mgclaw.com)

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October 15, 2012

VIA EMAIL dwilliams@wcc.sc.gov

Commissioner Derrick L. Williams
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

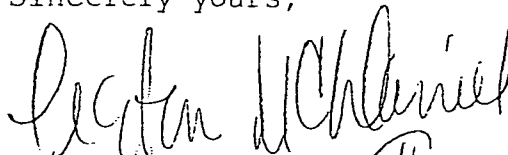
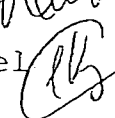
RE: Henton T Clemmons v. Lowe's Home Centers Inc
WCC File Number: 1015200

Dear Commissioner Williams:

By copy of this email I am notifying Kelly Morrow that my client has decided not to take the award that has been made in a lump sum but requests that it be paid out in weekly payments and that we are thus withdrawing our request for a total lump sum payment of the Award.

This email is simply to notify you of this request with which I am sure that you will not have a problem. As always I appreciate all courtesies and kindnesses shown to me by you and the Commission.

Sincerely yours,


Preston F. McDaniel 

PFM/pkb

cc: Kelly F. Morrow, Attorney-at-Law
(via email kmorrow@mgclaw.com)

RE: Henton T. Clemmons v. Lowe's Home Centers, Inc. WCC File No.: 1015200

From: **Kelly Morrow** (kmorrow@mgclaw.com)
Sent: Mon 10/15/12 12:04 PM
To: Patty Boatwright (pbmcdlaw@hotmail.com); Commissioner Derrick Williams (dwilliams@wcc.sc.gov); Renee Smith (rgsmith@wcc.sc.gov)
Cc: Elizabeth Render (elizabeth.render@mgclaw.com); Ricki Goodwin (ricki.goodwin@mgclaw.com)

Commissioner Williams—

I once again have to object to this request by the Claimant

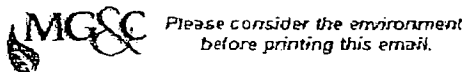
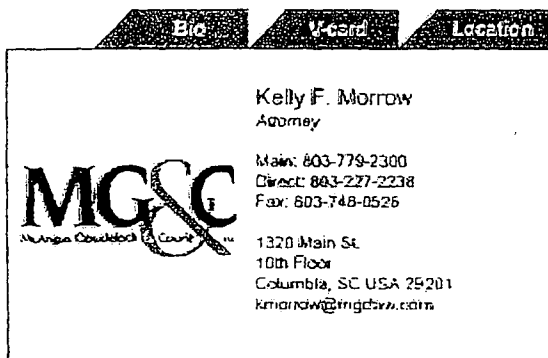
The Claimant has already previously requested reconsideration of the Order instructions as issued and your response has been that they are to remain as issued. The Order instructions clearly state in #9 that this award is to be paid in a lump sum. That matter has been litigated before you can not now be taken off the table by the Claimant pending the preparation of the Order in this case.

As soon as we receive the hearing transcript in this case, the Order will be forthcoming as quickly as possible.

Thank you for consideration of our objection to the most recent request for reconsideration.

Sincerely,

Kelly Morrow



McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211
Facsimile (803) 252-0709

October 16, 2012

VIA EMAIL rsmith@wcc.sc.gov
Commissioner Derrick L. Williams
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Henton T Clemmons v. Lowe's Home Centers Inc
WCC File Number: 1015200

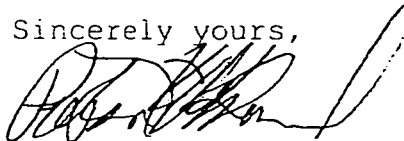
Dear Commissioner Williams:

Quite frankly Commissioner this is a new one on me as I have never had an insurance company object to paying out an award on a weekly basis.

With that said I don't believe this issue was, "litigated," but what you will find is that we made a, "request" in our Pre-Hearing Brief that any award made be paid in a lump sum. We are simply withdrawing that request and asking that the award be paid pursuant to the Act. Therefore the finding of fact that you made was in reference to our request which we are withdrawing. If I am wrong about this matter being litigated and if there was an objection to this matter being paid either in a lump sum or weekly I stand to be corrected but I know of none and again this was simply based on our "request" for a lump sum which we are withdrawing. By copy of this email I am advising Kelly of this communication.

I look forward to receiving a proposed Order.

Sincerely yours,



Preston F. McDaniel

PFM/bre

cc: Kelly F. Morrow, Attorney-at-Law
(via email kmorrow@mgclaw.com)

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211
Facsimile (803) 252-0709

November 1, 2012

VIA EMAIL rsmith@wcc.sc.gov
Commissioner Derrick L. Williams
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

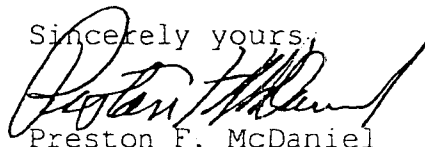
RE: Henton T Clemmons v. Lowe's Home Centers Inc
WCC File Number: 1015200

Dear Commissioner Williams:

Quite Frankly because I don't know what to do I decided to write you this before your final Order came out on Tommy Clemmons., In your Order notes you directed that Mr. Clemmons was to receive Dodge medicals per the direction of Dr. Drye. I have met with my client, told him of your Decision and we discussed the fact that he wanted to go back to see Dr. Drye and talk to Dr. Drye about ordering some of the medical care that was helping him and is allowing him to keep working.

I contacted Ms. Morrow about that and she advised me that she had reviewed his notes and that she did not see any reference to that medical care in the notes from Dr. Drye. Based on this I believe we need to specify what you meant by Dodge medicals. My understanding of your ruling was that any medical care that Dr. Drye recommended in reference to treatment for the injury that would have a tendency to reduce the disability would be authorized. Obviously Ms. Morrow's clients don't feel the same way. I would appreciate it if you would address this or if you would direct Ms. Morrow to take the deposition of Dr. Drye or at least set up a conference meeting with Dr. Drye, me and Ms. Morrow to specify what types of medical care he feels that Mr. Clemmons will need. We could actually write the Order allowing for a supplemental Order to be issued after such meeting or deposition. By copy of this letter I am notifying Ms. Morrow of this communication.

Sincerely yours,



Preston F. McDaniel

PFM/pkb

CC: Kelly F. Morrow, Attorney-at-Law (Kmorrow@mgclaw.com)

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
Justin S. Byars
Matthew Robertson
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

June 5, 2013

VIA EMAIL: kmorrow@mgclaw.com

Kelly F. Morrow, Attorney-at-Law
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, SC 29211

RE: HENTON T CLEMMONS, JR. v. LOWE'S HOME CENTERS, INC.
WCC File No. 1015200

Dear Kelly:

I have reviewed the proposed Order that the Full Commission requested you draft and I believe that the Order that you have drafted, while extremely well written, far exceeds the directions of the Full Commission.

The Full Commission simply found that, "the Commissioners considered the matter and find a FULL AFFIRMATION of the Single Commissioner's Decision and Order." They then directed you to prepare a proposed Order and only specified that that Order was to include and that it was to recite "the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order and reflects any comments requested by a Commissioner." It called for no separate Findings of Fact and Conclusions of Law by the Full Commission nor did it make any Findings of Fact or decisions of law on the various issues that were appealed to the Full Commission. I therefore believe that any Order that contains all the various legal arguments that you made in the Order far exceeds the directions of the Full Commission and is in violation of both the Workers' Compensation Statute and the specific directives of the SC Administrative Procedures Act.

Also this is a consensus Order and the Commissioners are required by law to make detailed Findings of Fact, Conclusions of Law and their own Findings and Conclusions and to set those out

Kelly Morrow, Attorney at Law

June 5, 2013

Page 2 of 2

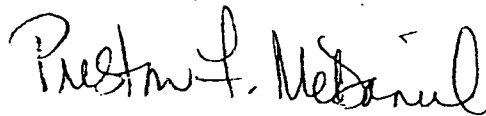
in the Record and again, as set out above, the "Request for Proposed Order" contains the only thing that they have ordered which is a Full Affirmation of the Decision and that the Single Commissioner's Findings of Fact and Conclusions of Law are affirmed.

Also while I think it is appropriate to set out the various issues that were presented to the Full Commission for appeal since the Request for an Order does not contain any specific ruling on those issues a decision on these should not be set out as there is no decision indicated in the request that there were any such decisions made by the Commission Panel on those issues.

I look forward to receiving the revised Order which is issued in compliance with the Commission's directive and the Administrative Procedures Act and the SC Workers' Compensation Act and the prior decisions of the SC Supreme Court and Court of Appeals.

By copy of this letter, I am notifying and serving Virginia L. Crocker, Judicial Director, of this notification and request for modification and for compliance with the Commission's directives.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Virginia L. Crocker, Judicial Director

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2013-001668

Henton T. Clemmons, Jr., Employee, ... Appellant,

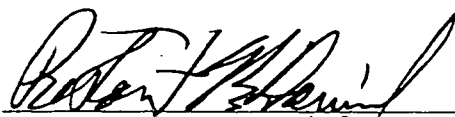
v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other materials.

Dated: January 10, 2014


Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appeal From The Workers' Compensation Commission

Opinion No. 5308

Heard November 5, 2014 – Filed April 1, 2015

AFFIRMED

Preston F. McDaniel, of McDaniel Law Firm, of
Columbia, for Appellant.

Weston Adams, III, Kelly Fitzharris Morrow, and Helen
Faith Hiser, all of McAngus Goudelock & Courie, LLC,
of Columbia and Mount Pleasant, respectively; and M.
McMullen Taylor, of Mullen Taylor, LLC, of Columbia,
for Respondents.

LOCKEMY, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission, Henton Clemmons contends the Appellate Panel erred in (1) proceeding with a hearing to determine his permanent disability award over his objection, (2) not finding him permanently and totally disabled due to a compensable work-related back injury, (3) not making a separate award for

myelopathy as a neurological injury, (4) not making a separate award for a low back injury, and (5) assigning great weight to the medical opinion of his authorized treating physician. We affirm.

FACTS

Clemmons works for Lowe's Home Centers as a cashier. On September 12, 2010, he entered a trailer at the store where he worked and slipped on wet straw, landing on his back, neck, and head. Clemmons was originally treated by Doctor's Care after he complained of low back pain radiating to his legs. Initial medical examinations diagnosed him with back strain, radiculopathy,¹ and right knee strain. After Clemmons's condition deteriorated, he was referred to Dr. Thomas Armsey of Midlands Orthopedics for further evaluation and treatment.

On November 1, 2010, Dr. Armsey's examination revealed acute ataxia.² In his report, Dr. Armsey recorded:

Clemmons and his mother report that he was a perfectly functional 38-year-old male until his work-related accident. Since that time his gait has been severely ataxic, he cannot dress because of poor balance, [and] has been bed ridden because of his inability to ambulate. He has had multiple falls because of his poor balance which is all reported as beginning September 12, 2010. He has had ventricular shunts³ placed as a child. . . .

I am concerned about a brainstem or cerebellar lesion, possibly complications from his intraventricular shunts with his recent trauma. I am certain that his ataxia is not coming from his lumbar spine and his right knee has no mechanical abnormalities on clinical exam and therefore his sensation of instability is likely neurologic at the knee

¹ Radiculopathy is a "[d]isease of the spinal nerve roots." *Stedman's Medical Dictionary* 1187 (24th ed. 1982).

² Ataxia is defined as "an ability to coordinate the muscles in the execution of voluntary movement." *Stedman's, supra*, at 135.

³ Clemmons suffers from hydrocephalus—"[a] condition marked by an excessive accumulation of fluid dilating the cerebral ventricles, thinning the brain, and causing a separation of cranial bones." *Stedman's, supra*, at 663.

as well. I would recommend an immediate neurology or neurosurgery referral. He is essentially wheelchair bound [] and will not return to work until cleared by a neurosurgeon/neurologist.

Dr. Armsey referred Clemmons to Dr. Randall Drye, a neurosurgeon. A neurologic examination revealed Clemmons had normal strength and reflexes, but an MRI showed spinal cord compression from disk herniation. Dr. Drye diagnosed Clemmons with "herniated nucleus pulposus [(herniated disc)] with cord compression and severe myelopathy,⁴ C5 and C7."

On November 9, 2010, Clemmons underwent an anterior cervical discectomy and fusion of C5 and C7. After the surgery, Clemmons returned to the hospital complaining of poor sensation and control of his legs, and he was transferred to HealthSouth rehabilitation facility. By November 24, 2010, Clemmons had recovered 90% of normal sensation in his legs with only mild spasticity and reported no issues with pain. In a November 30, 2010 report, Dr. Drye stated:

When we met in the office initially and we garnered his history he clearly reported no prior history of significant neck or neurologic problems prior to a fall at work. This occurred, according to the patient, on 9/12/10 when he slipped on some straw in a trailer and impacted on his back and the back of his head. This mechanism of injury is completely consistent as the force and flexion of the head and neck can result in a tear in the vulnerable disc and subsequent herniation. . . . Clemmons'[s] condition was perhaps worsened by the fact that he has congenital stenosis of the spine but again by history, he reports no prior symptoms of radicular nature or spinal cord dysfunction. For that reason, I believe that within a reasonable degree of medical certainty, his disc herniations, spinal cord impingement and subsequent myelopathy as well as the intervening surgery were a direct result of his fall at work.

⁴ Myelopathy is defined as a "[d]isturbance or disease of the spinal cord." *Stedman's, supra*, at 918.

Following his inpatient rehabilitation, Clemmons continued with outpatient physical therapy. After completing physical therapy, Clemmons had "regained relatively normal function in the upper extremities with no major complaints of numbness, tingling or weakness"; however, mild residual spasticity affected his gait and balance.

On November 30, 2010, Clemmons filed a Form 50, alleging he sustained an injury to his "head, back[,] and legs" as a result of the work-related accident. Lowe's admitted Clemmons sustained a work-related injury to his low back and right knee and agreed to pay Clemmons temporary total disability benefits from the date of the accident until properly terminated. Lowe's, however, denied Clemmons suffered an injury to his head or left lower extremity and further denied the extent of Clemmons's injuries.

On February 2, 2011, the parties entered a consent order in which Lowe's agreed to accept the back, neck, and right knee as compensable injuries. Lowe's also agreed to pay Clemmons temporary total disability benefits from the date of the accident until properly terminated due to a finding of maximum medical improvement (MMI), a return to work, or agreement of the parties.

On June 7, 2011, Dr. Drye concluded Clemmons had reached MMI, assigning a 25% whole person impairment "based on [his] injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." Thereafter, Lowe's asked Clemmons to provide a settlement demand pertaining to permanent disability. On September 22, 2011, Clemmons signed a Form 17, indicating he had returned to work with restrictions but at a salary not less than before the injury. He accepted a position with Lowe's as a cashier with accommodations allowing him to sit and request assistance as needed.

On January 4, 2012, Lowe's filed a Form 21 requesting a hearing to determine any compensation due for permanent total disability or permanent partial disability and requesting credit for overpayment of temporary benefits. In response to Clemmons's request for an additional medical evaluation, Lowe's withdrew its Form 21 request in order to provide for another evaluation from Clemmons's treating neurosurgeon, Dr. Drye.

On June 18, 2012, Dr. Drye examined Clemmons and reviewed recently performed magnetic imaging studies of Clemmons's lumbar spine and neck. Clemmons reported neck and back stiffness and pain experienced in the morning, which improved as he moved about. Dr. Drye characterized this pain as "axial,"

"myofascial," and suggestive of "arthritic-type symptoms." Dr. Drye noted Clemmons had gained considerable weight and advised him that losing weight would likely help reduce his back pain. Dr. Drye stated Clemmons "denies any radicular symptoms down the leg and continues to have some altered gait from his previous myelopathy as well as a long-standing, pre-injury inversion to his right foot and ankle." Dr. Drye concluded Clemmons had reached MMI and reaffirmed his earlier impairment rating of 25% whole person to the back.

Thereafter, Lowe's requested Clemmons "provide . . . a settlement demand at [his] earliest convenience." After it received no settlement demand, Lowe's filed another Form 21 request for overpayment of temporary benefits and to determine any permanent disability it owed Clemmons.

On September 5, 2012, Clemmons saw Dr. Howard Mandell, a neurologist, for an independent medical evaluation. Dr. Mandell noted Clemmons's "symptoms are stable now, not improving and not worsening for the past several months at least." Dr. Mandell concluded Clemmons did not "require additional treatment concerning his injuries other than perhaps ongoing physical therapy for balance and gait." Dr. Mandell also concluded there was "no indication" that Clemmons required further surgery. Finally, Dr. Mandell observed that Clemmons "still has spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run[,] and difficulty with balance. I would say he is probably 85% better but still has this 15% neurological injury left over."

On September 6, 2012, Clemmons saw Dr. Leonard Forrest of the Southeastern Spine Institute for another independent medical evaluation. Dr. Forrest noted Clemmons's hydrocephalus "[has] left him with some cognitive deficits, but overall otherwise he was doing physically well until [his work-related injury]." Dr. Forrest stated Clemmons had reached MMI and agreed with a twenty-five pound lifting restriction. Dr. Forrest assigned him a 30% permanent impairment rating for his neck and 10% for his "low-back related symptoms and problems[.]" resulting in a permanent impairment rating of "at least 40%." Dr. Forrest concluded Clemmons's loss of function to his back "would be over 50%."

On September 11, 2012, Clemmons saw physical therapist, Tracy Hill, for a functional capacity evaluation. According to Hill, Clemmons qualified for a whole person impairment rating of 28%, "which convert[ed] to a 80% cervical spine impairment." She found that he also qualified for a whole person impairment rating of 8%, "which convert[ed] to a 11% lumbar spine impairment."

Also on September 11, 2012, Clemmons received another independent medical evaluation by Dr. Gal Margalit of Sunset Family Practice. Dr. Margalit concurred with Dr. Drye's opinions concerning continuing work restrictions and weight loss. Dr. Margalit, however, disagreed with Dr. Drye's impairment rating, stating Clemmons "lost more than 50% of the functional capacity of his back."

On September 13, 2012, Clemmons received a vocational assessment by Harriet Fowler. Fowler noted Clemmons was currently working at Lowe's in a light duty job in a satisfactory manner and had experienced no wage loss as a result of his injury. She stated that due to his condition, Clemmons was restricted from the medium, heavy, and very heavy categories of work and "technically from the light category-although obviously he is performing a light duty job, apparently satisfactorily." Fowler concluded Clemmons had experienced a 99.94% loss of access to the job market; however, she further stated his loss of access to the job market would be 76%, assuming he could perform light duty work. She advised that light duty labor may not be sustainable for Clemmons over a long period, and therefore, working at a sedentary level may provide a better chance for sustainable employment.

On September 25, 2012, the single commissioner held a hearing to determine the issues raised in the Form 21 filed by Lowe's. Clemmons argued the hearing on the Form 21 request for a determination of permanent disability benefits violated due process because he had a right to request compensation at a time of his choosing. Clemmons further asserted that he had not reached MMI and was entitled to a second opinion regarding his back and neurological dysfunction. Alternatively, he argued that if the single commissioner found he had reached MMI, then he was entitled to permanent total disability due to either (1) a 50% or more loss of use of the back under subsection 42-9-30(21) of the South Carolina Code (2015) or (2) loss of earning capacity under section 42-9-10 of the South Carolina Code (2015). Lowe's asserted Clemmons had reached MMI, that a second opinion was unnecessary in light of the additional evaluation by his treating physician, and that Clemmons was not entitled to permanent total disability under subsection 42-9-30(21) or section 42-9-10.

The single commissioner found Clemmons sustained a 48% permanent partial disability to his back under section 42-9-30, which included "any radicular symptoms to his right leg." The single commissioner also found Clemmons was not entitled to permanent total disability pursuant to section 42-9-10 because he had returned to work for almost two years. Clemmons appealed to the Appellate

Panel, which affirmed the single commissioner's order in its entirety. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "[An appellate] court can reverse or modify the [Appellate Panel]'s decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Id.* "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* (internal quotation marks omitted). The possibility of drawing two different conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007).

"Where there are conflicts in the evidence over a factual issue, the findings of the [Appellate Panel] are conclusive." *Hall v. United Rentals, Inc.*, 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006). "The [Appellate Panel] is the ultimate fact finder in [w]orkers' [c]ompensation cases" *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight of the evidence is for the Appellate Panel. *Id.* "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995).

LAW/ANALYSIS

I. Form 21 Request for Hearing

A. Due Process

Clemmons argues the Appellate Panel violated his substantive and procedural due process rights to request a hearing for a determination of his permanent disability award at a time of his choosing. According to Clemmons, only he "has the right to bring a cause of action for a determination of [permanent disability] benefits and it is a denial of due process to force [him] to a premature determination of those benefits where he has not made a request that he be awarded any benefits whatsoever under the [Workers' Compensation] Act (the Act)." We disagree.

To establish a procedural due process claim, a person must show deprivation of his liberty or property interests due to the government's failure to provide notice, an opportunity to be heard in a meaningful way, or judicial review. *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). This court previously has identified "adequate notice," "adequate opportunity for a hearing," "the right to introduce evidence," and "the right to confront and cross-examine witnesses" as the minimal due process requirements in a contested case proceeding such as a workers' compensation hearing. *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012).

Clemmons has failed to show a procedural due process violation. The Commission held hearings to determine Clemmons's permanent disability benefits after notice was provided to both parties. At the hearings, Clemmons had the right to call any witness, cross-examine all adverse witnesses, and was allowed to present any admissible evidence to support his claim. Clemmons's primary complaint with the Commission proceeding with a hearing at this time appears to be that he was entitled to a "second opinion" regarding the extent of his impairment; however, after Dr. Drye assigned Clemmons an impairment rating of 25% whole person to the back, Clemmons received evaluations from Dr. Forrest, Dr. Mandell, Dr. Margalit, Hill, and Fowler, which the Commission considered in deciding his permanent disability benefits. Accordingly, the procedure employed by the Commission comported with due process.

B. Authority to Hear Claim

Clemmons next argues the Commission lacked statutory authority and jurisdiction to hold a hearing to determine his permanent disability benefits because he did not request a hearing to determine those benefits. He asserts that under subsection 42-9-260(E) of the South Carolina Code (2015), "An employer may request a hearing at any time to address termination or reduction of *temporary* disability payments"; however, the Act does not allow an employer to request a hearing to pay permanent disability benefits. (emphasis added). We disagree.

Section 42-17-20 of the South Carolina Code (2015) provides:

If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this title within fourteen days after the employer has knowledge of the injury . . . either party

may make application to the [C]ommission for a hearing in regard to the matters at issue and for a ruling thereon.

In *McMillan v. Midlands Human Resources*, this court held an employer has a statutory right under section 42-17-20 to request a hearing when it has knowledge of an injury for more than fourteen days, and the parties fail to reach an agreement for compensation. 305 S.C. 532, 534, 409 S.E.2d 443, 444 (Ct. App. 1991).

The Commission did not err in proceeding with a hearing to determine Clemmons's permanent disability award. Clemmons's injury occurred on September 12, 2010. On September 16, 2011, and July 24, 2012, Lowe's asked Clemmons for a settlement agreement for permanent disability compensation and received no settlement offer. Because fourteen days had passed since Clemmons's injury and the parties failed to reach an agreement as to an award for permanent disability, Lowe's had the right to request a hearing to determine compensation for any permanent disability, and the Commission was authorized to act on the request for a hearing under section 42-17-20.

Clemmons relies on *South Carolina Property & Casualty Insurance Guaranty Association v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund*, 303 S.C. 368, 401 S.E.2d 144 (1991) as support for his argument that the Commission lacks jurisdiction to determine an employee's permanent disability benefits when the employee does not request the hearing to determine permanent disability benefits. We disagree.

In *Carolinas Roofing*, the employee entered into a settlement agreement with his employer and its workers' compensation carrier that fully satisfied all liability under the Act. *Id.* at 370, 401 S.E.2d at 145. The employer's carrier became insolvent, making the South Carolina Property & Casualty Insurance Guaranty Association (Guaranty Association) responsible for providing coverage. *Id.* The Guaranty Association declined to pay the claim and filed a declaratory judgment in the circuit court seeking to determine its liability for the claim. *Id.* The respondents moved to dismiss the action, alleging the Commission had exclusive jurisdiction over the action. *Id.* The circuit court held the Commission had exclusive jurisdiction and entered a judgment in favor of the respondents. *Id.* On appeal, the issue before our supreme court was "whether there was a pending employee claim for compensation before the Commission at the time the action was commenced in circuit court." *Id.* at 371, 401 S.E.2d at 145. The supreme court held the settlement agreement terminated the employee's pending claim

before the Commission; therefore, the Commission lacked jurisdiction to decide the issue raised by the Guaranty Association. *Id.* at 371-372, 401 S.E.2d at 146.

Unlike *Carolinas Roofing*, a "pending employee claim for compensation" existed here because Clemmons's claim for workers' compensation benefits had not been decided when Lowe's requested a hearing to determine the permanent disability award. Moreover, Clemmons and Lowe's never entered a settlement agreement to resolve any liability that existed under the Act. Therefore, the Commission had jurisdiction to hold a hearing upon Lowe's request to determine whether Clemmons was entitled to permanent disability benefits.

II. Permanent Total Disability

A. 50% or more loss of use of back

Clemmons next argues the Appellate Panel erred in not finding him permanently and totally disabled due to 50% or more loss of use of the back. He contends he met his burden of proving he sustained 50% or more loss of use to his back, and Lowe's failed to rebut the presumption, thereby making him entitled to permanent total disability under section 42-9-30. We disagree.

"[I]n cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under [s]ection 42-9-10(B)." S.C. Code Ann. § 42-9-30(21) (2015). This presumption is rebuttable. *Id.*

"To qualify for total and permanent disability, a claimant must suffer a 50% or greater loss of use of his back." *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 115, 620 S.E.2d 99, 105 (Ct. App. 2005). "The [Appellate Panel]'s finding as to the degree of impairment is a question of fact." *Id.* "[T]he determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the [Appellate Panel] may gather from the injured employee, medical and vocational experts, and lay witnesses[.]" *Burnette v. City of Greenville*, 401 S.C. 417, 429, 737 S.E.2d 200, 206-07 (Ct. App. 2012). "While an impairment rating may not rest on surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009) (alteration in original) (internal quotation marks omitted). "The Appellate Panel is not bound by the opinion of medical experts and may find a degree of disability

different from that suggested by expert testimony." *Id.* (internal quotation marks omitted).

Substantial evidence supports the Appellate Panel's finding that Clemmons was not entitled to permanent total disability under section 42-9-30 due to 50% or more loss of use of his back. After considering "the medical evidence as a whole," the Appellate Panel determined Clemmons sustained a 48% permanent partial disability to the back. In making this finding, the Appellate Panel relied on the medical reports of Dr. Drye who assigned Clemmons a 25% whole person impairment rating "based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residue symptoms." Dr. Drye noted Clemmons's stiffness and pain in his back was "strongly suggestive of arthritic-type symptoms," and advised Clemmons that continued stretching exercises as well as weight loss would help with his lumbar symptoms. Admittedly, Clemmons presented medical evidence that supported an award of 50% or more loss of use to the back. Specifically, Dr. Forrest opined that Clemmons's loss of function to his back "would be over 50%." Likewise, Dr. Margalit stated Clemmons "lost more than 50% of the functional capacity of his back." Nevertheless, after considering all the medical evidence, the Appellate Panel chose to place more weight on Dr. Drye's reports, which was in its discretion as the factfinder. Although the Appellate Panel could have reasonably concluded Clemmons's loss of use to the back was 50% or more, "where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." *Mullinax*, 318 S.C. at 435, 458 S.E.2d at 78; *see also Harbin v. Owens-Corning Fiberglass*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) ("The existence of any conflicting opinions between the doctors is a matter left to the [Appellate Panel]"). Because substantial evidence supports the Appellate Panel's finding that Clemmons suffered a 48% permanent partial disability to the back, we affirm as to this issue.⁵

⁵ At oral argument, Clemmons contended the Appellate Panel erred in its award because all the medical evidence established his loss of use of the back was over 50%. Specifically, Clemmons pointed out subsection 42-9-30(21) addresses "loss of use" of the back, not "impairment" or "disability" and Dr. Drye's records do not support the Appellate Panel's finding of 48% permanent partial disability because they only addressed Clemmons's *impairment* rating. We disagree. Although Dr. Drye's records do not use the language "loss of use" of the back, we believe his 25% impairment rating provides substantial evidence to support the Appellate Panel's determination that Clemmons's loss of use of the back was not 50% or more.

B. Wage Loss

Clemmons next argues the Appellate Panel erred in considering wage loss in deciding whether he suffered 50% or more loss of use of his back. We disagree.

"While [permanent total disability] is generally based on loss of earning capacity, [sub]section 42-9-30(21) states there is a rebuttable presumption of [permanent total disability] when a claimant has 50% or more loss of use of the back." *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 464, 732 S.E.2d 190, 195 (Ct. App. 2012). "Therefore, a claimant with 50% or more loss of use of the back is not required to prove loss of earning capacity to establish [permanent total disability]." *Id.*

The Appellate Panel addressed whether Clemmons was entitled to permanent total disability under sections 42-9-30 and 42-9-10. It first found Clemmons was not entitled to permanent total disability under subsection 42-9-30(21) because his loss of use of the back was 48%. *Cf.* S.C. Code Ann. § 42-9-30(21) (stating a claimant with 50% or more loss of use of the back is presumed to be permanently and totally disabled). The Appellate Panel then found Clemmons was not entitled to permanent total disability under section 42-9-10 because he had returned to work for almost two years. Contrary to Clemmons's argument, the Appellate Panel considered loss of earning capacity when it addressed permanent total disability under section 42-9-10, not section 42-9-30. We find no error in the Appellate Panel's analysis because loss of earning capacity is generally a prerequisite to a finding of permanent total disability under section 42-9-10. *See Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 433, 716 S.E.2d 443, 445-46 (2011) ("It is well-settled that an award under [section 42-9-10] must be predicated upon a showing of a loss of earning capacity" (internal quotation marks omitted)). Because Clemmons returned to work in a job similar to that which he had prior to the accident making the same salary, the Appellate Panel did not err in finding he was not entitled to permanent total disability under section 42-9-10. *See Watson*, 399 S.C. at 462-63, 732 S.E.2d at 194-95 (noting an employee was not entitled to permanent total disability under section 42-9-10 when there was evidence she "could return to work in an occupation that complied with her job factor restrictions"). Finally, Clemmons argues that even if loss of earning capacity is a proper consideration in deciding permanent total disability under section 42-9-30, substantial evidence indicates he is permanently and totally disabled because his vocational evaluation determined he was excluded from more than 99% of the job market in the United States. Clemmons's argument erroneously attempts to infuse loss of earning capacity into the analysis of permanent total disability under section

42-9-30. Although Clemmons's exclusion from the job market would be an appropriate consideration when deciding permanent total disability under section 42-9-10, it is irrelevant under section 42-9-30. *See Watson*, 399 S.C. at 464, 732 S.E.2d at 195. Accordingly, we affirm the Appellate Panel as to this issue.

III. Myelopathy

Clemmons next argues the Appellate Panel erred in not making an award for myelopathy as a separate neurological injury. We disagree.

The Appellate Panel found "[Clemmons]'s permanent partial disability includes any radicular symptoms to his right leg." This finding was based on Dr. Drye's conclusion that Clemmons suffered a 25% whole person impairment "based on [his] injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." Thus, the Appellate Panel included residual myelopathy in its permanent partial disability award to the back, and it consequently rejected Clemmons's claim for a neurological award for myelopathy. We believe substantial evidence supports this finding. Although Dr. Mandell observed that Clemmons "is probably 85% better but still has this 15% neurological injury left over," we do not believe he was assigning an impairment rating for myelopathy as a neurological injury; rather, he was explaining Clemmons had not recovered 100% of his pre-injury functioning. Furthermore, Dr. Drye noted Clemmons continued to have altered gait from his previous myelopathy; however, Dr. Drye did not offer a separate impairment rating for myelopathy and opined that Clemmons's current symptoms were consistent with "axial and myofascial pain and strongly suggestive of arthritic type symptoms." Accordingly, the Appellate Panel did not err in deciding not to make an award for myelopathy as a separate neurological injury.

IV. Low Back Injury

Clemmons next argues the Appellate Panel erred in not making a separate award for his low back injury. Specifically, he asserts that he presented substantial evidence showing he sustained an additional injury to his "low back" that was separate and distinct from the injury to his back. We disagree.

The Appellate Panel's finding that Clemmons sustained a 48% permanent partial disability to the back under subsection 42-9-30(21) included any impairment to the low back. *See Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 443, 446, 434 S.E.2d 292, 294-95 (Ct. App. 1993) (analyzing an injury to "the low back" under

subsection 42-9-30(21)). Subsection 42-9-30(21) addresses "the loss of use of the back"; however, the term "back" is not defined in the Act. "In construing a statute, courts should give words their plain and ordinary meaning and should not resort to subtle or forced construction to limit or expand the statute's operation." *Hartford Acc. & Indem. v. S.C. Second Injury Fund*, 316 S.C. 420, 422, 450 S.E.2d 110, 111 (Ct. App. 1994) (defining the term "conceal" according to its "plain and ordinary meaning" when it was not defined in the Act). Merriam Webster's Collegiate Dictionary defines the "back" as "the rear part of the human body esp. from the neck to the end of the spine." *Merriam Webster's Collegiate Dictionary*, 83 (10th ed. 1993). Thus, the plain and ordinary meaning of the word "back" includes the low back. Moreover, section 42-9-30 does not recognize the "low back" as a separate scheduled member. Accordingly, this issue is without merit.

V. Weight Assigned to Dr. Drye's Opinion

Clemmons next argues the Appellate Panel erred in assigning great weight to the medical opinion of Dr. Drye because it contradicted the other medical evidence. We disagree.

The Appellate Panel did not err in assigning great weight to Dr. Drye's medical opinion. See *Etheredge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]"). Dr. Drye was Clemmons's authorized treating physician, and he treated Clemmons for over two years. After reviewing the medical evidence presented, the Appellate Panel determined Dr. Drye's medical reports "were the most persuasive." In a November 30, 2010 report, Dr. Drye stated Clemmons's "disc herniations, spinal cord impingement and subsequent myelopathy as well as the intervening surgery were a direct result of his fall at work." On June 18, 2012, Dr. Drye noted Clemmons "denies any radicular symptoms down the leg and continues to have some altered gait from his previous myelopathy as well as a long-standing, pre-injury inversion to his right foot and ankle." Although the June 18, 2012 report implies that Clemmons's myelopathy existed prior to his work-related injury, which contradicts the November 30, 2010 report, it was the Appellate Panel's duty as the factfinder to resolve this contradiction. See *Mullinax*, 318 S.C. at 435, 458 S.E.2d at 78 ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive."). Therefore, we find no error because this issue concerned a question of the weight assigned to the evidence.

CONCLUSION

Based on the foregoing, the Appellate Panel's decision is

AFFIRMED.

FEW, C.J., and McDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 16 2015

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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.

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

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 accidentally 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

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.

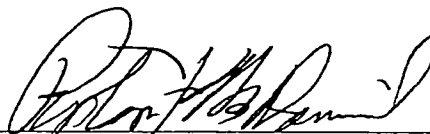
Like Nettles, The Appellant would ask the Court to reconsider its Opinion in this regard because the Court is here again justifying, "implicit" Findings made by the Commission and at a minimum, this case should be remanded to make specific Findings of Fact concerning the low back and also in reference 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,

A handwritten signature in dark ink, appearing to read "Preston F. McDaniel", is written over a horizontal line.

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April 16, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Susan S. Barden, Melody L. James and Scott T. Beck

WCC File No. 1015200

HENTON T. CLEMMONS, JR., EMPLOYEE,..... APPELLANT,

v.

LOWE'S HOME CENTERS, INC.-HARBISON, EMPLOYER, AND
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER,..... RESPONDENTS.

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

Pursuant to Rules 221 and 240, Respondents Lowe's Home Centers, Inc.- Harbison and Sedgwick Claims Management Services, Inc. oppose Claimant Henton T. Clemmons, Jr.'s Petition for Rehearing and/or Rehearing *en banc* ("Petition"). This Court did not misapprehend or overlook any argument presented by Claimant. There is no need for rehearing and certainly no reason to provide Claimant's counsel a second opportunity to argue his case to this Court.

- 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 Section 42-9-10 or Section 42-9-30.

Contrary to Claimant's repeated assertion that he did not raise or "infuse" the wage issue into his arguments below, (Pet. pp. 3, 4, 5, 6, 10, 22), there is no question that he alleged and attempted to prove total disability based on economic or wage loss. To begin with, his Form 58, Pre-Hearing Brief asserted that he was entitled "to an award of total disability based on ... Claimant has suffered a **permanent economic loss of earning capacity in the marketplace.**" (R. 127, "section 4(c)(1)". Tellingly, the section entitled "Legal issues involved: IN CORRELATION WITH RESPONSES UNDER NUMBER 4:" reveals that Claimant specifically argued that Section 42-9-10 and 42-1-120, defining total disability under Section 42-9-10, as well as relevant case law,¹ controlled issues raised under section 4(c)(1). (R. 128). Although he also raised the alternative argument that he was entitled to the presumption of total disability under Section 42-9-30(21), the above-quoted section clearly and unambiguously raised a claim for total and permanent disability under Section 42-9-10 and a theory of loss of earning capacity.

In fact, it appears that Claimant's counsel has been setting his current argument up from the beginning of this case. On October 2, 2012, in response to Commissioner

¹ Among other cases, Claimant cited Coleman v. Quality Concrete Prods, Inc., 245 S.C. 625, 629, 142 S.E.2d 43, 44 (1965) (explaining that the "generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist'"); Colvin v. E.I. Du Pont De Nemours Co., 227 S.C. 465, 475, 88 S.E.2d 581, 585-86 (1955) ("Disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion"); and Stephenson v. Rice Servs, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) (explaining the difference between the medical and economic models of compensation, defining each, and holding that just because the claimant had held jobs did not mean he was employable due to his PTSD).

Williams' Request for Proposed Order which included specific findings, (R. 209-210), Claimant's counsel wrote the Commissioner a letter with the following request:

You make the specific finding that, "I do not find that he is permanently and totally disabled, based on the evidence as a whole." You make this finding in reference to your finding of fact concerning the "48% permanent partial disability" award that you made. **I have been told by several Commissioners that since the 2007 amendments it is their position that you cannot award greater than 50% loss of use of the back in a situation where you do not find that the Claimant is totally and permanently disabled. Since you made that specific finding I was wondering if you are now of that opinion, and if you are would you simply set that out in your findings ... Would you consider reviewing the evidence and making a specific finding of fact as to how much limitation he has in your opinion to the job market based on the condition of his back and his permanent myelopathy ... whether or not in your opinion he is excluded from very heavy duty category jobs, heavy duty category jobs, medium duty category jobs under the US Department of Labor's Dictionary of Occupational Titles ...**

(R. 212-213) (emphasis added) (*see also* R. 129, raising this same issue in the attachment to his Form 58, Pre-Hearing Brief). Apparently, Commissioner Williams declined, as his Finding of Fact Nos. 10, 11 and 12 track the language of his proposed findings but do not address Claimant's "hearsay" argument based on what several Commissioners purportedly told him. (R. 19).

The Single Commissioner's proposed findings included the following: "Based on the record as a whole, I find that the Claimant has sustained a 48% PPD to his back. This includes any radicular symptoms to his right leg. I do not find that he is permanently and totally disabled, based on the evidence as a whole. This finding is based on the greater weight of the evidence, including his ability to work for nearly 2 years (while being accommodated by sitting down), his lack of prescription medication, and the medical reports and conclusions of Dr. Drye." (R. 209). Claimant suggests that the fact that the proposed findings included these sentences in one section (despite the fact that the issued

Decision, which was approved by the Single Commissioner, broke these into separate parts), means the Single Commissioner “specifically took into consideration wage loss in making [its] determination as to the Award under SC Code §42-9-30(21).” (Pet. p. 6). Claimant’s suggestion is as unsupported as it is wrong, and should be rejected.

The Commission clearly and separately held that: “Pursuant to S.C. Code Ann. Section 42-9-30 Claimant suffers from a 48% permanent partial disability to his back as a result of his work related accident,” and “[p]ursuant to S.C. Code Ann. Section 42-9-10 Claimant is not permanently and totally disabled as Claimant has returned back to work with the employer for almost two years.” (R. 42). The Commission’s Legal Conclusion under Section 42-9-10 is supported by Finding of Fact No. 12, and its Legal Conclusion under Section 42-9-30 is supported by Finding of Fact Nos. 8, 9, 10 and 11. (R. 40). This Court did not misapprehend or overlook anything in this regard.

Claimant began using the phraseology, “the injured worker has lost 50% or more of the functional use of the worker’s back to do work requiring the use of the worker’s back,” in the attachment to his Form 58 Pre-Hearing Brief.² He repeated it again in his appeal brief to the Full Commission. (R. 254-255 (arguing the test was loss of “the functional use of the worker’s back to do work requiring the use of the worker’s back,” in his discussion of whether or not he had proven 50% permanent partial disability to the back)). In essence, Claimant’s phrasing of the inquiry asks the Commission to decide whether a claimant can use a particular body part to do the same job he was doing when he was injured. This phrasing not only inappropriately inserts wage/economic loss issues into the determination under Section 42-9-30, it would make that analysis the sole

² Claimant’s counsel employed similar phraseology in his questioning of Claimant at the Single Commissioner hearing, asking Claimant’s opinion as to “what percentage of loss of use of your back to use your back to do work requiring the use of your back ...” (R. 337, lines 10-18).

determinative factor. Instead, as this Court has observed, determining a disability rating is, “more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses.” Burnette v. City of Greenville, 401 S.C. 417, 429, 737 S.E.2d 200, 206-207 (Ct. App. 2012); Stephenson, 323 S.C. at 117, 473 S.E.2d at 701 (scheduled member provisions “typically provide for fixed awards of workers’ compensation based on degrees of **medical impairment** to certain listed body parts”) (emphasis added). Thus, while at the same time arguing that wage loss is not an appropriate consideration under S.C. Code Ann. § 42-9-30(21), which is correct, Claimant has attempted repeatedly to insert the concept of ability to work into the analysis of the loss of use of a member.

Claimant wrongly suggests that Respondents improperly inserted the wage loss issue into the hearing before Commissioner Williams. Respondents’ counsel was merely stating their rebuttal argument in the event Commissioner Williams found Claimant had proven 50% or greater loss of use of his back under Section 42-9-30(21).³ Furthermore, in response, Claimant’s counsel merely stated that he would “rely on my memorandum in large part concerning the presumption to be rebutted.” (R. 298, lines 4-9). Presumably, that memorandum is the attachment to his Form 58, Pre-Hearing Brief. (R. 126-131). As noted above, in that memorandum, Claimant asserted that he was entitled “to an award of total disability based on [the fact that he] has suffered a **permanent economic loss of earning capacity in the marketplace.**” (R. 127, “section 4(c)(1)).

³ Clearly, considerations of wage loss and earning capacity *are* appropriate where an employer attempts to rebut the presumption of total disability under Section 42-9-30(21) once a claimant has proven a 50% or greater loss of use of the back, Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 464-65, 732 S.E.2d 190, 195 (Ct. App. 2012), which Claimant failed to prove here.

Claimant's counsel also asserted at the hearing "[b]ut wage loss has absolutely nothing to do with an award under 42-9-30. It is – the presumption that is to be rebutted is whether or not the claimant has lost 50 percent of the functional use of his back," (R. 298, lines 13-17), which is incorrect. Instead, it is only once the Commission has determined that a claimant has lost 50% or greater use of his back that a presumption of total and permanent disability arises, which presumption is rebuttable. S.C. Code Ann. § 42-9-30(21). Because Claimant never established a loss of use of his back of 50% or greater, the presumption never arose and, therefore, there was nothing to be rebutted. (R. 309, line 24 – 310, line 12 (Commissioner Williams denying Claimant's motion "for a ruling as to whether or not there's been any evidence to present it to rebut the 50 percent loss of the use of the back"))).

On appeal to the Full Commission, Claimant continued to mix the two concepts. In his appeal brief to the Full Commission, Claimant specifically argued that he was "entitled to an Award for total and permanent disability under S.C. Code §42-9-30(21), under the testimony and evidence in this case concerning the **Claimant's ability to work and the expert opinion of a vocational expert in reference to his job market access.**" (R. 258-259) (emphasis added).

In argument before the Full Commission, Claimant's counsel stated:

Wage loss has no place in a back award. However, going forward with that, this man is excluded, if you look at even the most recent caselaw, **the vocational expert who saw this man said that with his condition, with his problems, he is excluded from approximately 99 percent of the jobs out there.** I would ask you to increase it to an award for total and permanent disability based on having a loss of more than 50 percent use of the back ... I would ask you to find that he has sustained a greater than 50 percent loss of use of the back and give him an award that fairly represents the amount of loss of use, less than 100 percent, **but that represents a loss of use that this man has to do jobs requiring the use of his back**

that fairly represents the amount of loss of use and the labor access that this man has. Even under the best circumstances, this man is excluded from 76 percent of the job title classifications in the United States. At worst case and under the actual FCE and all that and the findings of the vocational expert, he's excluded from 99 percent. Please, grant him an award for loss of use for greater than 50 percent

...

(R. 366, line 19 – 367, line 24) (emphasis added). He can hardly complain at this point that the Commission and this Court addressed his two arguments (1. under Section 42-9-30(21), and 2. loss of earning capacity) separately.

Having improperly fused these two analyses, Claimant now argues that everyone else “misunderstands” what he really intended or argued. The Record speaks for itself. It is also ironic, in light of the above, that Claimant is asking this Court to make clear that it is “totally improper” to mix considerations of loss of earning capacity with the determination of disability rating under Section 42-9-30(21). (Pet. p. 8).

Claimant's forecast of doom – that insurers will read this Court's opinion and connive to deprive claimants of benefits, creating “make-shift jobs” that last only until the workers' compensation hearing is over – is overblown, unsupported conjecture and simply incorrect.⁴ Instead, this Court simply addressed the fact that Claimant himself presented both arguments to the Commission – that he was entitled to permanent and total disability under both Section 42-9-30(21) and Section 42-9-10 – which the

⁴ Claimant's counsel's comments regarding questions during oral argument as to whether Claimant was still working, (Pet. p. 10 n.2), are both irrelevant and highly inappropriate. First, whether Claimant was still working at the time oral argument took place before this Court is irrelevant to a decision as to his disability rating based on the record before the Commission. Second, Respondents' counsel simply responded that she did not know for certain but that she presumed Claimant was still working. Third, Claimant's counsel's current assertion that Claimant was fired from his job with Lowe's is completely unsupported by anything in the Record and should be disregarded. Claimant's attempt to rely on non-Record material on rehearing should be soundly rejected. Finally, even if, for the sake of argument, Claimant was fired by Lowe's, there is no indication or proof that he was not fired for cause.

Commission properly denied. The only confusion in this case has been on the part of Claimant, whether intentional or unintentional. The Commission and this Court understood Claimant's arguments, considered them and rejected them.

Nor is this Court's Order confusing because it did not specify that it was referring to Section 42-9-10(A). As Claimant points out, subsections (B) and (C) of Section 42-9-10 involve presumptions of total disability, which clearly and unambiguously distinguish them from subsection (A).⁵ This Court's Order does not create any confusion and is not inappropriate, inaccurate or wrong in any way.

Despite Claimant's colorful attempt to render a history of an "assault" on workers' rights, in which this case purportedly is yet but another episode,⁶ there simply is no conflict between this Court's decision and any of the cases cited by Claimant. For instance, in Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957), the Supreme Court held that an "award may be made, under [Section 42-9-30], 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." 231 S.C. at 461, 99 S.E.2d at 56. Here, Claimant was awarded 48% disability to his back, even though he was earning the same wages he had earned before. There is no conflict whatsoever between this case and Roper.

⁵ Subsection (D) contains a prohibition against total lump sum payments of lifetime benefits, which cannot even arguably be relevant here.

⁶ Similarly, there is no proof of or truth in Claimant's hyperbolic assertions that "[t]his is what the insurance industry has been wanting for decades ..." and other pronouncements about the "insurance industry." (Pet. pp. 7, 8 n.1). First, whatever the "insurance industry" might or might not want is not at issue in this case. Second, there is no evidence or support, other than Claimant's counsel's bald assertions, for these statements. Argument and advocacy by counsel simply do not constitute evidence. See, e.g., Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

In Bateman v. Town & Country Furn. Co., 287 S.C. 158, 336 S.E.2d 890 (Ct. App. 1985), unlike the instant case, the claimant proved he suffered a 50% or more loss of use of his back. This Court properly explained that, as a result, the claimant was entitled to permanent total disability under Section 42-9-30, and did not need to show a loss of earning capacity under Section 42-9-10. Here, because Claimant has not shown a 50% or more loss of use of his back, he simply is not entitled to total disability under Section 42-9-30.

Regardless of whether Claimant's appellate counsel was "the only one in the room at oral argument that knew anything about this case at the trial level," (Pet. p. 3), appeals are decided on the Record. It is incumbent on the appellant to present a reviewing court with an adequate record to support his or her case on appeal. *See, e.g., Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (the appellant bears "the burden of providing a sufficient record" for appellate review); Windham v. Honeycutt, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (same, and advising that appellate courts, "will not consider facts that do not appear in the transcript of record"). Unsupported assertions of what occurred or did not occur or, even more nebulous, what someone really meant by what they said below, cannot serve as the basis for overturning a Commission finding that is supported by substantial evidence or for rehearing the sound judgment of this Court.

Claimant next "assumes" for the sake of argument that he did raise wage loss below, which he clearly did as is discussed above, and then attacks the Commission's finding of fact and conclusion of law on this issue as inadequate for appellate review. (Pet. pp. 11-14). Here, the Commission properly based its determination that Claimant

failed to prove he was permanently and totally disabled based “on the greater weight of the evidence, including his ability to work for nearly two years while being accommodated by sitting down, his lack of prescription medication, and the medical reports and conclusions of Dr. Drye.” (R. 40).⁷ Thus, the Commission properly and fully explained the basis and support for its decision, which is sufficient for purposes of appellate review.

Furthermore, the conclusion that Claimant failed to prove he was permanently and totally disabled is correct as a matter of law. The cases Claimant points to are readily distinguishable from the instant case. McCullum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989) involved a claimant who was fifty years of age with a seventh grade formal education, and had only performed heavy, physical labor all of his life. The only evidence of employability the employer could point to in that case was that the claimant could drive a car for an hour, walk for 10 minutes and go shopping. In Colvin, the claimant had only “limited education [was] unskilled, [and] was employed as a messenger.” 227 S.C. at 466, 475, 88 S.E.2d at 581. Following his injury, he had a lifting limitation of no more than 15 pounds which incapacitated him from working as a laborer, which was the only job for which he was qualified. In Stephenson, the claimant suffered from severe PTSD and could not hold a regular job. 323 S.C. at 114-15, 473 S.E.2d at 700. In contrast, here Claimant not only graduated from high school, but also took some classes at Midland’s Technical College and then attended Winthrop

⁷ Dr. Drye found that Claimant was at MMI on June 7, 2011 and again on June 18, 2012. Both times, Dr. Drye released Claimant from care with an impairment rating of 25% to the back, and with lifting restrictions of less than 30 pounds, avoiding climbing heights or repetitively climbing steps or repetitive overhead reaching. Dr. Dry noted that, if Claimant’s employer could not accommodate those restrictions, he would be a candidate for vocational rehabilitation. (R. 73, 111-112).

University. Although he did not graduate, he testified that he was about a semester and a half from obtaining a 4-year college degree. (R. 311, line 13 -- 312, line 6). Both before and after his injury, he worked as a cashier for Lowe's. (R. 324, lines 14-18). He testified that both prior and after his injury, he worked 40-hour weeks, standing for eight hours, dumping trash, putting sodas in coolers. (R. 340, lines 8-25). Both before and after his injury, Claimant could ask for help with lifting or anything else, just as any other Lowe's employee could request aid. (R. 342, line 19 -- 343, line 15). Lowe's Customer Service Manager, Lynn Council, testified that, although the Employer provided accommodations for Claimant in the form of a chair to sit on if he needed it, he never asked to use it. (R. 301, lines 13-22) (R. 303, line 24 -- 304, line 23) (R. 308, lines 22-25).⁸ In addition, Ms. Council testified that Claimant never complained to her regarding any limitations or problems he was having performing his job. (R. 302, lines 12-15). In fact, at the time of the hearing, Claimant had been working his same job for two years, eight hours a day, 40 hours per week.

Moreover, Claimant either misunderstands or misconstrues language in Stephenson to the effect that, even after being found totally disabled pursuant to certain statutory provisions, "many employees receiving benefits ... continue to work either in the same or in a different field." 323 S.C. at 118 n.1, 473 S.E.2d at 701 n.1. In Stephenson, that comment was directly related to cases where a claimant is statutorily deemed to be totally disabled. And finally, while it is the law in South Carolina that "[e]mployees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding

⁸ Thus, Claimant's characterization of the accommodations as "substantial" is not supported by the record.

their normal earning capacity,” 323 S.C. at 118, 473 S.E.2d at 702, cashier jobs are not so limited that they fall within this definition. Claimant’s vocational assessment conceded that he was able to work at light duty and/or sedentary jobs. (R. pp. 194-196).

Thus, Claimant has presented no reasons justifying rehearing of this Court’s ruling that the Commission properly found that he did not sustain a 50% or greater loss of use of his back, that the Commission did not improperly consider loss of earning capacity in its analysis under Section 42-9-30(21), and that he failed to prove he was permanently and totally disabled.

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.

Claimant’s due process arguments, both substantive⁹ and procedural, are inflated but have no real basis in law or fact, and do not provide any reason for this Court to rehear his case. First, Claimant asserts, without any legal basis, that his entitlement to total disability benefits constitutes a cognizable constitutionally-protected property interest. His entire substantive due process argument flows from that incorrect assertion.

“In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” Sloan v. South Carolina Bd. of Phys. Therapy Exam., 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006). To demonstrate a protected property interest, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). The

⁹ Claimant incorrectly avers that Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) discussed both substantive and procedural due process issues. The discussion in Ham is limited to procedural due process.

presence or absence of mandatory language in the governing statute is an indication of whether a party possesses a protected property right. Grimsley v. South Carolina Law Enf. Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012). As is discussed in more detail below, the Act provides employers the right to request a hearing at any time to terminate payment of temporary total disability compensation (“TTD”). S.C. Code Ann. § 42-9-260(D) & (E). Conversely, there is no language in the Act granting a claimant the right to be paid TTD indefinitely or until he or she chooses to request permanency. Thus, Claimant has no cognizable property interest in continued payment of TTD until a time of his own choosing.

Following his injury and during treatment and recovery, Claimant received TTD payments. However, he is entitled to receive TTD only until it is determined that he has reached MMI. Curiel v. Environmental Mgmt. Servs (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 486 (2007) (“[e]ssentially, workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability or as a percentage of impairment to a scheduled member”); O’Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995) (TTD benefits are properly terminated once an employer satisfies one of the requirements of what is now codified as S.C. Code Reg. § 67-506). Claimant was not forced into a “pre-mature determination” of his rights. He simply has no on-going or permanent right to be paid TTD until a time of his own choosing.

In fact, Claimant’s allegation that he possesses a constitutionally protected property interest in his workers’ compensation benefits is belied by his argument that

their determination should be at a timing of his own choosing. (Pet. p. 17 (alleging due process violations in that Respondents were allowed “to deprive or force a pre-mature determination of the Appellant’s constitutionally protected property rights under color State law”)).¹⁰ He has no cognizable property interest in receiving TTD benefits indefinitely, and no property interest in permanent disability benefits precisely because they have not yet been determined. This alone distinguishes this case from the cases Claimant cited in his Brief to this court: Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987), involved the proceeds of a check received by the husband as settlement of his Tennessee workers’ compensation claim; Last v. MSI Constr. Co., 305 S.C. 349, 409 S.E.2d 334 (1991), involved an employer’s unilateral termination of TTD before filing a hearing request based solely on the fact that the claimant was incarcerated. Thus, while Claimant is entitled to a hearing before the Commission before his TTD is terminated, he does not possess the sole right to request that hearing nor does he possess any property interest in indefinite payment of TTD or a particular amount of permanent disability payments until that amount is determined by the Commission.

Claimant focuses on language from Sloan to the effect that he has a right to be heard in a meaningful way at a meaningful time. However, what is required is “notice and opportunity to be heard at some point before the agency makes its final decision.” Majors v. South Carolina Sec. Comm’n, 373 S.C. 153, 160, 644 S.E.2d 710, 714 (2007). Furthermore, this Court has held that participating in a hearing, presenting evidence and

¹⁰ Respondents also note that they are not “acting under color of state law.” *E.g.*, Banks v. Medical Univ. of S.C., 314 S.C. 376, 381, 444 S.E.2d 519, 522 (1994), *overruled on other gds.* Linog v. Yampolsky, 376 S.C. 182, 656 S.E.2d 355 (2008) (analysis of whether an individual is acting under the color of state law “focuses on: (1) the nature of the relationship between the individual and the state; (2) the dependence of the individual on the state for funds; and (3) whether the individual performs a state function”). None of those apply here.

confronting witnesses satisfies the requirement of a meaningful hearing at a meaningful time. Jones v. SC Dept. of Health and Env't'l Control, 384 S.C. 295, 316-17, 682 S.E.2d 282, 294 (Ct. App. 2009). Here, Claimant participated fully, was represented by counsel at all steps of Commission review, presented evidence and cross-examined witnesses.

Claimant has produced no case that even suggests due process dictates which party can bring a claim or file an action. To the extent he is suggesting that Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) supports that argument, he is mistaken. In Moore, the issue was whether 24-hour notice of an emergency hearing was sufficient notice of a hearing in which a final determination of abuse was made. Although 24-hour notice was sufficient for a temporary resolution of the emergency petition, a minimum of five days' notice had to be given prior to a hearing to obtain a final determination of abuse. 376 S.C. at 479, 657 S.E.2d at 749-50; S.C. Code Ann. § 20-4-50(b). Incidentally, the Supreme Court held that minimum 5-day notice under "section 20-4-50(b), which provides a respondent an extended period of time in which to retain counsel and prepare his or her case, should be viewed as an adjudicative hearing on the merits of the action." 376 S.C. at 480, 657 S.E.2d at 750. Here, Claimant had much more than 5-day notice before the hearing before the Single Commissioner.

In fact, the issue in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), relied on by Claimant, was precisely whether the process by which the state agency administering Social Security disability benefits terminated the claimant's cash benefits violated his due process rights. The distinction that Claimant attempts to make – that the moving party here is a private party rather than the State, as was the case in Mathews – is a distinction without significance. In fact, where the State takes action, satisfaction of

due process requirements should be just as stringent, if not more so, than when a private party initiates an action. Furthermore, in Mathews, the U.S. Supreme Court held that an initial termination of the claimant's cash disability benefits based on a written exchange of information but without an evidentiary hearing was sufficient to satisfy due process concerns, because an evidentiary hearing was provided if the claimant appealed the initial determination. 424 U.S. at 342-43, 96 S. Ct. at 906-07. The Court so held despite "the torpidity of this administrative review process ... and the typically modest resources of the family unit of the physically disabled worker, [and that] the hardship imposed upon the erroneously terminated disability recipient may be significant." 424 U.S. at 342, 96 S. Ct. at 906.

In Sniadach v. Family Fin. Corp., 305 U.S. 337, 89 S. Ct. 1820 (1969), the question was not whether a private party violated the petitioner's due process rights under color of state law, but whether the Wisconsin garnishment statute, which allowed an employee's wages to be garnished prior to a final determination of whether a debt is owed, violated the employee's due process rights. The Court held that "this prejudgment garnishment procedure," *i.e.*, freezing an employee's wages without notice and prior hearing, "violates the fundamental principles of due process." 305 U.S. at 341-42, 89 S. Ct. at 1822-23. In contrast, here, Claimant was afforded proper notice and full opportunity to participate in an evidentiary hearing before his TTD benefits, which are distinctly different in terms of possession of a property interest from an employee's earned wages, were terminated in favor of permanent partial disability benefits, if any.

Claimant's assertion that he should be awarded permanent total disability because "[h]e cannot work and/or his ability to earn wages to feed his family is extremely limited

...” is disingenuous at best. There is no evidence whatsoever that Claimant is married or supports any dependents.

Despite Claimant’s urging that this Court should find due process and other violations and, in essence, award him permanent and total disability for policy reasons, (Pet. pp. 18-19), the Supreme Court held in 1940 that, although the Act was intended to benefit injured employees and should be construed liberally in their favor, the Act also “must not be construed so as to work a hardship on the employer and/or the carrier by the interpolation of words or conditions not found in the act ... The act must be construed in justice to both parties and must not impose a burden on either.” Hill v. Skinner, 195 S.C. 330, 340, 11 S.E.2d 386, 390 (1940). In fact, Hill is instructive. In that case, the employer requested that the injured claimant submit to a medical examination, which the claimant refused. The claimant argued that the employer had no right to request that he submit to a physical exam until the claimant filed his claim for compensation. The Supreme Court roundly rejected that position: “To say that the claimant may delay the physical examination for so long a time after the injury as he wishes, is to put it in his power to defeat the benefit to the employer of such examination.” Id. The same is true here. To say that an employer can never file to terminate temporary benefits when a claimant reaches MMI, as Claimant argues in this case, would unfairly burden employers. What claimant would ever voluntarily file an action to terminate his or her own TTD in favor of a potentially lesser amount to be paid out over finite period of time? The answer is few to none.

Finally, neither this Court nor Respondents misinterpreted Section 42-17-20. The language Claimant insists is operative in this case only applies where the parties have

reached a settlement agreement that has been signed and filed with the Commission, and then later disagree as to whether the payments should be continued, which is not the case here. The full text of Section 42-17-20, which provides for a hearing under two different scenarios which are joined by the disjunctive “or,” is as follows:

If the employer and the injured employee or his dependents **fail to reach an agreement in regard to compensation** under this title within fourteen days after the employer has knowledge of the injury or after a 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 any weekly payment 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.** Immediately after such application has been received the commission shall set a date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county in which the injury occurred, unless otherwise agreed to by the parties and authorized by the commission.

S.C. Code Ann. § 42-17-20 (emphasis added). Here, as this Court appropriately recognized, the first scenario applies, and the Commission set a date for a hearing which was proper in all other respects. Claimant concedes he is not challenging the constitutionality of Section 42-17-20. (Pet. p. 16).

In addition, Section 42-9-260(D) & (E) provide that:

(D) If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary disability payments. The hearing must be held within sixty days of the date of the employer's request for a hearing.

(E) An employer may request a hearing at any time to address termination or reduction of temporary disability payments.

S.C. Code Ann. § 42-9-260(D) & (E). Although Claimant insists only he has the right to seek a determination of his permanent disability rights, he does not suggest how to reconcile his assertion that an employer can rightfully move to terminate his TTD but not

for a determination of permanent disability with his position that he is entitled to permanent disability benefits. Under Claimant's logic, once TTD is terminated, he would be entitled to zero payments until he decided to file a claim for permanent benefits. Clearly, this is not what he intends or desires.

In the end, neither Claimant's substantive nor procedural due process rights have been violated and he has presented no valid argument that warrant this Court's rehearing.

III. 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 Commission made several findings of fact with regard to Claimant's permanent partial disability award. First, it found that "Claimant sustained a 48% permanent partial disability to his back. We base this finding on the medical evidence as a whole." It also found that "Claimant's permanent partial disability includes any radicular symptoms to his right leg. We base this finding on the medical evidence." (R. 40). The Commission also found "that Dr. Drye's reports and conclusions are the most persuasive." (R. 40).

On June 7, 2011, Dr. Drye assigned Claimant "a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and **mild myelopathic residual symptoms.**" (R. 73) (emphasis added). On June 18, 2012, Dr. Drye noted that Claimant denied "**any radicular symptoms** down the leg and continues to have some altered gait from his **previous myelopathy** as well as a long-standing, pre-injury inversion of the right foot and ankle." (R. 112) (emphasis added). He noted Claimant had gained considerable weight. Having examined Claimant and reviewed the cervical MRI, Dr. Drye saw "no reason for any change in terms of his permanent work

restrictions, rating or no additional intervention or treatment,” (R. 112), which as noted above, included Claimant’s “mild myelopathic residual symptoms.” (R. 73). Thus, Dr. Drye’s impairment rating included both his mild myelopathic symptoms as well as any radicular symptoms (which Claimant denied). As such, there was absolutely no reason for the Commission to include a separate award for myelopathy.

Claimant’s current argument regarding whether or not Dr. Drye properly calculated his impairment rating under the AMA Guides, (Pet. pp. 23-24, 26), was not raised to the Commission or even in his Brief to this Court. (See Final Brief of Appellant, pp. 29-30 (constituting Claimant’s entire and brief argument regarding a separate award for myelopathy)). It is axiomatic that a party cannot raise an argument for the first time in his petition for rehearing. *E.g.*, Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (explaining that the “purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time”). In fact, at oral argument, Claimant’s counsel prefaced his entire argument regarding misapplication or misinterpretation of the AMA Guidelines with a statement to the effect that he had just thought of that argument, or that that thought had just occurred to him.

Claimant’s position that the Commission improperly failed “to address every body part affected and issue presented,” (Pet. p. 25), is both without support and just plain incorrect. First, Claimant’s myelopathy was never an admitted injury or a body part that was ruled compensable. See (R. 68 (Form 51, dated Dec. 29, 2010, accepting “injury to the low back and right knee”)) (R. 2 (Consent Order, dated Feb. 2, 2011, wherein

Respondents revised their position and accepted injury to "Claimant's back, neck, and right knee" as compensable)) (R. 78 (Respondents' Form 58, Pre-Hearing Brief, acknowledging compensable injury to Claimant's "back, neck, and right knee" only)). Both the Single Commissioner and Full Commission found Claimant "sustained admitted injuries to his back and right knee." (R. 18, 39). Thus, myelopathy is not a proven or accepted work-related injury.

The mere fact that Dr. Mandell provided a separate impairment rating for myelopathy does not require the Commission to separately address Claimant's myelopathy. As noted above, the Commission found Dr. Drye's reports and conclusions the most persuasive. (R. 40). In turn, Dr. Drye's impairment rating clearly included Claimant's "mild myelopathic residual symptoms." (R. 73). Finally, this Court neither "sanctioned" or "criticized" Dr. Mandell for not using the word "impairment" but, rather, explained that Dr. Mandell appeared to be explaining that Claimant "had not regained 100% of his pre-injury functioning."

Thus, Claimant has presented no reasons justifying rehearing of this Court's ruling that the Commission did not err in not making a separate award for myelopathy.

IV. 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.

Many of Claimant's arguments regarding an additional award for or increase in his disability award for his low back repeat the arguments he makes with regard to his mild myelopathic symptoms and, for the same reasons, do not constitute grounds for rehearing. First, despite his attempt to re-characterize his argument on rehearing by insisting he "does not seek a separate Award for the low back versus for the upper back,"

(Pet. p. 28), he clearly sought a separate award for the low back. (App. Br. p. 31 (referencing “evidence from Dr. Leonard Forrest who opined that Mr. Clemmons was entitled to a separate 10% whole person impairment due to the problems with his low back,” and insisting “such an Award should have been made addressing the low back problems and the loss of use for those problems”)). At the hearing before the Full Commission, Claimant’s counsel stated: “I would ask you for an award looking at [the] lumbar spine, looking at the cervical spine and also at the neurological deficit and would ask you for at least a separate award for the cervical spine, for the lumbar spine and for the neurological deficit.” (R. 368, lines 19-24).

Next, Claimant points to Respondents’ December 29, 2010 Form 51 as evidence that he suffered compensable injuries to his low back. What he fails to acknowledge is that, following that 2010 filing, the parties entered into a Consent Order in which Respondents admitted injury to Claimant’s back, neck and right knee. See (R. 68 (Form 51, dated Dec. 29, 2010, accepting “injury to the low back and right knee”)) (R. 2 (Consent Order, dated Feb. 2, 2011, wherein Respondents revised their position and accepted injury to “Claimant’s back, neck, and right knee” as compensable)). This Consent Order was signed by all parties. (R. 3). Respondents’ Form 58, Pre-Hearing Brief, also acknowledges compensable injury to Claimant’s “back, neck, and right knee.” (R. 78).

Although Dr. Drye’s 2011 impairment rating was “based on [Claimant’s] injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms,” (R. 73), his June 18, 2012 impairment rating included a lumbar study which indicated some disc protrusion and “very advanced degenerative disc with disc space

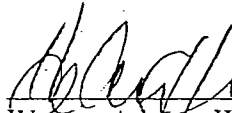
collapse.” Dr. Drye concluded that Claimant’s “symptoms are more consistent with axial and myofascial pain and the pattern is strongly suggestive of arthritic-[t]ype symptoms. I have encouraged him to continue with what he is doing in terms of stretching and movement and I have advised him to try and lose some weight as this would likely help with the lumbar problem.” (R. 111). Having reviewed the lumbar study, Dr. Drye saw “no reason for any change in terms of his permanent work restrictions, rating or no additional intervention or treatment ...” (R. 112). Thus, consideration of any impairment to Claimant’s low back was incorporated into Dr. Drye’s impairment rating as well as in the Commission’s disability award. Regardless of whether Claimant argued for a separate award to the lumbar spine or, as he now insists, an increase in the award to his back because of his lower back symptoms, Dr. Drye’s medical records provide substantial evidence for the Commission’s 48% disability award to the back. As this Court noted, the plain and ordinary meaning of the term “back” includes the rear side of the human body from the neck to the end of the spine. The Commission made its award to the back and Claimant has presented no issue with regard to an additional or increased award for his low back that warrants rehearing.

CONCLUSION

For the reasons stated above, this Court should deny Claimant's Petition for Rehearing and/or Rehearing *en banc*. In addition, there is no reason to provide Claimant an opportunity to reargue his case before this Court, and such request should be denied. Claimant had full opportunity to brief his arguments to this Court and to argue before the panel that decided this appeal.

April 27, 2015

Respectfully submitted,
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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

RECEIVED

MAY 12 2015

SC Court of Appeals

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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May 7, 2015

The South Carolina Court of Appeals

Henton T. Clemmons, Jr., Employee, Appellant,

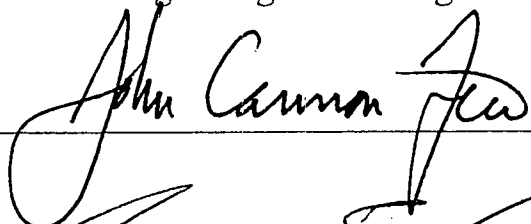
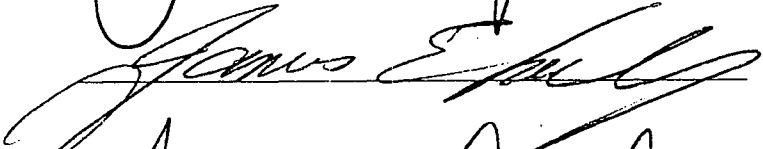
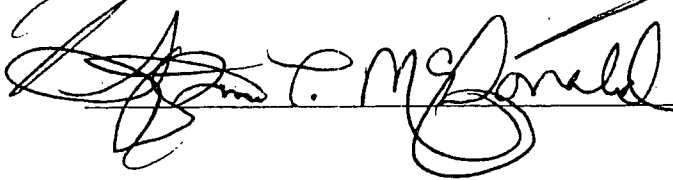
v.

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

Appellate Case No. 2013-001668

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Preston F. McDaniel, Esquire
Kelly Fitzharris Morrow, Esquire
Weston Adams, III, Esquire

FILED

SF 6/19/15