THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 19, 2015.

QUESTIONS PRESENTED

I. Was the Petitioner's right to due process of law violated by the Commission holding a hearing based on the Defendants' request (filing) where the sole purpose of the request was to determine the Petitioner's entitlement to an Award for permanent loss of use compensation payable to him for his injury under the Workers' Compensation Act; and especially where the Petitioner specifically objected to such determination concerning his property rights to such an award?

II. Did The Court of Appeals contrary to over seventy (70) years of precedents concerning scheduled member awards err by infusing, wage loss into and as a consideration in an award made for loss of use under SC Code §42-9-30, and specifically the back under subsection (21)?

III. Did the Court of Appeals err as a matter of law by failing to require the Commission to make detailed Findings of Fact and Conclusions of Law on the essential issues before the Commission for Decision?

VI. Did the Court of Appeals improperly apply the substantial evidence standard to the evidence in this case on the essential issue before the Commission for decision, which should be reversed?

STATEMENT OF THE CASE

The Petitioner sustained a injury on September 12, 2010 which was accepted. Benefits were then stopped and on November 30th, December 2nd/10th, Petitioner filed to reinstate benefits. (R., pp. 44, 46, 58). Respondents replied admitting, "compensable injury to the **low back** and right knee" and in the Form 51 admitted compensable injury to the **low back** and right knee. (R., pp. 65, 68). Then in a Consent Order Respondents agreed to reinstate benefits and treatment of the back, neck, and right leg. (R., p. 1).

October 3, 2011 a WCC Form 17 was filed agreeing weekly compensation had stopped because Petitioner had returned to work with restrictions on September 10th. (R., p. 69). (Emp. added). January 4, 2012 Respondents filed a Form 21 to pay compensation which was withdrawn and on July 25th Respondents refiled a Form 21 requesting to pay compensation **under SC Code §42-9-30** with hearing set September 25th. (R., pp. 72, 74, 77). The moving party, Respondents filed their Pre-Hearing Brief/APA Submissions on September 10th, and Petitioner filed his responsive Pre-Hearing Brief/APA Submissions on September 14th, (R., p. 78; p. 126). After hearing on September 25th, on September 27th, the Commissioner issued his notes requesting a proposed Order. (R., pp. 292, 209). On October 2nd and 3rd, Petitioner filed a Request for Reconsideration for the Order to be strictly limited to his findings. (R., pp. 212,

215). He issued his Order December 6th and a Request for Commission Review was filed. (R., pp. 4, 217).

Briefs were filed March 18th and April 2nd, 2013, with Commission Panel hearing April 16th. (R., p. 359). A Request for Proposed Order was sent to defense counsel on April 30th, objection to the Proposed Order was filed June 5th, and the Order was filed July 2nd. (R., pp. 291, 394, 22). Notice of Intent to Appeal filed and after briefing/ oral argument, April 1, 2015, the Court of Appeals issued its decision containing five (I-V) sections: I. Form 21 Request for Hearing (A) Due Process and (B) Authority to Hear Claim; II. Permanent Total Disability, (A) 50% or more loss of use of back and, (B) Wage loss; III. Myelopathy; IV. Low back injury; and V. Weight assigned to Dr. Drye's opinion. Although **an Award under §42-9-30** was the only issue before the Commission, the Court of Appeals bifurcated its Opinion on that issue: II(A) and (B). Also, while admitted Petitioner sustained injuries to his neck (cervical spine), low back (lumbar spine) and right leg, the Court held, since the plain and ordinary meaning of the word "back" includes low back and the Commission made an Award to the back, relying only on cervical spine impairment rating, there was no need to reference both neck and low back injuries or make detailed findings in its Award. Petitions for Rehearing were made and denied on June 19, 2015.

STATEMENT OF FACTS

A. POSITION OF THE PARTIES AT HEARING (9/25/12):

BY COMMISSIONER WILLIAMS:

TODAY'S DATE IS SEPTEMBER 25, 2012. THIS IS THE WORKERS' COMPENSATION CASE OF MR. HENTON CLEMMONS VERSES LOWE'S HOME CENTERS, INC., SELF-INSURED W.C.C. FILE NUMBER 1015200. DATE OF ACCIDENT SEPTEMBER 12TH OF 2010. AVERAGE WEEKLY WAGE $391.19, CORRESPONDING COMP RATE $260.81. ATTORNEY PRESTON MCDANIEL FOR THE CLAIMANT, ATTORNEY KELLY MORROW FOR THE EMPLOYER/ CARRIER. THE HEARING IS SET ON THE EMPLOYER/CARRIER'S FORM 21. RATINGS ARE LISTED IN THE FILE, AND THEY'RE IN THE APA SUBMISSIONS, WHICH I HAVE HANDED UP FROM BOTH PARTIES.

BY COMMISSIONER WILLIAMS:

ADMITTED ACCIDENT, ADMITTED CLAIM. EMPLOYER/CARRIER ADMITS AN INJURY TO THE CLAIMANT'S BACK IN THIS CASE. THEY WOULD ADMIT ALSO AN INJURY TO HIS NECK AND I BELIEVE HIS RIGHT KNEE AS WELL. THEY WOULD - THEY FILED A 21 SEEKING A FINDING OF M.M.I., SEEKING TO PAY PERMANENCY TO THE BACK. THEY WOULD ALLEGE IT'S A SCHEDULED MEMBER INJURY, AND THEY WOULD SEEK CREDIT I BELIEVE - IS THERE ANY CREDIT ISSUE? I KNOW HE'S BEEN BACK AT WORK. (Emp. add.) . . .

BY COMMISSIONER WILLIAMS:

THERE'S NO CREDIT ISSUE. BUT THEY WOULD SEEK THE PERMANENCY IN THIS CASE TO THE BACK AT A PERMANENCY AWARD OF LESS THAN 50 PERCENT LOSS OF USE. THE CLAIMANT WOULD ALLEGE - FIRST ALLEGE THAT HE'S 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'S PERMANENTLY AND TOTALLY DISABLED FOR A GREATER THAN 50 PERCENT LOSS OF USE TO HIS BACK, HE WOULD SEEK LIFETIME CAUSALLY RELATED MEDICAL TREATMENT UNDER DODGE, A LUMP SUM . . .

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 PERCENT LOSS OF USE OF THE BACK. DO YOU WANT ME TO REITERATE PRETRIAL AS FAR AS THE INDIVIDUAL REPORTS?

BY COMMISSIONER WILLIAMS:

ALL RIGHT. MR. MCDANIEL, ANYTHING ELSE FOR THE RECORD?

BY MR. MCDANIEL:

COMMISSIONER, I WILL RELY ON MY MEMORANDUM IN LARGE PART CONCERNING THE PRESUMPTION TO BE REBUTTED . . .

BUT 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.

* * *

At that point, conclusion of Respondents' case as the moving party, Petitioner's Counsel moved for a ruling,

BY MR. MCDANIEL:

COMMISSIONER, AT THIS POINT, I MOVE FOR A RULING AS TO WHETHER OR NOT THERE'S BEEN ANY EVIDENCE PRESENTED, [SIC TO PRESENT IT], TO REBUT THE 50 PERCENT LOSS OF THE USE OF THE BACK.

BY COMMISSIONER WILLIAMS:

OBVIOUSLY I HAVE TO READ ALL THE MEDICAL EVIDENCE. I HAVEN'T HEARD FROM THE CLAIMANT. WE DON'T -- IT'S NOT LIKE IN A CIVIL CASE.

BY MR. MCDANIEL:

I MEAN, MAKE - OF COURSE I - YOU NOTICE HOW I PHRASED THAT, I DID NOT PHRASE THAT AS A MOTION FOR DIRECT[ED] VERDICT.

BY COMMISSIONER WILLIAMS:

I KNOW. WE DON'T DO THAT EITHER WAY. MR. CLEMMONS, COME ON UP.

* * *

Petitioner then testified that in his opinion he had lost 80% of the use of his back. (R., p. 338, l. 11)

In his Pre-hearing Brief, the Petitioner stated his arguments on the back, the presumption and due process,

"The right to compensation for loss of use and/or loss of earning capacity is a property right of the Claimant and it is a denial of due process to determine his entitlement without his request." (R., p. 127).

In his Notes requesting a Proposed Order, the Commissioner made one Finding as to his Award,

"Based on the Record as a whole, I find that the Claimant has sustained a 48% TTD 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 two (2) years** (while being accommodated by sitting down), his lack of prescription medication, and the medical reports and conclusions of Dr. Drye." (R., p. 209).

That singular Finding of Fact however is set out in the Final Order as Findings of Fact 8-12. (R., p. 19).

B. Evidence Presented

On September 12, 2010, Mr. Clemmons entered the straw trailer, slipped on wet straw causing his feet to fly out from under him and him landing flat on the truck floor on his back, neck and head. Medical care was initiated for low back pain, radiculopathy and swollen knee. (R., pp. 83-89). Due to rapid deterioration, he was referred to Dr. Armsey on November 1st,

"Mr. Clemmons and his mother report that he **was** a **perfectly functional 38-yr-old male** until his work-related accident. **Since that time** his gait has been severely ataxic, he cannot dress himself because of poor balance, 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 [no (sic)] beginning September 12, 2010.

. . He is essentially wheelchair bound and will not return to work until cleared by a neurosurgeon/neurologist."

He was referred to and treated by Dr. Randall Drye including multi-level cervical fusion. He was released to return to work with restrictions on June 6, 2011.

"I have written for a return-to-work statement with permanent restrictions of no standing or walking for more than an hour without inability to sit for a brief amount of time. I do not think he should be climbing heights or repetitively climbing steps, should avoid any repetitive overhead reading and should lift or carry less than 30 pounds only occasionally. If his employer is unable to fulfill these restrictions, he would likely be a candidate for Voc. Rehab. I have referred to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, and would assign him to the DRE Cervical Category 4 resulting in a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms."(R., p. 110).

In June, 2012, Mr. Clemmons was sent back to Dr. Drye who restated his cervical spine impairment rating. (R., p. 100). Respondents immediately filed a new WCC Form 21 to pay compensation. Since his second opinion request for his back and neurological dysfunction had been denied, he obtained evaluations by a neurologist and an orthopaedic surgeon.

Dr. Howard Mandell, neurological specialist, evaluated Mr. Clemmons and opined that in addition to any back impairments he suffered from, "spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run and difficulty with balance," sustaining an, "additional" 15% whole person neurological injury. Also he found significant low back pain requiring ongoing low back

pain management, recommended an FCE and opined limitations on bending, twisting, turning, lifting and carrying and flexibility at work to sit or stand to reduce his pain.

An FCE found Mr. Clemmons limited to limited light duty work tolerating only occasional walking, stair climbing, kneeling, bending, twisting and reaching and not tolerating occasional squatting. Lifting was limited to sedentary/limited light duty levels under the D.O.L's Physical Demand Work Classifications with decreased balance and inability to stand on either leg, eyes closed. (R., p. 143).

Dr. Leonard Forrest, bd. cert. orthopaedist evaluated Mr. Clemmons on September 6th and opined he would require continuing treatment; prescribed work limitations; opined a 40% whole person (WP) combined AMA Guides spinal impairment: neck/cervical spine 30% WP, low back/lumbar spine 10% WP. He also opined:

"as to loss of function of the back . . . it would be over 50% loss of his functional capabilities". (R., pp. 172, 173).

Dr. Gal G. Margalit evaluated Mr. Clemmons, found an altered gait, concurred in findings of myelopathy with cord compression, permanent work restrictions and need for continuing treatment, and opined a 50% or greater functional loss of use of his back to do work. (R., p. 170).

A vocational expert (Ms. Harriet Fowler, CRC, M.Ed.) opined per the FCE and treating physician's restrictions that without accommodation he would not be able to function in his capacity at Lowe's. She performed a labor market analysis using the D.O.L.'s, Dictionary of Occupational Titles, and based strictly on his physical limitations opined Mr. Clemmons had a residual labor market access to only approximately 417 sedentary unskilled/semi-skilled work titles, representing a 99.9400% loss of job market access. If you were to assume he could perform the full range of limited-light duty jobs, he had lost access to over 76% of the jobs available in the economy.

ARGUMENTS

I. PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE COMMISSION HOLDING A HEARING BASED ON DEFENDANTS' REQUEST (FILING) WHERE THE SOLE PURPOSE OF REQUEST WAS TO DETERMINE PETITIONER'S ENTITLEMENT TO AN AWARD FOR PERMANENT LOSS OF USE COMPENSATION UNDER THE WORKERS' COMPENSATION ACT; ESPECIALLY WHERE PETITIONER SPECIFICALLY OBJECTED TO SUCH DETERMINATION CONCERNING HIS PROPERTY RIGHTS.

Petitioner had been back at work for Respondents almost a year when they filed a WCC Form 21 Hearing Request which must be set within sixty (60) days under SC Code §42-9-260.[1] (R., pp. 70, 74, 77). Its sole purpose was to obtain an Order determining Petitioner's right to permanent compensation under "SC Code §42-9-30". In Respondents' Pre-

[1] While The WCC Form has a separate section to pay compensation, The Official Form refers only to Regulations concerning stop payment; WCC Reg. 67-504, 505, 506 and 510.

Hearing Brief, they refer to the Stop-Payment Statute, §42-9-260, but makes no reference to §42-17-20. Petitioner's Pre-Hearing Brief specifically objected to a hearing to determine his right to compensation because it would deny him due process, where he had not requested an Award and was conducted over his objection. (R., p. 127; 128). This was a primary issue raised for Full Commission Review. (R., pp. 250-254). In the Court of Appeals Respondents argued SC Code §42-17-20 gives them the right to request a hearing to force a determination of the Petitioner's right to compensation for permanent disability or loss of use under the Act even though Petitioner had not requested compensation and specifically objected to a hearing. Petitioner would submit to the contrary the Act does not give Respondents the right to force him into a premature determination of his right to compensation under either SC Code §42-9-260 or §42-17-20 and to do so violates his rights to substantive and procedural due process.

Two statutory interpretation principles must be applied to all workers' compensation issues:

> "It is the established law of this state that any reasonable doubt as to the construction of the workmen's' compensation law must be resolved in favor of the claimant, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage . . . Compensation laws constitute a form of social legislation and were enacted for the benefit, protection and welfare of working

men and their dependents." Cokely v. Robert Lee, Inc., 197 SC 157, 14 SE2d 889 (1941). (Emphasis added).

The second principle is:

> "Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the Court must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities." Wigfall v. Tideland Utility, Inc., 354 SC 100, 580 SE2d 100, (2003), reh. den.

This Court has repeatedly held the entitlement to benefits under the Workers' Compensation Act is a property right owned by the claimant. Last v. MSI Construction, Inc., 305 SC 349, 409 SE2d 334 (1991); Orzsula v. Orzsula, 292 SC 264, 356 SE2d 114 (1987). The claimant has the burden of proof to establish by a preponderance of the evidence he is entitled to an Award under the Act. Walsh v. US Rubber Co., 238 SC 411, 120 SE2d, 685 (1961). Therefore, the entitlement/right to compensation is Petitioner's property right and he has the burden of proof to establish his entitlement to an Award under the Act.

SC Code §42-3-30 gives the Commission the authority to promulgate Regulations, including forms, to administer the workers' compensation laws, but such Regulations must be in accordance with its provisions, "and consistent therewith". While a Regulation has the force of law, it may not alter or add to a Statute; Goodman v. City of Columbia, 318 SC 488, 458 SE2d 531 (1995) and where the Regulation is not based on statutory authority, the Commission lacks the authority to enact the Regulations; in this case the

Official WCC Form 21 Respondents used to file for a hearing to pay compensation. Allison v. W.L. Gore & Assoc., 394 SC 185, 714 SE2d 547 (2011); SC Workers' Compensation Regulations 67-203(A) and (B)(31).

Two Statutes, SC Code §42-17-20 and §42-9-260 provide an employer a statutory basis to file for a hearing. Prior to §42-9-260, specifically addressing stop payment, §42-17-20 was the stop payment statute and since the inception of the Act its language has been limited to a hearing on the, "continuance of weekly payments". Quoting SC Code §42-17-20 in pertinent part:

> "If . . . compensation has been paid and the parties thereto then disagree **as to the continuance of weekly payments** . . . , either party may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon . . . ." (**underlined/bold omitted by Court of Appeals**.)

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., supra. 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 SC 79, 533 SE2d 578 (2000). §42-17-20 is specifically limited to the right of the parties to ask for a

hearing to determine whether the injured worker is entitled to, "a continuance of weekly payments". There is no language entitling Respondents to a hearing to determine benefits.

§42-9-260 modified §42-17-20 giving Respondents the right to stop payment of, "temporary" compensation without a hearing for 150 days and after that a hearing must be held within sixty (60) days. The statute is clear as to the limited hearing right given the employer under subsections D and E. D in pertinent part:

". . . employer may request a hearing to address the termination of temporary disability payments. A hearing must be held within sixty (60) days of the date of the employer's request for a hearing."

And subsection E in pertinent part:

"an employer may request a hearing at any time to address termination or reduction of temporary disability payments."

At no place in the statute is the employer/carrier given the right to seek a hearing to, "pay compensation".

The Court of Appeals in I.(A) and (B) did not apply the fundamental construction principles to the wording of the statutes and overlooked the uniqueness of the Workers' Compensation Act in reference to due process protections thereby sanctioning both substantive and procedural due process violations in the setting of a hearing at Respondents' request.

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 SC 157, 14 SE2d, 889 (1941). Under that mandatory statutory compensation system, benefits are not paid by the Government but are paid by the employer, a private party. The Court will find almost no similar type laws in our Nation to the Workers' Compensation Acts and because of that uniqueness, private action versus governmental action under law, the vast majority of decisions, ranging from the US Supreme Court to this Court, applying the protections of due process to the deprivation of individual property rights, deal with governmental action. For example, in both cases cited by the Court of Appeals, Harbit v. City of Charleston, 382 SC 383, 675 SE2d 776 (SC App. 2009) and Adams v. H.R. Allen, Inc., 397 SC 652, 726 SE2d 9, both arise out of governmental action and the authority cited in those decisions trace to decisions by US Supreme Court decisions applying due process to direct governmental actions. For example: Matthews v. Eldridge, 424 U.S. 319, 96 SC 893, 47 L.Ed.2d 18 (1976). However, another line of cases, starting with the US Supreme Court hold that due process protections apply to private action taken under the color of State law. Sniadacker v. Family Finance Corp., 395 SC 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Since 1940, this Court has held that all due process safeguards apply to proceedings under the Workers' Compensation Act. Hamm v.

Mullins Lumber Co., 193 SC 66, 7 SE2d 712 (1940).

As to substantive due process, the Court of Appeals interpreted §42-17-20 to allow Respondents to request a hearing solely to determine Petitioner's constitutionally protected property rights. Petitioner does not challenge the constitutionality of §42-17-20 but challenges the interpretation/application allowing a private party under the law to bring an action to prematurely determine his property rights especially over his objection.

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 SC 452, 636 SE2d 598 (2006). In Moore v. Moore, 376 SC 467. 657 SE2d 743 (2008), this Court held that where an emergency hearing was requested under a State law by a private party, a party's substantive due process rights are implicated by the proceedings. Here the Court of Appeals' interpretation of §42-17-20 allows Respondents to bring an, "action" over objection to determine Petitioner's property rights, where Petitioner made no such request, thereby allowing them to force a pre-mature determination of Petitioner's property rights.

As to procedural due process, the Court of Appeals recited a party's entitlements under procedural due process but left out some very important entitlements from its definition. Citing Sloan v. SC Board of Physical Therapy

Examiners, supra, referring to this Court's previous Decisions, in 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." (Bold/underlined omitted by Court of Appeals.)

The Court of Appeals left out the procedural due process requirements that Petitioner must be heard at, "a meaningful time" and in a, "meaningful way". The right to compensation is Petitioner's property right; not Respondents. Due process requirements in any particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur. The fundamental purpose of workers' compensation:

"Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents . . . and such laws **shall be liberally construed in favor of the employees and their dependents.**" Cokely v. Robert Lee, Inc., 197 SC 157, 14 SE2d 889 (1941). (Emphasis added).

Petitioner would submit his entitlement to some commodity of compensation to compensate him and his family for his inability to work involves one of the most fundamental rights that exists. He cannot work, and/or his ability to earn wages is extremely limited, and the purpose of the compensation laws is to partially compensate him for that loss. That is his constitutionally protected property right and his benefits should not be determined whenever somebody

else wants a determination made.

". . . when there exists no pending **employee claim for compensation**, the Commission lacks the jurisdiction to decide such questions." SC Property & Casualty Ins. Co. Assoc. v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund, 303 SC 368, 401 SE2d. 144 (1991).

"The rights and liabilities of the employee and employer under the Workers' Compensation Act are purely statutory and are to be judged by the terms of the Act." Owens v. Herndon, 252 SC 166, 165 SE2d 696 (1969).

If the Legislature intended to give an employer the right to file for a determination of benefits **over the objection** of claimant and when the employer wants a determination made, it is the responsibility of the legislature to set that clearly out by statute. Outlaw v. Johnson Service Co., 254 SC 486, 176 SE2d 152 (1970). Mr. Clemmons was denied both substantive and procedural due process because the Commission lacked the statutory authority to hold a hearing and jurisdiction because he had not made a claim for benefits.

II. THE COURT OF APPEALS CONTRARY TO OVER SEVENTY (70) YEARS OF PRECEDENTS CONCERNING SCHEDULED MEMBER AWARDS ERRED BY INFUSING WAGE LOSS INTO AND AS A CONSIDERATION IN AN AWARD MADE FOR LOSS OF USE UNDER SC CODE §42-9-30 AND SPECIFICALLY THE BACK UNDER SUBSECTION (21).

The fundamental error made by the Court of Appeals stems from its flawed analysis of the Record on the essential issue before the Commission for decision. One must analyze the position of the parties at the hearing; the evidence before the Commission on loss of use; and the findings of fact and conclusions of law made by the

Commission relative to the parties' positions/the evidence to understand how, the Court of Appeals' infused wage loss into a scheduled member Award. Based on that analysis and reliance on its precedents on scheduled member Awards and wage loss, the Court will see how the Court of Appeals, specifically through bifurcation in II(A); and (B), and reliance on Watson v. Xtra Mile Driver Training, Inc., 399 SC 455, 732 SE 2d 190 (SC App. 2012), infused, "wage loss" into a, "loss of use" case. If there is any doubt as to how this Opinion will be interpreted, a West's Key Notes reads:

> "Appellate panel of the Workers' Compensation Commission **did not err in considering Claimant's wage loss in determining that he did not suffer 50% or more loss of use of his back** in determining entitlement to permanent total disability (PTD) benefits. Panel found that Claimant had 48% loss of use of his back, **and Claimant returned to work for almost two years** in a job similar to that which he had prior to accident making the same salary." (Emp. added).

Position of both parties at hearing: issue before the Commission Award was under §42-9-30 for loss of use of the back. Claimant's position, "loss of use" evidence established 50% or more loss of the use of his back entitling him to total and permanent Award. Defendants' entitled to less than 50% loss of use Award based on the cervical spine whole person impairment rating 25%[2]; presumption rebutted by fact he was working. The only issue to be addressed: Award for loss of use.

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[2] Under the AMA Guides 5th Edition, a whole person impairment of the cervical spine converts to 71% as a spinal rating. AMA Guides to the Rating of Permanent Impairment 5th Edition, p. 427.

Evidence in the Record on the issue of loss of use of the back: two physicians expressed opinions Mr. Clemmons had lost 50% or more of the functional use of his back. (R., pp. 171, 173). The FCE established objectively his physical functional limitations of "limited light duty" (under the Physical Demand classifications). A vocational expert opined he was physically excluded from 76% to 99% of the jobs in the economy (R., p. 175). In Mr. Clemmons' opinion he had lost about 80% of the use of his back. (R., pp. 337-338). There is no other evidence in the Record on the issue of loss of use, the issue to be decided. SC Code §42-9-30(21); Roper v. Kimbrell's of Greenville, 231 SC 453, 99 S.E. 2d 52 (1957).

Unlike every other Record in cases decided by our Appellate Courts, this Record contained vocational and lay opinions on the specific issue of loss of use of the back and specific medical opinions on the loss of use of the back; with that evidence tied to the D.O.L.'s Physical Demand Job Classification System.

The only other opinion evidence was a whole person medical impairment rating under the AMA Guides 5th Edition which states on pages 4 and 5 that its medical impairment estimates concern the ability to perform Activities of Daily Living (ADLs) and have nothing to do with the ability to do work activities. Also a 25% WP rating is 71% to the cervical spine, (AMA Guides 5th Edition p. 427).

The general purpose of expert opinion evidence is to

aid the Commission in coming to the right conclusion. Baker v. Graniteville Co., 197 SC 21, 14 SE 2nd 367 (1941). The weight to be given to the evidence is up to the Commission but where the evidence is all one way, and there is no other competent, substantial evidence contrary to such evidence, the evidence should be conclusive. Herndon v. Morgan Mills, Inc., 246 SC 201, 143 SE 2nd 376 (1965). There is simply no contrary evidence on the issue of loss of use of the back in the Record.

The Commissioner's findings: The Commission is required to make detailed findings of fact on the, "essential" issues for decision so an Appellate Court is able to make a proper review of the factual and legal basis for the decision. Hill v. Jones, 255 SC 219, 178 SE 2d 142 (1970). The Hearing Commissioner made one Finding of Fact in his Notes, Finding No. 7, on the essential issue before him for decision, (R., p. 209), which was divided into four Findings in his final Order. However, it is clear both of those addressed the essential issue for Decision; an Award for loss of use of the back.

This leads to the Court of Appeals' bifurcation of that issue under II Permanent Total Disability (A) 50% or More of Use of Back. After accurately referring to the statutory language of SC Code §42-9-30 and the award to be made for loss of use, the Court relies on its decisions on the back; none of which contain any medical opinion on, "loss of use" but only opinions on "impairment". Clark v. Aiken City

Government, 366 SC 102, 620 SE 2d 99 (SC App. 2005); Burnette v. City of Greenville, 401 SC 417, 737 SE 2d 200 (SC App. 2012); and Fishburne v. ATT Sys. International 384 SC 76, 681 SE 2d 595 (SC App. 2009). Whereas this Record contains specific medical, vocational and lay opinion evidence on the loss of use of the Claimant's back. The provisions of the Workers' Compensation Act which are in derogation of common law rights must be strictly construed. If the legislature had intended for the Commission to make Awards for medical, "impairment" instead of "loss of use" it would have used that language. Wigfall v. Tidelands, Inc. supra; Ellison v. Frigidaire, 371 SC 159, 638 S.E. 2d 664 (2007). There is no evidence of less than 50% loss of use of the back.

The Court of Appeals then used the erroneous 48%, "disability" Finding to find no consideration by the Commission of wage loss.

Then in II(B) Wage Loss while giving lip service to the 48% Award as being the basis for denying Petitioner an award for total and permanent disability for having lost 50% of the use of his back, the Court goes on to consider permanent and total disability under, "both §42-9-10 and 42-9-30". The Court cites as authority its Opinion in Watson v. Xtra Mile Driver Training, Inc., supra, wherein the Court first infused wage loss into a loss of use award by finding that evidence the Claimant, "could work in some capacity," was sufficient to rebut the presumption thus tying the

presumption to wage loss under SC Code §42-9-10(A) whereas the presumption in §42-9-30(21) is tied to SC Code §42-9-10(B) based on the character of the injury.

Under II(B), the Court of Appeals reverts to a wage loss analysis under §42-9-10 finding Petitioner was not entitled to an Award because "he had returned to work for almost two years", but that his exclusion from 99% of the job market (based only on physical limitations) was irrelevant under an analysis under §42-9-30. This inconsistent analysis is wrong on many bases but for example just because a claimant is able to work does not exclude him from an Award under either §42-9-30(21) OR §42-9-10(A). Stephenson v. Rice Services, Inc., 323 SC 113, 473 SE2d 699 (1986). Considering its citation to Watson and its consideration of wage loss factors in a §42-9-30(21) case; the bifurcation but reference to vocational evidence, based on physical limitations only, being relevant to wage loss; and the statement the Commission properly denied Petitioner an Award for total and permanent, "both under §42-9-10 and §42-9-30" where only under §42-9-30(21) an Award was requested, clearly the Court of Appeals under its analysis makes wage loss a consideration in a loss of use award.

III. THE COURT OF APPEALS ERRED BY NOT REQUIRING THE COMMISSION TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE ESSENTIAL ISSUES FOR DECISION.

The Commission is required by law to make detailed

Findings of Fact and Conclusions of Law and it is reversible error for failing to do so. SC Code §1-23-380(5); §42-17-60 and §42-17-40. Because Petitioner's right to trial by jury has been taken away; the Commission is the fact finder, and the Commission's decision as the fact finder is not reviewable if there is substantial evidence in the Record to support it, this Court has held it is the duty of the Commission to make Findings of Fact on all essential factual issues and those Findings must be sufficiently definite and detailed enough to enable the Appellate Court to determine whether the Findings of Fact are supported by evidence and whether the law has been properly applied. Drake v. Raybestos Manhattan, Inc., 241 SC 116, 127 SE 2d 288; Hill v. Jones, supra.

Petitioner repeatedly pointed out to the Court of Appeals that the Commission had failed to make detailed Findings of Fact and Conclusions of Law on the essential issues. Petitioner would ask the Court to review the Findings of Fact of the Hearing Commissioner, especially Findings of Fact 8-12 concerning the Award under SC Code §42-9-30(21) and would submit those Findings are totally inadequate to determine how and on what evidentiary basis the Commission made its Award. It is insufficient to say he relied on the entire evidence or he placed great reliance on Dr. Drye's opinions where Dr. Drye did not express opinions on the low back, or loss of use; his only opinion, a cervical spine rating.

In light of the directions this Court, and the Findings made, the Commission failed to fulfill its statutory responsibility. Hill v. Jones, supra.

IV. THE COURT OF APPEALS IMPROPERLY APPLIED THE SUBSTANTIAL EVIDENCE STANDARD TO THE EVIDENCE IN THIS CASE ON THE ESSENTIAL ISSUE BEFORE THE.

The essential and only issue before the Commission, what Award was Petitioner entitled to under SC Code §42-9-30 for **loss of use**. Therefore, the substantial evidence in the Record to be considered was on loss of use. Two (2) doctors stated opinions Petitioner had lost more than 50% of the use of his back. A vocational expert opined based on D.O.L.'s Physical Demand Classifications and his physical back limitations he was excluded from 99% of the jobs in the marketplace. Petitioner opined he had lost, approximately 80% of the functional use of his back. There is simply no other evidence concerning, loss of use, of the back. While the Petitioner would agree generally the Commission is presented with medical impairment opinion, general vocational opinion and the Claimant's opinion on the loss of use that is not the case here. There was no substantial evidence in the Record other than a 50% or greater loss of use to the back. The Commission's decision should be reversed based on the undisputed evidence. Bartley v. Allendale School District, 392 SC 300, 709 SE2d 619 (2011).

CONCLUSION

This Court should grant Certiorari, review the denial of due process by allowing the Defendants in a workers'

compensation matter to request a hearing over Petitioner's objection to determine his rights to benefits under the Act, reverse the infusion of wage loss into loss of use awards; require the Commission to base its decisions on the evidence presented and in this case hold it ignored the substantial loss of use evidence; review the Commission's Decision and its responsibility to set out the factual and legal basis upon which the decision is based; otherwise, judicial review, most respectfully, is a joke.

Respectfully submitted,

Preston F. McDaniel
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(803) 771-7211
Attorney for Employee Claimant

August 10, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

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

PROOF OF SERVICE

I certify that I have served the **PETITION WRIT OF CERTIORARI** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 10, 2015, addressed to its attorneys of record: Weston Adams, III, Esquire and Kelly F. Morrow, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211; Helen F. Hiser, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 650007, Mt. Pleasant, SC 29465; and M. McMullen Taylor, Attorney at Law, Post Office Box 8567, Columbia, SC 29202.

Dated: August 10, 2015

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Proudly representing injured workers
for over 25 years.

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August 10, 2015

HAND DELIVERED
The Honorable Daniel E. Shearouse
Clerk of Court
SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Henton T. Clemmons, Jr. v. Lowe's Home Centers, Inc.-Harbison and Sedgwick Claims Management Services, Inc.
SC Court of Appeals Case No. 2012-212605

Dear Mr. Shearouse:

Please find attached the original and seven (7) copies of my Petition for a Writ of Certiorari and the unbound original and three (3) copies of the Appendix for filing with the Court in regards to the above referenced matter, along with the required $100.00 filing fee. I would appreciate your returning the clocked-in copies to the courier.

By copy of this letter, I am serving the Court of Appeals and Counsel for Defense with a copy of same.

I hope this is sufficient for filing with the Court; however if you require anything further, please do not hesitate to contact me.

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: Weston Adams, III, Esquire
Kelly F. Morrow, Attorney
Helen F. Hiser, Attorney
M. McMullen Taylor, Attorney
S.C. Court of Appeals

el Law Firm
mwood Avenue
ia, SC 29201

RECEIVED
AUG 11 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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AUG 11
SC Court of Appeals