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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Court of Appeals' Opinion No. 5308
(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.

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Kelly F. Morrow, S.C. Bar No.: 72909
1320 Main Street, 10th Floor (29201)
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

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

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Pursuant to Rule 242(f), Respondents Lowe's Home Centers, Inc.-Harbison and Sedgwick Claims Management Services, Inc. oppose Petitioner Henton T. Clemmons, Jr.'s Petition for Writ of Certiorari ("Petition"). Petitioner does not present any legitimate question of law or substantial constitutional issue. The Court of Appeals' Opinion is unanimous and is not in conflict with any decisions of this Court. Despite its embellished claims and baseless assertions, the Petition simply fails to present any issues that warrant or require this Court's review.

STATEMENT OF THE CASE

Petitioner was employed with Lowe's on September 12, 2010 when he sustained a work related injury. (Appx. pp. 69, 90). Pursuant to a Consent Order, the parties agreed that Petitioner suffered from a work-related injury to his back, neck and right knee, and Respondents agreed to provide medical care with the physician Petitioner had already chosen, Dr. Randall G. Drye. (Appx. pp. 68-70, 92). In addition, Respondents agreed to pay Petitioner temporary total disability ("TTD") benefits from the date of the accident "until properly terminated due to a finding of maximum medical improvement, a return to work, further determination of the Commission, or agreement of the parties." (Appx. pp. 69, 92).

On June 7, 2011, Petitioner was released by Dr. Drye at maximum medical improvement ("MMI") and assigned an impairment rating of 25% whole person to his back. (Appx. p. 177). Thereafter, Respondents forwarded a Form 17 to Petitioner's counsel. Respondents asked that, once the Form 17 was executed, Petitioner provide a settlement demand pertaining to permanent disability. (Appx. pp. 449-450). On

September 22, 2011, Petitioner signed the Form 17 indicating he could return to work. (Appx. p. 92).

Consequently, on January 4, 2012, Respondents filed a Form 21 requesting a determination of any compensation due for permanent total or partial disability. (Appx. p. 139). In response, Petitioner requested a return evaluation by his authorized treating physician, Dr. Drye, which Respondents provided. (Appx. p. 451). Respondents withdrew their request in order to provide for the second evaluation by Dr. Drye. (Appx. p. 451).

On June 18, 2012, Dr. Drye examined Petitioner and reviewed recently performed magnetic imaging studies of Petitioner's cervical and lumbar spine. (Appx. pp. 178-179). Dr. Drye released Petitioner stating "I see no reason for any change in terms of his permanent work restrictions, rating or no additional intervention or treatment is required." (Appx. p. 179). Respondents subsequently requested that Petitioner provide them with a settlement demand at his earliest opportunity. (Appx. p. 452). Having received no settlement demand, Respondents then filed a second Form 21 seeking a determination of any permanent compensation and a credit for any overpayment of temporary compensation. (Appx. p. 141).

The parties were heard by Single Commissioner Derrick L. Williams on September 25, 2012. He issued his Decision and Order on December 6, 2012 finding, among other things, that Petitioner had returned to work, had not made any complaints to his employer or asked for additional medical treatment; that Dr. Drye's reports and conclusions were the most persuasive; that petitioner reached MMI as of June 7, 2011 and had sustained a 48% permanent partial disability to his back, which included any

radicular symptoms to his right leg. In addition, the Single Commissioner found that Petitioner was not totally and permanently 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." (Appx. pp. 71-88).

Petitioner filed a timely Form 30 Request for Commission Review. (Appx. pp. 284-289). A hearing was held before the Full Commission on April 16, 2013. By Order entered July 7, 2013, the Full Commission affirmed the Single Commissioner's Order in its entirety. (Appx. pp. 89-110).

Petitioner timely appealed to the Court of Appeals, which heard oral argument on November 5, 2014. The Court of Appeals issued its Opinion No. 5308 in this case, rejecting all of Petitioner's arguments and affirming the Commission Decision. (Appx. pp. 464-478).

Petitioner sought rehearing, (Appx. pp. 479-509), which Respondents opposed, (Appx. pp. 510-533), and the Court of Appeals denied the rehearing petition on June 19, 2015. (Appx. p. 548). Petitioner sought an extension of time to file his Petition, and this Court granted him a 20-day extension. (Order granting extension, dated June 26, 2015).

Petitioner has now filed his Petition with this Court.[1]

[1] Respondents note that Petitioner does not challenge the Court of Appeals' affirmance of the Commission's determination that the Commission did not err: 1) in not making a separate award for myelopathy as a separate injury (Appx. p. 476); 2) in not making a separate award for Petitioner's lower back (Appx. pp. 476-477); and 3) in assigning great weight to the medical opinion of his treating neurologist, Dr. Drye (Appx. p. 477). Because Petitioner has not raised these issues in his Petition, they are waived and cannot be argued further. *See, e.g.*, Jones v. Enterprise Leasing Co., 383 S.C. 259, 269 n.6, 678 S.E.2d 819, 824 n.6 (Ct. App. 2009) (issue initially raised in a reply is not preserved for further review).

STATEMENT OF THE FACTS

On September 12, 2010, Petitioner slipped on wet pine straw while waiting on a customer and fell flat on his back. (Appx. p. 380, lines 2-15). Initial medical examinations diagnosed Petitioner with back strain, radiculopathy and right knee strain. (Appx. pp. 149, 152-153). Petitioner was referred to Dr. Drye, a neurosurgeon, for treatment. (Appx. pp. 158-159). Dr. Drye diagnosed Petitioner as having a "herniated nucleus pulposus with cord compression and severe myelopathy, C5 and C7." (Appx. p. 160). On November 9, 2010, Petitioner underwent an anterior cervical discectomy and fusion of C5-6 and C6-7. (Appx. pp. 160-162).

On June 7, 2011, Dr. Drye noted that Petitioner had had a full course of physical therapy and "has done quite well from his surgery though he continues to have some very mild myelopathic signs." He assigned permanent work restrictions of no standing or walking for more than an hour without the ability to sit for a brief period of time, climbing heights or repetitively climbing steps, avoiding repetitive overhead reaching and lifting or carrying less than 30 pounds only occasionally. Dr. Drye opined that Petitioner had reached maximum medical improvement, assigning a 25% whole person impairment "based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." (Appx. p. 177).

On June 18, 2012, Dr. Drye examined Petitioner and reviewed recently performed magnetic imaging studies of Petitioner's cervical and lumbar spine. As a result of his evaluation, Dr. Drye again released Petitioner at MMI stating, "I see no reason for any

change in terms of his permanent work restrictions, rating or no additional intervention or treatment is required." (Appx. pp. 178-179).

Subsequent to Respondents' second Form 21, (Appx. pp. 141-143), Petitioner obtained a series of opinions. On September 5, 2012, Petitioner saw Dr. Howard Mandell, a neurologist, for an unauthorized independent medical evaluation ("IME"). (Appx. pp. 202-207). Petitioner saw Dr. Mandell for about an hour. (Appx. p. 416, lines 8-9). Dr. Mandell concluded that Petitioner did not "require additional treatment concerning his injuries other than perhaps ongoing physical therapy for balance and gait," as well as pain management. (Appx. p. 207).

Petitioner's counsel then sent him to Dr. Leonard E. Forrest of the Southeastern Spine Institute for another unauthorized IME on September 6, 2012. (Appx. pp. 239-240). Petitioner spent about an hour and a half at Dr. Forrest's office. (Appx. p. 417, lines 7-16). Dr. Forrest stated that Petitioner had reached maximum medical improvement, and opined that Petitioner's permanent impairment rating for his neck and low back was at least 40%. He further opined that, "[a]s for loss of function of the back as a result of this injury September 2010, it would be over 50% loss of his functional capabilities ..." (Appx. p. 240).

Petitioner's counsel then sent him to a physical therapist, Tracy Hill, for a functional capacity evaluation ("FCE") on September 11, 2012. (Appx. pp. 208-232). According to Ms. Hill, Petitioner qualified for a whole person impairment rating of 28%, which she converted to an 80% impairment rating for the cervical spine. (Appx. pp. 208-209).

On the same date, Dr. Gal G. Margalit of Sunset Family Practice performed another unauthorized independent medical evaluation of Petitioner. (Appx. pp. 233-237). Petitioner spent about an hour with Dr. Margalit, (Appx. p. 416, lines 23-24), who concurred with Dr. Drye's opinions concerning continuing work restrictions and weight loss; however, Dr. Margalit opined that Petitioner had "lost more than 50% of the functional capacity of his back to work ..." (Appx. p. 237).

At the request of Petitioner's counsel, Petitioner also underwent a vocational assessment on September 13, 2012 with Harriet Fowler, CRC, M.Ed. (Appx. pp. 241-263). He spent about an hour with Ms. Fowler. Petitioner testified that she did not perform any testing. (Appx. p. 417, lines 17-25). The assessment noted that Petitioner had "experienced no wage loss" and was currently working at Lowe's in a light duty job in a satisfactory manner. Ms. Fowler concluded that, based on sedentary unskilled and semi-skilled job titles, Petitioner had experienced a 99.94% loss of access to the job market; however, considering his ability to perform light as well as sedentary jobs, he had experienced an approximate 76% access loss. (Appx. p. 262).

Testimony before the Single Commissioner revealed that, after appropriate medical treatment, Petitioner returned to work at Lowe's in his same position as cashier, was accommodated with work restrictions, and even received a raise. (Appx. p. 368, lines 10-14) (Appx. p. 369, lines 1-11) (Appx. p. 391, lines 5-18). He was working 40-hour weeks, eight hours a day. (Appx. p. 407, lines 11-17). Lowe's Customer Service Manager, Lynn Council, testified that he did not complain to her that he was having any problems performing his job or ask for additional medical treatment. (Appx. p. 369, lines 12-18). Although a stool had been made available to him so that he could sit, he never

asked to use the stool. (Appx. p. 370, line 24 – p. 371, line 23) (Appx. p. 375, lines 22-25).

In his Pre-Hearing Brief, Petitioner stated the facts in controversy as whether his due process rights had been violated, because "[t]he right to compensation for loss of use and/or loss of earning capacity is a property right of the Claimant." In addition, Petitioner argued that he was entitled to an award for total disability based on two different theories. First, he asserted that he "has suffered a permanent economic loss of earning capacity in the marketplace. He is unable to perform services other than those that are so limited in quality, quantity or dependability that a reasonably stable market for them does not exist without specific accommodation the Claimant cannot work." This was labeled section 4(c)(1). He also argued that he was entitled to total and permanent disability "based on having lost 50% or more of the functional use of his back to do work with his back." This was labeled section 4(c)(2). (Appx. p. 194). Under a section titled "Legal issues involved," Petitioner identified S.C. Code Ann. §§ 42-9-10 and 42-1-120 as the relevant statutory authority for section 4(c)(1), and S.C. Code Ann. § 42-9-30 as the relevant statutory authority for section 4(c)(2). (Appx. p. 195).

In addition, Petitioner explained that "[d]ue to the position being taken by some defendants and some indications from some Commissioners that the Commission or some members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back," he was submitting a memorandum of law on the subject. In that memorandum, he set out the appropriate test under Section 42-9-30(21) to be whether "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 ..." (Appx. p. 196).

At the hearing, Petitioner's counsel specifically asked Petitioner, "[i]n your opinion, zero meaning you got zero percent loss of use of your back, **and I'm talking about the functional loss of use of your back to do work requiring the use of your back** ... in your opinion, what percentage of **loss of use of your back to use your back to do work requiring the use of your back** and your arms ..." (Appx. p. 404, lines 10-18) (emphasis added). After objections were resolved, Petitioner responded, "[a]bout 80 percent." (Appx. p. 405, line 11).

Following the hearing, in response to the Single Commissioner's hearing notes, Petitioner's counsel again raised these arguments. He claimed that he had "been told by several Commissioner 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 ..." (Appx. p. 279). In addition, Petitioner specifically requested that the Single Commissioner "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." (Appx. p. 280).

In his brief to the Commission, Petitioner again argued that the evidence did not support a finding that he had "lost less than 50% of the **functional use of his back to do work requiring the use of the back**." (Appx. pp. 323-324, 331) (emphasis added).

Before the Commission, Petitioner's counsel argued:

> We requested an award for the back under 42-9-30 Subsection 21, and that's tied to Section 42-9-10, Subsection B, which is due to the character of the injury. 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 case law, 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. **In lieu of that**, the only testimony in evidence submitted in reference to loss of use of the back is that to which I've just referred, Dr. Forest, Dr. Margalit and my client. 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**.

(Appx. p. 433, line 16 – p, 434, line 16) (emphasis added).

ARGUMENT

I. Petitioner presents no valid reason why this Court should hear this case, as the Commission clearly had jurisdiction to hear and decide this claim, and Petitioner's due process rights were not violated.

A. The Commission had jurisdiction to hear and decide this matter.

The Commission had statutory authority to hear and decide this matter on Respondents' Form 21. Contrary to Petitioner's assertions, neither the Court of Appeals nor Respondents misinterpreted Section 42-17-20. The limited language Petitioner quotes 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 weekly payments should continue. 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). Petitioner would have this Court myopically focus only on the second provision, involving a settlement agreement signed and filed with the Commission and in fact, omits the first bolded language above entirely. (Pet. p. 12). Here, as the Court of Appeals appropriately recognized, the first scenario applies, and the Commission set a date for a hearing which was proper in all other respects.

In addition, Sections 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 Petitioner insists that 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. Under Petitioner'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 absurd result is not what he intends or desires, nor can it be what the Legislature intended. *See* Catawba Indian Tribe of S.C. v. South Carolina,372 S.C. 519, 527, 642 S.E.2d 751, 755 2007) (explaining that "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention .... If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect"). As is the case with his other arguments, Petitioner's reasoning is circular and irrational and should be rejected.

Petitioner's reliance on Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995) and Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E2d 547 (2011) is misplaced. Unlike the regulation at issue in Goodman, the Form 21 used by Respondents to initiate the hearing in this case does not add any requirements that are not covered by the enabling statute. 318 S.C. 490-491, 458 S.E.2d at 532 (holding that Regulation 67-701 added a requirement that an application for review by the Commission had to be submitted on a particular form). In Allison, the issue was whether the Commission had authority to extend the statutorily defined fourteen-day appeal window, which this Court found it did not. 394 S.C. at 188, 714 S.E2d at 549-550. Unlike the issues raised in Goodman and Allison, here the Commission's authority to hear a party's "application to the commission for a hearing in regard to the matters at issue and for a ruling thereon" is clearly provided in Sections 42-17-20 and 42-9-260(D) & (E).

Finally, Petitioner was found to have reached MMI, then provided with a second evaluation by his treating physician who again found that he had reached MMI. Thus, the determination of his right to permanent benefits was not premature.

There is no need for this Court to accept Petitioner's Petition to review this issue.

B. Petitioner's due process arguments are entirely without merit.

Petitioner's due process arguments, both substantive and procedural, are inflated, overreaching, have no real basis in law or fact, and do not provide any reason for this Court to accept his Petition. First, Petitioner argues that the Workers' Compensation Act ("Act") has some unique position with regard to due process protection. While he correctly states that the Act is in derogation of the common law, what he fails to acknowledge is that, in adopting the Act, the Legislature struck a balance between the advantages and disadvantages of forcing employees to litigate their injury claims as tort claims. Cook v. Mack's Transf. & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986). "The common law required the worker to prove he was injured as a result of fault on the part of his employer in order to receive compensation. It also gave the employer the defenses of assumption of risk, contributory negligence, and the fellow servant rule. Injured employees often received little or no compensation because of the difficulty of proving the employer's negligence or because of the availability of a defense to bar recovery." 291 S.C. at 86, 352 S.E.2d at 298; *see also* Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980) (noting that recovery under the common law was "usually unsatisfactory" for employees because "at least one defense was usually applicable"). Thus, the Act did not simply strip employees of the right to sue in tort but, instead, substituted a scheme under which an employee no longer had to prove

fault or negligence on the part of the employer and/or risk forfeiting benefits where one or more traditional defenses to tort claims was applicable. Thus, the structure of the Act does not raise any heightened due process concerns.

Next, Petitioner fabricates a theory that, by paying workers' compensation benefits, an employer is acting under color of law. (Pet. p. 14). Benefits are not paid by the government under the Act for the simple reason that no benefits are owed by the government. Contrary to Petitioner's suggestion, in paying workers' compensation benefits or moving the Commission for a hearing to determine the same, Respondents are not "acting under color of state law." Petitioner does not and, in fact, cannot make a plausible argument that Respondents were acting under color of state law. The 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." 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). None of those elements apply here.

Petitioner completely mischaracterizes Sniadach v. Family Fin. Corp., 305 U.S. 337, 89 S. Ct. 1820 (1969). In Sniadach, the question was not whether a private party was acting 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 procedural 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, as is explained in greater detail below, Petitioner was afforded proper notice and full opportunity to participate in an evidentiary hearing before his TTD benefits were terminated in favor of permanent partial disability benefits.

To the extent Petitioner is suggesting that that Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) discussed whether a private party was acting under color of state law, (Pet. p. 15), he is entirely mistaken. There is no suggestion, let alone discussion of whether either party was acting under color of law in Moore. Instead, the substantive due process implications discussed by this Court arose out of the operation of a statutory provision that allowed temporary deprivation of constitutionally protected liberty and property interests, *i.e.*, the father's "immediate loss of his children; reduction in his financial resources if child/spousal support is ordered; and immediate loss of possession of the marital residence," 376 S.C. at 476-747, 657 S.E.2d at 745, via an emergency hearing on less than 24-hour notice and denial of opportunity to obtain counsel. 376 S.C. at 470, 657 S.E.2d at 745. Ultimately, this Court determined that, while issuance of a **temporary** restraining order pursuant to the provisions of S.C. Code Ann. § 20-4-20 satisfied the father's due process rights, a **permanent** finding of physical abuse under those same provisions was improper and was not necessary to satisfy the government's interest in immediate spousal and family protection. This Court's main concern with the procedure in Moore with regard to establishing permanent facts was the father's inability to obtain counsel prior to the hearing. 376 S.C. at 480-481, 657 S.E.2d at 751. No such deprivation occurred here.

Petitioner has produced no case that even suggests substantive (or, for that matter, procedural) due process concerns dictate which party can request a hearing before the Commission. To the extent he is suggesting that Moore supports that argument, he is mistaken. 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 in which a final determination of abuse would be made. 376 S.C. at 479, 657 S.E.2d at 749-50; S.C. Code Ann. § 20-4-50(b). Incidentally, this Court held that the hearing on a minimum five-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, Petitioner had far longer than five days' notice – in fact, he had sufficient time not only to retain counsel, but also to obtain three medical opinions and two vocational opinions.

South Carolina Prop & Cas. Ins. Guar. Assoc. v. Carolinas Roofing & Sheet Metal Contractor's Self-Ins. Fund, 303 S.C. 368, 401 S.E.2d 144 (1991) does not support Petitioner's position. Instead, the quote Petitioner highlights, (Pet. p. 17), is lifted completely out of context. Carolinas Roofing did not address and does not stand for the proposition that only claimants can request a hearing to determine permanent benefits. Instead, in that case, the issue was whether a contract dispute between the Carolinas Roofing self-insurance fund and the S.C. Carolina Property & Causality guarantee association, which stepped in to cover insolvent insurers, could be adjudicated by the Commission. Because an earlier settlement agreement signed and filed by the parties had resolved the claimant's claim "in its entirety," this Court held that the Commission lacked

jurisdiction to resolve the contract dispute between the insurers, and remanded to the Circuit Court. 303 S.C. at 371- 372, 401 S.E.2d at 145-146.

Next, Petitioner 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 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 above, the Act provides employers the right to request a hearing at any time to terminate payment of 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, Petitioner has no cognizable property interest in continued payment of TTD until a time of his own choosing.

Furthermore, a claimant 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) (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). Petitioner 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, Petitioner's allegation that he possesses a constitutionally protected property interest in his workers' compensation benefits is belied by his acknowledgement that he bears the burden of proving his entitlement to such benefits. (Pet. p. 11 (alleging that his "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**") (emphasis added)). "It is the law of this State that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award under the Workmen's Compensation Act." Walsh v. U.S. Rubber Co., 238 S.C. 411, 416, 120 S.E.2d 685, 689 (1961). Thus, Petitioner has no cognizable property interest in receiving TTD benefits indefinitely because an employer can move at any time to terminate them, and no property interest in permanent disability benefits precisely because they have not yet been determined.

This readily distinguishes this case from the cases Petitioner cited in his Petition: 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 Petitioner 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 has been determined by the Commission.

In the end, because Petitioner cannot show any "government action" or that he possesses a vested property interest in this case, his substantive due process argument fails before it gets out of the gate. *See, e.g.*, Harbit v. City of Charleston, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009) (in order to prove a denial of substantive due process, a party must prove that the "State's deprivation of the property interest ... [falls] so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency").

As to his procedural due process argument, Petitioner 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, the Court of Appeals has held that participating in a hearing, presenting evidence and confronting witnesses satisfies the requirement of a meaningful hearing at a meaningful time. Jones v. SC Dept. of Health and Envt'l Control, 384 S.C. 295, 316-17, 682 S.E.2d 282, 294 (Ct. App. 2009). Here,

Petitioner participated fully, was represented by counsel at all steps of hearing and Commission review process, and presented evidence and cross-examined witnesses.

In fact, the issue in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), relied on by Petitioner, 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 Petitioner 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 its recognition of "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.[2]

Despite Petitioner'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

[2] Petitioner's assertion that he is entitled "to some commodity of compensation to compensate him and his family for his inability to work ..." (Pet. p. 16), is disingenuous at best. There is no evidence whatsoever that Petitioner is married or that any member of his family is dependent on him for income. Furthermore, he properly was awarded permanent partial compensation by the Commission.

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. This 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." 195 S.C. at 340, 11 S.E.2d at 390. The same is true here. To say that an employer can never file to terminate temporary benefits in favor of a permanent award once a claimant reaches MMI, as Petitioner 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 a finite period of time? The answer is few to none.

In the end, Sections 42-9-260(D) & (E) authorize an employer to request a hearing to terminate TTD, and Section 42-17-20 allows "either party" to move for a hearing where "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 ..." Neither Petitioner's substantive nor

procedural due process rights have been violated and he has presented no valid argument that warrants this Court's review.

II. Petitioner's argument that the Commission and/or the Court of Appeals "infused" wages loss into and as a consideration of benefits under the scheduled member provisions of Section 42-9-30 lacks merit.

Petitioner erroneously asserts that the Court of Appeals infused the concept of wage loss into the analysis under Section 42-9-30. However, contrary to his representation to this Court that the only he issue raised to the Commission was "Award for loss of use" of his back and that he never requested an award under Section 42-9-10, (Pet. pp. 18, 22), the truth of the matter is that Petitioner himself infused the wage loss issue into the Commission proceeding and he specifically requested consideration under Section 42-9-10.

As noted above, in his Pre-Hearing Brief to the Commission, in addition to asserting that he was entitled to total and permanent disability "based on having lost 50% or more of the functional use of his back to do work with his back," Petitioner argued that he "has suffered a permanent economic loss of earning capacity in the marketplace. He is unable to perform services other than those that are so limited in quality, quantity or dependability that a reasonably stable market for them does not exist without specific accommodation the Claimant cannot work." This was labeled section 4(c)(1). (Appx. p. 194). Under a section titled "Legal issues involved," Petitioner identified S.C. Code Ann. §§ 42-9-10 and 42-1-120 as the relevant statutory provisions for section 4(c)(1). (Appx. p. 195). Furthermore, the verbiage quoted above is the classic description of the test for loss of earning capacity under Section 42-9-10. 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, 474, 88 S.E.2d 581, 586 (1955) (same).[3]

In addition, Petitioner explained that "[d]ue to the position being taken by some defendants and some indications from some Commissioners that the Commission or some members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back," he was submitting a memorandum of law on the subject. In that memorandum, he set out the appropriate test under Section 42-9-30(21) to be whether "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** ..." (Appx. p. 196) (emphasis added).

At the hearing, Petitioner's counsel specifically asked Petitioner, "[i]n your opinion, zero meaning you got zero percent loss of use of your back, **and I'm talking about the functional loss of use of your back to do work requiring the use of your back** ... in your opinion, what percentage of **loss of use of your back to use your back to do work requiring the use of your back** and your arms ..." (Appx. p. 404, lines 10-18) (emphasis added). After objections were resolved, Petitioner responded, "[a]bout 80 percent." (Appx. p. 405, line 11).

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

[3] Among other cases, Claimant cited Coleman and Colvin as controlling authority in this section of his Pre-Hearing Brief. (Appx. p. 195).

Williams' Request for Proposed Order which included specific findings, (R. 209-210), Petitioner'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** ...

(Appx. pp. 279-280) (emphasis added). 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 Petitioner's "hearsay" argument based on what several Commissioners purportedly told him. (Appx. p. 86).

In his brief to the Commission, Petitioner again argued that there was not substantial evidence that he had "lost less than 50% of the **functional use of his back to do work requiring the use of the back**." (Appx. pp. 323-324, 331) (emphasis added). At oral argument before the Commission, Petitioner's counsel argued:

> We requested an award for the back under 42-9-30 Subsection 21, and that's tied to Section 42-9-10, Subsection B, which is due to the character of the injury. 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 case law, 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. **In lieu of that**, the only testimony in

> evidence submitted in reference to loss of use of the back is that to which I've just referred, Dr. Forest, Dr. Margalit and my client. 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**.
>
> (Appx. p. 433, line 16 – p. 434, line 16) (emphasis added).

In essence, Petitioner's phrasing of the inquiry asked the Commission to reach a disability rating by determining 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 determinative factor. Instead, as the Court of Appeals correctly observed, (Appx. p. 473), determining an impairment 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); *see also* Stephenson v. Rice Servs, Inc., 323 S.C. 113, 117, 473 S.E.2d 699, 701 (1996) (scheduled member provisions "typically provide for fixed awards of workers' compensation based on degrees of **medical impairment** to certain listed body parts") (emphasis added); Cropf v. The Pantry, Inc., 289 S.C. 106, 108, 344 S.E.2d 879, 881 (Ct. App. 1986) (the Commission may find "a degree of disability different from any degree supported by medical testimony").[4] Thus, while at the same time arguing that wage loss

[4] Petitioner's exposition on the AMA Guides 5th Edition and conversion of whole person impairment to a spinal rating, (Pet. pp. 18 n.2, 19), is not supported in the Record and should be stricken. *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

is not an appropriate consideration under S.C. Code Ann. § 42-9-30(21), which is correct, Petitioner has attempted repeatedly to insert the concept of ability to work into the analysis of the loss of use of a member.

The Commission clearly held that: "Pursuant to S.C. Code Ann. Section 42-9-30 Petitioner suffers from a 48% permanent partial disability to his back as a result of his work related accident," and, separately, that "[p]ursuant to S.C. Code Ann. Section 42-9-10 Petitioner is not permanently and totally disabled as Petitioner has returned back to work with the employer for almost two years." (Appx. p. 109). 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. (Appx. p. 107). The Court of Appeals did not inappropriately bifurcate or incorrectly analyze the issues presented to it on appeal from the Commission.

Petitioner's counsel also asserted at the initial 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 [Petitioner] has lost 50 percent of the functional use of his back,**" (Appx. p. 365, lines 13-17) (emphasis added), 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). Considerations of wage loss and earning capacity *are* appropriate at that stage, where an employer attempts to rebut the presumption of total disability under Section 42-9-30(21), which only arises after a claimant has proven a 50% or greater loss of use of the back. Watson v. Xtra Mile Driver

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record"). 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).

Training, Inc., 399 S.C. 455, 464-65, 732 S.E.2d 190, 195 (Ct. App. 2012). Here, because Petitioner failed to establish a 50% or greater loss of use of his back, the presumption never arose and, therefore, there was nothing to be rebutted. (Appx. p. 376, line 24 – p. 377, line 12 (Commissioner Williams denying Petitioner'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")).

Having improperly fused and confused these two analyses, Petitioner now argues that everyone else is confused. The Record speaks for itself. It is also ironic, in light of the above, that Petitioner is asking this Court to hear his appeal on the basis that the Court of Appeals improperly mixed the two issues, when he continues to do so himself. Admittedly, he has "shortened" his phrasing before this Court, from "the functional loss of use of his back to do work requiring the use of his back," (Appx. p. 404, lines 10-18) (Appx. p. 433, line 19 – p. 434, line 24), to just "loss of use of his back." However, Petitioner continues to argue that only he presented evidence regarding "loss of use of his back" and invites this Court to refer to vocational, lay 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." (Pet. p. 19).

Petitioner's argument is nothing short of an attempt to overturn decades of established Workers' Compensation law. Essentially, Petitioner asserts that the only evidence that can support an award under Section 42-9-30 is medical evidence couched in terms of "loss of use." Neither the Act nor this Court limits the Commission to assigning greater weight to or only considering evidence that is stated in terms of "loss of use." Pointedly, Petitioner can point to no statutory provision that limits the Commission

in this way. In fact, Section 42-9-30 provides that, "[i]n cases included in the following schedule, the disability in each case is considered to continue for the period specified and the compensation paid for the injury is as specified:" and then various lists body parts in terms of "loss of" or as is the case in Subsection 21 "for the loss of use of the back." S.C. Code Ann. § 42-9-30(21). There is no language limiting or specifying the words a physician must use in rendering an opinion in order for it to be probative, as is the case in other provisions of the Act. *Compare* Section 42-9-30 *with* Sections 42-1-172 and 42-11-10, both of which require medical evidence "stated to a reasonable degree of medical certainty."

In reality, Petitioner is attempting to set up "magic words" that a medical professional must use in order to offer an impairment rating that will support an award under certain parts of Section 42-9-30 – the magic words being "loss of use." Instead, cases discussing disability awards under Section 42-9-30 use the term impairment and loss of use interchangeably. *E.g.*, Therrell v. Jerry's Inc., 370 S.C. 22, 29, 633 S.E.2d 893, 897 (2006) (interpreting Section 42-9-30, with respect to a rotator cuff injury, as focusing "on the site of the injury and not the resulting functional limitation," and explaining that "the proper course in these cases is to proceed pursuant to 42-09-30(20) and use the AMA Guides or 'any other accepted medical treatise or authority' to convert the injury to the rotator cuff into a percentage of impairment to the whole person"); Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (relying on medical opinions providing impairment ratings and explaining that the "extent of loss of use need not be shown with mathematical precision"); Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 88, 681 S.E.2d 595, 601 (Ct. App. 2009) (basing award for loss of use of

claimant's back on impairment ratings provided by medical experts and holding that the permanent partial disability award "was within the medical evidence and testimony presented to the Commission"). In fact, in Therrell, this Court held the claimant was procedurally barred from obtaining relief based on the injury to her shoulder precisely because she failed to "present any evidence of the percentage of impairment to her shoulder" to the Commission. 370 S.C. at 30, 633 S.E.2d at 897.

The cases Petitioner relies on in his argument that there is no medical evidence that he has suffered less than 50% loss of use of his back are distinguishable on a key point. In both cases, Baker v. Graniteville Co., 197 S.C. 21, 14 S.E.2d 367 (1941) and Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965), the question under consideration raised issues of complex medical causation. In both cases, all of the physicians who examined either of the claimants testified unambiguously that the workplace accident was not the cause of death.[5] Thus, no magic words are needed for a physician to provide the Commission with probative evidence for purposes of Section 42-9-30.

Petitioner's reliance on a West's Key Note for evidence "as to how this Opinion will be interpreted," (Pet. p. 18), is woefully misguided and entirely unpersuasive. First, Key Notes included in legal research sources are hardly authority and, oftentimes, inaccurately describe the holding in a case. As noted above, any confusion created in this case has been on the part of Petitioner, whether intentional or unintentional. The

[5] In Baker, there was testimony by one physician who had never examined the claimant, who was given a history of events, and whose testimony this Court held amounted "to nothing more than an inference on an inference upon which to base the finding that the alleged accidental injury aggravated the disease." 197 S.C. at 28, 14 S.E.2d at 370.

Commission and the Court of Appeals understood Petitioner's arguments, considered them and properly rejected them.

Finally, the Court of Appeals' conclusion that Petitioner failed to prove he was permanently and totally disabled under Section 42-9-10 is correct as a matter of fact and law, and provides no reason for this Court to review. The cases Petitioner points to are readily distinguishable from the instant case. 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 Petitioner not only graduated from high school, but also took some classes at Midland's Technical College and then attended Winthrop University. Although he did not graduate, he testified that he was about a semester and a half from obtaining a four-year college degree. (Appx. p. 378, line 13 – p. 379, line 6). Both before and after his injury, he worked as a cashier for Lowe's. (Appx. p. 391, lines 14-18). He testified that both before and after his injury, he worked 40-hour weeks, standing for eight hours, dumping trash, putting sodas in coolers. (Appx. p. 407, lines 8-25). Both before and after his injury, Petitioner could ask for help with lifting or anything else, just as any other Lowe's employee could request. (Appx. p. 409, line 19 – p. 410, line 15). Ms. Council, testified that, although the Employer provided accommodations for Petitioner in the form of a chair to sit on if he needed it, he never asked to use it. (Appx. p. 368, lines 13-22) (Appx. p. 370, line 24 – p. 371, line 23) (Appx. p. 375, lines 22-25). In addition, Ms. Council testified that Petitioner never complained to her regarding any limitations or problems he was having performing his job. (Appx. p. 369, lines 12-15). In fact, at the time of the hearing, Petitioner had been working his same job for two years, eight hours a day, 40 hours per week.

Thus, Petitioner has presented no reasons justifying review of: 1) the Court of Appeals' approval of the Commission's ruling that he did not sustain a 50% or greater loss of use of his back, 2) the Court of Appeals' finding that the Commission did not improperly consider loss of earning capacity in its analysis under Section 42-9-30(21), and/or 3) the Court of Appeals' finding that the Commission correctly found that Petitioner was not permanently and totally disabled pursuant to 42-9-10.

III. The Court of Appeals did not err by not requiring the Commission to make more detailed Findings of Fact and Conclusions of Law.

Petitioner continues to attack the Commission's Findings of Fact and Conclusions of Law on this issue as inadequate for appellate review. (Pet. pp. 20, 22-24). Here, the Commission properly based its determination that Petitioner 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." (Appx. p. 40). Dr. Drye found that Petitioner was at MMI on June 7, 2011 and again on June 18, 2012. Both times, Dr. Drye released Petitioner 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. (Appx. pp. 177-179). As explained above, Petitioner returned to his regular 40-hour a week job requesting minimal accommodation. Thus, the Commission properly and fully explained the basis and support for its decision, which is sufficient for purposes of appellate review.

Furthermore, Petitioner is incorrect that Dr. Drye's impairment rating did not take into account his lower back complaints. Instead, on the June 18, 2012 visit, Dr. Drye notes specifically that "Cervical MRI as well as lumbar study done at LMC were

reviewed and the results shared with the patient." After review and consultation, Dr. Drye concluded that Petitioner's condition did not warrant a change in either his work restrictions or his impairment rating. (Appx. pp. 178-179).

Finally, the cases on which Petitioner relies do not provide any weight to his Petition. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962) involved a failure to find necessary facts to support the conclusion that the claimant had provided timely notice of her claim to her employer. In Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), the Commission was faced with conflicting testimony as to whether the claimant had fallen from scaffolding while he was working or whether he had suffered a seizure while walking. Without resolving the conflicting facts, the Commission merely stated that, "[i]n the absence of any medical testimony to the affect that claimant had a history of suffering from physical seizures and since there is so much controversy as to how claimant fell, it is the opinion of the Majority Commission that the basic purpose of the Workmen's Compensation Act is to include injured workmen within its protection rather than exclude them." The "vice in this award" identified by this Court was the Commission's failure to provide any legal or factual clarification of how it reached its decision. 255 S.C. at 224-225, 178 S.E.2d at 145. In contrast, here the Commission made clear Findings of Fact that, in the face of conflicting medical opinions, the Commission found Dr. Drye's reports and conclusions to be the most persuasive and that, based on the medical evidence as a whole, Petitioner "sustained a 48% permanent partial disability to his back." (Appx. p. 107). As noted above, 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. (Appx. p. 107).

Petitioner has presented no valid reason why this Court should review the Court of Appeals' Opinion based on his argument regarding the sufficiency of Commission's Findings of Fact and Conclusions of Law.

IV. Petitioner's fourth issue is not preserved for this Court's review and, in any event, is without merit.

First, Respondents note that Petitioner did not raise this issue to the Court of Appeals in his Petition for Rehearing. "Only those questions raised in the Court of Appeals **and** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR (emphasis added); *see also* Mazloom v. Mazloom, 392 S.C. 403, 709 S.E.2d 661 (2011) (refusing to consider issue that was not raised in the petition for rehearing). Petitioner did not ask the Court of Appeals to rehear its Opinion based on a misapplication of the substantial evidence standard to the facts of this case. Therefore, this issue is not preserved for this Court's review and should be summarily dismissed.

Even if this Court were to consider the substance of Petitioner's argument under Issue No. Four, it is entirely without merit. The Court of Appeals held that the Commission's determination that Petitioner had sustained a 48% permanent partial disability to his back pursuant to Section 42-9-30 was supported by substantial evidence. (Appx. p. 474). It is only by adopting Petitioner's theory that a physician has to use the magic words "loss of use" in a medical opinion in order to provide reliable, probative and substantial evidence to support an award under Section 42-9-30 that this argument would make any sense at all. As explained above, that is not and should not be the test under

Section 42-9-30. Unlike the position of the claimant in Bartley v. Allendale County Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011), where the Commission failed to properly apply this Court's decision in Ellison v. Frigidaire Home Prods, 371 S.C. 159, 638 S.E.2d 644 (2006), here, Petitioner is asking this Court to reverse the Court of Appeals based on his novel and wholly incorrect reading of the Act.

This argument is not preserved and, in any event, provides no reason for this Court to accept Petitioner's appeal.

CONCLUSION

For all of the reasons stated herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

August 18, 2015

Respectfully submitted,
MCANGUS, GOUDELOCK & COURIE LLC

Kelly F. Morrow, S.C. Bar No.: 72909
1320 Main Street, 10th Floor (29201)
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211-2519
(803) 779-2300

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Court of Appeals' Opinion No. 5308
(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 **Respondents' Return in Opposition to Petition for Writ of Certiorari** on Henton T. Clemmons, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on August 18, 2015, addressed to his attorney of record:

Preston F. McDaniel, Esq.
MCDANIEL LAW FIRM
1315 Elmwood Ave.
Columbia, South Carolina 29201

Jami L. Richards
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents