

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

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

v.

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

PETITIONER'S REPLY TO THE RETURN TO
THE PETITION FOR A WRIT OF CERTIORARI

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S.C. SUPREME COURT

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REPLY TO PRELIMINARY STATEMENT

Preliminary to their argument, Respondents make a generalized statement asserting the Petition does not present any, "legitimate question of law or substantial constitutional issue" and that these are, "embellished claims and baseless assertions". As to that assertion, Mr. Clemmons was back to work and had made no claim for permanent disability or for loss of use to a member, organ or bodily part. However while working for Respondents in what Counsel would submit was a makeshift job to avoid payment of total and permanent disability (he was fired after the Full Commission ruled)¹, Respondents decided it was time to determine his benefits and filed a request to determine Mr. Clemmons' rights to benefits at a time of their choosing. If that is proper, this would be the only forum and only place under our law where an individual citizen is entitled to benefits, damages or some type of compensation and someone other than the person entitled to that compensation makes the decision as to filing for that compensation. Petitioner will not belittle the Respondents' right to their opinion but would simply assert that whether the Respondents had the right to force a premature determination of Mr. Clemmons' benefits when he did not want that determination made, and had not ever made a request for

¹ See Appendix: Footnote #2 to the Petition for Rehearing.

those benefits, clearly is a substantial issue under due process and also as to the jurisdiction of the Commission.

As to the Court of Appeals' Opinion being unanimous and not in conflict with any decisions of this Court, that is blatantly wrong as is evidenced by a reading of how the Court of Appeals infused wage loss into a scheduled member award contrary to this Court's precedents. Further, the Court of Appeals has made a decision contrary to the past decisions of this Court and the statutory law which require that the Commission make its own Findings of Fact and Conclusions of Law, and has abdicated in the appellate process at the Commission this principle by allowing the prevailing party before the Full Commission to write the Order for the Commission. This Petition submits numerous important issues Petitioner hopes this Court will address.

STATEMENT OF THE CASE

Petitioner would note to the Court that improperly as part of their Statement of the Case, Respondents make legal argument under footnote #1 of the Return.

STATEMENT OF FACTS

As to the Statement of Facts, because of his compliances with the Court's 25 page limit for the Petition, Petitioner would ask the Court to refer to the Statement of Facts before the Court of Appeals and Full Commission.

ARGUMENTS

IA. BY WAY OF REPLY TO IA., THE COMMISSION DID NOT HAVE JURISDICTION TO HEAR AND DECIDE THIS MATTER.

The parties have recited their reading of SC Code §42-17-20 ad nauseum to the Court and Petitioner will leave to the Court its reading of the wording applying the concepts of a liberal interpretation in favor of benefits to the injured worker and a strict statutory construction of the wording which is in derogation of common law. Petitioner would also point out that under West Ann. Code §42-17-20, "Notes of Decisions", all of the cases recited therein address the right of the employer to stop payment of compensation and nothing more.

Subject matter jurisdiction refers to the authority of a Court to entertain a particular action and if §42-17-20 does not confer to Respondents the right to bring an action to determine a claimant's entitlement to compensation, then the Commission had no jurisdiction over that claim. Price v. Peachtree Electrical Services, Inc., 396 S.C. 403, 721 S.E.2d 461 (SC App. 2011), cert. granted and affirmed as modified, 405 S.C. 455, 748 S.E.2d 229 (2013).

In reference to the argument made under SC Code §42-9-260(D) and (E), both of those Code sections specifically refer to the right of the Defendants to request a hearing to terminate, "temporary" disability payments. That Statute has nothing to do with permanent disability. Respondents in making this argument also fail to note several important

points. First, Petitioner's argument, which Respondents did not read, is in accordance with the law concerning any claimant/party's property interests wherein this Court has addressed a claimant's property rights to compensation benefits in both contents and has never differentiated between temporary and permanent benefits. Second, the fundamental argument is over who has the right to determine when a hearing will be held to determine permanent awards to a claimant for disability or loss of use; and third, specifically is it a violation of Petitioner's due process rights where he objects specifically to a determination of his property right to permanent benefits being made prematurely and/or where he is not ready?

Further,, in arguing this section Respondents fail to note that the rights and responsibilities under the Workers' Compensation Act are just that; statutory rights and responsibilities that are in derogation of the common law and are strictly limited to those statutory provisions.

Also, Respondents fail to note that Mr. Clemmons was back at work. There was no issue of stop payment of benefits and the only issue was whether or not he was entitled to permanent "loss of use" benefits for injury to a scheduled member, organ or bodily part. §42-9-260 only gives Respondents the right to stop temporary total disability benefits where the Commission decides the claimant has reached maximum medical improvement. Since he was not

receiving temporary compensation, that Statute simply does not apply and renders no right to the Respondents.

The argument that 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 & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011) is misplaced is simply wrong. The Form 21 used by the Respondents to request a hearing expands the right of the Respondents to request a hearing beyond the right conferred by statute. There is absolutely no difference between increasing the amount of time to appeal from 14 days to 19 days as compared to giving the Respondents a right to a hearing under the statute to which they are not entitled. Both are rights to which a party is not entitled under the Act.

The Respondents are obviously not aware of the statutory authority granted to the parties to reach voluntary settlements of the issues under SC Code §42-9-390 and the Regulations adopted by the Commission under that authority under Reg. 67-801 and 802. Under those Regulations, when the claimant reaches maximum medical improvement and assigned an impairment rating, either the claimant or the Employer's representative may request an Informal Conference. Under Reg. 67-804, at the Informal Conference, the parties can resolve the matter by settlement or agreed award, present a settlement agreement and the Commissioner can either approve or disapprove the settlement. The Commissioner under the authority of SC Code

§42-17-30 can order an evaluation of the claimant if he/she disagrees with whether the claimant has reached maximum medical improvement. If there is no agreement, the Commissioner may also order that the matter be set for hearing and the claimant has the right to file a Form 50 requesting additional medical care be ordered by the Commission under SC Code §42-15-60 and/or evaluation be performed under §42-17-30. In other words, the Regulations are set up to ensure that the Employer does not determine the timing and that the claimant is given all the time he needs to request that an award be made.

IB. BY WAY OF REPLY, THE PETITIONER'S DUE PROCESS ARGUMENTS ARE VALID AND THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED.

While the issue is not before the Court, and while Petitioner's Counsel is of the opinion that the exclusivity doctrine applied to the Workers' Compensation Act violates a worker's right to trial by jury as guaranteed by the South Carolina and United States Constitutions, our compensation law and the compensation laws of the United States do hold a unique position in our jurisprudence. Our compensation laws provide for the mandatory payment of benefits under statutory authority by a private party. Thus, the benefits due to an injured worker and to which they are entitled are mandated by statute and Petitioner stands by his reading of the US Supreme Court decisions and decisions of this Court in reference to actions taken by a private party under State

Statutory law. Again, substantive due process applies and it is the, "interpretation" by the Commission and the Court of Appeals of the Statute granting Respondents a right to request a premature determination of the claimant's entitlement to benefits which the Petitioner challenges.

As to procedural due process, the Court of Appeals, not the Petitioner, left out an important part of the definition that has been applied by this Court. In this case, the Petition calls upon the Court to give meaning to that part of its definition and the requirements of procedural due process that the opportunity to be heard must be at a, "meaningful time and in a meaningful way".

Next, the Petitioner does not understand the logic of Respondents' argument. They argue that this Court has held and that it is Black Letter law, with which the Petitioner agrees, that the claimant in a workers' compensation case has the burden of proof to establish his entitlement to an award under the Act but they then go on to argue that they have the right to determine when he has to meet that burden of proof. So the Petitioner has the burden of proof to prove his entitlement to benefits but at the same time they have the right to choose when he has to go before the Commission, prove that entitlement and meet that burden of proof and that applies even over his objection and if he is not ready to proceed. So let's apply that logic to other parties' entitlement to benefits or compensation for permanent disability or injury. So a transfer truck plows into a family

of four, killing the mother, making the father a paraplegic and severely injuring the two children, and the transfer truck company can immediately file for, go into court, and obtain a determination as to whether they are liable. Under the Workers' Compensation Act, when an employee reports what he believes to be an injury on the job, a repetitive injury, or an occupational disease requiring medical opinion, the company can immediately file, go before the Commission, and get a determination as to whether an accident has occurred and whether they are liable under the Act. The absurdity of both of those statements is obvious as is the absurdity of the Respondents' position. This Court, not the Petitioner, has held that an injured worker has a protected property interest to which he should request a determination.

Finally, in reference to the argument made under Hill v. Skinner, 195 S.C. 330, 11 S.E.2d 386 (1940), the Petitioner agrees that Hill is instructive but for a different reason. In this case, the Petitioner is arguing that §42-17-20 does not give the insurance carrier the right to force a premature determination of the claimant's rights to benefits for permanent disability or loss of use under the Act. Whereas, as Hill holds, the Act specifically gives the insurance carrier the right to request an independent medical evaluation and if the claimant refuses and unless the claimant shows just cause for the refusal, the Commission will order the suspension of benefits during the time of such refusal. Again, this is a specific statutory right that is

specifically provided for under the Act as is the right to stop payment of temporary total disability benefits, but also as is the claimant's right to file a claim for benefits.

II. BY WAY OF REPLY, THE COMMISSION AND COURT OF APPEALS INFUSED WAGE LOSS INTO AND AS A CONSIDERATION OF BENEFITS UNDER THE SCHEDULED MEMBER PROVISIONS OF §42-9-30.

The Petitioner will stand on the clear unequivocal statement in the Record at the hearing as to the position of the parties and by the Commissioner that the only issue before him was the Claimant's entitlement to benefits under SC Code §42-9-30. That is the decision that was made by the Hearing Commissioner and the Respondents cannot boot strap this into any other position.

The language of the Act which must be strictly construed provides under §42-9-30(21) specifically that the determination to be made by the Commissioner is, "loss of use", of the scheduled member; the back. This Court has repeatedly held that neither impairment nor loss of earning capacity have anything to do with a scheduled member award and those decisions will not be further reiterated here.

Respondents want this Court to ignore and they gloss over the statement by their Counsel in reference to their position as to what is necessary to rebut the presumption:

"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?"

Their position was and is that all they have to do to rebut the presumption concerning the loss of use to the back is to establish his return to work for almost two (2) full years . . . enough said.

In reference to Respondents' argument, Return, p. 23 characterizing a statement made in a letter to the Hearing Commissioner as being a, "hearsay argument", nowhere in the Record is that statement challenged as being hearsay or as being inaccurate.

They also criticize Petitioner's position in argument at Full Commission (Return, pp. 23-24) which was taken in reference to the erroneous previous decision by the Court of Appeals which first infused wage loss into a loss of use award scenario and situation. The Petitioner has consistently challenged both the decision in this case and the previous decision by the Court of Appeals, Watson v. Extra Mile Drivers Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (SC App. 2012) for infusing wage loss into a loss of use situation and request for award. Quoting from argument: ". . . if you look at even the most recent case law" (Return, p. 23); and see: Final COA Brief, p. 32 and 34, concerning Watson, infusing wage loss and the request to argue against precedent.

Finally, medical impairment has nothing to do with loss of use and cannot stand in the face of expert medical

opinion, the Claimant's own testimony and vocational testimony, all addressing specifically the loss of use of the Claimant's back. Loss of use is the statutory issue to be addressed. The Petitioner will again state emphatically that neither this Court nor the Court of Appeals have ever been called upon to render a decision based on a Record where the evidence in the Record specifically included evidence concerning the amount of, "loss of use" of the Claimant's back, and where there is absolutely no contrary evidence in the Record.

The Commission and this Court can review the AMA Guides, 5th Edition, concerning medical impairment versus loss of use. Those are two totally separate and distinct propositions and issues. (App., p. 140; SC Code §1-23-330(4)).

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

The Hearing Commissioner, affirmed verbatim by the Full Commission, made the following conclusory Findings of Fact:

10. The Claimant sustained a 48% permanent partial disability to his back. I base this Finding on the medical evidence as a whole.

11. The Claimant's permanent partial disability includes any radicular symptoms to his right leg. I base this Finding on the medical evidence.

12. The Claimant is not permanently and totally disabled. I based this Finding 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."

In addition to authorities cited previously, Petitioner would note that the Court of Appeals itself has found such conclusory Findings are insufficient; Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (SC App. 1991).

Therefore the Court of Appeals' decision not only violates this Court's decisions, it violates its own.

Quoting from this Court's opinion in Brayboy v. Clark Heating Co., Inc., 306 S.C. 56, 409 S.E.2d 767 (1991):

"In Able Communications, Inc. v. SCPSC, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986), we stated: The Findings of Fact of an Administrative Body must be sufficiently detailed to enable the reviewing Court to determine whether the Findings are supported by the evidence and whether the law has been properly applied to those Findings. Hill v. Jones, 255 S.C. 219, 1978 S.E.2d 142 (1970). Implicit Findings of Fact are not sufficient. Where material facts are in dispute, the Administrative Body must make specific, express Findings of Fact. Aristizabel v. Woodside Div. of Dan River, 268 S.C. 366, 234 S.E.2d 21 (1977). No particular format is required. Airco, Inc. v. Hollingston, 269 S.C. 152, 236 S.E.2d 804 (1977). However, a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing Court to address the issues."

The Commission Findings are patently insufficient concerning loss of use of the back, the central issue before the Commission for decision.

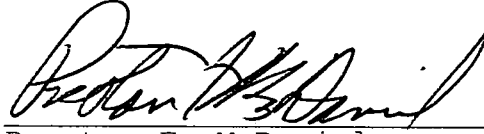
IV. THE COURT OF APPEALS IMPROPERLY APPLIED THE SUBSTANTIAL EVIDENCE STANDARD TO THE EVIDENCE IN THIS CASE, WHICH IS PRESERVED FOR APPEAL.

Petitioner's Brief before the Court of Appeals contained an entirely separate argument on the issue of loss of use arguing that based on the only evidence in the Record, and therefore the substantial evidence, the Commission should have found the claimant had lost more than 50% of the use of his back. The Court of Appeals' decision bifurcated under II., concerning permanent disability, the Petitioner's argument concerning 50% or more loss of use of the back and under §A held that the, "substantial evidence" supported the Appellate Panel's Finding that Clemmons was not entitled to permanent total disability under §42-9-30 due to 50% or more loss of use of the back. In the Petition for Rehearing, Petitioner specifically addressed as issues misapprehended or overlooked the Court's decision under permanent disability II. B.: Wage Loss; and permanent and total disability II. A.: 50% or more loss of use of the back. Throughout the rehearing argument, Petitioner specifically and constantly refers to the inadequacy of the Findings and the fact that the evidence established he had lost more than 50% of the use of his back. For example, p. 6, Pet. for Rehearing (App., p. 484), Petitioner refers specifically to the fact that the claimant was requesting an award for having lost more than 50% of the use of his back and had asked the Commissioner, "based on a review of the evidence" to make an award. The issue is addressed under

the failure of the Commission to make detailed findings citing the evidence upon which it relied in making the decision claimant had sustained "48% disability" to the back and that this was error in light of the evidence in the Record. Finally, as Petitioner's Counsel is painfully aware, as part of its review of any legal issues raised from the Opinion of the Court of Appeals, this Court will review the substantial evidence in the Record in reference to those issues. Shealy v. Aiken Co., 341 S.C. 448, 535 S.E.2d 438 (2000). The standard applicable to a request for an award under SC Code §42-9-30(21); whether the claimant under the evidence should have been awarded total and permanent disability for having lost more than 50% of the loss of use of his back; and whether the Commission applied the proper standard to the evidence are specific legal issues on appeal.

The issue is preserved and there is absolutely no evidence whatsoever contrary to the opinion evidence of all doctors who expressed an opinion concerning loss of use and the claimant's testimony concerning loss of use. There being no contrary evidence, the Commission should have made an award for total and permanent disability for having lost more than 50% of the functional use of the claimant's back.

Respectfully submitted,

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

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October 29, 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,

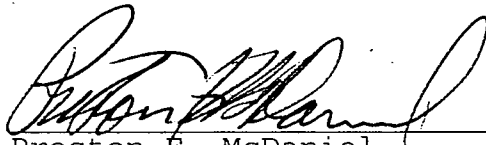
v.

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 PETITIONER'S REPLY TO THE RETURN TO THE PETITION FOR A WRIT OF CERTIORARI on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 20, 2015, addressed to its attorneys of record: Kelly F. Morrow, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211; and Helen F. Hiser, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 650007, Mt. Pleasant, SC 29465.

Dated: October 29, 2015


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