THE STATE OF SOUTH CAROLIONA

IN THE COURT OF APPEALS

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Full Commission Order Dated December 19, 2013 Affirming Commissioner Melody L. James orders dated January 04, 2013 And September 30, 2013

Case No: 2014-000186

John McDaniel, Employee, Appellant

v.

Career Employment Professional D/B/A Snelling Staffing, Employer and United Wisconsin Insurance Co., Carrier, Respondents

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FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents	2-3
Table of Authorities	4-5
Statement of Issues on Appeal	6-7
Statement of Case	8-10
Argument	11-35

1. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ENFORCE SUBPOENAS?

2. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ACCEPT APPELLANTS DEPOSITION AND ADDITIONAL RECORDS AT THE REMAND HEARING?

3. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY PROVIDING INSUFFICIENT NOTICE OF THE REVIEW HEARING?

4. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACTS?

5. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION FAILING IN FAILING TO ACCEPT APPELLANTS AMENDED FORM 30?

6. DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT'S DISABILITY?

7. DID THE COMMISSION ERR IN DETERMINING THE APPELLANT'S DISABILITY UNDER SCHEDULED LOSS; THE ERROR BEING THAT ONLY WHEN INJURY IS CONFINED TO A SCHEDULED MEMBER AND THERE IS NO IMPAIRMENT OF ANY OTHER PART OF THE BODY IS A SCHEDULED LOSS WARRANTED.

8. DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPEALLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND/OR LOSS OF EARNING CAPACITY?

9. DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

10. DID THE COMMISSION ERR IN FINDING THAT THE RESPONDENTS SHOULD RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MMI PURSUANT TO *CURIEL*?

11. DID THE COMMISSION ERR IN FINDING THAT THE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK WERE RESPECTIVELY $492.85; $506.88; $618.50 AND $533.41; THE ERROR BEING ALL THE WAGE CALCULATIONS INCLUDED PARTIAL WEEKS AS FULL WEEKS AND ARE NOT CORRECTLY CALCULATED UNDER THE DEFINITION OF AVERAGE WEEKLY WAGE.

12. IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42?

13. DID THE COMMISSION ERR IN FAILING TO FIND THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD HAVE CONTINUED EMPLOYMENT AT ALSIDE REVERE?

14. DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

15. DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS AGAINST THE RESPONDENTS?

16. IS THE COMMISSION BARRED FROM GRANTING A CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

Conclusion 35-36

Table of Authorities

South Carolina Case Law

Adams v. H.R. Allen Inc., 397 S.C. 652,726 S.E.2d 9(2012) *11*

Chavis v. Watkins 256 S.C. 409 (S.C. 1971) *31*

Coleman v. Quality Concrete Products, Inc. 245 S.C. 626, 142 S.2d 43(1965) *17,18*

Collins v. Charlotte 2012 WL 3323345 (S.C.App. 2012) *30*

Curiel v. environmental services inc., 376 S.C. 23, 655 S.E.2d 482(2007) *22, 23, 24*

Dukes v. Daniel Const. Co. 262 SC 98(1974) *21*

Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 248, 609 S.E.2d 506 (2005) *13, 23*

Flemon v. Dickert-Keowee, Inc. 259 S.C. 99, 190 S.E.2d 751(1972) *13*

Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391(1995) *18*

Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct. App.2006) *21*

Lee v. Harborside Café 350 S.C. 74, 564 S.E.2d 354(S.C. App. 2002) *19*

Outlaw v. Johnson Services Co. 254 S.C 486, 176 S.E.2d 152 (S.C. 1970) *17, 23*

Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527(2005) *18*

Prescott v. Farmers Telephone Cooperative, Inc, 335 S.C. 330, 516 S.E.2d 923(1999) ... *27*

Smith v. Daniel Construction Co., 253 S.C. 248, 169 S.E.2d(1969) *23*

Sellers v. Pinedale Residential Center 350 S.C. 183, 564 S.E.2d 694(S.C.App. 2002) *29*

Swinton v. South Carolina Dept of Mental Health 314 S.C. 202(S.C. App. 1994), ... *23*

SC Statues

S.C. Code Ann. § 1-23-320 ..... 12, 16

S.C. Code Ann. § 1-23-350 13

S.C. Code Ann. § 42-1-40 ..... 24, 25,26 31

S.C. Code Ann. § 42-1-160 27

S.C. Code Ann. § 42-9-10.....19,20

S.C. Code Ann. § 42-9-20.....19, 20, 21

S.C. Code Ann. § 42-9-30.....20

S.C. Code Ann. § 42-9-90.....32

S.C. Code Ann. § 42-9-260.....35

S.C. Code Ann. § 42-17-50.....13

SC Code of Regulations

S.C. Code Ann. Regs. § 67-207.....14, 15

S.C. Code Ann. Regs. § 67-210..... 15

S.C. Code Ann. Regs. § 67-211.....15

S.C. Code Ann. Regs. § R. 67-607.....12

S.C. Code Ann. Regs. § R. 67-610.....14,15, 16

S.C. Code Ann. Regs. § R. 67-613.....12, 14, 15

S.C. Code Ann. Regs. § R. 67-701.....15

S.C. Code Ann. Regs. § R. 67-704.....12

S.C. Code Ann. Regs. § R. 67-707.....8, 12, 14

S.C. Code Ann. Regs. § R. 67-708.....15.

Code of Federal Regulations

49 CFR 391.41(b)(2).....20

Other Authorities

US Department of Labor, Dictionary of Occupational Titles

(4th Ed., Rev. 1991 -- APPENDIX C.).....17

STATEMENT OF ISSUES ON APPEAL

1. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ENFORCE SUBPOENAS?

2. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ACCEPT APPELLANTS DEPOSITION AND ADDITIONAL RECORDS AT THE REMAND HEARING?

3. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY PROVIDING INSUFFICIENT NOTICE OF THE REVIEW HEARING?

4. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACTS?

5. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION FAILING IN FAILING TO ACCEPT APPELLANTS AMENDED FORM 30?

6. DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT'S DISABILITY?

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12. IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42?

13. DID THE COMMISSION ERR IN FAILING TO FIND THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD HAVE CONTINUED EMPLOYMENT AT ALSIDE REVERE?

14. DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

15. DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS AGAINST THE RESPONDENTS?

16. IS THE COMMISSION BARRED FROM GRANTING A CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

Statement of the Case

This is a Workers Compensation case in which the Appellant was injured on November 21st , 2011 while working through a professional staffing agency for a building supply company. The Appellant's foot was crushed by a 9,000 pound forklift while working in a building supply warehouse. The Employer, Career Employment Professionals (Snelling), admitted injury by accident that arose out of and in the scope of employment, but denied the extent and duration of disability, argued preexisting conditions, the amount of compensation for Average Weekly Wage and for a credit for Temporary Total Disability payments paid after August 13th,2012.

Three Hearings were held on this case. The first hearing was held November 28th, 2012. The hearing was then remanded and reconvened on July 8th, 2013. The November 28th, 2012 and July 8th, 2013 hearings were presided over by Commissioner James. On October 14th, 2013 a Review Hearing was held by Commissioners Barden, Roche, and McCaskil.

The Single Commissioner issued her decision and order on January 4, 2013 (R. p.1-14). The Appellant filed a Form 30 Appealing this order (R. p. 63-65).

Thereafter, Appellant's former attorney filed a Motion for Additional and Newly Discovered Evidence pursuant to S.C. Code Ann. Regs. § 67-707. (R. p.67-73) This motion was granted by the Judicial Committee. On April 15, 2013 Appellant objected to the way in which the Motion was granted. (R. p.74). The Commission granted the objection of the Appellant, which asked for remittance of the file to the Single Commissioner as outlined in § 67-707.(R. p.18)

Appellant filed a Motion for Additional Evidence to Complete the Record, Motion for Additional Testimony to Complete the Record and a Motion to Enforce Penalties after the first hearing, all of which were denied by the judicial committee. (R. p.75-79, 80-83, 91-114)

A remand hearing was held on July 8, 2013. At the remand hearing the Appellant attempted to submit records, enforce subpoena upon parties to appear, enforce compliance with records subpoenas, compel medical treatment and submit deposition testimony. (R. p.312-367)

All of the above actions were denied or disallowed.

On August 6, 2013 the Single Commissioner issued a request for proposed order and directives. (R. p.50-51). On August 30, 2013 Appellant submitted Proposed Findings of Facts for this Order. (R. p.162-180). On September 30, 2013 the Single Commissioner issued her Order from the remand hearing. (R. p.23-27). This Order did not contain a ruling on Appellants proposed Findings of Fact.

On October 3, 2013 the Appellant received Notice of Appellant Hearing. (R. p.45). On October 4, 2013 the Appellant informed the Commission that he was not in receipt of the Order from the remand hearing and had a conversation with the Judicial Director regarding the bifurcation of Appellant's case. (R. p. 159-161).

Later that day, on October 4, 2013, Appellant received the Decision and Order dated September 30, 2013 via Certified Mail. On October 12, 2013 Appellant submitted an Amended Form 30 (R. p. 129-196).

The Full Commission Panel Hearing was held on October 14, 2013. At this hearing Commissioner Barden stated that the Appellant's Amended Form 30 was in front of the Full Commission Panel. (R. p. 372, line 16-20). At this hearing, the Appellant attempted to submit evidence and enforce subpoenas requiring parties to attend the hearing, however the subpoenas were quashed and the evidence was denied. (R. p. 370-373, 377-378) & (R. p. 33).

On December 2, 2013, Appellant submitted proposed findings of fact to be ruled on by the full commission. On December 16, 2013 Appellant notified the Commission that the Respondents proposed order contained errors and misrepresentations of the case (R. p.862-863).

The Full Commission unanimously affirmed the Single Commissioners order dated January 4th, 2013, however, the remand hearing held on July 8, 2013, is not reflected and/or referenced in the Decision and Order dated Dec. 19, 2013.

Notice of appeal was served January 24th, 2014.

ARGUMENT

1. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION BY FAILING TO ENFORCE SUBPOENAS?

Pursuant to *Adams v. HR Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (2012)* procedural due process requirements are not technical and the procedures before administrative agencies must provide adequate notice of a hearing, provide adequate opportunity for hearing, afford the right to present evidence and afford the right to cross examine witnesses.

In State v. Mouzon, the South Carolina Supreme Court distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards.". There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. ...the hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process."... (stating that "certain errors, termed `structural errors,' might `affect substantial rights' regardless of their actual impact on an appellant's trial").

Appellant served appearance and document subpoenas for both the remand hearing and the review hearing.

Respondents successfully Motioned to Quash the production of documents and the appearances of Jim Pascutti, Angela Baldwin and Nicole Service at both hearings. (R. p. 371 lines 1-7) & (R. p. 26)

Appellant believes this denies him his right to question and cross examine witnesses and/or parties, and warrants a new trial.

2. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO ACCEPT APPELLANT'S DEPOSITION AND ADDITIONAL RECORDS AT THE REMAND HEARING?

On July 8, 2012, a Remand Hearing was held under § 67-707 which establishes that the evidence sought to be admitted must be of such importance that a new trial is warranted. At the Commission's discretion, the original hearing was reconvened.

Under § 1-23-320 (E) and R. §67-613 Appellant tried repeatedly to present his deposition and additional evidence to the commissioner at the remand hearing. (R. p. 338-341; p. 343 lines 15-24; p. 351 lines 13-24; p. 358-359) The Commissioner would not allow the entering of evidence into the record. (R. p. 359 lines 18-21).

When the Commission denied the Appellant the right to enter evidence into the record the result is an award based on an incomplete record and warrants a new trial.

3. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN PROVIDING SUFFICIENT NOTICE OF THE REVIEW HEARING?

S.C. Code Ann. § 1-23-320 (A)-(B), R. § 67-607 and 67-704, among others, lay out that sufficient notice includes at least 30 days prior; notice of date, place, time, purpose of the hearing, and date for filing Appellant's brief.

Appellant only received ten (10) days notice of the Review Hearing. (R. p. 45)

Appellant objected to the Review Hearing going forward with only 10 days notice but the commission did not postpone the hearing. (R. p. 483-490)

Instead of administratively postponing the hearing, the judicial director sent an office wide email saying that the appellant was lying about receipt of the order.(R, p. 486)

The Appellant believes 10 days is insufficient notice in this case, and warrants remand.

4. DID THE COMMISSION VIOLATE THE APPELLANTS RIGHT TO DUE PROCESS AND/OR THE RIGHT TO EQUAL PROTECTION IN FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACT?

S.C. Code Ann. § 1-23-350 states if findings of facts are submitted after a hearing that they shall be ruled on individually.

After the Remand Hearing and after the Full Commission Hearing, the Appellant submitted Proposed findings of Fact. Appellant received confirmation that the findings were received and would be reviewed. (R. p. 474-482)

Appellants proposed findings of fact were not ruled upon by the single Commissioner or the full commission and warrants remand, so that the Commission may enter a ruling on each of the proposed findings.

5. DID THE COMMISSION ERR IN FAILING TO ACCEPT APPELLANTS AMENDED FORM 30?

§ 42-17-50 "If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award"

"An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 248, 609 S.E.2d 506 (2005) "The Workmen's compensation act is

remedial legislation which is entitled to a liberal construction to accomplish the ends and purposes for which it was enacted." Flemon v. Dickert-Keowee, Inc. 259 S.C. 99, 190 S.E.2d 751(1972)

1) Does the appellant have the right and/or duty to amend forms and/or pleadings after a remand hearing?

R.67-613 B.(4) "If the nature of the claim or the relief requested changes, file a new hearing request according to R.67-207 unless R.67-610 applies."

After receipt of the Decision and Order on Oct 4, 2013 the Appellant tried to Amend the Form 30 to reflect a change in the nature of the relief requested on his request for review. (R. p. 129-196)

2) Did the Appellant timely serve the Amended Form 30?

The original hearing was held Nov. 28, 2012 and then a Form 30 was timely served. (R. p. 63-66)

Thereafter, a Motion for Additional evidence was granted under R. 67-707. (R. p. 67-73)

The remand hearing was held July 8, 2013. On October 3, 2013 Appellant received via U.S. mail "Notice of Appellate Review" setting a full commission review hearing for October 14, 2013.(R. p. 483) On October 4, 2013 Appellant received via Certified Mail both the Decision and Order from the July 8, 2013 remand hearing and the "Notice for Appellate Review."

On October 12, 2013 Appellant delivered to the Commission the "Amended Form 30 with attachments" via Email. (R. p. 503)

R.67-211 C.(2) "When the claimant does not serve the form or document, the Commission will serve it by depositing the form or document in the United States Postal Service first class postage, addressed to the opposing parties per R.67-210."

R.67-701 A." The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the hearing Commissioner's order." R.67-701 B. states for *pro se* claimants "the judicial department will prepare the additional copies of the Form 30 and serve the Form 30 on the opposing party."

R.67-701 (B) and R. 67-211 (C)(2) places the duty of service of the Form 30 with the Commission. The Commission was provided with the Amended Form 30 within eight (8) days of the receipt of the Decision and Order from the (July 8, 2013) remand hearing. The Full Commission review was held on the tenth (10^{th}) day after receipt of the remand order by the Appellant.

This is within the jurisdictional time limit for filing a request for full commission review.

To disallow the Appellant the right of review is beyond the scope and latitude of the Commission's discretion, is based on error of law and substantially prejudices the appellant.

3) Is the Commission barred from retroactively excluding the Amended Form 30?

§ R.67-708 "A review hearing may be postponed for the reasons in § R.67-613." § R.67-613 B.(4) "If the nature of the claim or the relief requested changes, file a new hearing request according to § R.67-207 unless § R.67-610 applies." § R.67-610 C. "An amended form must be timely filed and served. The Commission will determine at the hearing whether to allow a party to rely on new facts or defenses."

§ 1-23-320 (E) "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved."

At the review hearing the Appellant was notified by the Full Commission Panel that "We have that [amended form 30] in front of us, yes, sir."(R. p. 372 lines 16-20) The Appellant relied on this statement as an express declaration that the Amended Form 30 was accepted and relied upon portions of that pleading in his argument.

The Respondents objected to the "Amended Form 30" and its attachments but failed to motion for postponement. (R. p. 381 lines 9-17)

There-after the Commission excluded the Amended Form 30 and its attachments. (R. p. 33)

To allow the Commission to exclude pleadings after the hearing, that were relied on during the hearing is highly prejudicial to the Appellant, by not allowing him to present argument on all issues involved. If the commission had informed the Appellant that the Amended Form 30 was not before the panel, the Appellant would have motioned for postponement upon this ground.

When the commission determines that the new facts and defenses can be relied on, they, in accordance with R.67-610 (C), must be bound by that decision.

In conclusion, when the Commission excluded the Amended Form 30 they denied the Appellant of his right to due process. This error must not be held to be harmless, as exclusion of pleadings must amount to a structural defect, making the review hearing a nullity.

6. DID THE COMMISSION ERR IN THE DETERMINATION OF APPELLANT'S DISABILITY?

1) Did the Commission err in finding the Appellant has a disability to the left leg of thirty-four percent (34%); the error being that the Appellant's loss of use and disability greatly exceeded this amount based upon the permanent vocational impact and the Appellant's decrease in earning capacity?

Outlaw v. Johnson Services Co. 254 S.C 486, 176 S.E.2d 152 (1970). "the loss of earning capacity alone is the criterion for compensation under the Act." Coleman v. Quality Concrete Products, Inc. 245 S.C. 626, 142 S.2d 43 (1965) "Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment."

The Appellant was released to sedentary work with restrictions. Prior to the Appellant's injury he was performing Heavy work and all the Appellant's past job experience would constitute light work to heavy work according to the US Department of Labor, Dictionary of Occupational Titles (4th Ed., Rev. 1991 -- APPENDIX C.)

Appellant is permanently restricted to; lifting no more than 10 pounds, no more than 1 hour standing in an 8 hour day, and has to take multiple medications for pain. (R. p. 62)

Appellant is permanently restricted to working in "less than sedentary" jobs according to the D.O.T. appendix.

Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527(2005) " He takes medication, but his leg remains swollen and painful. He now has difficulty walking and standing for long periods of time. Peoples stated that he is unable to participate in sports, cannot lift heavy objects, and climbs stairs with difficulty. The single commissioner held that Peoples had undergone a sixty-eight percent permanent partial disability to his right lower extremity and awarded benefits accordingly."

"The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995)

An award of 34% to the leg is arbitrary and not supported by substantial evidence and fails to provide equal protection under the law.

The injured worker in *Peoples, supra*, had difficulty walking or standing for long periods of time, was able to return to his previous position, walked with a limp but did not rely on an assistive device to walk and estimated his loss to be seventy percent (70%.)

In contrast, the Appellant has lost his license on which his employment was based, has been unable to return to work since reaching MMI, has trouble standing and walking for short periods of time, walks with a limp, relies on a cane and has a total vocational loss.

Appellant cannot perform any job he has held in the past.(R. 273 lines 9-13)

In accordance with *Coleman, supra*, the inability to work in even the lowest physical qualification class equates to a total loss of earning capacity for the Appellant, and the commission should have awarded at a minimum 100% loss of use of the leg, and/or awarded under § 42-9-10 or § 42-9-20.

7. DID THE COMMISSION ERR IN DETERMINING THE APPELLANT'S DISABILITY UNDER SCHEDULED LOSS; THE ERROR BEING THAT ONLY WHEN INJURY IS CONFINED TO A SCHEDULED MEMBER AND THERE IS NO IMPAIRMENT OF ANY OTHER PART OF THE BODY IS A SCHEDULED LOSS WARRANTED?

Pursuant *to Lee v. Harborside Café 350 S.C. 74, 564 S.E.2d 354 (S.C. App. 2002)* which states that claimant may proceed under either Workers Compensation Act's general disability section in order to maximize recovery and only when schedule loss is not accompanied by additional complications affecting other parts is scheduled loss exclusive, the Commissioner should have awarded disability compensation under §42-9-10 and/or §42-9-20. The single commissioner awarded 34% permanent loss of use of leg.

However, complications include but are not limited to:

1) Dependence on a walking device (R. p. 292 lines 3-7),
2) Loss of use of sural nerve (R. p. 557-559),
3) Loss of use of superficial paraneal nerve (R. p. 557-559),
4) Loss of use of lesser MTP joints (R. p. 557-559),
5) Balance Problems ((R. p. 294 lines 22-24),
6) Loss of use of skin, 6 months for a wound to close, (R. p. 113-114)

7) Loss of use of nervous system "dysthesias" (R. p. 557-559),

8) Ankylosed position of the toe (5^{th} toe) (R. p. 557-559),

9) Hammertoe deformation (2^{nd}-5^{th} toes) (R. p. 557-559),

10) Disfigurement of foot (large scar)

11) Severe antalgic gate (R. p. 557-559),

12) Continued medical care to correct flat foot deformity and pes planus (orthopedic shoe inserts), (R. p. 557-559),

13) Likely future surgery (R. p. 557-559),

14) Permanent work restrictions (R. p. 557-559),

15) Lack of congruity in medical opinions, due to the need for multiple specialists in different fields (R. p. 557-559) & (R. 139-140).

The Appellant has multiple complications affecting other parts of the body and thus scheduled recovery is NOT exclusive. Therefore the Commission erred in strictly construing §42-9-30.

In conclusion, due to restrictions, work qualifications, education level, medical complications, injury to multiple scheduled loss body parts as well as non-scheduled body parts, impairment rating of multiple scheduled loss body parts and other applicable factors, the Appellant should receive general disability under permanent total disability or maximum partial disability under §42-9-10 or §42-9-20 and/or a finding of total and permanent disability under §42-9-30.

8. DID THE COMMISSION ERR IN FAILING TO COMPENSATE THE APPEALLANT FOR LOSS OF A LICENSE DUE TO DISABILITY AND/OR LOSS OF EARNING CAPACITY?

Pursuant to the US Department of Transportation, 49 CFR Part 391.41(b)(2) states that a person is physically qualified for a Commercial Drivers Licenses if that person has no impairment of an arm, foot or leg, or any other significant limb defect. Due to the Appellant's injury, impairment and his physical restrictions, the Appellant is no longer able to utilize his class A CDL.

The primary qualification depended upon by Snelling to staff the Appellant was his Class A Commercial Drivers Licenses. (R. p. 632) & (R. p. 403 lines 15-17) Since the Appellant's injury, the Appellant has attempted to be hired for multiple positions that do not require a CDL and fit within the Appellant's work restrictions. (R. p. 671-700) This equates to a loss of earning capacity for the Appellant.

Therefore, the loss of the Appellant's Class A CDL Drivers Licenses should be compensated for under § 42-9-20.

9. DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

The term "maximum medical improvement" means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006)

Dukes v. Daniel Const. Co. 262 SC 98 (SC 1974,) where the commission found that further medical care was necessary and should be furnished, implicit in such award is the finding that additional medical treatment will tend to lessen the period of disability, for on no other grounds could liability for additional treatment be based under §42-15-60.

The Appellant reached maximum medical improvement according to Dr. Ohlson "from an orthopedic standpoint" on Aug. 13, 2012 but stated appellant would need further treatment (R. p. 526-560), Dr. Tavel found Appellant to be at MMI on July 22, 2013 (R. p. 845-856), Dr. Brilliant opined that Appellant could still be up to a year away from MMI (R. p. 564-565) and Dr. Gudas judged MMI to be premature (R. p. 561-563).

Dr. Ohlson was clear in two aspects of finding "MMI" on August 13, 2013; 1) further treatment would be necessary 2) his opinion was limited in scope to his specialty and did not account for any further impairments or treatments.

To only take into consideration one out of four medical opinions fails to reach the threshold of substantial evidence.

10. DID THE COMMISSION ERR IN FINDING THAT THE RESPONDENTS SHOULD RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MMI PURSUANT TO *CURIEL*?

Curiel v. Environmental Services Inc., (2007) 376 S.C. 23, 655 S.E.2d 482

"Appellant was not entitled to Temporary total benefits because Appellant had exaggerated the degree of his vision loss. The commission found: Had the Appellant been honest with his physicians concerning the sight in his right eye, a corrective lens could have been provided, and the Appellant could have worked."

The Commissioner erred in the application of *Curiel v. Environmental Management Services*. In Curiel, the Appellant failed to cooperate with his physician which resulted in his inability to return to work. The credit was based on his earning capacity.

"My understanding of the decision of *Curiel* is at the date of maximum medical improvement, whatever that date is, that that is the date the temporary total and/or temporary partial has to stop." Commissioner James (R. p. 261 lines 8-21)

The Commissioner's understanding of *Curiel* amounts to an error of law. To award the carrier a credit based on the understanding that any payments of support MUST be credited to the carrier supplants the legislative intent of the Act.

Outlaw, supra, "the loss of earning capacity alone is the criterion for compensation under the Act."

Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 248, 609 S.E.2d 506(2005), "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support."

Swinton v. South Carolina Dept. of Mental Health 314 S.C. 202, (S.C. App. 1994), which states that since the finding of MMI did not establish the Appellant was no longer disabled, disability was presumed to continue.

Smith v. Daniel Construction Co., 253 S.C. 248, 169 S.E.2d (1969)

"When the court is asked to follow the line marked out by a single precedent case, it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated."... "The doctrine of stare decisis should not stand in the way. That doctrine has no application, where there is conflict in the decisions of the court. In that event the court is at liberty to adopt those decisions which are sound in principle and in accord with right and justice and the statute law, and, overrule those which are contrary thereto." "This Court has always attached

great importance to the doctrine of stare decisis, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application.".... *"Nonetheless, stare decisis will not be applied when it results in perpetuation of error or grievous wrong," ..." since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible."*

In summary, *Curiel* is off-point with the current case in the following ways: (1) no evidence exists, nor has the defense asserted that the Appellant has been dishonest with his physicians. (2) No substantial corrective treatment exists for the Appellant's injury that would instantly return him to work. (3) It is disability resulting from injury that has precluded him from employment.

In conclusion, where the only reason given for an award is based on error of law, that award must not be upheld. *Curiel* did not have the effect of overturning *Swinton.* The Appellants disability was presumed to continue. This presumption was not rebutted. The credit must not be awarded to the carrier in this case.

11. DID THE COMMISSION ERR IN FINDING THAT THE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK WERE RESPECTIVELY $492.85; $506.88; $618.50 AND $533.41; THE ERROR BEING ALL THE WAGE CALCULATIONS INCLUDED PARTIAL WEEKS AS FULL WEEKS AND ARE NOT CORRECTLY CALCULATED UNDER THE DEFINITION OF AVERAGE WEEKLY WAGE.

In Accordance with §42-1-40 "If the time worked does not exceed 52 weeks the proper method to calculate AWW is to take earnings and divide them by actual number of weeks worked and *parts thereof.*"

None of the employees had worked 52 weeks and the calculations used do not take into consideration any partial weeks.

The commission did not calculate the AWW in accordance with §42-1-40 in the following instances.

A) Appellants Form 20

Appellant's average wage was determined by dividing gross pay ($9,856.96) by number of checks received (20) which equates to $492.85 (which is approx. $28 less than 40 hours per week at $13 an hour.) (R. p. 38)

Respondents listed 20 weeks as the number of weeks worked. (R. p. 53)

Commissioner James used their calculation. (R. p. 38)

Appellant only worked 19 weeks during the period. (R. p.566-586 & 707)

This calculation is contrary to § 42-1-40, and using $492 instead of $518.79 does not properly account for actual number of weeks worked, and warrants reversal.

B) <u>Wayne Atkins' Average Weekly Wage</u>

Wayne Atkins average wage was determined by dividing his gross pay ($7,603.24) by paychecks received (15 checks) resulting in an average wage of $506.88 (which is equal to less than 40 hours a week at $13 an hour). (R. p. 38)

Wayne Atkins wage the week ending 4/8/11 was for 8 hours but calculated as a full week (R. p. 625)

Wayne Atkins worked 45 hours at $8 an hour instead of $13 an hour the last week of his employment, resulting in wages of $344.35 ($8 an hour x 45 hours) instead of his normal pay rate equal to $606.25 ($13 an hour x 45 hours)(R. p. 625).

Atkins worked 3 other fractional weeks that the commission counted as full weeks. (R. p. 625)

Excluding his first week Atkins actually worked 2.51 hours of overtime and earned actual wages of $568.95 weekly.

In conclusion, the Commission determining Clark's AWW at $506.88 instead of $568.95 is clearly prejudicial to the Appellant and based on error of law, thus it warrants reversal.

C) Jared Lampkin's Average Weekly Wage while employed through Snelling

Lampkin's average wage was determined by dividing gross pay ($8,040.52) by number of checks received (13) which equates to $618.50 (which is equal to approx. 5 hours of overtime per week.) (R. p. 38)

Lampkin worked 78 hours of overtime over 11 full weeks resulting in 7.09 hours of overtime or actual wages of $658.25.

Lampkin worked a partial week the week ending 11/25/11 (32 hours). Lampkin worked a partial week the week ending 2/17/12 (31 hours) (R. p. 627). Jarod Lampkin's wage determination does not take into account any partial weeks in accordance with §41-1-40.

In conclusion, the Commission should not have used $618.50 for Lampkin's AWW, $658.25 at the minimum should be utilized as this calculation properly accounts for weeks and parts thereof.

D) Alvin Clark's Average Weekly Wage

Clark's average wage was determined by dividing gross pay ($8,534.51) by number of checks (16) and equates to $533.41 (which is equal to less than 2 hours of overtime). (R. p. 38)

Alvin Clark's wage determination does not take into account any partial weeks. This is a violation of S.C. Code Ann. §42-1-40 (1976).

Clark worked partial weeks the weeks ending 7/29/11 (32 hours worked) and 11/11/11 (8 hours worked). (R. p. 626) Both of these weeks are clearly fractional. Clark's average wage accounts both of the above weeks as full weeks.

Clark worked five other fractional weeks. (R. p. 626) Excluding the partial weeks results in 5.61 hours of overtime or actual wages of $629.40 weekly.

The Commission determining Clark's AWW at $533.41 instead of $629.40 is clearly prejudicial to the Appellant and based on error of law, thus it warrants reversal.

12. IS THE GUARANTEE OF CONTINUED EMPLOYMENT RELEVANT TO RECOVER UNDER TITLE 42?

South Carolina is an at-will employment state. *Prescott v. Farmers Telephone Cooperative, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) "A contract for permanent employment, ... is terminable by either party. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all."*

The Single Commissioner penalized the injured worker by finding there was "No guarantee he would have continued with the assignment at Alside Revere." (R. p. 38)

To lower the AWW in this case, on this basis, would substantially prejudice the rights of the Appellant. §42-1-160 defines injury, and includes a non-inclusive list (§42-1-160 (C)) of "events which are incidental to normal employer/employee relations including but not limited to...terminations..." Any reference to what "might" have happened would be based on speculation, conjecture or surmise, and no award shall be based on speculation, conjecture or surmise.

In conclusion, there is no basis for the applicability of whether or not employment was guaranteed as consideration of guarantees are not accounted for under S.C. Code Ann. (1976) Title §42, thus it warrants reversal.

13. DID THE COMMISSION ERR IN FAILING TO FIND THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WOULD HAVE CONTINUED TO WORK AT ALSIDE REVERE?

Appellant testified "Dan Cobb said they liked my work and that if I was on board, that he would like to hire me.(R. p. 279 lines:1-2)" I was looking for long term stability so I could finish school.(R. p. 279 lines:13-14)" "They [snelling] try to put you with someone that would be a good long term fit for you to be hired on for (R. p. 299 line:24 & p. 300 line:1)" "Snelling does not take you on a daily basis to go to different places. They are – their mission is to place people to be hired on at companies rather than filling day labor needs.(R. p. 298 lines:7-11)" "me and Dan Cobb had had a conversation regarding... bring me on before the 550 hours because its an exorbitant cost for the company to outlay for the staffing agency.(R. p. 304 lines:21-25)" "Alside Revere did try to re-employ me simply as a driver until I was healed enough to take over full duties again...I believe that would speak to their intent of wanting to hire me.(R. p. 305 lines:19-25 & p. 306 line:1)"

Dan Cobb Testified that ultimately he would make the final (hiring) decision (R. p. 399) "We brought him on to be full time (R. p. 402.)" "would receive at least 40 hours a week (R. p. 402)" "he was the only one" employed to make deliveries (R. p. 403) "that he [appellant] was working out" and had performed "so far so good (R. p. 404)" That "It's a permanent position" and "No, it's permanent (R. p. 408)" "He was a very good employee. He did very well in the limited time he was there (R. p. 405)" That there was overtime ranging from two (2) to ten (10) hours of overtime a week." "If he worked out we would make him a permanent employee" and "If they do well that is my intention."(R. p. 407)

The Appellant believes it is more likely than not that he would have been hired at Alside Revere, and that substantial evidence supports that contention that his wages should be looked at as if he was hired permanently, and those wages should reflect likely earnings going forward.

14. DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

The Commission erred in finding that a fair and just method to calculate the wages of the Appellant was to take an average of his wages from a previous job along with the three other employee wages provided; the error being that it was not fair and just to the Appellant as it did not reflect the earnings of the injured employee and the error being that the amount that should have been used should be the actual earnings in the employment at time of injury with the ultimate objective being to fairly reflect the Appellant's probable future earnings.

The weeks accounted for by the Commission includes, 44 weeks of various statutory employees working in the same employment in which the Appellant was injured (Alside Revere, a building supply company) and 20 weeks, only 19 of which the Appellant actually worked, in a different scope of employment for a different statutory employer (Ben Arnold, a wine distributer).

The appellate relies heavily on *Sellers v. Pinedale Residential Center 350 S.C. 183(S.C.App. 2002). "The disability of a workers compensation claimant reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, for the purposes of calculating the claimant's average weekly wage." "The workers compensation statute, which sets forth several different methods for calculating the claimants AWW, provides an elasticity or flexibility with a view towards always achieving the ultimate objective of reflecting fairly a claimant's probable future earnings loss."*

1) Did the commission err in relying on a Form 20 from a different "employment?"

Whether or not an employer-employee relationship exists within the meaning of the workers compensation law is a jurisdictional question for which the reviewing court can take its own view by a preponderance of the evidence." Collins v. Charlotte (S.C.App. 2012) 2012 WL 3323345,"

On May 13, 2011 the Appellant became initially employed with Snelling Staffing working with Ben Arnold. The pay rate for this employment was $11.50/hr. This employment was Tuesday thru Friday with an arrival time of approximately 6:00 am and a departure time varying from noon till 8:00 pm. This job required a Class B CDL (commercial driver's license). This job required constant lifting up to 50lbs, driving a class

B vehicle, minimal warehouse work, delivery, stocking and merchandising of beer and wine to various locations for Ben Arnold.

When this employment ended there was no guarantee of future employment, no timetable given for return and for all intents and purposes the appellant was no longer employed.

Unless claimant knew of and agreed to a new employer-employee relationship replacing the one thereforto existing, his rights under the Workman's Compensation Act against his regular employer were unabridged. Chavis v. Watkins 256 S.C. 409(S.C. 1971).

On November 11, 2011 the appellant entered into a subsequent employee/employer relationship with Snelling Staffing to work for Alside Revere. This employment was for a construction distribution company. The pay rate for this employment was $13/hr. This position was for Monday thru Friday work from 7:00 am till 4:00 pm with the understanding that there would be regular overtime. Requirement for employment involved possessing a Class A CDL. (R. p. 405) This job included several hours of warehouse work daily and irregular delivery routes, twice a week going within 5 miles of the Georgia border.

To base AWW on wages from a previous employment, that included lower wages, a different scope of work, in a different industry, with different hours, needing a different license with less dangerous conditions does not comply with §42-1-40 which states AWW must be determined "in the employment working at the time of injury" and warrants reversal.

Due to the fact that disability reaches into the future and not the past, loss must be calculated upon probable future earnings.

2) Do Jared Lampkin's earnings most accurately reflect what the Appellant would be earning were it not for the injury?

On Nov. 22, 2011, Jared Lampkin replaced the Appellant at Alside Revere. Lampkin was the only person to work this job for the following year. Taking into account pay records from Alside Revere and Snelling, The period from Nov. 22, 2011 to Nov. 10, 2012 included forty-nine (49) full weeks and two (2) partial weeks. During this period Lampkin earned wages equal to $36,544.61.

Lampkin's AWW excluding the partial weeks are equal to:

(Total wages – partial week wages) / full weeks worked = AWW or ($36,544.61 – $916.50) / 49 full weeks = $727.10

In conclusion, AWW should reflect probable future earnings, which in this case would be a minimum of $727.10 a week.

15. DID THE COMMISSION ERR IN FAILING TO APPLY PENALTIES AND/OR SANCTIONS AGAINST THE RESPONDENTS?

Is the Appellant due penalties and/or sanctions and/or an increase in compensation?

The Commission erred in failing to find that the Respondents should be subject to fines and penalties for late payments of Temporary Total Disability and Temporary Partial Disability Benefits; the error being that the record reflects payments were made at least 14 days after they were due, the records reflect that Respondent's failed to make timely payments on multiple occasions and the fine is mandated by §42-9-90.

The first check paid to claimant has a received date stamp on it reflecting it was received 12/27/11, this is over one month after claimants injury 11/21/11 (R. p. 596), and the records reflects no payment was made the week of 4/14/12 (R. p. 59)

There is no record of payment of the mandatory increase in compensation of 10% for the period of benefits from 11/22/11 till 12/02/11. There were multiple occasions of late payments (R. p. 596-614)

There was no increase in compensation nor penalties applied for multiple late payments, as mandated by law, and this is prejudicial to the Appellant.

The Commission erred in failing to find Respondents be subject to fines and penalties for not authorizing Appellant's treating physicians' prescribed medical care and not authorizing treating physicians' medical care in a timely manner; the error being that the record reflects the Appellant did not receive all treatment and did not receive all treatment in a timely manner and the motion for penalties should have been granted.(R. p. 91-114)

Dr. Olson initially recommended and prescribed Physical Therapy on 1/9/12. Claimant's first visit to Physical Therapy was on 2/27/13. (R. 105-106)

Dr. Olson initially recommended and prescribed wound debradement/therapy on 1/27/12. Wound care was never approved or provided. (R. p. 91-114)

The Claimant's recovery was hindered due to the gross delay in approving physical therapy. "Potential barriers to patient's ability to reach maximum rehab potential: delayed attendance to PT" (R. p. 106) Physical therapy was delayed for a second period from

4/10/12 till 5/1/12. Dr. Olson's report dated 4/2/2012 states that there is no longer need for wound therapy.

Rehabilitation Centers of Charleston's physical therapy notes from 6/26/12 state that the wound is nearly healed. The Claimant's wound remained open at least until 6/26/12 resulting in Dr. Olson not proceeding with surgery (R. p. 113-114). Dr. Olson's report dated 5/14/12 recommends and prescribes Chronic Pain Management. The Claimant attempted to facilitate and receive Chronic Pain Management as prescribed by Dr. Olson. The Claimant first received Chronic Pain Management on 10/30/12. Dr. Ohlson first recommended and prescribed orthotics on 7/2/12, United Heartland delayed approval of this until, on or after, 11/1/12. (R. p. 91-114) The record contains substantial evidence that the carrier has failed to provide medical care as directed.

To not enforce penalties and/or sanctions against the Respondents for failing to provide medical care as ordered, recommended and prescribed, by the treating physicians encourages carriers to disregard the law. This violation of the simple trade-off of swift medical care and sure compensation for limited liability must not be upheld. To do so would tip the scale of justice away from protecting the injured worker and undermine the concept of workers compensation. In an exclusive recovery setting penalties must be applied as the legislators intended.

The concept is elementary, if the injured worker endures additional loss and the carrier is responsible for it, additional compensation is due.

16. IS THE COMMISSION BARRED FROM GRANTING A CREDIT TO RESPONDENTS FOR OVERPAYMENT OF TEMPORARY TOTAL AND/OR TEMPORARY PARTIAL DISABILITY BENEFITS IF PENALTIES ARE DUE?

The commission should have awarded at the minimum the mandatory penalties, thus, an application for suspension of benefits should not have been entertained by the commission on November 28, 2012.

Pursuant to § 42-9-260 (F) "Further, the commission may not entertain any application to terminate or suspend payments unless and until the employer or carrier is current with all payments due."

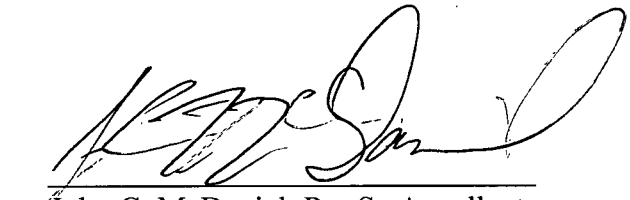
If Appellant was due penalties for late payments of temporary disability payments can the commissioner grant an application to terminate benefits and then give a credit, while outstanding penalties are due?

CONCLUSION

Title § 42 was authored and implemented with the sole purpose to protect the injured worker, the goal of keeping injured workers from becoming charges on society and an exclusive remedy in exchange for swift care and limited compensation. The Appellant is permanently disabled and must be protected by this court.

The Appellant prays that this court will seek justice and uphold the law by: remanding the case back to the South Carolina Workers Compensation Commission for a rehearing with specific instructions to at a minimum; accept the amended form 30, calculate AWW excluding partial weeks and reflect future and not past earnings, to reconsider disability and find no less than 68% to the leg, to apply mandatory penalties and reconsider discretionary penalties, deny the Respondents credit, accept evidence, enter

appellants deposition into the record, rule on the Appellants proposed findings of fact and find MMI no earlier than July 22, 2013, or in the alternative, overturn all of the appealed issues and enter an award fair and just to the Appellant, and/or whatever other action the court may deem fair and just.



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