THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee,..... Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier, ... Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

STATEMENT OF ISSUES ON APPEAL

I. Whether the Commission properly held that Claimant was at Maximum Medical Improvement and awarded Respondents credit for Total Temporary Disability benefits paid after that date?

II. Whether the Commission properly determined Claimant's disability rating?

III. Whether the Commission properly calculated Claimant's Average Weekly Wage?

IV. Whether the Commission correctly rejected Claimant's Amended Form 30 as untimely filed?

V. Whether the Commission properly rejected Claimant's request for penalties and/or sanctions?

VI. Whether Claimant's remaining arguments regarding alleged Due Process rights violations are meritless?

STATEMENT OF THE CASE

Although the underlying facts of this case are fairly straightforward, it has a complicated procedural history. Appellant John McDaniel ("Claimant") was injured in a work-related accident on November 21, 2011, when a forklift injured his left foot. (R. 282, lines 6-18) (R. 306, lines 21-24) (R. 526). At the time of his injury, Claimant was employed by Respondent Career Employment Professional d/b/a Snelling Staffing ("Snelling Staffing").

Claimant began working for Snelling Staffing, a temp staffing agency, in May 2011. (R. 262, line 23) (R. 271, lines 15-20).[1] Claimant testified that he understood that his pay rate depended on the assignment he received through Snelling Staffing, and that there was no guarantee of a permanent placement with any temporary assignment. (R. 298 line 2 – 299, line 18). Snelling Staffing first placed Claimant with Ben Arnold. He worked at Ben Arnold from May to September 2011, making $11.50/hour. He was let go by Ben Arnold because of a scheduling conflict with his classes. (R. 271, line 15 – 272, line 7) (R. 272, line 15 – 276, line 1) (R. 300, line 5 – 301, line 14). At that time, Claimant was enrolled at Trident Technical College, studying civil engineering. (R. 267, 12, lines 15-23).

After being let go by Ben Arnold, Claimant was unemployed for approximately six weeks, (R. 301, lines 15-18), and, at some point, began waiting tables. He was called by Snelling Staffing with a temporary offer to work at Alside Revere, making $13/hour.

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[1] Between the time that Claimant graduated from high school in 2000, (R. 267, lines 5-7), and the time he began working for Snelling Staffing, he held a number of different positions ranging from vehicle sales, to waiting tables at "various establishments," to construction debris removal, to caddying, to bar sales and auditing inventory, moving from Texas to South Carolina, to Florida, to North Carolina, to Wisconsin, and back to South Carolina. (R. 268, line 5 – 271, line 7).

(R. 276, lines 2-19). Claimant understood that, during the time he worked for Ben Arnold and Alside Revere, he was a Snelling Staffing employee and was paid by Snelling. (R. 303, lines 9-13). Claimant started working at Alside Revere on Friday, November 11, 2011, and then worked the full week of November 14-18. He was injured on the following Monday, November 21. (R. 277, lines 12-20) (R. 302, lines 6-15). Thus, he worked one full week and two days, or ten calendar days, at Alside Revere. (R. 302, lines 16-21).

His supervisor at Alside Revere was Daniel J. Cobb. (R. 277, lines 21-22). Mr. Cobb testified that there was "a possibility" of overtime if they were busy, "[d]epending on how many deliveries we have during the course of the day .... there was a possibility of overtime. It wasn't every day or anything like that." (R. 402, lines 16-23). Mr. Cobb testified that, at the time of his deposition, the person who replaced Claimant at Alside Revere was still working for them. (R. 404, lines 11-20). Mr. Cobb estimated that the individual who replaced Claimant was working overtime from a couple of hours a week to ten hours a week. (R. 405, lines 9-19). Mr. Cobb explained that "[t]here might be weeks in there you have no overtime." (R. 408, lines 11-12).

Temporary employees sent to Alside Revere through Snelling Staffing have to work at approximately 550 hours, or three months, before Alside Revere can take them on as direct employees. (R. 404, line 21 – 405, line 5) (R. 406, lines 15-21) (R. 279, lines 3-8). Mr. Cobb testified that Claimant "was a very good employee," but that it was too early to tell whether Alside Revere would take him on as a permanent employee. He explained, "I know he had plans on going back to school. So that would probably – whether it might have interfered with that or not I don't know. Again, it was just too

early in it." (R. 406, lines 1-14). Mr. Cobb reiterated that there was no guarantee that a temporary employee ever would be offered a permanent position with Alside Revere, and that the ten days Claimant worked there was an insufficient amount of time to determine whether he would be offered a permanent position. (R. 408, line 24 – 409, line 14).

Following his injury on November 21, 2011, emergency treatment was provided to Claimant at Roper Hospital in Charleston, (R. 506-520), after which Claimant came under the care of Dr. Blake L. Ohlson and Orthopaedic Specialists of Charleston. (R. 526-556). Starting in April 2012, Dr. Ohlson began advising Claimant "to quit smoking ... as this affects the rate of healing." (R. 541, 545-546) (R. 307, lines 10-25). Although Dr. Ohlson recommended that Claimant be "evaluated by wound care," (R. 534), a few months later he concluded that the "[w]ound is nearly healed on the foot ... it is very superficial in nature there is no purulence no evidence of infection," and noted that since the wound was nearly healed, "wound care specialist will not be necessary." (R. 541).

On April 27, 2012, Dr. Charles J. Gudas examined Claimant for an Independent Medical Examination ("IME") at the request of Claimant's counsel. Dr. Gudas opined that, at that time, Claimant had not yet reached Maximum Medical Improvement ("MMI"). (R. 561-563).

On May 18, 2012, Claimant filed a Form 50 seeking additional medical care, Temporary Total Disability ("TTD") benefits from the date of injury and continuing, as well as Permanent Partial Disability benefits. Claimant sought an average weekly wage ("AWW") calculation based on the increased salary he was making at the time of his injury. (Cl. Form 50, dated May 18, 2012, R. 54). Snelling Staffing and its insurer, United Wisconsin Insurance Company (Respondents herein) filed a Form 51 denying the

nature and extent of injury and any resulting disability, as well as Claimant's calculation of the AWW and entitlement to temporary benefits. (Resp. Form 51, dated June 15, 2012, R. 55).

On August 13, 2012, Dr. Ohlson stated that Claimant had reached MMI, and determined an impairment rating, using AMA Fifth Ed. Guidelines, of "15% impairment to the left lower extremity. In addition 2% ... should be added for ankylosis of the fifth toe. This brings a total of 17% impairment to the left lower extremity." Dr. Ohlson discussed final work restrictions with Claimant, which included lifting capacity of approximately 10 pounds, and recommendations against climbing ladders, roof work, running and prolonged periods of standing. (R. 557-558).

On September 17, 2012, Respondents filed a Form 21 request for hearing, seeking credit for overpayment of TTD. (Resp. Form 21, dated Sept. 17, 2012, R. 56-61).

Dr. Howard L. Brilliant conducted a second IME and, on October 11, 2012, opined that, "[a]t present time, [Claimant] does not need any special treatment. No surgery is indicated. He may benefit by getting a supportive made-to-order shoe so he can get around more. It will probably be about another year until he is fully improved." Dr. Brilliant estimated Claimant's impairment rating to be 50% to the left foot. (R. 564-565).

Claimant began seeing Dr. Edward M. Tavel for pain management in October 2012. (R. 628-630). At the time of the January 2013 hearing, he was continuing to be treated by Dr. Tavel for pain. (R. 283, line 5 – 284, line 5).

Claimant submitted his Form 58, Pre-Hearing Brief, and APA pages 1-119, under cover of letter dated October 31, 2012. (Cl. Form 58, Pre-Hearing Brief, served October 31, 2012, R. 205).

The parties were heard by Hearing Commissioner Melody James on November 28, 2012. The Hearing Commissioner stated on the record, without objection, that the parties agreed that Claimant had reached MMI. (R. 260, lines 13-14). Claimant argued that his AWW should be based on the salary he was making at Alside Revere, assuming 40 hours per week plus five hours overtime, "which was his understanding he would be getting in this job." (R. 262, lines 4-9). Claimant submitted wages of three other employees who worked the same job at Alside Revere that Claimant was working when he was injured – Wayne Atkins, Alvin Clark and Jarod Lampkin. (R. 263, lines 5-10). Claimant's counsel asserted that Jerod Lampkin's AWW was $618.50. (R. 263, lines 10-22). Respondents argued that the most accurate way to calculate Claimant's AWW was based on the actual wages he earned working the different positions with Snelling Staffing and that, in any event, the AWW calculations for Messrs. Atkins and Clark should be $506.88 and $533.41, respectively. (R. 264, line 11 – 265, line 21).

The Hearing Commissioner issued a Decision and Order on January 4, 2013. (Hearing Commissioner Decision, filed Jan. 4, 2013, R. 1-14 ("January Hearing Commissioner Decision")).[2] The Hearing Commissioner noted that Claimant "agrees that the treating physician says he is at maximum medical improvement." (January Hearing Commissioner Decision, R. 3). She found that Claimant's AWW was $537.91, with a corresponding compensation rate of $358.62. "The Claimant's twenty weeks of

[2] The Hearing Commissioner requested that Claimant's counsel draft a proposed decision based on her findings. (Request for Proposed Order, dated Dec. 3, 2012, R. 48-49).

work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing. However, there is no guarantee he would have continued with the assignment at Alside Revere." (Id., R. 11). The Hearing Commissioner concluded that "[a] fair and just method to calculate the wages of the Claimant is to take an average of the wages along with the three other employee wages provided. The Claimant - $492.84; Atkins - $506.88; Lampkin - $618.50; and Clark - $533.41." (Id.). She found that Claimant reached MMI on August 13, 2012 and had a disability to the left leg of 34%. She awarded Respondents a credit for TTD benefits paid after Claimant reached MMI on August 13, 2012, and held that Claimant was entitled to future medical care as indicated by Dr. Ohlson, to include future surgery on the fifth toe, extra wide shoes and Celebrex, as well as pain management. (Id., R. 12). Claimant was awarded compensation for a 34% permanent partial disability to the leg pursuant to Section 42-9-30.

Claimant filed a timely Form 30 Request for Commission Review. (Form 30, dated Jan. 14, 2013, R. 63-65). He raised six specific issues that centered on the calculation of the AWW, the 34% disability rating, the credit awarded to Respondents for TTD paid after the date of MMI, and whether Respondents should be subject to fines and penalties for alleged late payment of TTD. (Id.).[3]

On March 8, 2013, Claimant's counsel filed a motion to have the pay records of Jerod Lampkin admitted. In his motion, Claimant asked that Full Commission review be stayed and that the matter be remanded to the Hearing Commissioner to consider the

[3] Respondents note that this last issue was not raised in Claimant's Form 50, (R. 54), his Form 58 Pre-Hearing Brief, (R. 205), or at the hearing before the Hearing Commissioner. (R. 256-311). Although Claimant raised some issues regarding the timeliness of the medical care he had been provided, the Hearing Commissioner reminded him that the hearing was to determine permanency, not his medical care. (R. 283, line 13 – 289, line 11).

additional evidence. (Motion Pursuant to Regulation 67-707 to Admit Additional and Newly Discovered Evidence, dated Mar. 8, 2013, R. 67-73 ("Motion to Admit")).

Subsequently, Claimant filed, through his counsel, an appellate Brief with the Full Commission, which reduced the issues raised on appeal to three arguments stated as follows: 1) The average weekly wage and compensation rate should have been based on what the Claimant might have earned at Alside Revere since compensation benefits reach into the future and not the past; 2) the Claimant's loss of use and disability greatly exceeded the 34% impairment rating given by the Commissioner; and 3) the Hearing Commissioner should not have given the [Respondents] a credit for the payments made after the date of Maximum Medical Improvement." (Brief on Behalf of Claimant/Appellant, dated March 26, 2013, R. 207-216).

On March 29, 2013, Claimant notified the Commission that he was relieving his counsel. (Order Relieving Counsel, dated March 29, 2013, R. 15).

Subsequently, Full Commission review was scheduled for April 16, 2013. (Notice of Appellate Hearing, dated March 29, 2013, R. 43). Respondents filed their Brief to the Full Commission on April 10, 2013, responding to the three issues raised by Claimant in his Brief. (Respondents' Brief to the Full Commission, dated April 10, 2013, R. 217-227).

On April 15, 2013, the Commission granted Claimant's Motion to Admit, and noted that the matter was "set for Appellate Hearing on all issues." (Judicial Conference Decision and Order, dated April 15, 2013, R. 16-17). Claimant, now proceeding *pro se*, contacted the Commission directly and asked that the matter be remanded to the Hearing Commissioner for consideration of the new evidence. (*See* Email correspondence

between Eugenia Hollmon and John McDaniel, "Re: motion for new evidence," dated April 15, 2013, R. 74).

On May 6, 2013, Claimant filed another motion to admit additional evidence, purporting to add pages 126-209 to his APA submissions. (Claimant's Motion for Additional Evidence to Complete the Record and Notice of Additional Evidence and Additional APA Submissions on behalf of the Claimant, dated May 6, 2013, R. 75-79 ("May 6 Motion")). On May 10, 2013, he filed another motion seeking to admit his deposition transcript into the record. (Claimant's Motion for additional Evidence and Testimony to Complete the Record, dated May 10, 2013, R. 80-83 ("May 10 Motion")).[4] Respondents opposed both of these motions. (Defendants' Response to Claimant's 2nd Motion to Add Additional and Newly Discovered Evidence and Notice of Additional APA Submissions, dated May 16, 2013, R. 84-88).

Claimant filed a 28-page Reply to Respondents' Brief, raising a number of issues not raised in either prior brief. (Appellant's Reply to Respondents' Brief, served by the Commission on May 15, 2013, R. 228-255). For example, Claimant argued that the Hearing Commissioner's calculation of Mr. Lampkin's AWW at $618.50 was incorrect, even though this was the amount his counsel asserted at the hearing. (R. 262, line 4 – 263, line 10). He also challenged the Hearing Commissioner's finding that he had reached MMI on August 13, 2012, even though he conceded that fact at the hearing. R. 260, lines 10-18) (R. 283, lines 1-12) (R. 308, lines 1-6 (Claimant agreeing he had been released from Dr. Ohlson's care on August 13, 2012)).

[4] Claimant sought to waive the filing fees for these two motions, which request was denied pursuant to an Administrative Order. (Administrative Order re Form 32(s), dated June 3, 2013, R. 19).

Under cover of a letter dated May 17, 2013, Claimant submitted the pay records of Jerod Lampkin. (Claimant's Notice of Additional Evidence to be Introduced into the Record, APA pp. 210-278, dated May 17, 2013, R. 89-90).

On May 20, 2013, the Commission issued an order granting Claimant's motion to remand this matter to the Hearing Commissioner. (Judicial Conference Decision and Order, dated May 20, 2013, R. 18 ("May 20 Order")). Upon inquiry, the Commission clarified that its May 20 Order was "solely based on the prior Judicial Conference Order" granting Claimant's Motion to Admit Mr. Lampkin's pay records. Because Claimant asked that the additional evidence be addressed by the Hearing Commissioner, the May 20 Order remanded the matter to Commissioner James to consider this newly admitted evidence. (Letter from Valerie D. Deller to Allison Nussbaum, dated May 29, 2013, R. 470).

Claimant filed another motion on June 11, 2013, raising an issue regarding timeliness of treatment reaching back to January of 2012. (Claimant's Motion for Penalties and Sanctions for Failure to provide Medical Treatment and Failure to Provide Medical Treatment in a Timely Manner, dated June 11, 2013 and filed with the Commission on June 14, 2013, R. 91-97 ("Motion for Penalties")). Respondents filed an opposition to Claimant's Motion for Penalties. (Defendants' Response to Claimant's Motion for Penalties and Sanctions for Failure to Provide Medical Treatment and Failure to Provide Medical Treatment in a Timely Manner, dated June 21, 2013, R. 115-118).

On June 17, 2013, the Commission issued orders denying Claimant's May 6 Motion and May 10 Motion, both of which sought to admit additional evidence. (Judicial Conference Decision and Order concerning Motion for Additional Evidence Dated May

6, 2013, filed June 17, 2013, R. 20) (Judicial Conference Decision and Order concerning Motion for Additional Evidence Dated May 10, 2013, filed June 17, 2013, R. 21).

A hearing was set before Hearing Commissioner James for July 8, 2013 to consider Mr. Lampkin's newly admitted pay records. The hearing notice indicated that it was a "[r]emand on issues as set forth by Full Commission Order." (Notice of Hearing, dated June 19, 2013, R. 44). Upon inquiry, Claimant was advised several times that the remand hearing was solely to consider the additional evidence in the form of Mr. Lampkin's pay records. (Email correspondence between John McDaniel and Tamara Morris, "Re: wcc file # 1116275", dated June 26, 2013 and June 27, 2013, R. 472-473).

Nonetheless, Claimant served subpoenas in an attempt to require Jim Pascutti, Angela Baldwin and Nicole Service to appear at the remand hearing before Commissioner James. (Subpoenas to Jim Pascutti, Angela Baldwin and Nicole Service, served on Respondents under cover of letter dated June 27, 2013, R. 202-204). Respondents duly moved to quash the Subpoenas. (Motion to Quash Claimant's June 27, 2013 Subpoenas to Angela Baldwin, Jim Pascutti, and Nicole Service, dated July 2, 2013, R. 119-123).

At the July 8, 2013 hearing, Commissioner James first clarified that the remand was "for consideration of [Jerod Lampkin's pay records] and the impact with regards to those records to the original decision and order." (R. 314, line 21 – 315, line 1). She next considered and granted Respondents' Motion to Quash, as the individuals subpoenaed were two employees of Snelling Staffing and the claims adjuster for its insurer, who could not speak to anything regarding employment records from Alside Revere that post-dated the time that Claimant worked there. (R. 315, line 15 – 317, line

11) (R. 327, line 13 – 329, line 7). Commissioner James heard both parties' arguments regarding the impact, if any, that Mr. Lampkins' pay records should have on the calculation of Claimant's AWW, and reiterated several times during the hearing that the sole purpose of and the single issue under consideration at the remand hearing was "the interpretation of [Jarod Lampkin's] pay records and any impact that they have on the decision and order …" (R. 327, lines 16-19) (R. 326, lines 14-23) (R. 344, lines 4-5) (R. 355, lines 19-20) (R. 357, lines 13-24) (R. 359, lines 17-21).

Commissioner James issued a Request for Proposed Order, with detailed notes, instructing Commission Staff Attorney Keith Roberts to prepare the proposed Order. The Request noted that Staff Attorney Roberts could propose other Findings of Fact "not inconsistent with those attached," to the request. (Request for Proposed Order, dated Aug. 6, 2013, R. 50-51).

Subsequently, Claimant's Motion for Penalties and Sanctions was denied. (Judicial Conference Decision and Order, dated August 12, 2013, R. 22).

Although Claimant was not specifically requested to draft a proposed order, he submitted seven pages of proposed findings of fact to Staff Attorney Roberts. (Email correspondence from John McDaniel to Keith Roberts and Allison Nussbamu, "Re: Proposed Findings of Fact RE:SWCC file #1116275," dated Aug. 30, 2013, R. 474-476). Staff Attorney Roberts drafted a proposed Order pursuant to Commissioner James' instructions and provided a copy to both parties for review. (Email correspondence between Keith Roberts, Tamara Morris, John McDaniel and Allison Nussbaum, "Re: John McDaniel Charleston Order Instructions from Commissioner James for Keith to prepare Order," dated Sept. 10, 2013, R. 477). In a series of emails dated September 13,

2013, Staff Attorney Roberts reiterated that all of the comments and proposed findings had been forwarded to Commissioner James, who would make the final decision regarding what would be contained in her Decision and Order. (Email correspondence between Keith Roberts, Gary Cannon, John McDaniel and Allison Nussbaum, "Re: Proposed order language," dated Sept. 13, 2013, R. 479-481).

Commissioner James issued her Decision and Order on September 30, 2013, first finding that this case had been "remanded by the Full Commission to consider the newly discovered evidence of the pay records of Jarod Lampkin at Alside Revere, along with the previously submitted evidence at the initial hearing." (Decision and Order of Hearing Commissioner Melody L. James, filed Sept. 30, 2013, R. 23-27 ("September Hearing Commissioner Decision")). She also found that, as had been found "in the previous order, whether the Claimant would have been permanently hired by Alside Revere, is unknown," but that, given the "shortness of the duration of Claimant's work at the assignment on which he was injured, Claimant has shown exceptional reasons why the methods of calculating his average weekly wage provided for in the first paragraph of 42-1-40 would be unfair." She concluded that "[t]he method which would most nearly approximate [Claimant's] average weekly wage at the time of his injury is to average Claimant's wages with the three 'like employees' that were earning wages with the Employer, Snelling." This resulted in an AWW of $537.91 with a corresponding compensation rate of $358.62. Commissioner James granted the Respondents' Motion to Quash the Subpoenas on Nicole Service, Angela Baldwin and Jim Pascutti, and noted that no other discovery or motions were properly before her. (Id.).

On October 1, 2013, the Commission provided notice of the rescheduled Full Commission hearing on the previously-filed Form 30 Notice of Appeal. The appellate hearing was scheduled for October 14, 2013. (Notice of Appellate Hearing, dated Oct. 1, 2013, R. 45). Upon inquiry from Claimant, the Commission staff confirmed on multiple occasions, that the Full Commission hearing was based on his January 2013 Form 30 appeal of the January Hearing Commissioner Decision. (Email correspondence between John McDaniel, Eugenia Hollmon, Gary Cannon, Valerie Deller, Virginia Crocker, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 483-488). In particular, Ms. Crocker informed Claimant that, "[t]he matter on appeal on October 14, 2013 is your appeal of the Decision and Order of Commissioner James dated January 4, 2013. The order served on September 30, 2013 is not currently on appeal although you are still within the time period for appeal of that order." (Email correspondence between Virginia Crocker, John McDaniel, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 488).[5]

In response to a long list of questions from Claimant, Staff Attorney Roberts confirmed that, "[t]he purpose of [the] Appellate Hearing set for October 14th, 2013 is to determine the issues your former attorney raised on the Form 30 filed on January 14th, 2013, which appealed the Decision and Order of Commissioner James dated January 4th, 2013. You were served with a copy of the Brief Request notifying you that the matter was on the appellate docket on June 19th, 2013. You were served with a notice of the

[5] Nonetheless, Claimant served subpoenas on Jim Pascutti, Angela Baldwin and Nicole Service to appear at the appellate panel hearing set for October 14, 2013, (Subpoenas to Jim Pascutti, Angela Baldwin and Nicole Service, served on Respondents under cover of letter dated Oct. 4, 2013), which Respondents moved to quash. (Motion to Quash Claimant's October 14, 2013 Supbpoenas to Angela Baldwin, Jim Pascutti, and Nicole Service, dated Oct. 10, 2013, R. 124-128).

time and date of the Oral Arguments on October 1st, 2013 … The Decision and Order of Commissioner James filed September 30th, 2013 is not under review at the Hearing set for October 14th, 2013." (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 8, 2013, R. 491-492).

Claimant sought further clarification in an October 10 email, to which Staff Attorney Roberts responded: "The issues to be heard at the October 14th, 2013 [hearing] are all the issues that you raised on your Form 30 filed on January 14th, 2013 that were not remanded to Commissioner James for adjudication …" (Email correspondence between Keith Roberts, John McDaniel, Gary Cannon, Virginia Crocker, Allison Nussbaum, "Re: Application for notice wcc #1116275," dated Oct. 10, 2013, R. 497).

On Saturday, October 12, 2013, Claimant emailed a self-styled "Amended Form 30 for the upcoming review hearing …," which was dated October 8, 2013 and accompanied by numerous attachments. (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker, Gary Cannon, E. Boyd, and Elizabeth McDaniel, "Re: FW: FW: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 12, 2013, R. 503-504). Claimant's self-styled "Amended Form 30" attempted to raise a number of issues concerning the January Hearing Commissioner Decision, as well as subsequent motions and rulings, including arguments he made to Hearing Commissioner James in the July 8, 2013 hearing regarding additional evidence. Claimant's "Amended Form 30" was not accompanied by any filing fee or a request for waiver of same. (Cl. Amended Form 30, dated Oct. 9, 2013, and transmittal email dated Oct. 12, 2013, R. 503-504).

An Appellate Panel of the Full Commission heard oral argument on October 14, 2013, first granting Respondents' Motion to Quash the additional subpoenas that Claimant served on Jim Pascutti, Angela Baldwin and Nicole Service. Claimant, proceeding *pro se*,[6] asserted, among other things, that he had been given inadequate notice of the appellate panel hearing and that he had submitted an Amended Form 30, to which Commissioner Barden replied: "We have that in front of us, yes, sir." (R. 372, lines 3-19). The Commission allowed Claimant extra time in which to argue his case. (R. 377, line 10 – 381, line 7).

The Appellate Panel unanimously affirmed the January Hearing Commissioner Decision in its entirety. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Dec. 19, 2013, R. 28-41 ("Commission Decision"). The Commission noted the admission of the pay records of Jarod Lampkin and included the same in its review. However, in reaching its decision, the Commission "did not consider any documents outside the record because the Claimant's Amended Form 30 was not timely served; therefore, any records submitted with the Amended Form 30 were not considered by the Panel." (Commission Decision, R. 33). The Commission determined that the January Hearing Commissioner Decision was supported by substantial evidence and fully adopted the Findings of Fact and Conclusions of Law. In

[6] Throughout his *pro se* representation before the Commission, the Commission and its staff advised Claimant of his right to have a lawyer represent him and offered to reschedule hearings in order to allow him time to engage counsel. (R. 315, lines 9-11) (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re FW; FW: remanded or bifurcated?) SCWCC file #1116275," dated Oct. 9, 2013, R. 494 (advising Claimant that, "[m]isunderstanding legal terms is a risk that you run by choosing to remain pro se. If you are having trouble understanding any aspect of your case, you are permitted to retain a private attorney to represent you in all proceedings before the Workers' Compensation Commission," and cautioning Claimant against further *ex parte* communications with the Commission)) (R. 370, lines 10-17).

particular, the Commission found that "[a] fair and just method to calculate the wages of the Claimant is to take an average of the wages along with ... three other employee wages provided," resulting in an AWW of $537.91 and corresponding compensation rate of $358.62. (R. 38-40). The Commission also affirmed that Claimant reached MMI on August 13, 2012, and that Respondents were entitled to a credit for overpayment of benefits after that date. In addition, the Commission determined that, pursuant to Section 42-9-30, Claimant was entitled to compensation for a permanent partial disability to the left leg of 34%. (Id.).

Claimant timely appealed the Commission Decision to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

"The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Finally, the burden is on the claimant to prove he is entitled to benefits, which award cannot be based "on surmise, conjecture or speculation." *E.g.*, Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630-31, 142 S.E.2d 43, 45 (1965); Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 832 (1960) (noting "rule which is applicable to the finding of facts is that a claimant must establish

by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts").

ARGUMENTS

I. The Commission properly held that Claimant was at Maximum Medical Improvement and awarded Respondents credit for Total Temporary Disability benefits paid after that date.

A. The Commission's determination that Claimant reached MMI on August 13, 2012 should be upheld on appeal.

First, this issue is not preserved for appellate review, as Claimant did not raise it in his Form 30. (Cl. Form 30, R. 63-66). Findings and rulings not raised on appeal to the Full Commission become and are the law of the case, and cannot be raised later on appeal to a higher forum. *See, e.g.*, Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) ("only issues within the application for review are preserved for the full commission"); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (only those issues within the scope of the appellant's exception to the full commission and its notice to the respondent are preserved for appeal to the commission), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that "all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission").

Second, this issue has been conceded by Claimant. Regardless of Claimant's assertions on appeal, he conceded before the Hearing Commissioner that he had reached MMI. (R. 260, lines 13-14). Claimant asserted on his Form 58, Pre-Hearing Brief that he reached MMI on August 13, 2012. (Cl. Form 58, R. 205). He stated the same in his appellate Brief to the Full Commission. (Brief of Claimant/Appellant, dated March 26,

2013, R. 213-214 (noting the fact that "August 13, 2012, [was] the date of maximum medical improvement")). Parties are bound the statements and concessions made on the record and in briefs filed by their counsel. *See* JASDIP Props. SC, LLC v. Estate of Stewart Richardson, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011) (holding that "[a]n issue conceded in the trial court cannot be argued on appeal"); Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S.C. 550, 558, 684 S.E.2d 79, 784 (Ct. App. 2009) (parties are bound by concessions made in their briefs); State v. Dicapua, 373 S.C. 452, 456, 646 S.E.2d 150, 152 (Ct. App. 2007) (parties are "bound by the actions and concessions of counsel"); Parker v. Spartanburg San. Sewer Dist., 362 S.C. 276, 283, 607 S.E.2d 711, 715 (Ct. App. 2005) (parties are bound by concessions made at trial). Therefore, Claimant is barred from challenging the finding that he reached MMI on August 13, 2012.

Third, even if this Court considers the substance of Claimant's arguments, despite the fact that this issue is both unpreserved and conceded, the Commission Decision should be affirmed. Whether a claimant has reached MMI is a factual determination to be made by the Commission. Curiel v. Environmental Mgmt Servs. (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). So long as the Commission's finding is supported by substantial evidence, it should be upheld on appeal. McGuffin, 307 S.C. at 186, 414 S.E.2d at 163; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. Here, the Commission's determination that Claimant reached MMI on August 13, 2012 is supported by reliable, probative and substantial evidence in the form of his treating physician's medical notes. Dr. Ohlson stated, "Patient has reached maximum medical improvement." (R. 557-558).[7]

[7] Claimant erroneously asserts that Dr. Ohlson's "opinion was limited in scope to his specialty ..." Dr. Ohlson did not limit his opinion in any way. (R. 557-558). He did refer Claimant to a

The fact that there may be conflicting opinions or evidence in the record does not mean the Commission's determination of this point is either unsupported by substantial evidence or should be overturned. *See, e.g.*, Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, the Commission's resolution of that conflict must be affirmed so long as it is supported by substantial evidence).

The purportedly conflicting evidence Claimant cites does not change this result. Claimant was seeing Dr. Tavel for pain management at the time of the January 2013 hearing before Commissioner James. (R. 283, line 5 – 284, line 5) (R. 268-630).[8] Dr. Gudas's statement that Claimant was not yet at MMI was made on April 27, 2012, over three months before Dr. Ohlson determined Claimant had reached MMI on August 13, 2012. *Compare* (R. 557-558) *with* (R. 561-563). Dr. Brilliant, who Claimant consulted

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chronic pain management specialist; however, that does not mean Claimant was not at MMI for his work-related injury. *See, e.g.*, Dodge v. Broccoli, 334 S.C. 574, 582, 514 S.E.2d 593, 596-597 (Ct. App. 1999) (the fact that a claimant continues to receive medical care does not preclude a finding that he has reached MMI).

[8] Claimant repeatedly attempts to rely on evidence that was never admitted into the Record before the Commission. This includes (1) "ROA___Tavel Report 7/22/13" and (2) "ROA_____APA p.340-351." He submitted the 7/22/13 report and APA pages 340-351 to the Commission under cover of letter dated October 4, 2013, but Claimant never moved to have them admitted into the record. *See* (Appellant's Response to Respondents' Motion to Strike and/or Amend Claimants Initial Brief and Designation of Matter, dated May 31, 2014, p. 5 and Exhibit C, referencing "APA p.# 340-351", R. 857-865). It also includes (3) "ROA___ Exhibit to Motion for Additional Evidence Bate #127 dated May 9, 2013" and (4) "ROA_____ Exhibit to Motion for Additional Evidence Bate #166-195 dated May 9, 2013." Claimant's May 6 Motion attempted to add these pages to the APA; however, that motion was denied on June 17, 2013. It also includes (5) three Affidavits submitted to the Commission under cover of letter dated October 7, 2013, and (6) records from Rehabilitation Centers of Charleston dated February 27, 2012 and June 26, 2012, designated for the Record on Appeal, all of which were never made part of the record before the Commission. While this Court may consider these items in order to determine, upon proper motion, whether they were properly excluded by the Commission, it cannot rely substantively on non-record material in order to reach factual conclusions on its own. *See, e.g.*, Canteen v. McLeod Reg. Med. Ctr., 400 S.C. 551, 558, 735 S.E.2d 246, 250 (Ct. App. 2012) (improper for appellate court to make factual findings based on disputed facts); S.C. Code Ann. § 1-23-380(4); *see also* Terry v. South Carolina Dept. of Health & Env'l Control, 377 S.C. 569, 574, 660 S.E.2d 291, 294 (Ct. App. 2008) (appellate review of agency decisions "is confined to the record ..."). "This Court's review is restricted to the evidence considered by the appellate panel in reaching its decision," and may not rely on evidence not considered by the Commission. Martin v. Rapid Plumbing, 369 S.C. 278, 288, 631 S.E.2d 547, 553 (Ct. App. 2006).

for an IME, did not discuss MMI, but merely opined that it would "probably be about another year until he is fully improved," and assigned an impairment rating. (R. 564-565).

To the extent that Claimant relies on Dykes v. Daniel Constr. Co., 262 S.C. 98, 109, 202 S.E.2d 646, 652 (1974) to imply that he has not reached MMI because he was entitled to receive on-going medical care, he fails to understand that "even though a claimant has reached [MMI], if additional medical care of treatment would 'tend to lessen the period of disability,' then the Appellate Panel may be warranted in requiring such treatment to at least maintain the claimant's degree of physical impairment." Hall v. United Rentals, Inc., 371 S.C. 69, 82, 636 S.E.2d 876, 883 (Ct. App. 2006). In short, the fact that Claimant is entitled to on-going medical treatment does not mean he has not reached MMI for his compensable injury.

This Court should uphold the Commission's determination regarding MMI.

B. The Commission properly awarded Respondents credit for Total Temporary Disability benefits paid after the date Claimant reached MMI.

Claimant argues that the Commission misapplied Curiel. However, Claimant mis-reads Curiel, which does **not** stand for the proposition that, once a claimant reaches MMI, he is entitled to TTD so long as he is not able to work and/or so long as he did not exaggerate or obfuscate the degree to which he was injured. Instead, in Curiel the issue was whether the claimant was entitled to MMI for the period from the date he was fired, January 21, 2002, up and until the date the claimant reached MMI, or October 3, 2002. Thus, even in Curiel, the proposed TTD would not have been paid after the claimant reached MMI, but only up to that date. 376 S.C. at 29-30, 655 S.E.2d at 845-86. Here, Claimant is arguing that, even once he reached MMI, he was entitled to continued

payments of TTD because he was not working. That is not the holding in Curiel and is not the law in South Carolina.

Instead, the Hearing Commissioner and the Full Commission correctly applied the law as stated in Curiel and elsewhere:

> Essentially, 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. [citation omitted] Accordingly, **the date of maximum medical improvement signals the end of entitlement to temporary total benefits**.

Curiel, 376 S.C. at 29, 655 S.E.2d at 485 (emphasis added). South Carolina courts consistently apply this reasoning. *See, e.g.*, Smith v. South Carolina Dept. of Mental Health, 335 S.C. 396, 399, 517 S.E.2d 694, 695-696 (1999) (holding that, "[t]he rationale for ceasing **temporary** benefits upon a finding of MMI is to permit entry of a **permanent** award. [citation omitted] Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate **temporary** benefits in favor of **permanent** benefits upon a finding of MMI") (emphasis in original); Hendricks v. Pickens County, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999) (once a claimant reaches MMI, it is "appropriate to terminate TTD benefits in favor of either permanent partial or permanent total disability benefits ...").[9]

Where an employer has continued to pay TTD after the date a claimant reaches MMI, the employer may be awarded credit for those TTD payments made after the MMI

[9] Claimant's citation to and discussion of cases dealing with *stare decisis*, is perplexing and out of context, as he does not indicate what ruling of this Court and/or the South Carolina Supreme Court he believes should not be followed. To the extent he is arguing that this Court should not follow Curiel, he fails to note the numerous other decisions, noted above, that are consistent with the holding in Curiel, and that should be followed here.

date. *See, e.g.*, Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 465, 732 S.E.2d 190, 195-196 (Ct. App. 2012) (employer entitled to a credit for TTD payments made after the date the claimant reached MMI); O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 27-28, 459 S.E.2d 324, 326 (Ct. App. 1995) (upholding credit of TTD payments back to the date of MMI, despite the fact that the claimant continued to receive pain medications and was not able to return to work).

Claimant's reliance on Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994) is misplaced. As noted in Hendricks, Swinton involved an employer who unilaterally suspended TTD payments under former Regulation 67-504, which required proof that the claimant both had reached MMI and was capable of returning to work without restriction. Hendricks, 335 S.C. at 414-415, 517 S.E.2d at 703. Neither that regulation nor fact pattern is at issue in this case and, therefore, both the reasoning and result reached in Swinton are inapposite.

The provisions applicable to this claim for termination of TTD are now codified at S.C. Code Reg. § 67-506. Regulation 67-506(A) provides that, "[d]isability is presumed to continue until the employee returns to work, **except as provided here**." S.C. Code Reg. § 67-506(A) (emphasis added). Regulation 67-506(B) provides that TTD may be stopped when the claimant reaches MMI and the Commission finds the employer may terminate TTD. S.C. Code Reg. § 67-506(B). There is no requirement that the claimant be provided with full-time employment. There is no requirement that no further medical care be provided to Claimant. As noted above, the fact that a claimant has reached MMI "does not preclude a finding the claimant still may require additional medical care or treatment." *E.g.*, Dodge, 334 S.C. at 582, 514 S.E.2d at 596-597

(explaining that, "[a]lthough this medical care or treatment may not reduce the claimant's degree of physical impairment, it may 'tend to lessen the period of disability'").

Thus, the Commission's application of Curiel to the facts of this case is both proper and correct, and this Court should affirm the Commission's award of credit for TTD paid to Claimant after the date he reached MMI.

II. The Commission properly determined Claimant's disability rating.

A. The Commission's disability award is supported by substantial evidence.

The Commission's determination of Claimant's disability rating pursuant to S.C. Code. Ann. § 42-9-30 is supported by substantial evidence and should be upheld on appeal. Claimant's treating physician, Dr. Ohlson, assigned him a 17% impairment rating to his lower left extremity on August 13, 2012, the date Claimant reached MMI. (R. 557-558). Taking the evidence and testimony into account, the Commission doubled that percentage to arrive at a permanent partial disability award of 34% to the leg. Just because a claimant disagrees with the Commission's conclusions, and even where there is a possibility of drawing two inconsistent conclusions form the evidence (which Respondents do not concede is the case here), an administrative agency's factual findings must be upheld where they are supported by substantial evidence. Lee v. Harborside Cafe, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002).

B. The Commission properly awarded Claimant benefits under Section 42-9-30.

Claimant incorrectly asserts that the Commission erred by awarding him compensation under Section 42-9-30 instead of Sections 42-9-10 or 42-9-20. First, this issue is not preserved for appeal. Claimant's Form 50 alleged injury only to his left foot. (Cl. Form 50, R. 54). Claimant's Form 58, Pre-Hearing Brief likewise alleged injury

only to his left foot, and asserted a 17% impairment rating to the lower left extremity and/or a 50% loss of the left foot. (Cl. Form 58, R. 205).

The January 2013 Hearing Commissioner Decision awarded Claimant benefits under Section 42-9-30. (January Hearing Commissioner Decision, R. 13). Although Claimant's Form 30 raised the issue of **the amount of** his disability rating, he did not raise the issue that the wrong statutory section had been applied and/or that he should have been allowed to proceed under Sections 42-9-10 or 42-9-20. (Cl. Form 30, R. 63-65). As noted above, matters not raised to the Full Commission in a Form 30 become and are the law of the case. *See, e.g.,* Creech, 320 S.C. at 564, 467 S.E.2d at 117; Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712.

In his Brief to the Full Commission, Claimant argued that his disability rating should be higher, but did not assert he should be able to proceed under a different section of the Act. (Brief of Claimant/Appellant, dated March 26, 2013, pp. 5-7). Although Claimant attempted to raise this issue in his Reply Brief to the Commission, (Appellant's Reply to Respondents' Brief, served by the Commission May 15, 2013), it is axiomatic that a new issue cannot be introduced in a Reply Brief. *See, e.g.*, Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (issues cannot be raised for the first time in a reply brief).[10]

Second, in the event this Court finds this matter sufficiently preserved for appeal, which Respondents do not concede, Claimant's argument fails for the simple reason that he has not proven injury to two body parts. In the case he relies on, Lee, the hearing commissioner found the claimant had suffered injury to two distinct body parts. 350 S.C.

[10] Respondents did not raise this issue in their appellate brief to the Full Commission, (Respondents' Brief to the Full Commission, dated April 10, 2013, R. 217-227), so Claimant cannot assert he was merely responding to an issue raised by Respondents.

at 77, 564 S.E.2d at 355-56.[11] Where a claimant proves injury to two scheduled members or a scheduled and an unscheduled member, he "may proceed under either the general disability *sections* 42-9-10 and 42-9-20 or under the schedule member *section* 42-9-30 in order to maximize recovery under," the Act. Lee, 350 S.C. at 78, 564 S.E.2d at 356. However, where a scheduled loss is **not** accompanied by injury to another body part, the claimant is limited to disability payments as set forth in the scheduled member provisions of S.C. Code Ann. § 42-9-30. *See, e.g.*, Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Under the scheduled member provisions, payment is made regardless of whether the claimant suffers any loss of earning capacity as the result of a work-related injury. Id. at 470, 114 S.E.2d at 845. Conversely, even if a claimant is totally unable to earn a living as a result of a compensable injury to a single, scheduled member, he is limited to recovery under the provisions of section 42-9-30. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).[12]

Subsequent cases make it clear that "the Singleton Court intended 'impairment' to encompass a physical deficiency," and requires some injury or impairment to the second body part. Wigfall, 354 S.C. at 106, 580 S.E.2d at 103 (explaining that Singleton stands for the proposition that "an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury"); *see also* Bass v. Kenco Group, 366 S.C. 450, 462-65, 622 S.E.2d 577, 583-85 (Ct. App. 2005) (finding

[11] Respondents note that the language relied on by Claimant in Lee is dicta, as the claimant there did not assert his award should be made under either Section 42-9-10 or 42-9-20. *See* 350 S.C. at 78, 564 S.E.2d at 356.

[12] Claimant's disagreement appears to arise out of his misunderstanding of the distinction between the economic model and the medical model of compensation embodied in the S.C. Workers' Compensation statute. Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (explaining that our workers' compensation Act contains two "competing models of workers' compensation," the economic model and the medical model).

claimant had incurred two compensable injuries); Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (finding the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual disability as a result" of the compensable injury). In this case, Claimant alleged and testified to an injury only to his left foot. (Cl. Form 50, R. 54) (R. 306, lines 21-24 (Q: "The only body part you injured in this accident is your left foot; is that correct?" A: "Yes, Ma'am")).

Claimant's list of 15 "complications" were not raised to the Hearing Commissioner and, in any event, do not change the result. First, a number of his so-called complications – such as "dependence on a walking device," "balance problems," "continued medical care," *i.e.*, orthopedic shoe inserts, "likely future surgery," "permanent work restrictions," or "lack of congruity in medical opinions due to the need for multiple specialists in different fields", (Nos. 1, 5, 12, 13, 14 and 15) – do not even allege injuries to specific body parts. A number of the other complications listed by Claimant involve his lower left extremity and, therefore, were included in Dr. Ohlson's impairment rating for that body part. *See* Nos. 2 & 3 (Dr. Ohlson noted superficial paraneal nerve and sural nerve "insensate area" to the left foot); No. 4 ("[m]inor diminished range of motion lesser MTP joints" on left foot); No. 6 ("loss of use of skin" to left foot); No. 7 ("[m]inor dysesthesias" of left foot); No. 8 (ankylosed position of the fifth toe); and No. 9 ("possible hammertoe surgery versus excision of the exostosis").[13] Dr. Ohlson's August 13, 2012 report does not mention disfigurement of foot or severe

[13] For "conditions" 2-4, 7-9, and 11-15, Claimant even cites to Dr. Ohlson's August 13, 2012 medical report in which he recommended a 17% impairment to his lower left extremity. Therefore, to the extent to which any of these conditions are relevant, they have already been included in Dr. Ohlson's impairment rating.

antalgic gate, (Nos. 10 and 11), and the record lacks substantial evidence of these alleged problems.

Patently, just because Claimant alleges "multiple complications affecting other parts of the body," does not mean he has proven injury to a second body part pursuant to Singleton, 236 S.C. at 471, 114 S.E.2d at 845, and its progeny such that he is entitled to pursue an award under either Section 42-9-10 or 42-9-20. Claimant neither plead in his Form 50 or Form 58, nor proved that his work-related accident has caused injury or affected more than one body part as contemplated in Singleton and its progeny.

The two cases Claimant relies on regarding the proof of total or partial disability, Outlaw v. Johnson Serv. Co., 254 S.C. 486, 176 S.E.2d 152 (1970), and Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 142 S.E.2d 43 (1965), were decided under the "economic model" provisions of the Act, now codified at Sections 42-9-10 and 42-9-20. In contrast, Claimant's award in this case was made under the "medical model" scheduled member provision, Section 42-9-30. As noted above, under Sections 42-9-10 and 42-9-20, the burden is on the claimant to prove actual loss of earning power, whereas under Section 42-9-30, the claimant is awarded the scheduled amount regardless of whether he is able to work or not. Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (noting that "in cases of schedule losses the compensation depends on the character of the injury (the medical model), and not the loss of earning capacity (the economic model)"); *see also* Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) (award pursuant to Section 42-9-30 is made without any proof of lost earning capacity); Dykes, 262 S.C. at 106, 202 S.E.2d at 650 (when an award is under the

scheduled member provisions of the Act, "compensation depends upon functional loss rather than upon the loss of earnings").[14]

Claimant's attempt to compare himself to the claimant in Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005), is misguided. There is no discussion in Peoples of the evidence that supported the 68% permanent partial disability to the claimant's leg, nor is there any indication of what medical records the Commission relied on. Here, the medical records adequately support the Commission Decision. (*See* R. 557-558). In a workers' compensation proceeding, the "claimant bears the burden of proving the facts essential to his right to compensation, and an award may not be based upon surmise or conjecture." Shealy v. Algernon Blaire, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967); *see also* Forrest v. A.S. Price Mechanical, 373 S.C. 303, 311, 644 S.E.2d 784, 788 (Ct. App. 2007) (noting that "[t]he law mandates the Commission evaluate each case ... in accordance with its particular facts").

Claimant cites Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995), in support for his equal protection argument. Grant has no application here where each claimant bears the burden of proving he or she is entitled to workers' compensation benefits. In Grant, the court found no 14th Amendment equal protection violation because the plaintiff, who was not allowed to fill in part of his property, failed to show he was similarly situated to his neighbors, who were permitted to do so. 319 S.C. at 354-55, 461 S.E.2d at 391-92. Similarly, and at a minimum, here Claimant's injury was to his left leg/foot whereas in Peoples, the injury was to the claimant's Achilles tendon and affected his leg. In Peoples, the claimant testified that he had lost

[14] For the same reasons, Claimant's argument regarding the effect of his inability to use his CDL license, (App. Br. Issue 8), is irrelevant to the award in this case and, therefore to the issues on appeal.

70% of the use of his leg, 364 S.C. at 129, 611 S.E.2d at 530, whereas here there was no similar testimony. Unlike Claimant, the claimant in Peoples underwent two surgeries and a third was recommended, which the claimant refused because it likely would require a fusion of his ankle bones. 364 S.C. at 125, 611 S.E.2d at 528. Here, future surgery was recognized as a possibility but not ordered by Dr. Ohlson. (R. 557-558). Thus, as was the case with the plaintiff in Grant, Claimant is not similarly situated to the claimant in Peoples. Claimant's superficial attempt to compare the facts in this case to the facts in Peoples, along with his unsupported equal protection argument, should be rejected.

Here, Claimant neither alleged in his Form 50 nor has subsequently proven that he suffered a compensable injury or impairment to a second member. He is, therefore, restricted to recovery under S.C. Code Ann. § 42-9-30. Therefore, this Court should uphold the Commission's 34% disability award under Section 42-9-30.

III. The Commission properly calculated Claimant's Average Weekly Wage.

Claimant raises several arguments concerning the Commission's calculation of his AWW in this case. First, Claimant takes issue with the actual calculation of the similar employee wages of Messrs. Lampkin, Clark and Atkins. Next, he challenges the Commission's finding with regard to the possibility that he might have become a permanent employee of Alside Revere and how that possibility should affect the determination of his AWW. Finally, he argues that the wages he was earning at the time of the work-related injury should be used and that the wages he earned previously while working for Snelling Staffing should be disregarded. Respondents address each of these arguments in reverse order.

Section 42-1-40 provides "four alternative methods for the commission to use to calculate the average wage." Pilgrim v. Eaton, 392 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). In a majority of cases, AWW is "calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred ... divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40. However, Section 42-1-40 provides three alternative methods of calculating AWW where employment prior to the injury was less than 52 weeks.

> When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.[15]

Finally, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40. In calculating AWW under this provision, the Commission exercises flexibility, always keeping in mind that the "objective of the AWW calculation is to arrive at a figure that is fair to both the employee and the employer." Bennett v. Gary Smith Builders, 271 S.C. 94, 99, 245 S.E.2d 129, 131 (1978).

[15] Note that this calculation looks at the wages being earned in the 52 weeks prior to, not following, a work-related injury.

Here, the Commission found that "Claimant's twenty weeks of work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing." In the unappealed September Hearing Commissioner Decision, Commissioner James found that, as had been found "in the previous order, whether the Claimant would have been permanently hired by Alside Revere, is unknown," but that, given the "shortness of the duration of Claimant's work at the assignment on which he was injured, Claimant has shown exceptional reasons why the methods of calculating his average weekly wage provided for in the first paragraph of 42-1-40 would be unfair." (September Hearing Commissioner Decision, R. 26). The Commission also found that there was "no guarantee [Claimant] would have continued with the assignment at Alside Revere (Testimony of Dan Cobb by way of Deposition). Employer provides temporary assignments with a goal of permanent placement. The third employee wages submitted do not provide for fifty-two weeks and they were all employed by Alside Revere." (Commission Decision, R. 38).

Claimant erroneously argues his AWW should have been calculated on the wages he was earning at the job with Alside Revere at the time of his injury. His calculation appears to be derived from the first alternative listed under Section 42-1-40, and must be rejected for a number of reasons. First, Claimant's argument ignores the fact that he was employed by Snelling Staffing, not Alside Revere. He had worked for Snelling Staffing for some 20 weeks at different rates of pay. By his own admission, he had been working at Alside Revere only ten calendar days, or seven actual work days, and the rest of the time that he was employed by Snelling Staffing he worked at Ben Arnold at a lower pay rate. There was no guarantee whatsoever that he would be placed permanently at Alside

Revere and he worked there for far too short of a time to determine whether he would be offered a full-time position. (R. 406, lines 1-14). Thus, it would be both irrational and patently unfair to the employer to base his pay solely on the ten calendar days (seven actual work days) he worked at Alside Revere at a higher wage. Pugh v. Piedmont Mechanical, 396 S.C. 31, 39, 719 S.E.2d 676, 680-81 (Ct. App. 2011) (overturning AWW calculated solely on 17-week period claimant had been working prior to his injury because it was not "fair and just to **both** parties") (emphasis added). As explained in Pugh, calculating AWW under the first alternative listed under Section 42-1-40 "is proper if two 'predicate conditions' exist: (1) it is 'practicable' to use the alternative method and (2) the calculation yields a result 'fair and just' to both parties." 396 S.C. at 39, 719 S.E.2d at 680. Here, Claimant's proposed approach may or may not satisfy the first prong but certainly does not meet the second. Furthermore, this approach was rejected in Pilgrim as impermissible. Pilgrim, 392 S.C. at 45, 703 S.E.2d at 244 (overturning calculation of AWW based on hourly wage being earned by the claimant where he had worked only a few days prior to the injury).

Claimant relies heavily on Sellers v. Pinedale Res. Ctr., 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002); however, what he fails to understand is that, although the AWW calculation is intended to fairly reflect a claimant's **future** earning potential, that does not mean it is necessarily based on wages that were earned by another employee **after** Claimant's injury. *See* Roberts v. McNair Law Firm, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005) (post-injury wage increase not relevant to calculation of AWW).

Furthermore, Claimant's situation is strikingly different from that of the claimant in Sellers. In Sellers, the claimant was sixteen years old when he was injured. The

Commission found that "but for the severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician. At the time of his injury, Sellers was a full-time student and was working several part-time jobs. He had worked with his father, who is an electrician, since he was twelve years old." Sellers, 350 S.C. at 191, 564 S.E.2d at 699. Here, in contrast, Claimant had a history of jobs since graduating, moving from vehicle sales, to waiting tables at "various establishments," to construction debris removal, to caddying, to bar sales and auditing inventory. (R. 268, line 5 – 271, line 7). There is no evidence that Claimant had trained and planned for a career at Alside Revere; in fact, Claimant's primary concern with regard to job placement appeared to be the hourly wage. (R. 297, line 23 – 299, line 9). There is no indication that Claimant would have left the position with Ben Arnold, where he was making $11.50 per hour, but for the fact that Ben Arnold let him go due to a scheduling conflict with his Trident Tech school schedule. (R. 272, lines 1-16) (R. 275, line 15 – 276, line 1).

Claimant asserts that "Jared Lampkin's earnings most accurately reflect what the appellant would be earning were it not for the injury." Beyond the fact that this assertion is entirely unsupported, the record reveals the speculative nature of this position. First, as noted above, Claimant had been dismissed from his previous assignment with Ben Arnold because of conflicts with his school schedule. There is no guarantee the same would not happen with Alside Revere, as Mr. Cobb noted. (R. 406, lines 1-14) (indicating it was too early to tell whether Claimant's school schedule would interfere with his work schedule). Second, Claimant had worked for too short of a time at Alside Revere for his supervisor to make any prediction as to whether they might offer him a full-time position or not. (Id.). Finally, Claimant has a history of moving from one job to

another, (R. 268, line 5 – 271, line 7), having been unemployed for most of the six weeks between being let go by Ben Arnold and being placed with Alside Revere by Snelling Staffing. (R. 301, lines 15-18).

The above-referenced portions of the record constitute credible, reliable and substantial evidence supporting the Commission's determination that there was no guarantee that Claimant "would have continued with the assignment at Alside Revere." (Commission Decision, R. 38).[16] Claimant cites to his own testimony as support for his assertion that he would have continued working at Alside Revere permanently. His own testimony is understandably self-serving and, in part, based on hearsay, *i.e.*, Claimant's own testimony about what Mr. Cobb allegedly told him. The extremely edited snippets from Mr. Cobb's deposition are misleading. For example, the full statement from page 10 of Mr. Cobb's deposition is "Yeah. We brought him on to be full-time. Full-time temp agency person at the time, yes." (R. 402, lines 11-12).[17] When asked whether he had had any discussions with Claimant about the possibility of him "staying on" at Alside Revere, Mr. Cobb said, "Very early discussed it probably in the initial interview that if he worked out, we would make him a permanent employee, but basically that was about it ... I know he had plans on going back to school. So that would probably – whether it might have interfered with that or not I don't know. Again, it was just too early in it." (R. 406, lines 3-14).

> Q: And the temporary employees that you have used through Snelling, is there any guarantee they will receive a permanent job offer from you?

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[16] These facts also support the Commission's decision to base Claimant's AWW on "an average of the [Claimant's] wages along with ... three other employee wages provided," resulting in an AWW of $537.91. (Commission Decision, R. 38-40).

[17] Simply because the position at Alside Revere is permanent does not mean Claimant himself would have filled that position permanently.

A: No.

Q: It's my understanding that you typically look at performance to determine whether you'll make a job offer?

A: Correct.

Q: In this, I think it was only ten days that John worked for you before his accident. In those ten days, would that have been enough time to determine whether he would have been a permanent employee?

A: No.

Q: Typically, now long before you make that decision?

A: I usually don't do anything prior to 60 days.

(R. 408, line 24 – 409, line 14).

Claimant's argument regarding the fact that South Carolina is "at-will employment state" is no more than an attempt to side-step the fact that, during his assignment to Alside Revere, he was employed by a temporary employment agency, Snelling Staffing. He readily acknowledged this fact. (R. 303, lines 9-13). Furthermore, the at-will nature of employment in South Carolina applies to a majority of employees, whether working for a temporary agency or not, and does not provide a basis for re-calculating Claimant's AWW. Certainly, the Legislature, Commission and Courts are aware of the nature of employment in South Carolina and have developed the statutes, regulations and jurisprudence governing how AWW is calculated with that reality in mind.

Claimant's arguments about whether an employer-employee relationship existed are misdirected and irrelevant. Claimant readily admitted that he was employed by Snelling Staffing for both of the placements with Ben Arnold and Alside Revere. (R. 300, line 5 – 303, line 13). In any event, it is irrelevant whether Snelling Staffing or

Alside Revere was Claimant's jurisdictional employer because he worked for such a short period of time with Alside Revere prior to his injury. The briefness of his work with Alside Revere results in two conclusions: 1) any assertion that Claimant would have been hired for the position at Alside Revere on a permanent basis is purely speculative, and 2) the Commission's decision that extraordinary circumstances warranted a flexible approach to determining AWW is amply supported by the record and entirely appropriate.

Furthermore, Claimant's suggestion that Alside Revere and/or Ben Arnold were his "statutory employers" reveals his misunderstanding of that concept. *See, e.g.*, Pilgrim, 392 S.C. at 41-42, 703 S.E.2d at 242-243 (statutory employer determination governs which employers are subject to the burdens and protections of the Act); *see also* Posey v. Proper Mold & Eng., Inc., 378 S.C. 210, 217, 611 S.E.2d 395, 399 (Ct. App. 2008); S.C. Code Ann. §§ 42-1-400 – 42-1-410. There has never been a suggestion in this case that Alside Revere is responsible, as a statutory employer, for paying Claimant's benefits and that assertion cannot be made at this late date.[18]

Finally, Claimant takes issue with the actual calculation of the AWW. Referring back to the first alternative under Section 42-1-40, Claimant argues that the Commission must calculate wages by taking into account the "actual number of weeks worked and *parts thereof*." As noted above, the second alternative under Section 42-1-40, where this language is found, is not appropriate in this case because it would produce an AWW that is not fair to **both** the employee **and** the employer. Consequently, that is not the

[18] Claimant did not assert before the Commission that either Alside Revere or Ben Arnold were his statutory employers. Instead, Claimant conceded that he was employed by Snelling Staffing. (R. 271, lines 15-20) (R. 303, lines 9-13). He is bound by those statements on appeal. JASDIP Props, 395 S.C. at 641, 720 S.E.2d at 489 (issue conceded below cannot be raised on appeal).

approach applied by the Commission and, as a result, Claimant's insistence that partial weeks be treated in a specific manner is irrelevant. Instead, as noted above, the Commission is afforded "[a]n elasticity or flexibility ... with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett, 271 S.C. at 98, 245 S.E.2d at 131.

The Commission found that twenty weeks of work with Snelling Staffing was insufficient to calculate Claimant's AWW, "especially in light of his assignment and wages changing." The Commission also found that there was no guarantee that Claimant would have continued to a permanent assignment with Alside Revere and that his employer, Snelling Staffing, "provides temporary assignments with a goal of permanent placement." Acknowledging that the third employee wages did not "provide for fifty-two weeks," and were all for Alside Revere, the Commission concluded that "[a] fair and just method to calculate the wages of the Claimant is to take an average of the wages along with ... three other employee wages provided." (Commission Decision, R. 38). Thus, here, Commission made the requisite findings to justify its choice of alternate methods of calculating AWW. *See* Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 187, 736 S.E.2d 672, 676 (Ct. App. 2012) (either the Commission must find or the record must clearly show "the necessary conditions to deviate exist before employing one of the alternative methods of calculating average weekly wage").

Claimant's hourly analysis of Mr. Clark's, Mr. Atkins', and Mr. Lampkin's wage records, and his insistence that each partial day or week be excluded from the calculation of those workers' wages misses the point. The calculation is for the period of time worked – in reality, workers work part-days and part weeks for all kinds of reasons. The

Commission does not perform an autopsy on each wage report in order to derive the AWW. The reported wages are the reported wages for the relevant periods of time. The Commission properly based its AWW calculations on the submitted wage reports.

First, Messrs. Arkins, Clark and Lampkin's wages were properly divided by the number of periods for which they were paid. (R. 625-627). Second, Claimant's speculations about partial weeks, reductions in salary and overtime are not supported by credible probative evidence in the record. The calculation is not based on the highest wages that could possibly be paid under perfect circumstances during a particular period; instead, AWW is calculated by taking the amount actually earned by an employee divided by the number of weeks worked.

Although Claimant now challenges the calculation of Mr. Lampkin's average wage, at the hearing before the Hearing Commissioner, both parties agreed that $618.50 was the correct amount. (R. 263, lines 21-22) (R. 265, lines 16-17). A party is bound by concessions made at trial. JASDIP Props, 395 S.C. at 641, 720 S.E.2d at 489. Although Claimant successfully moved to have Mr. Lampkin's actual pay records from his "subsequent, permanent" employment by Alside Revere entered into the record, the Hearing Commissioner correctly declined to rely on those records in order to change Claimant's AWW. (September Hearing Commissioner Decision, R. 25-26). As noted above, that decision was not appealed and is now the law of this case. *See, e.g.*, Creech, 320 S.C. at 564, 467 S.E.2d at 117; Ham, 193 S.C. 66, 7 S.E.2d 712.

IV. The Commission correctly rejected Claimant's Amended Form 30 as untimely filed.

Claimant's attempt to file an Amended Form 30 was both untimely and defective, and the Commission properly declined to accept it. Section 42-17-50 provides, in

pertinent part, that an application for review must be filed with the Commission "within fourteen days from the date when notice of the award shall have been given," and that "[e]ach application for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review." S.C. Code Ann. § 42-17-50; *see also* S.C. Code Reg. § 67-701. The requirements of Section 42-17-50 delineate the Full Commission's appellate jurisdiction and cannot be expanded by that body. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 188-189, 714 S.E.2d 547, 549-550 (2011) (the fourteen-day window for appeals is jurisdictional and cannot be extended).

The first Hearing Commissioner Decision in this matter was filed on January 4, 2013. Pursuant to S.C. Code Ann. § 42-17-50, the deadline to file an appeal with the Full Commission was January 18, 2013. Claimant, who was represented by counsel at that time, filed a timely Form 30, along with the appropriate filing fee, raising six issues on appeal to the Full Commission. (Form 30, R. 63-66). Claimant filed an appellate brief with the Full Commission, Respondents filed their brief, and Claimant filed a reply brief.[19]

Claimant's purported Amended Form 30 was dated October 9, 2013 and emailed to the Commission on October 12, 2013. (Amended Form 30, R. 129, 503-504). Filed over 10 months after the January Hearing Commissioner Decision, it was neither timely to appeal that decision nor accompanied by the requisite filing fee. Claimant's Amended Form 30 attempted to raise a number of issues, at least eight of which directly challenged the January Hearing Commissioner Decision. It was clearly outside the 14-day window

[19] *See* (Brief on Behalf of Claimant/Appellant, dated March 26, 2013, R. 207-216) (Respondents' Brief to the Full Commission, dated April 10, 2013, R. 217-227) and (Appellant's Reply to Respondents' Brief, served May 15, 2013, R. 229-255).

to appeal the January Hearing Commissioner Decision and filed after the parties had fully briefed the appeal.[20] Claimant's Amended Form 30 was, therefore, ineffective to raise new or additional issues to the Full Commission.

The Commission's regulations do not provide for amended Form 30s. *Compare* S.C. Code Reg. § 67-613 (amending requests for hearing and answers via Forms 15, 50 and 52) *with* S.C. Code Reg. § 67-701 (Form 30 request for review hearing with no provisions for amended filings). Claimant's reliance on R.67-613(B)(4) is misplaced. The quoted portion specifically states that "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." S.C. Code Reg. § 67-613(B)(4). R.67-207 specifically refers to hearing requests via Forms 15, 50 or 52, and does not refer to or implicate Form 30 appeals in any way. R.67-610 likewise applies to "Requests for Hearing" and "Answers" and not Form 30 appeals. Furthermore, R.67-610(B) allows a party to amend a form "once as a matter of course at any time before or within thirty days after it is served. Otherwise a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party." S.C. Code Reg. Ann. § 67-610(B). Here, even if this section applied to his Form 30 request for appellate review, which it does not, Claimant did not file his Amended Form 30 within thirty days of his original Form 30 and did not obtain either leave of the Commissioner or Respondents' consent.

[20] Respondents note that the Commission had already set this matter for appellate review, (Notice of Appellate Hearing, dated March 29, 2013, R. 43), which review was delayed, on Claimant's motion, to allow the Hearing Commissioner to consider additional evidence consisting of Mr. Lampkin's pay records.

Although Claimant's Amended Form 30 may have been timely to appeal issues decided in the September Hearing Commissioner Decision, he failed to submit the statutorily-required filing fee with his Amended Form 30, S.C. Code Ann. § 42-17-50; S.C. Code Reg. § 67-701, and did not file a Form 32 request for waiver of filing fees. As a result, he failed to effectively appeal the September Hearing Commissioner Decision. Thus, the unappealed September Hearing Commissioner Decision is the law of the case with respect to the issues decided therein. *See, e.g.*, Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) (findings of fact and conclusions of law of the Hearing Commissioner become the law of the case unless appealed to the Full Commission); Ham, 193 S.C. 66, 7 S.E.2d 712 (holding that "all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission").

Claimant appears confused regarding the reasons why his Amended Form 30 was improper and untimely, arguing that the Commission failed to properly serve it on Respondents. Claimant's attempt to file an Amended Form 30 did not fail for lack of service; instead, as noted above, it failed because it was untimely to appeal the January Hearing Commissioner Decision, and was ineffective as to the September Hearing Commissioner Decision for lack of the statutorily-required filing fee.

In addition, contrary to suggestions contained in Claimant's Brief, the Appellate Panel hearing set for October 14, 2013 was solely to consider the issues raised in his January 14, 2013 Form 30 appealing issues in the January Hearing Commissioner

Decision. He was advised of this on numerous occasions.[21] Claimant's appeal of the January Hearing Commissioner Decision previously had been set for appellate review,[22] and fully briefed by both parties. The October 1, 2013 Notice of Appellate Hearing merely advised Claimant as to the date set for argument on his previously-noticed and fully-briefed appeal to the Full Commission. Thus, whether the Commission served his unperfected Amended Form 30 prior to the October 14, 2013 Appellate Panel hearing pursuant to Reg. 67-211 is of no import.[23]

Claimant's implication that the Appellate Panel accepted his Amended Form 30 as properly filed based on the statement by Commissioner Barden that they had the Amended Form 30 in front of them, and then "retroactively" excluded it, is without merit or legal support. As explained above, his Amended Form 30 did not comply with either S.C. Code Ann. § 42-17-50 or S.C. Code Reg. § 67-701. The defects in Claimant's attempt to file an Amended Form 30 could not be "cured" by a statement by a Commissioner, Allison, 394 S.C. at 188-189, 714 S.E.2d at 549-550, and certainly not by Claimant's own mistaken belief that his Amended Form 30 was properly before and would be considered by the Appellate Panel.[24]

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[21] *See* (Email correspondence between John McDaniel, Eugenia Hollmon, Gary Cannon, Valerie Deller, Virginia Crocker, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 486); (Email correspondence between Virginia Crocker, John McDaniel, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 488); (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 8, 2013, R. 491); (Email correspondence between Keith Roberts, John McDaniel, Gary Cannon, Virginia Crocker, Allison Nussbaum, "Re: Application for notice wcc #1116275," dated Oct. 10, 2013, R. 497).

[22] *See* (Notice of Appellate Hearing, dated March 29, 2013, R. 43).

[23] Furthermore, unless and until Claimant filed a timely Form 30 with the appropriate filing fee, there was no requirement for the Commission to serve other parties with his improperly and incompletely filed submission.

[24] Claimant's assertion that R.67-610(C) provides him relief is also mistaken. S.C. Code Reg. § 67-610 addresses the contested case procedure for the initial hearing before a Hearing

As is the case with many of Claimant's other allegations of wrong-doing by the Commission or Respondents, it is his own misunderstanding of applicable law and/or Commission rules and procedures that lies at the heart of his disagreement with the Commission. Despite repeated offers to postpone hearings so that he could obtain counsel, Claimant voluntarily and purposefully chose to proceed *pro se* and must accept the consequences of his decision to do so.

This Court should hold that the Commission properly rejected Claimant's Amended Form 30, including the attachments he attempted to submit at that time.

V. The Commission properly rejected Claimant's request for penalties and/or sanctions.

Claimant incorrectly asserts that the Commission erred in not penalizing Respondents for late payment of both TTD and Temporary Partial Disability. This issue is not preserved for appellate review. Claimant did not seek such sanctions in either his Form 50 or Form 58. (*See* Cl. Form 50, R. 54) (Cl. Form 58, R. 205). He did not raise this issue at the hearing before Commissioner James. (R. 260, line 5 – 266, line 4 (summarizing in detail issues to be determined at the hearing)). Although Claimant raised this issue in his Form 30, he abandoned it in his initial Brief to the Commission, where Claimant's former counsel reduced his exceptions on appeal to the Full Commission to three arguments. (Brief on Behalf of Claimant/Appellant, dated March 26, 2013, R. 207-216).

Furthermore, this issue is meritless. The date-stamps on Claimant's checks, (Cl. APA pp. 91-109), are unidentified and, therefore, lack any probative value. There was no testimony elicited at the hearing indicating who put the date-stamps on the copies of

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Commissioner. S.C. Code Reg. §§ 67-701 through 67-712 govern the Review and Hearing procedures before the Full Commission.

Claimant's checks or for what purpose.[25] It is just as likely that these are the dates on which Claimant provided his attorney with a copy of the checks as that they are the date that Claimant himself received them. Any conclusion that Claimant was paid benefits late based on unexplained and unidentified date stamps on copies of checks would amount to impermissible speculation. *E.g.*, Coleman, 245 S.C. at 630-31, 142 S.E.2d at 45. Without any support for his argument that he is entitled to penalties, Claimant's assertion that he is entitled to a ten percent increase in compensation under S.C. Code Ann. § 42-9-90 is misplaced and also should be rejected.

With respect to Claimant's allegation that Respondents should have been penalized for not authorizing medical care as ordered or in a timely manner, this issue is not properly before this Court. Claimant did not raise this issue in his Form 50 (Cl. Form 50, R. 54), his Form 58 (Cl. Form 58, R. 205). Respondents note that, when Claimant and his counsel attempted to raise this issue with the Hearing Commissioner, she advised that that issue was not before her. (R. 288, line 20 – 289, line 11 (Commissioner James advising Claimant that she would look at the pictures of his foot wound, but "what we're determining is permanency")). Claimant did not raise this issue in his Form 30. (Cl. Form 30, R. 63). Therefore, it is not preserved for appellate review. Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712.

Substantively, Claimant's argument is without merit.[26] Nearly all of Claimant's complaints regarding delayed or lack of medical treatment occurred prior to the January

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[25] Claimant cannot provide an explanation of these date stamps to this Court now and ask it to become the fact finder, when such evidence was never presented to the Commission. *See, e.g.*, Canteen, 400 S.C. at 558, 735 S.E.2d at 250.

[26] Although Claimant indicates his Motion for penalties is dated July 1, 2013, the only Motion for Penalties in Respondents' file is dated June 11, 2013 and was filed with the Commission on June 14, 2013.

Hearing Commissioner Decision, issued January 4, 2013. None of the medical treatment Claimant alleges he was entitled to but did not receive was ordered by the Commission. Therefore, he is not entitled to any penalty and/or sanctions.

Finally, citing Section 42-9-260(F), Claimant erroneously argues that the Commission Decision is defective because it allowed Respondents to stop paying TTD as of the date Claimant reached MMI. Section 42-9-260(F) simply does not apply in this case. Respondents' request to terminate TTD was pursuant to Section 42-9-260(D), (Employer's Form 21, dated Sept. 17, 2012), which provides, in pertinent part, that "[i]f 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." S.C. Code Ann. § 42-9-260(D). Furthermore, as discussed above, Claimant has not and cannot establish on this record that payments to him were late. Therefore, this Court should reject his argument regarding S.C. Code Ann. § 42-9-260.

VI. Claimant's remaining arguments regarding alleged Due Process rights violations are meritless.

Contrary to Claimant's assertions otherwise, he has not been denied any due process to which he is entitled. Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Jones v. South Carolina Dept. of Health & Envt'l Control, 384 S.C. 295, 316, 682 S.E.2d 282, 294 (Ct. App. 2009). Due process "requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). In order to prevail on a claim that he was denied due process in

an administrative setting, Claimant must show he has been substantially prejudiced. Jones, 384 S.C. at 316, 682 S.E.2d at 294.[27]

Claimant was represented by counsel at the November 28, 2012 hearing before Commissioner James. He was not only allowed but obligated to present all the relevant evidence and testimony at that hearing. *See* S.C. Code Reg. § 67-613.

First, Claimant argues the he was denied due process when the Hearing Commissioner denied his attempt to subpoena two employees of Snelling Staffing and the claims adjuster for Snelling's insurer at the July 8, 2013 remand hearing. At that hearing, Commissioner James clarified that the remand was solely to consider the recently-submitted Lampkin pay records and their impact, if any, on the AWW calculation. (R. 314, line 21 – 315, line 1). She properly granted Respondents' Motion to Quash, as the subpoenaed individuals simply could not speak to anything regarding employment records from Alside Revere. (R. 315, line 15 – 317, line 11) (R. 327, line 13 – 329, line 7).

Claimant also argues that he should have been allowed to submit additional evidence, including his deposition transcript, at the July 8, 2013 remand Hearing. As noted above, that hearing was convened for the sole purpose of considering Mr. Lampkin's pay records. (Notice of Hearing, dated June 19, 2013, R. 44) (Email correspondence between John McDaniel and Tamara Morris, "Re: wcc file # 1116275",

[27] The issue in Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012) was the method by which a portion of the initial hearing transcript, which was inaudible in part, was reconstructed. The impermissible method chosen by the hearing commissioner restricted counsel to the exact questions they asked in the first hearing, but allowed the claimant to testify however he chose. State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997) involved a criminal trial wherein the defendant, who presented no evidence during trial, was denied his right to make the final closing argument to the jury, to which he was entitled. In contrast, here, Claimant's repeated attempts to circumvent Commission statutory and regulatory procedures properly were denied and do not constitute a violation of due process.

dated June 26, 2013 and June 27, 2013, R. 472-473) (R. 314, line 21 – 315, line 1). In addition, this evidence does not meet the standard for late discovered evidence. *See* S.C. Code Reg. § 67-707. At a minimum, his deposition was not newly discovered but, in fact, was known to him prior to the November 28, 2012 hearing before Commissioner James. In his May 10 Motion, Claimant admitted that he was under the mistaken impression that his deposition had been admitted into the record – this explanation simply does not meet the requirements of S.C. Code Reg. § 67-707.

Contrary to Claimant's assertions otherwise, the Commission's October 1, 2013 Notice of Appellate Hearing did not violate Claimant's due process rights. As is explained above, this was a rescheduled appeal hearing; the appeal was first scheduled to be heard on April 16, 2013, and both parties had filed appeal briefs. That appellate hearing was postponed as a result of Claimant's request to have the Hearing Commissioner consider Mr. Lampkin's pay records. In response to repeated inquiries from Claimant, the Commission explained that the appeal hearing scheduled for October 14, 2013 would consider **only** the issues raised on his Form 30 appeal of the January Hearing Commissioner Decision. (Email correspondence between John McDaniel, Eugenia Hollmon, Gary Cannon, Valerie Deller, Virginia Crocker, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 486) (Email correspondence between Virginia Crocker, John McDaniel, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013, R. 488). Thus, the issues to be addressed at the appeal hearing had been briefed months previous.

Finally, Claimant misreads Section 1-23-350, which provides, in pertinent part that, "[i]f, in accordance with agency rules, a party submitted proposed findings of fact,

the decision shall include a ruling upon each proposed finding." S.C. Code Ann. § 1-23-350. The Commission does not have rules or regulations governing or allowing for each party to submit proposed findings of fact in the workers' compensation context.[28] Furthermore, Claimant's suggestion would render workers' compensation proceedings uncontrollably unwieldy. Parties could submit lengthy proposed findings that would require the Commission essentially to rehear the entire matter each time it proposed to enter a written decision.

This Court should reject Claimant's due process arguments as meritless and unsupported.

[28] Instead, the Commission has a long-standing practice of issuing a detailed Request for Proposed Order, such as the ones sent to Claimant's counsel, (Request for Proposed Order, dated Dec. 3, 2012, R. 48-49), to Staff Attorney Roberts, (Request for Proposed Order, dated Aug. 6, 2013, R. 50-51), and the request issued by the Commission on October 31, 2013. (South Carolina Workers' Compensation Commission Request for a Proposed Decision and Order, emailed and mailed Oct. 31, 2013, R. 52). In such requests, the Commission always reserves "the right to modify and/or delete any or all portions of the submitted Decision and Order." (Id.).

CONCLUSION

Respondents respectfully request that this Court affirm the Commission in its entirety.

Respectfully submitted,

April 20, 2015

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee,.....Appellant,

v.

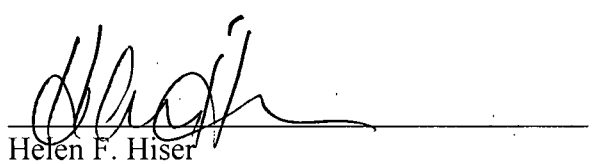
Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier,.....Respondents.

PROOF OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that Respondents' Final Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 20, 2015

McANGUS GOUDELOCK & COURIE, L.L.C.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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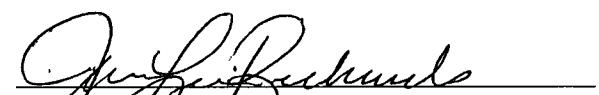
PROOF OF SERVICE

I certify that on the 20th day of April, 2015, I served the **Final Brief of Respondents** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

John C. McDaniel, *Pro Se*
1387 Camp Road, Unit C
Charleston, SC 29412



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