THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-002112

Lettie Spencer, Employee, Appellant,

v.

NHC Parklane, Employer,

and

Premier Group Insurance Co., Inc., Carrier, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Claimant/Appellant Lettie Spencer suffered admitted work-related injuries to her low back and psyche while pushing a medical cart on June 22, 2011. On February 28, 2014, she filed a Form 50 seeking permanent and total disability pursuant to § 42-9-10 or § 42-9-30, or, in the alternative, seeking a partial wage loss award under § 42-9-20. (R. p. 22). Respondents filed a Form 51 denying permanent and total disability and seeking a determination of compensation pursuant to § 42-9-30. (R. p. 24).

A hearing was held before Commissioner R. Michael Campbell, II on September 3, 2014. Prior to the hearing, counsel for Ms. Spencer made an oral motion clarifying his alternative positions, requesting that if Ms. Spencer was not found permanently and totally disabled under §§ 42-9-10 and 42-9-30, she be entitled to an award for wage loss under § 42-9-20. (R. p. 35, lines 11-14). Counsel for Defendants/Respondents consented to the motion. (R. p. 35, line 15). In an order filed on March 12, 2015, Commissioner Campbell found that Ms. Spencer "sustained permanent partial disability to the back in the amount of 21%." (R. p. 12, par. 15). The commissioner made no findings with regard to Ms. Spencer's wage loss claim under § 42-9-20. Ms. Spencer timely filed a Form 30 request for appellate review. (R. p. 26).

On June 15, 2015, oral argument was presented before an Appellate Panel of the South Carolina Workers' Compensation Commission consisting of Commissioners Avery B. Wilkerson, Jr.; Aisha Taylor; and Susan S. Barden. In its order of September 11, 2015, the Commission acknowledged seven issues were properly before the panel; five of these related to whether Ms. Spencer was permanently and totally disabled, while one pertained to alleged overpayment of temporary total compensation. (R. pp. 17-18). The remaining issue was

whether "the Single Commissioner err[ed] in failing to make a finding under 42-9-20 regarding the extent of the Claimant's wage loss." (R. p. 18, par. 6).

The Commission simply re-affirmed the findings of the Single Commissioner verbatim, finding that Ms. Spencer sustained only a 21% permanent partial disability to her back and that Defendants/Respondents were not entitled to a credit for overpayment of temporary compensation. (R. p. 5). However, the Full Commission also failed to enter any rulings whatsoever concerning Ms. Spencer's wage loss. Neither their Findings of Fact nor their Conclusions of Law so much as mention wage loss or § 42-9-20. The terms never appear again after being listed as an issue on appeal. (R. pp. 17-21).

On October 9, 2015, Ms. Spencer filed a Notice of Appeal with the South Carolina Court of Appeals. (R. p. 28).

FACTS

Ms. Spencer is a 67-year-old woman. She completed the 8th grade, but later obtained a GED. (R. pp. 40-41, lines 25-2). In 1982, Ms. Spencer was accepted into nursing school in Orlando, where she received a degree as a licensed practical nurse (LPN). (R. p. 41, lines 2-10). She has worked as an LPN for the last 33 years; she has not performed any other type of work. (R. p. 42, lines 11-17). In 1997, Ms. Spencer joined National Health Care (NHC) as an LPN. (R. p. 42, lines 18-25). Her primary job duties included looking after Alzheimer's patients, which became a passion for her. (R. p. 43, lines 7-11). Ms. Spencer worked for NHC for approximately 15 years. (R. p. 42, lines 18-25).

On June 22, 2011, Ms. Spencer suffered an admitted lower back injury when the wheels locked up on a medical cart she was pushing. (R. pp. 44-45, lines 13-8; p. 24). She was initially evaluated by neurosurgeon Dr. Randall Drye, who determined that she was not a surgical candidate and instead recommended physical therapy and potentially pain management. (R. p. 181).

Ms. Spencer treated with pain management physician Dr. Tony Owens. (R. p. 190). Dr. Owens performed an SI injection for her in November 2011, and a radiofrequency ablation in December 2011. (R. pp. 192, 197). Unfortunately, this conservative treatment failed. (R. p. 200). In April 2012, Dr. Owens diagnosed Ms. Spencer with chronic pain syndrome, SI joint pain, and low back pain. (R. pp. 211-212). He then referred her for a second opinion from an orthopedist. (R. p. 212).

Ms. Spencer accordingly saw orthopedic surgeon Dr. William Lehman of Carolina Orthopaedic Surgery Associates. (R. p. 228). Dr. Lehman recommended a series of L4-5 nerve root blocks for Ms. Spencer's radiating left leg pain, as well as epidural steroid injections. (R. p.

234). Initially, the root blocks were effective in treating Ms. Spencer's leg pain. (R. p. 246). Her back pain, however, remained. (R. p. 246). On April 2, 2013, Dr. Lehman diagnosed her as suffering from chronic back pain with resolved left leg symptoms per nerve root block, severe depression with resulting severe weight loss. (R. p. 246). Records from this time indicate that Ms. Spencer weighed only 103 pounds, a 35-pound loss from her pre-injury weight of 138. (R. p. 246). On that same day, Dr. Lehman found that Ms. Spencer had reached MMI from an orthopedic standpoint, stating in his records that, "It is obvious Ms. Spencer is functioning at a less than sedentary level, not only to her back difficulties requiring independent recumbency, but also chronic pain syndrome as well as major depression." (R. p. 247). Dr. Lehman noted that these restrictions were permanent in nature. (R. p. 248). He also stated that Ms. Spencer would need ongoing medication both for pain management and for her severe depression. (R. p. 247). Dr. Lehman assigned her a 7% whole person impairment to her back. (R. p. 247).

In August of 2013, Ms. Spencer was referred by Respondents to a "comprehensive rehabilitation program" at The Rehab Center Incorporated in Charlotte, North Carolina. (R. p. 300). At the conclusion of this program, Dr. Kern Carlton released Ms. Spencer with an 8% impairment rating to her back and permanent restrictions of "sedentary work." (R. p. 408). These assessments were based primarily on a functional capacity examination performed on October 2, 2013. (R. p. 403).

A closer look at this FCE reveals that Ms. Spencer put forth "excellent effort" and "full effort." (R. p. 403). The specific restrictions actually enumerated in the APA include "Sitting for 60 minutes; Standing for 10 minutes; Lift 6 lbs frequently; Lift 7 lbs occasionally; Avoid twisting at the waist." (R. p. 404). These restrictions indicate that Ms. Spencer is <u>not</u> capable of sedentary work pursuant to the DOT physical classifications. Ms. Spencer is not capable of

occasionally lifting up to 10 pounds, and is not able to sit constantly for 6 to 8 hours, both of which are minimum requirements for the sedentary work classification listed in 20 CFR § 404.1567.

After her stint at The Rehab Center Incorporated, Ms. Spencer was referred to an authorized treating pain management doctor, Dr. Sanjay Nandurkar of Piedmont Interventional Spine and Pain Care. (R. p. 259). By this time, Ms. Spencer's left leg radiculopathy had returned. (R. p. 259). Dr. Nandurkar made a diagnosis of lumbar radiculopathy, lumbar disc bulges, chronic pain syndrome, and lumbosacral spondylosis. (R. p. 283). For her pain, Ms. Spencer was prescribed 75 milligrams of Nucynta every 8 hours, 300 milligrams of Gabapentin three times a day, and 4 milligrams of Zanaflex as needed. (R. p. 286). In December of 2013, Dr. Nandurkar recommended that Ms. Spencer consider a spinal cord stimulator. (R. p. 283). However, after discussing this procedure with a friend who underwent the same operation, Ms. Spencer decided against the stimulator. She was therefore declared by Dr. Nandurkar to have reached maximum medical improvement, and assigned a 13% whole person impairment for "injury to the low back affecting the leg," with permanent restrictions of "less than sedentary work." (R. p. 288).

In January of 2014, Ms. Spencer underwent a second FCE, this time at Columbia Rehabilitation Clinic. (R. p. 416). This second FCE noted "full and consistent effort" and again concluded that Ms. Spencer was limited to "less than sedentary work." (R. p. 417).

Ms. Spencer's psychological injury, her severe depression, has also been admitted by Respondents to be compensable. (R. p. 37, lines 7-11). Treatment for this injury has been provided. On February 28, 2014, Ms. Spencer was sent for a psychiatric IME with Dr. Patrick Mullen. (R. p. 443). After the examination, Dr. Mullen concluded that "Ms. Spencer is not a

candidate in the active work force in any capacity. Her depression and her pain make her more than 50% to 60% disabled, but even that may be a low estimate." (R. p. 447). He added that, "Ms. Spencer cannot work and she will remain permanently disabled for the rest of her life. She could not maintain the persistence and pace necessary for any kind of gainful employment and her depression prevents her from learning anything new, plus her chronic pain is just worse and worse and prevents her from doing any kind of work at all." (R. p. 447). Ms. Spencer continues to require anti-depressants as prescribed by her family physician. (R. p. 51, lines 14-21). She will require those medications indefinitely. (R. p. 52, lines 5-8).

Finally, Ms. Spencer was evaluated by vocational expert Leanna Hollenback on March 8, 2014. (R. p. 449). Ms. Hollenbeck concluded that "Ms. Spencer cannot work at all and will remain permanently disabled for the rest of her life." (R. p. 456). Additionally, Ms. Hollenbeck opined that even if Ms. Spencer were able to return to work, it would be in an unskilled entry-level position earning $7.50 per hour. (R. p. 456). However, given Ms. Spencer's less-than-sedentary work restrictions, age, chronic pain, emotional and cognitive disabilities, and lack of transferrable skills, it was Ms. Hollenbeck's opinion that Ms. Spencer sustained a 100% wage loss. (R. p. 456).

At hearing, Ms. Spencer testified that her back pain is constant, but worse at night. (R. p. 56, lines 5-6). She stated that, on average, this pain is a 6 out of 10. (R. p. 56, lines 17-23). The pain can be helped by sitting in a recliner. (R. p. 57, lines 2-9). Ms. Spencer testified that she is unable to lift more than 10 pounds. (R. p. 57, lines 13-15). She can sometimes sit for long periods of time if she is in a comfortable chair, and she can drive, but not continuously for more than an hour or two. (R. pp. 57-58, lines 19-4). She has problems standing in one place, but does better if she walks. (R. p. 58, lines 7-10). She also has difficulty with going up and down

stairs, and issues with balance due to the weakness and pain in her legs. (R. p. 60, lines 20-23). This pain is in both legs, but worse in the left. (R. p. 60, lines 20-22). Ms. Spencer is able to dust and clean the kitchen, but cannot vacuum. (R. p. 61, lines 22-23). She can run errands and shop for groceries, but has to make sure that no one bag is too heavy. (R. p. 62, lines 10-11). Normally when she shops, she uses a grocery cart she can lean on to relieve the pressure on her back. (R. p. 62, lines 18-20). Ms. Spencer stated that she can still squat to weed a flower bed, but only for a short period of time. (R. p. 63, lines 1-9). Likewise, she can ride a lawnmower over certain places in her yard, so long as they are level and she turns her TENS unit all the way up. (R. p. 63, lines 13-15).

At the hearing, Respondents did not introduce any evidence to contradict the medical testimony finding Ms. Spencer to be permanently and totally disabled. Instead, they relied on copious amounts of surveillance footage. This footage, however, served to confirm rather than contradict Ms. Spencer's testimony. It shows her driving; grocery shopping; putting small bags of groceries into her car; walking; often with difficulty; and standing and sitting at her son's place of business. All of these activities accord with Ms. Spencer's testimony regarding her physical limitations.

Respondents put special emphasis on the time Ms. Spencer spent at her son's business, Car Toys. The evidence in the record indicated that Ms. Spencer would occasionally visit Car Toys. (R p. 65, lines 22-25). These visits occurred during a time when she was very depressed, and her son asked her to come to his office so she would not be alone. (R. p. 65, lines 16-20). Ms. Spencer testified that some weeks, she would visit the business daily, while during others she would not go at all. (R. p. 65, lines 22-25). She never worked there and was never paid any wages. (R. p. 65, lines 4-10).

This testimony was confirmed by Ms. Spencer's son, Terry Sartin. He stated that he would ask his mother to come to the shop to get out of the house, and that she came and went as she pleased. (R. p. 111, lines 5-9). Mr. Sartin testified that Ms. Spencer never worked for the business and was never paid any wages; he was happy simply to see her. (R. p. 111, lines 10-12). While she was there, Mr. Sartin said that his mother mostly sat on the couch in the office, watched TV, or talked to the customers as they came in. (R. p. 111, lines 17-22).

STANDARD OF REVIEW

An appellate court's review of factual findings in a workers' compensation case is governed and controlled by the substantial evidence rule. Houston v. Deloach & Deloach, 378 S.C. 543 (Ct. App. 2008). This rule dictates that the Court review factual findings to determine whether there is competent evidence to sustain them. Wynn v. Peoples Natural Gas Co., 238 S.C. 1 (1961). The Commission's findings "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Edwards v. Pettit Constr. Co., Inc., 273 S.C. 576, 579 (1979). "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 conclusion the administrative agency reached in order to justify its action." Houston v. Deloach & Deloach, 378 S.C. at 543.

ARGUMENT

I. THE FULL COMMISSION'S FINDING THAT MS. SPENCER SUFFERED ONLY A 21% PARTIAL DISABILITY TO HER LOWER BACK IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Single Commissioner lacked substantial evidence to support his finding that Ms. Spencer suffered a 21% impairment to her back and was not totally disabled.

Generally, an injured claimant may proceed under either the general disability statutes, (§§ 42-9-10 and 42-9-20) or under the scheduled member statute (§ 42-9-30) to maximize recovery. Colonna v. Marlboro Park Hosp., 404 S.C. 537, 548 (Ct. App. 2013). The scheduled recovery is exclusive only when a scheduled loss is not accompanied by additional complications affecting another part of the body. Id. As with all workers' compensation statutes, these provisions must be "construed liberally in favor of coverage." Peay v. United States Silica Co., 313 S.C. 91, 94 (1993). Ms. Spencer is entitled to pursue recovery under the general disability statutes because she suffered admitted injuries to two distinct body parts—her back and her psyche—and because her back pain is affectng into her left leg. Accordingly, Ms. Spencer is seeking recovery under § 42-9-10 on the ground that she is totally disabled.

To support her claims, Ms. Spencer introduced the testimony of the following six medical professionals:

William Lehman, M.D.: "It is obvious that Ms. Spencer is functioning at a less than sedentary level." (R. p. 247).

Kern Carlton, M.D.: "She was placed in a sedentary work category." (R. p. 408).

Sanjay Nandurkar, M.D.: "The claimant is unable to return to work at his or her current employment. Less than sedentary restriction." (R. p. 288).

Tracy Hill, PT: "She qualifies for limited sedentary (less than sedentary) work." (R. p. 417).

Patrick B. Mullen, M.D.: "She cannot work at all and she will remain permanently disabled for the rest of her life." (R. p. 447).

Leanna Hollenbeck, M.S., C.L.C.P., C.R.C.: "Ms. Spencer is not employable now, nor will her employability increase in the future....Given her less than sedentary work restriction, combined with her age, chronic pain level, emotional and cognitive instability, and her lack of transferrable skills, it is my professional opinion that she has experienced a 100% loss". (R. p. 456).

Medical testimony such as this is entitled to great respect in Workers' Compensation hearings. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23 (Ct. App. 2011). The Commission may only disregard such evidence in favor of other competent evidence in the record. Id. When an opinion does not originate from a medical provider, but is instead the medical opinion of the single commissioner, adopted by the Commission, any findings based on that opinion should be overruled. See Burnette v. City of Greenville, 401 S.C. 417, 428 (Ct. App. 2012).

What occurred in this case is exactly the situation described in Burnette—the single commissioner entered his own medical opinion, which was then adopted by the Full Commission. The idea that Ms. Spencer suffered a 21% impairment to her back does not originate with any medical provider. No provider lends any substantial support or evidence for that finding. Only one witness, Dr. Carlton, provided any evidence that Ms. Spencer was capable of performing some level of work – releasing her with sedentary work restrictions. However, Dr. Carlton's opinion was internally inconsistent and contradictory. When one moves beyond the substance of his discharge summary and examines the actual results of his FCE, it is

clear that he should have found Ms. Spencer incapable of performing sedentary work. Under the Social Security regulations, a sedentary job "involves lifting no more than 10 pounds at a time" as well as sitting for the better part of a 6-8 hour workday. 20 CFR § 404.1567. Yet Dr. Carlton only measured that Ms. Spencer was capable of lifting "7 lbs occasionally" and was "observed sitting for 60 minutes at a time," despite putting forth excellent effort. (R. pp. 403-404). This is clearly and unequivocally less than what is required to qualify for sedentary work. Dr. Carlton's opinion is thus of no value, and fails to provide substantial evidence for the Commissioner's finding.

The only other evidence Respondents presented at the hearing was the surveillance footage. As previously stated, this footage in no way contradicts Ms. Spencer's testimony. Rather, it shows her performing the exact same tasks that she testified, both at her deposition and at hearing, she was able to do. In any event, carrying small bags of groceries, slowly walking about a store, and driving short distances are not equivalent to the demands of working a full-time sedentary job. Yet the video shows no more than this. It does not form a sufficient basis for finding that Ms. Spencer is capable of gainful employment in a competitive market.

Ms. Spencer's orthopedist, pain management physician, psychiatrist, physical therapist, and vocational expert all found that Ms. Spencer was permanently and totally disabled. The actual findings and observations of Dr. Carlton's report indicated the same. The Single Commissioner, however, decided to disregard this evidence and substitute his own medical opinion for that of the providers. There was no sufficient basis for his conclusion that Ms. Spencer suffered a mere 21% permanent partial disability to her back, and this finding must therefore be overturned.

II. THE FULL COMMISSION ERRED IN FAILING TO ADDRESS MS. SPENCER'S WAGE LOSS CLAIM UNDER § 42-9-20.

It is Ms. Spencer's position that she suffered permanent and total disability to her back as a result of her admitted workplace injury. In the alternative, if Ms. Spencer did sustain only partial disability, she is entitled to compensation for wage loss. However, neither the Single Commissioner nor Full Commission ever entered any finding of fact or law concerning Ms. Spencer's wage loss.

As set forth above, Ms. Spencer is entitled to seek recovery under either of the general disability statutes, § 42-9-10 or § 42-9-20. Like § 42-9-10, § 42-9-20 is based on the economic model, which defines disability and incapacity in terms of the claimant's loss of earning capacity. Wigfall v. Tideland Utils., 354 S.C. 100, 103 (2003). Disabilities under § 42-9-20 are to be measured by the claimant's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Owens v. Herndon, 252 S.C. 166, 169 (1969). Loss of earning capacity is the criterion. Outlaw v. Johnson Service Co., 254 S.C. 486, 489 (1970). Under the statute, she is entitled to receive "weekly compensation equal to sixty-six and two-thirds percent of the difference between [her] average weekly wages before the injury and the average weekly wages which [s]he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year." As with all workers' compensation statutes, § 42-9-20 must be "construed liberally in favor of coverage." Peay v. United States Silica Co., 313 S.C. at 94.

The uncontroverted testimony at the hearing was that Ms. Spencer did suffer a diminishment in her earning capacity. It is not disputed that Ms. Spencer is physically unable to return to her former job. At the time of her workplace injury, she was working as a licensed practical nurse. This job falls under medium-level work under the Social Security

classifications. 20 CFR § 404.1567. Even the most optimistic of medical evaluations in this case placed her only "in the sedentary work category." Clearly, then, she is not able to return to her former job. Leanna Hollenbeck, an expert in vocational rehabilitation, opined in the unlikely event Ms. Spencer were able to return to work, it would be in an entry-level position earning $7.50/hour. This would represent a wage loss of 70%. Respondents did not present any evidence to rebut this testimony.

Neither the Commissioner nor the Full Commission entered any finding concerning wage loss, "the criterion" for a claim under § 42-9-20. In his Order, Commissioner Campbell states, "I am not persuaded that Claimant's disability to her back, combined with the impairment to her psyche, diminishes her earning capacity to such an extent as to result in a total incapacity for work." (R. p. 12, par 14). The implication of this statement is Ms. Spencer did in fact suffer some diminishment of her earning capacity. However, the extent of that reduction was never addressed, calculated, or ruled upon. This was error on the part of the Single Commissioner, and should be reversed by this Court.

CONCLUSION

Ms. Spencer is totally and permanently disabled as a result of her workplace injury. Even if she were physically capable of performing sedentary work, the only vocational expert opinion in the record states that—based on her age, education, lack of work experience and transferrable skills, chronic pain, and emotional instability—Mrs. Spencer would not be able to work in any capacity. This was the unanimous opinion of Dr. Lehman, Dr. Nandurkar, Dr. Mullen, and the Columbia Rehabilitation Clinic. Even the Respondents' hand-picked physical therapist returned the same results, if not the same opinion, in his FCE. However, the Single Commissioner disregarded this evidence and entered his own medical opinion that Ms. Spencer sustained a 21% permanent partial disability to her back.

In the alternative, if the Court determines Ms. Spencer is able to work in some capacity, the only evidence of record states she has suffered a wage loss of 70%. Her old duties as a licensed practical nurse constitute medium work under the Social Security regulations. There is no dispute that Ms. Spencer is unable to return to this work, and the only evidence on the record concerning wage loss establishes that Ms. Spencer would be paid $7.50 for performing sedentary work. This would constitute a wage loss of 70%, for which she is entitled to compensation under § 42-9-20.

For these reasons, this Court should reverse the judgment of the Full Commission.

Respectfully submitted,

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March 15, 2016

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APPELLATE PANEL
Commissioner Campbell, II, Chair

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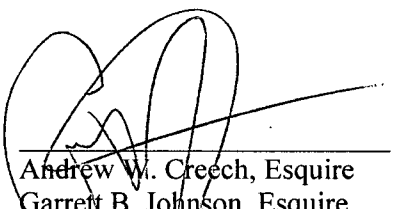
CERTIFICATE OF COUNSEL

The undersigned certifies that this **FINAL BRIEF OF APPELLANT** complies with Rule 211 (b), SCACR.



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NHC Parklane and
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CERTIFICATE OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** upon the attorneys of record for NHC Parklane and Premier Group Insurance Co. Inc., Clarke W. McCants III and Amy P. Shubert, Esquire by depositing a copy of it in the United States Mail, postage pre-paid, on March 16, 2016:

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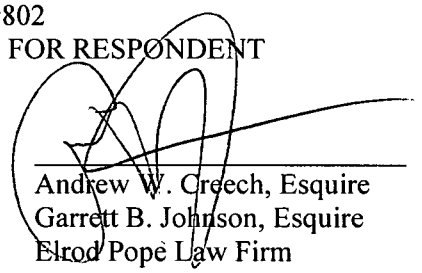

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Re: Lettie Spencer vs.
NHC Parklane, Inc.
WCC File No. 1120778
Appellate Case No. 2015-002112

Dear Ms. Kitchings:

Enclosed for filing, please find 15 copies of the Final Brief of Appellant, to include an unbound copy, Rule 211 (b) Certification, and Certificate of Mailing.

Very truly yours,

ELROD POPE LAW FIRM

By: Andrew W. Creech
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AWC/csb
Enclosures

cc: Clarke W. McCants III &
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