THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Opinion No. 5308
(SC Ct. App. heard November 5, 2014;
filed April 1, 2015)

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

v.

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

BRIEF OF PETITIONER

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211
Attorney for Petitioner

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QUESTIONS PRESENTED

I. Did The Court of Appeals, contrary to over seventy (70) years of precedents concerning scheduled member awards err by infusing and by allowing the Commission to infuse wage loss into and as a consideration in an award made for loss of use under SC Code §42-9-30, and specifically the back under subsection (21)? (Certification Question II)

II. Did the Court of Appeals improperly apply the substantial evidence standard to the evidence in this case on the essential issue before the Commission for decision, "functional loss of use" of the Claimant's back under SC Code §42-9-30(21)? (Certification Question II)

STATEMENT OF THE CASE

The Petitioner sustained a injury on September 12, 2010 which was accepted. Benefits were then stopped and on November 30th, December 2nd/10th, Petitioner filed to reinstate benefits. (App.., pp. 111, 113, 125). Respondents replied admitting, "compensable injury to the **low back** and right knee" and in the Form 51 admitted compensable injury to the **low back** and right knee. (App., pp. 132, 135). Then in a Consent Order Respondents agreed to reinstate benefits and treatment of the back, neck, and right leg. (App., p. 68).

October 3, 2011 a WCC Form 17 was filed agreeing weekly compensation had stopped because Petitioner had returned to work with restrictions on September 10th. (App., p. 136). (Emp. added). January 4, 2012 Respondents filed a Form 21 to pay compensation which was withdrawn and which was then refiled on July 25th requesting to pay compensation **under S.C. Code §42-9-30** with a hearing being set September 25th. (App., pp. 139, 141, 144). The moving party, Respondents, filed their Pre-Hearing Brief/APA Submissions on September 10th, and Petitioner filed his responsive Pre-Hearing Brief/APA Submissions on September 14th, (App., p. 145; p. 193). After hearing on September 25th, on September 27th, the Commissioner issued his notes requesting a proposed Order. (App., pp. 359, 276). On October 2nd and 3rd, Petitioner filed a Request for Reconsideration and/or for the Order to be strictly limited

to his findings. (App., pp. 279,8215). He issued his Order December 6th and a Request for Commission Review was filed. (App., pp. 71, 284).

Briefs were filed March 18th and April 2nd, 2013, and a Commission Panel hearing was held April 16th. (App., p. 426). A Request for Proposed Order was sent to defense counsel on April 30th, objection to the Proposed Order was filed June 5th, and the Order was filed July 2nd. (App., pp. 358, 461, 89). Notice of Intent to Appeal was filed and after briefing/ oral argument on April 1, 2015 the Court of Appeals issued its decision containing five (I-V) sections: I. Form 21 Request for Hearing (A) Due Process and (B) Authority to Hear Claim; II. Permanent Total Disability, (A) 50% or more loss of use of back and, (B) Wage loss; III. Myelopathy; IV. Low back injury; and V. Weight assigned to Dr. Drye's opinion. (App., pp. 1, 40, 464)

Although **an Award under §42-9-30** was the only issue before the Commission, the Court of Appeals bifurcated its Opinion on that issue: II(A) and (B). Also, while it was admitted, agreed and accepted before the Commission that Petitioner sustained injuries to his neck (cervical spine), low back (lumbar spine) and right leg, the Court held, that since the plain and ordinary meaning of the word "back" includes low back and the Commission made an Award to the "back" (relying only on a cervical spine impairment rating), there was no need for the Commission to reference both neck and low back injuries or make detailed findings

in its Award that it took into consideration the entire back in making the Award. Petition for Rehearing was made and denied on June 19, 2015. The Petition for Certiorari followed.

STATEMENT OF FACTS

A. POSITION OF THE PARTIES AT HEARING (9/25/12):

BY COMMISSIONER WILLIAMS:

TODAY'S DATE IS SEPTEMBER 25, 2012. THIS IS THE WORKERS' COMPENSATION CASE OF MR. HENTON CLEMMONS VERSES LOWE'S HOME CENTERS, INC., SELF-INSURED W.C.C. FILE NUMBER 1015200. DATE OF ACCIDENT SEPTEMBER 12TH OF 2010. AVERAGE WEEKLY WAGE $391.19, CORRESPONDING COMP RATE $260.81. ATTORNEY PRESTON MCDANIEL FOR THE CLAIMANT, ATTORNEY KELLY MORROW FOR THE EMPLOYER/ CARRIER. **THE HEARING IS SET ON THE EMPLOYER/CARRIER'S FORM 21**. RATINGS ARE LISTED IN THE FILE, AND THEY'RE IN THE APA SUBMISSIONS, WHICH I HAVE HANDED UP FROM BOTH PARTIES. (Emp. add.). (App., p. 362, ll. 6-18).

BY COMMISSIONER WILLIAMS:

ADMITTED ACCIDENT, ADMITTED CLAIM. **EMPLOYER/CARRIER ADMITS AN INJURY TO THE CLAIMANT'S BACK IN THIS CASE**. **THEY** WOULD **ADMIT** ALSO AN **INJURY TO HIS NECK** AND I BELIEVE **HIS RIGHT KNEE** AS WELL. THEY WOULD - THEY FILED A 21 SEEKING A FINDING OF M.M.I., SEEKING **TO PAY PERMANENCY TO THE BACK**. **THEY WOULD ALLEGE IT'S A SCHEDULED MEMBER INJURY**, AND THEY WOULD SEEK CREDIT I BELIEVE - IS THERE ANY CREDIT ISSUE? I KNOW HE'S BEEN BACK AT WORK. . . . (Emp. add.). (App., p. 363, ll. 6-14).

BY COMMISSIONER WILLIAMS:

THERE'S NO CREDIT ISSUE. BUT THEY WOULD SEEK THE PERMANENCY IN THIS CASE TO THE BACK AT A PERMANENCY AWARD OF LESS THAN 50 PERCENT LOSS OF USE. THE CLAIMANT WOULD ALLEGE - FIRST ALLEGE THAT HE'S ENTITLED TO A SECOND OPINION IN THIS CASE, THAT HE HAS NOT YET REACHED M.M.I. HOWEVER, IF HE HAS REACHED M.M.I., **CLAIMANT WOULD ALLEGE HE'S PERMANENTLY AND TOTALLY DISABLED FOR A GREATER THAN 50 PERCENT LOSS OF USE TO HIS BACK, HE WOULD SEEK LIFETIME CAUSALLY RELATED MEDICAL TREATMENT UNDER** DODGE, A LUMP SUM . . . . (Emp. add.). (App., p. 363, l. 19 - p. 364, l. 5).

THAT BEING SAID, DO THE PARTIES WANT TO STATE ANYTHING ELSE FOR THE RECORD, MS. MORROW?

BY MS. MORROW:

YOUR HONOR, I JUST WANT TO ADD THAT **THE BASIS OF THE REBUTTAL PRESUMPTION OBVIOUSLY IS HIS RETURN TO WORK FOR ALMOST TWO FULL YEARS IN RESPONSE TO THE CLAIMANT'S POSITION THAT HE'S PERM TOTAL BASED ON GREATER THAN 50 PERCENT LOSS OF USE OF THE BACK.** DO YOU WANT ME TO REITERATE PRETRIAL AS FAR AS THE INDIVIDUAL REPORTS? (App., p. 364, ll. 7-16).

BY COMMISSIONER WILLIAMS:

ALL RIGHT. MR. MCDANIEL, ANYTHING ELSE FOR THE RECORD?

BY MR. MCDANIEL:

COMMISSIONER, I WILL RELY ON MY MEMORANDUM IN LARGE PART CONCERNING THE PRESUMPTION TO BE REBUTTED . . . (Emp. add.). (App., 365, ll. 3-9).

BUT WAGE LOSS HAS ABSOLUTELY NOTHING TO DO WITH AN AWARD UNDER §42-9-30. IT IS - THE PRESUMPTION THAT IS TO BE REBUTTED IS WHETHER OR NOT THE CLAIMANT HAS LOST 50 PERCENT OF THE FUNCTIONAL USE OF HIS BACK. (Emp. add.). (App., p. 365, ll. 13-17).

* * *

At the conclusion of Respondents' case, as the moving party, Petitioner's Counsel moved for a ruling,

BY MR. MCDANIEL:

COMMISSIONER, AT THIS POINT, I MOVE FOR A RULING AS TO WHETHER OR NOT THERE'S BEEN ANY EVIDENCE PRESENTED, [SIC TO PRESENT IT], TO REBUT THE 50 PERCENT LOSS OF THE USE OF THE BACK.

BY COMMISSIONER WILLIAMS:

OBVIOUSLY I HAVE TO READ ALL THE MEDICAL EVIDENCE. I HAVEN'T HEARD FROM THE CLAIMANT. WE DON'T -- IT'S NOT LIKE IN A CIVIL CASE.

BY MR. MCDANIEL:

I MEAN, MAKE - OF COURSE I - YOU NOTICE HOW I PHRASED

THAT, I DID NOT PHRASE THAT AS A MOTION FOR DIRECT[ED] VERDICT.

BY COMMISSIONER WILLIAMS:

I KNOW. WE DON'T DO THAT EITHER WAY. MR. CLEMMONS, COME ON UP. (App., p. 376, l. 23 - p. 377, l. 13).

* * *

Petitioner then testified that in his opinion he had lost 80% of the use of his back. (App., p. 405, l. 11)

In his Pre-Hearing Brief, the Petitioner stated his arguments on the back, the presumption and due process,

"The right to compensation for loss of use and/or loss of earning capacity is a property right of the Claimant and it is a denial of due process to determine his entitlement without his request." (App., pp. 195-198).

In his Notes requesting a Proposed Order, the Commissioner made one Finding as to his Award,

"Based on the Record as a whole, I find that the Claimant has sustained a 48% TTD to his back. This includes any radicular symptoms to his right leg. I do not find that he is permanently and totally disabled based on the evidence as a whole. This finding is based on the greater weight of the evidence, **including his ability to work for nearly two (2) years** (while being accommodated by sitting down), his lack of prescription medication, and the medical reports and conclusions of Dr. Drye." (Emp. add.). (App., p. 276).

That singular Finding of Fact however is set out in the Final Order as Findings of Fact 8-12. (App., p. 86).

B. Evidence Presented

On September 12, 2010, Mr. Clemmons entered the straw trailer, slipped on wet straw causing his feet to fly out from under him and him landing flat on the truck floor on

his back, neck and head. Medical care was initiated for low back pain, radiculopathy and swollen knee. (App., pp. 150-156). Due to rapid deterioration, he was referred to Dr. Armsey on November 1st,

"Mr. Clemmons and his mother report that he **was** a **perfectly functional 38-yr-old male** until his work-related accident. **Since that time** his gait has been severely ataxic, he cannot dress himself because of poor balance, has been bed ridden because of his inability to ambulate. He has had multiple falls because of his poor balance which is all reported as [no (sic)] beginning September 12, 2010. . . He is essentially wheelchair bound and will not return to work until cleared by a neurosurgeon/neurologist." (Emp. add.). (App., p. 157).

He was referred to and treated by Dr. Randall Drye including multi-level cervical fusion. He was released to return to work with restrictions on June 7, 2011.

"I have written for a return-to-work statement with permanent restrictions of no standing or walking for more than an hour without inability to sit for a brief amount of time. I do not think he should be climbing heights or repetitively climbing steps, should avoid any repetitive overhead lifting and should lift or carry less than 30 pounds only occasionally. If his employer is unable to fulfill these restrictions, he would likely be a candidate for Voc. Rehab. I have referred to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, and would assign him to the DRE Cervical Category 4 resulting in a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." (App., p. 177).

In June, 2012, Mr. Clemmons was sent back to Dr. Drye who restated his cervical spine impairment rating. (App., p. 179). Respondents immediately filed a new WCC Form 21 to pay compensation. Since his second opinion request for his back and neurological dysfunction had been denied, he obtained evaluations by a neurologist and an orthopaedic

surgeon.

Dr. Howard Mandell, neurological specialist, evaluated Mr. Clemmons and opined that in addition to any back impairments he suffered from, "spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run and difficulty with balance," sustaining an, "additional" 15% whole person neurological injury. Also he found significant low back pain requiring ongoing low back pain management, recommended an FCE and opined limitations on bending, twisting, turning, lifting and carrying and flexibility at work to sit or stand to reduce his pain. (App., pp. 206-207).

An FCE found Mr. Clemmons limited to limited light duty work and able to tolerate only occasional walking, stair climbing, kneeling, bending, twisting and reaching and not tolerating occasional squatting. Lifting was limited to sedentary/limited light duty levels under the U.S. Dept. of Labor's ("D.O.L.") Physical Demand Work Classifications with decreased balance and inability to stand on either leg, eyes closed. (App., pp. 208-232).

Dr. Leonard Forrest, bd. cert. orthopaedist evaluated Mr. Clemmons on September 6th and opined he would require continuing treatment; prescribed work limitations; opined a 40% whole person (WP) combined AMA Guides spinal impairment: neck/cervical spine 30% WP, low back/lumbar spine 10% WP. He also opined:

"as to loss of function of the back . . . it would be over 50% loss of his functional capabilities". (App., pp. 239, 240).

Dr. Gal G. Margalit, M.D. evaluated Mr. Clemmons, found an altered gait, concurred in the findings of myelopathy with cord compression, the permanent work restrictions and the need for continuing treatment, and opined a 50% or greater functional loss of use of his back to do work. (App., pp. 237, 238).

A vocational expert (Ms. Harriet Fowler, CRC, M.Ed.) opined per the FCE and treating physician's restrictions that without accommodation he would not be able to function in his capacity at Lowe's. She performed a labor market analysis using the U.S. Department of Labor's Dictionary of Occupational Titles, and based strictly on his physical limitations opined Mr. Clemmons had a residual labor market access to only approximately 417 sedentary unskilled/semi-skilled work titles, representing a 99.9400% loss of job market access. If one were to assume he could perform the full range of sedentary and light duty physical demand jobs, he had lost access to over 76% of the jobs available in the economy. (App., p. 262).

WORKERS' COMPENSATION CLAIMS STANDARD OF REVIEW AND APPLICABLE FUNDAMENTAL LEGAL PRINCIPLES

There are two fundamental statutory interpretation principles that this Court has held must be applied to all workers' compensation issues. The first principle is:

"It is the established law of this state that any reasonable doubt as to the construction of the workmen's' compensation law must be resolved in favor of the claimant, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage . . . Compensation laws constitute a form of social legislation and were enacted for the benefit, protection and welfare of working men and their dependents." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emphasis added).

This Court has repeatedly reaffirmed this principle over the decades. See for example: Hutson v. South Carolina Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2014).

The second principle is:

"Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the Court must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities." Wigfall v. Tideland Utility, Inc., 354 S.C. 100, 580 S.E.2d 100, (2003), reh. den.

with the fundamental purpose of workers' compensation being:

"primarily for the benefit, protection and welfare of working men and their dependents . . . ."

and therefore:

"such laws **shall be liberally construed in favor of the employees and their dependents.**" Cokely v. Robert Lee, Inc., supra. (Emphasis added).

Therefore, S.C. Code §42-9-30 must be liberally construed in favor of the injured worker and the language of the statute must be strictly construed leaving it to the

Legislature to amend and define any ambiguities. Also under that principle where a statute's language is plain, unambiguous and conveys a clear meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. Wigfall v. Tideland Utility, Inc., supra; Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

The sole issue before the Commission if further medical care was not needed to decrease the degree of disability was an Award under the scheduled member statute, S.C. Code §42-9-30(21), for the functional loss of use of his back. The Commission was required to liberally construe the Act and apply the plain, ordinary meaning of the language to the Award for "functional loss of use".

ARGUMENTS

I. THE COURT OF APPEALS CONTRARY TO OVER SEVENTY (70) YEARS OF PRECEDENTS CONCERNING SCHEDULED MEMBER AWARDS ERRED BY INFUSING AND ALLOWING THE COMMISSION TO INFUSE WAGE LOSS INTO AND AS A CONSIDERATION IN AN AWARD MADE FOR LOSS OF USE UNDER S.C. CODE §42-9-30 AND SPECIFICALLY THE BACK UNDER SUBSECTION (21).

While the back, which is the subject of this appeal, did not become a scheduled member until 1974, the scheduled award statute was a part of the original 1936 Act and its wording as to the awards has not changed. Since 1936 the Act has provided for Awards for the functional, "loss of use" of a scheduled member, organ or bodily part regardless of wage loss. 1936 Acts and Joint Resolutions (39), p. 1231, Section 31(t). This author frequently uses the example that he is a left-handed lawyer and that if he lost his right arm in a work-related accident he would be entitled to 220 weeks of compensation regardless of whether he lost a dime of earning capacity or ever missed a day's work.

As will be addressed later, the Award that the Commission is required to make based on the evidence is an Award for the functional, "loss of use" of the member, organ or bodily part in reference to work. While our Act was enacted in 1936, the first national guide to the rating of medical impairment was not published until 1957 and was published as a Special Edition of the Journal of the American Medical Association. A copy of the original Guides and the cover page is attached to this Brief and the

full Special Edition is available to the Court upon request. The point of this reference to medical impairments is that from 1936 until 1957, almost 21 years later, there was no nationally recognized Guide concerning anatomical medical impairment or as to what medical impairment means. Since the publication of that first Guide, the Guides have made it very clear that the Guides do not evaluate and/or have anything to do with the ability to do work; in other words, functional loss of use. The impairment ratings contained within the Guides are in reference to impairment to do the Activities of Daily Living. Quoting from the 5th Edition of the AMA Guides, pp. 4:

> "**Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and degree to which the impairment decreases an individual's ability to perform common **Activities of Daily Living (ADL)**, *excluding* work."

On page 5:

> "a medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities, to most people. Work is not included in the clinical judgment for impairment percentages for several reasons: 1) work involves many simply and complex activities; 2) work is highly individualized, making generalizations inaccurate; 3) impairment percentages are unchanged for stable conditions, but work and occupations change; and 4) impairments interact with such other factors as a workers' age, education, and prior work experience to determine the extent of work disability . . . ."
>
> * * *
>
> "For individuals who work in sedentary jobs,

> there may be no decline in their work ability, although their overall functioning is decreased. Thus, a 30% impairment rating does not correspondence to a 30% reduction in work capability. Similarly, a manual laborer with a 30% impairment due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability."

Based on the wording of the Act in 1936 and ever since, this Court has repeatedly held in, reference to a scheduled member Award under the statute currently S.C. Code §42-9-30, that the Award to be made is, pursuant to the wording of the statute, for the functional loss of use of the organ, member or bodily part and loss of earning capacity has absolutely nothing to do with that Decision.

Beginning in 1941 specifically on this issue this Court, and consistently ever since, has held that the loss of earning capacity or a loss of earnings has absolutely nothing to do with the decision and award to be made for loss of use in a scheduled member Award case. Quoting this Court from the case of Ferguson v. State Hwy. Dept., 197 S.C. 520, 15 S.E.2d 775 (1941):

> "The right to compensation for serious facial or head disfigurement is not dependent on diminution of earning capacity, as in serious bodily disfigurement. If the condition exists, compensation under the Act is mandatory."

This Court reiterated that holdings again in reference to serious disfigurement in the case of Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945). Then in

1946 in the case of Ripley v. Anderson Cotton Mills, 209 S.C. 401, 40 S.E.2d 508 (1946), this Court applied that principle to a specific Award made by the Commission for loss of use to a scheduled member without any showing of any loss of earning capacity or earnings. In that case, this Court found that the Claimant was specifically earning as much or more than he was earning at the time of the injury and specifically affirmed the Award of the Commission awarding the Claimant,

> "Twenty-five (25%) percent **functional loss of use** of the right eye, ten (10%) percent **functional loss of use** of the left eye, and One Thousand ($1,000.00) Dollars for disfigurement."

The Court then held that diminution of earning capacity is not a consideration in a loss of use/scheduled member Award case. That fundamental principle has been applied by this Court ever since. Hoke v. Cherokee County, 215 S.C. 376, 58 S.E.2d 330 (1950); Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957); G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958), (the Court specifically held in G.E. Moore that the fact that the Claimant after his injury was regularly employed at greater wages than before was totally immaterial); and the last decision by this Court, to the knowledge of this author on this issue prior to the back becoming a scheduled member,

was in the case of Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974). In Dykes, this Court specifically stated and held again that under a scheduled member Award that the entitlement to:

> "**Compensation** depends upon **functional loss** rather than the loss of earnings."

In 1974 the back was added as a scheduled member and this Court and the Court of Appeals in their decisions have consistently applied the same standard to the back as a scheduled member as applied previously to all scheduled Awards in that the decision to be made by the Commission is an award for the, "functional loss of use" of the back and wage loss has absolutely nothing to do with that decision. The Courts have also consistently held that it is an error of law for the Commission, and in this case both the Commission and the Court of Appeals, to infuse and to consider wage loss in a loss of use to the back Award. See the following cases for the application of the criteria requiring the award to be based on, "functional loss of use" versus diminution of earning capacity: Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985); Bateman v. Town and Country, 287 S.C. 158, 336 S.E.2d 890 (S.C. App. 1985); McCullum v. Singer, 300 S.C. 103, 386 S.E.2d 471 (S.C. App. 1989); Lyles v. Quantum Chemical Co., 315 S.C.

440, 434 S.E.2d 292 (S.C. App. 1993), reh. den., cert. den.; Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996), (citing as authority to Lyles v. Quantum Chemical Co., supra.

Next the statute as enacted by the General Assembly in reference to loss of use of the back contains a presumption that the loss of use of the back is so critical to the ability to work that where a worker has lost 50% or more of the use of the worker's back that the worker is entitled to an award for permanent and total disability. The presumption for having lost more than 50% of the functional use of the back to do work was part of the original 1974 enactment and was tied to paragraph (2) of S.C. Code §42-9-10 allowing for permanent and total disability awards based strictly on the severe character of certain injuries; ex. loss of both legs. The only effect of the 2007 Amendment as to the presumption for 50% or more loss of use of the back was to change the codification of paragraph 2 to a codification of the paragraph as paragraph (B). The Award to be made under §42-9-30 in reference to the back, whether it be under pre-2007 subparagraph (19) or post-2007 subparagraph (21) is the same. Under §42-9-30 the scheduled member Award statute, the Award to be made is based on loss of use of the back as it has been since 1936,

and loss of earning capacity is not a factor to be considered which it was in this case.

In this case, the fundamental error made by the Court of Appeals stems from its flawed analysis of the Record on the essential issue before the Commission for decision; i.e., an Award to a scheduled member for loss of use under S.C. Code §42-9-30. To understand the flawed analysis and that the Commission did base the decision on the consideration of wage loss, one must analyze the position of the parties at the hearing; the evidence before the Commission on loss of use; and the findings of fact and conclusions of law made by the Commission relative to the parties' positions/the evidence. Based on that analysis and reliance on its precedents on scheduled member Awards and wage loss, the Court will see how the Court of Appeals, specifically through bifurcation in II(A); and (B), and reliance on Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (S.C. App. 2012), infused, "wage loss" into a, "loss of use" case. If there is any doubt as to how this Opinion will be interpreted if left to stand, a West's Key Note reads:

> "Appellate panel of the Workers' Compensation Commission **did not err in considering Claimant's wage loss in determining that he did not suffer 50% or more loss of use of his back** in determining entitlement to permanent total disability

(PTD) benefits. Panel found that Claimant had 48% loss of use of his back, **and Claimant returned to work for almost two years** in a job similar to that which he had prior to accident making the same salary." (Emp. added).

As to the position of both parties at hearing: both agreed that the sole issue before the Commission was an award under §42-9-30 for loss of use of the back. The Claimant's position, the "loss of use" evidence established 50% or more loss of the use of his back entitling him to total and permanent Award. Defendants' position he is entitled to a less than 50% loss of use Award based a cervical spine whole person AMA medical impairment rating of 25% (71% to the back)[1] and that the statutory presumption is rebutted based solely on the fact he was working. Therefore, both parties agreed and the Commissioner understood the only issue to be addressed: the Award for loss of use.

Next, evidence in the Record on the "essential issue" before the Commission of loss of use of the back: two physicians expressed specific opinions on that essential issue - Mr. Clemmons had lost 50% or more of the functional use of his back. (App., pp. 237, 238, 240).. The FCE established objectively his physical functional limitations of "limited light duty" (under the U.S. Dept. of Labor's Physical Demand classifications). (App., pp. 210, 211-232). A vocational expert opined he was, "physically" excluded

[1] Under the AMA Guides 5th Edition, a whole person impairment of the cervical spine converts to 71% as a spinal rating. AMA Guides to the Rating of Permanent Impairment 5th Edition, p. 427.

from 76% to 99% of the jobs in the economy (App., pp. 261-263). Mr. Clemmons expressed the opinion on the "essential issue" that he had lost about 80% of the use of his back. (App., pp. 405, l. 11). There is no other evidence in the Record on the "essential issue" of loss of use, the issue to be decided. S.C. Code §42-9-30(21); Roper v. Kimbrell's of Greenville, supra.

Unlike every other Record in cases that have been decided by our Appellate Courts, this Record contains specific vocational and lay opinions on the specific issue of, "loss of use" of the back and specific medical opinions on the, "loss of use" of the back; with that evidence tied to the D.O.L.'s Physical Demand Job Classification System.

The only other opinion evidence was a whole person medical, "impairment" rating under the AMA Guides 5th Edition. Those Guides state on pages 4 and 5 that the Guide's medical impairment estimates concern the ability to perform the Activities of Daily Living (ADLs) and have nothing to do with the ability to do work activities. Also a 25% WP rating is 71% to the cervical spine, (AMA Guides 5th Edition p. 427).

The general purpose of expert opinion evidence is to aid the Commission in coming to the right conclusion. Baker v. Graniteville Co., 197 S.C. 21, 14 SE 2nd 367 (1941). The weight to be given to the evidence is up to the Commission but where the evidence is all one way, and there is no other substantial evidence contrary to such

evidence, the evidence should be conclusive. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E. 2nd 376 (1965). There is simply no contrary evidence on the "essential issue" before the Commission of loss of use of the back in the Record.

Finally, the Commissioner's findings: The Commission is required to make detailed findings of fact on the, "essential" issues for decision so an Appellate Court is able to make a proper review of the factual and legal basis for the decision. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970). The Hearing Commissioner made one Finding of Fact in his Notes, Finding No. 7, on the essential issue before him for decision, (App., p. 359), which was divided into four Findings in his final Order. However, it is clear his Findings addressed the essential issue before him for Decision; an Award for loss of use of the back under S.C. Code §42-9-30(21):

> "Based on the Record as a whole, I find that the Claimant has sustained a 48% TTD to his back. This includes any radicular symptoms to his right leg. I do not find that he is permanently and totally disabled based on the evidence as a whole. This finding is based on the greater weight of the evidence, **including his ability to work for nearly two (2) years** (while being accommodated by sitting down), his lack of prescription medication, and the medical reports and conclusions of Dr. Drye."

However, in part because this Finding was broken out as four (4) Findings in the final Order, this lead to the Court of Appeals' bifurcating this issue and under II Permanent

Total Disability (A) 50% or More of Use of Back, after accurately referring to the statutory language of S.C. Code §42-9-30 and the award to be made for loss of use, the Court applied some of its decisions on the back; none of which contained any medical opinion on, "loss of use" but only opinions on "impairment". Clark v. Aiken City Government, 366 S.C. 102, 620 S.E.2d 99 (S.C. App. 2005); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (S.C. App. 2012); and Fishburne v. ATT Sys. International 384 S.C. 76, 681 S.E.2d 595 (S.C. App. 2009). Whereas this Record contains specific medical, vocational and lay opinion evidence specifically on the loss of use of the Claimant's back. The provisions of the Workers' Compensation Act which are in derogation of common law rights must be strictly construed. If the legislature had intended for the Commission to make Awards for medical, "impairment" instead of "loss of use" it would have used that language. Wigfall v. Tidelands, Inc. supra; Ellison v. Frigidaire, 371 S.C. 159, 638 S.E.2d 664 (2007). There is no evidence of less than 50% loss of use of the back in the Record.

The Court of Appeals then used the erroneous 48%, "disability" Finding to find no consideration by the Commission of wage loss, which is specifically contrary to the Record and the Commissioner's specific understanding of the sole issue that was before him for decision. Again, the basic problem created by the Court of Appeals its bifurcation of the issue instead of treating the Hearing

Commissioner's Decision as one Decision on one issue, which in fact it was.

Then in II(B) Wage Loss while giving lip service to the 48% Award as being the basis for denying Petitioner an award for total and permanent disability for having lost 50% of the use of his back, the Court goes on to consider permanent and total disability under, "both S.C. Code §42-9-10 and 42-9-30". The Court of Appeals then cited as authority, its Opinion in Watson v. Xtra Mile Driver Training, Inc., supra, wherein the Court of Appeals actually first infused wage loss into a loss of use award by finding that evidence the Claimant, "could work in some capacity," was sufficient to rebut the presumption thus tying the presumption to wage loss under S.C. Code §42-9-10(**A**) whereas the presumption in §42-9-30(21) is tied to S.C. Code §42-9-10(**B**) under which like §42-9-30 Awards are based on the character of the injury not wage loss.

Under II(**B**), the Court of Appeals reverts to a wage loss analysis under §42-9-10 finding Petitioner was not entitled to an Award because "he had returned to work for almost two years", but that at the same time his exclusion from 99% of the job market based solely and strictly on physical limitations was irrelevant under an analysis under §42-9-30. In other words, mixing apples and oranges. This inconsistent analysis is wrong on many bases but for example just because a claimant is able to work does not exclude him from an Award under either §42-9-30(21) for

loss of use OR under §42-9-10(A) for wage loss. Stephenson v. Rice Services, Inc., supra. Considering: 1) its citation to Watson and its consideration in Watson of wage loss factors in a §42-9-30(21) case: 2) the bifurcation but reference to vocational evidence, based on physical limitations only, as being relevant to wage loss; and 3) the statement that the Commission properly denied Petitioner an Award for total and permanent, "both under §42-9-10 and §42-9-30" where only under §42-9-30(21) an Award was requested, clearly establishes that the Court of Appeals under its analysis makes wage loss a consideration in a loss of use award.

Wage loss is not a consideration in a scheduled member Award case, never has been, and this Court must again clearly state that in its Opinion in this case.

II. THE COMMISSION AND COURT OF APPEALS IMPROPERLY APPLIED THE SUBSTANTIAL EVIDENCE STANDARD TO THE EVIDENCE IN THIS CASE ON THE ESSENTIAL ISSUE BEFORE THE COMMISSION, "THE FUNCTIONAL LOSS OF USE OF THE CLAIMANT'S BACK".

The essential and only issue before the Commission, was what Award is the Petitioner entitled to under S.C. Code §42-9-30 for **loss of use**. Therefore, the substantial evidence in the Record to be considered was on the essential issue before the Commission; i.e., loss of use. The Commission must make under law detailed Findings of Fact and Conclusions of Law on each essential issue presented to it for decision. Hill v. Jones, supra. The Commission decision must be based on substantial evidence in the Record on the essential issue before the Commission for decision and it cannot be based upon surmise, conjecture or speculation. There is no contradictory evidence in the Record nor actually any evidence in the Record concerning the loss of use, the "essential issue" before the Commission for decision other than that presented by the Claimant that he had lost 50% or more of the use of his back, and the Commission's decision to the contrary that the Claimant had not lost 50% or more of the functional use of his back to do work requiring the use of his back is based on rank speculation. Hutson v. South Carolina Ports Authority, supra.

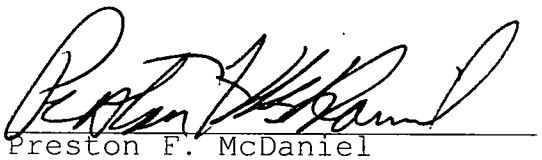
Two (2) doctors stated opinions that the Petitioner had lost more than 50% of the use of his back. A vocational expert opined based on D.O.L.'s Physical Demand

Classifications and Mr. Clemmons' "physical" back limitations that he was excluded from 99% of the jobs in the marketplace. Petitioner opined he had lost, approximately 80% of the functional use of his back to do work with his back. There is simply no other evidence concerning, loss of use, of the back in the Record. While the Petitioner would agree that generally the Commission is presented with only medical impairment opinion evidence, general vocational opinion evidence, and the Claimant's opinion on the loss of use that is not the case here. There was no substantial evidence in the Record other than that Mr. Clemmons had sustained a 50% or greater loss of use to the back. The Commission's decision should be reversed based on the undisputed evidence in the Record. Bartley v. Allendale School District, 392 S.C. 300, 709 S.E.2d 619 (2011).

CONCLUSION

This Court should reverse the Decision infusing wage loss into loss of use awards; require the Commission to base its decisions on the evidence presented and in this case hold it ignored the substantial evidence in the Record on loss of use; review the Commission's Decision and its responsibility to set out the factual and legal basis upon which the decision is based; and lastly recommit our State and the Commission to the fundamental principles this Court has established for injured workers under the Act since its inception in 1936.

Respectfully submitted,



Preston F. McDaniel
SC Bar No.: 3770
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Petitioner

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A GUIDE TO THE EVALUATION OF PERMANENT IMPAIRMENT OF THE EXTREMITIES AND BACK

BY
THE COMMITTEE ON MEDICAL RATING
OF PHYSICAL IMPAIRMENT

Special Edition

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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-001350
Workers' Compensation File No. 1015200

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

v.

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

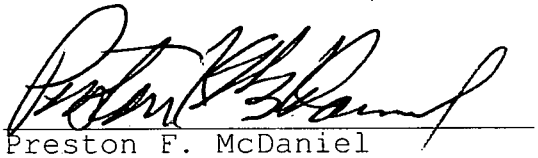
PROOF OF SERVICE

I certify that I have served the **BRIEF OF PETITIONER** and **APPENDIX** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2016, addressed to its attorneys of record:

Kelly F. Morrow, Attorney at Law
McAngus, Goudelock & Courie
Post Office Box 12519
Columbia, SC 29211

Helen F. Hiser, Attorney at Law
McAngus, Goudelock & Courie
Post Office Box 650007
Mt. Pleasant, SC 29465

Dated: June 6, 2016



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Petitioner