THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Court of Appeals' Opinion No. 5308
(filed April 1, 2015)

HENTON T. CLEMMONS, JR., EMPLOYEE,.....PETITIONER,

v.

LOWE'S HOME CENTERS, INC.-HARBISON, EMPLOYER, AND
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER,.....RESPONDENTS.

RESPONDENTS' BRIEF

MCANGUS GOUDELOCK & COURIE
Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Kelly F. Morrow, S.C. Bar No.: 72909
1320 Main Street, 10th Floor (29201)
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211-2519
(803) 779-2300

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

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STATEMENT OF THE CASE

Petitioner Henton Clemmons was employed with Lowe's on September 12, 2010 when he sustained a work related injury. (Appx. pp. 69). Pursuant to a Consent Order, the parties agreed that Petitioner suffered from a work-related injury to his back, neck and right knee, and Respondents agreed to provide medical care with the physician Petitioner had already chosen, Dr. Randall G. Drye. (Appx. pp. 68-70). In addition, Respondents agreed to pay Petitioner temporary total disability benefits from the date of the accident "until properly terminated due to a finding of maximum medical improvement, a return to work, further determination of the Commission, or agreement of the parties." (Appx. p. 69).

On June 7, 2011, Petitioner was released by Dr. Drye at maximum medical improvement ("MMI") and assigned an impairment rating of 25% whole person based on the injury to Petitioner's back. (Appx. p. 177). Thereafter, Respondents forwarded a Form 17 to Petitioner's counsel, requesting that, once the Form 17 was executed, Petitioner provide a settlement demand pertaining to permanent disability. (Appx. pp. 449-450). On September 22, 2011, Petitioner signed the Form 17 indicating he could return to work. (Appx. p. 92).

Subsequently, having received no settlement demand from Petitioner, Respondents filed a Form 21 on January 4, 2012 requesting a determination of compensation due, if any, for permanent total or partial disability. (Appx. p. 139). In response, Petitioner requested a return evaluation by his authorized treating physician, Dr. Drye, which Respondents provided. Respondents withdrew their Form 21 request in order to provide for the second evaluation by Dr. Drye. (Appx. p. 451).

On June 18, 2012, Dr. Drye examined Petitioner and reviewed updated magnetic imaging studies of Petitioner's cervical and lumbar spine. (Appx. pp. 178-179). Dr. Drye released Petitioner stating, "I see no reason for any change in terms of his permanent work restrictions, rating or no additional intervention or treatment is required." (Appx. p. 179). Respondents subsequently requested that Petitioner provide them with a settlement demand at his earliest opportunity. (Appx. p. 452). Again, having received no settlement demand, Respondents filed a second Form 21 seeking a determination of permanent compensation due, if any, and a credit for any overpayment of temporary compensation. (Appx. p. 141).

After filing pre-hearing briefs, the parties were heard by Single Commissioner Derrick L. Williams on September 25, 2012. He issued his Decision and Order on December 6, 2012 finding, among other things, that Petitioner had returned to work, had not made any complaints to his employer or asked for additional medical treatment; that Dr. Drye's reports and conclusions were the most persuasive; that Petitioner had reached MMI as of June 7, 2011; and that, based on the medical evidence, Petitioner had sustained a 48% permanent partial disability to his back, which included any radicular symptoms to his right leg. In addition, Commissioner Williams found that Petitioner was not totally and permanently disabled. (Appx. pp. 71-88).

Petitioner filed a timely Form 30 Request for Commission Review. (Appx. pp. 284-289). Following briefing, a hearing was held before the Full Commission on April 16, 2013. By Decision entered July 7, 2013, the Full Commission affirmed the Single Commissioner's Decision in its entirety. (Appx. pp. 89-110). The two factual findings that are pertinent to the issues before this Court are that: 1) "Claimant sustained a 48%

permanent partial disability to his back. We base this finding on the medical evidence as a whole"; and 2) "Claimant is not permanently and totally disabled. We base this finding on the greater weight of the evidence, including his ability to work for nearly two years while being accommodated by sitting down, his lack of prescription medication, and the medical reports and conclusions of Dr. Drye." (Appx. p. 107). The Commission's legal conclusions included determinations that, "[p]ursuant to S.C. Code Ann. Section 42-9-30 Claimant suffers from a 48% permanent partial disability to his back as a result of his work related accident," and that "[p]ursuant to S.C. Code Ann. Section 42-9-10 Claimant is not permanently and totally disabled as Claimant has returned back to work with the employer for almost two years." (Appx. p. 109)

Petitioner timely appealed to the Court of Appeals which heard oral argument on November 5, 2014 and issued its Opinion on April 1, 2015, affirming the Commission. (Appx. pp. 464-478). In particular, the Court of Appeals held that the Commission's factual finding that Petitioner sustained a 48% partial disability to his back pursuant to Section 42-9-30 was supported by substantial evidence in the form of Dr. Drye's impairment rating, despite conflicting evidence that could have supported an alternative finding of 50% or greater. (Appx. p. 474). In reaching this conclusion, the Court of Appeals specifically rejected Petitioner's argument that Dr. Drye's medical records do not constitute substantial evidence because they do not use the phrase "loss of use" of the back. (Id.).

The Court of Appeals then considered Petitioner's argument that "the Appellate Panel erred in considering wage loss in deciding whether he suffered 50% or more loss of use of his back." (Appx. p. 475). The Court of Appeals explained that the Commission

did not consider earning capacity in assigning him 48% loss of use of his back but, rather, found alternatively that Petitioner was not permanently and totally disabled under Section 42-9-10. The Court of Appeals stated that Petitioner "erroneously attempts to infuse loss of earning capacity into the analysis of permanent total disability under section 42-9-30." (Appx. pp. 475-476).

Petitioner moved for rehearing, which was denied. (Appx. 548).

Petitioner sought review by this Court on four separate issues. This Court granted review on two of the four issues.

STATEMENT OF THE FACTS

On September 12, 2010, Petitioner slipped on wet pine straw while waiting on a customer and fell flat on his back. (Appx. p. 380, lines 2-15). After medical treatment, Petitioner was referred to Dr. Drye, a neurosurgeon. (Appx. pp. 168-169). Petitioner underwent an anterior cervical discectomy and fusion of C5-6 and C6-7, performed by Dr. Drye. (Appx. pp. 160-162).

During follow-up visits with Dr. Drye on February 16, 2011 and April 12, 2011, Petitioner reported "no major pain issues." (Appx. pp. 174-175). On June 7, 2011, Dr. Drye concluded that, after a full course of physical therapy which Petitioner felt had "been quite beneficial," Petitioner had reached maximum medical improvement. Dr. Drye assigned him "a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." Petitioner was released from care with permanent restrictions of "no standing or walking for more than an hour without inability to sit for a brief period of time. I do not think he should be climbing heights or repetitively climbing steps, should avoid any repetitive

overhead reaching and should lift or carry less than 30 pounds only occasionally." (Appx. p. 177).

After Petitioner signed a Form 17 indicating he could return to work, Lowe's offered him a position as cashier with accommodations allowing him to sit as needed and request assistance as needed. Petitioner accepted that position. (Appx. pp. 137, 191). Petitioner returned to work at Lowe's in his same position as cashier, and received positive work evaluations. Although a stool was made available for Petitioner to use to accommodate his restrictions, he never asked to use it. As is the case for any other Lowe's employee, Petitioner could ask for assistance in lifting heavy objects. (Appx. p. 368, line 4 – p. 369, line 18) (Appx. p. 371, lines 2-23) (Appx. p. 407, lines 2-17) (Appx. p. 409, line 19 – p. 410, line 15).

On January 4, 2012, Respondents filed a Form 21 requesting a determination of compensation due for permanent total or partial disability, if any, and requested credit for overpayment of temporary benefits. (Appx. p. 139). In response to Petitioner's request for an additional medical evaluation, Respondents withdrew their hearing request in order to provide for another evaluation from Petitioner's treating neurosurgeon, Dr. Drye. (Appx. p. 451).

Dr. Drye examined Petitioner again on June 18, 2012, and reviewed updated magnetic imaging studies of Petitioner's lumbar spine and neck. Dr. Drye noted that Petitioner had "healed beautifully from his surgery," and that any residual symptoms were likely due to arthritis and degenerative disc disease. (Appx. p. 178). Dr. Drye concluded that Petitioner had reached maximum medical improvement, reaffirmed his

earlier 25% whole person impairment rating, saw no reason to change his permanent restrictions or for any "additional intervention or treatment." (Appx. p. 179).

Subsequently, on July 24, 2012, Respondents filed another Form 21 request credit for overpayment of temporary benefits and to determine any permanent disability award. Respondents sought a determination of whether "compensation is due pursuant to § 42-9-10, § 42-9-20 or § 42-9-30 and, if so, in what amount ..." (Appx. p. 141).[1]

In his Form 58, Pre-Hearing Brief, dated September 14, 2012, Petitioner argued that he was entitled "to an award for total disability based on: ... a permanent economic loss of earning capacity in the marketplace. He is unable to perform services other than those that are so limited in quality, quantity or dependability that a reasonably stable market for them does not exist without specific accommodation the Claimant cannot work. Therefore, the Claimant is totally and permanently disabled." (Appx. p. 194). The legal authority Petitioner associated with this factual controversy included, "§42-9-10 and §42-1-120 defines total disability under §42-9-10,"[2] as well as the following cases: Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); Colvin v. E. I. Du Pont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Gilliam v. Woodside Mills, 312 S.C. 523, 435 S.E.2d 872 (Ct. App. 1993); Singleton v. Young

[1] The quoted language is pre-printed on the Commission's "WCC Form # 21." (Id.). Thus, Petitioner's statement that Respondents filed a Form 21 "requesting to pay compensation **under S.C. Code §42-9-30**," (Pet. Br. p. 1), is not only improper argument included in his Statement of the Case, (*see* Rule 208(b)(1)(C), SCACR ("[t]he statement shall not contain contested matters ...")), but is plainly incorrect.

[2] Section 42-1-120 defines "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120.

Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960); and Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). (Appx. p. 195).[3]

Petitioner also cited as a factual controversy whether he was entitled "to an award for total and permanent disability based on having lost 50% or more of the *functional use of his back to do work with his back.*" (Appx. p. 194) (emphasis added). In connection with this issue under S.C. Code Ann. § 42-9-30, Petitioner opined that, "[d]ue to the position being taken by *some* defendants and *some* indications from *some* Commissioners that the Commission or *some* members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back," he submitted a memorandum. (Appx. p. 196) (emphasis added). In his memorandum, Petitioner stated that he "had, has and will always have the burden of proof to put forth evidence, either lay, medical and/or otherwise, that the injured worker has lost 50% or more of the worker's back *to do work requiring the use of the worker's back* which must be sufficient to prove that fact by a preponderance of the evidence." (Id.) (emphasis added).

At the Hearing before Commissioner Williams, Petitioner's counsel argued incorrectly that, under Section 42-9-30, "the presumption that is to be rebutted is whether or not the claimant has lost 50 percent of the functional use of his back," and indicated he would "rely on my memorandum in large part concerning the presumption to be rebutted." (Appx. p. 365, lines 7-17). Petitioner's counsel questioned Petitioner at length

[3] Petitioner's statement that "[a]lthough **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)," (Pet. Br. p. 2), also is improper argument included in his Statement of the Case, (*see* Rule 208(b)(1)(C), SCACR ("[t]he statement shall not contain contested matters ...")). In addition, the above-quoted language from Petitioner's Form 58 plainly shows that it is factually incorrect as well.

about his ability to work – his ability to earn wages. (Appx. p. 384, line 18 – p. 388, line 10).

Petitioner was asked by his own counsel:

> Q: In your opinion, zero meaning you got zero percent loss of use of your back, and *I'm talking about the functional loss of use of your back to do work requiring the use of your back.* Assuming zero means you've got zero loss of use and a hundred percent means you've los[t] a hundred percent use of your back, in your opinion ... what percentage of *loss of use of your back to use your back to do work requiring the use of your back* ...
>
> A: About 80 percent.

(Appx. p. 404, line 10 – p. 405, line 11) (emphasis added).

Petitioner's supervisor, Lynn Council, testified that Petitioner had returned to work full time, had not requested special accommodations or medical treatment and had performed his job fully. (Appx. p. 367, line 6 – p. 376, line 7). More specifically, Ms. Council testified that she informed Petitioner that a chair or stool had been made available for him to use but that he never asked to use it. (Appx. p. 371, lines 2-23) (Appx. p. 375, lines 22-25). Petitioner never complained about limitations or problems he was having performing his job, was capable of performing his job, and never asked for medical treatment for his back. (Appx. p. 369, lines 12-18).

At the close of Ms. Council's testimony, Petitioner's counsel attempted to "move for a ruling as to whether or not there's been any evidence [presented] to rebut the 50 percent loss of the use of the back." (Appx. p. 376 line 24 – p. 377, line 2). Commissioner Williams denied the motion, explaining that "we don't do that either way." (Appx. p. 376, line 24 – p. 377, line 12).

Petitioner testified that he could work as a cashier. (Appx. p. 384, lines 18-20). Petitioner was a cashier at the time of his injury, and returned to that position, working 40-hour weeks, eight-hour shifts during which he stood most of the time. (Appx. p. 391, lines 5-18) (Appx. p. 407, lines 8-17). He was receiving good performance evaluations and was always on time. (Appx. p. 414, lines 9-22). Petitioner also agreed that "any employee at any time has the right to call a Code 50, which is lifting assistance, no matter what their department limitations or restrictions..." (Appx. p. 409, line 19 – p. 410, line 15). Petitioner testified that he was not taking anything for pain and just did the stretches that his therapist showed him. (Appx. p. 402, lines 23-25). He also agreed that, although he previously had testified that he could not do certain jobs, he had not tried to perform and had not applied to any other jobs. (Appx. p. 408, line 4 – p. 409, line 9). Petitioner also stated that he spent only about one hour with each of the other doctors and vocational experts his attorney sent him to for evaluation, including Dr. Gal G. Margalit, Dr. Leonard E. Forrest and Harriet Fowler. (Appx. p. 416, line 2 – p. 418, line 6).

Commissioner Williams requested that Respondents' counsel draft a proposed order. (Appx. pp. 276-278). In response, Petitioner's counsel asked Commissioner Williams to make various other findings and explanations, including: 1) whether it was Commissioner Williams' "position that you cannot award greater than 50% loss of the use of the back in a situation where you do not find that the Claimant is totally and permanently, disabled," 2) whether Commissioner Williams would consider "making a greater award to the back while still not finding him permanently and totally disabled," in light of Petitioner's and two doctors' testimony that he had "sustained a greater than 50% *loss of use of his back to do work requiring the use of his back*"; and 3) whether

Commissioner Williams would make a specific finding regarding Petitioner's access to the job market, so that he could "understand the importance of your findings and decision on total and permanent disability in reference to a man's back and the award to be made by the statute." (Appx. pp. 279-281) (emphasis added).

Commissioner Williams did not respond directly to Petitioner's letter. Instead, he issued his Decision. (Appx. pp. 71-88).

Petitioner filed a Form 30 Request for Commission Review. (Appx. pp. 284-289). In his brief to the Full Commission, Claimant argued (among other things) that the only relevant medical evidence was that of Drs. Forrest and Margalit who "stated the opinion in reference to the *functional loss of use of the back that the Claimant has to do work requiring the use of his back* that in their opinion the Claimant had lost 50% or greater of the *use of his back to do work requiring the use of his back.*" (Appx. pp. 321-324, 331) (emphasis added). Petitioner also argued that he was barred from a substantial number of jobs in the workplace due to his disability. (Appx. pp. 325-326).

In their response brief, Respondents pointed out that Petitioner was back performing his regular job, 40 hours a week, spending much of that time standing because he did not request the use of a chair that was provided for him. Petitioner had not complained about his physical limitations to his employer, was able to perform his job duties, and was a valued employee. (Appx. p. 349). Respondents also addressed Petitioner's argument that he is permanently and totally disabled.[4] (Appx. pp. 350-351).

At oral argument before the Commission, Petitioner's counsel asked the Commission "to give little weight to Dr. Drye's opinions." (Appx. p. 432 lines 1-3). His counsel also repeated his argument that Petitioner was entitled to an award that

[4] "Claimant also contends that he is permanently and totally disabled." (Appx. p. 350).

"represents a *loss of use that this man has to do jobs requiring the use of his back* that fairly represents the amount of loss of use *and the labor access that this man has.*" (Appx. p. 434, lines 11-16) (emphasis added).

In his Brief to the Court of Appeals, Petitioner continued to phrase his burden in terms of proving he had "lost 50% or more of the *functional use of the worker's back to do work requiring the use of the worker's back.*" (Appx. pp. 26-27, 29-30) (emphasis added). Again, Petitioner focused on evidence concerning his access to "jobs available to him in the marketplace," (Appx. p. 30), a factor that goes to loss of earning capacity.

Petitioner filed a Petition for Rehearing with the Court of Appeals, arguing that the addition of the back to the list of scheduled members in 1972 represented a legislative choice to provide permanent total compensation "where a claimant had lost 50% or more of *the functional use of his back to do work* ..." (Appx. p. 486) (emphasis added). Petitioner also argued that he "cannot work and/or his ability to earn wages to feed his family is extremely limited by the severe injury that [he] sustained ..." (Appx. p. 497).

STANDARD OF REVIEW

Judicial review of a Worker's Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5). 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 v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). 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).

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. Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). "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). The Commission's determination of the degree of loss of use under Section 42-9-30 is "an issue of fact; and the Commission's determination of that issue is conclusive" when it is supported by substantial evidence. Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 455, 99 S.E.2d 52, 53-54 (1957).

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). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"); *see also* Sharpe, 336 S.C. at 161, 519 S.E.2d at 106 (stating that "in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact").

ARGUMENTS

I. Neither the Commission nor the Court of Appeals improperly infused wage loss into and as a consideration of the award made under S.C. Code Ann. § 42-9-30(21).

Section 42-9-30 and subsection 21 provide, in relevant part, that:

> In cases included in the following schedule, the *disability* in each case is considered to continue for the period specified and the compensation paid for the injury is as specified ... for the *loss of use* of the back in cases where the loss of use is forty-nine percent or less, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks. In cases where there is fifty percent or more *loss of use* of the back sixty-six and two-thirds percent the average weekly wages during five hundred weeks ... in cases where there is fifty percent or more *loss of use* of the back the injured employee *shall be presumed to have suffered total and permanent disability* and compensated under Section 42-9-10(B). *The presumption set forth in this item is rebuttable.*"

S.C. Code Ann. § 42-9-30(21) (emphasis added). The term "disability" is defined in the Workers' Compensation Act ("Act") to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120. Thus, under Section 42-9-30, disability, the inability to earn wages, is *presumed* to exist for the loss of or loss of use of certain listed body parts, including the back. As this Court explained in Wigfall v. Tideland Util., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), "[u]nder the medical model loss of earning capacity is not irrelevant. Instead, the Legislature has statutorily presumed lost earning capacity for certain scheduled injuries even where the employee is still capable of working." 354 S.C. at 104 n.2, 580 S.E.2d at, 102 n.2. Under Section 42-

9-30, specifically, a "claimant is not required to show lost earnings capacity because the compensation is based on the character of the injury and lost earning capacity is conclusively presumed." 354 S.C. at 107, 580 S.E.2d at 103.

Under Section 42-9-30(21), it is the claimant's burden to prove the degree of loss of use of the back in the first instance. The presumption of permanent total disability arises only after the claimant proves the loss of use of his or her back is 50% or greater. Furthermore, even where a 50% or greater loss of use of the back is proven, the presumption of total disability may be rebutted.

Logically, the way the presumption that a claimant is permanently and totally disabled is rebutted is to show that the claimant is not, in fact, permanently and totally disabled, *i.e.*, that he or she has not experienced a total loss of earning capacity and is able to work. *See* Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 464-465, 732 S.E.2d 190, 195 (Ct. App. 2012) (holding that evidence indicating that the claimant could work within her restrictions rebutted the presumption of permanent and total disability under Section 42-9-30(21)).[5] Contrary to Petitioner's assertion, the Court of Appeals did not improperly infuse wage loss into a loss of use award in Watson[6]; instead, the Court of Appeals first determined that the claimant had sustained a 50% disability to her back,

[5] Petitioner's argument that a left-handed lawyer who loses his right hand is still compensated for the loss of the hand even though he or she can still work, (Appx. pp. 323, 500-501) (Pet. Br. p. 11), misses the point. Loss of a hand is compensated under Section 42-9-30(12). That section does not include any presumption of total disability or rebuttal of the same but, instead, simply provides that the disability is considered to continue for the period specified. Once there is a finding of loss or degree of loss of use, the finding is conclusive and benefits are awarded regardless of whether the claimant is able to work or not. Section 42-9-30(21), in contrast, provides that, where "there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability ..." However, that presumption is rebuttable and it is in the rebuttal phase that a claimant's ability to work and earn wages becomes relevant.

[6] In fact, as is the case here, (Appx. pp. 194-195), in Watson, the claimant attempted to prove alternately that she was permanently and totally disabled under Section 42-9-10 and under Section 42-9-30. 399 S.C. at 463-464, 732 S.E.2d at 194-195.

specifically noting that "a claimant with 50% or more loss of use of the back is not required to prove loss of earning capacity to establish PTF." Then, only after making that determination, the Court of Appeals looked at the Functional Capacity Evaluation and other evidence that showed the claimant was able to work, albeit with restrictions. 399 S.C. at 464-465, 732 S.E.2d at 195. The rebuttal evidence in this case, where Petitioner returned to his former job, which he performed successfully working a regular 40-hour a week schedule, for two years with minor accommodations, no medication and no missed time, is demonstrably stronger than that in Watson, where the claimant was sent home because the employer could not accommodate her restrictions. 399 S.C. at 460, 732 S.E.2d at 193.

Apparently, Petitioner still takes the position he first announced at the hearing before Commissioner Williams which is that under Section 42-9-30, "the presumption that is to be rebutted is whether or not the claimant has lost 50 percent of the functional use of his back." (Appx. p. 365, lines 14-17). He argues that the Court of Appeals' finding in Watson that the claimant could work erroneously tied "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." (Pet. Br. p. 22). First, the presumption to be rebutted under Section 42-9-30(21) is *not* whether Petitioner has lost 50% of the use of his back and is *not* tied to Section 42-9-10(B). Instead, once a claimant has proven a 50% or greater loss of use of his or her back, he or she is presumed to be permanently and totally disabled – that is the presumption that is to be rebutted, not the degree of loss of use. S.C. Code

Ann. § 42-9-30(21).[7] There was no error in Watson in analyzing whether the claimant could work in order to determine whether the presumption had been rebutted. In this case, because Petitioner failed to prove a loss of use of his back that was 50% or greater, the presumption simply never arose.

Furthermore, Respondents' rebuttal was not "based solely on the fact that [Petitioner] was working." (Pet. Br. pp. 18). Instead, Respondents presented evidence that Petitioner had been back to work for two years, working 8-hour shifts, 40 hours per week. Claimant was dependable and received positive performance evaluations. He was offered a chair or stool to use at his register but he never asked to use it. He did not complain about limitations or problems performing his job and did not request medical treatment. Like any other employee, he could request assistance in lifting heavy objects. (Appx. p. 367, line 6 – 376, line 7) (*see also* Appx. p. 44, lines 23-25 (Petitioner agreeing he just performs stretches to relieve his pain)) (Appx. p. 407, line 2 – p. 410, line 15) (Appx. p. 414, lines 6-22). Thus, substantial evidence in this record supports the Commission's finding that Petitioner did not prove he was permanently and totally disabled, whether looked at under Section 42-9-10 or even assuming the presumption arose under Section 42-9-30(21). The fact that Petitioner presented evidence to the contrary does not mean the Commission Decision may be overturned. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105 ("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by

[7] Even the Dissent in Watkins acknowledged that the presumption that was triggered by the Commission's finding that the claimant sustained a 50% loss of use to her back was "the presumption that Watson is totally disabled." 399 S.C. at 469, 732 S.E.2d at 197. That is the presumption to be rebutted under section 42-9-30(21). The Dissent's argument was that the claimant had proven she was permanently and totally disabled and, as a result, the presumption was not effectively rebutted.

substantial evidence."); Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, the factual findings of the Commission are conclusive).

In summary, in cases where the claimant proves a 50% or greater loss of use of the back, and the ensuing presumption is *not* rebutted, compensation is to be paid pursuant to Section 42-9-10(B). No one questions that. Neither the Commission nor the Court of Appeals was confused. Neither infused wage loss into the initial determination under Section 42-9-30(21) of Petitioner's degree of loss of use of his back. While the ability to earn wages is not a consideration in determining the percentage of loss of use of the back, which is the claimant's burden to prove under Section 42-9-30(21), consideration of earning capacity and ability to work ***are*** appropriate considerations in determining whether the presumption, once triggered, has been rebutted. Watson, 399 S.C. at 464-465, 732 S.E.2d at 195.

As is discussed in more detail below, it is Petitioner who first raised a claim for permanent and total disability under Section 42-9-10 and who repeatedly and consistently has attempted to infuse the concept of "loss of use of the back to do work that requires the use of the back" into the initial disability rating under Section 42-9-30(21), as the Court of Appeals noted. (Appx. pp. 475-476). Petitioner continues to do so before this Court. (Pet. Br. pp. 12-13, 16, 24-25).

A. Petitioner sought benefits under both Sections 42-9-10 and 42-9-30.

Although he faults the Commission and the Court of Appeals for addressing whether he was entitled to benefits under Section 42-9-10, Petitioner unarguably raised the issue of loss of earning capacity and sought to prove he was entitled to benefits under *both* Sections 42-9-10 and 42-9-30. In his Form 58 Pre-Hearing Brief, Petitioner sought

an award under both statutory sections, arguing first that he was entitled "*to an award for total disability based on: ... a permanent economic loss of earning capacity in the marketplace*. He is unable to perform services other than those that are so limited in quality, quantity or dependability that a reasonably stable market for them does not exist without specific accommodation the Claimant cannot work. Therefore, the Claimant is totally and permanently disabled." (Appx. p. 194) (emphasis added). The legal authority Petitioner associated with this factual controversy included, "§42-9-10 and §42-1-120 defines total disability under §42-9-10" as well as various cases. *See* Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); Colvin v. E. I. Du Pont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Gilliam v. Woodside Mills, 312 S.C. 523, 435 S.E.2d 872 (Ct. App. 1993); Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960); and Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). (Appx. p. 195).[8]

The fact that he alternatively argued that he was entitled to the presumption under Section 42-9-30(21) does not negate the fact that he sought to establish that he was permanently and totally disabled due to "*a permanent economic loss of earning capacity in the marketplace*." (Appx. pp. 194-195) (emphasis added). Thus, contrary to Petitioner's assertions, both parties did *not* agree "that the sole issue before the Commission was an award under §42-9-30 for loss of use of the back," because he raised a claim under Section 42-9-10. (Pet. Br. pp. 18, 24).

[8] These cases set out the commonly accepted test for proving disability under Section 42-9-10(A), *i.e.*, the "generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" *See* Coleman, 245 S.C. at 629, 142 S.E.2d at 44; *see also* Colvin, 227 S.C. at 474, 88 S.E.2d at 586 (same); Stephenson, 323 S.C. at 118, 473 S.E.2d at 702 (same).

Petitioner also makes erroneous assertions about Commissioner Williams' "specific understanding of the sole issue that was before him for decision." (Pet. Br. p. 21). He has not and cannot establish that the sole issue before Commissioner Williams was his entitlement to an award under Section 42-9-30, as Petitioner clearly sought a determination of permanent and total disability under Section 42-9-10. (Appx. pp. 194-195 (Petitioner's Form 58 seeking recovery separately under Sections 42-9-10 and 42-9-30)). Patently, Petitioner's single-minded focus on a portion of the hearing transcript is an attempt to divert this Court's attention away from the fact that he clearly and unambiguously alleged entitlement to permanent total disability under Section 42-9-10 in his Form 58.

In the end, Petitioner raised a claim for permanent and total disability under Section 42-9-10. Furthermore, Petitioner argued to the Court of Appeals that, "[t]he law requires the Commission to address every ... issue presented." (Appx. p. 503). By addressing his claim for permanent and total disability under Section 42-9-10, neither the Commission nor the Court of Appeals improperly "infused, 'wage loss' into a, 'loss of use' case." (Pet. Br. p. 17). In fact, in arguing to this Court that the Commission and Court of Appeals erred by addressing his claims under Section 42-9-10, Petitioner seems to have completely reversed that position on appeal, a practice routinely rejected by this Court. *See, e.g.*, Vaughan v. Kalyvas, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below).

B. Petitioner improperly infused the issue of wage loss into the determination of the loss of use of his back.

Petitioner argues that the Commission and Court of Appeals improperly infused issues of wage loss and ability to work into the determination of the loss of use of his back under Section 42-9-30(21). However, it is Petitioner himself who repeatedly and consistently stated his position to be that he had lost more than 50% of the use of his back *to perform work that required the use of his back*, (*see* Appx. pp. 26-27, 29-30, 194-196, 280, 321-326, 331) (Appx. p. 384, line 18 – p. 388, line 10) (Appx. p. 404, line 10 – p. 405, line 11) (Appx. p. 434, lines 11-16), thereby improperly infusing wage loss and his ability to work into the analysis of his loss of use rating under Section 42-9-30(21).

In particular, Petitioner's Form 58 Pre-Hearing Brief cited as a factual controversy whether he was entitled "to an award for total and permanent disability based on having lost 50% or more of the *functional use of his back to do work with his back.*" (Appx. p. 194) (emphasis added). Associated with his claim under Section 42-9-30, Petitioner explained that, "[d]ue to the position being taken by *some* defendants and *some* indications from *some* Commissioners that the Commission or *some* members of the Commission believe that after the 2007 amendments that wage loss has been infused into a determination and as evidence to be considered concerning an Award under S.C. Code §42-9-30(21) for loss of use of the back," he was submitting a memorandum. (Appx. p. 196) (emphasis added). In his memorandum, Petitioner stated that he "had, has and will always have the burden of proof to put forth evidence, either lay, medical and/or otherwise, that the injured worker has lost 50% or more of the worker's back *to do work requiring the use of the worker's back* ..." (Id.) (emphasis added).

At the hearing before Commissioner Williams, Petitioner's counsel questioned Petitioner at length about his ability to earn wages. (Appx. p. 384, line 18 – p. 388, line 10). In addition, he asked the following:

> Q: In your opinion, zero meaning you got zero percent loss of use of your back, and *I'm talking about the functional loss of use of your back to do work requiring the use of your back.* Assuming zero means you've got zero loss of use and a hundred percent means you've los[t] a hundred percent use of your back, in your opinion ... what percentage of *loss of use of your back to use your back to do work requiring the use of your back* ...
>
> A: About 80 percent.

(Appx. p. 404, line 10 – p. 405, line 11) (emphasis added).

In his Brief to the Full Commission, Petitioner argued that the only relevant medical evidence was that of Drs. Forrest and Margalit who "stated the opinion in reference to the *functional loss of use of the back that the Claimant has to do work requiring the use of his back* that in their opinion the Claimant had lost 50% or greater of the *use of his back to do work requiring the use of his back.*" (Appx. pp. 321-324, 331) (emphasis added). Petitioner also argued that he was barred from a substantial number of jobs in the workplace due to his disability, (Appx. pp. 325-326), and that, "loss of use and/or loss of earning capacity is a property right of the Claimant." (Appx. pp. 316). At the Full Commission hearing, his counsel sought an award "that represents a *loss of use that this man has to do jobs requiring the use of his back* that fairly represents the amount of loss of use and the labor access that this man has." (Appx. p. 434, lines 11-16) (emphasis added).

In his brief to the Court of Appeals, Petitioner continued to argue that he had "lost 50% or more of the *functional use of the worker's back to do work requiring the use of the worker's back.*" (Appx. pp. 26-27, 29-30) (emphasis added). Again, Petitioner focused on evidence concerning his access to "jobs available to him in the marketplace," (Appx. p. 30), a factor that goes to loss of earning capacity. In his Petition for Rehearing, Petitioner argued that the addition of the back to the list of scheduled members in 1972 represented a legislative choice to provide permanent total compensation "where a claimant had lost 50% or more of *the functional use of his back to do work* ..." (Appx. p. 486) (emphasis added). Petitioner also argued that he "cannot work and/or his ability to earn wages to feed his family is extremely limited by the severe injury that [he] sustained ..." (Appx. p. 497).

In fact, Petitioner continues to argue both sides of the fence: on one hand, he insists earning capacity and/or ability to work have no place in the loss of use analysis performed under Section 42-9-30(21), while, on the other hand, he argues that impairment ratings do not constitute substantial evidence because they have nothing "to do with the *ability to do work*; in other words, functional loss of use." (Pet. Br. pp. 12-13, 16) (emphasis added). What's more, he continues to argue that he is entitled to a higher disability rating based on his vocational expert's opinion that he is excluded from "76% to 99% of the jobs in the economy," (Pet. Br. pp. 18-19), and that the Commission erred in not finding that he had "lost 50% or more of the *functional use of his back to do work requiring the use of his back* ..." (Pet. Br. pp. 24-25) (emphasis added).

Thus, it is Petitioner, not the Commission or Court of Appeals, who has improperly attempted to infuse issues of wage loss and the ability to earn wages into the analysis of the degree of loss of use of his back under Section 42-9-30(21).

C. There is no requirement in Section 42-9-30(21) that medical evidence be stated in terms of "loss of use" or "functional loss of use."

Curiously, Petitioner argues that the Act should be strictly construed while, at the same time, he attempts to add language to the statute that he believes favors his case. In particular, he argues that Section 42-9-30(21) "... must be strictly construed leaving it to the Legislature to amend and define any ambiguities," while at the same time insisting that, "[t]he Commission was required to ... apply the plain, ordinary meaning of the language to the award for '*functional* loss of use.'" (Pet. Br. pp. 9-10, 13, 15) (emphasis added). However, the phrase "*functional* loss of use" does not appear anywhere in Section 42-9-30(21). Instead, the relevant portions of Section 42-9-30 simply and clearly state that "the disability in each case is considered to continue for the period specified and the compensation paid for the injury is as specified" and that "where there is fifty percent or more *loss of use* of the back the injured employee shall be presumed to have suffered total and permanent disability," which presumption is rebuttable. S.C. Code Ann. § 42-9-30(21) (emphasis added).

Petitioner cannot overcome the fact that the Commission found Dr. Drye's two impairment ratings, (Appx. pp. 177-179), more persuasive than the opinions of two physicians and a vocational expert Petitioner hired to provide additional opinions. In his attempt to discredit Dr. Drye, his own hand-chosen physician who performed surgery and treated Petitioner successfully from 2010 to 2012, Petitioner endeavors to set up "magic words" that a medical professional must use in order to offer an impairment rating that

will support an award under Section 42-9-30(21) – the magic words being "loss of use," "loss of function," or "functional loss of use." (Pet. Br. pp. 12-13, 15, 18-19, 21). There is no such requirement.

First, Section 42-9-30(21) does not specify particular language that a physician must use in order to provide substantial, reliable and probative evidence of loss of use. S.C. Code Ann. § 42-9-30(21). Other provisions of the Act demonstrate that the Legislature knows how to specify what constitutes substantial, reliable and probative evidence in relation to proving a compensable injury. For example, the provisions addressing repetitive trauma injuries specify that, "[a]s used in this section, 'medical evidence' means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C. Code Ann. § 42-1-172(C). A similar requirement exists for medical proof of an occupational disease. S.C. Code Ann. § 42-11-10(C). In contrast, Section 42-9-30(21) contains no such requirement.

Clearly, if the legislature intended for awards under section 42-9-30(21) to be based only on medical evidence phrased in terms of "loss of use," "loss of function," or "functional loss of use," it knew how to limit the type of medical evidence that constitutes substantial evidence. *See* State v. Ramsey, 409 S.C. 206, 211, 762 S.E.2d 15, 17-18 (2014) (use of a phrase or terminology in one statute "illustrates the legislature knows how to draft a statute" extending its coverage to certain circumstances, and "the omission of such a provision from a similar statute concerning a related subject is significant to show that a different intention has existed"); Resolution Trust Corp. v. Eagle Lake & Golf Condos, 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993) (specific

limitations written into one section of a statute with regard to liens but not included in another "indicates the legislature knew how to write limitations" into the statute). Where the Legislature has specified the level of medical opinion or testimony that constitutes substantial, reliable and probative evidence in some sections, (S.C. Code Ann. §§ 42-1-172(C) & 42-11-10(C)), and not in others, (S.C. Code Ann. § 42-9-30(21)), the only reasonable conclusion that can be drawn is that there is no "magic" language required to prove the degree of loss of use under Section 42-9-30(21).

Second, not a single case cited by Petitioner or that uses the phrase "functional loss of use" requires medical evidence to be stated in those terms, and certainly not anything remotely resembling "functional loss of use to do work requiring the use of the back." True, Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974), discusses whether the loss of sight in the claimant's injured eye "render[ed] sight in the eye so unreliable as to destroy its usefulness for any industrial purpose." 262 S.C. at 107-108, 202 S.E.2d at 652. However, that opinion also equates "functional loss" to "when the member or its function is *impaired* or lost ..." 262 S.C. at 106, 202 S.E.2d at 650 (emphasis added). In Hoke v. Cherokee County, 216 S.C. 376, 58 S.E.2d 330 (1950), this Court recited the Commission's finding that the claimant had "sustained a fifty (50%) per cent functional loss of use of his right hand," 216 S.C. at 379, 58 S.E.2d at 331, but did not even discuss the medical evidence on which that finding was based. Although the discussions in both Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985), and Lyles v. Quantum Chem. Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993), used the phrase "loss of use," they did not rely on medical opinions stated in terms of "functional loss of use" but, instead, relied on impairment ratings. Linen, 286 S.C. at

68-69, 332 S.E.2d at 212 (relying on impairment ratings to determine loss of use of the back under Section 42-9-30, and explaining that the "extent of loss of use need not be shown with mathematical precision"); Lyles, 315 S.C. at 443-445, 434 S.E.2d at 294-295 (relying on medical report proving impairment rating to the whole body and explaining that "[t]he commission may find a degree of disability different from that suggested by expert testimony"); *see also* Ripley v. Anderson Cotton Mills, 209 S.C. 401, 405, 40 S.E.2d 508, 509 (1946) (affirming the Commission's award for "functional loss of use" of the claimant's eyes, based on medical evidence indicating the claimant's "eyes were very red" and sensitive to light, that he needed glasses, and was suffering from astigmatism that was aggravated by the accident). In Ripley, this Court explained that, "[i]t is not necessary that claimant show the extent of disability with mathematical exactness, and direct evidence of the percentage of partial loss of normal efficiency is not essential to the determination of such percentage, and it is not essential that a percentage of disability be specified by any witness." 209 S.C. at 404, 40 S.E.2d at 509. Thus, even the cases relied on by Petitioner do not require that medical evidence contains the "magic words" he insists qualifies his as the only "substantial evidence" to prove "loss of use."

In fact, South Carolina appellate courts routinely use the terms impairment and loss of use interchangeably. *E.g.*, Bundrick v. Powell's Garage & Wreckage Serv., 248 S.C. 496, 151 S.E.2d 437 (1966) (relying on medical evidence stated in terms of "disability" and "impairment" to determine the claimant's loss of use of his right arm under what is currently Section 42-9-30); Bateman v. Town & Country Furn. Co., 287 S.C. 158, 159, 336 S.E.2d 890, 890 (Ct. App. 1985) (Court of Appeals finding medical testimony rating the claimant's "present impairment at 50%" and "50% permanent partial

functional impairment of the spine" sufficient to support loss of use award); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 464 (Ct. App. 1989) (Court of Appeals relying on medical opinion that the claimant "had a 60 percent impairment of his spine" sufficient to uphold finding of greater than 50% loss of use and presumption of total disability); Lyles, 315 S.C. at 443, 434 S.E.2d at 294 (relying on a physician's 35% impairment rating to the whole body to support the Commission's finding of 58% loss of use of his back)[9]; Fishburne, 384 S.C. at 86, 681 S.E.2d at 600 (the Court of Appeals relying medical reports expressed in terms of "impairment" and "physical impairment" to support "a permanent partial disability benefit of ten percent loss for her back"). Our courts have never required medical evidence in a Section 42-9-30(21) claim to be stated in terms of "loss of use," or "functional loss of use" and certainly not "functional loss of use to do work requiring the use of the back."

Although Stephenson did not turn on the application of Section 42-9-30, this Court explained therein that, "[n]otwithstanding the definition of disability in section 42-1-120, South Carolina's workers' compensation law also recognizes a competing concept of disability that is tied to *medical impairment* rather than to wage loss or to any reduction in earning capacity." 323 S.C. at 117, 473 S.E.2d at 701 (emphasis added). In fact, although the main issue in Therrell v. Jerry's Inc., 370 S.C. 22, 29, 633 S.E.2d 893, 897 (2006), was determining whether to adopt a functional impairment or a situs of the injury approach to awarding benefits for a rotator cuff tear, this Court relied on Singleton for the proposition that "the scheduled recovery scheme is partially focused on

[9] In Lyles, the Commission was careful to note that it was "not equating 35% of the whole man to 58% of the back ..." 315 S.C. at 443, 434 S.E.2d at 294.

compensating the claimant for his or her physical ailments, *independent of functional ability*." Therrell, 307 S.C. at 27 n.1, 633 S.E.2d at 895 n.1 (emphasis added).

The cases Petitioner relies on in his argument that there is no medical evidence that he has suffered less than 50% loss of use of his back are distinguishable on a key point. In each case, Baker v. Graniteville Co., 197 S.C. 21, 14 S.E.2d 367 (1941) and Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965), the question under consideration concerned complex issues of medical causation. In both cases, all of the physicians who examined either of the claimants testified unambiguously that the workplace accident was not the cause of death.[10] Neither case dealt with the type of medical evidence necessary to support a loss of use rating under Section 42-9-30. Thus, neither case provides support for Petitioner's position that Dr. Drye's medical opinion is insufficient to support the Commission Decision.

Petitioner's recitation of awards in early cases based on disfigurement, Ferguson v. State Hwy Dept., 197 S.C. 520, 15 S.E.2d 775 (1941) and Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945) (Pet. Br. pp. 13-14), are of questionable value to the resolution of this appeal. Petitioner is not claiming an award for disfigurement under Section 42-9-30(23). The language of that subsection as well as the analysis under it are different from the language and analysis under Section 42-9-30(21).

Petitioner's exposition on the AMA Guides, 5th Edition, as well as his attempt to opine on the specific conversion of the whole person rating to a different rating to the back, (Pet. Br. pp. 18 & n.1, 19), find no support in the Record and should be rejected.

[10] In Baker, there was testimony by one physician who had never examined the claimant, who was given a history of events, and whose testimony this Court held amounted "to nothing more than an inference on an inference upon which to base the finding that the alleged accidental injury aggravated the disease." 197 S.C. at 28, 14 S.E.2d at 370.

First, Petitioner did not raise this argument to the Commission. An argument raised by an appellant that is based on different grounds from the argument presented to the trial court is not preserved for appeal. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Second, there is no expert evidence confirming this conversion or opining that Dr. Drye's whole person impairment rating really amounted to a 71% impairment rating to the back. Argument and advocacy by counsel do not constitute evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). Third, the AMA Guides to the Rating of Permanent Impairment 5th Edition is not in the Record. *See* Rule 210(h), SCACR ("[e]xcept as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal"); *see also* Windham v. Honeycutt, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (same, and advising that appellate courts, "will not consider facts that do not appear in the transcript of record"). The appellant bears "the burden of providing a sufficient record" for appellate review. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005).[11] Fourth, as noted elsewhere herein, the Commission is not limited to the precise impairment rating provided by a physician. *See, e.g.*, Fishburne, 384 S.C. at 88,

[11] Respondents also note that Petitioner is attempting improperly to add to the Record in this case by attaching the cover of a Special Edition of the Journal of the American Medical Association titled, "A guide to the evaluation of permanent impairment of the extremities and back," dated Feb. 15, 1958, and offering to provide it to the Court "upon request." (Pet. Br. pp. 11-12). Petitioner has not moved to supplement the Record pursuant to Rule 212(b), SCACR, nor has he previously mentioned this piece of evidence in any submittal to the Commission or even the Court of Appeals. (*See* Rule 210(c), SCACR, instructing that the Record "shall not ... include matter which was not presented to the lower court or tribunal"). Respondents did not move to strike the cover of the AMA Journal attached to Petitioner's Brief as well as his discussion of it on pages 11-12 of his Brief because: 1) doing so would delay resolution of this case unnecessarily, and 2) Respondents do not believe the 1958 AMA Journal is relevant to the outcome of this appeal. However, for the reasons stated herein, Respondents urge this Court to disregard Petitioner's argument regarding and his attempt to include the 1958 AMA Journal, if not completely strike them from this Record.

681 S.E.2d at 601 (upholding Commission finding of 10% loss of use of back based on a range of impairment ratings from 5% to the whole person and entire spine, to 15-20% to the lumbar spine, to 24% to the whole person and 27% to the lumbar spine); Lyles, 315 S.C. at 445, 434 S.E.2d at 295 ("[t]he commission may find a degree of disability different from that suggested by expert testimony").

As noted above, South Carolina appellate courts routinely affirm Commission decisions based on medical records and opinions that are stated in terms of impairment, and base disability or loss of use ratings on medical impairment ratings under the AMA Guidelines. Therrell, 370 S.C. at 30, 633 S.E.2d at 897 (explaining that "the proper course in these cases is to proceed pursuant to 42-9-30(20) and use the AMA Guides or 'any other accepted medical treatise or authority' to convert the injury to the rotator cuff into a percentage of impairment to the whole person" and barring claimant from obtaining relief based on the injury to her shoulder precisely because she failed to "present any evidence of the percentage of impairment to her shoulder"); Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (explaining that under the medical model of compensation, disability awards are "based upon degrees of medical impairment to specified body parts"); Watson, 399 S.C. at 464, 732 S.E.2d at 195 (relying on impairment rating by the claimant's treating physician based on the AMA Guidelines); Sanders v. MeadWestvaco Corp., 371 S.C. 284, 291 n.1, 638 S.E.2d 66, 70 n.1 (Ct. App. 2006) (relying in part on medical impairment rating to the back pursuant to the AMA Guidelines); Bundrick, 248 S.C. at 500-501, 151 S.E.2d at 440 (relying on medical ratings drawn from the "AMA chart on impairment"). In fact, impairment ratings ***not*** determined under the AMA guidelines may be given less weight. Harbin v. Owens-Corning Fiberglas, 316 S.C. 423,

431, 450 S.E.2d 112, 116 (Ct. App. 1994). The Commission's regulations specifically rely on the AMA's "Guide to the Evaluation of Permanent Impairment." S.C. Code Reg. § 67-1101(B).

In the end, it is the Commission's role to evaluate the evidence and assign weight. S.C. Code Ann. § 1-23-380(5); Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528. Here, the Commission properly weighted Petitioner's treating physician's impairment as more persuasive than those of his hired experts. Because there is no such requirement, the fact that Drs. Margalit and Forrest used the phrase "loss of function" or "functional capacity" in their reports and Dr. Drye did not makes no difference in terms of whether substantial evidence supports the Commission decision.

D. Commissioner Williams' Request for a Proposed Order does not indicate he improperly infused wage loss into his finding that Petitioner had lost 48% of use of his back.

Petitioner again raises the argument that the Single Commissioner Decision and the Commission Decision are suspect because, in his request for a proposed decision, Commissioner Williams included multiple findings in one finding, whereas the filed Single Commissioner Decision broke these out into three separate findings of fact. (Pet. Br. pp. 5, 20-21).[12] Petitioner's argument is based on nothing more than supposition and conjecture. If, in fact, Commissioner Williams intended the findings to all be part of one finding of fact and, by breaking them out into three findings the proposed order changed

[12] In his discussion of this issue, Petitioner asserts that this proposed finding was broken out into four Findings of Fact in the Single Commissioner Decision, including Finding of Fact No. 8. However, Finding of Fact No. 8, which states, "[t]he greater weight of the evidence shows, based upon review of the medical records, including Independent Medical Evaluations, that Dr. Drye's reports and conclusions are the most persuasive. I base this finding upon the medical records submitted into evidence," is reflected separately as Finding No. 6 in the request for proposed order. (Appx. pp. 86, 276).

his intended meaning, Commissioner Williams could have edited the proposed order before issuing it. He did not.

Furthermore, a request for a proposed order is no more a final order than a ruling from the bench, which is not binding on the parties, the court (or, for that matter, the Commission) until the actual order is issued. First Union Nat'l Bank of South Carolina v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) (an order is not final until it is written and entered because, until that point, "the trial judge retains discretion to change his mind and amend his oral ruling accordingly"), *affirmed* 308 S.C. 421, 418 S.E.2d 545 (1992); Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (a proposed order or ruling is not "binding on the parties until it has been reduced to writing, signed by the Judge and delivered for recordation"). There is no reason to assume or evidence to support Petitioner's speculation that the filed Single Commissioner Decision did not fully reflect Commissioner Williams' ruling in this case.

Petitioner is correct that the initial assignment of a disability rating for loss of use of the back under Section 42-9-30(21) does not involve or require the claimant to prove a loss of the ability to earn the same wages he or she was earning prior to the workplace injury. However, what Petitioner has not and cannot show is that, by combining three thoughts into one finding in his request for proposed order, Commissioner Williams somehow impermissibly relied on a wage-loss analysis to determine the percentage of loss of use of his back. First, in the signed Decisions by both Commissioner Williams and the Full Commission, these three findings are stated separately as Findings of Fact Nos. 10, 11, and 12. Finding of Fact No. 10 clearly states that the 48% disability rating "is based on the medical evidence as a whole." In contrast, Finding of Fact No. 12, in

which the Commission found that Petitioner was not permanently and totally disabled, is based on Petitioner's "ability to work for nearly two years while being accommodated by sitting down, his lack of prescription medication, and the medical reports and conclusions of Dr. Drye." (Appx. pp. 86, 107). If Commissioner Williams or the Full Commission believed wage loss or the fact that Petitioner was currently working was relevant to their determination of his loss of use rating, they could have and would have stated that.

Second, Petitioner reads far too much into the grouping of findings in the request for a proposed order. Although Petitioner insists that including these thoughts in one paragraph means Commissioner Williams improperly took loss of earning capacity into account in his determination of Petitioner's loss of use rating under Section 42-9-30, there is no evidence that that is so. His allegations are nothing more than speculation based on the fact that Commissioner Williams found he had suffered only a 48% permanent partial disability to his back. Bundrick, 248 S.C. at 503, 151 S.E.2d at 441 (awards cannot be based on speculation, surmise and conjecture).

Third, as is explained more fully above, it is Petitioner, and not the Commission, who has continually attempted to infuse wage loss issues into the loss of use determination under Section 42-9-30(21), by arguing that the relevant formulation is the degree of loss of use of the back to do work that requires the use of the back. (*See* Appx. pp. 194-196, 288, 316, 322-323, 486) (Pet. Br. pp. 24-25).

Furthermore, Petitioner raised this "grouping of findings" argument to the Full Commission, (Appx. pp. 288), which obviously rejected it as they fully affirmed the Single Commissioner Decision, adopting these specific findings as its own. (Appx. pp. 107-108). The Full Commission is not bound by a single commissioner's determination

but, instead, has full authority to review and amend a single commissioner's award. S.C. Code Ann. § 42-17-50; Pack, 381 S.C. at 535, 673 S.E.2d at 466 (the Full Commission "is not bound by the Single Commissioner's findings of fact").

E. The Court of Appeals Opinion is neither erroneous nor confusing, and should be upheld.

Petitioner's reliance on a West's Key Note for evidence "as to how [the Court of Appeals'] Opinion will be interpreted," (Pet. Br. pp. 17-18), is misguided and entirely unpersuasive. Patently, "key notes" included in legal research sources are hardly authoritative and, oftentimes, inaccurately describe the holding in a case. As noted above, any confusion created in this case has been on the part of Petitioner, whether intentional or unintentional. The Commission and the Court of Appeals understood Petitioner's arguments, considered them and properly rejected them.

The Court of Appeals was not lead or mis-lead into addressing both of Petitioner's claims for relief under Sections 42-9-10 and 42-9-30 because the Commissioner Williams broke out certain findings in the Single Commissioner Decision, as is suggested by Petitioner. (Pet. Br. pp. 20-21). Instead, the Court of Appeals was addressing the claims for permanent and total disability under both sections, raised by Petitioner, (Appx. pp. 194-195), and ruled on by the Commission. (Appx. pp. 86-88, 107-109).

Petitioner dismisses the Court of Appeals' reliance on three cases. First, Petitioner criticizes Clark v. Aiken County Gov't, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005), because the Court of Appeals' opinion in that case did not use the phrase "loss of use" in upholding a rating to the claimant's back under Section 42-9-30. First, the Court of Appeals correctly stated that "[t]he full commission's finding as to the degree of

impairment is a question of fact," which must be affirmed if supported by substantial evidence. 366 S.C. at 115, 620 S.E.2d at 105. Second, the award under what is now Section 42-9-30(21) was based on medical evidence stated in terms of impairment and disability. 366 S.C. at 115, 620 S.E.2d at 106. As is discussed more fully above, the Clark decision is not alone in using these terms interchangeably.

The Court of Appeals cited Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), for the familiar proposition that "the determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses." 401 S.C. at 429, 737 S.E.2d at 206-207. Finally, the Court of Appeals cited Fishburne, for the proposition that the percentage of disability does not need to be "shown with mathematical exactness." 384 S.C. at 86, 681 S.E.2d at 600.

Petitioner takes issue with these cases because they did not contain medical evidence stated in terms of "loss of use" but only "impairment." (Pet. Br. p. 21). As explained more fully above, our courts use these terms interchangeably and Petitioner has not presented any statutory authority or case law that requires medical opinions be stated in terms of "loss of use."

II. The Court of Appeals and Commission properly applied the substantial evidence standard to the evidence in this case.

Petitioner's arguments regarding substantial evidence summarily repeat his allegations that Dr. Drye's impairment ratings do not constitute substantial, reliable and probative evidence of the degree of loss of use of his back under Section 42-9-30(21),

because Dr. Drye did not use the phrase "loss of use." As explained in detail above, there is no such requirement in the Act.

Here, the Commission found Petitioner's treating physician and surgeon, Dr. Drye's rating more persuasive than that of Petitioner's hired experts, who only saw Petitioner briefly for litigation-oriented evaluations.[13] What's more, the Commission awarded Petitioner a higher disability rating, 48%, (Appx. p. 107), than the impairment rating recommended by Dr. Drye, 25% to the whole person. (Appx. pp. 177-179). It is well established that, "[t]he commission may find a degree of disability different from that suggested by expert testimony." Lyles, 315 S.C. at 443-445, 434 S.E.2d at 294-295.

Dr. Drye's medical records constitute substantial evidence supporting the Commission determination that Petitioner suffered a 48% disability under Section 42-9-30. The fact that there is other evidence in the record that might justify a different outcome is of no import. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105 ("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence."); Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, the factual findings of the Commission are conclusive).

Petitioner's argument that this case is unique because his physicians used the phrase "loss of use," (Pet. Br. p. 25), implies that there is some requirement in the Act for medical records to contain that phrase. However, as explained in more detail above, there is no such statutory requirement or preference under Section 42-9-30(21). *Compare* S.C. Code Ann. § 42-9-30(21), *with* S.C. Code Ann. §§ 42-1-172(C) & 42-11-10(C).

[13] Petitioner testified that he spent only about one hour with each of the other doctors and vocational experts his attorney sent him to for evaluation, including Drs. Margalit and Forrest and Ms. Fowler. (Appx. p. 416, line 2 – p. 418, line 6).

Petitioner's attempts to judicially expand on the Act must be rejected. Wigfall, 354 S.C. at 110, 116-117, 580 S.E.2d 115, 108-109 (courts strictly construe the terms of the Act and leave it to the Legislature to make any necessary revisions). Indeed, this Court has held that "'[l]oss of use' and 'partial loss of use' are simply, everyday, unambiguous words, and are to be given their ordinary, generally accepted meaning." Roper, 231 S.C. at 456, 99 S.E.2d at 54 (refusing to limit "loss of use" to direct injuries to a member).

At its core, Petitioner's argument that the Commission and Court of Appeals improperly infused wage loss into its disability determination under Section 42-9-30(21) is based on his position that, because he does not believe Dr. Drye's impairment rating constitutes substantial evidence, there is no substantial evidence supporting the Commission's 48% loss of use rating. Therefore, according to Petitioner, the only explanation for the disability rating being less than 50% is that the Commission must have based its loss of use rating on Petitioner's ability to earn wages and/or the fact that he was working. (Pet. Br. pp. 18-19, 24-25). Because Dr. Drye's two medical reports from 2011 and 2012 constitute substantial, reliable and probative evidence supporting the Commission decision, Petitioner's entire argument fails. There simply is no evidence that either the Commission Decision or the Court of Appeals' Opinion were based on an improper consideration of wage loss and/or the fact that Petitioner was working.

In light of the conflicting, competing medical evidence in this case, this Court should uphold the Commission decision under the substantial evidence standard of review. Bundrick, 248 S.C. at 503, 151 S.E.2d at 441 (affirming the well-settled principle that an appellate court cannot "choose between the conflicting testimony of the two medical witnesses" without impinging on the fact-finding role of the Commission);

Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, the factual findings of the Commission are conclusive).

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission and the Court of Appeals and dismiss Petitioner's appeal.

June 24, 2016

Respectfully submitted,
MCANGUS, GOUDELOCK & COURIE LLC

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
Post Office Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Kelly F. Morrow, S.C. Bar No.: 72909
1320 Main Street, 10th Floor (29201)
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211-2519
(803) 779-2300

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Court of Appeals' Opinion No. 5308
(filed April 1, 2015)

HENTON T. CLEMMONS, JR., EMPLOYEE,.....PETITIONER,

v.

LOWE'S HOME CENTERS, INC.-HARBISON, EMPLOYER, AND
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER,.....RESPONDENTS.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of Lowe's Home Centers, Inc.-Harbison, and Sedgwick Claims Management Services, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Orde r re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

June 24, 2016

McANGUS GOUDELOCK & COURIE, L.L.C.

Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

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

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PROOF OF SERVICE

I certify that I have served the **Respondents' Brief** on Henton T. Clemmons, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on June 24, 2016, addressed to his attorney of record:

Preston F. McDaniel, Esq.
MCDANIEL LAW FIRM
1315 Elmwood Ave.
Columbia, South Carolina 29201

Michaela Shepherd

Michaela Shepherd
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents