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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Supreme Court Opinion No. 27708
(filed March 8, 2017)

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

v.

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

BRIEF ON BEHALF OF THE *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

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The South Carolina Municipal Insurance Trust;
The Palmetto Hospital Trust; and
The South Carolina Chamber of Commerce.

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Statement of the Case

Pursuant to Rules 221(a) and 240, SCACR, Respondents Lowe's Home Centers, Inc.-Harbison, and Sedgwick Claims Management Services, Inc. have petitioned this Court for rehearing of its Opinion No. 27708. The Respondents argue that this Court not only overlooked and misapprehended the proper statutory interpretation of S.C. Code Ann. § 42-9-30(21), but also usurped the Commission's fact finding role. In particular, the Respondents argue that this Court engaged in impermissible fact finding based on arguments that are not preserved for appellate review and rendered a medical conclusion/opinion based on evidence not in the Record. In addition, the Respondents argue this Court's interpretation of Section 42-9-30(21) is based on a flawed and incorrect statutory interpretation, which will produce absurd and unintended results. Finally, the Respondents argue that, even assuming for the sake of argument that Clemmons met his burden of proving a greater than 50% loss of use of his back, this matter must be remanded to the Commission to determine whether Employer can rebut the presumption of total and permanent disability, in light of this Court's overruling of Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012), and, if so, what Claimant's disability rating between 50% and 100% should be. In these arguments, the *Amici Curiae* concur, as set forth below.[1]

[1] The *Amici Curiae* take no position on Clemmons's individual entitlement to an award under the Act.

Arguments

I. The Court misconstrues the plain meaning of the term "disability" in applying S.C. Code Ann. § 42-9-30(21) to its own impermissible factual findings.

"Disability" is a term of art, specifically defined by the South Carolina Workers' Compensation 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. In the context of S.C. Code Ann. § 42-9-30, the degree of "disability" that corresponds with the loss of use of a scheduled body member is generally presumed[2], as indicated by the introductory clause of that statute, which states "[i]n cases included in the following schedule, the disability in each case is considered to continue for the period specified..." For that reason, in deciding most scheduled injury cases, the factual determination is only the degree of physical loss of use to a body member because the corresponding degree of disability has already been presumed by the Legislature. G.E. Moore Co. *et al.*, v. Walker *et al.*, 232 S.C. 320, 102 S.E.2d 106 (1958) (holding that the "period during which the weekly payments are to continue is based solely on the character of the injury and not upon the earnings or earning capacity of the injured employee.").

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[2] Note that the presumed disability corresponding with the loss of use of a scheduled body member is less than the maximum 500 weeks in every instance, save loss of use of the back.

By design, this factual determination is wholly different with respect to cases involving greater than fifty percent loss of use of the back under S.C. Code Ann. § 42-9-30(21). Prior to July 1, 2007, loss of use of the back was governed by S.C. Code Ann. § 42-9-30(19), which included a **conclusive** presumption that in all cases "where there is fifty percent or more loss of use of the back...the injured employee shall be deemed to have suffered total and permanent disability..." In December 2005, Governor Mark Sanford's Task Force on Workers' Compensation Reform recommended that the conclusive presumption of total disability in back cases be repealed because it was "not reflective of the true disability in many cases." (*See* Final Report of Governor's Task Force on Workers' Compensation Reform, December 7, 2005, p.27). Basically, employees who had no true "disability" (*i.e.*, loss of wage-earning capacity) were entitled to an unavoidable windfall under S.C. Code Ann. § 42-9-30(19), which was seen by many (including the Governor, the General Assembly, and the business community) as inequitable. Therefore, that same year, legislation was introduced in the House eliminating the presumption entirely and similar legislation was introduced in the following session. (H.4217, 2006--2007; H.3799, 2007--2008). A compromise was reached in the Senate during the 2007-2008 session that retained the presumption of permanent and total disability in cases where there is greater than a 50% loss of use of the back; however, the formerly conclusive presumption of total disability was specifically made rebuttable. (S.332, 2007--2008). It is this compromise between injured workers and the business community that is currently embodied in S.C. Code Ann. § 42-9-30(21) and which the Court appears to have eviscerated in the case *sub judice*.

According to the express terms of the current statute, when loss of use of the back is "forty-nine percent or less," the legislature has presumed that disability "is considered to continue" for up to "three hundred weeks" and "[i]n cases where there is fifty percent or more loss of use of the back," disability "is considered to continue" for up to "five hundred weeks." However, the statute specifically states that

> "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**..." (emphasis added).

In no other section of S.C. Code Ann. § 42-9-30 is the presumption of disability rebuttable in any degree, nor does any other section reference the general disability statute, S.C. Code Ann. § 42-9-10. Therefore, on its face, the factual determination to be made under § 42-9-30(21) necessarily differs from other sections, where the only determination is the extent of physical loss of use.

While the Supreme Court's recent opinion in the case *sub judice* correctly holds that "the mere fact a claimant continues to work is ***insufficient*** to defeat the presumption of permanent and total disability for loss of use of the back,"[3]

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[3] (Emphasis added). South Carolina has consistently held that 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 reasonable stable market for them does not exist." Wynn v. Peoples Natural Gas Co., 248 S.C. 1, 118 S.E.2d 812 (1961); Colvin v. E.I. DuPont de Nemours & Co., 227 S.C. 465, 88 S.E.2d 581; Coleman v. Quality Concrete Products, Inc., 245 S.C. 626, 142 S.E.2d 43 (1965). Therefore, the fact that an employee is working, standing alone, may not be dispositive of the issue of total disability under S.C. Code Ann. § 42-9-10.

the Court misapprehends the force and effect of the holding of Wigfall v. Tideland Utilities, Inc., in further suggesting that wage loss is somehow ***irrelevant*** under S.C. Code Ann.§ 42-9-30(21). 354 S.C. 100, 580 S.E.2d 100 (2003). First, Wigfall does not address S.C. Code Ann.§ 42-9-30(21) specifically. The holding in Wigfall was issued more than 4 years prior to the enactment of S.C. Code Ann. § 42-9-30(21) and does not otherwise deal with loss of use of the back. Secondly, Wigfall does not address S.C. Code Ann. § 42-9-30(21) generally and is wholly inapplicable to that section's terms, which differ significantly from the general "medical model" of the remainder of § 42-9-30 with its unique rebuttable presumption of total disability. The general inapplicability of Wigfall is most obviously illustrated by the Court's statement that "South Carolina has never recognized that a claimant can suffer a single scheduled injury and as a result become totally, permanently disabled," a statement that is clearly at odds with S.C. Code Ann. § 42-9-30(21). Finally, the Court's application of Wigfall in this manner is contrary both to the plain language of S.C. Code Ann. § 42-9-30(21) and the legislative intent behinds the statute's amendment in 2007.

In addition, the Court misconstrues the plain meaning of the term "disability" in suggesting that wage loss is not germane to the rebuttable presumption. The term "disability," having but one meaning under the Workers' Compensation Act, requires "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. This principle has been long-established both by the plain statutory language of § 42-1-120 and case law. For

example, in Walker v. City Motor Car Co., 232 S.C. 392, 396, 102 S.E.2d 373 (1958), the Supreme Court held that

> "disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. There is no recognition of the elements of pain and suffering or discomfort or difficulty in performing the work so long as there is no reduction of earning capacity. Loss of earning capacity alone is the criterion and medical opinion as to the extent of physical disability can have no probative value against actual earnings." (citing Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945); Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954)).

In contravention of this well-established precedent[4], the Court in the case *sub judice* boldly suggests that "evidence of subsequent employment is insufficient by itself to rebut the presumption of permanent and total disability," without elucidating exactly what type of evidence would be relevant to a determination of "disability." It is respectfully submitted that the Court is without authority to redefine this term of art and that the failure to restrict a determination of "disability" to it statutory terms would lead to absurd results, unintended by the

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[4] *See* Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970) (holding that "[t]he ruling in *Parrott* has been adhered to as the law of this state for twenty-five years without intervention or change by the legislature. We conclude, as did the lower court, that the statute sets forth how disability shall be determined.")

legislature.[5] When S.C. Code Ann. § 42-9-30(21) was enacted, it was for the express purpose of ensuring that employees who are not disabled in fact do not benefit from a windfall presumption. Therefore, evidence of wage-earning capacity must be considered both relevant and sufficient in determining whether the presumption has been rebutted, as evinced by the plain language of the statute.

Furthermore, the Court suggests that "[s]eparating wage loss from the analysis in establishing the presumption, only to allow earning capacity to come in after the fact and conclusively rebut it, renders the presumption meaningless" and that returning to work somehow results in a denial of benefits. These suggestions are unfounded. First, the presumption is not "meaningless," because no other single scheduled member injury is even eligible for the award of permanent and total disability benefits that the presumption of § 42-9-30(21) affords. Under S.C. Code Ann. § 42-9-30(21), an employee with a single, scheduled injury to the back is eligible for an award of permanent and total

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[5] "The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Id.* (quoting Norman J. Singer, Sutherland Statutory Construction §46.03 at 94 (5th ed. 1992)).

disability if (1) he has sustained greater than fifty percent physical loss of use of the back and (2) there is no evidence that he is able to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Wynn v. Peoples Natural Gas Co., 248 S.C. 1, 118 S.E.2d 812 (1961); Colvin v. E.I. DuPont de Nemours & Co., 227 S.C. 465, 88 S.E.2d 581; Coleman v. Quality Concrete Products, Inc., 245 S.C. 626, 142 S.E.2d 43 (1965). Secondly, if the employee has sustained greater than fifty percent loss of use of the back, but he does not have a total loss of wage earning capacity, he is still entitled to an increased scheduled award based upon a percentage of 500, as opposed to 300, weeks of benefits. Without the presumption, no employee with a back injury would ever be eligible for 3more than 300 weeks of benefits, much less benefits for permanent and total disability. And even when the presumption of total disability is rebutted, an employee with loss of use of the back is still entitled to a significant presumption of disability of up to 500 weeks.

Take for example an employee like Stephen Hawking, a wheelchair-bound theoretical physicist. His physical loss of use of the back is undeniably significant and based upon medical evidence, the Commission would easily find that his loss of use of the back exceeds fifty percent. The next question is whether his employer can rebut the presumption of total disability afforded him by S.C. Code Ann. § 42-9-30(21). Assuming that Hawking's employer showed that his physical loss of use of the back did not affect his ability to actually continue earning his regular pre-injury wages and that the market for his services was not "so limited in quality, dependability, or quantity that a reasonable stable market for them

does not exist," then the employer would have effectively rebutted the presumption of total disability by definition. Therefore, the Commission would then be tasked with quantifying Hawking's degree of loss of use and awarding the proportional benefits of up to 500 weeks. If the Commission finds that Hawking has a 75% loss of use of the back, he would be entitled to 375 weeks of benefits, regardless of his wage-earning capacity.[6] As a result, neither Hawking, nor his employer, would be prejudiced or penalized by S.C. Code Ann. § 42-9-30(21)'s rebuttable presumption. However, if the Commission was forced to apply the Court's holding in the case *sub judice*, not only would Hawking receive a windfall of 500 weeks of benefits based on his 75% loss of use of the back despite his residual wage-earning capacity, and not only would his employer be clearly prejudiced by the unjust award, but such a policy would serve as a very real *disincentive* to Hawking's employer in determining whether to maintain Hawking's employment following the injury. Quite simply, there would be no cost savings for an employer to retain employee with high impairment ratings because there would be no meaningful way to rebut the presumption of permanent and total disability under S.C. Code Ann. § 42-9-30. Certainly, this is not sound public policy, nor was it the intent of the Legislature in enacting S.C. Code Ann. § 42-9-30(21) in 2007.

Therefore, it is respectfully submitted that the Court has overlooked or misapprehend the fact that some degree of disability – regardless of earning

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[6] In fact, the Commissioner could find that Hawking has a 100% loss of use of the back and award him a full 500 weeks of benefits, again regardless of his wage-earning capacity.

capacity – is still presumed in all cases where there is permanent physical loss of use of the back and no employee is denied scheduled benefits simply because of his wage-earning capacity. In cases where the physical loss of use of the back is less than forty-nine percent, disability is "considered to continue" for up to 300 weeks. In cases where the physical loss of use of the back exceeds 50 percent, disability is "considered to continue" for up to 500 weeks. Both are true irrespective of earning capacity and the factual determination of physical "loss of use" is still premised on the general medical model. However, an employer must be able rebut a presumption that the disability is "total" with evidence showing that the loss of earning capacity is not absolute to effectuate the legislative purpose of the 2007 amendment. This presumption was made rebuttable, not to discourage an employee from returning to work, but to prevent a windfall of benefits when the loss of wage-earning capacity is not total.

Lastly, without clarification from the Court, the result of the Clemmons decision will be chaos and increased costs across the Workers' Compensation system. Formerly well-defined terms, such as "disability" under S.C. Code Ann. § 42-9-120, being rendered nebulous, will become a font of litigation. Formerly well-founded traditions, such as applying whole person impairment ratings to back claims, having been upended by the Court will now necessitate depositions and testimony from medical experts to elucidate impairment ratings in terms of the "back" – a concept for which there is no guidance given that the AMA Guides fail to even recognize that statutory, non-medical term – imposing delay and additional costs across the board. Not only will litigation necessarily increase, but so too will appeals, as it now appears that the appellate courts are free to

make their own findings of fact, based not upon evidence in the record, but upon its own devination. Why would a rebuffed litigant settle for only a single bite at the apple? Respectfully, these are the very real consequences of the Court's misconstruction of S.C. Code Ann. § 42-9-30(21) and misapprehension of the actual evidence in the record. As such, rehearing and reconsideration is of vital importance.

II. **The Commission's finding that Clemmons sustained a 48% loss of use of his back is supported by substantial evidence and the Court erred in wholly disregarding and otherwise misconstruing this evidence.**

Consistency and predictability of awards are of utmost importance in our Workers' Compensation System. Consistency and predictability not only promote fairness, but reduce litigation, appeals, and costs for both injured employee and their employers. The *Amici Curiae* respectfully contend that the Court's failure to uphold the Workers' Compensation Commission's findings based upon substantial evidence in the record and concomitant decision to look outside the record in making an award of benefits on appeal undermines the consistency and predictability of the Workers' Compensation System and; therefore, request reconsideration of these issues.

First, the Court appears to have misconstrued the evidence in the record in concluding that

> "there is *no* evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back."

> (emphasis original). Every doctor and medical professional who assigned an AMA Guides impairment rating indicated Clemmons lost more than seventy percent of the use of his back, including Dr. Drye, whom Commission relied on in making its finding."

Quite simply, neither Dr. Drye, or any other medical expert, issued any such opinion and there are no medical impairment ratings in the record in excess of seventy percent or otherwise expressed in terms of the "back." *See* A. pp. 177, 240.

According to Dr. Drye's plain statements, he assigned Clemmons "a 25% whole person impairment...." (A. p.177). At no time did Dr. Drye issue any impairment rating in any other terms. In addition, the report of Dr. Forrest states that he

> "would define at least a 30% permanent impairment rating for the neck-related symptoms and problems. For the low-back related symptoms and problems, I would define 10%. As such, the permanent impairment rating here is at least 40%" (A. p.240).

Dr. Forrest does not reference any edition of the AMA Guides, does not elucidate whether the rating is based upon a diagnosis-related estimate (DRE) or range of motion (ROM) method, nor does Dr. Forrest indicate whether the 40% rating refers to the whole person, the back generally, or some other entity.

Respectfully, the Commission properly applied Dr. Drye's "25% whole person impairment" and Dr. Forrest's 40% impairment rating to S.C. Code Ann. § 42-9-30(21) in finding that Clemmons sustained a forty-eight percent loss of use

of the back, consistent with long-standing convention based upon both the AMA *Guides* themselves, and the positions of the parties. According to the 4th Edition AMA Guides, the "whole person" is considered the exact equivalent of the spine as a whole.

In addition, the Commission has long-considered "whole person" ratings as equivalent to ratings the "back." *See* Sanders v. MeadWestvaco, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) (*cert. dismissed as improvidently granted* 381 S.C. 208, 672 S.E.2d 785 (2009)). For example, in Sanders, the Court of Appeals concluded that impairment ratings expressed in terms of "the whole person" and "the whole back" are equivalent under the AMA *Guides*. The Court in Sanders went on to note that it was readily agreed by the parties "that impairment to the whole back is equal to impairment of the whole person." Both before and after the *Sanders* case, the Workers' Compensation Commission has routinely found that "whole person" impairment ratings are applicable to their determination of the loss of use of the "back" under S.C. Code Ann. § 42-9-30 and the appellate courts have repeatedly affirmed this practice. *See* Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012); Fishburne v. ATI Systems Intn'l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009); Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006); Nettles v. Spartanburg Co. School Dist., 341 S.C. 580, 535 S.E.2d. 146 (Ct. App. 2000); and Ancrum v. Lowcountry Steaks, 317 S.C. 188, 452 S.E.2d 609 (Ct. App. 1994). Furthermore, prior to the decision in the case *sub judice*, it has always been considered within the discretion of the Commission alone, as the ultimate finder of fact, to weigh and

consider all evidence in making a determination of physical loss of use under S.C. Code Ann. § 42-9-30.[7]

More importantly, Clemmons did not challenge the applicability of the "whole person" impairment rating to S.C. Code Ann. § 42-9-30(21), either before the Hearing Commissioner, the Commission's Appellate Panel, or the Court of Appeals.[8] Therefore, any issue regarding the weight or sufficiency of the impairment ratings is not preserved on appeal and should not have been

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[7] While an impairment rating may not rest on "surmise, speculation or conjecture it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957) (citations omitted); *see also* Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (finding that although expert testimony found claimant suffered from a 20-30% impairment to his back, testimony of vocational expert and claimant provided substantial evidence to affirm Appellate Panel's decision finding claimant's impairment exceeded 50%); Lyles v. Quantum Chem. Co., 315 S.C. 440, 445-46, 434 S.E.2d 292, 294-95 (Ct.App.1993) (finding, pursuant to section 42-9-30, that while expert testimony suggested claimant suffered only a 35% impairment to his back, testimony of claimant and others provided substantial evidence that claimant's impairment exceeded 50%). Furthermore, the Commission is not bound by the opinion of medical experts and "may find a degree of disability different from that suggested by expert testimony." Lyles, 315 at 445, 434 S.E.2d at 295 (citations omitted). Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct.App.2002) (citing Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999)). "Unless the question of the extent of partial loss of use under [section] 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible." Linen, 286 S.C. at 68, 332 S.E.2d at 212.

[8] Note Clemmons raised no argument regarding the propriety or applicability of Dr. Drye's "whole person" impairment rating in his Form 58 Pre-Hearing Brief (A. pp.193—198); at the hearing before Commissioner Williams (A. pp.363—366); in his request for reconsideration of Commissioner Williams's Decision and Order (A. pp.455—266); in his Form 30 Application for Review (A. pp.284—289); in his brief to the Commission's Appellate Panel (A. pp. 302—332); in his oral arguments before the Appellate Panel (A. pp.359—448); or in his brief to the Court of Appeals (A. pp. 1—39). Therefore, the issue is not preserved for appeal and is not properly before the Supreme Court.

addressed by the Court.[9] Having failed to preserve this issue for appellate review, the Court lacked appellate jurisdiction to address any argument regarding the weight, sufficiency, or interpretation of the medical impairment ratings relied upon by the Commission in determining Clemmons's physical loss of use under S.C. Code Ann. § 42-9-30(21). *See* In re Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005) (holding that a reviewing court has appellate jurisdiction over only those matters which are properly appealed); *see also* State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (holding that when an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated).

Moreover, Clemmons presented no evidence that the "back" has a higher value than the "whole person" in terms of impairment. Such was the case in Therrell v. Jerry's Inc., 70 S.C. 22, 633 S.E.2d 893 (2006), wherein this Court previously held that where an employee requested a "determination as to the proper ratio for a shoulder injury as it bears to the whole man," but did not

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[9] Clearly, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, it is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Lastly, in the workers' compensation context, only issues raised to the Commission within the Form 30 application for review of the single commissioner's order are preserved for review. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1952).

present any evidence of the percentage of impairment to her shoulder, granting relief would effectively provide the employee with an impermissible "second bite at the apple." The Supreme Court refused to convert Therrell's "whole person" into a "shoulder" rating, explaining that

> "the burden is on the claimant to prove that an injury is compensable within the act. Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air." 70 S.C. 22, 30; 633 S.E.2d 893,897 (internal citations omitted).

Following this precedent, the Court should have refused increase the Commission's award of benefits to Clemmons based on the very same "thin air" it once admonished.

Despite the plain statement of the medical experts, the directives of the AMA *Guides*, the wide latitude that should have been afforded the fact-finder, the positions of the parties themselves, the lack of issue preservation, and prior well-established Supreme Court precedent, the Court appears to have gone outside the record and *sua sponte* determined that Dr. Drye's "25% whole person" rating should be substituted with a "seventy-one percent regional impairment to his spine" and Dr. Forrest's non-specific "40% permanent impairment rating" should be substituted with a "ninety-nine percent regional impairment rating with respect to his back." The Court failed to elucidate the basis for either their

authority to reach outside of the record in this manner[10], the basis for its calculation of regional impairment ratings, or its rationale for applying regional spinal impairment ratings to the back as a whole.

Presumably, the Court attempted to apply Chapter 15.13 of the 5th Edition AMA Guides to the Evaluation of Permanent Impairment, which states that "a whole person estimate being converted to a regional estimate would be divided by 0.35 for the cervical spine." While twenty-five divided by 0.35 does equal seventy-one, the Court erred in suggesting that this means Dr. Drye's twenty-five percent whole person impairment rating is the equivalent of a seventy-one percent rating to the "back." Instead, the AMA *Guides* make it clear that a twenty-five percent *whole person* impairment is instead the equivalent of a seventy-one percent rating to the *cervical* spine. Plainly, the cervical spine is but one functional unit of the spine as a whole and there is no known definition of the term "back" that would limit it to the "cervical spine."[11] Under the AMA *Guides*, the cervical spine is thirty-eight percent of the spine as a whole;[12] therefore, a

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[10] *See* Rule 210(c), S.C.A.C.R. (record on appeal shall not include matter which was not presented to lower court); review); Windham v. Honeycutt, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (advising that appellate courts, "will not consider facts that do not appear in the transcript of record").

[11] In fact, most commonly-accepted definitions of the term "back" actually exclude the "cervical spine" or "neck," which further calls into question the Court's analysis in the case *sub judice*. Specifically, injuries to the "cervical spine" may not be scheduled member injuries under S.C. Code Ann. § 42-9-30, much like shoulder injuries are no longer considered scheduled member injuries to the "arm." *See* Therrell v. Jerrys, Inc., 370 S.C. 22, 633 S.E.2d 893 (2006).

[12] According to Figure 15-19 of the 5th Edition Guides, the cervical spine is 80% of the whole person, the thoracic spine is 40% of the whole person, and the lumbar spine is 90% of the whole person. Therefore, the relative value of the cervical spine is 38% of the spine as a whole (80 divided by 210) and cervical spine

seventy-one percent cervical spine rating could theoretically be converted to a twenty-seven percent (26.98%) whole spine or "back" rating using simple math and the tenants of the AMA *Guides*, though these *Guides* are not in evidence and are not binding legal authority. Even if the Guides were binding, Dr. Drye's twenty-five percent whole person impairment is necessarily less than fifty percent of the spine or back as a whole and does not support the Court's independent finding to the contrary.

Similarly, nothing but pure surmise, conjecture, or speculation could support a finding that Dr. Forrest's "40% permanent impairment rating" somehow "translates to a ninety-nine percent regional impairment to his back" as so boldly suggested by the Court. As noted above, unlike Dr. Drye's rating, Dr. Forrest's rating was not expressed in terms of the "whole person" and those words do not appear in Dr. Forrest's medical report. Furthermore, even if one were to (impermissibly) assume that Dr. Forrest's "40% impairment rating" was intended to be expressed in terms of the "whole person," one would have to also assume whether the rating was based upon the "DRE method" or the "ROM method" before it could be properly converted to a regional impairment of the cervical or lumbar spine under the AMA *Guides*. *See* Chapter 15.13, p. 427, AMA

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ratings can be converted to whole spine ratings by multiplying the former by 0.38.

In the alternative, employing the logic used by the Commission (and affirmed by the Courts) in Lyles v. Quantum Chem. Co., 315 S.C. 440, 445-46, 434 S.E.2d 292, 294-95 (Ct.App.1993), one could assume that if the "whole person" has a value of 500 weeks then a 40% "whole person" has a value of 200 weeks (0.40 * 500). Because the "back" also has a value of 500, a 200 week award also represents a 40% loss of use of the back. Essentially, the whole person and the back are equivalent in terms of impairment under the current version of S.C. Code Ann. § 42-9-30(21).

Guides to the Evaluation of Permanent Impairment, 5th Edition. Even then, the converted 30% rating for the cervical problems and the converted 10% rating for the lumbar problems, could not be properly combined without reference to the AMA *Guides* Combined Values Chart.

Presumably, the Court assumed that the ten percent rating for the lumbar symptoms was actually a whole person DRE method rating equivalent to a thirteen and 3/10ths percent rating to the lumbar spine and the thirty percent rating for the neck symptoms was a whole person DRE rating equivalent to an eighty five and 7/10ths percent rating to the cervical spine. Even if one could assume such facts – which appear nowhere in the record and are otherwise not supported by any evidence in the record– such a finding overlooks the very plain fact that the maximum whole person rating for a cervical spine rating cannot exceed eighty percent. *See* Chapter 15.13, p. 427, AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Therefore, it would seem that the Court has failed to even apply the AMA *Guides* according to its own terms, making it all the more obvious that application of the AMA Guides and the determination of the appropriate medical impairment ratings should be reserved to the medical experts.

For these reasons, rehearing and reconsideration is respectfully submitted. By misconstruing the evidence in the record and the issues preserved for appeal, the Court has fundamentally altered the procedure for proving entitlement to benefits under S.C. Code Ann. § 42-9-30(21), which will result in increased litigation, greater time and expense investments by all parties in the workers'

compensation system, and questionable finality of Commission awards leading to unnecessary appeals.

Conclusion

Based upon the foregoing arguments, the *Amici Curiae* respectfully request that this Court reconsider its Opinion No. 27708, reverse its improper factual findings including, but not limited to: 1) that Dr. Drye's impairment rating converts to a 71% regional impairment to Claimant's spine/back, and 2) that, consequently, the Commission's 48% disability rating is not supported by substantial evidence. In addition, this Court must revise its statutory analysis of Section 42-9-30(21) to hold that evidence that a claimant is able "to earn the wages which the employee was receiving at the time of injury in the same or any other employment" is both probative and sufficient to rebut the presumption contained in S.C. Code Ann. § 42-9-30(21). In the event this Court fails to reverse its improper factual findings and analysis as noted above, the *Amici Curiae* respectfully contend that the Court must remand this case to the Workers' Compensation Commission for further proceedings. The *Amici Curiae* request that this Court order oral argument on the issues raised in the Respondents Petition for Rehearing and restated herein, given the importance and far-reaching consequences of this Court's Opinion.

Respectfully submitted,

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