

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

David Lemon, Claimant, Appellant,

v

Mt. Pleasant Waterworks, Employer, and State Accident Fund,
Carrier, Respondents.

RECORD ON APPEAL

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SC Court of Appeals

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**OPINION, ORDER AND AWARD OF
THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File NUMBER 1205924**

**STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)**

David Lemon,)

Claimant,)

vs.)

Mt. Pleasant Waterworks,)

Employer,)

and)

State Accident Fund,)

Carrier/Defendants.)

HEARING: APPEARANCES:

Held in Goose Creek, South Carolina on
September 11, 2014

Claimant was represented at the hearing by
Carl H. Jacobson of Uricchio, Howe & Krell,
P.A.

Defendants were represented by Matthew A.
Schonfeld of Willson, Carter & Baxley, P.A.

PURPOSE OF HEARING: DECISION AND

To determine issues as set forth on Forms
50/51 and Form 21 to determine if the
employer/carrier may stop payment, and if so,
to determine if claimant is entitled to any
further benefits.

ORDER:

ORDER FILED:

Commissioner T. Scott Beck

, 2014

CLAIMANT'S APA SUBMISSIONS

NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE	DATE OF REPORT(S)	PAGES
CL1. Thomas Due, Jr., M.D.	03/12/14- 08/26/13	01-25
CL2. Orthopaedic Specialists of Charleston	03/11/14- 06/08/12	26-67
CL3. Rehabilitation Centers of Charleston 06/14/13 <u>EXHIBITS</u>		68-69
EX1. Vocational Assessment of David Price, M.Ed. EX2. Deposition Transcript of Jan Westmoreland, M.Ed.		

DEFENDANT'S APA SUBMISSIONS

<u>NAME OF PHYSICIAN/OTHER</u>	<u>DATE OF REPORT</u>	<u>PAGE</u>
Exhibit (1) CBD Medical Enterprises, PA - Dr. Thomas Due, MD	4/9/14-7/11/14	70-80
Exhibit (2) Tri-County Radiology	4/23/13	81-82
<u>NAME OF EXHIBIT</u>	<u>DATE OF REPORT</u>	<u>PAGE</u>
Exhibit (A) Pleadings filed relating to Claimant's 03/05/05 work accidents with other employer		83-86
Exhibit (B) Vocational Assessment of Jan 7/18/14 Westmoreland, M.Ed., CRC		87-100
Exhibit (C) Excerpts of Claimant's Personnel File		101-117
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Exhibit (E) Deposition Transcript of David Price 8/6/14		135-218

STIPULATIONS

This case was heard by the undersigned Commissioner in Goose Creek, South Carolina on September 11, 2014

The parties stipulated at the hearing to the following issues:

- (1) No objections to the jurisdiction or venue.
- (2) The Claimant's average weekly wage is \$636.04, yielding a compensation rate of \$424.05.

STATEMENT OF THE CASE

The Claimant maintains that he sustained an injury to his back and legs as a result of a work-related accident that occurred on May 8, 2012. Although the Claimant concedes that he had achieved maximum medical improvement on February 12, 2014, he is seeking a finding of permanent and total disability, seeking an award for lifetime causally related medical care and asserts that the Defendant is entitled to only a credit for 20.5714 weeks due to a prior back claim with the Employer. He is also seeking an award in a lump sum and is requesting Utica/James vs. Anne's allocation language in the Order.

The Claimant maintains that the Defendants are not entitled to any additional credit for any other payments of disability on any prior claims because the payments were for body parts other than the back and that the settlement documents and the Form 19s relating to the settlements do not specifically allocate a number of weeks for the prior injuries. It would be purely speculative for the fact finder to allocate credit for the prior claims when the documents are ambiguous and do not delineate the applicable number of weeks for prior injuries. Additionally, the seminal case on this issue Medlin vs Greenville

County. 401 S.E. 2d 667(SC 1991), only presented "the issue of whether an employee can recover total and permanent benefits under the Workers' Compensation Act for a successive total and permanent injury to *the same body part*." (emphasis added). In the present case, the only prior injury for which the Claimant recovered any disability benefits for his back while working for the Employer was the prior back injury of 10/03/2011 and the specific number of weeks allocated on the Form 19 was 20.5714 weeks. The language in the Clincher that applied to the specific prior injury to the back allocated a sum certain for the "disability claims to include 25% to the spine." However, the Clincher also included an unallocated sum for "compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability and claim for disfigurement or for a change of condition." The settlement also included an unallocated sum for medical and future medical.

The Claimant contends that he has sustained an injury not only to his back but also to his legs because of radiculopathy and he has been assigned a 24% impairment to the lumbar spine and 7% impairment to his right and 7% impairment to his left legs. (APA 4). As such, since he has sustained injuries to more than one body part, he maintains that he is entitled to permanent and total disability benefits because of his lost earnings capacity. Singleton vs. Young Lumber Company. 114 S.E. 2d 837 (SC 1960).

In addition to the above, Claimant maintains that he is entitled to a lump sum award of benefits and also seeks appropriate language in the Order pursuant to James vs. Anne's, Inc. He is planning to file for Social Security Disability benefits. The Claimant is seeking lifetime causally related medical pursuant to the recommendations of his current

authorized treating physician, Dr. Thomas Due.

The Defendants assert that the Claimant is only entitled to an award for permanent partial disability of the back and he would only be entitled to causally related medical care in the future in accordance with Dr. Aymond's recommendations. The Defendants also seek a credit for temporary total disability benefits paid beyond the date of maximum medical improvement or, alternatively, back to the filing of the Form 21 which was on May 13, 2013.

The Defendants seek a credit for all weeks paid for any awards while the Claimant was employed with the Employer. The Defendants rely on SC Code §42-9-170 as the sole determination of whether the Claimant is entitled to a maximum of 500 weeks worth of benefits while under the employment of Mt. Pleasant Waterworks. The Defendants also contend that the language in the prior settlement agreements is clear and unambiguous with respect to the amount that was paid for specific percentages of permanent disability. The Defendants did not state any objection on the record to the Claimant's seeking a lump sum award for his indemnity payments or for the insertion of Utica/James vs. Anne's language in the final Order.

EVIDENCE OF THE CASE The Claimant testified that he is fifty-two (52) years old and married with four (4) children, two of whom are still dependant on him. He was born and raised in Charleston and attended Charleston High School. He graduated with a diploma from Charleston High School but had to repeat the 1st grade and he was socially promoted to the 2nd grade. When he went to Charleston High School, he was provided a vocational diploma, as

opposed to an academic type diploma. After graduating from high school, he worked for the City of Charleston in the Parks Department doing grounds maintenance. He then went into the military and served six (6) years in the Army as a Cannoneer and four (4) years in the Reserves. He did a tour at Desert Storm in the Infantry and was awarded an honorable discharge from the Army.

The Claimant has been working since he was fourteen (14) years old. After getting out of the Army, the Claimant worked at Trident Security as a security guard and did some landscaping and sprinkler installation work. He then worked at Home Depot in the plumbing department stocking shelves on the floor, warehouse and other various duties. He performed similar work at Lowe's. He then did warehouse work for Northern where he stocked tools and equipment. Lastly, he started working for the Employer, Mt. Pleasant Waterworks, and was injured on May 8, 2012. He had been working there for approximately seven (7) years. He was initially hired as a Maintenance Mechanic I and had been promoted to Maintenance Mechanic II. As a Maintenance Mechanic, he repaired metal lined pipes, sewage lines, gravity lines, air release valves, man hole repairs and excavation of anything that involved waste water maintenance.

After he was injured while working for the Employer, he attempted to go back to work but his Employer was unable to accommodate him. He was essentially informed by Human Resources that they couldn't use him anymore and they didn't have suitable employment and he was laid off. (Tr. 14, Lines 4-8). He was informed that he should apply for State Disability Retirement and he has qualified for these benefits.

The Claimant had a prior back injury while working for the Employer before the

accident of May 8, 2012. He had been treated and released by Dr. Aymond with no restrictions, full duty. He testified that he was "perfectly fine" and was "working full duty with no restrictions" at the time of his accident. (Tr. 15, Lines 7-16).

On May 8, 2012, the Claimant injured his back when he was repairing a water line. He was pulling on a pry bar when there was a release of pressure, he came back with the bar and injured his back. The Defendants have admitted the back injury.

The Claimant had spinal surgery on October 31, 2012 consisting of a two level fusion. Dr. Aymond was treating him not only for his low back pain, but also for pain in the backside of both legs and numbness in his toes. The surgery did help to some degree but after he had physical therapy his back started getting weaker and his condition deteriorated. He had numbness in his legs and had problems with his balance. His condition worsened and Dr. Aymond released him as a patient and referred him to Dr. Due for pain management. He has been treated by Dr. Due since August 26, 2013 on a regular basis. The Carrier authorized the referral from Dr. Aymond to Dr. Due and has been paying Dr. Due for the medical services rendered. The Claimant has not seen Dr. Aymond since he was released on June 20, 2013. Dr. Due has been his only authorized treating physician.

The Claimant testified that he is on multiple medications that give him pain relief and relaxes his muscles and eases his spasms. His medication also helps him sleep through the night. However, he still normally wakes up every night and his sleeplessness causes him to be tired, sluggish and lethargic. His medication causes side effects, including dizziness, drowsiness and "messes" with his memory. (Tr. 24, Line 4-Tr. 25, Line 1).

The Claimant testified that if he did not follow the recommendations and limitations as set forth by Dr. Due, he could hurt himself worse. Additionally, if he followed his doctors instructions with respect to limitations, there is no work that he has performed in the past that he could perform within those restrictions. He also stated that if he were to follow the instructions, he did not know of any job that he could perform. (Tr. 26, Line 17-Tr. 27, Line 9).

The Claimant testified that his pain level fluctuates between four (4) and seven (7), depending on whether he has a good day or bad day. (zero (0) being no pain, ten (10) being worst imaginable pain). During an average month, he believes that he would miss approximately eight (8) days from work, even if he could obtain employment. He does some limited gardening for recreation, but has to use clamps to assist him pick up small objects and self limits himself with respect to lifting heavy objects. He has had to hire an individual to do his lawn. He has purchased a "handicap toilet" and grab bars out of his own pocket money. He is limited as far as walking, standing and sitting. He has loss of balance and walks with a limp. He does not feel comfortable walking on uneven surfaces because of his lack of balance. From time to time he feels as if he is falling and has to catch himself. He's limited as far as climbing stairs.

The Claimant testified that he attempted to apply for the various jobs that had been identified by the vocational expert retained by the Carrier. All of the jobs required that he apply online. He does not have sufficient internet skills to do so. One of the jobs that was identified by the Carrier's vocational expert was to work as a security guard. The Claimant testified that he does not believe that he could restrain a violator until a police arrived

based on his physical limitations. This job also required an online application. Another job identified was Headway Workforce Solution to recruit perspective households to participate in the Nielsen TV Ratings. The Claimant testified that he had no experience in educating and recruiting prospective households. Similarly, the Claimant testified that he could not perform the essential functions of the jobs that were identified by the vocational consultant, including a job with the Department of Motor Vehicles, LabCorp and the other jobs that were identified by the Carrier's vocational expert.

The Claimant testified that he went to the SC Department of Vocational Rehabilitation for assistance. They couldn't do anything for him. He was planning on filing for Social Security Disability benefits.

Christopher OUic also testified. He stated that he worked for the Claimant's law firm and physically took the Claimant to the various jobs that had been identified in the report that was completed by the Carrier's vocational expert. One of the jobs that was identified was actually located in Fayetteville, North Carolina. When the Claimant came out from the different job locations, he did not have any written application forms. Instead, he had business cards and a couple of flyers. Mr. OUic testified that he called Hertz that was identified as one of the potential employers. They informed him that the application had to be online.

MEDICAL EVIDENCE After the Claimant's injury, he was referred to Dr. Aymond who is a spinal specialist. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond. He had a fusion at the L4-5, L5-S1 levels. Interbody fusion cages were also implemented.

Following surgery, the Claimant continued to have back and leg pain and Dr. Aymond referred the Claimant to Dr. Thomas Due. Dr. Due has been the Claimant's authorized treating physician since August 26, 2013.

Prior to his referral by Dr. Aymond to Dr. Due, the Claimant was last seen by Dr. Aymond on June 20, 2013. On June 20, 2013, Dr. Aymond assigned the Claimant a 24% impairment rating to the spine as it relates to motion segment integrity loss as well as intermittent radicular pain into his feet...limitations included: lifting restriction of 15 pounds or less and avoid repetitive bending or twisting activities...He is not able to return back to his previous line of work." (APA 30). Dr. Aymond also stated that he had assigned a 24% impairment rating to the spine (whole man)...a percentage of the impairment rating includes as part of the rating consideration for Mr. Lemon's permanent impairment to his feet caused by his back injury and accident of May 8, 2012. (APA 26).

Dr. Due has continued to treat the Claimant on a regular basis. He sees him approximately once every month since the initial date of treatment. On February 28, 2014, Dr. Due assigned the Claimant a "24% impairment to his lumbar spine, a 7% impairment to the right and a 7% impairment to the left legs. Dr. Due stated that the Claimant is unable to return to work at his current employment...limitations include: unable to lift greater than ten (10) pounds, no sitting/standing over 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

Dr. Due has treated the Claimant through medication and injections. Medication includes Norca, Amrix and Flector patches. His diagnoses include "sacroiliac pain, lumbar

facet arthralgia, and post laminectomy lumbar radiculopathy." (APA 1). According to Dr. Due, the Claimant "will need future medical treatment, including, most probable need for ongoing treatment including but not limited to medication, epidurals, facet injections, sacro-ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), surgical consultations. (APA 4).

SUMMARY OF VOCATIONAL EVALUATIONS

The Claimant was interviewed by two (2) vocational experts, namely, David Price, M.Ed., for the Claimant and Jan Westmoreland, M.Ed., for the Defendants.

During her deposition, Ms. Westmoreland conceded that she has never testified or been qualified as an expert witness in the public sector. (Tr. 9, Lines 17-24). The most current medical information that she had available in order to determine the Claimant's employability at the time that she generated her report was from Dr. Due, as opposed to Dr. Aymond. Yet, she relied upon Dr. Aymond's evaluation as well as Dr. Due's evaluation in performing her Labor Market Survey. (Tr. 17, Line 22-Tr. 18, Line 3). She testified that based upon her education, training and experience as a vocational expert she has been instructed to rely on the most current medical information that is available in determining an individual's employability. (Tr. 18, Line 24-Tr. 19, Line 4). She testified that all of the jobs that she identified in her Labor Market Survey required online applications and Mr. Lemon does not have sufficient computer literacy in order to apply online for the various jobs that she identified. (Tr. 43, Lines 2-20). Lastly, Ms. Westmoreland testified that Mr. Lemon would probably miss more than four (4) days of work a month because of his medical condition and that by definition an individual who misses more than four (4) days

of work during a month is considered vocationally disabled. (Tr. 44, Line 14-Tr. 45, Line 5). She also stated that based on Dr. Due's limitations it would be difficult for the Claimant to compete in the open labor market. (Tr. 46, Lines 20-25).

According to the Claimant's vocational expert, David Price, "in my opinion he is completely disabled. Mr. Lemon has reached a point of MMI and is not expected to further improve. As such his disability is most probably permanent. He is not a candidate for vocational rehabilitation. The Claimant has also qualified for State Disability Retirement. (EX 1). Although the Claimant graduated from high school, according to his test scores, his Word Reading was at a 7.5 grade equivalent; Sentence Comprehension, 8.9 grade equivalent; Math Computation, 5.1 grade equivalent; with reading scores falling in the low range. (EX 1).

Based upon the above, the following Finding of Fact are accordingly made:

FINDINGS OF FACT IT IS

FOUND AS A FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. Singleton v. Young Lumber. 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain

radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.

3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.

As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.

4. I find that the award is to be paid in a lump sum.

5. I find that the Claimant is entitled to Utica- Mohawk Mills v. Orr language in this order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to James v. Anne's he is entitled to an award for a lump sum with the insertion of Utica-Mohawk Mills v. Orr language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.

6. The Claimant sustained an admitted injury to his back that occurred on May

8,2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).

7. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).

8. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).

9. The Claimant underwent back surgery on October 31,2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).

10. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.

11. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required

online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

CONCLUSIONS OF LAW Accordingly, as provided in Section 42-17-40 of the South Carolina Worker's Compensation Act, it is the determination of this Commissioner that:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

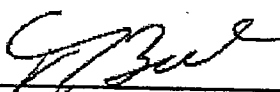
ORDER AND AWARD IT IS THEREFORE ORDERED that the Defendants shall pay all medical expenses that are causally related to the Claimant's compensable injuries and shall continue to

provide medical treatment by Dr. Thomas Due, the authorized treating physician, and shall provide lifetime causally related medical, including medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRTs), and surgical consultations.

IT IS FURTHER ORDERED that the Defendants shall pay permanent total disability benefits to the Claimant at the weekly comp rate of \$424.05 and that said payments shall be made in a lump sum payment, giving the Defendants credit for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing. The Claimant is entitled to Utica, language in the final order. The specific allocation of weeks, taking into consideration attorney's fees and expenses, with the appropriate Utica v. Orr/James v. Anne's language can be done by supplemental order.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
January 7, 2015

By: Shawn DeBruhl, Administrative Assistant to Commissioner Beck

David R. Price M.ED., CRC
222 King Rail Lane
Huger, S.C. 29450

Vocational & Occupational Counseling Services, LLC
Phone & Fax: 843-336-4902
Cell: 843-810-6592

Date: March 26, 2014

VOCATIONAL ASSESSMENT OF DAVID LEMON

Introduction:

David Lemon is a 52 year old former Maintenance Mechanic employed by the Mt. Peasant Water Works where he worked installing and maintaining water lines. On May 8, 2012 he injured his back at work pulling and straining to put a heavy coupling onto a water main. He was evaluated by spine surgeon James Aymond, M.D. and diagnosed with two herniated lumbar discs L4-5 and L5-S1. On October 31, 2012 Dr. Aymond intervened surgically for Discectomy and Posterior Lumbar Interbody Fusion L4-5-S1. Maximum Medical Improvement was achieved on June 20, 2014. Mr. Lemon had a Functional Capacity Evaluation recommending him for Sedentary-Light Physical Demand. He was rated by Dr. Aymond with 24% impairment of the spine and permanently restricted to lifts of fifteen pounds or less with no repetitive bending and twisting. As per Mr. Lemon he was not helped by the surgery. He continues to report severe back and lower extremity pain and remains under the care of Thomas Duc, M.D. for ongoing pain management. On February 28, 2014 Dr. Duc assessed impairment as 24% of the lumbar spine with 7% added for each lower extremity. Mr. Lemon was restricted to no lifting greater than ten pounds, no sitting/standing greater than two hours, no crawling, climbing, pulling, pushing, and no operation of machinery secondary to impairments in judgment from narcotic medication. Since injury Mr. Lemon has not been able to return to his job or any other form of employment. He cannot tolerate prolonged time on his feet, extended periods of sitting, or any use of the lumbar spine for strenuous or repetitive activity. Mr. Lemon has lower extremity weakness, walks with a limp, and continues to require narcotic pain medication several times daily. He is also battling depression and anxiety over an uncertain future. He has been approved for total disability benefits by the South Carolina State Disability Retirement System and is receiving monthly benefits.

Mr. Lemon's present concern is an open worker's compensation claim with unresolved issues of disability compensation. It is in this respect that he is referred today for vocational assessment and opinion on how the impairments from the work injury have impacted his ability to participate in gainful employment. To that end on March 26, 2014 a vocational interview was conducted. Mr. Lemon's medical file was reviewed and he was

asked to provide a detailed symptoms report and estimate of his current physical ability. His medical, educational, and employment histories were taken. Standardized intelligence and achievement testing was administered. Based on the available medical reports, information provided by Mr. Lemon and objective test results, the conclusions and recommendations contained in this report are given with a reasonable degree of vocational certainty and represent my professional opinion as a certified vocational rehabilitation counselor.

Records Reviewed:

James K. Aymond, M.D.
Thomas A. Duc, M.D.
James A. Theising, D.O.
Jay B. Robards, M.D.
David Goltra, M.D.
Jennifer Wetzal, PT, CFCE
Doctors Care
Roper Hospital

Observations:

Mr. Lemon appeared early for vocational assessment. He was noted to be African-America, 5'11", 177 lbs. He walked without aid of a cane but was observed to have a slight antalgic gait. When seated for interview Mr. Lemon frequently shifted positions and got up at about fifteen minute intervals to stand and stretch. He was stoic and did not complain. Mood was depressed as evidenced by one episode of tearfulness when describing the impact of injury on his life. Affect was appropriate. Mr. Lemon was oriented to person, place, time, and situation. Speech was fluent and memory grossly intact. He answered interview questions in an apparent honest manner with no suspicion of deceit, embellishment, or secondary gain. His presentation of symptoms was supported by the medical record and accepted as genuine. Good effort was given on standardized testing. Results are considered valid.

Symptoms Report:

Mr. Lemon described constant low back pain that radiates bilaterally into the lower extremities. Pain is equal on both sides. There is report of weakness, easy fatigue, limping and giving way of the legs. Mr. Lemon has fallen on several occasions. There is

numbness in the toes of both feet. Pace of gait is slow and a lumbar brace is worn whenever Mr. Lemon is ambulatory. He states that he can stand or walk for about 20-30 minutes. In a typical day he is on his feet no more than 2-3 hours total. Mr. Lemon reports that he can sit in a straight chair such as is required for desk work for about 10-15 minutes at a time. He can occasionally lift 10-15 pounds from waist to chest level. He states that he cannot comfortably lift from floor to waist level. Overhead lifting and repetitive lifting, pushing and pulling are avoided. At night Mr. Lemon is frequently awakened by pain. He manages to get about 4-5 hours of non-restorative sleep. Typically he must nap in the daytime to combat fatigue. He is unable to run, jump, or climb ladders. Mr. Lemon avoids repetitive stairs, steep inclines, and rough uneven surfaces. He cannot repetitively twist, bend, stoop, crouch, or crawl. Driving is limited to short durations. Most days Mr. Lemon can be found at home. If he is too active or overexerts, pain is exacerbated and may extend into a prolonged flare of several days. Consequently he avoids most activity. He is able to perform some housework, cook from a stool, cut his grass, and do light vehicle maintenance by working slowly and taking frequent breaks. Occasionally he must lie supine to rest his spine. To occupy his time Mr. Lemon volunteers to read and mentor children at his daughter's school. He does not engage in any strenuous or aerobic hobby activity. He attends church, Bible study, and sings in his choir. He walks his dog.

Pain is managed with Lortab 7.5 mg taken twice daily as needed. Mr. Lemon reports that the medication make him sleepy and causes him to periodically nod off to sleep. He states that his mentation and reaction times are slowed by the medication. Memory, attention, concentration, and judgment are reported to be impaired. Mr. Lemon states that the medications cause him to feel anxious and irritable. Occasionally he experiences disorientation and confusion. There is report of constipation and erectile dysfunction.

As a result of chronic pain, stress, and physical impairment Mr. Lemon admits to periods of depression. He states that he has good days and bad days. On bad days he feels sad, lethargic, unmotivated, and low on energy. He is less social and more withdrawn. He has experienced suicidal thoughts but states that this is no longer present. He tries to dwell on positives.

Past Medical History:

Mr. Lemon reports that he injured his back about eight months prior to the May 2012 injury. He was treated and returned to full duty. There have been surgeries on the left and right shoulders for rotator cuff repair. Mr. Lemon reports history of hypertension

and chest pain with negative heart cathertization. No history is given for alcohol abuse, substance abuse, or mental illness. There are no known major allergies.

Social History:

Mr. Lemon lives in Charleston, S.C. with his wife. He has been married to his second wife for two years. They have no biological children. He was married the first time for sixteen year and has a sixteen year old daughter that lives with her mother. He has three children and eight grandchildren from other relationships. Mr. Lemon has a valid driver's license with no history of DUI, DUS, or felony conviction. Current income consists of \$424 per week in worker's compensation benefits and \$525 per month is disability retirement income from the state.

Education:

Mr. Lemon reports that he graduated from Charleston High School in 1980. He attended classes at the Clemson University Agriculture Extension for six months and earned a certificate in Horticulture. Through a process of work experience and testing he earned a Wastewater Operator Class B License. Mr. Lemon served ten years in the U.S. Army. He is a veteran of Desert Storm I. He was active for 6 years as a Cannoneer and served 4 years in a reserve unit as an Artillery Observer.

Results of *The Wide Range Achievement Tests, 3rd Revision, Blue Form* are:

	<u>Standard Score</u>	<u>Percentile</u>	<u>Grade Equivalent</u>
Word Reading-	81	10	7.5
Sentence Comprehension-	82	12	8.9
Math Computation-	80	9	5.1
Reading Composite-	79	8	N.A.

Reading Scores fall in the *Low Range*. Math Score is in the *Low to Below Average Range*.

Intelligence was assessed with *Revised BETA III IQ Test*:

IQ- 84

Percentile- 6

Scores fall in the *Low-Average of intelligence*.

Employment History:

Mr. Lemon was employed by The Mt. Pleasant Water Works as a Maintenance Mechanic for 6 ½ years. He reports that he was earning \$16.75 per hour at the time of injury. He worked six months as a Sales Associate at Northern Tool. Mr. Lemon worked 3 years at Lowes Home Improvement as Head of the Plumbing Department. He worked 5 years as a Sales Associate in the Plumbing Department of Home Depot. Mr. Lemon states that his occupation at the time of injury required him to lift heavy water pipe weighing from 50 to 100 pounds. This would be consistent with the U.S. Department of Labor's definition for HEAVY WORK or:

"Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects."

Conclusions and Recommendations:

David Lemon is a fifty-two year old Maintenance Mechanic for the Mt. Pleasant Water Works. He injured his back at work on May 8, 2012 and was diagnosed with two levels of disc herniations in his lumbar spine. He had surgery for Posterior Lumbar Interbody Fusion L4-5 and L5-S1 on October 5, 2012. He has attained MMI and is rated with 24% permanent impairment of the spine by his spine surgeon James Aymond, M.D. Permanent restrictions on activity provided by Dr. Aymond are designated Sedentary-Light with a 15 pound weight limit and no repetitive bending and twisting of the lumbar spine. Treating pain management physician Thomas Duc, M.D. rated impairment as 24% to the lumbar spine with 7% added to the left lower extremity and 7% added to the right lower extremity. Activity restrictions limit lifting to ten pounds, no sitting or standing greater than two hours, no crawling, climbing, pushing or pulling. Narcotic pain medications are noted by Dr. Duc to impair judgment and preclude Mr. Lemon from operating machinery. In addition Mr. Lemon requires position changes frequently for comfort. He cannot run, jump, climb or crawl. He is unable to easily walk over rough uneven ground or steep inclines. He cannot use his spine or lower extremities for strenuous or repetitive activity. Mr. Lemon is slow and compromised in all functions of daily living. He is also experiencing periods of disruptive depression. At this time he is living a highly sheltered sedentary lifestyle. Mr. Lemon reports little benefit obtained

from surgery as pain levels remain high and regular administrations of narcotic medication are required daily for symptoms management. This of course has led to significant cognitive impairment as well as issues of impaired coordination and reaction times. Mr. Lemon has not been able to work since the day of his accident and reports that he was terminated from employment in June 2012. He was subsequently awarded total disability retirement benefits from the S.C. State Disability Retirement System.

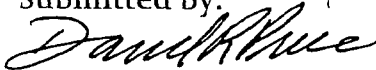
As to his future Mr. Lemon is in a difficult place. All of his past work experience has been dependent on good physical conditioning, being able to walk and stand for long periods, and use his back for exerting significant force. He has no experience with sedentary clerical, administrative, managerial, or technical work. With his current limitations Mr. Lemon will be excluded from production and manufacturing work, agriculture, construction, and forestry occupations. His medications will prevent work in commercial driving, equipment operation, and being around dangerous machinery. He is precluded from the food and beverage industry, service occupations, and any other occupation requiring the exertion of significant forces, meaningful standing, sitting, or repetitive use of the spine. Mr. Lemon has lower extremity pain and weakness that will prevent him from working on his feet. He has sitting intolerance that precludes desk and bench work. With sedentary-light restriction, this essentially rules out all forms of employment. There is of course the medication issue and side effects that will interfere with attention, concentration, alertness, and potentially could lead to errors in the workplace. Any employer that hires Mr. Lemon must assume this liability. Furthermore Mr. Lemon did not adequately profit from his educational experience and has significant academic deficits that likely will disqualify him from sedentary work. Typically, these jobs are reserved for those with higher education or technical skills. As someone who has performed physical work his entire life Mr. Lemon is not adequately prepared for work behind a desk.

Before Mr. Lemon can perform work he must be able to actually obtain employment. With his history this is likely to be extremely difficult. Mr. Lemon is known to have been injured at work and required spine surgery. All employers know that there is a high rate of recurrent back injury. None want it to happen in their workplace. Mr. Lemon's history of worker's compensation claims will not endear him to prospective employers. Mr. Lemon has medical restrictions that require major workplace accommodations. He has not demonstrated an ability to consistently work at a sustained productive pace, meet daily attendance expectations, or adhere to the standards of 8-hour days and 40-hour week. There are the issues of liability associated with pain medications. Mr. Lemon has basically been reduced to a nonskilled level and has been absent from the workforce for

nearly two years. He presents with so many red-flag issues that I do not believe there is a reasonable chance employers will give him serious consideration for a job. In the unlikely situation that he does get an opportunity to work, I do not believe Mr. Lemon is capable of performing it to the expectations or standards of gainful employment.

Therefore, based on the available information and with a reasonable degree of vocational certainty, it is my opinion that the impairments from the 2012 work injury have rendered David Lemon incapable of performing gainful employment. In my opinion he is completely disabled. Mr. Lemon has reached a point of maximum medical improvement and is not expected to further improve. As such his disability is most probably permanent. He is not a candidate for vocational rehabilitation. Mr. Lemon has been determined totally disabled by the state disability system. I believe that he meets the criteria for social security disability retirement and see this as a viable option. Unfortunately, I have nothing to offer Mr. Lemon from the vocational perspective.

Submitted by:



David R. Price M. ED., CRC

Certified Vocational Rehabilitation Counselor



Claimant's Name: David Lemon SSN: 251-31-1250 Employer's Name: Mt. Pleasant Waterworks
Address: PO Box 12055 Address: 1619 Rifle Range Road
City: Charleston State: SC Zip: 29422 City: Mt. Pleasant State: SC Zip: 29465
Home Phone: (843) 609 - 2889 Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Carl H. Jacobson Law Firm: Uricchio, Howe & Krell Preparer's Phone #: (843) 723 - 7491

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 05/08/2012
(m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Matt Schonfeld, Esq., Willson, Jones, Carter & Baxley address 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464 on the 20th day of January 2015, by X first class postage _____ certifi mail _____ personal service.

Preparer's Signature [Signature] Attorney for Claimant Carl@uricchio.com Title _____ Email _____ January 20, 2015 Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 6:205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

1. Did the Single Commissioner err by finding "as of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170." (Finding of Fact No. 3).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this

case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

2. The Single Commissioner erred in concluding that "§42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive." (Conclusion of Law No. 3)

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same

employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

3. The Single Commissioner erred in ordering that the Defendants be credited "for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing." (Order and Award).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability

benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

Respectfully Submitted,

Carl H. Jacobson

January 20, 2015

000029

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1205924

David B. Lemon,)
)
Claimant,)
)
v.)
)
Mt. Pleasant Waterworks,)
)
Employer,)
)
and)
)
State Accident Fund,)
)
Carrier/Defendants.)
-----)

COPY

FULL COMMISSION HEARING

Monday, April 20, 2015
1:33 p.m. - 1:57 p.m.

The Full Commission Hearing was heard before Commissioners Melody L. James, Aisha Taylor and Avery B. Wilkerson, Jr. at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 20th day of April, 2015, before Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina.



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000030

APPEARANCES

Carl H. Jacobson, Esquire

Uricchio, Howe, Krell, Jacobson, Toporek, Theos, & Keith, P.A.

17 ½ Broad Street

Post Office Box 399

Charleston, South Carolina 29402-0399

Attorney for the Claimant

Matthew A. Schonfeld, Esquire

Holder, Padgett, Littlejohn, & Prickett, L.L.C.

210 Wingo Way, Suite 201

Mt. Pleasant, South Carolina 29464

Attorney for the Respondent

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



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1 COURT REPORTER: Today is Monday, April 20, 2015.

2 This is South Carolina Workers' Compensation
3 Case number 1205924. This is the case of David
4 B. Lemon, Claimant versus Mt. Pleasant Water
5 Works, Employer, and the State Accident Fund.
6 The Appellant is the Claimant represented by
7 Carl H. Jacobson. The Respondent is
8 represented by Matthew Schonfeld. Each side is
9 allowed 10 minutes for oral argument, and the
10 appellant three minutes in reply. You are
11 requested to argue the grounds of exception and
12 stay within the record.

13 ARGUMENT BY MR. JACOBSON:

14 MR. JACOBSON: Good afternoon. I'm Carl Jacobson and
15 I represent David Lemon. He is the Appellant
16 in this case. It's unusual to appeal a case
17 where an Employee was awarded permanent total
18 disability benefits. But we are appealing one
19 part of that Order. In addition to awarding
20 the Claimant permanent total disability
21 benefits, the Hearing Commissioner awarded the
22 Defendants a credit for weeks that have been
23 paid to the Claimant for prior injuries while
24 employed by the same Employer. We maintain
25 that the code section that the commissioner



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1. referenced for his authority to award credit
2. for multiple claims by the same Employer does
3. not provide the statutory authority for the
4. commissioner. I would like you to look, if you
5. would please -- I would like to refer you to
6. the order of the single commissioner to the
7. findings of fact. Finding of fact number one,
8. which is on page 12 of the Order, I find, based
9. upon the greater weight of the evidence, the
10. Claimant is permanently and totally disabled
11. pursuant to South Carolina Code Section 42-9-
12. 10, 42-9-10, not 42-9-30, not 42-9-20, but 42-
13. 9-10. And as such his claim for permanency not
14. restricted to the schedule, because he has an
15. injury to both body parts, his back, and his
16. legs. And he cited Singleton versus Young
17. Lumber. As you know, Singleton versus Young
18. Lumber indicates that when a claimant has an
19. injury to more than one body part, he can
20. claim general disability under wage earning,
21. wage earning which is 42-9-10. Commissioner
22. then went on to state that under paragraph
23. three, I find that this is the Claimant's fifth
24. work accident while employed by Mt. Pleasant
25. Water Works. He referenced injuries to the



1 shoulders and to the back. And the
2 commissioner gave a credit for 321 weeks and
3 I am representing to you that 199 weeks -- and
4 I will -- I'm sure that defense counsel will
5 stipulate 199 weeks is the total number of
6 weeks that we're talking about today. That's
7 the credit for the prior benefits that the
8 Claimant received for the multiple injuries
9 while employed by the same Employer. One-
10 hundred and ninety-nine weeks, that's the
11 subject of today's case. Now, the commissioner
12 said that -

13 COMMISSIONER WILKERSON: I mean, do y'all agree on
14 that?

15 MR. JACOBSON: We agree on 199, don't we?

16 MR. SCHONFELD: Yeah.

17 MR. JACOBSON: Now, the question, but the question
18 is this. The question is, did the commissioner
19 error by awarding the credit for the 199 weeks.
20 Page 15, commissioner found 42-9-10 provides
21 for permanent total disability. 43-9-170
22 provides for the maximum exposure, the payment
23 of disability benefits is 500 weeks for
24 multiple claims filed by an employee by the
25 same employer. The maximum number is 500



1 weeks. I specifically find there's no need to
2 look any further than the plain language of 42-
3 9-170 to determine the number of weeks of
4 credit the defendant's entitled to receive,
5 that's the error. That is an error of law.
6 There's no factual disputes here. Now, I also
7 have included with my brief, the code section
8 42-9-170, because that is the authority the
9 commissioner relied on in this case. And the
10 only authority that he relied on and decided to
11 give the employer credit for multiple -- for
12 when you have prior injuries on the same
13 employer. 42-9-170 is broken down in two
14 different sub-sections A & B. A doesn't apply
15 because that sub-section was effective only
16 until June 30, 2008. It doesn't apply. Now,
17 the only sub-section that could possibly apply
18 is B. Does that apply in this case. The
19 answer's clearly no. Why, because this code
20 section says that if an employee receives a
21 permanent injury, as specified in 42-9-30,
22 which is a scheduled or the second paragraph in
23 section 42-9-10, which is a paragraph dealing
24 with the total loss of use of two hands, two
25 feet, two legs, and so forth. After having



1 sustained another permanent injury in the same
2 employment, then in no case can the total
3 amount exceed 500 weeks. So if the -

4 **COMMISSIONER TAYLOR:** It doesn't say then, it says
5 and.

6 **MR. JACOBSON:** But it says, if an employee receives a
7 permanent injury as specified in 42-9-30, and
8 in this case the permanent injury that the
9 commissioner awarded is permanent total
10 pursuant to 42-9-10. What the second paragraph
11 of 42-9-10, and that's this paragraph right
12 here (indicating). Yeah, 42-9-10 is broken out
13 in several paragraphs. A is the general
14 disability statute dealing with Singleton,
15 where you have the loss of use of the back and
16 multiple members to make a lost wage capacity.
17 The commissioner didn't say in his Order, 42-9-
18 10(a), he said 42-9-10 and referenced
19 Singleton. So it has to be 42-9-10(a). It
20 can't be the quadriplegic statute. It can't be
21 this section because we don't have a loss of
22 use -- a total loss of use of hands, arms,
23 shoulders, legs and hips. B applies in the
24 case where you have a claimant who has both
25 hands chopped off by a press or something like



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1 that. A is the general disability statute
2 dealing with lost earnings where you have a
3 Singleton type case. So that's the type of
4 disability that's been awarded in this case.
5 So let's go back to 42-9-170. There's a
6 preface -- there's a preface to this particular
7 code section. In order for this code section
8 to apply, an employee has to receive a
9 permanent injury, as sustained in 30, which we
10 don't have in this case. But the second
11 paragraph for 42-9-10, that is the only way
12 that this statute can be read to apply in this
13 case. Now, if this award in this case were
14 made pursuant to 42-9-30, the 500 weeks would
15 apply. If by some strange coincidence, the
16 commissioner made a finding of 42-9-10(b),
17 which we don't have total loss of the use of
18 the hands, feet, and so forth, then this would
19 apply. I don't know why the legislature did
20 this. I suspect I know why, that's because
21 before they had the statute an interim employee
22 could receive Second Injury Fund benefits.
23 Where the employer would pay permanent total,
24 then be reimbursed by the Second Injury Fund.
25 But the legislature, whether they meant to or



1 not, only allows for a credit and for this
2 section of 500 weeks to apply only when you
3 have permanency awarded pursuant to 42-9-30, or
4 the second paragraph of 42-9-10(b). Now,
5 defense counsel is going to argue in this case
6 that the commissioner's finding of perm total
7 was pursuant to 42-9-10(b). And that's a real
8 stretch of the imagination, because in this
9 case we don't have the loss -- the kind of loss
10 that's actually covered by B. 42-9-10(b)
11 contemplates the total loss of the use of the
12 hands, or a total loss of use of the feet, or
13 the hips and so forth. And that's a schedule,
14 it's not -

15 COMMISSIONER WILKERSON: Tell me where it says the
16 total loss?

17 COMMISSIONER TAYLOR: It doesn't say total.

18 MR. JACOBSON: It doesn't say total loss, but it says
19 contemplate ---

20 COMMISSIONER WILKERSON: It says the loss of.

21 MR. JACOBSON: That means it's contemplating to be
22 the loss of. Otherwise, if you have the loss,
23 does that mean if you have a claimant that has
24 10 percent loss of use of both hands, he's
25 entitled to perm total and the 42-9-10(b)?



1 COMMISSIONER WILKERSON: Depends on what his job is.
2 If he's a taxi car driver.

3 MR. JACOBSON: But I don't -- well, and that
4 wouldn't be the Singleton case. And the
5 commissioner specifically found and 42-9 -- and
6 under findings of fact awarded benefits
7 pursuant to 42-9-10 and referenced Singleton,
8 which is a general disability statute. I think
9 in this particular case, considering the fact
10 that the Claimant only had a seven percent loss
11 of use of both legs, it would hard to believe
12 that he was awarded perm total because of seven
13 percent loss of use of both legs.

14 COMMISSIONER TAYLOR: Well, again, doesn't that
15 depend on what his job is and whether that
16 seven percent affected the job. Because B does
17 not say total. It doesn't say total.

18 COMMISSIONER WILKERSON: It just says loss of.

19 COMMISSIONER TAYLOR: It just says loss of. And in
20 this case, he lost seven percent to each leg.

21 MR. JACOBSON: I guess you have to look at the
22 contents of the findings. You have to look at
23 the whole Order in its entirety to make sense.
24 And see what is the commissioner awarding in
25 this case. To look at -- the simplest answer



1 to that is you look at finding number one,
2 where it says 42-9-10, he talks about
3 Singleton. He doesn't say I'm finding that
4 this man is permanently totally disabled
5 because of the loss of use of both hands or
6 both feet. Now, you can remand this back to
7 the commissioner and ask, did you mean 42-9-10
8 A or B, if you want, or you can just read the
9 Order in its entirety and look at the evidence
10 that was presented and give it a meaning that
11 just is consistent with the evidence in this
12 case. The commissioner also relied upon the
13 vocational expert testimony and that also was
14 based on wage earning. Wage earning which is
15 Singleton, which is 42-9-10(a). But we could
16 have it remanded, but I think it would be a
17 waste of time. I think it's only one common
18 sense practical application that if the reading
19 of this to be 42-9-10(a).

20 **COMMISSIONER TAYLOR:** And you'll have a few minutes,
21 but I do want you to address. So even if we,
22 you know, look at the various points of the
23 statute. Essentially, your argument is that a
24 person could collect more than 500 weeks from
25 the same employer, generally speaking.



1 MR. JACOBSON: Only -- but no more than 500 weeks
2 per accident. And that's what I think is the
3 limitation. I think that if this statute 42-9-
4 170 doesn't apply, then you're back to 42-9-
5 10(a). And I think there's a limitation of 500
6 weeks. So I believe that an individual who's
7 injured and has multiple injuries with the same
8 employer can receive 50 weeks for this
9 accident, 100 weeks for this accident, 500
10 weeks for this accident. As long as there's no
11 more than 500 weeks per accident. Because 42-
12 9-10(a) talks about the limitation being -

13 COMMISSIONER WILKERSON: Tell me where the law says
14 per accident.

15 MR. JACOBSON: Under 42-9-10(a).. It says when -

16 COMMISSIONER WILKERSON: We don't know that he chose
17 42-9-10 -

18 MR. JACOBSON: 42-9-10(a) says that when incapacity
19 for work resulting from an injury is total,
20 then the amount, the compensation cannot exceed
21 500 weeks. So if 42-9-170 doesn't apply, and
22 it doesn't, if it doesn't apply then they're
23 limited to 500 weeks. So therefore, the
24 employee is in no -- the legislature maybe,
25 they made a mistake, maybe they did make a



1 mistake. All I can do is read the statute.
2 And 42-9-170 clearly does not apply when the
3 individual is awarded benefits under 42-9-
4 10(a). Now, if you want a find 42-9-10 that
5 the commissioner meant 42-9-10(b), I think
6 that's a stretch in this case, based on a seven
7 percent impairment to the legs and no reference
8 to the code section.

9 COMMISSIONER WILKERSON: He doesn't say what section
10 that he found it under.

11 MR. JACOBSON: He doesn't, we can remand it back to
12 the commissioner and find what section he
13 wanted.

14 COMMISSIONER WILKERSON: If it's the entire section
15 and you would take the encompassing entire
16 section and apply the law as opposed to pick A
17 or B or C, would you not?

18 MR. JACOBSON: Well, you know, it's not C because
19 that deals with -

20 COMMISSIONER WILKERSON: Absolutely. I don't
21 disagree with that.

22 MR. JACOBSON: You know it's not B because that
23 really is -- I don't how many people -

24 COMMISSIONER WILKERSON: Tell me how we know that.
25 Tell me how we know that.



1 MR. JACOBSON: Because the common interpretation of
2 B is when you have loss of use of both hands
3 and both feet, such that the injury and the
4 disability is resulting from that. Now, how do
5 I know what -- why am I saying 42-9-10(a),
6 because the commissioner specifically used the
7 word Singleton, which is -- Singleton stands
8 for the proposition of wage earning. There are
9 two ways of getting permanent total. One is
10 under the schedule and one is under general
11 disability. Now, if you look at the -- go
12 ahead.

13 COMMISSIONER JAMES: I don't want to cut you off,
14 but I thought if we go ahead and hear, unless
15 some of the commissioner's wants to go ahead
16 and hear the other argument, then we're going
17 to have questions for both.

18 MR. JACOBSON: Okay. Sure.

19 COMMISSIONER JAMES: I'm sure we won't cut it off at
20 three minutes. We'll probably have some
21 additional questions and I'm sure we'll have
22 some additional questions of his response.

23 ARGUMENT BY MR. SCHONFELD:

24 MR. SCHONFELD: All right. Good afternoon,
25 Commissioners. May it please the Commission.



1 Looking at the context of the injury and the
2 nature of it and how Mr. Lemon was found to be
3 permanently and totally disabled it's going to
4 become clear that the single commissioner's
5 decision to award the credit to Defendants for
6 the 199 week was the correct decision.

7 **COMMISSIONER JAMES:** Did he do it under B? Is that
8 your theory. That's what Mr. Jacobson says
9 it's going to be.

10 **MR. SCHONFELD:** I believe it's under B,
11 Commissioner.

12 **COMMISSIONER JAMES:** Well, let me ask you this. If
13 you read B, the loss of both hands, and you
14 read it not to be the entire loss of both
15 hands, just some loss of hands. Then a severe
16 carpel tunnel syndrome case that a person can
17 do something else, they wouldn't have to prove
18 the loss of income. They could just go under
19 this and say they were P&T, so you basically
20 just change the whole construction of all of
21 the act. Tell me how that wouldn't be complete
22 loss?

23 **MR. SCHONFELD:** Because there are claimants -- under
24 42-9-10, you still have to prove A. Just
25 because you have loss of use -



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1 COMMISSIONER JAMES: It says loss of both hands, if
2 you read B, okay, because we've got A, B, and
3 C. If you read B, it says loss of both hands
4 and then, of course, you can have two arms.
5 You get combination of anything. And then it
6 says, it constitutes total and permanent
7 disability. Okay, as opposed to A, with the
8 Singleton -- going beyond Singleton and then
9 showing the continued disability. So how --
10 and I'm just trying to read everything
11 together. But I've got to read it also as an
12 act. And I don't know if perhaps,
13 legislatively, you know -- and if it is that
14 way, it is that way. But if you interpret B to
15 be that way, and I read it's plain meaning, it
16 says loss of those body parts constitutes P&T.
17 It doesn't say you have to come in with both.
18 So in that case somebody could come in -- if
19 you argue it's any loss, they could come in and
20 say, well, this was my carpel tunnel with both
21 hands and I don't have to show you anything
22 else, Commissioner, other than B. And I don't
23 think that your construction in that case would
24 be the same construction that you're arguing
25 today. So I'm just trying to, you know -- I'm



1 trying to put everything together here. So
2 that's my question.

3 **MR. SCHONFELD:** Commissioner, first of all, the
4 reference to Singleton doesn't mean that the
5 commissioner was only talking about A just by
6 virtue of the fact that Singleton's referenced.
7 Singleton -

8 **COMMISSIONER JAMES:** I didn't say that. I don't
9 know what the commissioner was talking about.
10 We may have to make that decision or we may
11 have to remand it to him. But what I'm asking
12 you, your position then would be that it would
13 be in B. I'm not saying just because he
14 happened to mention Singleton. But your
15 construction in B -- and you think the
16 commissioner meant B. How did the commissioner
17 mean B, and B not mean what I just said, that
18 it could possibly mean under your construction.

19 **MR. SCHONFELD:** Commissioner, B, first of all,
20 there's no qualification as to the extent of
21 the loss. And just like 42-9-30, the schedule
22 member that uses the same language, loss of
23 this member, loss of that member. So -- and it
24 doesn't say total loss. It's loss of use of
25 his member, you get a max of max weeks. So the



1 language is consistent in the 42-9-10, 20, and
2 30 as far as loss. The second -

3 **COMMISSIONER JAMES:** So someone can come in with
4 carpal tunnel in both hands -- or let's say
5 their a desk person and they have some loss of
6 use in their legs. And they could do -- and
7 you read this it says the loss constitutes
8 total and permanent disability. So any loss is
9 how you're interpreting that.

10 **MR. SCHONFELD:** It can be proven under B with any
11 extent of loss. So someone that relies heavily
12 on both of their hands, somebody in the
13 logging industry that has to be maneuvering
14 heavy items, it doesn't -- it may not take
15 much loss of use of each hand. For example, as
16 a result of carpal tunnel syndrome and surgery
17 and the resulting disability thereafter, it may
18 not take much disability for a person like
19 that, given their extent of education, or lack
20 thereof, to be found permanently and totally
21 disabled. I don't believe that B stands for
22 the proposition that the Claimant is removed of
23 the duty to still prove -

24 **COMMISSIONER JAMES:** It says constitutes. If I read
25 it the way you say it, it says constitutes.



1 Whereas A has to do with continuing disability.
2 Which then you see people get out and they show
3 the evidence of the disability voc assessment
4 or whatever avenues.

5 **MR. SCHONFELD:** Commissioner, B, it can't be read in
6 a vacuum just in and of itself.

7 **COMMISSIONER JAMES:** That's what I'm saying. That's
8 why I'm reading all of it. I'm looking at the
9 whole act. And if I read it that way I have to
10 look and say how it's going to be interpreted
11 on another day too.

12 **MR. SCHONFELD:** Commissioner, I think B still
13 references back to A, because it says to be
14 compensated according to the provisions of this
15 section. So the two of them are inextricably
16 intertwined. I think when the legislature in
17 42-9-170 was making a distinction, when it
18 specifically wrote the second paragraph of 42-
19 9-10, I think the only reason why they were
20 doing that was to make sure that we're not
21 talking about C. We're not talking about
22 permanent brain injury. We're not talking
23 about lifetime benefits. Because it could be
24 talking about lifetime benefits if there's
25 limitation of 500 weeks. Because they say,



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1 okay, it's got be under the second paragraph.
2 So that coupled with the language and the
3 injury as described by the commissioner makes
4 its clear that although he didn't put 42-9-(b)
5 (sic) in there, when he says here's why I find
6 that the claim is entitled to permanent and
7 total disability under 42-9-10. It's because
8 of loss of use of the back and injury to both
9 legs, which puts it squarely within paragraph
10 B. And that's why the decision that it applies
11 was correct. And then moving on to the
12 decision to award credit was also correct.
13 Because 42-9-170 makes it clear that when an
14 injury under 42-9-30, or the second paragraph
15 of 42-9-10 happens after some other permanent
16 injury and it doesn't have that limiting
17 language. It doesn't limit it to body parts.
18 It doesn't limit the compensation either. It
19 doesn't limit the compensation to temporary
20 compensation, or compensation that's awarded
21 for permanent partial disability. It just says
22 permanent injuries, same employment and
23 compensation. Mr. Lemon was awarded
24 compensation for prior injuries that were
25 permanent in nature with the same employer.



1 Therefore, the max amount he can get in total
2 is 500 weeks. And he would have exceeded that
3 were he to be awarded a permanent and total
4 disability from this injury, in and of itself.
5 So not only was the decision to find that 42-9-
6 170 applied in this case, but the decision to
7 award the credit as it was awarded, which is
8 199 weeks, was also proper.

9 COMMISSIONER WILKERSON: Y'all agreed to some credit
10 on the record anyway.

11 MR. JACOBSON: If the commission had ruled that way,
12 we would have agreed to that. That was only 20
13 weeks -- if you look at all the Form 19s in the
14 case. The only Form 19 that actually laid out
15 a certain number of weeks for a back injury was
16 like 22 weeks. And that was a -- my argument
17 to commission was if you were going to find a
18 credit, that would be the only credit that would
19 apply.

20 MR. SCHONFELD: Thank you. I haven't yielded any of
21 my time. I appreciate it.

22 MR. JACOBSON: Well, he asked me a question.

23 COMMISSIONER JAMES: We're not going -- we're letting
24 everybody go at it.

25 COMMISSIONER WILKERSON: We'll give you some extra



1 time.

2 COMMISSIONER JAMES: Yeah.

3 MR. SCHONFELD: And just to briefly talk about
4 whether a remand would appropriate in this
5 case. I don't know that it's needed,
6 especially given the language that was used in
7 the findings of fact and that this is a very
8 specific question of law and interpretation of
9 statute. The full commission is perfectly
10 within its purview of finding additional facts
11 of its own, which it can do per the statute.
12 So I don't that remand gets us any further than
13 we need to get. I think it's clear from the
14 findings of fact, the language and the type of
15 injury that the commissioner took into account
16 when he found that Mr. Lemon was at permanently
17 total disability.

18 MS. JAMES: Well, whether it's the single
19 commissioner or whether it's us someone has to
20 address whether it was under B or A, how the
21 award was given in order to be able to apply
22 42-9-170. Because the legislatures is specific
23 with how they want the credit applied.

24 MR. SCHONFELD: Which can be done in this case,
25 Commissioner, based on all of the findings, the



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1 fact and the evidence that was submitted.
2 There can be a finding extrapolated from all of
3 that it was really under the second paragraph
4 of 42-9-10 making 42-9-170 applicable in this
5 case. There's enough evidence that was
6 considered and is findings of fact. I think
7 we're explicit enough for there to be an
8 additional finding of fact or at least an
9 addendum to that finding of fact sustaining the
10 single commissioner's decision in this case.
11 Thank you.

12 REPLY BY MR. JACOBSON:

13 MR. JACOBSON: I think we are at the point that you
14 have to look at 42-9-170. That only applies to
15 give the employer a credit, if in this
16 particular case, the commissioner made specific
17 findings with regards to this particular
18 permanent and total disability claim. If the
19 commissioner had intended to give a credit
20 pursuant to this statute, he also would have
21 specifically had to find perm total pursuant
22 to 42-9-30 or he would have had to make a
23 specific finding of 42-9-10. He did not. To
24 the contrary, he found the greater weight of
25 the evidence was permanent and total disability



1 and referenced Singleton. That clearly puts
2 into focus the economic model of disability.

3 COMMISSIONER WILKERSON: How do we know that, based
4 on his findings? He says it is clearly under
5 42 -

6 MR. JACOBSON: Because 42-9-10, the second paragraph
7 of 42-9-10 just simply doesn't apply in this
8 case, because I agree with Commissioner James
9 that if you were to interpret it that way, then
10 all a claimant would have to do is come into
11 the court and say I've got a partial loss of
12 use of both hands and both feet, partial loss
13 and that would constitute perm total
14 disability. I don't know if any commissioners
15 that made any awards based, as a matter of law,
16 that just when you have partial loss of use of
17 a hand, both hands, that that constitutes perm
18 total.

19 COMMISSIONER WILKERSON: I've had one. Five percent
20 carpel tunnel syndrome, perm total disabled.

21 MR. JACOBSON: But there would be no discretion
22 under that statute if you have -- under 42-9-
23 10, second paragraph there wouldn't be
24 discretionary for the commissioner. It says it
25 constitutes as a matter of law. Any partial



1 loss of use whether or not the persons back to
2 work or not. So under that code section, you
3 could have somebody who has partial loss of use
4 of the hands and working and get perm total.
5 I don't think that was the intent of 42-9-10,
6 the second paragraph. Now, I've read this code
7 section hundreds of times and never really --
8 it didn't make any sense. I didn't have to
9 interpret it until this case. So I think maybe
10 in the past a lot of commissioners or a lot of
11 cases have been -- just automatically employers
12 were given credits for prior awards or maybe
13 not. It may just have happened. But now that
14 you're looking at the statute, there's no way
15 around it. Now, I have a reason why I think
16 the statute's written this way. And that's
17 this, why should an employee who's permanently
18 totally from an injury, why should that
19 employee be treated any differently than an
20 employee who's injured on the job and didn't
21 have injuries from any other employer. In
22 other words, if I'm injured and I get a
23 permanent injury from job A and I go to work
24 for job B and I get perm total, there's no
25 credit from this second job for the

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1 compensation I received from the first job.
2 But the reason this statute was designed or
3 written this way was because under the old law
4 there was an incentive for employers to
5 continue to have their employees employed even
6 after successive injuries and they were limited
7 to no more than 500 weeks. But the employee
8 could get additional benefits by the Second
9 Injury Fund. And that's the missing link.

10 COMMISSIONER WILKERSON: You can't get additional
11 benefits -

12 MR. JACOBSON: Under the old law -

13 COMMISSIONER WILKERSON: -- a recovery for the
14 amount paid because of that.

15 MR. JACOBSON: Right. So the incentive for the,
16 under the old law the incentive for the
17 employer was I'll keep this person employed and
18 I may have to pay perm total, but I'm going to
19 get my money back from the Second Injury Fund
20 because I'm being a good employer by keeping
21 this injured employee on the job. When the
22 legislature changed this particular law, they
23 left that part out.

24 COMMISSIONER WILKERSON: Well, let me ask a
25 question. The part you may have -



1 COMMISSIONER JAMES: That may be the point. They
2 may have constructed it in a way that they
3 meant to take the B out and just say 42-9-10,
4 because it almost mirrors the one that they
5 said is no longer valid.

6 COMMISSIONER WILKERSON: Let me ask how do you
7 interpret, and in no case exceeding 500 weeks?

8 MR. JACOBSON: That only applies if the first part
9 applies. In other words, you have to read --
10 it says under B, if an employee receives a perm
11 injury -

12 COMMISSIONER WILKERSON: He included both A and B in
13 his decision, did he not?

14 MR. JACOBSON: In his decision he said -- in the
15 decision the commissioner simply found that the
16 Claimant's permanently total disabled pursuant
17 to 42-9-10. He did not say anything about 42-
18 9-10(b). He did not say anything about 42-9-
19 30.

20 COMMISSIONER WILKERSON: He just said 42-9 -

21 MR. JACOBSON: 42-9-10.

22 COMMISSIONER WILKERSON: Yeah, but he also said -

23 MR. JACOBSON: And then he also said, I'm
24 interpreting this as, you know, Singleton
25 applies in this case.



1 COMMISSIONER WILKERSON: It says, I specifically find
2 that I need not look any further than the plain
3 language of SC Code 42-9-170 -

4 MR. JACOBSON: That's the error. That's what we're
5 alleging is error law. Because what he did is
6 he said, I'm looking at 42-9-170 and I'm seeing
7 that -- what he said, was that if you look 42-
8 9-170(b) --

9 COMMISSIONER WILKERSON: He didn't say B.

10 MR. JACOBSON: Well he said, 42-9-170, he also said
11 that A doesn't apply, so B has to apply. If
12 you look at 42-9-170.

13 COMMISSIONER WILKERSON: That's fair.

14 MR. JACOBSON: You know, I mean, if you look at that
15 then the commissioner's saying, you don't have
16 to look any further than this. He says under
17 that code section, nobody can get more than 500
18 weeks. But that's not what that law says at
19 all. The law says that section only says that
20 you can't get more than 500 weeks if you're
21 disabled pursuant to 42-9-30 for the second
22 paragraph 42-9-10.

23 COMMISSIONER WILKERSON: That's fine.

24 MR. JACOBSON: Any other questions?

25 COMMISSIONER JAMES: No. This concludes the



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1 hearing.

2 (There being nothing further, the hearing concluded
3 at 1:57 p.m.)
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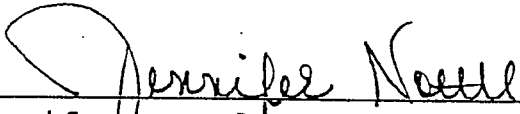


CERTIFICATE

This is to certify that the within hearing consisting of twenty nine (29) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on December 2, 2016.



Jennifer Nottle
Court Reporter

Notary Public for South Carolina
My Commission Expires: July 11, 2023



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APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1205924

DAVID LEMON,

EMPLOYEE,
CLAIMANT/APPELLANT,

vs.

MT. PLEASANT WATERWORKS,

EMPLOYER,

AND

S.C. STATE ACCIDENT FUND,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina
on April 20, 2015, upon notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

September 11th, 2015

REMANDED

APPEARANCES:

Claimant represented by Carl H. Jacobson, Esquire,
of Uricchio, Howe, Krell, Jacobson, Toporek, Theos
& Keith, PA, Charleston, South Carolina.

Defendants represented by Matthew A. Schonfeld,
Esquire, of Willson Jones Carter & Baxley, P.A.,
Mount Pleasant, South Carolina.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This claim involves an admitted work accident and related injury which occurred on March 8, 2012. As a result of this injury, Defendants admitted injury to the lower back only and provided causally related medical treatment for the same. Claimant alleges causally related injuries to the lower back and both legs. A hearing on permanency was held before Commissioner T. Scott Beck on September 11, 2014.

At the single Commissioner hearing, it was Defendants' position that Claimant's entitlement to permanency was limited to permanent partial disability to the back in an amount less than 50% pursuant to § 42-9-30(21). In the alternative, if Claimant was found to be permanently and totally disabled, Defendants asserted entitlement to a credit of 321 weeks of benefits against such an award, 199 weeks of which were paid to Claimant in the form of TTD and PPD relating to prior injuries while working with the same employer, Mount Pleasant Waterworks, pursuant to §42-9-170.

It was Claimant's position that as a result of injuries to the lower back and both legs he has been rendered permanently and totally disabled under §42-9-10. Claimant further asserted that §42-9-170 does not apply to the facts of this case, so with respect to credit against an award of permanent and total disability, Claimant argued that Defendants should only be entitled to credit for TTD paid on the present claim, which by the date of hearing before the single Commissioner was 122 weeks.

On January 7, 2015, a Decision and Order was issued by the single Commissioner containing the following findings of fact, conclusions of law and order/award:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. *Singleton v. Young Lumber*. 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.

3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.

4. I find that the award is to be paid in a lump sum.

5. I find that the Claimant is entitled to *Utica- Mohawk Mills v. Orr* language in this

order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to James v. Anne's he is entitled to an award for a lump sum with the insertion of Utica-Mohawk Mills v. Orr language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.

6. *The Claimant sustained an admitted injury to his back that occurred on May 8, 2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).*

7. *The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).*

8. *The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).*

9. *The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).*

10. *The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.*

11. *According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery."*

(APA 4).

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40 of the South Carolina Worker's Compensation Act, it is the determination of this Commissioner that:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

ORDER AND AWARD

IT IS THEREFORE ORDERED that the Defendants shall pay all medical expenses that

are causally related to the Claimant's compensable injuries and shall continue to provide medical treatment by Dr. Thomas Due, the authorized treating physician, and shall provide lifetime causally related medical, including medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRTs), and surgical consultations.

IT IS FURTHER ORDERED that the Defendants shall pay permanent total disability benefits to the Claimant at the weekly comp rate of \$424.05 and that said payments shall be made in a lump sum payment, giving the Defendants credit for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing. The Claimant is entitled to Utica, language in the final order. The specific allocation of weeks, taking into consideration attorney's fees and expenses, with the appropriate Utica v. Orr/James v. Anne's language can be done by supplemental order.

AND IT IS SO ORDERED.

Claimant timely appealed from the portions of the Decision and Order dated January 7, 2015, that relate to credit awarded to Defendants under §42-9-170.

Based on his brief and oral arguments, the thrust of Claimant's argument on appeal is that §42-9-170 does not apply to the facts of this claim and it was therefore error for the single Commissioner to order credit to Defendants for 199 weeks of TTD and PPD paid on prior claims while Claimant was with the same employer, Mount Pleasant Waterworks. Specifically, Claimant argues that the 199 weeks of credit awarded would have been proper had his present permanent injury been under §42-9-30 or the second paragraph of §42-9-10 (which is §42-9-10(B)). However, Claimant insists that he sustained permanent and total disability under §42-9-10(A), therefore the credit should not apply.

In response, Defendants argue that the ordering of credit under §42-9-170 was proper, pointing out that Claimant was deemed to have sustained permanent injury and resulting disability to both legs, a fact and conclusion that is not disputed by Claimant, therefore making Claimant's award of permanent and total disability proper under §42-9-10(B). In light of the lack of specificity in the single Commissioner's Decision and Order with respect to which paragraph of §42-9-10 applies to Claimant's award, Defendants argue that the full Commission should make its own findings of fact based on the evidence, pursuant to the authority granted under §42-17-50, and find that Claimant was properly awarded permanent and total disability benefits under §42-9-10(B).

On appeal, the parties agree the relevant and operative statutory provision, the applicability of which is in dispute, is §42-9-170(B), which states:

If an employee receives a permanent injury as specified in Section 42-9-30 or the second paragraph of Section 42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35. This subsection is effective on July 1, 2008.

All proffered testimony has been taken. Such, together with all documentary evidence and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration.

STANDARD OF REVIEW

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or

inconsistent with those of the Hearing Commissioner. See *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); see also *Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

FULL COMMISSION APPELLATE PANEL DECISION

After a thorough review of the evidence, including the hearing testimony, medical evidence, exhibits, other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel, WE, THE APPELLATE PANEL, REMAND TO THE SINGLE COMMISSIONER FOR:

1. A determination of the particular subsection of §42-9-10 used for the award of the present case.
2. A determination of the statutes under which the prior awards were issued.
3. Any facts, analysis, conclusions of law, or order provisions that the single Commissioner should deem necessary in the analysis of the §42-9-170 credit issue.

ORDER/AWARD

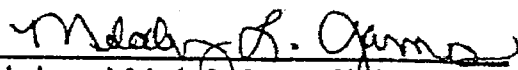
IT IS HEREBY ORDERED that this claim is hereby remanded to Commissioner T. Scott Beck for a determination of the matters set forth above.

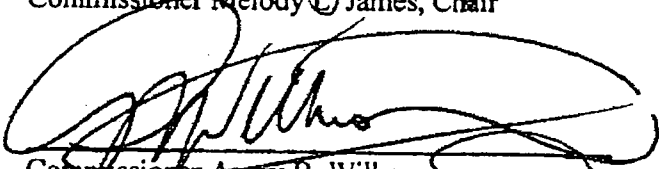
IT IS SO ORDERED.

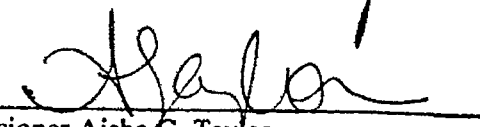
CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 11, 2015


Commissioner Melody L. James, Chair


Commissioner Avery B. Wilkerson


Commissioner Aisha G. Taylor

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1205924

David B. Lemon,	)
Employee,	)
Claimant,	)
vs.	)
Mt. Pleasant Waterworks,	)
Employer,	)
and	)
State Accident Fund,	)
Carrier,	)
Defendants.	)

HEARING:

Original hearing held in Goose Creek, South Carolina on September 11, 2014. Issues on remand decided on December 2, 2015.

APPEARANCES:

Claimant represented by Carl H. Jacobson, Esquire of Charleston, South Carolina.

Defendants represented by Matthew Schonfeld, Esquire of Willson Jones Carter & Baxley, P.A., Mount Pleasant, South Carolina.

PURPOSE OF HEARING:

To address specific questions proposed by the Full Commission Panel and to address any other issues which may come before the Commissioner.

DECISION AND ORDER:

By T. Scott Beck, Commissioner

FILED:

May 9, 2016

I. APA SUBMISSIONS and STIPULATIONS

All evidence received in the case was outlined in the original January 7, 2015 Order and, along with the Claimant's testimony, remains a part of the Commission's file and serves as the basis upon which this decision was issued. The questions on remand are being responded to herein without the necessity of oral arguments without the necessity of oral arguments or additional submissions.

II. STATEMENT OF THE CASE

This claim involves an admitted work related injury, which occurred on March 8, 2012. As a result of this injury, Defendants admitted an injury to the low back only and provided causally related medical treatment for the same. Claimant alleged he injured not only his low back but also both legs (radiculopathy). A hearing on permanency was held on September 11, 2014.

On January 7, 2015, I issued a Decision and Order which found that the Claimant was permanently and totally disabled pursuant to S.C. Code §42-9-10 and that he had sustained permanent injuries to his back and both legs as a result of this work accident. I awarded ongoing medical care per Dodge and instructed that the Claimant's award be structured pursuant to Utica-Mohawk. I found that the Defendants were entitled to 199 weeks of credit for TTD and PPD paid on previous claims with the same employer plus an additional credit for all TTD paid per the instant claim, all of which is taken against the Claimant's 500 week award.

The Claimant timely appealed the portion of the January 7, 2015 order that related to the credit awarded to Defendants.

Defense Position Regarding the Credit

Defendants assert that the Claimant is entitled to a maximum of 500 weeks of indemnity benefits during his entire employment at Mt. Pleasant Waterworks. Because the Claimant had

already received 199 weeks for prior claims and 122 weeks of TTD as of the date of the hearing, Defendants assert that, as of the date of the hearing, the Claimant had only 179 weeks remaining to be awarded, subject to additional decrease for any other TTD benefits paid during the pendency of this action.

Claimant's Position Regarding the Credit

The Claimant's position is that the 500 week limitation is per *claim*, not per *employer*. Thus, Claimant's position is that he is entitled to 500 weeks total for this injury and would have been entitled to 500 weeks of benefits (if appropriate) for each and every one of his prior injuries with Mount Pleasant Waterworks. Claimant concedes that the TTD paid for this claim is to be subtracted from the max of 500 weeks in determining his current award but asserts that, otherwise, there is no "credit" or offset to be taken for the Claimant's prior four claims, despite the undisputed fact that TTD and PPD were paid.

Full Commission Proceedings

The Appellate Panel reviewed all evidence, including the September 11, 2014 hearing testimony, medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and the oral arguments of counsel, and remanded the following questions to be addressed:

1. A determination of the particular subsection of 42-9-10 used for the award of the present case.
2. A determination of the statutes under which the prior awards were issued.
3. Any fact, analysis, conclusions of law, or order provisions that I deem necessary in the analysis of the 42-9-170 credit issue.

Summary of Prior Claims and Awards

As outlined above, the issue in dispute is the Defendants' entitlement to a credit or offset for workers' compensation indemnity benefits paid on the Claimant's prior claims.¹ It is undisputed that the Claimant received the following benefits via prior claims with Mt. Pleasant Waterworks:

- WCC #0902321, DOI 3/4/09, with 3 weeks of TTD paid. Per the Form 12A, this case involved a back injury.
- WCC #1006927, DOI 4/26/10, with 25.4286 weeks of TTD paid and WCC # 1103641, DOI 4/13/11, with no TTD paid. WCC #1006927 involved a shoulder injury which was aggravated/re-injured by WCC # 1103641 (see Forms 12A). Per the clincher agreement, Dr. Rudolph "gave a rating of 12% to the right shoulder." These two files were closed via a single, joint clincher agreement for \$30,357.75 which, per agreement of the parties, "represents any and all disability claims to include 25% to the right shoulder." The carrier agreed to waive overpayment of temporary total disability in exchange for this agreement.
- WCC # 1114198, DOI 10/3/11, 20.5714 weeks of TTD paid. This file involved a low back injury which was settled via a clincher agreement. Per the clincher agreement, Dr. Aymond "gave a rating of 7% to the spine." The parties resolved the case for \$32,005.50, which per agreement of the parties "represents any and all disability claims to include 25% to the spine."

¹ While the Claimant's Form 30 lists several grounds for appeal, his brief addresses only whether Defendants are entitled to a credit for "the prior awards" and/or "payments pursuant to prior claims" that the Claimant received in workers' compensation cases which occurred prior to the instant case but with the same employer. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (citing *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993); *Bell v. Bennett*, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992)). See also *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal)." and *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 186, 564 S.E.2d 694, 696 (Ct. App. 2002).

It is noted by the Undersigned, and is not disputed by the parties, that 25% to the right shoulder equals payment of 75 weeks under the Act. Similarly, 25% to the back equals payment of 75 weeks under the Act. It is further noted that the above figures, including 75 weeks each for the shoulder and the back, total 199 weeks ($3 + 25.4286 + 75 + 20.5714 + 75 = 199$). Finally, it is further noted that, as of the date of the merits hearing, the Claimant received 122 weeks of TTD for the instant injury. Thus, as of the date of the merits hearing, the Claimant has received 321 weeks of indemnity benefits under the workers' compensation system during his employment with Mt. Pleasant Waterworks.

Legal Analysis

As an initial matter, Wyndham v. R.A. & E.M. Thornley and Co., 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987) states that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." Thus, according to Wyndham, the Defendants are entitled to a full credit or offset for both TTD and PPD paid for his prior claims.

Beyond Wyndham, both the Claimant and Defendants turn to Section 42-9-170 to provide guidance on this issue. Section 42-9-170 provides

(B) If an employee receives a permanent injury as specified in Section 42-9-30 or the second paragraph of Section 42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35. This subsection is effective on July 1, 2008 (emphasis added).

For reasons outlined fully in my September 11, 2014 Decision & Order, I find as a fact that

the award in the present case is awarded under 42-9-10(A). This finding is based on the Claimant's age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.

Thus, the first sentence of (B) above does not apply. The second sentence does apply. The Claimant has previously incurred permanent partial disability through the loss of his shoulder per WCC claims #1006927 and # 1103641. He subsequently has incurred total permanent disability through the loss of another member, which is his instant back claim with radiculopathy. Thus, pursuant to Section 42-9-170, Defendants' liability is for the subsequent injury only, which clearly means that the Legislature intended that Defendants be able to take a credit for all benefits paid for the shoulder for prior claims. If that were not the intent of the legislature, then there would have been no need to include the provision that "the employer's liability is for the subsequent injury only" (emphasis added).

Because Defendants' liability is limited to the "subsequent injury only" with regard to his shoulder claims, I find that the Defendants are entitled to a credit or an offset for all indemnity benefits paid for claims #1006927 and #1103614, which are 25.4286 weeks of TTD and 75 weeks of PPD.

Regarding the credit or offset for benefits paid on the Claimant's back claims, I first review the terms of Section 42-9-10. Section 42-9-10(A), under which I find the Claimant to be totally disabled, provides that "when the incapacity for work resulting from an injury is total," the Claimant receives benefits but "in no case may the period covered by the compensation exceed five hundred weeks" except in cases involving paraplegia, quadriplegia, and physical brain damage. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage in the instant case.

I also have reviewed and considered Hopper v. Firestone Stores, 222 S.C. 143, 72 S.E.2d 71 (1952). Mr. Hopper was involved in a motorcycle accident, not connected with his employment, where he sustained amputation of his right leg above the knee. He wore an artificial leg. During the course of his employment with Firestone Stores, he sustained an injury to his residual leg which caused amputation of about four inches of his remaining residual leg. Mr. Hopper received TTD and medical care for his compensable work injury and further alleged loss of use of his leg and/or disfigurement. Firestone Stores argued that Mr. Hopper had already lost 100% of his leg prior to his work injury and thus "there was no basis upon which an award for permanent disability or specific loss could be computed."

~~The Supreme Court agreed with the Defendants. The Court found that~~

An examination of the entire record in this case in the light of the [statute] leads us to no other conclusion than that the Legislature intended that the **compensation here, if there is to be such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto....**" (emphasis added)

In the instant case, the parties agreed that the Claimant sustained 25% disability to the Claimant's back as a result of WCC # 1114198. Thus, based on 42-9-170 and Hopper, as well as other relevant cases, the Claimant, already having been paid for 25% to the back (75 weeks of disability), had only 75% of his back remaining to be awarded. In order for the intent of Hopper to be effectuated, Defendants must be given a credit or an offset for the PPD paid to the Claimant already pursuant to his prior claim, and I so rule.

The parties also turn to the case of Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991). In Medlin, Mr. Medlin sustained a compensable back injury in 1983 while working for Greenville County. He was found to have sustained greater than 50% loss of use of his back, which entitled him to the "maximum compensation of five hundred weeks" for total and permanent disability. The parties settled the 1983 case for a lump sum payment, and Mr. Medlin returned to

work with Greenville County. In 1985, Mr. Medlin had another work injury for which he again claimed permanent and total disability. Greenville County admitted that the second accident occurred but denied the Claimant was entitled to PPD because he had already been paid "the maximum compensation of five hundred weeks."

The Supreme Court held that Mr. Medlin was not allowed to recover under the Act for the loss of his back because he had already received total disability benefits for a back injury. Thus, per the Supreme Court, the "loss of use to his back has already been fully 'written-off' and is non-existent in so far as the Act is concerned." While the instant case addresses a prior partial loss (25% of the back) instead of total loss (as in Medlin), the reasoning is the same – on the Claimant's date of injury, he had only 75% of his back to lose, with the other 25% having been "written off" because loss of that 25% was paid pursuant to WCC # 1114198. Thus, Defendants are entitled to a credit or offset from the Claimant's instant permanent and total disability finding for the 75 weeks PPD paid under WCC # 1114198.

Regarding the TTD paid pursuant to WCC #0902321 and #1114198, I note the findings of United Technologies v. S.C. Second Injury Fund. Mr. Kelly was injured in Michigan while working for United. He received 63 weeks of temporary benefits "under Michigan law at a higher compensation rate" than that allowed in SC. His PPD was determined in South Carolina pursuant to SC law. The Commission deemed it appropriate for United to receive a credit for the 63 weeks of TTD the Claimant received under Michigan's workers' compensation scheme. When United requested Second Injury Fund reimbursement, the SIF asserted that United and its carrier had paid 78 weeks of benefits prior to notifying the Fund of a possible claim. The crux of the issue was that, if the 63 weeks paid in Michigan "counted" towards the 78 week limit, then the SIF was correct and no SIF reimbursement was possible. If the 63 weeks did not count, then the claim was

eligible for reimbursement by the SIF if the other conditions were met.

The Court of Appeals found that the 63 weeks did count as compensation pursuant to the SC Act, despite the fact that it was paid in another state at a higher rate than appropriate under SC law. Clearly, the Court of Appeals believed and ruled that temporary benefits are weeks of compensation per the Act and thus "count" as part of Mr. Kelly's 500 week recovery. Similarly, the Court of Appeals in Roberts v. McNair found that payment of temporary partial benefits counted as weeks, not "half-weeks" of compensation to be taken "against the statutory 500-week recovery period." The court stated that "the period for compensation may not exceed 500 weeks."

Based on the relevant law, and the undeniable fact that temporary benefits are part of compensation just as permanent benefits are, I hereby further find that the Defendants are entitled to a credit or offset for the 3 weeks of TTD paid pursuant to WCC # 0902321 and for the 20.5714 weeks of TTD paid pursuant to WCC # 1114198.

In support of my ruling that the Defendants are entitled to a credit or offset for all indemnity benefits paid to the Claimant for his four prior claims, I also note Getsinger v. Owens-Corning Fiberglass, 335 S.C. 77, 515 S.E.2d 104 (1999). Mr. Getsinger sustained a 30% disability to his right foot in June 1993. He then sustained another 10% disability in October 1995. By December 1995, his impairment had increased to 50%. Mr. Getsinger was ultimately found totally disabled based on the loss of use of his foot and psych overlay. The Commissioner "awarded Getsinger 500 weeks compensation, **offset by previous payments.**" (emphasis added).

See also for support of this decision Roberts v. McNair Law Firm, 366 S.C. 50, 691 S.E.2d 453 (2005), which provides that "Section 42-9-10 of the Workers' Compensation Act provides that, except under circumstances not applicable in this case, the period for compensation may not exceed 500 weeks. S.C. Code Ann. § 42-9-10 (Supp.2004)."

See also Crisp v. SouthCo, Inc., Appellate Case No. 2010-180906, Opinion No. 27230, holding that “in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks. See S.C. Code Ann. Section 42-9-10(A) (Supp. 2011; S.C. Code Ann. Reg 67-1101 (Supp. 2011)).”

See also Reed-Richards v. Clemson University, 638 S.E.2d 77 (2006), stating that, in SC, “the normal statutory maximum [is] 500 weeks.” See also James v. Anne’s, 390 S.C. 188, 701 S.E.2d 730 (2010), holding that “the maximum period for benefits is generally 500 weeks” and quoting Section 42-9-10(A) which states that “In no case may the period covered by the compensation exceed five hundred weeks” except in cases of paraplegia, quadriplegia, and physical brain damage.

III. FINDINGS OF FACT

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

IT IS FOUND AS A FACT:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase “receives a permanent injury” in 42-9-170(B) refers to the present claim and “another permanent injury in the same employment” refers to the Claimant’s prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.

6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.
7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of

paraplegia, quadriplegia, or physical brain damage.

15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.
17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper, Medlin, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies, Roberts, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

IV. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment."

3. Section 42-9-170 provides that if an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.
4. Hopper provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto."
5. Medlin provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned."
6. United Technologies provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation.
7. Roberts provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks."
8. Gestinger provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments.
9. Crisp provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A).
10. Reed-Richards provides that, in SC, "the normal statutory maximum [is] 500 weeks."
11. James provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in

cases of paraplegia, quadriplegia, and physical brain damage.

V. ORDER/AWARD

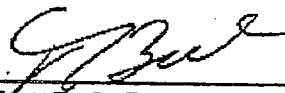
IT IS HEREBY ORDERED that the Claimant is permanently and totally disabled and entitled to 500 weeks of compensation, but that Claimant's 500 weeks is offset not only by temporary benefits paid in the instant claim but also by TTD and PPD paid in each of his prior four claims as outlined herein.

IT IS FURTHER ORDERED that Claimant's request for Utica-Mohawk language is again granted, with the specific language to be issued via supplemental order.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

May 9, 2016

By: Shawn DeBruhl, Administrative Assistant to Commissioner Beck



WCC File #: 1205924
Carrier File #: 2012-001473
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: David Lemon SSN: 251-31-1250 Employer's Name: Mt. Pleasant Waterworks
Address: PO Box 12055 Address: 1619 Rifle Range Road
City: Charleston State: SC Zip: 29422 City: Mt. Pleasant State: SC Zip: 29465
Home Phone: (843) 609 - 2889 Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Carl H. Jacobson Law Firm: Uricchio, Howe & Krell Preparer's Phone #: (843) 723 - 7491

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 05/08/2012
(m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Matt Schonfeld, Esq. and Morgan T. McQueeney, Esq. Willson, Jones, Carter & Baxley address 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464 on the day of May 2016, by X first class postage certified mail personal service.

Preparer's Signature: [Signature] Attorney for Claimant: Carl@uricchio.com Email: May 23, 2016 Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

1. The Single Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, namely: 1) a determination of the particular subsection of §42-9-10 used for the award of the present case. 2) the determination of the statutes under which the prior awards were issued. 3) any fact, analysis, conclusions of law, or provisions that are necessary in an analysis of the §42-9-170 credit issue.
2. The Single Commissioner erred in finding that "the Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy" (Finding of Fact No. 12). The error being that the present award for permanent total disability is pursuant to §42-9-10(A) and not based upon the loss of another member pursuant to §42-9-30.
3. The Single Commissioner erred in finding that "Defendants' liability per §42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims...Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks." (Finding of Fact No. 13). The error being that the Single Commissioner determined that the

Claimant is entitled to permanent total disability benefits pursuant to §42-9-10(A) and is not based upon a finding of a subsequent injury to the back. This Finding is inconsistent with the award pursuant to §42-9-10(A).

4. The Single Commissioner erred in finding "because the Claimant has already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012. (Finding of Fact No. 17). The error being that the award pursuant to §42-9-10(A)

was based on the Claimant's loss of earning capacity and was not based upon §42-9-30 and the specific loss of use of the back is totally irrelevant and inconsistent with the award made pursuant to §42-9-10(A) for lost earnings capacity. Additionally, 75% disability of the back is presumed to be permanent total disability.

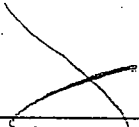
5. The Single Commissioner erred in Finding of Fact 19 awarding the Defendants a credit or off set for prior awards. The error being that the applicable credit statute, §42-9-170, does not apply to awards pursuant to §42-9-10(A).

6. The Single Commissioner in Conclusions of Law items 2-11. The error being that the cited cases do not apply to allow credits to the Defendants for prior awards; most of the cases precede the 2007 amendment to §42-9-170; and the only statutory basis for the credits, §42-9-170, does not apply to

§42-9-10(A).

7. The Single Commissioner erred in awarding the Defendants a credit for the prior awards. The Commissioner has expressly found and concluded that §42-9-170 applies in this case. Said code section does not provide any credit for an award of permanent total disability pursuant to §42-9-10.

Respectfully Submitted,



Carl H. Jacobson

May 23, 2016

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1205924

David Lemon,)
)
Claimant,)
)
v.)
)
Mt. Pleasant Waterworks ,)
)
Employer,)
)
and)
)
State Accident Fund,)
)
Carrier/Defendants.)
_____)

FULL COMMISSION HEARING

Monday, August 15, 2016
2:58 p.m. - 3:20 p.m.

The Full Commission Hearing was heard before Commissioners Avery B. Wilkerson, Jr., Melody L. James and R. Michael Campbell, II, Chair, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 15th day of August, 2016, before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this
deposition is being taken pursuant to the
Administrative Procedures Act and the South
Carolina Rules of Civil Procedure.

1 COURT REPORTER: Today is Monday, this is South
2 Carolina Worker's Compensation case number
3 1205924. This is the case of David Lemon,
4 the claimant versus Mt. Pleasant Waterworks,
5 the employer, and the State Accident Fund,
6 the carrier. The appellant is the claimant,
7 represented by Carl H. Jacobson, and the
8 respondent is represented by J. Gabriel
9 Coggiola. Each side is allowed 10 minutes
10 for oral argument, and the appellant three
11 minutes in reply. You're requested to argue
12 the grounds of exception and stay within the
13 record.

14 MR. COGGIOLA: Thank you.

15 COMMISSIONER CAMPBELL: Mr. Jacobson.

16 MR. JACOBSON: Good afternoon.

17 COMMISSIONER CAMPBELL: Good afternoon.

18 MR. JACOBSON: I feel like this is a D,j... vu second
19 time I've been up here on this particular
20 case, basically on the same issue. Things
21 haven't changed from the original order as
22 far as I can tell. As you recall, Mr. Lemon
23 was awarded permanent total disability
24 benefits by Commissioner Beck, and under
25 findings of fact number one in the original

1 Order, Commissioner Beck found, I find, based
2 upon the greater weight of the evidence, the
3 claimant is permanently and totally disabled,
4 pursuant to South Carolina code section 42-9-
5 10. The claimant has sustained permanent
6 injuries to more than one body part, namely
7 his back and both legs. As such, his claim
8 for permanency is not restricted to the
9 scheduled benefits as provided by South
10 Carolina code section 42-9-30, and he cites
11 Singleton versus Young Lumber, 114
12 southeastern Second 837, a 1960's decision.
13 There Commissioner Beck gave -- awarded the
14 carrier benefits, or a credit I should say,
15 not only for the weeks of temporary total
16 disability that had been consumed with respect
17 to this particular accident, but went back
18 and awarded the defendants a credit for all
19 prior awards for perm partial disability while
20 this claimant had been employed by the
21 employer over the many years. And then under
22 conclusions of law, the Commissioner stated
23 42-9-170 provides that the maximum exposure
24 for payment of disability benefits is 500
25 weeks for the multiple claims filed by an

1 employee with the same employer. The maximum
2 number of disability is 500 weeks. I
3 specifically find that there is no need to
4 look any further than the plain language of
5 42-9-170 to determine the number of weeks of
6 credit that the defendant is entitled to
7 receive. We appealed that decision because
8 when you look at section 42-9-170, we
9 maintain that there is a clear error of law
10 in that if you look at the particular
11 statute, the code section of 42-9-10(A), which
12 was -- 42-9-10, which was the basis for the
13 award of perm total to Mr. Lemon, and is not
14 mentioned and has not a- -- give a credit for
15 any prior awards while the claimant is
16 employed by the same employer. Let's see if
17 we can agree on a couple of principles. The
18 first principle is this, that the South
19 Carolina Worker's Compensation act is a
20 creature statute, and that the authority for
21 the Commission, whether it's to award benefits
22 or to take away benefits, is pursuant to
23 legis- -- the legislature, pursuant to a
24 specific act or code section in the act. I
25 think we can all agree on that, that's the --

1 that's the long standing law in South
2 Carolina, has been for years. The second
3 premise I'd like you to adopt and to recall
4 is that when you do construe a statue, under
5 the law the Commission is supposed to
6 construe statutes deliberately, and in favor
7 of coverage and benefits as opposed to taking
8 away benefits from the injured employee. But
9 let's just look at the statute again, and
10 let's look at the clear reading of the
11 statute. We have two sec- -- we have two --
12 as far as I know ---

13 COMMISSIONER WILKERSON Is it the statute or is it
14 the coverage were supposed to look at?

15 MR. JACOBSON: Coverage, and I believe -- you're
16 supposed to look at the statute for
17 legislative authority ---

18 COMMISSIONER WILKERSON: I heard that.

19 MR. JACOBSON: --- to either award or to take away
20 benefits. The general construction of
21 statutes by the Commission is to favor
22 coverage and liberally supposed to be
23 construed in favor of the claimant is my
24 understanding of the law. So the question is
25 what do we do with -- how do we construe

1 about this ga- -- this limit of 500 weeks?
2 There is a limit of 500 weeks of
3 compensation, and 42-9-10(A) -- and section
4 42-9-10 specifically says that the amount of
5 compensation for total disability, when the
6 capacity [sic] for work is total, the period
7 covered by the compensation cannot exceed 500
8 weeks except as provided by the statute
9 dealing with quadriplegics and brain damage
10 ~~and so forth. And as amount of compensation~~
11 for total disability resulting from an injury,
12 from one injury, in this particular cases we
13 have one accident, one injury, it's our
14 contention that there is indeed a cap. The
15 cap is 500 weeks for the injury that Mr.
16 Lemon was awarded permanent total disability
17 benefits. So we don't question that the
18 carrier is entitled to a credit for the path
19 for the TTD payments that were made. The
20 Commissioner went ahead and awarded benefits
21 for awards made pursuant to other injuries,
22 other accidents. Now, where does he get that
23 authority? He says he looked at 42-9-170.
24 You know, I agree. If there's going to be a
25 credit at all you look at 42-9-170. And

1 under 42-9-170 there's a subparagraph A that
2 is no longer effective because that was
3 effective until June 30th, 2008. So we can
4 eliminate subsection A as a code provision.
5 Now let's look at subsection B. And I don't
6 know whether this was a mistake that was made
7 by the legislature, I don't know if they
8 meant to do this, but I can tell you what the
9 clear reading of the statute says. It says if
10 an employee receives a permanent injury as
11 specified in section 42-9-30 -- in our
12 particular case it was not a 42-9-30 award,
13 it was a 42-9-10 award for perm total -- or
14 receives a permanent injury as specified under
15 the second paragraph of section 42-9-10, in
16 this particular case the reason why we had to
17 remend this case, as you all recall, is that
18 we came here and we argued that the
19 Commissioner awarded benefits pursuant to 42-
20 9-10(A). Defense counsel argued, well, it's
21 not clear, it could have been A, it could
22 have been B. If it's B, then he could award
23 this credit because there's no exclusion, or
24 there's nothing stopping him from giving
25 additional credit to the employer if it's

1 under 42-9(B) [sic], the second paragraph.
2 But if -- that second paragraph in 42-9-10
3 doesn't apply in this case because when the
4 C- -- when y'all remanded it to Commissioner
5 Beck, he specifically found the paragraph that
6 I'm referring to in this award is [sic] 42-9-
7 10A, which is the first paragraph. So in
8 this particular case, since the claimant was
9 not awarded perm total under 42-9-10-30 [sic]
10 or the second paragraph of 42-9-10(A), we
11 couldn't see who was awarded benefits. I
12 mean -- I mean, since it was awarded benefits
13 pursuant to A, then this -- the rest of this
14 paragraph has nothing to do about giving a
15 credit for any prior awards made to the
16 claimant, there's no legislative authority for
17 that. Now here's another disingenuous
18 argument that's now raised for the first time
19 by the defendants. The defendants now say
20 this -- and I believe this -- I believe that
21 this, under the clear reading the statute,
22 either you meet this or don't meet this. If
23 it's under 42-9-10(A), you don't get a
24 credit, period, but the defendants now have
25 come up with another argument. They say,

1 well if an employee previously has incurred
2 permanent partial disability through the loss
3 of a hand, arm, shoulder, foot, leg, hip, or
4 eye, and by subsequent it incurs total
5 permanent disability through the loss of
6 another member, the employees liability is for
7 the subsequent injury only. So what they're
8 arguing in this case is that since Mr. Lemon
9 had received a prior award for benefits for a
10 shoulder, therefore he's only entitled to
11 benefits in this case for total permanent
12 disability, but only for the subsequent injury
13 only. Now I don't know what that means, but
14 I can tell you this, in this particular case
15 that paragraph doesn't apply either. Why?
16 Because it says, if an employee previously
17 has incurred perm partial disability, and by
18 subsequent accident incurs total permanent
19 disability through loss of use of another
20 member. In this particular case, the
21 claimant is not receiving benefits and was
22 not awarded benefits for loss of use of
23 another member. To the contrary, the
24 claimant was specifically awarded benefits
25 under perm total disability for loss of use

1 of multiple members under the Singleton
2 guidance. And in this particular case, the
3 Commissioner specifically found on remand
4 under number one, conclusion of law, pursuant
5 to 42-9-10(A), the claimant is permanently and
6 totally disabled based upon age, education --
7 education level, ongoing complaints of
8 medications, restrictions, limitations, an
9 inability to identify work they could complete
10 construing the ma- -- condition. So what the
11 Commissioner awarded in this case for
12 permanent total disability, not based upon the
13 loss of use of another member, not pursuant
14 to 42-9-30 -- if he had made an award of 42-
15 9-30 for the back, then perhaps that
16 provision would apply, but it doesn't; because
17 in this particular case there was not an
18 award made pursuant to loss of use of another
19 member. It's pursuant to 42-9-10(A). So
20 there's no legislative authority. Now, the
21 reason we have this statute is because we
22 used to have a second injury fund, and at
23 that point this statute made a lot more sense
24 than it does now. And the reason we had the
25 second injury fund was to try to encourage

1 employers to maintain employer -- employment
2 which a -- one of their employees was
3 injured.

4 CHAIRMAN: Go ahead and finish your thought.

5 MR. JACOBSON: What -- thank you. One very quick
6 note, please. After going through -- after
7 the employer in this case tries to come up
8 with some contorted basis legislatively under
9 that statute to give the credit, it -- the
10 Commission -- the Commissioner then starts
11 citing cases. The first case that's cited by
12 the Commissioner in favor of the position
13 that there's a credit to be given in this
14 particular case is the Wyndham case, which
15 the -- which -- related to the same code
16 section, but the Wyndham case was decided in
17 1987. This law was amended and changed
18 substantially in 2007. Half the ca- --
19 almost all the cases, almost all the cases
20 the are cited in this brief precede 2007 when
21 this statute was changed and passed. And the
22 rest of the cases absolutely don't apply at
23 all factually to this particular case. Do
24 you have any questions?

25 COMMISSIONER WILKERSON: Not at this point.

1 CHAIRMAN: No, and you'll have three minutes in
2 reply.

3 MR. JACOBSON: Thank you.

4 CHAIRMAN: Mr. Coggiola.

5 MR. COGGIOLA: Good afternoon, Your Honors. May it
6 please the Court. I agree with counsel, it
7 is a difficult statute and it is one that was
8 created in the time of the second injury fund
9 when there was avenues -- and -- and the
10 ~~reason for that is the policy behind the~~
11 Worker's Compensation Commission. One of --
12 and -- and the whole system. One of the
13 biggest parts of the system is that we've
14 tried to create a system where employers will
15 continue to bring back injured workers to
16 work. Whether through their employer or
17 whether it was injured through somewhere
18 before, part of the basis of this all is to
19 allow employers an avenue to bring someone
20 who already has some kind of disability back
21 to work. To say that the statute allows you
22 to not get credit for that is A, in practical
23 application, going to stop all employers from
24 being people back to work if they've got
25 previous disability if they know they're not

1 going to get any credit towards it. Now
2 looking at the statute, first off, we would
3 argue that A really, I mean A and B is -- A,
4 if you read section 42-9-10, A is really the
5 definition of permanent -- of permanent and
6 total, whether it's temporary, partial, it
7 gives the 500 week cap. But A doesn't really
8 set forth the avenue of how you can get
9 there. To get there, you've gotta have one
10 of several things, you've got to have
11 combination of body parts or you gotta be
12 under 42-9-30 for 50 percent or greater to
13 the back. Under A, if I walked in with my
14 arm cut off (indicating) and five vocational
15 evaluations saying I'm permanent and total,
16 it's too bad. The Wigfall case clarified
17 Singleton and everything and it says that's
18 not enough, you've got to have one of these
19 other things.

20 COMMISSIONER WILKERSON: Unless it got your
21 shoulder.

22 MR. COGGIOLA: I'm sorry?

23 COMMISSIONER WILKERSON: Unless it got your
24 shoulder?

25 MR. COGGIOLA: What, I -- I don't ---

1 COMMISSIONER WILKERSON: I said unless it got your
2 shoulder, would that get you disabled?

3 MR. COGGIOLA: Well, let's say they cut off the arm
4 just above ---

5 COMMISSIONER WILKERSON: Okay, I know -- I just
6 watch ---

7 MR. COGGIOLA: Very astute point ---

8 COMMISSIONER WILKERSON: Because you went up here
9 (indicating), I just want to make sure.

10 MR. COGGIOLA: Very astute point, Commissioner. I
11 should have dropped it down to here
12 (indicating).

13 COMMISSIONER WILKERSON: Okay.

14 MR. COGGIOLA: But if you walk in -- my only point
15 is, all the voc reports, all the age, all the
16 lack of job training in the world don't make
17 a difference if it's a single scheduled
18 member. A is really the -- the framework of
19 what is permanent and total disability. B
20 provides the ability to get there with the
21 combination of body parts. And then C
22 provides -- or the 3rd subsection is just the
23 exception to the rule, which obviously we
24 count here because it's a lifetime benefit.
25 So, it would go out of there. In addition to

1 that, the Commissioner did, as he was
2 instructed by the Commission on remand, not
3 only to go back to the statue but go back to
4 any analysis, anything he thought necessary.
5 And he went through an extensive list of case
6 law. He cited the Hopper case, which goes to
7 the credit towards the back. In that case
8 the claimant lost half his leg in an
9 unrelated accident and then injured a part
10 and this Court held that the legislative
11 intended compensation to be based solely on
12 the extent of -- to which the loss of the
13 existing after the last injury exceeds that
14 which it was prior to. They looked at the
15 Medlin case wherein the claimant was found to
16 be permanently and totally disabled, came back
17 later, reapplied with the same employer, tried
18 to get another award and they said there's no
19 compensation due. There is a 500 week cap.
20 And the 500 week cap isn't only in 42-9-170,
21 there is a 500 week cap on Worker's
22 Compensation benefits in the State of South
23 Carolina. Unless you are going to meet the
24 requirements of a paraplegic, a quadriplegic,
25 or physical brain damage, there is a cap of

1 500 weeks on benefits. The practical
2 application, again, of what you're asking here
3 is you could allow a claimant to collect 40 -
4 - 490 weeks of benefits, go back to work, and
5 then re-injure that body part the next day
6 and start over with a whole new 490 -- you
7 know, 500 weeks to go after. The legislative
8 intent -- and it's especially clear if you
9 read Wigfall. Because in Wigfall they go
10 into, you know, the claimant is asking us to
11 do this because it seems that's what's fair;
12 and although we agree that might make sense,
13 we're stuck to the legislative creation of
14 the statute. And in that case they -- you
15 know, they held that although there was all
16 these other vocational factors, you were
17 limited to that. So our position essentially
18 is that, you know, you can't just have 42-9-
19 10(A). It -- I don't think the Commissioner
20 erred by saying he's totaled under that, he
21 is totaled under 42-9(A) [sic], but to get
22 there, you have to have one of two things,
23 you gotta have a combination of body parts or
24 you gotta have 50 percent greater to the back
25 which is now even a rebuttable presumption.

1- And I would go -- again, go back to exactly
2 what counsel said, the public policy of this,
3 the -- at the time that statute was created
4 we had another method to encourage employers
5 to continue employing people who have had
6 injuries whether they had them before they
7 worked for them, during the course of their
8 employment with them. To -- to hold that
9 you're enti- -- you don't get credit for
10 permanency that you've paid on a claimant,
11 the practical effect is that no ones going to
12 bring anybody back to work. No one is -- no
13 one's ever going to -- there's no incentive
14 to resolve the claim if knowing that as soon
15 as that's resolved, the next day they can
16 star over with a whole new one and you're
17 going to end up with a lot of employees out
18 of -- out of work. I would further just
19 argue that the Commissioner in his subsequent
20 Order, the May 2016 Order, you know, he also
21 cites in addition to the Medlin case, the
22 Wyndham case that was referenced, it says
23 it's clear, 500 weeks total. There is no way
24 around that. That language is even further
25 buttressed in Crisp, Sparks, James v. Zant.

1 I mean all the cases stand for the premise
2 that that is the cap. And the only way
3 around that cap is the third subsection of
4 42-9-10, not by getting a second accident
5 with the same employer to get another bite
6 after. Still have a few minutes left. And I
7 would also point to Commissioner Beck's
8 language in that he finds with regards to the
9 -- basically with the back, he cites more
10 specifically the Hopper case wherein you get
11 with what is -- what's left after the last
12 injury to measure it. So if he had 25
13 percent to the back from his last injury,
14 that's what he's coming in with. There's
15 only 75 percent of the back left. You gotta
16 get that credit. And then with respect to
17 the shoulder, you know, he cites to, I mean,
18 look at the Getsinger case. Three previous
19 foot claims and then finally the last claim
20 they add psych overlay to get a total claim.
21 They were entitled to credit for all of that
22 leading up to that point for every one. If
23 we didn't allow employers to get credit for
24 previously-paid disability to an employee
25 that's suffered an injury with them, there

1 would be no point for this -- this statute.
2 I mean it's -- there's a separate statute for
3 people that are injured in other employment,
4 and this one's clear that under this if
5 you've re- -- suffer subsequent injuries,
6 there is a 500 week cap on benefits. Unless
7 the Commission has any questions for me?

8 CHAIRMAN: No. Thank you, sir.

9 MR. COGGIOLA: Thank you very much.

10 CHAIRMAN: Mr. Jacobson?

11 MR. JACOBSON: I don't know how we're going to get
12 around what the clear reading of the statute
13 is. If you -- if you want to give a credit
14 to the employer for the subsequent -- for the
15 other weeks, you're going to be just reading
16 something into the statute that's not there
17 and you'll be committing an error of law in
18 my respect for -- opinion. Because there is
19 -- there are plenty, plenty situations where
20 an employer's entitled to a credit -- prior
21 credits for prior awards. And one of the
22 examples that was just cited or questioned by
23 defense counsel would apply in this case. He
24 said what would happen if an injured employee
25 had received 490 weeks of disability

1 compensation over the multiple injuries he had
2 while working for the same employer and then
3 gets a subsequent injury to his arm, are you
4 claiming he can get perm total for that
5 without giving a credit? No. No. The
6 statute provides a credit for that situation.
7 It specifically says if you have a subsequent
8 disability award pursuant to 42-9-30, the
9 employer gets a credit for all prior awards.

10 The statute also could possibly be
11 interpreted, I don't believe it says this,
12 that if you have a prior permanent partial
13 award for the shoulder and then you have a
14 subsequent award for -- based on loss of a
15 member, they're entitled arguably to a credit.
16 It doesn't really say that, but arguably you
17 could argue that. But that's not what this
18 statute says. The statute says -- the
19 statute doesn't apply in this case. The
20 statute doesn't apply for two reasons.
21 Number one, the Commissioner has already found
22 this specifically, that he made an award
23 pursuant to 42-9-10(A). And again, this
24 statute says that you'll only receive a
25 credit if the subsequent award is pursuant to

--1 42-9-30. Or the second paragraph, which
2 would be 42-9-10(B), doesn't apply. Second
3 part of this statute, which I don't believe
4 is a -- precludes recovery in this case
5 either. This says if an employee previously
6 has incurred permanent partial disability,
7 through let's say a shoulder, and then by
8 subsequent accident incurs total permanent
9 disability through the loss of use of another
10 member, then they're -- then arguably I don't
11 see a credit there. That doesn't say they're
12 entitled to a credit, I guess they could try
13 to bootstrap it that way. But in this case,
14 the subsequent accident, which -- for which
15 incurred permanent total disability, was not
16 through the loss of use of another member, it
17 was pursuant to 42-9-10(A), and Commissioner
18 Beck specifically found he wasn't making an
19 award pursuant to loss of use of a member.
20 It was multiple members, so it doesn't apply.
21 As to the argument that if you eliminate
22 credits to the employers for prior injuries
23 and awards for they're injured employees, that
24 that would stop them from hiring -- keeping
25 their employees hired, that's not true. I

1 haven't see -- I haven't -- I've seen more
2 claimants laid off, terminated, laid off
3 because they can't come back to work with
4 restrictions, asked to sign resignation forms,
5 resigning from work. It's prevalent more
6 today than it ever has been. And the second
7 injury fund, which is no longer in existence,
8 does not apply in this particular case. Are
9 there any questions at all?

10 COMMISSIONER WILKERSON: No.

11 CHAIRMAN: Thank y'all.

12 (There being nothing further, the hearing concluded
13 at 3:20 p.m.)

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1205924

David B. Lemon,

CLAIMANT/APPELLANT,

vs.

Mt. Pleasant Waterworks,

EMPLOYER,

AND

State Accident Fund ,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina,
on August 15, 2016 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
October 26th, 2016

APPEARANCES:

Appellant David B. Lemon, Claimant of Charleston, South
Carolina represented by Carl H. Jacobson, Esquire of
Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith,
P.A. in Charleston, South Carolina.

Defendants/Respondents represented by John Gabriel
Coggiola, Esquire of Willson Jones Carter & Baxley, P.A. in
Columbia, South Carolina.

STATEMENT OF THE CASE

Claimant/Appellant ("Appellant") was involved in an admitted work accident on May 8, 2012, when he injured his lower back while pulling a device designed to provide leverage on a sewer line. As a result of his accident, Defendants/Respondents ("Respondents") provided Appellant with authorized causally related medical treatment pursuant to S.C. Code Ann. §42-15-60, with multiple medical providers, including but not limited to, Dr. James Aymond and Dr. Thomas Duc. On June 20, 2013, Dr. Aymond found the Appellant to be at maximum medical improvement ("MMI") and assigned 24% impairment to the Appellant's spine. On February 12, 2014, Dr. Duc found the Appellant to be at MMI, and February 28, 2014, Dr. Duc completed a Form 14B Physician's Statement wherein he assigned Appellant impairment ratings of 24% to the lumbar spine, 7% to the right lower extremity, and 7% to the left lower extremity.

On March 6, 2014, Appellant filed a Form 50 request for hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability, lifetime medical treatment, and a lump sum award. On April 7, 2014, Respondents timely filed a Form 51 response. In addition, on May 1, 2014, Respondents filed a Form 21 request for hearing, seeking stop payment of temporary compensation, a determination of permanency, and a requesting credit for overpayment of temporary compensation.

On September 11, 2014, a hearing was held on all pleadings before the Single Commissioner, Commissioner Scott Beck ("Single Commissioner"). On January 7, 2015, the Single Commissioner issued a decision and order, wherein he set forth the following findings of fact and conclusions of law:

Findings of Fact:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. Singleton v.

Young Lumber. 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.
3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.
4. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.
5. I find that the award is to be paid in a lump sum.
6. I find that the Claimant is entitled to Utica- Mohawk Mills v. Orr language in this order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to James v. Anne's he is entitled to an award for a lump sum with the insertion of Utica-Mohawk Mills v. Orr language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.
7. The Claimant sustained an admitted injury to his back that occurred on May 8, 2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).
8. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).
9. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-lvac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).
10. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).
11. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.
12. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing,

narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

13. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.
14. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

Conclusions of Law:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

On January 20, 2015, Appellant filed a Form 30 Request for Commission Review, listing the following grounds for appeal:

1. Did the Single Commissioner err by finding "as of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170." (Finding of Fact No. 3).

The Commissioner erred as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170 (B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170 (B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

2. The Single Commissioner erred in concluding that “§42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.” (Conclusion of Law No. 3).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that “if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.”

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

3. The Single Commissioner erred in ordering that the Defendants be credited “for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the hearing.” (Order and Award).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170 (B), provides that “if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.”

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170 (B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

Copies of the above assignments of error were furnished to all parties prior to the oral arguments scheduled before the Full Commission Appellate Panel ("Appellate Panel") on April 20, 2015. On September 11, 2015, the Appellate Panel issued a decision and order, remanding the case back to the Single Commissioner (1) for a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) for a determination of the statutes under which prior awards were issued; and (3) for any facts, analysis, conclusions of law, or order provisions that the Single Commissioner should deem necessary in the analysis of the §42-9-170 issue.

On May 9, 2016, the Single Commissioner issued a second decision and order in response to the Appellate Panel's instructions on remand. At the outset, Single Commissioner noted that all evidence received in the case was outlined in the original January 7, 2015 order, and, along with the Appellant's testimony, remained part of the commission's file and served as the basis upon which the current decision was issued. The Single Commissioner found that the questions on remand would be responded to without the necessity of oral arguments or additional submissions, and he issued a Decision and Order wherein he set forth the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.
6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.
7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.
15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of

his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.

17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper v. Firestone Stores, Medlin v. Greenville County, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies v. S.C. Second Injury Fund, Roberts v. McNair, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

Conclusions of Law:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham v. R.A. & E.M. Thornley and Co. provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).
3. Section 42-9-170 provides that if an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.
4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C. 1952).
5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2d 667 (S.C. 1991).
6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).
7. Roberts v. McNair Law Firm provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2d 453 (S.C. 2005).
8. Gestinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2d 104 (S.C. 1999).
9. Crisp v. SouthCo, Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-

9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).

10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 304, 638 S.E.2nd 77 (S.C. 2006).
11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2nd 730 (S.C. 2010).

On May 23, 2016, Appellant filed a second Form 30 Request for Commission Review, listing the following grounds for appeal:

1. The Single Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, namely: 1) a determination of the particular subsection of §42-9-10 used for the award of the present case. 2) the determination of the statutes under which the prior awards were issued. 3) any fact, analysis, conclusions of law, or provisions that are necessary in an analysis of the §42-9-170 credit issue.
2. The Single Commissioner erred in finding that "the Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy" (Finding of Fact No. 12). The error being that the present award for permanent total disability is pursuant to §42-9-10(A) and not based upon the loss of another member pursuant to §42-9-30.
3. The Single Commissioner erred in finding that "Defendants" liability per §42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims . . . Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks." (Finding of Fact No. 13). The error being that the Single Commissioner determined that the Claimant is entitled to permanent total disability benefits pursuant to §42-9-10(A) and is not based upon a finding of a subsequent injury to the back. This finding is inconsistent with the award pursuant to §42-9-10(A).
4. The Single Commissioner erred in finding "because the Claimant has already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012. (Finding of Fact No. 17). The error being that the award pursuant to §42-9-10(A) was based on the Claimant's loss of earning capacity and was not based upon §42-9-30 and the specific loss of use of the back is totally irrelevant and inconsistent with the award made pursuant to §42-9-10(A) for lost earnings capacity. Additionally, 75% disability of the back is presumed to be permanent total disability.
5. The Single Commissioner erred in Finding of Fact No. 19 awarding the Defendants a credit or offset for prior awards. The error being that the applicable credit statute, §42-9-170, does not apply to awards pursuant to §42-9-10 (A).
6. The Single Commissioner in Conclusions of Law items 2-11. The error being that the cited cases do not apply to allow credits to the Defendants for prior awards; most of the cases precede the 2007 amendment to §42-9-170; and the only statutory basis for the

credits, §42-9-170, does not apply to §42-9-10(A).

7. The Single Commissioner erred in awarding the Defendants a credit for the prior awards. The Commissioner has expressly found and concluded that §42-9-170 applies in this case. Said code section does not provide any credit for an award of permanent total disability pursuant to §42-9-10.

Copies of the above assignments of error were furnished to all parties prior to the oral arguments scheduled before the Full Commission on August 15, 2016.

Pursuant to S.C. Code Ann. §42-17-50 (1985), the Full Commission reviewed the award and weighed all of the evidence in the record as presented at the prior hearings. The Appellate Panel also considered all issues raised in the briefs of both Appellant and Respondents. Following their review, the Appellate Panel has determined that the May 6, 2016 Order of the Single Commissioner is hereby **AFFIRMED IN FULL**. The Findings Fact and Conclusions of Law found in the Single Commissioner's May 6, 2016 Decision and Order, as specified above, are hereby **AFFIRMED IN FULL**.

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, **WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:**

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.
6. While the Single Commissioner initially stated that he needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding his research to other cases and

statutes, he became even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.

7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.
15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.
17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper, Medlin, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies, Roberts, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws,
**WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF
LAW:**

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham v. R.A. & E.M. Thornley and Co. provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).
3. Section 42-9-170 provides that if an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.
4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C. 1952).
5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2nd 667 (S.C. 1991).
6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).
7. Roberts v. McNair Law Firm provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2nd 453 (S.C. 2005).
8. Gestinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2nd 104 (S.C. 1999).
9. Crisp v. SouthCo, Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).
10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 304, 638 S.E.2nd 77 (S.C. 2006).

11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2nd 730 (S.C. 2010).

ORDER:

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner from which this appeal has been taken is hereby **AFFIRMED IN FULL**.

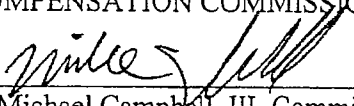
IT IS HEREBY ORDERED that the Appellant is permanently and totally disabled and entitled to five hundred (500) weeks of compensation, but that Appellant's five hundred (500) weeks is offset not only by temporary benefits paid in the instant claim but also by TTD and PPD paid in each of his prior four claims as outlined herein.

IT IS FURTHER ORDERED that claimant's request for Utica-Mohawk language is again granted, with specific language to be issued via supplemental order.

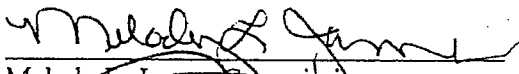
IT IS SO ORDERED.

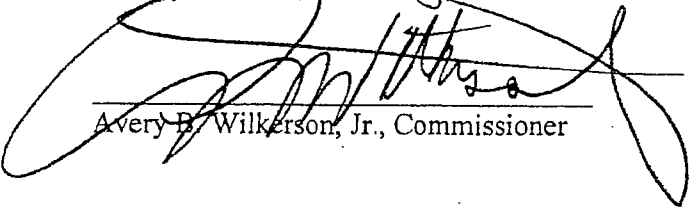
AFFIRMED

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


R. Michael Campbell, III, Commissioner
Chair for Appellate Panel

CONCUR:


Melody L. James, Commissioner


Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on October 26, 2016

000121

3/17/2009 08:40:23 (Page 2 of 2)

WCC FORM 12-A REV. DATE 3/98

000122

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0902321
Carrier File # 2009-000940
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
P. O. Box 12055, Charleston, SC 29422

MT. PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(843) 926-8734 (home) (work)

Preparer's name: Mee Ling Khor-Gould (803) 896-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.	TT 3.0000	10-MAR-09	30-MAR-09	1,243.35
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release				
Total Compensation Paid				1,243.35

6. Total Medical Benefits* Paid

7. Funeral Benefits

() Case Denied

Date of Injury: 03/04/2009

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: _____

Claimant

By: _____

Employer's Representative

Date: 4/9/09

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: _____

Report of additional Fees and Recoupment

A. Carrier Reimbursement by Third Party

B. Attorney's Fee Paid by Employer

C. Attorney's Fee Paid by Claimant

(Non contingent fees, only)

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. *Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within sixteen days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC
4/10/09

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0902321
Carrier File # 2009-000940
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
P. O. Box 12055, Charleston, SC 29422

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

Preparer's name: Mee Ling Khor-Gould (803) 896-5834 State Accident Fund, Insurance Carrier

TT	3.0000	10-MAR-09	30-MAR-09	1,243.35
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To: SAF

From: nbocan@compendiumusa.net

5/4/2010 09:05:04 (Page 2 of 2)

SC WORKERS COMPENSATION FIRST REPORT OF INJURY OR ILLNESS									
EMPLOYER (NAME & ADDRESS (INCL. ZIP))				INSURED REPORT NUMBER		LOCATION #			
Mount Pleasant Waterworks Water Operations 955 Waterworks Blvd Mt Pleasant SC 29464						PHONE #			
SIC CODE		EMPLOYER FIRM		EMPLOYER'S LOCATION ADDRESS (IF DIFFERENT)		PHONE #			
CARRIER/CLAIMS ADMINISTRATOR CARRIER (NAME, ADDRESS, & PHONE NO)				POLICY PERIOD		CLAIMS ADMINISTRATOR (NAME, ADDRESS, & PHONE NO)			
State Accident Fund of South Carolina P.O. Box 102100 Columbia, SC 29221-5000 800-521-6576				TO					
CHECK IF APPROPRIATE				SELF INSURANCE		ADMINISTRATOR FIRM			
AGENT NAME & CODE NUMBER									
EMPLOYEE NAME (LAST, FIRST, MIDDLE)		DATE OF BIRTH		SOCIAL SECURITY NUMBER		DATE HIRED		STATE OF HIRE	
Lemon, David L		11-17-1961		251311250		12-18-2006		SC	
ADDRESS (INCL. ZIP)		SEX		MARITAL STATUS		OCCUPATION/JOB TITLE			
816 Bermuda Street		☒ MALE ☐ FEMALE ☐ UNKNOWN		☒ UNMARRIED (SINGLE) ☐ MARRIED ☐ SEPARATED ☐ UNKNOWN		Mechanic			
Charleston, SC 29412						EMPLOYMENT STATUS			
PHONE		# OF DEPENDENTS				Regular Employment			
843-928-8734		0							
RATE		PER		DAY		MONTH		# DAYS WORKED/WEEK	
\$34,174.40		PER		WEEK		☒ OTHER		5	
DATE OF OCCURRENCE/TREATMENT		DATE OF INJURY/ILLNESS		TIME OF OCCURRENCE		LAST WORK DATE		DATE EMPLOYER NOTIFIED	
07:00		04/26/2010		02:00		04-25-2010		04/29/2010	
CONTACT NAME/PHONE NUMBER		TYPE OF INJURY/ILLNESS		PART OF BODY AFFECTED		FULL PAY FOR DAY OF INJURY?		DID SALARY CONTINUE?	
Ronnie Freeman 843-375-5468 Safety Director		Strain		R shoulder		☒ YES ☐ NO		☒ YES ☐ NO	
DID INJURY/ILLNESS OCCUR ON EMPLOYER'S PREMISES?		DEPARTMENT OR LOCATION WHERE ACCIDENT OR ILLNESS EXPOSURE OCCURRED		ALL EQUIPMENT, MATERIALS, OR CHEMICALS EMPLOYEE WAS USING WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED		WORK PROCESS THE EMPLOYEE WAS ENGAGED IN WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED			
☐ YES ☒ NO		Lucas Street		Camera, camera cable.		Pulling a camera cable trying to free camera.			
SPECIFIC ACTIVITY THE EMPLOYEE WAS ENGAGED IN WHEN THE ACCIDENT OR ILLNESS EXPOSURE OCCURRED		HOW INJURY OR ILLNESS (ABNORMAL HEALTH CONDITION) OCCURRED		DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE ANY OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL					
Pulling a camera cable trying to free camera.		The camera was stuck and I was pulling a camera cable trying to free it. When it became unstuck, I was thrown down and fell, landing on his R shoulder.							
DATE RETURN(ED) TO WORK		IF FATAL, GIVE DATE OF DEATH		WERE SAFEGUARDS OR SAFETY EQUIPMENT PROVIDED?		WERE THEY USED?			
				☐ YES ☒ NO		☐ YES ☒ NO			
PHYSICIAN/HEALTH CARE PROVIDER (NAME & ADDRESS)		HOSPITAL (NAME & ADDRESS)		INITIAL TREATMENT					
Doctors Care - Mt. Pleasant 631 Johnnie Dobbs Blvd Mt. Pleasant, SC 29464				☐ NO MEDICAL TREATMENT ☐ MINOR BY EMPLOYER ☒ MINOR CLINICAL CASE ☐ EMERGENCY CARE ☐ HOSPITALIZED > 24 HRS ☐ PATIENT WOULD NOT BE A MEDICANT					
WITNESSES (NAME & PHONE #)		DATE PREPARED		PREPARED BY NAME & TITLE		PHONE NUMBER			
John Turner; 843-884-9626		05-04-2010		Ronnie Freeman/Safety Director		843-375-5468			
DATE ADMINISTRATOR NOTIFIED		05-03-2010							

WDC FORM 12-A REV DATE 066

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1006927
Carrier File # 2010-001561
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
P. O. Box 12055, Charleston, SC 29422-2055

(843) 926-8734 (home) (work)

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

Preparer's name: Mee Ling Khor-Gould (803) 896-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.	TT 25.4286	29-JUN-10	23-DEC-10	10,292.72
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				

RECEIVED

5. Agreement and Final Release
Total Compensation Paid
MAY 16 2011 30,357.75
(FRONT DESK) 40,650.47
SC Workers' Comp Comm 18,853.59

6. Total Medical Benefits* Paid
7. Funeral Benefits

() Case Denied
Date of Injury: 04/26/2010
By signing this receipt, I acknowledge that I have received the compensation shown above.

By: David B. Lemon By: Mee Ling Khor-Gould Date: 5/13/11
Claimant Employer's Representative

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: _____
Report of additional Fees and Recoupment
A. Carrier Reimbursement by Third Party \$
B. Attorney's Fee Paid by Employer \$
C. Attorney's Fee Paid by Claimant \$
(Non contingent fees, only)

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. *Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within sixteen days of final payment of compensation. Form 19 must be filed when a claim is denied.

To: SAF

From: nboean@compendiumusa.net 4/14/2011 9:30:48 AM (Page 2 of 2)

SC WORKERS COMPENSATION FIRST REPORT OF INJURY OR ILLNESS									
EMPLOYER (NAME & ADDRESS INCL ZIP)			CARRIER/CLAIMS ADMINISTRATOR		REPORT PURPOSE CODE		INSURED REPORT NUMBER		
Mount Pleasant Waterworks Water Operations 955 Waterworks Blvd Mt Pleasant SC 29464			State Accident Fund of South Carolina P.O. Box 102100 Columbia, SC 29221-5000 800-521-5578		POLICY PERIOD		CLAIMS ADMINISTRATOR (NAME, ADDRESS, & PHONE NO)		LOCATION #
SIC CODE	EMPLOYER FEN		TO		CHECK IF APPROPRIATE		ADMINISTRATOR FEN		PHONE #
CARRIER/CLAIMS ADMINISTRATOR			POLICY PERIOD		CHECK IF APPROPRIATE		ADMINISTRATOR FEN		PHONE #
State Accident Fund of South Carolina P.O. Box 102100 Columbia, SC 29221-5000 800-521-5578			TO		CHECK IF APPROPRIATE		ADMINISTRATOR FEN		PHONE #
AGENT NAME & CODE NUMBER			POLICY/SELF INSURED NUMBER		CHECK IF APPROPRIATE		ADMINISTRATOR FEN		PHONE #
AGENT NAME & CODE NUMBER			POLICY/SELF INSURED NUMBER		CHECK IF APPROPRIATE		ADMINISTRATOR FEN		PHONE #
EMPLOYEE/INJURED			DATE OF BIRTH		SOCIAL SECURITY NUMBER		DATE HIRED		STATE OF HIRED
Lemon, David L			11-17-1961		251311250		12-18-2008		SC
ADDRESS (INCL ZIP)			SEX		MARRITAL STATUS		OCCUPATION/JOB TITLE		EMPLOYMENT STATUS
816 Bermuda Street PO Box 12055 Charleston, SC 29422-2055 Charleston, SC 29412			☒ MALE ☐ FEMALE ☐ UNKNOWN		☒ UNMARRIED (SINGLE) ☐ MARRIED ☐ SEPARATED ☐ UNKNOWN		Mechanic		Regular Employment
PHONE			# OF DEPENDENTS		DAYS WORKED/ WEEK		FULL PAY FOR DAY OF INJURY?		DATE SALARY CONTINUED?
(843) 925-8734			0		5		☒ YES ☐ NO		☒ YES ☐ NO
RATE			PERU		DAY		MONTH		# DAYS WORKED/ WEEK
\$34,174.40			WEEK		☒ OTHER				5
OCCURRENCE/TREATMENT			DATE OF INJURY/ILLNESS		TIME OF OCCURRENCE		LAST WORK DATE		DATE EMPLOYER NOTIFIED
THE EMPLOYEE BEGAN WORK			07:00		11:00		04-13-2011		04/13/2011
CONTACT NAME/PHONE NUMBER			TYPE OF INJURY/ILLNESS		PART OF BODY AFFECTED				
Ronnie Freeman, safety dir. 843-375-5468			Strain		R shoulder				
DID INJURY/ILLNESS EXPOSURE OCCUR ON EMPLOYER'S PREMISES?			TYPE OF INJURY/ILLNESS		PART OF BODY AFFECTED/COOPERATIVE				
☒ YES ☐ NO			TYPE OF INJURY/ILLNESS		PART OF BODY AFFECTED/COOPERATIVE				
DEPARTMENT OR LOCATION WHERE ACCIDENT OR ILLNESS EXPOSURE OCCURRED			ALL EQUIPMENT, MATERIALS, OR CHEMICALS EMPLOYEE WAS USING WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED		N/A				
SPECIFIC ACTIVITY THE EMPLOYEE WAS ENGAGED IN WHEN THE ACCIDENT OR ILLNESS EXPOSURE OCCURRED			WORK PROCESS THE EMPLOYEE WAS ENGAGED IN WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED		Playing Volleyball				
HOW INJURY OR ILLNESS/ABNORMAL HEALTH CONDITION OCCURRED. DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE ANY OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL.			DATE RETURNED TO WORK		IF FATAL, GIVE DATE OF DEATH		WERE SAFEGUARDS OR SAFETY EQUIPMENT PROVIDED?		YES ☒ NO ☐
Had team building exercise. The exercise was Volleyball. RW was participating in Volleyball when he re-injured his right shoulder.			DATE RETURNED TO WORK		IF FATAL, GIVE DATE OF DEATH		WERE THEY USED?		YES ☒ NO ☐
PHYSICIAN/HEALTH CARE PROVIDER (NAME & ADDRESS)			HOSPITAL (NAME & ADDRESS)		INITIAL TREATMENT				
Doctors Care - Mt. Pleasant 631 Johnnie Dobbs Blvd Mt. Pleasant, SC 29464					NO MEDICAL TREATMENT WHICH BY EMPLOYER ☒ WHICH CLINICAL HOSP EMERGENCY CARE HOSPITALIZED > 24 HRS SURGERY/AMPUTATION THE INFORMATION				
WITNESSES (NAME & PHONE #)			DATE PREPARED		PREPARED BY NAME & TITLE		PHONE NUMBER		
Johnny Stead; (843) 884-9626			04-14-2011		Ronnie Freeman, Safety Dir.		843-375-5468		
DATE ADMINISTRATOR NOTIFIED			DATE PREPARED		PREPARED BY NAME & TITLE		PHONE NUMBER		
04-13-2011			04-14-2011		Ronnie Freeman, Safety Dir.		843-375-5468		

WCC FORM 12-A

REV DATE 3/99

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1103641
Carrier File # 2011-001072
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
P. O. Box 12055, Charleston, SC 29422-2055

(843) 926-8734 (home) (work)

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

Preparer's name: Mee Ling Khor-Gould (803) 896-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.				
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release	(Case settled with claim #2010-001561. See WCC # 1006927)			

Total Compensation Paid

6. Total Medical Benefits* Paid 175.00

7. Funeral Benefits

() Case Denied

Date of Injury: 04/13/2011

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: [Signature]
Claimant

By: [Signature]
Employer's Representative
5/13/11

Date: 5/13/11

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: _____

Report of additional Fees and Recoupment

- A. Carrier Reimbursement by Third Party
- B. Attorney's Fee Paid by Employer
- C. Attorney's Fee Paid by Claimant
(Non contingent fees, only)

WCC
5/16/11

\$
\$
\$

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. *Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within sixteen days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NOS.: 1006927 and 1103641

David Lemon,

#2010-001561

Employee-Claimant

RECEIVED
SETTLEMENT

vs.

MAY 18 2011

PETITION FOR APPROVAL
OF
COMPROMISE SETTLEMENT
AGREEMENT

Mt. Pleasant Waterworks

Division of Claims
Workers' Comp. Comm.

Employer, and

State Accident Fund,

Carrier-Defendants.

The Petition of David Lemon, Employee, and Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, respectfully shows:

1. That the Employee sustained an injury by accident arising out of and in the course of employment by Employer on or about April 26, 2010 and April 13, 2011, in Charleston County, South Carolina. Employee suffered an injury to the right shoulder.

2. That Employee received medical treatment for the above injury. That on March 14, 2011, Dr. Harry P. Rudolph, IV gave a rating of 12% to the right shoulder.

3. That Employee has an average weekly wage of \$607.13, making a compensation rate of \$404.77.

4. That an actual bona fide disagreement exists between Employee on the one hand and Employer and Carrier on the other as to the extent of residual disability, if any, and the amount of compensation for disability, if any, and the amount of compensation for any disfigurement to which Employee might be due and for which Employer and Carrier may be liable under the South Carolina Workers' Compensation Law based upon the aforesaid accident and injury.

5. That an agreement has been reached between Employee and Employer and Carrier whereunder Employer and Carrier will pay and Employee will accept the sum of Thirty Thousand Three Hundred Fifty-Seven and 75/100 (\$30,357.75) Dollars in full

payment and compromise settlement of all rights and claims of Employee under South Carolina Workers' Compensation Law for the above accidents. That this agreement shall act as a full and final release of all claims of Employee against Employer and Carrier. That this agreement shall release Employer and Carrier of all claims of Employee for compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability, and claim for disfigurement or for a change of condition.

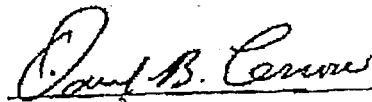
6. That this agreement shall release Employer and Carrier for all medical care and treatment including hospital, surgical, nursing, physician, prescriptions and any other medical expenses for which Employee has incurred or will incur in the future. Medicals authorized by Carrier prior to the date of this agreement will be paid by Carrier. Medicals previously denied or unknown will remain denied by Carrier and will be the responsibility of Employee.

7. That the payment of the sum of Thirty Thousand Three Hundred Fifty-Seven and 75/100 (\$30,357.75) Dollars represents any and all disability claims to include 25% to the right shoulder. Carrier has agreed to waive overpayment of temporary total benefits.

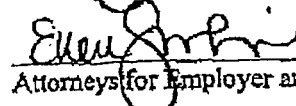
8. That Employer and Carrier do not waive any right to a third party lien or the proceeds of any third party recovery from the above accidents.

9. That both parties believe this final release and compromise settlement agreement to be in their best interests and is fair, reasonable, and proper under all of the circumstances of the matter.

WHEREFORE, The Petitioners each pray that the South Carolina Workers' Compensation Commission does consider the said compromise settlement agreement, and enter an Order confirming and approving the same and authorizing the parties hereto to carry the said compromise settlement agreement out and make and receive the aforesaid payment in full settlement, acquittance and discharge of all of the rights of Employer and Carrier based upon the aforesaid accidents and injuries, and all disability and expenses resulting or hereafter to result therefrom.


Employee


Attorney for Employee


Attorneys for Employer and Carrier/Defendants

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1006927 and 1103641

David Lemon,

Employee-Claimant,

vs.

Mt. Pleasant Waterworks,

Employer, and

State Accident Fund,

Carrier-Defendants.

ORDER APPROVING
SETTLEMENT AGREEMENT

The foregoing settlement was examined after a review of the Workers' Compensation Commission file relative to these cases. Relying upon the representations of the parties and/or counsel, the same are hereby approved this ____ day of _____, and these cases are dismissed with prejudice. All orders, awards and opinions heretofore issued in these cases are hereby set aside, abrogated, and nullified.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By: _____

Columbia, South Carolina

FEE SUBJECT TO FORM 61

To: SAF

From: areitz@compendiumusa.net 10/5/2011 8:22:54 AM (Page 2 of 2)

1

SC WORKERS COMPENSATION - FIRST REPORT OF INJURY OR ILLNESS											
EMPLOYER (NAME & ADDRESS (NCL ZIP))			CARRIER/CLAIMS ADMINISTRATION CLAIM NUMBER			REPORT PURPOSE CODE					
Mount Pleasant Waterworks Water Operations 955 Waterworks Blvd Mt Pleasant SC 29464			INSURED REPORT NUMBER			LOCATION #					
RC CODE			EMPLOYER FEIN			LOCATION #			PHONE #		
CARRIER/CLAIMS ADMINISTRATOR			POLICY PERIOD			CLAIMS ADMINISTRATOR NAME, ADDRESS, & PHONE NO					
State Accident Fund of South Carolina P.O. Box 102100 Columbia, SC 29221-5000 800-521-6576			TO								
CHECK IF APPROPRIATE			CHECK IF APPROPRIATE								
CARRIER FEIN			POLICY/SELF INSURED NUMBER			ADMINISTRATOR FEIN					
AGENT NAME & CODE NUMBER											
EMPLOYEE WAGE			DATE OF BIRTH			SOCIAL SECURITY NUMBER			DATE HIRED		
NAME (LAST, FIRST, MIDDLE)			11-17-1961			251311250			12-18-2006		
Lemon, David L			SEX			MARITAL STATUS			OCCUPATION/JOB TITLE		
ADDRESS (NCL ZIP)			X MALE			X UNMARRIED (S/SELDOM)			Wastewater Technician		
816 Bermuda Street			FEMALE			MARRIED			EMPLOYMENT STATUS		
Charleston, SC 29422			X COMMON			SEPARATED			Regular Employment		
PHONE			OF DEPENDENTS			UNKNOWN			NCCI CLASS CODE		
(843) 925-8130			0								
RATE			PER			DAY			MONTH		
\$34,174.40			WEEK			X OTHER			5		
OCCURRENCE/TREATMENT			DATE OF INJURY/ILLNESS			TIME OF OCCURRENCE			LAST WORK DATE		
TIME EMPLOYEE BEGAN WORK			X AM			DATE OF INJURY/ILLNESS			10/03/2011		
07:00			PM			03:00			X PM		
CONTACT NAME/PHONE NUMBER			TYPE OF INJURY/ILLNESS			PART OF BODY AFFECTED					
Ronnie Freeman P# 843-375-5468			Strain			Lower Back					
NO INJURY/ILLNESS EXPOSURE OCCUR ON EMPLOYER'S PREMISES?			TYPE OF INJURY/ILLNESS CODE			PART OF BODY AFFECTED CODE					
X YES			NO								
DEPARTMENT OR LOCATION WHERE ACCIDENT OR ILLNESS EXPOSURE OCCURRED			ALL EQUIPMENT, MATERIALS, OR CHEMICALS EMPLOYEE WAS USING WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED								
Jobsite at residential area			Pipe								
SPECIFIC ACTIVITY THE EMPLOYEE WAS ENGAGED IN WHEN THE ACCIDENT OR ILLNESS EXPOSURE OCCURRED			WORK PROCESS THE EMPLOYEE WAS ENGAGED IN WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED								
Repairing a pipe while inside a trench.			Repairing a pipe while inside a trench.								
HOW INJURY OR ILLNESS/ANIMAL HEALTH CONDITION OCCURRED, DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE ANY OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL			CRUCIAL GENERAL CODE								
Repairing a pipe while inside a trench, strained lower back when pulling pipe towards him.			CRUCIAL GENERAL CODE								
DATE RETURNED TO WORK			IF FATAL, GIVE DATE OF DEATH			WERE SAFEGUARDS OR SAFETY EQUIPMENT PROVIDED?			YES		
						WERE THEY USED?			X NO		
PHYSICIAN/HEALTH CARE PROVIDER (NAME & ADDRESS)			HOSPITAL (NAME & ADDRESS)			INITIAL TREATMENT					
Doctors Care - Mt Pleasant 631 Johnnie Dobbs Blvd Mt Pleasant, SC 29464						NO MEDICAL TREATMENT					
						MAJOR BY EMPLOYER					
						X MAJOR CLINICAL					
						EMERGENCY CARE					
						HOSPITALIZED > 24 HRS					
						HOME HEALTH CARE OR ATTENDED					
WITNESSES (NAME & PHONE #)			DATE PREPARED			PREPARER'S NAME & TITLE			PHONE NUMBER		
Johnnie Stead ; 843-884-9626			10-05-2011			Ronnie Freeman			843-375-5468		
DATE ADMINISTRATOR NOTIFIED			DATE PREPARED			PREPARER'S NAME & TITLE			PHONE NUMBER		
10-04-2011			10-05-2011			Ronnie Freeman			843-375-5468		

WCC FORM 12-A

REV. DATE 3/04

000132 71

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1114198
Carrier File # 2011-003224
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
PO Box 12055, Charleston, SC 29422

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(843) 926-8734 (home) (work)

Preparer's name: Mee Iing Khor-gould (803) 896-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.	20.5714	* Details on Page 2 *		7,559.40
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release				
Total Compensation Paid				32,005.50
				39,564.90
				6,090.64
6. Total Medical Benefits* Paid				
7. Funeral Benefits				

RECEIVED

APR 30 2012

(FRONT DESK)

SC Workers' Comp Comm

() Case Denied

Date of Injury: 10/03/2011

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: David B. Lemon By: Mee Iing Khor-gould
Claimant Employer's Representative

Date: 4/27/12

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: _____

Report of additional Fees and Recoupment

A. Carrier Reimbursement by Third Party

\$.00

B. Attorney's Fee Paid by Employer

\$

C. Attorney's Fee Paid by Claimant

\$

(Non contingent fees, only)

File this form with the Claims Department according to R.67-414 and R.67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. *Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within sixteen days of final payment of compensation. Form 19 must be filed when a claim is denied

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1114198
Carrier File # 2011-003224
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon 251-31-1250
PO Box 12055, Charleston, SC 29422

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

Preparer's name: Mee ling Khor-gould (803) 896-5834 State Accident Fund, Insurance Carrier

TT	1.8571	05-OCT-11	17-OCT-11	640.12
TT	2.8571	05-OCT-11	24-OCT-11	234.46
TT	15.8571	18-OCT-11	05-FEB-12	6,684.82

2011-003224

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1114198

David Lemon,
Employee-Claimant,
vs.
Mt. Pleasant Waterworks,
Employer, and
State Accident Fund,
Carrier-Defendants.

PETITION FOR APPROVAL
OF
COMPROMISE SETTLEMENT
AGREEMENT
RECEIVED
SETTLEMENT
APR 16 2012
Division of Claims
SC Workers Comp. Comm.

The Petition of David Lemon, Employee, and Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, respectfully shows:

1. That the Employee sustained an injury by accident arising out of and in the course of employment by Employer on or about October 3, 2011, in Charleston County, South Carolina. Employee suffered an injury to lower back.
2. That Employee received medical treatment for the above injuries. That on February 24, 2012, Dr. James Aymond gave a rating of 7% to the spine.
3. That Employee has an average weekly wage of \$640.08, making a compensation rate of \$426.74.
4. That an actual bona fide disagreement exists between Employee on the one hand and Employer and Carrier on the other as to the extent of residual disability, if any, and the amount of compensation for disability, if any, and the amount of compensation for any disfigurement to which Employee might be due and for which Employer and Carrier may be liable under the South Carolina Workers' Compensation Law based upon the aforesaid accident and injury.
5. That an agreement has been reached between Employee and Employer and Carrier whereunder Employer and Carrier will pay and Employee will accept the sum of

Thirty-Two Thousand Five and 50/100 (\$32,005.50) Dollars in full payment and compromise settlement of all rights and claims of Employee under South Carolina Workers' Compensation Law for the above accident. That this agreement shall act as a full and final release of all claims of Employee against Employer and Carrier. That this agreement shall release Employer and Carrier of all claims of Employee for compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability, and claim for disfigurement or for a change of condition.

6. That this agreement shall release Employer and Carrier for all medical care and treatment including hospital, surgical, nursing, physician, prescriptions and any other medical expenses for which Employee has incurred or will incur in the future. Medicals authorized by Carrier prior to the date of this agreement will be paid by Carrier. Medicals previously denied or unknown will remain denied by Carrier and will be the responsibility of Employee.

7. That the payment of the sum of Thirty-Two Thousand Five and 50/100 (\$32,005.50) Dollars represents any and all disability claims to include 25% to the spine.

8. The Employer and Carrier express no opinion regarding the above allocation of the settlement proceeds. The Employer and Carrier have not given any advice concerning the distribution of money per the above Utica Mohawk language.

9. That Employer and Carrier do not waive any right to a third party lien or the proceeds of any third party recovery from the above accident.

10. That both parties believe this final release and compromise settlement agreement to be in their best interests and is fair, reasonable, and proper under all of the circumstances of the matter.

WHEREFORE, The Petitioners each pray that the South Carolina Workers' Compensation Commission does consider the said compromise settlement agreement, and enter an Order confirming and approving the same and authorizing the parties hereto to carry the said compromise settlement agreement out and make and receive the aforesaid payment in full settlement, acquittance and discharge of all of the rights of Employer and Carrier based upon the aforesaid accident and injuries, and all disability

and expenses resulting or hereafter to result therefrom.

Don B. Lew
Employee

[Signature]
Attorney for Employee

Matth
Attorneys for Employer and Carrier/Defendants

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1114198

David Lemon,
Employee-Claimant,
vs.
Mt. Pleasant Waterworks,
Employer, and
State Accident Fund,
Carrier-Defendants.

ORDER APPROVING
SETTLEMENT AGREEMENT

The foregoing settlement was examined after a review of the Workers' Compensation Commission file relative to this case. Relying upon the representations of the parties and/or counsel, the same is hereby approved this ____ day of _____, _____, and this case is dismissed with prejudice. All orders, awards and opinions heretofore issued in this case are hereby set aside, abrogated, and nullified.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By: _____

Columbia, South Carolina

FEE SUBJECT TO FORM 61