

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

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

RECEIVED

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S.C. SUPREME COURT

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

v.

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

**MOTION TO STRIKE AND
REPLY IN OPPOSITION TO
PETITIONER'S RETURN**

Pursuant to Rules 240 and 242(f), SCACR, Respondents Lowe's Home Centers, Inc.-Harbison and Sedgwick Claims Management Services, Inc. hereby move to strike Petitioner Henton T. Clemmons, Jr.'s Return to Petition for Rehearing ("Return") and, out of an abundance of caution, reply in opposition. Respondents filed their Petition for Rehearing with this Court on April 7, 2017, making Petitioner's Return due April 17, 2017. Rule 242(f), SCACR. Petitioner did not seek an extension of time in which to file his Return but,¹ instead, filed his Return on April 28, 2017. Petitioner's Return is out of time and should be stricken.

¹ In any event, Petitioner has used the full 20 days of extensions allowed under this Court's Order, dated July 16, 2014, regarding extensions.

1. This Court erred by basing its Opinion on an argument that is unpreserved for appellate review.

In any event, and out of an abundance of caution, should this Court consider the substance of Petitioner's Return, it lacks merit. Nothing in his Return effectively counters the problem that this Court's Opinion is based entirely on an unpreserved argument. Although Petitioner argued to the Commission that the evidence supported a finding that he had lost 50% or more of the use of his back, he never argued to the Commission or to the Court of Appeals that Dr. Drye's rating actually supported such a finding. As noted in Respondents' Petition for Rehearing, Petitioner went out of his way to obtain multiple independent medical opinions, all couched in terms of loss of function or similar language, (Appx. pp. 208-263), in order to counter Dr. Drye's impairment rating. Before the Commission and the Court of Appeals, Petitioner consistently argued that Dr. Drye's medical opinion should be disregarded in favor of his own medical opinions because only his medical experts used phrases such as "loss of function." (Appx. pp. 329-330; p. 432, lines 16-21; p. 434, lines 4-8). Not once did he argue that Dr. Drye's whole person rating converted to a cervical spine rating, not until oral argument and in his Petition for Rehearing before the Court of Appeals and, even then, only in reference to his argument that he should receive separate ratings for his myelopathy and lower back.

Petitioner can point to no place in the Record where this entirely new theory of his case – that Dr. Drye's rating, once converted to the cervical spine, actually supports a finding that he has lost 50% or more of the use of his back – was ever raised before the Commission or, for that matter, to the Court of Appeals. Thus, as Respondents have pointed out, the entire argument/theory of the case that supports this Court's Opinion No.

27708 is not preserved for appellate review. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 645 (2011) (it is axiomatic that an argument or theory of a case that is raised for the first time on appeal is not preserved for appellate review); see also Foster v. Foster, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011) (an argument not raised to the lower courts is not preserved for this Court’s appellate review); Creighton v. Coligny Plaza Ltd. P’ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (an argument raised by an appellant based on different grounds from the argument presented to the trial court is not preserved for appellate review); see also I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000) (explaining the importance of preservation rules, which prevent “a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card”); Mercer v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (an appellate court cannot address an issue that was not raised to the lower tribunal).

Since this argument is undisputedly unpreserved for appellate review, this Court should reconsider and reverse its Opinion No. 27708.

2. This Court engaged in impermissible fact finding in order to overturn the Commission’s Finding of Fact that Claimant sustained a 48% permanent partial disability to his back.

Petitioner apparently misunderstands Respondents’ argument regarding this Court’s impermissible judicial fact finding. In Section 2 of his Return, Petitioner only addresses the issue of what rebuttal evidence is or should be persuasive under Section 42-9-30(21). However, Respondents’ argument that this Court engaged in impermissible fact finding goes to the initial determination of loss of use and this Court’s *sua sponte* and erroneous conversion of Dr. Drye’s rating based on evidence that is not in the record.

Petitioner completely fails to address the conversion point raised by Respondents, which indicates that he has conceded this point. Turner v. South Carolina Dept. of Health & Envtl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (where a party “fails to respond to an issue ... the appellate court may treat the failure to respond as a [concession] that the [moving party’s] position is correct”), *citing* First Union Nat’l Bank of S.C. v. FCVS Commc’ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev’d on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

In addition to the fact that Petitioner did not raise the “conversion” argument below, the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (“AMA Guides”), are not part of the Record before this Court. This Court’s review is limited to facts in the Record on Appeal. Rule 210(h), SCACR. No physician converted Dr. Drye’s whole person rating to the cervical spine, let alone to the whole back. As explained in more detail in their Petition for Rehearing, and in the Brief on Behalf of the Amici Curiae in Support, converting a whole person rating to a cervical spine rating is not equivalent to a whole back rating. In an attempt to convert Dr. Drye’s whole person rating, this Court has misapplied the relevant sections of the AMA Guides and rendered its own, erroneous, medical conclusion.

As this Court pointed out, the scheduled member statute does not address impairment to the whole body; however, neither does the scheduled member statute address impairment to a single region of the spine. Awards are not made to the cervical region, the thoracic region or the lumbar/sacral region. Awards are made to the back. *See, e.g.*, S.C. Code Ann. § 42-9-30(21) (providing compensation for “loss of use of the back ...”); Medlin v. Greenville County, 303 S.C. 484, 488, 401 S.E.2d 667, 669 (1991)

(discussing proper award for successive injuries to a listed body part, “in this case, his back”); Fishburne v. ATI Syst. Int’l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (award for loss of use of the back); Lyles v. Quantum Chem. Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (same).

There is no simple mathematical formula by which the Commission or this Court can convert a whole person rating to a whole back rating under the AMA Guides. As the Amici Curiae point out in their Brief in Support, the cervical spine is only 38% of the spine as a whole. Thus, if this Court intends to convert Dr. Drye’s whole person impairment rating to the whole back, it must complete the process, including dividing Dr. Drye’s 25% whole person rating by .35, which produces a 71% impairment rating to the cervical spine, and then multiplying that by 38% (the percentage of the whole spine represented by the cervical spine) to arrive at a 26.98% impairment to the whole back. Respondents maintain that converting Dr. Drye’s whole person impairment rating constitutes impermissible judicial fact finding; however, if this Court decides to proceed forward into that thicket, it must complete the analysis and not stop half-way through.

This Court should reconsider its Opinion No. 27708 and reverse its erroneous factual findings.

3. This Court’s statutory interpretation of Section 42-9-30(21) is flawed and must be reversed.

Petitioner criticizes the “shifting analysis” discussed in the Petition for Rehearing as not having been raised “before the Opinion.” However, this analytical framework is implicit in Respondents’ consistent position before the Commission and the Court of Appeals, where they relied on medical evidence in the form of Dr. Drye’s impairment rating for the initial determination of loss of use. Then, in the event the Commission or

Court of Appeals found that Petitioner had lost 50% or more of the use of his back, Respondents presented evidence that, not only could Petitioner work, he actually was back at his pre-injury position, working 8-hour days, 40-hours a week, for two years with only minor accommodations, no pain medication, no complaints or requests for medical care, and no missed time. (Appx. p. 368, line 4 – p. 369, line 18) (Appx. p. 371, lines 2-23) (Appx. p. 407, lines 2-17) (Appx. p. 409, line 19 – p. 410, line 15) (Appx. p. 415, line 23 – p. 416, line 1). Further, until this Court overruled Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012) and indicated that only medical evidence is or may be relevant to rebutting the presumption under Section 42-9-30(21), there was no need to explain in detail how the “intertwined” or hybrid Subsection 21 works. Thus, Petitioner’s attempt to characterize Respondents’ analysis as inconsistent or new is simply incorrect.

Petitioner disregards the rudimentary fundamentals of statutory interpretation, relying instead on general statements regarding liberal construction of the Act. However, liberal construction is not a license for re-writing the balances and compromises struck by the Legislature. The concept of liberal construction, “does not empower the courts to employ semantics to stretch the Act or its attendant regulations and extend benefits” where they are not warranted under the Act. See Johnson v. Beauty Unlimited Landscape Co., 379 S.C. 403, 410, 665 S.E.2d 656, 660 (Ct. App. 2008); Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 167, 64 S.E.2d 396, 400 (1951) (courts are not justified in construing the Act so “as to do violence to a specific requirement”).

Petitioner incorrectly asserts that Respondents have taken “the word ‘disability’ out of context in the statute,” arguing that, simply because it is used as “part of a phrase”

in Sections 42-9-30(21) and 42-9-10(B), its meaning somehow morphs into something other than as defined in Section 42-1-120. First, he provides no authority for this improbable theory. Second, in defining the term “disability,” the Legislature did not exempt out any particular sections of the Act from that definition. Instead, Section 42-9-30(21) clearly provides that, “in cases where there is fifty percent or more loss of use of the back the injured employee shall be **presumed** to have suffered total and permanent **disability** and compensated under Section 42-9-10(B),” which **presumption** “is rebuttable.” S.C. Code Ann. § 42-9-30(21) (emphasis added). Thus, as explained in more detail in their Petition for Rehearing, the presumption that is to be rebutted is that Petitioner has not totally and permanently lost his capacity, “because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” S.C. Code Ann. § 42-1-120. Any other interpretation makes no sense and would produce absurd results. Petitioner has not presented any persuasive arguments otherwise.

Petitioner’s attempt to analogize the use of the statutorily-defined term “disability” in Section 42-9-30(21), to the absence of the word “partial” in Section 42-9-10(D), misses the mark. In Glover v. Suitt Constr. Co., 318 S.C. 465, 548 S.E.2d 535 (1995), this Court upheld the Commission’s lump sum award of attorneys’ fees in a lifetime benefits case, explaining that, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” 318 S.C. at 469, 548 S.E.2d at 537. This Court did not rely on or cite to Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d

889 (1941). Instead, this Court looked to the broader effect that its ruling would have on workers' compensation claims.

Here, as pointed out in the Petition for Rehearing and in the Brief on Behalf of the Amici Curiae in Support, this Court's Opinion inevitably will result in a battle of expert ratings and will mean, effectively, that the Section 42-9-30(21) presumption, once it arises, will never be rebutted. As a result of this Court's interpretation of Section 42-9-30(21), combined with the erroneous approach to conversion of whole body impairment ratings under the AMA Guide, any claimant with a cervical fusion automatically and irrefutably would be entitled to total and permanent disability. Petitioner fails to explain how the result would be otherwise under his and this Court's interpretation of the AMA Guides and Section 42-9-30(21). Conversely, in light of this Court's heavy reliance on medical ratings alone, claimants who receive relatively low impairment ratings will be restricted, at best, to the highest medical impairment rating they are able to obtain.² In the wake of this Court's Opinion, there will be little to no incentive for an employer to offer to accommodate an employee who has undergone a cervical fusion, as that employee automatically will be presumed to be totally and permanent disabled. Furthermore, as a result of this Court's Opinion, there is already talk of significant premium increases for workers' compensation coverage.

As Respondents explained, the revision of the Act in 2007, including the presumption of total and permanent disability and the employer's ability to rebut that presumption, transformed Subsection 21 from a strictly medical model provision to an "intertwined" or hybrid provision. See Wigfall v. Tideland Utils., Inc., 354 S.C. 100,

² If lay testimony supporting an employer's case regarding degree of impairment and/or disability is not relevant, such evidence would be equally irrelevant on behalf of a claimant.

104, 580 S.E.2d 100, 102 (2003). The legislative history of the 2007 revision to this subsection supports Respondents' position. *See* Brief on Behalf of the Amici Curiae in Support, p. 9. Given the statutorily defined term "disability" in Subsection 21, which is the presumption that is to be rebutted, there simply is no valid reason to discredit any of the types of evidence that normally are employed to prove or disprove disability.

This Court should reconsider its Opinion No. 27708 and hold that the same types of evidence that are relevant to a determination of total and permanent disability under Section 42-9-10(A) are probative in determining whether an employer has rebutted the presumption of total and permanent disability when it arises under Section 42-9-30(21).

4. If this Court does not reverse its holding with respect to the above-discussed issues, this Court must remand to the Commission for additional rebuttal evidence.

Respondents are not asking for "a second bit of the apple" as Petitioner suggests but, instead, for a fair opportunity to attempt to respond to this Court's novel statutory interpretation of Section 42-9-30(21), particularly in light this Court's overruling of the only guiding case law that existed at the time this case was brought before the Commission. As explained in Respondents' Petition for Rehearing, litigants should not be held to a standard of "guessing" whether valid case law might be overturned in the future and be required to submit evidence that would meet multiple, as-yet unstated standards. Due process requires that Respondents be provided an opportunity to at least attempt to submit evidence to meet the new standard set by this Court.

In Watson, the Court of Appeals held that the claimant's ability to return to work was sufficient to rebut the presumption of total and permanent disability. 399 S.C. at 464, 732 S.E.2d at 195. Here, Respondents justifiably relied on the fact that Petitioner

not only could return to work, but had returned to work for two years, to his same position, working a regular 8-hour a day, 40-hour a week schedule, for two years with minor accommodations, no pain medication, no complaints or requests for medical care, and no missed time. (Appx. p. 368, line 4 – p. 369, line 18) (Appx. p. 371, lines 2-23) (Appx. p. 407, lines 2-17) (Appx. p. 409, line 19 – p. 410, line 15) (Appx. p. 415, line 23 – p. 416, line 1). Because the rebuttal evidence submitted to the Commission in this case was substantively stronger than that in Watson, there was no reason for Respondents to somehow divine that they would need to present additional or different evidence.

In repeating the “two bites” argument, Petitioner seems to adopt this Court’s reasoning and reliance on Parker v. South Carolina Pub. Serv. Comm’n, 288 S.C. 304, 342 S.E.2d 403 (1986). However, as Respondents pointed out, in Parker, there was no change in the law or standard that the power company had to meet between the time of the first hearing and the remand hearing. Here, in contrast, this Court’s Opinion has completely altered the landscape, by overruling the only existing precedent addressing rebuttal evidence under Section 42-9-30(21) and by interpreting that subsection in a way that is at odds with the plain, defined language of the Act. As the Dissent correctly pointed out, “fundamental fairness requires that [Respondents] be afforded” the right to rebut the presumption on remand in light of this Court’s Opinion.

5. Oral Argument.

Petitioner did not address Respondents’ request for oral argument. It may safely be assumed, therefore, that he has no objection. *See* Turner, 377 S.C. at 547, 661 S.E.2d at 121. Given the importance and far-reaching effects of this Court’s Opinion,

Respondents repeat their request that this Court grant oral argument on their Petition for Rehearing.

CONCLUSION

For all the reasons stated herein, this Court should strike Petitioner’s Return. In any event, and for all the reasons stated herein and in their Petition for Rehearing, Respondents request that this Court reconsider its Opinion No. 27708 and reverse its improper factual findings. This Court should take this opportunity to revise its interpretation of Section 42-9-30(21) and hold that evidence that a claimant is able “to earn the wages which the employee was receiving at the time of injury in the same or any other employment” is both probative and sufficient to rebut the presumption of total and permanent disability in Section 42-9-30(21). In the event this Court fails to reverse its improper factual findings and analysis as noted above, it must remand to the Commission for further proceedings as discussed herein and in the Petition for Rehearing. Finally, Respondents request that this Court order oral argument on the issues raised on Rehearing, given the importance and far-reaching consequences of this Court’s Opinion.

May 2, 2017

Respectfully submitted,

MCANGUS, GOUDELOCK & COURIE, LLC



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

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

(803) 779-2300

Attorneys for Respondents

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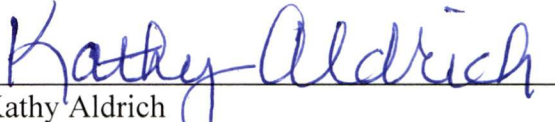
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PROOF OF SERVICE

I certify that I have served the Respondents' **Motion to Strike and Reply in Opposition to Petitioner's Return** on Henton T. Clemmons, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on May 2, 2017, addressed to his attorney of record:

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


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

Attorneys for Respondents