

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

RECEIVED

JUN 20 2017

SC Court of Appeals

John McDaniel, Employee, Claimant Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier, ... Respondents.

**REPLY TO RETURN TO
MOTION TO STRIKE OR CORRECT
APPELLANT'S NOTICE OF APPEAL**

Pursuant to Rules 203 and 240, SCACR, Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Co. reply to Appellant John McDaniel's Return to Respondent's Motion to Strike ("Return"). Respondent is incorrect that his self-styled Amended Form 30 was either proper or sufficient to appeal either the January 4, 2013 or the September 30, 2013 Order. Tellingly, he does not dispute that he has never submitted the required filing fee with his Amended Form 30. Instead, without a single citation to case law or controlling authority, he argues that he had a right to craft his own appellate process in contravention of the unambiguous requirements of the Workers' Compensation Act.

Appellant cites to no legal authority for his assertions regarding the remand hearing being a "linear continuation" of the first hearing and/or the rationale for staying an appeal hearing, and/or his argument that he was not required to appeal the January 4, 2013 Order and the

September 30, 2013 Order separately and in compliance with Section 42-17-50. He also cites to no authority for his assertion that the January 14, 2013 Form 30, the effectively filed appeal, “became stale the moment the motion for additional evidence ... was granted.” That is because there is none.

Appellant’s fixation with whether the Commission proceeding was bifurcated started with the inadvertent use of that term by Commission staff, when they were attempting to assist Appellant with his pro se claim. The issue apparently arose during a telephone conversation between Appellant and Virginia Crocker, in the midst of a series of emails between Appellant and various Commission staff and counsel regarding the subject matter of the Appellate Panel hearing scheduled for October 14, 2013. (Motion Exh. H) (Return Exh. B) (Exh. I).¹ It is unclear precisely what Ms. Crocker told Appellant, but there has never been an allegation by the Commissioners or Respondents that his case was bifurcated, as are some civil trials.

Instead, it has been Respondents’ consistent position that Appellant failed to properly appeal the September 30, 2013 Order, which cannot be challenged now on appeal and is the law of the case. *See, e.g., Brunson v. American Koyo Bearings*, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005) (“[t]he findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant’s exception to the full commission” pursuant to Section 42-17-50), *citing Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (“[o]nly issues within the application for review under *S.C. Code Ann. 42-17-50* (1976) are preserved for appeal to the commission”). Clearly, a party cannot appeal the decision of a single commissioner directly to the Court of Appeals. *See Jahnrette v. Union Camp Paper*

¹ In any event, the term “bifurcate” simply means, “1. To divide or fork into two branches,” or “2. Divided into two branches,” <http://www.dictionary.com/browse/bifurcate?s=t>, and is used to describe processes outside of the legal system, such as bifurcation theory or bifurcated lakes and rivers.

Corp., 293 S.C. 59, 60, 358 S.E.2d 704, 705 (1987) (a single commissioner decision must first be appealed to the full commission pursuant to the terms of the Act). Respondents' Motion is not premature to raise this issue,² since the September 30, 2013 Order, which was never effectively or properly, appealed, has now become an unappealed order of the Commission, not subject to judicial review.

Appellant's attempt to file an Amended Form 30 was both untimely and defective, and the Commission properly declined to accept it. Section 42-17-50 provides, in pertinent part, that an application for review must be filed with the Commission "within fourteen days from the date when notice of the award shall have been given," and that "[e]ach application for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review." S.C. Code Ann. § 42-17-50; *see also* S.C. Code Reg. § 67-702 ("[t]he appellant shall attach to the Form 30 the filing fee required by the Act If the filing fee is not waived, the appellant must pay the filing fee within ten days of the date of receipt of a notice denying waiver of the filing fee"). The requirements of Section 42-17-50 delineate the Full Commission's appellate jurisdiction and cannot be expanded by that body. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 188-189, 714 S.E.2d 547, 549-550 (2011) (the fourteen-day window for appeals is jurisdictional and cannot be extended).

The first Hearing Commissioner Decision in this matter was filed on January 4, 2013. (Motion Exh. B). Pursuant to S.C. Code Ann. § 42-17-50, the deadline to file an appeal with the Full Commission was January 18, 2013. Appellant, who was represented by counsel at that time, filed a timely Form 30, along with the appropriate filing fee, raising six issues on appeal to

² Appellant indicated in his Return that he had not yet received a copy of the transcript of the Appellate Panel hearing. Respondents have not been served with notice of and do not see any indication that Appellant has advised the Office of Court Administration that he has ordered the transcript, as is required by Rule 207(1)(a), SCACR.

the Full Commission. (Motion Exh. C). Appellant filed an appellate brief with the Full Commission, Respondents filed their brief, and Appellant filed a reply brief. (Exh. J) (Exh. K) (Exh. L). As noted in Respondent's Motion, the Appellate Panel hearing set for October 14, 2013 was solely to consider the issues raised in his properly filed January 14, 2013 Form 30 appealing issues in the January 4, 2013 Order. Appellant was advised of this on numerous occasions.³

Appellant's purported Amended Form 30 was dated October 9, 2013 and emailed to the Commission on October 12, 2013. (Motion Exh. H). Filed over 10 months after the January 4, 2013 Order, it was not timely to appeal that Order. Appellant's Amended Form 30 attempted to raise a number of issues, at least eight of which directly challenged the January 4, 2013 Order. It was clearly outside the 14-day window to appeal the January 4, 2013 Order and filed after the parties had fully briefed the appeal. (Exh. J) (Exh. K) (Exh. L).⁴ Appellant's Amended Form 30 was, therefore, ineffective to raise new or additional issues regarding the January 4, 2013 Order to the Full Commission.

Although Appellant's Amended Form 30 may have been timely to appeal issues decided in the September 30, 2013 Order, he failed to submit the statutorily-required filing fee with his self-styled Amended Form 30, in contravention of S.C. Code Ann. § 42-17-50 and S.C. Code Reg. § 67-702, and did not file a Form 32 request for waiver of filing fees. As a result, he failed to effectively appeal the September 30, 2013 Order. Thus, the unappealed September 30, 2013 Order is the law of the case with respect to the issues decided therein. *See, e.g., Brunson*, 367

³ See Exhs. F & H to Respondents' Motion, Exhs. B & C to Appellant's Return, and Exh. I hereto.

⁴ Respondents note that the Commission had already set this matter for appellate review, (Notice of Appellate Hearing, dated March 29, 2013, (Exh. M)), which review was delayed, on Claimant's motion, to allow the Hearing Commissioner to consider the effect, if any, of additional evidence consisting of Jared Lampkin's pay records.

S.C. at 165-66, 623 S.E.2d at 872 (findings of fact and conclusions of law of the Hearing Commissioner become the law of the case unless appealed to the Full Commission); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that “all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission”).

The Commission’s regulations simply do not provide for amended Form 30s. *Compare* S.C. Code Reg. § 67-613 (amending requests for hearing and answers via Forms 15, 50 and 52) *with* S.C. Code Reg. § 67-701 (Form 30 request for review hearing with no provisions for amended filings). Appellant’s reliance on R.67-613(B)(4) is misplaced. The quoted portion specifically states that “if the nature of the claim or the relief requested changes, file a new hearing request according to R.67-207 unless R.67-610 applies.” S.C. Code Reg. § 67-613(B)(4). In an attempt to come within the parameters of R.67-613(B)(4), Appellant asserts, without any basis or support, that his Amended Form 30 reflects “a change in the nature of the relief requested on his request for review.” While his Amended Form 30 lists additional objections to the January 4, 2013 Order, the relief he sought was basically the same, *i.e.*, a higher average weekly wage, a greater disability award to his left leg, denial of a credit to Respondents and the imposition of sanctions against Respondents. (Motion Exh. H). This relief was sought in his January 14, 2013 Form 30. (Motion Exh. C). There simply was no “change in the nature of the claim or relief requested,” for purposes of R.67-613(B)(4).⁵ To the extent Appellant

⁵ Appellant’s confusing analogy to criminal double jeopardy is likewise misplaced. Furthermore, his argument that his Amended Form 30 reflects “a change in the nature of the relief requested on his request for review,” is in conflict with his later assertion that he could “not appeal the same topic twice.” Furthermore, the September 30, 2013 Order, which addressed the effect of Jared Lampkin’s pay records on the average weekly wage calculation, was an entirely separate order from the January 4, 2013 Order.

sought to appeal the September 30, 2013 Order, he had to comply with the terms of Section 42-17-50, which he failed to do.

Furthermore, R.67-613(B)(4) does not apply to Form 30s but, instead, refers specifically applies to R.67-207 and R.67-210. In turn, R.67-207 addresses hearing requests via Forms 15, 50 or 52, and does not refer to or implicate Form 30 appeals in any way. Similarly, R.67-610 applies to “Requests for Hearing” and “Answers” and not Form 30 appeals. Furthermore, R.67-610(B) allows a party to amend a form “once as a matter of course at any time before or within thirty days after it is served. Otherwise a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party.” S.C. Code Reg. Ann. § 67-610(B). Here, even if this section applied to his purported Amended Form 30 request for appellate review, which it does not, Appellant did not file his Amended Form 30 within thirty days of his original Form 30 and did not obtain either leave of the Commissioner or Respondents’ consent.

Commissioner Barden’s statement at the October 14, 2013 Appellate Panel hearing that the Panel had the Amended Form 30 in front of them does not somehow “cure” the defects in Appellant’s attempt to file an Amended Form 30. Allison, 394 S.C. at 188-189, 714 S.E.2d at 549-550 (Commission cannot expand or contract the requirements of Section 42-17-50). Nor does the Commission’s refusal to accept Appellant’s improperly submitted Amended Form 30 deprive him of some right to provide a full record for appellate review. Instead, under R.67-613, each party is required to “arrange and present all evidence” at the initial evidentiary hearing.⁶ Contrary to Appellant’s assertion, the proper rejection of his Amended Form 30 does not inhibit “substantial judicial review,” a phrase coined by Appellant but for which he provides no

⁶ Here, Appellant was provided a remand hearing at which he was allowed to present and argue the effect of late-submitted evidence that the Commission allowed.

explanation or legal authority. This Court should hold that the Commission properly rejected Appellant's Amended Form 30, including the attachments he attempted to submit at that time.

Finally, contrary to Appellant's assertions, the Commission did not err and committed no "miscarriage of justice" by requesting one of the parties to draft a proposed order. Although Appellant disagrees with the order that was issued, what he fails to note is that, in its request for a proposed order, the Commission clearly, "reserve[d] the right to modify and/or delete any or all portions of the submitted Decision and Order." (Exh. N). Each of the Appellate Panel Commissioners reviewed and separately signed the Commission Decision before it was filed. (Motion Exh. A). The argument raised by Appellant – that it is somehow unfair or an abuse of process for one party to draft a proposed Commission decision – has been before this Court in various other cases and this Court routinely has found it to be without merit. It should do so again here.

CONCLUSION

For the reasons stated herein and in their Motion, Respondents move this Court to strike or correct Appellant's Notice of Appeal to remove the reference to any appeal of Commissioner James' September 30, 2013 Order.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

June 16, 2017



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

From: John McDaniel <jmcdaniel1982@gmail.com>
Sent: Friday, October 04, 2013 12:23 PM
To: Crocker, Virginia; Cannon, Gary; Allison Nussbaum
Subject: bifurcated? SCWCC # 1116275

Ms. Crocker,

Our conversation included the comment from you that my case had been bifurcated at my request. This case has not been bifurcated, it was remanded as reflected in a multitude of records.

Page 51 lines 19-22 of the transcript of the July 8, 2013, Read:

"BY COMMISSIONER JAMES:

-----Okay. What I have is a motion for remand, okay, and thats what was scheduled, and that is what is heard today."

Notice of Hearing dated June 19, 2013

"Subject: Remand on issues as set forth by full commission order."

Request for proposed order dated Aug. 6th, 2013

"1. This matter was remanded by the full commission...."

I was further informed by Ms. Hollmon that the commission "assumed" I had recieved The order. This assumption is in violation of your regulations.

I made a claim to you that the hearing notice being issued was premature and in violation of 67-707. You then made a determination that the Commission was NOT in violation of the regulations. You are not authorized to make rulings.

Further, my appeal was stayed, not held in abayance as you commented.

In closing could you please answer the following.

As of now, does the commission have any records to indicate that the order has been served on the pro se claimant?

As of now, does the commission have any records that indicate that my appeal was held in abayance?

As of now, does the commission have any records that indicate the motion for additional evidence and its resulting remand is not governed by 67-707?

Sincerely,

John McDaniel



From: john mcdaniel <jmcdaniel1982@gmail.com>
Sent: Monday, October 07, 2013 4:44 PM
To: keroberts@wcc.sc.gov; Allison Nussbaum
Subject: bifurcation (scwcc file# 1116275)

Mr. Roberts,

I was informed that my case has been bifurcated by Ms. Crocker. This email is to clarify the conflicts between what has happened in my case up to this point and the laws and regulations that govern the Commission.

1) I received notice of appeal hearing (10/3/13) prior to receiving the signed order from the July 8, hearing in front of Commissioner James. This is in direct conflict with 67-707.

2) Rule 42 (b) SCRCP, does not allow for an administrative ruling to bifurcate any case.

3) Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000)- Trial judges are responsible for determining whether trial issues are distinct enough to warrant severability.

3) Bifurcation of a trial is only appropriate "if the issues are so distinct that trial of each alone would not result in injustice." Creighton v. Coligny Plaza Ltd. Partnership 512 SE 2d 510, 334 SC 96 - SC: Court of Appeals, 1998

4) I was never notified of the resetting of my case on the docket.

5) I was not given 30 days notice of appeal hearing..

Please respond via email in addition to us mail.

Sincerely, John C McDaniel

From: Roberts, Keith <keroberts@wcc.sc.gov>
Sent: Thursday, October 10, 2013 4:54 PM
To: john mcdaniel; Cannon, Gary; Crocker, Virginia; Allison Nussbaum
Subject: RE: Application for notice wcc #1116275

Dear Mr. McDaniel,

The issues to be heard at the October 14th, 2013 are all the issues that you raised on your Form 30 filed on January 14th, 2013 that were not remanded to Commissioner James for adjudication pursuant to your request on April 15th, 2013.

Sincerely,

J. Keith Roberts

Attorney at Law
South Carolina Workers' Compensation Commission
1333 Main Street - Suite 500
Columbia, South Carolina 29201
Direct: (803) 737-5701
KeRoberts@wcc.sc.gov

From: john mcdaniel [<mailto:jmcdaniel1982@gmail.com>]
Sent: Thursday, October 10, 2013 4:49 PM
To: Cannon, Gary; Roberts, Keith; Crocker, Virginia; Allison Nussbaum
Subject: Application for notice wcc #1116275

To all concerned,

This letter is to serve as an application for clarification of issues to be heard at the October 14, 2013 appellate hearing on the above named case. This application is submitted pursuant to 1-23-320 (B)(4).

Sincerely, john mcdaniel

DAVID T. PEARLMAN
J. KEVIN HOLMES
THOMAS M. WHITE
DALE E. VAN SLAMBROOK
MALCOLM M. CROSLAND, JR.
STEVEN E. GOLDBERG
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Reply to: Thomas M. White
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March 26, 2013

COPY

Virginia Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

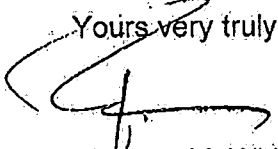
RE: John McDaniel v. Career Employment Professional d/b/a Snelling Staffing
WCC File #: 1116275

Dear Ms. Crocker:

Enclosed please find the original and three (3) copies of the Brief of Claimant/Appellant in the above matter. By copy of this letter, I am sending to Allison Nussbaum, attorney for the Defendants, a copy of the Brief.

Please return a filed copy of the Brief to me in the self-addressed, stamped envelope enclosed. Thank you for your assistance in this matter.

Yours very truly,


Thomas M. White

TMW/llb

Enclosure

cc: John McDaniel
Allison Nussbaum, Esquire
Roy Maybank, Esquire



BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1116275

John McDaniel, Employee,
Claimant,

vs.

Career Employment Professional d/b/a
Snelling Staffing, Employer, and

United Wisconsin Insurance Company,
Carrier,

Defendants.

**BRIEF ON BEHALF OF
CLAIMANT/APPELLANT**

STATEMENT OF CASE

This matter was originally heard on November 28, 2012 and an Order was issued by the Single Commissioner finding that the Claimant had a compensable injury of November 21, 2011 to his left leg and had reached maximum medical improvement as of August 13, 2012. The Order further found that the Claimant's average weekly wage was \$537.91 with an applicable compensation rate of \$358.62. The Order provided for a 34% loss of use to the left leg and gave a credit for all weekly benefits paid after the date of maximum medical improvement. Finally, the Order provided future medical care with Dr. Ohlsen and Dr. Tavel as the authorized treating physicians with that medical care to include the medicals set out by Dr. Ohlsen in his report of August 13, 2012.

This matter was appealed by the Claimant. A Form 30 was filed and raised 6 exceptions to the Order. Those exceptions have been reduced to 3 arguments.

ARGUMENT

1. THE AVERAGE WEEKLY WAGE AND COMPENSATION RATE SHOULD HAVE BEEN BASED ON THE CLAIMANT'S FUTURE EARNING CAPACITY SINCE THE COMPENSATION BENEFITS REACH INTO THE FUTURE AND NOT THE PAST.

The Claimant's average weekly wage was found by the Single Commissioner to be \$537.91 with a compensation rate of \$358.62. The Claimant argues that is incorrect and the average weekly wage should have been based on his potential earnings from his employment at the time he was injured. Based upon the earnings of his replacement, the average weekly wage should have been \$656.50 with a compensation rate of \$437.69 or, in the alternative, additional earnings of Jerod Lampkin provided by Alside Revere subject to a subpoena served on them by the Claimant to produce those records.

The Claimant worked for a staffing agency and was employed by that staffing agency with Alside Revere shortly before his injury. He was hired at the rate of \$13.00 per hour.

Section 42-1-40 states that the calculation of average weekly wage is based upon the actual number of weeks for which wages were paid. When the injured employee has worked for a period less than 52 weeks, the method of dividing the earnings during the period by the number of weeks, or parts thereof, in which the employee earned wages shall be followed as long as the results are fair and just to both parties. The Commission is allowed for exceptional reasons to compute average weekly wages based upon what will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

The objective of wage calculation for Workers' Compensation purposes is to arrive at a fair approximation of the Claimant's probable future earning capacity. Sellers v.

Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002).

The disability of a Workers' Compensation Claimant reaches into the future, not the past; his loss as a result of the injury must be thought of in terms of its impact on probable future earnings, for purposes of calculating the Claimant's average weekly wage. Sellers v. Pinedale.

The Workers' Compensation Act is remedial legislation enacted to protect the worker. The Statute provides an elasticity or flexibility with a view towards always achieving the ultimate objective of reflecting fairly a Claimant's probable future earning loss. Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004).

It is fair to the Claimant to base his average weekly wage and compensation rate on what his **probable** future earning capacity is.

The Claimant was placed by the staffing agency with Alside Revere. The Claimant's supervisor at Alside Revere was Dan Cobb. The Claimant was hired at \$13.00 per hour but was told by Angela Baldwin, his direct contact at Snelling Staffing, that he could expect 42 to 45 hours per week regularly. (Tr. p. 22).

Dan Cobb told the Claimant that he would typically get 45 hours per week. (Tr. p. 23). The Claimant was also told by Dan Cobb that he liked the Claimant's work and he wanted to employ him with Alside Revere. (Tr. p. 24). The Claimant had no conflict with school and wanted to stay with Alside Revere as he was looking for long term stability for work. (Tr. p. 24).

Dan Cobb testified in his deposition that he makes the hiring and firing decisions as operations manager for Alside Revere. He testified that the Claimant was brought on full

time and was working at least 40 hours per week with overtime of a couple of hours up to 10 hours per week. (Cobb Dep. p. 13). He testified there was consistent overtime. (Cobb Dep. p. 13). He testified the Claimant was a good employee and if it worked out, he felt that he would be permanent. (Cobb Dep. p. 14). Dan Cobb told Snelling the Claimant was working out and if they do well, the intent is to make them permanent employees. (Cobb Dep. p. 15).

The Claimant worked and got overtime for the 2 pay periods he worked. The one full week he worked, he received 5 hours of overtime.

The best projection of what the Claimant would have made while working at Alside Revere is to review what the Claimant's replacement, Jerod Lampkin, made following the Claimant's injury. Jerod Lampkin consistently made overtime and for the weeks worked, deducting the first and last weeks as partial weeks, he averaged \$656.50 per week. (APA #22). Over an 11 week period, he made \$7,221.52. This would result in a compensation rate of \$437.69.

These were the wages paid to Mr. Lampkin by Snelling Staffing while he was an employee of Snelling Staffing. Alside Revere had also been served a subpoena to produce Mr. Lampkin's wages after he became a permanent employee. As of the date of the Hearing, Alside Revere had not complied with the subpoena although they had been properly served.

As the goal is to protect the worker and to project his probable future earning loss, the fairest way to calculate his average weekly wage and compensation rate would be to base it upon the overtime hours earned by the employee that replaced the Claimant. The Claimant's replacement averaged over 7 hours of overtime per week.

It was an error to base the Claimant's average weekly wage and compensation rate on \$537.91 per week which is less than 1 hour per week of overtime.

2. THE CLAIMANT'S LOSS OF USE AND DISABILITY GREATLY EXCEEDED THE 34% IMPAIRMENT RATING GIVEN BY THE COMMISSIONER.

The Claimant is 30 years of age and a high school graduate. He had done various jobs prior to going to work for the Defendant Employer. He had done jobs as a salesman of ATV's and motorcycles, where he worked on his feet 12 hours per day, stood and walked all day long. He worked as a waiter where he stood the entire shift and lifted 60 to 70 pounds routinely. He had worked in construction where he had to lift 80 to 100 pounds and was on his feet constantly. He worked as an auditor in bars where he had to do inventory which included lifting kegs and cases of beer, all heavy lifting, and was mostly working on his feet. He worked as a caddy and had to carry 60 pound golf bags and routinely walked a number of miles around the golf course. He worked briefly in car sales where he had to stand and walk most of the day. For the Defendant Employer, he had been a route driver for a distributor where he had to routinely deliver boxes weighing up to 40 pounds. With his last job at Alsde Revere, he was delivering building materials which required routinely lifting up to 75 pounds. (Tr. p. 13-15)

Under his current restrictions, the Claimant could not return to do any of the work he had done in the past. He was limited to walking less than 1 hour and his lifting was limited to 10 pounds or less. He could not climb ladders. He could not work on a roof. He could do no prolonged standing. (Tr. p. 18). The Claimant had never had a Workers' Compensation case before. He had cut his finger one time and required medical care but resulted in no treatment. He had no previous problems with his left foot. He had no

limitations and he was able to do all aspects of his job.

He had multiple problems during his treatment. His wound treatment was delayed in being approved. There were long delays in approving his chronic pain physician. He never received the appropriate shoes that were ordered for him. As of the date of the Hearing, he was still required to wear special shoes and orthotics. He needed extra padding and protection. He had significant swelling that was visible at the Hearing.

The Claimant wore a 12 C on his right foot and a 12 E on his left. (Tr. p. 30). There was a 4 width size in difference between his feet. He had bad circulation according to the doctor and had neuropathic symptoms in his foot. (Tr. p. 30).

The pain was always at a 3 to 4 out of 10 level. With activity, that would increase to a 6 to 7 out of 10. If he stood or walked longer than an hour, it felt like his foot was in boiling water. (Tr. p. 36). He also had a large area of his foot where he had no feeling.

To get relief, he would stop his activity and take medication. He would have to get off his foot. After an hour, he would have to get some sort of relief. (Tr. p. 37).

The Claimant would elevate his foot for relief. He estimated he elevated his foot for probably 2 to 3 hours per day. (Tr. p. 38). He took Celebrex and Gralise daily. Standing was limited to 15 to 20 minutes. Walking was limited to 15 to 20 minutes. (Tr. p. 38). He felt he could stand or walk for about 15 minutes out of one hour, which would be a total of 2 hours out of an 8 hour day. He could no longer run, climb ladders, squat, or jump. (Tr. p. 39). It was very difficult for him to walk downhill and he had problems with balance. (Tr. p. 39).

In considering loss of use and disability, the consideration is what loss the Claimant has suffered from a vocational standpoint considering his age, education, and work history.

The Claimant here was a high school graduate who had a history of doing only manual jobs. He could not return to do any of the work he had ever done before. He could not do any job that required standing or walking more than 15 minutes out of an hour and was going to be relegated in the future to sedentary jobs only that also allowed him to elevate his feet for periods of time.

From a vocational standpoint, the Claimant had lost all the use of his leg for any light, medium, or heavy work. The Claimant was relegated to sedentary work only and even sedentary work would be significantly restricted due to limitations on standing and walking and limitations on having to elevate his feet. The Claimant was also having to take medication on a daily basis. To award a loss of use and disability of 34% was unfair to the Claimant and did not accurately reflect his loss of use and disability from a vocational standpoint.

The Claimant's foot was run over by a forklift and he had a crush injury with multiple fractures. He was left with a permanent limp, having to wear custom shoes and orthotics, and future medical care to include surgery. His fifth toe was malunited. His treating physician gave him 17% to the leg. A second opinion by Dr. Brilliant gave him 50% to the foot.

The award to the Claimant should consider the overall impact to him from a vocational standpoint and the percentage of his loss of use and disability to the leg should be much greater than that awarded by the Single Commissioner.

3. THE SINGLE COMMISSIONER SHOULD NOT HAVE GIVEN THE DEFENDANTS A CREDIT FOR THE PAYMENTS MADE AFTER THE DATE OF MAXIMUM MEDICAL IMPROVEMENT.

The Single Commissioner gave a credit to the Defendants for payments made after

August 13, 2012, the date of maximum medical improvement. The Defendants did not file a Stop-Pay Application until September 17, 2012. The Claimant takes the position that the Defendants should not have been given a credit for the payment of weekly benefits. The Statute is clear under §42-9-10 that any payments made by an employer to an injured employee during the period of his disability, which by the terms of this title were not due and payable, when made may, subject to approval by the Commission, be deducted from the amount to be paid as compensation. The awarding of a credit by Statute is in the discretion of the Commission.

Here, the Claimant had never had a Workers' Compensation claim before. The Claimant had worked consistently throughout his adulthood and based upon this injury, could not return to any of the jobs he had ever done before. When he was released to return to work, he went back to his employer, Snelling Staffing, and inquired about the availability of work. They provided him with a job at a law firm where he worked for a period of time until the law firm no longer had work available. At all times, he advised Snelling Staffing that he was ready, willing, and able to work and was willing to work any job that was available within his restrictions. No work was ever provided except for with the law firm. In addition to that, the Claimant has been going to school to better himself by studying Civil Engineering.

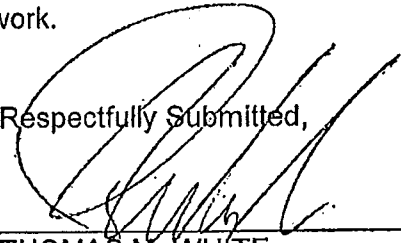
He was told by his employer that he was a great employee and they would find him work. (Tr. p. 40). He had applied for 30 to 40 jobs and called approximately 20 jobs. (Tr. p. 40). The Claimant had done everything he could possibly do to get back to work and the Defendants, Snelling Staffing Agency, had made no effort to employ him even though they are a staffing agency with multiple jobs in the area. The Claimant should not have been

penalized by giving a credit back to the date of maximum medical improvement, which in this case equated to a credit of almost \$7,000.00 by the time the Order was issued. This was clearly not fair to the Claimant and was a misuse of discretion by the Commissioner.

CONCLUSION

The Claimant's compensation rate should be based on his probable future earnings and there is evidence in the record that is not speculative. The Claimant's loss of use and disability greatly exceeds the 34% loss of use to the leg that he received from the Commissioner. Finally, it was an error to give any sort of credit to the Defendants for payment of temporary total after the date of maximum medical improvement when there was not a Stop-Pay Application filed at that time and there had been no effort by the Defendants to put the Claimant back to work.

Respectfully Submitted,



THOMAS M. WHITE

March 26, 2013

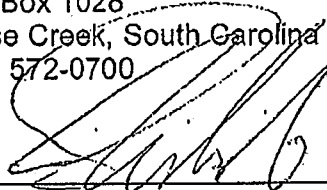
CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2013, I served the Defendant in the foregoing matter with a copy of the attached *Brief on Behalf of Claimant/Appellant* by mailing a copy of same via first class mail, postage pre-paid and addressed as follows:

S.C. Workers' Compensation Commission
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Columbia, SC 29202

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By: 
Thomas M. White
Attorneys for Claimant

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1116275

JOHN MCDANIEL,

Employee,

Claimant,

vs.

SNELLING STAFFING SERVICES,

Employer,

AND

UNITED WISCONSIN INSURANCE
COMPANY C/O UNITED HEARTLAND

Carrier,

Defendants.

RESPONDENTS' BRIEF TO THE
FULL COMMISSION

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JOHN
MCDANIEL, *PRO SE* CLAIMANT:

STATEMENT OF THE CASE

A hearing was held in the above-referenced workers' compensation claim on November 28, 2012 before the single Commissioner. The purpose of the hearing was to determine the issues as set forth on Workers' Compensation Commission Forms 50/51 and Form 21, including a determination of whether Claimant had reached maximum medical improvement, the extent of any permanent partial disability, whether Defendants were entitled to stop payment of temporary disability benefits to Claimant and to determine if Claimant was entitled to any additional benefits. The single Commissioner issued a Decision and Order dated January 4, 2013 in which she found, *inter alia*, that Claimant had an appropriate average weekly wage of \$537.91 with a

EXHIBIT

K

corresponding compensation rate of \$358.62; that Claimant had reached maximum medical improvement and Defendants were entitled to stop payment of temporary total disability benefits; that Defendants were entitled to a credit for all weekly benefits paid after Claimant's date of maximum medical improvement; that Claimant had suffered a 34% permanent partial disability to the left leg; and that Claimant was entitled to future medical care per Dr. Ohlson's report of August 13, 2012.

Claimant also filed a Motion to Admit Additional and Newly Discovered Evidence to which Defendants replied on March 18, 2013. In summary, Claimant subpoenaed a representative of Alside Revere to the hearing on November 28, 2012, the Alside Revere representative failed to appear and, during the pre-hearing conference, the single Commissioner asked Claimant if he intended to proceed with the case without the Alside Revere representative. By and through his attorney, Claimant proceeded with the hearing based on the evidence submitted in the Pre-Hearing Brief and declined the opportunity to postpone the hearing. Furthermore, Claimant did not request the record be left open to submit additional pay records which had been subpoenaed from Alside Revere. Therefore, pursuant to Regulation 67-707(2), Claimant would be required to prove the evidence requested was unknown to him at the time of the first hearing, and could not have been secured prior to the hearing. Claimant's alleged new evidence fails to satisfy the requirements of Regulation 67-707(2), because Claimant was aware of the requested evidence at the time of the original hearing and, when presented with the opportunity to obtain the additional evidence prior to going forward with the hearing, opted to proceed with evidence submitted in his Pre-Hearing Brief. Therefore, Defendants assert Claimant's Motion to Add Additional Evidence should be denied and the instant Appeal should go forward.

STANDARD OF REVIEW

While it is well-established that the Full Commission may make its own Findings of Fact and Conclusions of Law in workers' compensation cases, "it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion..." *Muir v. C.R. Baird, Inc.*, 519 S.E. 2d 583 (S.C. Ct. App. 1999).

ARGUMENT

Defendants hereby respond to Arguments set forth in Claimant's Appellant's Brief to the Full Commission:

I. THE HEARING COMMISSIONER CORRECTLY DETERMINED CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE OR, IN THE ALTERNATIVE, CLAIMANT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE SHOULD BE LOWER.

The Hearing Commissioner received testimony and evidence at the hearing concerning Claimant's correct average weekly wage and compensation rate. Claimant completed 20 weeks of work, from May 9, 2011 to September 30, 2011, via Snelling Staffing Services at Alside Revere. Defendants therefore calculated Claimant's average weekly wage and compensation rate based on his actual time worked, resulting in an average weekly wage of \$492.85 with a corresponding compensation rate of \$328.58. However, the Hearing Commissioner chose to utilize wages of similar employees working Claimant's same or similar position at Alside Revere (via Snelling Staffing Services) to calculate an average weekly wage and compensation rate. Specifically, the Hearing Commissioner utilized the wage records of Jarod Lampkin, Alvin Robert Clark and Wayne Atkins, in addition to Claimant's wages, to reach an average weekly wage calculation of \$537.91 and a corresponding compensation rate of \$358.62. Therefore, Defendants contend the Hearing Commissioner's methodology was "fair and just to both parties"

as required by statutory and case law and should be affirmed by the Full Commission.

The Workers' Compensation Act defines an average weekly wage as "the earnings of the injured Employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately proceeding the date of injury." S.C. Code §42-1-40. The primary method for calculating average weekly wage, as provided in S.C. Code Ann. §42-1-40, has been interpreted by South Carolina Courts to contemplate the "usual" job situation with one Employer. See *Forrest v. A.S. Price Mechanical*, 644 S.E.2d 784 (S.C. Ct. App. 2007) citing *Foreman v. Jackson Minit Markets, Inc.*, 217 S.E.2d 214 (S.C. 1975). However, the Statute provides both a primary method of calculation of an average weekly wage, as well as alternative methods of calculation when the primary method is unavailable because "the employment, prior to the injury, extended over a period of less than 52 weeks" or unless "for exceptional reasons" it would be unfair to utilize the primary method.

The seminal case of *Forrest v. A.S. Price Mechanical* and its progeny, *Pilgrim v. Eaton and Revis*, shed additional light upon the directives for calculating a correct average weekly wage and compensation rate. See *Forrest, supra*; *Pilgrim v. Eaton and Revis*, 703 S.E.2d 241 (S.C. Ct. App. 2010). In *Forrest*, the Court of Appeals noted S.C. Code Ann. §42-1-40 provides that when exceptional reasons make one of the standard approaches for calculation of average weekly wage unfair to either the Employer or Employee, "such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured Employee would be earning were it not for the injury." *Forrest* at 787. In expanding on the directives of *Forrest*, *Pilgrim* spells out the precise methods which must be employed to calculate a correct average weekly wage and compensation rate. See *Pilgrim, supra*. In *Pilgrim*, the Court of Appeals held that the provisions of S.C. Code Ann. §42-1-40 must be employed

sequentially, in that first the primary method of calculation must be used, but if such method proves "impracticable" one may move to the first, second or third alternative methods of calculation. *Id.* at 245. However, "the third alternative method of calculation may not be used unless the first or second methods are 'impracticable.'" *Pilgrim* at 245, fn 7.

The primary method of calculation is to utilize the 52 weeks of payment immediately preceding the date of injury, in the employment in which Claimant was working at the time of the injury, excluding the quarter in which the injury occurred, to arrive at an average weekly wage. If such data is unavailable because Claimant's employment extended over a period of less than 52 weeks, making the calculation impracticable, the first alternative method is to be employed. The *Pilgrim* Court noted, in quoting the Statute, "in such a situation, the Commission must use 'the method of dividing the earnings during that period by the number of weeks and parts thereof during which the Employee earned wages.'" *Pilgrim* at 245 (quoting S.C. Code Ann. §42-1-40). Furthermore, the *Pilgrim* Court noted this method of calculation "shall be followed, as long as results fair and just to both parties will be obtained." *Id.* Therefore, the *Pilgrim* Court reasoned, if the Commission chooses to use the first alternative method of calculation of the average weekly wage, two conditions must exist: (1) the alternative must be "practicable" and (2) the calculation must yield a result which is "fair and just to both parties." *Pilgrim, Id.* Importantly, before the Commission may use any of the alternative calculations, the Commissioner must find, and the record must clearly show, that the necessary conditions exist to use an alternative method for calculating the average weekly wage. *Id.*

The second alternative calculation involves utilizing a similar Employee's wages to arrive at an average weekly wage. The Statute requires the Commission to consider "the average weekly amount which...was being earned by a person of a same grade and character employed

in the same class of employment in the same locality or community." S.C. Code Ann. 42-1-40. The third and final alternative for calculating average weekly wage is to be employed only when "exceptional reasons" exist that make it "unfair, either to the Employer or the Employee, to use the primary or first and second alternative methods." Furthermore, Section 42-1-40 provides that the third alternative method may not be used unless the first or second methods are impracticable. *See Pilgrim at 245.* In summary, both the South Carolina Worker's Compensation Statute and applicable case law note that the objective of the calculation of average weekly wage is to arrive at a fair approximation of Claimant's earnings had he not suffered an injury. However the methods of calculation dictated by S.C. Code 42-1-40 must be employed methodically and sequentially, and may not be haphazardly applied.

Therefore, Defendants submit the Hearing Commissioner should have utilized the "first alternative method of average weekly wage calculation", as dictated by S.C. Code Ann. §42-1-40 which requires utilizing the number of weeks Claimant worked in employment (if less than 52 weeks) to reach an appropriate average weekly wage and compensation rate. Based on Claimant's actual wages, such calculation would result in an average weekly wage of \$498.85 and a corresponding compensation rate of \$328.58.

However, the Hearing Commissioner, in Finding of Fact No. 2, opined Claimant's 20 weeks of work was "insufficient to base his average weekly wage." Therefore, the single Commissioner clearly elected to use an alternative method of calculation which was both "practicable" and would yield a "fair and just result to both parties." By averaging the wages of three additional similar employees, working in the same position, with Claimant's wages, the Hearing Commissioner arrived at an average weekly wage of \$537.91 with a compensation rate of \$358.62. As the Commissioner noted, Claimant had no guarantee his assignment at Alside

Revere would continue. Claimant worked temporary jobs via Snelling prior to his assignment at Alside Revere, and was certainly aware of a temporary employment scenario. Therefore, basing an average weekly wage and compensation rate on "forward looking" and "probable" future earnings would be based on surmise and conjecture, particularly when evaluated in a temporary employment scenario. The business of Employer is to provide temporary assignments of employment. Therefore, although the ultimate goal may be permanent placement, there is simply no guarantee Claimant would have been provided permanent employment with Alside Revere.

However, should the Full Commission find the single Commissioner's method of calculation does not reach the standard of being practicable and fair to both parties, Defendants submit utilizing Claimant's own wages over his 20 weeks of employment would be the most accurate assessment of his average weekly wage and compensation rate. As noted in *Pilgrim*, if the primary method of utilizing 52 weeks of payment immediately proceeding the date of injury is unavailable because Claimant's employment extended over a period of less than 52 weeks, the Commission should use the first alternative method of calculation. In fact, the *Pilgrim* Court noted mandatory language finding "the Commission must use 'the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages.'" (*Pilgrim* at 245 (quoting S.C. Code Ann. §42-1-40)). As the *Pilgrim* Court noted, this first alternative method of calculation [using the actual weeks worked by a Claimant] "shall be followed, as long as results fair and just to both parties will be obtained." Defendants submit utilizing Claimant's own wages, over 20 weeks, would be most fair and just to both parties. Although Defendants elected not to appeal the findings of the Hearing Commissioner, should this claim be remanded for additional determination of average weekly wage and

compensation rate, Defendants will submit that the correct average weekly wage should be \$492.85 with a corresponding compensation rate of \$328.58 based on Claimant's 20 weeks of work for the employer at Alside Revere.

II. THE HEARING COMMISSIONER CORRECTLY
DETERMINED CLAIMANT'S LOSS OF USE AND
DISABILITY TO THE LEFT LOWER EXTREMITY.

The Hearing Commissioner had the opportunity to evaluate all medical evidence, including the treating physician's opinion that Claimant suffered a 17% impairment of his left lower extremity as a result of his foot injury. Furthermore, the Hearing Commissioner had the benefit of examining Claimant, listening first hand to his testimony and assessing his condition. Based on all available and properly admitted evidence, the Hearing Commissioner opined Claimant had suffered 34% disability to the left lower extremity and was entitled to significant future medical treatment as outlined by Dr. Ohlson. Furthermore, the Hearing Commissioner specifically noted Claimant's entitlement to future medical care and treatment may include additional surgery and ongoing medications. Defendants contend the Hearing Commissioner's assignment of 34% disability of the lower extremity properly considered all available evidence, provided for all potential future medical treatment of the left lower extremity related to Claimant's injury, and is correct based upon the directives of South Carolina Code Ann. Section 42-9-30.

While the Full Commission is entitled to make their own Findings of Fact, great deference should be given to the Hearing Commissioner who carefully evaluated all available information, including Claimant's sworn testimony, in reaching a decision regarding disability. See *Muir v. C.R. Baird, Inc.*, 519 S.E. 2d 583 (S.C. Ct. App. 1999). Therefore, Defendants respectfully request the Hearing Commissioner's assignment of 34% disability to the left lower

extremity be affirmed.

III. THE SINGLE COMMISSIONER CORRECTLY AWARDED
DEFENDANTS CREDIT FOR PAYMENTS MADE AFTER
AUGUST 13, 2012.

The Hearing Commissioner awarded Defendants credit for all TTD benefits made after August 12, 2012, the date on which Claimant reached maximum medical improvement, pursuant to South Carolina Code Annotated section 42-9-10. In doing so, the Hearing Commissioner relied upon legal interpretation and principles as set forth in *Smith v. S.C. Department of Mental Health* (finding employers are entitled to stop payment of temporary total disability benefits upon a showing that a Claimant has reached maximum medical improvement) and *Curtel v. Environmental Management Services* (holding that the date of maximum medical improvement signals the end of entitlement to temporary total disability benefits). See *Smith v. S.C. Department of Mental Health*, 517 S.E. 2d 694 (S.C. 1999) and *Curtel v. Envtl. Mgmt. Svcs.*, 655 S.E. 2d 482 (S.C. 2007).

Claimant apparently argues "equity" would provide Defendants are not entitled to credit for weekly benefits paid after MMI. Claimant contends that because he has never had a previous workers' compensation claim, because the employer was only able to provide him one temporary position post-injury (at a law firm), and because he has been enrolled in school, Defendants should not receive credit for temporary total disability benefits paid after MMI. However, as our Court of Appeals noted in *Watson v. Xtra Mile*, "equity follows the law" and, it well-established that entitlement to temporary disability benefits payments ends upon a finding of maximum medical improvement. *Watson v. Xtra Mile* (S.C. S.Ct. Op No. 5013, August 1, 2012). The Hearing Commissioner found Claimant reached MMI on August 13, 2012, and that Finding is unappealed. Therefore, Defendants are entitled to credit for TTD compensation payments made

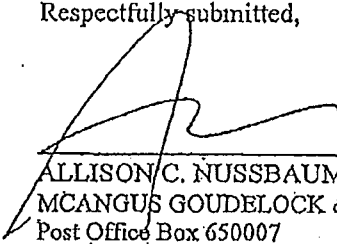
after the date of maximum medical improvement. See *Watson v. Xtra Mile Driver Training*, (S. Ct. Op. No. 5013, August 1, 2012).

Pursuant to South Carolina Code Ann. §42-9-10 and all appropriate case law, the Hearing Commissioner correctly found Defendants are entitled to credit for temporary total disability payments made after the date on which Claimant reached maximum medical improvement.

CONCLUSION

Based on the foregoing, Defendants respectfully request the Full Commission Affirm the Order of the Hearing Commissioner that (1) Claimant's correct average weekly wage is \$537.91 with a corresponding compensation rate of \$358.62; (2) Claimant suffered a 34% permanent partial disability to his left lower extremity and is entitled to appropriate future medical care; and (3) Defendants are entitled to credit for temporary disability payments made after the date on which Claimant reached maximum medical improvement.

Respectfully submitted,



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April 10, 2013

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WCC File #: 1116275

Date of Injury: 11/21/2011

JOHN MCDANIEL v. CAREER EMPLOYMENT PROFESSIONAL
WCC File No. 1116275

The Commission is hereby providing you a copy of the Appellant's Reply to Respondent's Brief filed by the unrepresented claimant pursuant to R.67-705 G.


Virginia L. Crocker
Judicial Director

Date: May 15, 2013

CERTIFICATE OF SERVICE

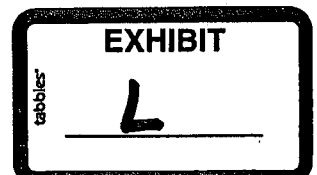
I hereby certify on May 15, 2013, I served this document on the parties listed below by electronic mail or depositing a copy hereof, postage prepaid, in the United States mail and addressed as follows:

JOHN MCDANIEL
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By: Valerie D. Deller, Judicial Department



South Carolina Workers Compensation Commission
W.C.C. File No: 1116275

John McDaniel
employee

Appellant

Snelling Staffing Services
employer

Appellant's Reply to
Respondents' Brief

And

United Wisconsin Insurance Company c/o
United Heartland
Carrier

Defendant

AS TO STANDARD OF REVIEW

In worker's compensation cases, the Workers Compensation Commission is the ultimate fact finder. Tims v. J.D. Kitts Const. (S.C. App. 2011) 393 S.C. 496.

Where there are conflicts in the evidence over a factual issue in a workers compensation proceeding, the findings of the Appellate Panel of the Workers Compensation Commission are conclusive. The Appellate Panel of the Workers Compensation Commission is the ultimate fact finder in workers compensation cases and is not bound by the single commissioner's Findings of Fact. Hall v. Desert Aire, Inc. (S.C. App. 2007) 376 S.C. 338

The appellant contends that a standard of review from *Muir v. C.R. Baird* as asserted in Respondents' brief, would NOT be applicable in this case since, Mr. McDaniel is representing himself Pro Se and will be at the review hearing, and pursuant to 42-17-50 "If good cause be shown" wide latitude is given to the commission to, during a review hearing, receive additional evidence or take additional testimony among others. Thus, the Full commission will have the benefit of witnessing the testimony first hand, and *Muir, supra*, is NOT applicable as Respondents assert. However, the rest of *Muir v.* goes on to expand as the court ruled "the full commission is empowered to make its own findings of fact and to reach its own conclusions of law, consistent or inconsistent with those of the single commissioner."

The standard of review in workers compensation cases must be the "substantial evidence" standard of review.

The appellant contends that very little evidence was given by the defense to: disprove the extent of injury, correctness of the form 20, AWW figures for Lampkin, Clarke and Atkins, nor, good faith reasons for suspension of benefits, among other issues.

"substantial evidence" is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. Houston v. Deloach and Deloach (S.C. App. 2008) 378 S.C. 543.

AS TO MOTION FOR ADDITIONAL AND NEWLY DISCOVERED EVIDENCE

The Appellants Motion for Additional and Newly Discovered Evidence was properly brought before the Full Commission in Judicial Committee in April, 2013, where the motion was granted.

Although the Appellant objects to the matter in which the motion was granted, where it should be noted, that, in addition to preserving this issue for appeal, correspondence between the Appellant and the S.C. Workers' Compensation Commission judicial department outlines this objection in through detail. Pursuant to 67-707 (C) (2) (D,E,F and G)

This evidence was deemed to be evidence of a non cumulative nature that likely would have resulted in a different outcome.

This evidence included in Jared Lampkin's records show that:
Since replacing John McDaniel at Alside Revere,

- 1) Lampkin earned \$28,504.09 through Alside Revere in 38 full weeks
- 2) He also earned \$278.25 for a (1) partial week at Alside
- 3) In the 26 weeks from 2/25/12 till 8/18/12 leading up to Dan Cobb's deposition Lampkin **AVERAGED** 12.48 hrs of overtime.
- 4) In this same time frame the **MINIMUM** overtime worked was 5.25 hours.
- 5) In this same time frame the **MAXIMUM** overtime worked was 20.25 hours.

- 6) In this same time frame the **MEDIAN** overtime worked was 12.75 to 13.0 hours.
- 7) This represents the **MINIMUM, MEDIAN and MAXIMUM** wages of Lampkin at \$634.34, \$783.41 to \$788.38 and \$932.47

This clearly calls into question the validity of detail in Dan Cobb's "SWORN TESTEMONY" Mr. Cobb testified to the fact that Mr. Lampkin was working 2-10 hours of overtime a week. This would result in average overtime being approx 6 hours a week. This was less than half of the actual overtime average. This significantly underestimates the ACTUAL time worked on a weekly basis. The record as a whole clearly indicates this was a material misrepresentation.

Further the appellant contends that overtime was essentially guaranteed in contradiction of Respondents brief. As the only weeks (2) that Lampkin did **NOT** work overtime are as follows: Check Dated 12/2/11 (The week he reported as Mr. McDaniel's replacement), and Check Dated 12/30/11 (The week before Christmas). This means that in 49 full weeks and 2 partial weeks Lampkin worked 49 weeks WITH overtime and averaged \$727.10. This represents overtime 96.07% of total weeks worked. Unlike testimony, accuracy of records does not fall over time.

- 8) From Lampkin's first day at Alside till his last, he earned wages equal to;
- a. \$36,544.61
 - b. This was from 11-22-11 to 11-10-12
 - c. This included 49 full weeks and 2 partial weeks
 - d. Lampkin's AWW excluding the partial weeks would be equal to:
 - e. $(\text{Total wages} - \text{partial week wages}) / \text{full weeks worked} = \text{AWW}$
 - f. $(\$36,544.61 - \$916.5) / 49 \text{ full weeks} = \$727.10$

In summary, the single Commissioner's order provided for an AWW for Lampkin to be \$618.50 and this is clearly erroneous.

Jarod Lampkin was the only replacement for which there was only one such position with Alside Revere. The Appellant contends that Lampkin's earnings would most accurately reflect earnings "in the employment" working at the time of injury as if he had not been injured.

The respondents brief states the commissioner noted "claimant had no guarantee his assignment at Alside Revere would continue." This contention was brought up in front of the commissioner during the hearing through a line of questioning that is summarized below:

Defendants: Was there any guarantee of continued work?

Mr. McDaniel: No, this is a right to work state.

The appellant contends there is no basis for the applicability of whether or not employment was guaranteed. South Carolina is a right to work state. This means employer can end employment without cause. To lower the AWW in this case, on this basis, would substantially prejudice the rights of the Appellant. This could lead to a "slippery slope" where in becoming the law of the case, there would be a new defense for any employer. The employer could simply state that there was no guarantee of future work, or as a natural progression, employers could claim that the injured was about to be fired and thus would have an AWW of \$0. Title 42 does not provide for consideration of guarantees of work. Further, 42-1-40 makes no reference to such applicability and neither does Title 67 article 5 or 67-606. Further, there is no reference to the same in any of the applicable laws or definitions as provided for. Particularly, there is no reference to the same in any of the definitions for: employee (42-1-130), employer (42-1-140), or employment (42-1-150). As an additional point, 42-1-160 defines injury, and includes a non-inclusive list (42-1-160 (C)) of "events which are incidental to normal employer/employee relations including but not limited to...terminations..." Given that, any reference to what "might" have happened would be based on speculation, conjecture or surmise. The appellant contends that this portion of finding of fact #2 is non-applicable, contrary to law, irrelevant and highly prejudicial; further, it should be removed from the record.

In light of this new evidence and in direct response to respondents claim that the order as stated should be upheld:

The Appellant claims the Commission should vacate the current Form 20 and Replace his AWW with what would most nearly approximate his income were it not for the injury, by ordering an AWW of \$727.10 with a corresponding comp rate of \$484.76 at the

minimum, or in the alternative, the wages outlined for the same employment by the U.S. Bureau of Labor Statistics 2010 publication or a more recent publication if available at time of decision.

AS TO MAXIMUM MEDICAL IMPROVEMENT

Under the substantial evidence doctrine, the respondents have failed to prove the appellant is at MMI.

The single commissioner erred in finding the appellant was at Maximum Medical Improvement as of August 13, 2012.

The appellant claims that he is not yet at maximum improvement as his treating physician Dr. Tavel has not yet declared MMI.

Pursuant to Dodge v. Bruccoli, Clark, Layma, Inc. (SC App. 1999) 334 SC 574, under workers' compensation law, a finding of MMI indicates that a person has reached such a plateau that in the physician's opinion there is no further medical care of treatment which will lessen the degree of impairment.

Pursuant to Dukes v. Daniel Const. Co. (SC 1974) 262 SC 98, where the commission found that further medical care was necessary and should be furnished, implicit in such award is the finding that additional medical treatment will tend to lessen the period of disability, for on no other grounds could liability for additional treatment be based under 42-15-60.

The Appellant pre-hearing brief filed prior to the first hearing states that his treating physician opined that he was at MMI on August 13, 2012. The Appellant agrees that in Dr. Ohlson's report he reached MMI "from an orthopedic standpoint" August 13, 2012. As indicated in Dr. Ohlson's report 7/2/12 which states "He is likely approaching MMI from the orthopedic standpoint. However, he may need ongoing chronic pain management." (APA p.49) At which time Dr. Ohlson once again recommended Pain Management. This had been initially recommended in the report dated 5/14/12 "referral to chronic pain management doctor" (APA p.41). Pain Management would not be provided until October 30, 2012.

Had this treatment been granted in a timely manner more than one visit could have transpired prior to the initial hearing. This would have allowed Dr. Tavel to more clearly relay to the Appellant that MMI had not been reached. This was further talked about at a medical visit 5/6/2013 and should be reflected in the doctors notes. Due to the rules of court not applying to Workers Compensation cases, and the wide latitude given the commission the appellant will bring the related documents and if the commission find "good reason" to include them they will then be provided for review. The "Motion to Complete the Record" is a continuing motion due to the fact that Dr. Tavel is my treating physician and continues to treat me to lessen the extent and duration of disability.

Appellant is not a physician or of the medical profession, therefore the Appellant contends that per conversations with Dr. Ohlson a severe limp will lead to lifelong diminution of the Appellant's physical condition. The appellant was specifically advised of the body parts that are affected by a severe antalgic gait, they included in short: feet, ankles, knees, hips and back. With this in mind, the appellant contends although his condition may have plateaued at this time (in the opinion of 1 of 4 of his doctors), that it will in the future diminish at an accelerated rate due to the injury. The Appellant contends that this should not be taken as a submission of reaching MMI by the Appellant. Further, these future complications should be taken into account when considering extent of disability.

The Appellate contends the single commissioner disregarded Dr. Brilliant's finding that MMI could still be up to a year away. (APA p.60)

The Appellate contends the single commissioner disregarded Dr. Gudas' finding that MMI had not been reached (APA p.58)

The Appellate contends the single commissioner disregarded Dr. Tavel's lack of a finding of MMI although he is Mr. McDaniel's "treating physician." (emphasis added)

The single Commissioners order stated the Appellant is entitled to future medical treatment as indicated by Dr. Ohlson, and that, Dr. Ohlson and Dr. Tavel would be the "authorized treating

physicians." Pursuant to Dodge and Dukes, supra, respectively, MMI may not be established unless and until the treating physicians establish that date.

The Appellant contends he has not reached MMI. As a finding of MMI is not purely an anatomical plateau but has widely been considered to happen when an employee returns to work without future treatment and/or without restrictions.

The Appellant has NOT gained employment, is NOT free of restrictions, and has NOT been deemed to be at MMI by Dr. Tavel whom continues treatment to lessen the extent and duration of the Appellants disability.

The statute clearly outlays in 42-9-10 that the employer should pay or cause to be paid compensation while the employee is unable to work due to injury.

In *Watson v. Xtra Mile S.C. Ct.App. Opinion No: 5013*, the Court did not find that the Commission erred in determining Watson was at MMI and did not find a loss of earning capacity and/or permanent and total/partial disability, therefor Watson was not entitled to payments after MMI.

The Court found that Watson had significant training, education and experience in sedentary work that Watson could utilize. The majority opinion reasons this based on the fact that Watson's strength rating was "light duty" and because her work at the time of injury was sedentary (Geathers, J., concurring in part and dissenting in part).

Due to the above findings Watson could return to work and although her employer had sent her home she could still find work elsewhere. In *Watson* the defendants successfully rebutted Watson's presumption of Total and Permanent Disability.

The Appellant was released to sedentary work with restrictions. Prior to the Appellant's injury he was performing Heavy work and all the Appellant's past job experience would constitute light work to heavy work according to the US Department of Labor, Dictionary of Occupational Titles (4th Ed., Rev. 1991) -- APPENDIX C, Therefor *Watson v. Xtra Mile* is not applicable.

Further, the appellant contends that an application for suspension of benefits should not have been entertained by the commission on November 28, 2012. Pursuant to 42-9-260 (F)

"Further, the commission may not entertain any application to terminate or suspend payments unless and until the employer or carrier is current with all payments due."

Evidence and testimony was presented to the single commissioner as to the fact that as of Nov. 28, 2012 the carrier was NOT current on all payments due.

The Appellant further contends that the Respondents have failed to rebut HIS presumption of continued disability as established in Swinton v. South Carolina Dept of Mental Health (S.C. App. 1994), 314 S.C. 202, which states that since the finding of MMI did not establish the Appellant was no longer disabled, disability was presumed to continue

Due to the above mentioned, a credit to the date of MMI, established Nov. 28, 2012, to be Aug. 13, 2012 is non-applicable as it is against the law to entertain an application for termination of benefits without up to date benefits paid.

The carrier must not be given the credit due to the standard of review the appellant applies instantly.

AS TO REMAINING ISSUES ON

AVERAGE WEEKLY WAGE

Pursuant to 42-1-40 the appellant takes multiple exceptions to this Respondents claim to uphold the order, on this issue, in the following ways:

- 1) The method used
- 2) Claimant's wage (Form 20)
- 3) Atkin's wage
- 4) Lampkin's wage
- 5) Clarke's wage

1 & 2) The method used is not one found in Title 42, the results are not fair and just to both parties and the commissioner did not articulate any findings of fact to the Exceptional reason the alternative methods in Title 42 would not be fair and just to both parties.

The Appellant's AWW was found by the single commissioner to be \$537.91 with a compensation rate of \$358.62. Respondent agrees. Appellant contends that this is an error. The Appellant contends that this figure is highly prejudicial and that it does not reflect accurately his earnings "were it not for the injury" or "in the employment in which he was working at the time of injury." (S.C. code 42-1-40)

The Appellant contends that his AWW should be at the minimum \$727.10 with a corresponding compensation rate of \$484.76, as reflected in Jarod Lampkin's pay records, or in the alternative base the Appellants AWW on the U.S. Bureau of Labor Statistics 2010 national average for Class A Commercial Drivers which the published the median pay as \$54,000 (AWW of \$1040 with a comp rate of \$693.37), or in the alternative, on median pay for Construction Equipment Operators at \$39,460 (AWW of \$789.20 with a comp rate of \$526.16.)

The appellate relies heavily on Sellers v. Pinedale Residential Center (S.C.App. 2002) 350 S.C. 183. "The disability of a workers compensation claimant reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, for the purposes of calculating the claimant's average weekly wage." "The workers compensation statute, which sets forth several different methods for calculating the claimants AWW, provides an elasticity or flexibility with a view towards always achieving the ultimate objective of reflecting fairly a claimant's probable future earnings loss."

On May 13, 2011 the Appellant became initially employed with Snelling Staffing working with Ben Arnold. The pay rate for this employment was \$11.50/hr. This employment was Tuesday thru Friday with an arrival time of approximately 6:00 am and a departure time varying from noon till 8:00 pm. This job required a Class B CDL (commercial driver's license). This job required constant lifting up to 50lbs, driving a class B vehicle, minimal warehouse work, delivery, stocking and merchandising of beer and wine to various locations for Ben Arnold. This employment ended Sept. 30, 2012.

When this employment ended there was no guarantee of future employment, no timetable given for return and for all intents and purposes the appellant was no longer employed.

Further, the claimant had just been hired at "On The Border" as a waiter as he had often done in the past to insure no period of unemployment became extended. This job was informed as to Mr. McDaniel's intention to accept new job offer from Alside Revere.

Unless claimant knew of and agreed to a new employer-employee relationship replacing the one theretofore existing, his rights under the Workman's Compensation Act against his regular employer were unabridged. Chavis v. Watkins (S.C. 1971) 256 S.C. 409

On November 11, 2011 the appellant entered into a subsequent employee/employer relationship with Snelling Staffing to work for Alside Revere. This employment was for a construction distribution company. The pay rate for this employment was \$13/hr. This position was for Monday thru Friday work from 7:00 am till 4:00 pm with the understanding that there would be regular overtime. Requirements for employment involved possessing a Class A CDL and the ability to lift over 50 lbs constantly. This job included several hours of warehouse work daily and irregular delivery routes, twice a week going within 5 miles of the Georgia border. The Actual number of weeks worked (length of employment) was from 11-11-11 till 11-21-11 (ten calendar days, 7 working days including the day of injury) not 20 weeks as the defendant states in their Brief.

The appellant contends that 42-1-40 states "in the employment working at the time of injury." The previous relationship of employee and employer should not be taken into account as the subsequent employment at Alside Revere was in no way predicated on any other facts of that relationship other than the availability for further employment. Further Chavis, supra, gives the threshold requirements for a NEW employee-employer relationship. Both the respondents and the Appellant were aware of and agreed to the new relationship.

The quarterly earnings of the Appellant used to calculate the current Form 20 consist of wages from a different job and with a different scope of work than that which the Appellant was working at the time of injury. This contradicts SC Code 42-1-40.

Prior to the Appellant beginning work at "Alside Revere", the Appellant's scope of work was solely as a CDL driver/deliveries at a compensation rate of 11.50/hr for "Ben Arnold". During his employment at Ben Arnold the Appellant's scope of work did not include warehouse work and/or warehouse stocking.

The Appellant's duties at Alside Revere consisted of CDL driver/deliveries and warehouse worker/assistant. Further the Appellant was injured while filling the role of warehouse worker in the warehouse at Alside Revere. Due to the additional duties associated with the Appellant's work at Alside Revere, the Appellant was hired at a higher wage rate than at Ben Arnold and was injured as a result of the additional risk and role of warehouse worker.

These facts alone should lead to the form 20 being voided.

Further 42-1-40 states the average weekly wage must be calculated by taking the total wages paid and by the actual number of weeks for which wages were paid. The single commissioner relied on a number of weeks worked that was not substantiated by the evidence, and did not take into account "weeks and parts thereof" for any of the wages she relied on.

Although time sheets of Lampkin, Atkins and Clarke were properly subpoenaed, they were never received. As AWW is an award, and awards may not rest on speculation, surmise, or conjecture, and given that, there is no way for the commission to prove particular fractions of weeks without these records: **The appellant contends that portions of weeks should be excluded from the calculation in this case.**

The Form 20 submitted to the Appellant in June, 2012, has elected by checking a box that employment was less than 52 weeks and the method of calculating comp would be by dividing earnings by actual weeks worked. The Form then instructs the preparer to disregard the quarter in which the injury occurred. The Appellant contends that the form should be amended to include a separate section for figuring AWW for employment lasting less than 52 weeks, as the intent of the

form is in conflict with itself as it instructs both "count actual number of weeks worked" and "do not count the quarter in which the injury occurred."

The Appellant contends that this Form 20 has lead to the exclusion of his "actual time worked" where none of the wages received during the employment with Alside Revere have been accounted for.

In addition to the above points, the calculation on the current Form 20 contains material misrepresentations. Reference APA p.71-72 as hand written notes bring attention to pay date, start period and end period.

Uncontested facts:

- 1) The Appellant took unpaid family medical leave under (FMLA) for the week of 8-29-11 thru 9-2-11.
- 2) The employer paid 43 hours for check dated 8/5/11 when actual number of hours worked was 53.
- 3) This error resulted in the Mr. McDaniel being underpaid.
- 4) The employer addressed this error to my satisfaction and remedied it.
- 5) This remedy came in the form of an additional check paid the week of 8/5/11
This check was for 10 hours of overtime equal to \$172.50
- 6) This resulted in two checks being issued for one week of work.
- 7) The respondents representative was made aware of this July 27, 2012

The above resulted in 20 checks being issued over a 20 week period although actual weeks worked were 19 in the two quarters immediately preceding the quarter in which the injury occurred.

The order states that AWW will include "an average of the wages along with the three other employee wages provided. The Claimant – \$492.85; Atkins – \$506.88; Lampkin – 618.50; and Clarke - \$533.41."

42-1-40 states that if employment is over a period of less than 52 weeks, then the method of dividing the earnings by the number of weeks and parts thereof shall be followed.

SC Workers Compensation Code specifically states the compensation rate should be an average of weeks the employee earned wages.

On July 27, 2012 this matter was brought to Allison Nussbaum's attention via email which was replied to by Allison Nussbaum attorney for the respondent. This matter was never resolved and the commissioner disregarded oral argument to the fact that the "Form 20 is miscalculated on its face" (TW hearing) The Defendants in bad faith have repeatedly misrepresented the form 20 as being accurate on a mathematical level, even though they knew the error was contained therein. The appellant will address this further under "As to penalties: Form 20"

3,4,5) The Appellant further contends that, although error, if AWW is to be determined by the average weekly wage of Clark, Lampkin, Atkins and the Appellants wage then weeks and portions of weeks should be accounted for in all of those calculations.

The wage of Atkins was ordered to be \$506.88 this is not substantiated by the evidence as the pay records of Atkins indicate:

- | | |
|------------------------|-------------------|
| 1) Check dated: 4/8/11 | 8 hours @ \$13 |
| 2) 6/10 | 35.5 hours @ \$13 |
| 3) 6/24 | 33.5 hours @ \$13 |
| 4) 7/15 | 36 hours @ \$13 |
| 5) 7/29 | 45 hours @ \$8 |

In summary of Atkins weeks and parts there of: 1) clearly this is not a full week 2,3,4) Dan Cobb testified to hours of operation being 7 am to 4 pm with some overtime being the regular week. (only upon conjecture or surmise could one guess as to the fractions of weeks worked without the daily time sheets which were subpoenaed but never received) and 5) this week is interesting as it was a full week worked (45 hours) but was paid at \$8 an hour (this was a result of having his pay reduced as a penalty for not timely notifying Snelling staffing of his intention to discontinue his employment (min 7 days) as outlined in employment contracts with Snelling, Instance #5 should be accounted for as a full week but at the rate of \$13 an hour resulting in

"wages" for that week equal to \$617.50. The others must be omitted from the calculation as the equivalent fraction of each week would have to be based on conjecture or surmise.

Therefore, Wayne T. Atkins AWW in this instance should be $\$6407.39 / 11 = \$582.49$.

The wage of Clarke was ordered to be \$533.41 this is not substantiated by the evidence as the pay records of Clarke indicate:

- | | |
|-------------|-------------|
| 1) 8/5/2011 | 32 hours |
| 2) 9/16 | 36.5 hours |
| 3) 10/7 | 38 hours |
| 4) 10/14 | 37.5 hours |
| 5) 10/28 | 32.25 hours |
| 6) 11/10 | 36.5 hours |
| 7) 11/18 | 8 hours |

See argument above for issues # 1-7 as the same applies.

This results in an AWW for Alvin R. Clarke, Jr. of $\$5664.76 / 9 = \$629.41$.

The argument for Lampkin's AWW has been extensively covered and the Appellant, will for convenience, reference his AWW here as \$727.10.

This would result in the same method as used by the single commissioner to result in an AWW of $(\$727.10 + \$629.41 + \$582.41 + \$627.50) / 4 = \$641.60$

This number must be upheld as no substantial evidence exists to uphold the previous calculation.

However the claimant would rely on Lampkin's earnings to most accurately reflect wages likely to be earned, as exceptional circumstances in this case would be:

- 1) 2008 housing crash
- 2) 2008 financial crash
- 3) Dow loses approx half its value (2009)
- 4) Construction jobs become scarce (2009)
- 5) 2010 sees major fluctuations and uncertainty in the economy

6) 2011 marks end of bear market (recovery)

7) 2012 sees Dow add 50%

8) Home investment rises

9) More jobs available in housing market

The Appellant contends that this further proves how earning looking forward would be the only way to approximate future earnings as any earning in the last 5 years have been tainted by the "GREAT RECESSION"

The Appellant filled the role of warehouse/delivery driver. There was only one such position at Alside Revere. Jared Lampkin was the direct replacement for the injured worker as his start date was 11-22-11. Mr. Lampkin's wages alone would most accurately reflect the probable weekly wage for the appellant as AWW reaches into the future and not the past.

AS TO DISABILITY RATING

§ 42-1-120 Defines Disability as incapacity because of injury to earn the wages which the employee was receiving at the time of injury in same or any other employment.

§ 42-9-10 (A) states when the incapacity for work resulting from an injury is total, the employer shall pay, compensation equal to sixty-six and two-thirds percent of his average weekly wages not exceeding five hundred weeks.

§ 42-9-20 states that when incapacity for work resulting from the injury is partial the employer shall pay compensation equal to sixty-six and two-thirds percent of his average weekly wages not exceeding three hundred forty weeks

§ 42-9-30(22) states for the total or partial loss of, or loss of use of, a member, organ, or part of the body not covered in this section and not covered under Section 42-9-10 or 42-9-20, sixty-six and two-thirds of the average weekly wages not to exceed five hundred weeks. The commission, by regulation, shall prescribe the ratio which the partial loss or loss or partial loss of use of a particular member, organ, or body part bears to the whole man, basing these ratios on accepted medical standards and these ratios determine the benefits payable under this subsection

The single commissioner's order provided for a 34% disability rating to the lower left leg.

The appellant claims that the single commissioner should have awarded Total and permanent disability under 42-9-10, or in the alternative, the maximum allowable under 42-9-20 for permanent partial disability, and/or total and permanent disability under 42-9-30.

The Appellant was given a 17% *Impairment* rating to the lower left extremity from Dr. Ohlson, a 50% *Impairment* rating to the left foot from Dr. Brilliant even though he opined that Appellant could still be up to a year away from MMI, no impairment rating from Dr. Tavel as he has not yet found Appellant to be at MMI, and no impairment rating from Dr. Gudas as MMI was judged to be premature..

The Appellant's work restrictions include but are not limited to; standing or walking for one hour maximum in an 8-hour shift and no lifting over 10lbs as stated in medical reports. Due to his extreme work restrictions as a result of his injury he is unable to fulfill any of the job descriptions he previously held. 34% Impairment rating would assume the Appellant would be able to complete 66% of the work he previously held prior to injury, and this is not true. Further the Appellant has made numerous attempts to be hired at jobs that fall within his work restrictions. Snelling staffing (employer) has repeatedly tried to staff Appellant but has been unsuccessful. The appellant contends that Snelling could not find a job within his restrictions that he was qualified for either by training or experience. The appellant contends that Snelling is in a unique situation where outsourcing for all levels of multiple fields should make possible employment more readily available. Further, the below excerpt from Snelling's website demonstrates a level of ability to find jobs in multiple, specific fields for candidates.

Appellant contends that, due to work restrictions, lack of education and limited computer skills the Appellant is not employable at these jobs.

Due to the circumstances, the limited resources of resolution and the limited education and computer skills of the Appellant, the 34% impairment rating does not accurately reflect the

Appellant's disability, as defined in title 42, and the effect of injury on the Appellant's earnings capacity.

Outlaw v. Johnson Services Co. (S.C. 1970) 254 SC 486, 176 S.E.2d 152, the loss of earning capacity alone is the criterion for compensation under the Act. *Wynn v. Peoples Natural Gas Co.* (1961) 238 SC 1, 118 SE2d 812. *Colvin v. E.I. Du Pont DE Nemours & Co.* (1955) 227 SC 465, 88 Se2d 581. *Coleman v. Quality Concrete Products, Inc.* (1965) 245 SC 626, 142 SE2d 43. Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment.

Prior to the Appellant's injury the appellant's work history consisted of labor work including but not limited to Construction, Distribution, use of the Appellant's class A CDL licenses and work requiring the Appellant to be able to constantly stand, walk and/or run far distances. His role was as a laborer. He stands 6'3" and weighs 260 lbs. His job history from 2000 to present consisted purely of entry level labor intensive jobs. Appellant was a highly capable individual prior to injury.

Workers Compensation law does not take into consideration pain and suffering, loss of enjoyment of life, punitive damages associated with negligent acts or other forms of resolution. The sole purpose of workers compensation is to take in consideration earning and earning capacity. The Appellant's job history shows that his entire prior jobs held consist of labor intensive work

On or about March 9, 2011, The Appellant met with Angela Baldwin from Snelling Staffing. Upon information and belief, Snelling Staffing received the Appellant's resume through an application by the Appellant for a CDL/Labor position found on Craigslist. During the interview process the Appellant was analyzed and evaluated for suitable work by Angela Baldwin and Snelling Staffing.

The Appellant's interview data form reflects a high school level of education and has handwritten notes that reference the Appellant's Class A CDL. On the Employee Master Dossier Report, pg. 2, the Monitor Comments state; *good Attitude, great image, Class A CDL, driving records attached, Good Ben Arnold, girlfriend is Elizabeth Dale, caddie experience, took prove it test in the office.* The Appellant's Employee Master Dossier Report, pg 3, Test Scores state; MS

Word, 87; MS Excel, 87, **Speed Typing, 24 wpm**, basic ruler, 100%, basic industrial math, 93%, basic reading, 90%. The Appellant's Application Questionnaire states jobs applying for as Driver/other and areas willing to work as Industrial/Driver.

The Appellant's Light Industrial D.O.T. Occupation Titles and Skills Coding states; Position Desires #1 as Driver & Position Desired #2 as open. The Appellant's Light Industrial D.O.T. form also states the Appellant to indicate all areas in which you have prior referenceable experience and feel confident. The Appellant's form indicates warehouse inventory, wait staff and also indicates skills with tape measure, screwdrivers and wrenches.

The Appellant's Safety Video Test questionnaire references questions concerning the proper way to lift heavy objects, operation of machinery and equipment and questions regarding the permission to operate Forklifts.

The Appellant was placed in Snelling Staffing's Light Industrial Branch Department for staffing and positions. Snelling Staffing Services is listed as a *Professional Staffing Agent*.

Pursuant to the US Department of Transportation, 49 CFR Part 391.41(b)(2) states that a person is physically qualified for a Commercial Drivers License if that person has no impairment of an arm, foot or leg, or any other significant limb defect. The Appellant contends that due to his injury, impairment and his physical restrictions, the Appellant is no longer able to utilize his class A CDL and no longer able to perform the physical labor associated with his prior work experience or any other similar job. According to the United States Department of Labor, Dictionary of Occupational Titles, Fourth Edition, due to the Appellant's injury and work restrictions, the Appellant is no longer physically able to perform any prior job that he previously held.

The Appellant contends that due to his restrictions, work qualifications, education level, medical complications, injury to multiple scheduled loss body parts as well as non-scheduled body parts, impairment rating of multiple scheduled loss body parts and other applicable factors, the Appellant should receive general disability under permanent total disability or partial disability under 42-9-10 or 42-9-20 and/or a finding of total and permanent disability under 42-9-30.

The appellant contends that Title 42 being remedial in nature must protect the workman who does the work. As the final decision is at the discretion of the commission, being the fact finder, and that the appellant is entitled to award under 42-9-10 or 42-9-20 and 42-9-30 to maximize recovery for the injured, the commission must consider both options to their full extent and award the larger of the two as to do anything less would be contrary to the statute and its intent.

Further the Appellant contends that pursuant to *Lee v. Harborside Café* (S.C. App. 2002) 350 S.C. 74, 564 S.E.2d 354 which states that claimant may proceed under either Workers Compensation Act's general disability section. In order to maximize recovery and only when schedule loss is not accompanied by additional complications affecting other parts is scheduled loss exclusive, the Commissioner should have awarded disability compensation under 42-9-10 and/or 42-9-20. The single commissioner awarded for permanent loss of use of leg and toes. However, complications include but are not limited to:

- 1) Loss of use of sural nerve (Ohlson 8/13/12)
- 2) Loss of use of superficial paraneal nerve (Ohlson 8/13/12)
- 3) Loss of use of lesser MTP joints (Ohlson 8/13/12)
- 4) Loss of use of skin (6 months for a skin wound to close)
- 5) Loss of use of vascular system (foot constantly falls asleep)
- 6) Loss of use of nervous system (dysthesias, Ohlson 8/13/12)
- 7) Loss of use of bone density (diffuse osteopenia)
- 8) Ankylosed position of the toe (5th toe)
- 9) Hammertoe deformation (2nd-5th toes)
- 10) Disfigurement of foot (large scar)
- 11) Severe antalgic gate
- 12) Continued medical care to correct flat foot deformity and pes planus (orthopedic shoe inserts)
- 13) Likely future surgery

14) Weight gain and muscle loss/atrophy

15) Permanent work restrictions

16) Lack of congruity in medical opinions (due to the need for multiple specialists in different fields).

The Appellant contends that he has multiple complications affecting other parts of the body and thus scheduled recovery is NOT exclusive.

Further, this list of complications could all be provided for under 42-9-30. The Appellant contends that he had repeated conversations with his former attorney concerning the desire to seek disability under general disability statutes and not solely under the scheduled loss. The Appellant further contends that he approached his former attorney regarding the need to show a loss of earning capacity. The appellant contends that the record, when considered in its entirety, clearly reflects a loss of earning capacity when viewed in the entirety.

The substantial evidence standard should be applied here as during the hearing: (1) the appellant gave extensive testimony during the single commissioners hearing to his work history, (2) this work history shows little training beyond entry level jobs, (3) NONE of the appellants previous jobs can be done within his work restrictions, (4) the appellant holds NO special license or certificates other than a Class A CDL and a D.O.T. card, (5) since the accident the appellant is no longer able to use his ONLY special qualification as under CFR 49.1 he is no longer physically fit to utilize his CDL, (6) the appellant knows of no jobs that fall within his restrictions that he is qualified for that could meet or exceed wages earned at the time of injury, (7) the respondents could only provide employment within his restrictions twice, both times were very short in duration, further proving that the abilities that the appellant has are so limited in scope that there is no stable market for them, (8) the first "light duty offer" was for \$9.10/hour and included shredding paper 1 sheet at a time 5 days a week, (9) although released to "sedentary work" this was within the confines of further restrictions, in which there are many "sedentary" jobs that still do not fall within these restrictions or the appellants physical limitations.

The Appellant contends that the Commission should correctly apply the applicable statutes regardless of the Appellant's forms.

The Appellant contends that expert opinions of his physicians should not be considered facts in conflict as they are professional opinions. Dr. Ohlson's reports, along with Dr. Brilliant's report do not constitute facts in the Appellant's case but medical opinions of the Appellant's condition and treatment.

The Appellant contends that in *Muir v. C.R. Baird* the medical opinions were to address causation in order to prove the six elements that must apply for occupation disease benefits under the SC Workers Compensation and are not applicable to the Appellant's claims.

AS TO CREDIT FROM MMI

The Appellant contends that if the commission determines him to be at MMI, the Defendants are not entitled to a back credit pursuant to *Swinton v. South Carolina Dept of Mental Health* (S.C. App. 1994), 314 S.C. 202, which states that since the finding of MMI did not establish the Appellant was no longer disabled, disability was presumed to continue.

The Respondent's claim my argument on this topic is "apparently 'equity'" as filed in their brief. Respondent states that pursuant to *Cruel v. Environmental*, Appellant is not due compensation after MMI. They further state that *Watson v. Xtra Mile Driver Training* states that "equity follows the law".

The Appellant takes exception to the misapplication of both of these cases.

Upon information and belief, At no time did the Appellant contend that Defendants are not entitled to credit for benefits after MMI due to "equity" or the fact that the Appellant was in school and/or because he has never had a previous workers compensation case as stated in the Defendants Brief.

Although these points should be noted, as to speak to the strength of character of Mr. McDaniel, these alone are not substantial enough for denial of credit.

The Appellant contends that the Commissioner erred in the application of *Cruel v. Environmental Management Services, et. al.* The Appellant contends in *Cruel*, the claimant failed

to cooperate with his physician which resulted in his inability to return to work. The full commission agreed, and this finding was upheld as the highest court noted "claimant was not entitled to Temporary total benefits because claimant had exaggerated the degree of his vision loss. The commission found : Had the claimant been honest with his physicians concerning the sight in his right eye, a corrective lens could have been provided, and the claimant could have worked."

In summary of application of Curiel supra: (1) no evidence exists, nor has the defense asserted that the appellant has been dishonest with his physicians. (2) No substantial corrective treatment exists for the appellant's injury that would instantly return him to work. (3) It is disability resulting from injury that has precluded him from gainful employment. ((4, further facts of the case call into question the weight to be given to Curiel's testimony as he was a criminal. i.e, illegal alien.) and (5, in that case suspension of temporary compensation could have been terminated under S.C. code 67-504 (A) pursuant to 42-9-260 (B)(6) refusal of medical treatment)).

In order to uphold the commissions own previous ruling, the full commission must find the employer is NOT eligible for a credit to the date of MMI as the specificity of the ruling is clear in its intent.

The Appellant contends that the Defendants have hindered his rehabilitation by delaying and not approving treatment prescribed by the Appellant's treating physician. In summary of delayed/never approved medical care: two delays to physical therapy authorization (one of 4 weeks and one of 6 weeks), delays in medication, never approved wound care therapy (which resulted in the hardship of an open wound for approx. 6 months and permanent disfigurement), never approved referral to Dr. Nancy Lembo for chronic pain management (employer substituted Dr. Tavel after approximately 5 month delay), 3 month delay in approval of orthotics, denial of prescription for custom shoes to present.

The Appellant claims this has undoubtedly increased his period of disability and most probably its extent. (further in "as to penalties: treatment")

For the above reasons the appellant contends that the respondent is NOT due a credit to the date of August 13, 2012.

Pursuant to Swinton v. SC Dept of Mental Health the Appellant further contends that he has been ready, willing and able to work with in his restrictions, however he is not qualified for sedentary work and no work has been offered to him within his restrictions through Snelling Staffing Services.

The Appellant has been ready and willing to work with in his restrictions. On 4/2/2012 the Appellant had a follow-up appointment with Dr. Ohlson. The Appellant inquired at the front desk whether he could be released for sedentary work. See APA submission 45-46. The Appellant contends that he inquired regarding sedentary work due to the fact that he had not worked since November of 2011 and was beginning to become depressed and frustrated with his inability to work and the lack of structure of his daily life. At a later follow up appointment on 7/2/12, Dr. Ohlson's records will reflect his status of not being able to return to work. (pg. 51)

The Appellant contends that due to the conditions and him being anxious to return to work and a normal daily life style, he was prematurely assigned to return to sedentary work pursuant to his request in May of 2012. This was approximately 6 months after his injury. Dr. Ohlson had stated in a report dated 1/9/12 that he would keep the injured out of work until the open wound was closed. Due to denial of medical care (wound therapy) this open wound would not be noted closed until 7/2/2012. At this time the doctor elected to keep Appellant out of work until the next follow up 8/13/12 at which point he released with final work restrictions from an "orthopedic standpoint" as stated in the 7/2/12 report.

The Appellant contacted Snelling Staffing immediately being released to sedentary work. Snelling Staffing assigned him duties at their office ranging from filing to shredding documents (approx. 3 weeks). The Appellant was then placed at Barnwell Whaley as an intern in an attempt to gain experience in an office setting (approx. 8 weeks).

Upon information and belief the Appellant was placed at Barnwell Whaley free of Snelling Services' charges and at the expense of the Defendants in order to allow the Appellant to have any office or sedentary work on his resume. Once Barnwell Whaley released the appellant stating strong work ethic but unfortunately no position for him, Snelling staffing declined to have him work

further in their office. Mr. McDaniel kept constant contact with Jim Pascuttili about "possible leads." That was in addition to a personal job search that resulted in 50+ inquiries in wide ranging positions from receptionist and file clerk to secretary and phone receptionist. However, none of these would result in as much as an interview.

For the above reasons the Commission must NOT give a credit for overpayment, as payments are of a supportive nature. The payments, when made, went to support the Appellant in a period of total incapacity for employment due to injury.

AS TO PENALTIES

67-510. Unauthorized Suspension or Termination of Temporary Compensation Benefits.

A. If the employer's representative suspends, terminates, or reduces temporary total or temporary partial compensation benefits without first complying with the procedures in this Article, the Appellant may be entitled to additional compensation and penalty as provided in this Chapter and the Act.

42-9-260. Notice to commission when payments have begun: suspension or termination of benefits.

(F) Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current on all payments due.

(G) Failure to comply with this section shall result in a twenty five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section must be paid to the employee in addition to the amount of benefits withheld.

Page 14 of the single Commissioner's order contradicts the above statutes. In Summary it reads:

IT IS FURTHER ORDERED THAT...Defendants shall pay the claimant for the underpayment of benefits.

The appellant contends that 42-9-260 should have precluded the entertaining of ANY application to terminate benefits. The commissioner was aware that there were weeks of benefits still due to the Appellant.

There were multiple delays in receiving payments when due. The first check received was "issued" 12-2-11 as that would comply with the statutory time limit. The Appellant contends that this document was falsified as to its issuance date being that it was not received until Dec 27, 2011.

I will briefly summarize late payments below: check date received (for benefit period of) \$ amount

- 1) 5/21/12 (4/5-4/6/12) \$13.49
- 2) 5/21/12 (4/7-4/13) \$146.55
- 3) 6/15/12 (4/21-5/25) \$896.56
- 4) Issued 6/27/12 (5/26-6/15) \$475.30
- 5) Issued 8/20/12 (6/16-6/25) \$65.92
- 6) Issued 9/6/12 (6/16-6/25) \$60.93
- 7) In addition to an approx \$1300 late payment (4 weeks beginning after Issue #6) that I had to sign over to my former attorney due to high interest bridge loans taken out during that period of non-payment.
- 8) This is a non inclusive list as my former attorneys file keeping was not the most accurate.

The Appellant would further request penalties to be imposed based on the multiple incidents of grossly late payment of compensation benefits, which was the directly cause of financial hardship of the Appellant, including but not limited to the need for the Appellant to take out grossly high interest payday loans, the pawning of the Appellant's assets and withdrawal from classes at Trident Technical College.

The Employee Master Dossier Report, pg 4; 2/16/2012, reflects notes of conversation with Snelling Staffing. In these notes it states, "John called me back and said he was frustrated with Insurance. His Dr. had written him for physical therapy on his foot as well as debridement of his wound and it has been hung up waiting on approval." The Appellant contends that the debridement of his wound was never approved and he never received wound therapy to excel the healing of his wound. The Appellant further references later notes from Dr. Ohlson on 2/20/12.

These notes reflect that the appellant is attempting to facilitate wound treatment and Dr. Ohlson encouraging him to touch base with Steinberg to get him into some wound care. The Appellant further referenced Dr. Ohlson's report of 5/14/12, pg 2 which states the patient has "proximal phalanx of the fifth toe complicated by delayed wound healing" and the patient having "significant soft tissue damage". The report further states, "because it took several months for the wound on his foot to heal it would not have been appropriate to place a surgical incision on an area that is asymptomatic."

Form 20

The appellant contends that the defendants should be liable for both Criminal penalties pursuant to Sc code 38-55-540 and civil penalties under SC code 38-55-550.

Four conditions must exist for this law to be applicable as SC code 38-55-530 defines "false statement or misrepresentation"

- 1) Statement is false.
- 2) It is a material representation
- 3) It is made with the persons knowledge.
- 4) Made with the intent of economic advantage.

38-55-540 outlines the criminal penalties for "A person who knowingly makes a false statement or misrepresentation...with an intent to injure, defraud, or deceive...is guilty of a: (2) misdemeanor...If the benefit or advantage received is \$1,000 or more but less than \$10,000." The code further outlines that full restitution must be ordered for the victim by the court.

The Appellant claims that the defendants gained an undeserved economic advantage in the amount of \$2867.91. The economic advantage gained in this instance is equal to $\{[(\text{corrected AWW} - \text{deceptive AWW}) * \text{compensation ratio}] * (\text{total weeks paid under the single commissioners order} + \text{total weeks of TTD and TPD})\}$ or $\{[(532.96 - 492.87) * .6667] * (66.3 + 41)\} = \$2867.91$

The claimant contends that due to consistent delays, material misrepresentations, non/slow payment when due on multiple occasions, need to provide restitution for victims of misrepresentation and inadequate ability to provide prescribed medical care in a timely fashion the

commission should DOUBLE the imposed fine (authority granted under 42-3-105) in this instance AFTER the applicable increases in compensation for non-payment (of 10%) and the penalty imposed for unauthorized termination of disability benefits.67-505.

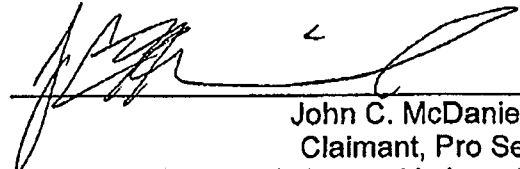
In Summary

The Appellant's compensations rate should be based on the Appellant's future probable earnings or in the alternative the in the employment that the Appellant was working at the time of injury. The Appellant's loss of use and disability greatly exceeds 34% of his leg and the disability should be rated on the Appellant's incapacity to earn the wages which he was receiving at the time of injury due to injury. The Appellant's disability should also address his inability to utilize his Class A Commercial Drivers Licenses and that effect on his ability to earn wages. The Defendant's should not receive a credit from date of Dr. Ohlson's opined MMI since the finding of MMI did not establish the Appellant was no longer disabled and disability was presumed to continue. Further, the Appellant should not be considered to have reached MMI since only one of the two treating physicians issued a finding of MMI and that was merely from an orthopedic standpoint. Medical records suggest he will have future medical problems and probable need for surgery as a result of this injury. The Commission should apply penalties due to grossly late payments, delayed in approval of medical treatment and unapproved medical treatment which has hindered the Appellant's recovery and contributed to future medical complications to include but not be limited to the need for surgery in the future.

Conclusion

The appellant implores the commission to use the substantial evidence standard of review and order that: 1) Appellants AWW should be at the minimum \$727.10. 2) Find appellant is not at MMI. 3) return to general files until MMI after providing for the reinstatement of TTD payments or in the alternative find MMI as of the date that all past due benefits were made current and a stop payment is properly executed, 4) award total and or partial permanent disability under 42-9-10 or 42-9-20 or total and permanent disability under 42-9-30, 5) order continuing medical care at the

minimum as the single commissioner did, 6) affect all penalties possible to the maximum allowed by law in addition to figuring interest at the maximum allowable for egregious violations of the act for financial gain.

A handwritten signature in black ink, appearing to read 'J. McDaniel', is written over a horizontal line.

John C. McDaniel
Claimant, Pro Se
(Former Class A CDL Driver & General Laborer)

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 1116275
Carrier File #: 041100021048
March 29, 2013

NOTICE OF APPELLATE HEARING

JOHN MCDANIEL v CAREER EMPLOYMENT PROFESSIONAL

Subject: Set on Review.
Date: 04/16/13 at 03:30 PM
Location: South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
Columbia, SC 29201

South Carolina Regulations 67-701 through 67-711 govern appeals before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Briefs are due according to prior notice and are governed by Regulation 67-705. For questions regarding this matter, please visit eCase Status at www.wcc.sc.gov or contact the Judicial Department of the South Carolina Workers' Compensation Commission at (803) 737-5739 or appeals@wcc.sc.gov.

The Commission requests your presence thirty minutes prior to your scheduled oral argument.

This matter is set before: Panel A.

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail. Unrepresented parties were served by certified mail.

By: Eugenia Hollmon, SC Workers' Compensation, March 29, 2013

Party

Employee: JOHN MCDANIEL

Attorney

Thomas M. White
twhite@steinberglawfirm.com
843-572-0700

Employer: CAREER EMPLOYMENT PROFESSIONAL
Carrier: United Wisconsin Insurance Company

R. Mark Davis
mdavis@mgclaw.com
843-576-2782



From: Hollmon, Eugenia <EHollmon@wcc.sc.gov>
Sent: Wednesday, April 05, 2017 9:48 AM
To: Allison Nussbaum; Helen Hiser; john mcdaniel
Cc: Marguerite Karnilaw
Subject: McDaniel

Below is a request for a proposed decision and order

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
REQUEST FOR A PROPOSED DECISION AND ORDER

This document is not a Decision and Order. It is a request for a proposed order. The Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order.

John McDaniel v Career Employment Professional
SCWCC: 1116275
Commission Panel: Beck, Wilkerson, Campbell; Chair
Order Assigned to Commissioner: Beck
Court Reporter – Cortney Glover – 803-252-3445

John McDaniel
Allison C. Nussbaum
Helen Hiser

Pro Se/Claimant
Defendants/Appellant

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **Affirm w/ Amendments** the decision and order of the Single Commissioner. Claimant's amended Form 30 is not properly before this Panel.

Ms. Hiser please prepare a proposed order and submit to the Judicial Department within thirty (30) days of this notice. The proposed order shall be submitted in Word format to appeals@wcc.sc.gov and shared with each Party. Please make sure the Appellate Panel Decision and Order recites the specific Finds of Fact and Rulings of Law of the Single Commissioner's Decision and Order and reflects any comments requested by a Commissioner.

The signature page shall include a signature line for each Commissioner and the first signature should be the name of the Commissioner assigned the case as indicated above.

If you have any questions, please do not hesitate to email me at ehollmon@wcc.sc.gov or call at 803.737.5737

Judicial

Transmitted via email and regular mail this 5 April 2017



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

JUN 20 2017

SC Court of Appeals

W.C.C. File No. 1116275

John McDaniel, Employee, ... Appellant,

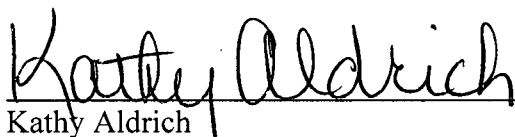
v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that on the 16th day of June, 2017, I served the Respondents' **Reply to Return to Motion to Strike or Correct Notice of Appeal** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

John C. McDaniel, *Pro Se*
4247 Stonebridge Road, SW, Apt. 5
Wyoming, MI 49519



Kathy Aldrich
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents Career Employment
Professional d/b/a Snelling Staffing and United
Wisconsin Insurance Co.*



Reply To

HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

June 16, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: John McDaniel v. Career Employment Professionals d/b/a Snelling Staffing
Services and United Wisconsin Insurance Company c/o United Heartland
Date of Accident: November 21, 2011
WCC File No.: 1116275
Our File No.: 20638.12027
Claim No.: 041100021048
Appellate Tracking No.: 2017-001217

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Reply to Return to Motion to Strike or Correct Notice of Appeal, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC


Helen F. Hiser

RECEIVED

Enclosures

cc: John C. McDaniel, *pro se*

JUN 20 2017

SC Court of Appeals

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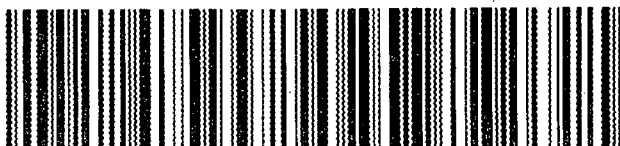
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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211-1629

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JUN 20 2017

SC Court of Appeals

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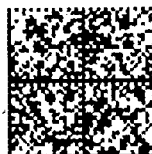
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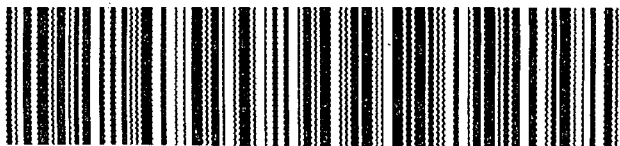
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