

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

RECEIVED

JUN 30 2017

Henton T. Clemmons, Jr., Employee,Petitioner, **S.C. SUPREME COURT**

v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier,Respondents.

PETITION FOR REHEARING AND REQUEST FOR
ORAL ARGUMENT TO THE REFILED OPINION
NO. 27708 FILED JUNE 28, 2017 AND
REQUEST FOR EXTENSION TO AMEND THE
PETITION PURSUANT TO RULE 263(b), SCACR

Pursuant to Rules 221(a) and 240, SCACR, the Petitioner, Henton T. Clemmons, Jr., would respectfully request Rehearing, or maybe better phrased, reconsideration of, amendment to, or a further substituted Opinion by the Court. Further this Petition is being filed pursuant to the Court Rules that require that a Petition for Rehearing be filed within 15 days of the date of the Opinion. The Opinion was filed on June 28, 2017 and as Counsel for the Petitioner has previously notified the Court, he

has a scheduled vacation the first and second week of July and has protection, where it can be granted. Counsel had requested from the Court, prior to the Court's Opinion, as to what he should do should something arise that required action during his time out of the office as to requesting an extension.

Wherefore, pursuant to Rule 263(b), SCACR, and other applicable Rules, the Petitioner would request that the Court not take any action on the Petition and would enter an Order allowing the Petitioner to file an Amended Petition for Rehearing within fifteen (15) days after his return to the office on Tuesday, July 18, 2017.

Pursuant to Rule 221(a) and Rule 240, SCACR, briefly that the Petitioner would submit, and particularly by way of comparison of the Court's original Opinion with the substitute Opinion that the Court overlooked or misapprehended and should address the following points:

1. That in the Courts substitute Opinion filed June 28, 2017, the Court correctly states the issue under the scheduled-member statute for decision and award stating:

"The issue under the scheduled-member statute is not impairment as to the whole body, but rather it is the loss of use of a specific body part - in this case, Clemmons back." (emphasis added).

Whereas In the last sentence under the **CONCLUSION** part of the Opinion, the Courts states,

"We hold Clemmons has lost more than 50% of the use of his back and remand to the Commission for a new Hearing to determine his percentage of impairment and whether the presumption of permanent and total disability under Section 42-9-30 (21) has been rebutted". (emphasis added).

That the Petitioner would simply ask the Court to consider changing the words "percentage of "impairment" in the last sentence to the decision that is to be made by the Commission under the scheduled-member statute to the determination of what the statute requires, which is to determine the loss of use of the injured body part involved, in this case the back.

2. That while the Court clearly sets out in the Opinion under **LAW/ANALYSIS** and quotes from SC Code Section 42-9-30 (21) and emphasizes that the presumption to be rebutted is tied to Section 42-9-10 (B), the Court in its holding simply remands to the Commission to determine whether or not the presumption of total and permanent disability under Section 42-9-30 (21) has been rebutted.

The Petitioner would request that the Court consider for the benefit of the Commission, the bench and the bar to simply add a sentence or statement or reinstate to the Opinion the Court's direction as to the evidence necessary to rebut the presumption, that the presumption under the scheduled-member statute 42-9-30(21) and is tied to §42-9-10(B) where Awards are made for total and permanent disability due to the "character"

of the injury and not to loss of earning capacity under §42-9-10 (A). This is in accordance with the law since the inception of the Act, wherein this Court has always held under a scheduled member Award that the appropriate considerations are tied to the loss of use and not to economic loss or loss of earning capacity.

3. That unless the Court has completely changed its Opinion as to the guiding principles under the Act since its inception, the Court did nothing more and nothing less in its original Opinion than give guidance to the Commission, Bench and Bar when it held the following:

"We further hold that based on the Record before us, the presumption of permanent and total disability has not been rebutted. While this Court has indicated a claimant's return to work is not probative to an analysis under the scheduled-member statute, we have not squarely addressed whether return to employment may be considered to rebut the presumption of total and permanent disability. See Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 109, 580 S.E.2d 110, 104 (2003) ("In the context of the scheduled injuries, South Carolina recognizes a claimant's entitlement to be deemed disabled and to receive compensation for an injury even though the claimant is able to work."); Stephenson, 323 S.C. at 118 n.1, 473 S.E.2d at 701 n.1 (recognizing that "even after being adjudged totally disabled, many employees receiving benefits under one of the specific statutory presumptions of total disability continue to work either in the same or in a different field. An employer may not refuse to pay the total disability benefits simply because the employee retains earning capacity after the accident." (emphasis added)).

Nevertheless, in Watson v. Xtra Mile Driver Training, Inc., the court of appeals held evidence of a claimant's mere ability to return to work within her restrictions was alone sufficient to rebut the presumption of total and permanent disability under section 42-9-30(21). 399 S.C. 455, 464-65, 732 S.E.2d 190, 195 (Ct. App. 2012). Today, we hold the mere fact a claimant continues to work is insufficient to defeat the presumption of permanent and total disability for loss of use of the back."

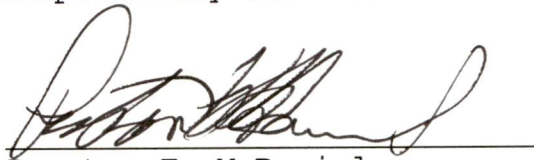
The Court goes on to talk about the two competing models and to further delineate the difference between the economic model and the medical model. The Petitioner has absolutely no problem with the Court adding that language back in or whatever language is appropriate to establish that work alone is insufficient; just as it was in Stephenson. The Court will recall that the entire argument was over the fact in this case that the Defendants presented nothing more than the fact that Mr. Clemmons was continuing to work. He was then fired after a decision by the Commission affirming the Hearing Commissioner's Award. If the Court does not restate those guiding principles in the Opinion, there is nothing, and the Petitioner would reiterate nothing, to prevent the Commission and/or the Defendants taking the very same position on Remand. This guidance has nothing to do with whether or not the Court of Appeals infused wage loss; it is simply a restatement of the law of this State as this Court has applied to scheduled-member

awards and to loss of earning capacity Awards ever since the inception of the Act. The Petitioner has absolutely no problem if the Court wants to rephrase that but the Petitioner actually begs the Court to restate the law in its Opinion.

The Court will also recall that in this case there was absolutely no evidence that the Claimant had not lost 50% of the use of the back; there was medical opinion evidence that he had lost 50% of the use of his back; and there was also vocational evidence that due to the physical injury to his back alone the Claimant had lost access to far greater than 50% of all of the jobs available to him in the economy under the Department of Labor's physical demand classification system. Unfortunately, that should give guidance to the Defendants on how to rebut the presumption of total and permanent tied to the character of the injury.

If the Court will not reinstate this language without rehearing, the Petitioner welcomes the opportunity to appear before the Court on behalf of this injured worker and all the injured workers of this State who this Opinion will affect. To not reinstate this language is to abandon the very fundamental principles that this Court has always applied to scheduled-member awards and awards made due to the character of the injury.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Preston F. McDaniel", is written over a horizontal line.

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June 29, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

JUN 30 2017

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S.C. SUPREME COURT

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v.

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PROOF OF SERVICE

I certify that I have served the PETITION FOR REHEARING AND
REQUEST FOR ORAL ARGUMENT TO THE REFILED OPINION NO. 27708 FILED
JUNE 28, 2017 AND REQUEST FOR EXTENSION TO AMEND THE PETITION
PURSUANT TO RULE 263(B), SCACR on June 30, 2017, addressed as
follows to its Attorneys of Record:

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