THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner,
Avery Wilkerson, Commissioner

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W.C.C. File No. 1102937
SC Court of Appeals Case. No. 2016-00514

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Barry Adickes, Claimant, . . . . . Respondent,

v.

Phillips Healthcare, Employer, and
Fidelty and Guarantee Insurance Company, Carrier, . . . . . Appellants.

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# BRIEF OF AMICUS CURIAE SOUTH CAROLINA SELF INSURERS ASSOCIATION IN SUPPORT OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

1. Did the Commission Err in Awarding Wage Loss Benefits in Contravention to S.C. Code Ann. § 42-9-20?

## STATEMENT OF INTEREST

The South Carolina Self Insurers Association (SCSIA) was formed in 1975 to develop and support the interests of employers self-insured for workers' compensation in South Carolina. As members of SCSIA represent in part self-insured employers before the South Carolina Workers' Compensation Commission (SCWCC), the SCSIA has a substantial interest in one of the issues presented in this appeal. Specifically, the interpretation of § 42-9-20 by the SCWCC may result in a scenario that allows an employee to receive an award of partial disability for wage loss in excess of the maximum allowed not only under § 42-9-20, but also of that allowed for permanent and total disability under § 42-9-10. Such an interpretation is inequitable and not in the best interest of the self-insured employers of South Carolina.

## STATEMENT OF THE CASE

SCSIA adopts the Statement of the Case as submitted by the Appellants.

## STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. *See Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). In workers' compensation cases, the Full Commission or Appellate Panel is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of this Court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981).

However, an appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the [Appellate Panel] are affected by error of law, clearly erroneous

in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. §1–23–380(A) (6) (d), (e) (Supp.1997). Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Appellate Panel reached. *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996).

## ARGUMENT

### I. THE COMMISSION INCORRECTLY INTERPRETED S.C. CODE ANN. § 42-9-20 BY ALLOWING WAGE LOSS BENEFITS TO BE PAID FOR A PERIOD GREATER THAN 340 WEEKS FROM THE DATE OF INJURY.

Section 42-9-20 of the Act, defining a claimant's entitlement to wage loss, provides that "[i]n no case shall the period covered by such compensation be greater than three hundred and forty weeks from the date of injury." Any application of this statute should be predicated upon the understanding that a Claimant is only entitled to wage loss benefits for the first 340 weeks after the date of injury. Unfortunately, the Commission in the present case has failed to comply with Section 42-9-20 and, further, has failed to explain their reasoning for doing so. As such, this error of law should be reversed by this Court and the claim remanded to the Commission for proper application of the law.

#### a. THE 340-WEEK LIMITATION OF § 42-9-20 REQUIRES STRICT CONSTRUCTION.

In South Carolina, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). In furtherance of that rule, words in a statute are given their plain, ordinary meaning. *Id.* When statutory language is plain and unambiguous and conveys a clear

and definite meaning, the appellate court will not look for or impose another meaning. *State v. Jihad*, 342 S.C. 138, 142, 536 S.E.2d 79, 81 (Ct. App. 2000); see also *Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993) (noting when the statute contains terms which are clear and unambiguous, the court must apply those terms according to their literal meaning). Moreover, it is well-settled that "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *S.C. Ins. Reserve Fund v. East Richland Cnty.*, 417 S.C. 149, 151, 789 S.E.2d 63, 68 (Ct. App. 2016) (*r'hrg denied*) (*quoting Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005)).

The language of § 42-9-20 limiting an employee from receiving wage loss benefits beyond 340 weeks from the date of injury is clear and unambiguous. While true the Act is generally liberally construed in favor of coverage, exceptions and limitations are to be strictly construed. *James v. Anne's, Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (1960). Since this particular case deals with limitations set forth by § 42-9-20, it requires a strict interpretation. Importantly, neither the Commission nor the Respondents have provided any explanation as to why the requirements addressed above should not be applied in this case, and every other case dealing with a claim of wage loss.

b. THE COMMISSION ERRONEOUSLY BELIEVES A CLAIMANT IS ENTITLED TO 340 WEEKS OF BENEFITS AFTER A PERIOD OF TTD BENEFITS.

A critical review of Section 42-9-20 reveals three distinct parts. The first part of the statute sets forth precisely how to calculate the weekly compensation rate in wage loss claims. ". . . when the incapacity for work resulting from the injury is partial, the employer shall pay . . . to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wage before the injury and the average weekly wage

which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year." This language is clear and unambiguous as to its intent – the Commission awards wage loss based upon the difference between the wages earned before and after the injury. The application of this part of Section 42-9-20 is not in dispute.

The language in the second part of the statute unequivocally limits the disability period in wage loss claims to **340 weeks from the date of injury**.

The third and final part of the statute recognizes an exception for claims where the wage loss begins after a period of total disability, providing that "[i]n case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability." The Commission has interpreted this part to allow for a Claimant to be paid a "new" period of 340 weeks when MMI is reached after a period in which temporary total disability (TTD) benefits are paid. The inconsistency created by the Commission between parts two and three of this statute is obvious and inescapable and, if applied as such, creates an error of law.

SCSIA believes that to correctly apply the law one must first understand that partial disability only extends for a period of 340 weeks from the date of injury. With this foundation the application of part three is best understood by way of an example, as follows:

> Claimant receives 100 weeks of TTD benefits continuously from the date of accident before reaching MMI. Claimant asserts an entitlement to partial disability benefits under Section 42-9-20. Pursuant to Section 42-9-20 the maximum period of benefits to which the Claimant is now entitled to is 240 weeks, as partial disability benefits cannot extend past 340 weeks from the date of the injury. However, under part three of the statute, the carrier may not deduct from the maximum period of 240 weeks the period of 100 weeks of TTD benefits already paid. As such, if the Claimant chooses to proceed under Section 42-9-20, he is entitled to 240 weeks of benefits.

This example establishes the proper way to apply Section 42-9-20 as it both complies with the 340-week limit on wage loss benefits while also addressing the prohibition against deducting previously paid indemnity benefits.

Furthermore, if we are to understand Section 42-9-20 to provide that a Claimant is entitled to a "new" 340 weeks of benefits at MMI and after a period of TTD benefits, why then would a Claimant not receive a "new" 340-week period of benefits at MMI and after a period of temporary partial disability (TPD) benefits. Moreover, does a Claimant get 340 weeks of partial disability benefits if MMI is reached 100 weeks after the date of injury and no indemnity benefits have been paid? To answer in the affirmative, these questions require the adjudicating body to completely ignore the unambiguous requirement that the partial disability benefits extend only for 340 weeks after the injury.

c. THE COMMISSION'S INTERPRETATION OF § 42-9-20 ALLOWS FOR GREATER RECOVERY FOR PARTIAL DISABILITY THAN PERMANENT AND TOTAL DISABILITY.

The Commission's flawed interpretation of Section 42-9-20 produces the inevitable opportunity for an award under this statute to greatly exceed an award of permanent and total disability under § 42-9-10 or § 42-9-30. For example, a Claimant could receive TTD for 499 weeks and then be found entitled to a wage loss award of a "new" 340 weeks. Under this scenario, the Claimant would ultimately receive a total of 839 weeks of benefits - ***339 weeks greater than the maximum allowed under the Act for permanent and total disability***. This is exactly the type of absurd results this Court has confirmed it will reject. *See S.C. Ins. Reserve Fund, supra.* Not only is this result illogical and absurd, but it also contradicts a well-established precedent by this Court and the Supreme Court.

In *Roberts v. McNair Law Firm*, 366 S.C. 50, 619 S.E.2d 453 (2005), Roberts was found permanently and totally disabled with the Defendants receiving a credit for the temporary partial

disability benefits already paid. Roberts appealed and argued she should be paid the entire 500 weeks of total compensation, disregarding what was already paid in partial disability. *Id.* at 55, 619 S.E.2d at 456. This Court refused to provide her with a "new" 500 weeks of total compensation as the Act expressly limits compensation to 500 weeks, except under circumstances not applicable in this matter. *Id.* Similarly, in *Burnette v. Startex Mill*s, 195 S.C. 118, 10 S.E.2d 164 (1940), our Supreme Court refused to award benefits for disfigurement in addition to an award of permanent and total disability, reasoning that "to add an award for disfigurement would be to go beyond the whole scheme of our Workmen's Compensation legislation."

Clearly our appellate courts have refused to expand the scope of benefits to exceed the statutory allowance of 500 weeks, as was intended and codified by our legislature. It seems contrary to that precedence to now allow the Commission to expand this allowance by as much as 339 weeks in a case where the Claimant is not even deemed permanently and totally disabled. SCSIA requests this Court to refuse to allow the Commission to create a scenario by which our employers may be subjected to exposure for partial disability which greatly exceeds the exposure for permanent and total disability. Such a result is not only absurd and illogical as prohibited by this Court in *S.C. Ins. Reserve Fund*, but as the Supreme Court confirmed in *Burnette*, goes "beyond the whole scheme of our workmen's compensation legislation." *Id.*

d. *Bass v. Kenco* Is Inapplicable.

The issue of whether a claimant can receive wage loss benefits for a period greater than 340 weeks from the date of injury is a matter of first impression and has not been specifically addressed by our Courts. The Respondent leans on the case of *Bass v. Kenco* as support for his position that the claimant is entitled to 340 weeks regardless of the amount of time that has passed since the date of accident. A careful review of *Bass v. Kenco*; however, reveals it does not stand

for that proposition at all and is distinguishable from the case at bar. *Bass v. Kenco*, 366 S.C. 450, 622 S.E.2d 577 (2005). Accordingly, and as the inapplicability of *Bass* was appropriately argued by the Appellants, SCSIA hereby adopts the argument of the Appellants.

e. Public Policy Supports Strict Interpretation of § 42-9-20 in favor of the Appellants.

SCSIA asserts Section 42-9-20 allows a Claimant to only receive wage loss benefits during the first 340 weeks from the date of injury, and has demonstrated the slippery-slope which will be created by affirming the Commission's decision, specifically the likelihood that partial disability benefits will routinely exceed permanent and total disability benefits. The consequences of the Commission's interpretation reach farther, however. There is no incentive for an employer to bring a Claimant back to work after a period of temporary disability if the employer does not reap any financial benefit from doing so and, in reality, may be subjected to higher exposure than if the Claimant were simply found totally and permanently disabled. One can see easily how this is neither good for the employee nor the employer, and surely is not what our legislature envisioned or intended. Thus, the public policy of our State should encourage, not discourage, the ability to have employees return to work from injuries whenever possible.

## CONCLUSION

Based upon the foregoing, the South Carolina Self Insurers Association respectfully joins in the position of the Appellants, in requesting that if the Court of Appeals of South Carolina finds the Respondent has reached MMI and is entitled to an award pursuant to Section 42-9-20, that the award reflects only a period of 340 weeks from the date of injury as specifically stated in the statute.

Respectfully submitted,

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September 30, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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## CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the foregoing Amicus Curiae Brief complies with Rule 211(b), SCACR.

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## PROOF OF SERVICE

I certify that I have served the Brief of Amicus Curiae South Carolina Self Insurers Association in Support of Appellants, by depositing a copy in the United States Mail, postage prepaid, on September 30, 2016, addressed to all counsel of record, William L. Smith, II, Esquire, Post Office Box 12330, Columbia, SC 29211, Blake A. Hewitt, Esquire, Post Office Box 7965, Columbia, SC 29202, John S. Nichols, Esquire, Post Office Box 7965, Columbia, SC 29202, Brooke A. Payne, Esquire, 503 Wando Park Boulevard, S, Mt. Pleasant, SC 29464, Ryan D. Oxford, Esquire, 503 Wando Park Boulevard, S, Mt. Pleasant, SC 29464 and Honorable Jenny Abbott Kitchings , Judicial Director, South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201 (via Hand-delivery, on September 30, 2016).

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