

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

**RECEIVED**

Appeal No: 2015-001350

AUG 02 2017

**S.C. SUPREME COURT**

Henton T. Clemmons, Jr., Employee, .....Petitioner,

v.

Lowe's Home Centers, Inc.-Harbison, Employer,  
and Sedgwick Claims Management Services,  
Inc., Carrier, .....Respondents.

---

**AMENDED**  
**PETITION FOR REHEARING AND REQUEST FOR**  
**ORAL ARGUMENT TO THE REFILED OPINION**  
**NO. 27708 FILED JUNE 28, 2017**

---

Pursuant to Rules 221(a) and 240, SCACR, the Petitioner, Henton T. Clemmons, Jr., would respectfully request Rehearing, reconsideration of, amendment to, and/or a further substituted Opinion by the Court. Further because of the deletion of specific Rulings made by the Court in its original Opinion from the substituted Opinion on those specific issues; and the actual change in the decision from REVERSE to REVERSE AND REMAND, the Petitioner respectfully requests and verifiably believes that oral

argument on those specific issues is now required and should be granted.

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

1. **Undisputed essential fact under law:** Since the inception of the Act in 1936 and under every Opinion ever issued by this Court, even under "wage loss", the fact that the injured worker is working **alone** does not prove or disprove total and permanent disability. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996).

Originally this Court granted Certiorari on two questions:

I. Did the Court of Appeals properly apply the substantial evidence standard?

II. Did the Court of Appeals improperly infuse wage loss into and as a consideration for an Award under the scheduled-member statute?

In the Court's original Opinion, the Court simply **REVERSED** based on the Record before it on Question I, substantial evidence, and there was no need to reach Question II wage loss in a scheduled-member back Award situation. All of the remainder of that original Opinion would be and is considered dicta. However, the

original Opinion and that dicta reaffirmed existing law and gave guidance to the Commission, the Bench, and the Bar as to the type of evidence that should be considered in a scheduled-member back award situation where the presumption would apply. In the original Opinion, a majority of this Court was of the opinion that a return to work alone was insufficient to rebut the presumption. The one member dissent to that Opinion, after using the Court of Appeals decision in Watson v. Xtra Mile Driver Training, 399 S.C. 455, 732 S.E.2d 190 (S.C. App. 2012) as a basis for justifying the Respondents' "return to work only" defense and arguing for remand to allow them a "second bite of the apple", clearly stated the opinion that if the claimant retains any earning capacity that rebuts the presumption.<sup>1</sup> That has never been the law and by totally deleting that dicta and not addressing wage loss, the Court is acquiescing to that dissent. You cannot un-ring the bell. The Court's original Opinion is out there and it will be compared to the deleted substituted Opinion. The dissent and Xtra Mile are out there and will be used to totally change this Court's meaning of total and permanent disability under the Act; at the very least (which

---

<sup>1</sup> The dissent wrongly quotes the statutory definition of "disability" to define the phrase "total and permanent disability". There is no definition under the Act of "total and permanent disability". That phrase has been used by this Court for loss of earning capacity Awards under current SC Code §42-9-10(A). So, if the Legislature wanted to infuse wage loss into the analysis in 2007, why did it not either tie the back presumption to subsection (A) or simply delete the reference to any subsection? Ambiguities are supposed to be interpreted in favor of the injured worker and the Legislature is presumed to know what it is doing. Bentley v. Spartanburg County, 398 S.C. 418, 730 S.E.2d 296 (2012).

is doubted) as it applies to back injuries. This Court's silence will be profound.

There are many Opinions wherein this Court decides the case and issues an Opinion on one basis but gives its opinion and guidance on other issues involved or presented. Examples:

Labouseur v. Harleysville Mutual Ins. Co., 302 S.C. 540, 397

S.E.2d 526 (1990); and Elam v. SC Dept. of Transportation, 361

S.C. 9, 602 S.E.2d 772 (2004).<sup>2</sup> This regularly occurs where the

Court remands the case. Questions of public interest should be

addressed for future guidance and where further proceedings are

required. Ashmore v. Greater Greenville Sewer Dept., 211 S.C.

77, 44 S.E.2d 88 (1947).

In the substituted Opinion, the Court **REVERSED AND REMANDED**

the case to the Commission for a "new hearing" to determine

whether the presumption of permanent and total disability under

SC Code §42-9-30(21) [? (A) or (B)] has been rebutted. At the

"new hearing", the Commission a quasi-judicial body, made up of

lawyer and lay Commissioners, will be called upon to make that

decision without any guidance from the Court as to the type of

evidence or the evidence that is to be considered and/or is

sufficient to rebut (to a Lay Commissioner what does that mean?)

the presumption. Does that mean evidence concerning the

"character" of the injury, i.e., "loss of use" to do work with

---

<sup>2</sup> Ironically, in Elam, wherein this Court changed the law, the dissent in this case argued that the party should not have a "second bite of the apple."

the back (original majority Opinion), or the "total" loss of "earning capacity" of the worker (dissent). The Commission is the fact-finder, "the jury", in a workers' compensation case and like a jury the Commission is supposed to apply the law to the facts as given to it by this Court. It has always been the law that the Commission must make detailed Findings of Fact that are sufficiently definite and detailed enough to:

"enable the Appellate Court to properly determine whether the Findings of Fact are supported by the evidence and **whether the law has been properly applied** to those findings".  
Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962).

Since the Court is "remanding" this case for a, "new hearing", the Court must address and tell the Commission what the law is. Most respectfully that is the responsibility of this Court and is the only thing that would be fundamentally fair to this worker.

By not speaking there is nothing to prevent the Defendants/ Respondents from arguing again on remand that simply because Mr. Clemmons returned to work with the Employer in work that they made available that that is sufficient to rebut the presumption. There will be nothing to prevent this Respondent and other employers from making make-shift, pseudo-employment commonly referred to as "benevolent" employment or sheltered employment available to avoid paying only the balance of 500-weeks of

compensation. A return to work "alone" is not even dispositive in a request for an Award for total and permanent disability under a "wage loss" claim. Stephenson v. Rice Services, Inc., supra; Colvin v. E.I. DuPont Nemours and Co., 227 S.C. 465, 88 S.E.2d 581 (1955); ("Disability is a relative term and must be related to the occupation of the claimant ... Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment".)

The Court cannot allow that (even higher) standard to be applied in a claim based on the character of the injury not wage loss without speaking.

Because the issue of the type and character of evidence necessary to rebut the presumption was not specifically and only argued to the Court, the Petitioner would request and verily believes that oral argument is required and would plead for the same. In support of that request and what will happen if the substituted Opinion remains as written, quoting Thomson Reuter's South Carolina Workers' Compensation Annotated, 2017:

**"Notes for Decision**

**1. In General**

A workers' compensation claimant's loss of earning capacity is generally a prerequisite to a finding of permanent total disability (PTD). Clemmons v. Lowe's Home Centers, Inc. - Harbison (SC App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied. Workers' Compensation (key number) 880.5" (emp. added)

2. While the Court clearly sets out in the substitute 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 the substitute Opinion in its "holding" REMANDS to the Commission to determine whether or not the presumption of total and permanent disability under, "Section 42-9-30(21)" (no subsection) has been rebutted.

The Petitioner would request that the Court consider for the benefit of the Commission, the bench and the bar to 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) 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 due 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. This is a fundamental principle upon which this Court has not spoken nor has it reaffirmed since 2003 in Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 180 S.E.2d 100 (2003), (Justice Moore and Justice Pleicones joined in that Opinion).

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 Petitioner respectfully requests the opportunity by each member of the Court at oral argument as to why the above is not simply and only a restatement of the last eighty (80) years of jurisprudence of this Court. 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 would respectfully ask that the Court add that language back into the Opinion or whatever language is appropriate to establish that work "alone" is insufficient; just as it was in Stephenson and as it has always been.

The Court will recall that the entire argument in this case was over the fact that the Defendants presented nothing more than the fact that Mr. Clemmons was continuing to work. That "benevolent" employment came to a sudden end when he was then fired after the decision by the Full Commission affirmed the Hearing Commissioner's Award. This guidance does not have anything to do with whether or not the Court of Appeals infused wage loss; but it would simply be a restatement of the law of this State as this Court has applied it to scheduled-member awards and to loss of earning capacity Awards ever since the inception of the Act.

In support of guidance as to rebuttal evidence, and particularly in this case in fundamental fairness to Mr.

Clemmons on remand, the Court will recall that in this case there was absolutely no evidence that the Claimant had not lost 50% of the use of the back but there was specific medical opinion evidence that he had lost 50% of the use of his back. Most importantly there also was a Functional Capacity Evaluation (FCE) and vocational evidence both tied to the US DOT (Dictionary of Occupational Titles) physical demand classification system under which 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 DOT job classification system. By continuing to tie the award for loss of use to the back to §42-9-10 **(B)**, the Legislature meant to continue to tie it to evidence in reference to the, "character" of the injury and meant for it to be a hard presumption to rebut. How hard or how strong a presumption is to rebut is for this Court to say. For example, this Court established that the presumption of legitimacy is one of the strongest known to law. Barr's Next of Kin v. Cherokee, Inc., 220 S.C. 447 68 S.E.2d 440 (1951).

The whole purpose of scheduled awards under the Act is a presumption of a loss of access to a quantity of jobs in the economy due to industrial injury to a member, organ or bodily part and "the disability in each case is considered to continue for the period specified." S.C. Code §42-9-30, Preamble. The

Act was always only meant to partially "compensate" the worker and to place, "a share of the burden from industrial accidents" on the employer. Marchbanks v. Duke Power Co., 190 S.C. 336. 2 S.E.2d 825 (1939) (emp. added):

"After all we are governed by the Act of our own State. It behooves us then to consider it and **determine what that Act means**, and to that end we must determine the **intent of the Legislature, as it is disclosed by the language used** in the Act. It is our task to discover **the sense in which the words were used when the section was passed.**

In construing a statute, effect should be given to the **manifest intention** of the Legislature. Second syllabus in Fulghum v. Blakeley, 177 S.C. 286, 181 S.E.2d 30.

**The Workers Compensation Act was adopted to protect industrial workers** ...and to cast upon industry ... a **share** of the burden resulting from industrial accidents." (emp. added).

Total and permanent disability for loss of use of the back is only 500-weeks of compensation based on the worker's average weekly wage. Yes, if a worker has lost access to a large majority of the jobs available in the economy based strictly on the loss of use of their back, the Legislature intended that worker to receive a total disability Award due to the "character of that injury," no matter how, "benevolent," his employer or its insurance carrier is or is not.

All of the above if incorporated into this Court's Opinion should give guidance to the Commission and Defendants on the evidence necessary to rebut the presumption of total and

permanent disability as tied to the character of the injury under S.C. Code §42-9-10(B).

4. That the Court granted the Petition for a Writ of Certiorari on only the two issues as referred to in the Court's Opinion, but did not grant cert. on two other questions. While this argument is not intended to address the other two issues and is based on the Court's current substitute Opinion and while four (4) of the Justices of this Court in the original Opinion were of the opinion that the Respondent should not get a second bite of the apple, under the current substitute Opinion they will be entitled to just that and more importantly, they will have carte blanche unfettered ability to do as they want to limit their liability. Under the substituted Opinion if left untouched and the current statutory scheme, the Respondents are entitled under the statute to choose the doctors that will provide medical care. When their chosen doctors determine that the claimant has reached maximum medical improvement, they can file for and get a hearing that has to be held in less than sixty (60) days to determine the injured worker's right to benefits; but yet under law, the worker has the burden of proof to determine his entitlement to benefits. Under the substituted Opinion, the Respondents can argue the Claimant is not entitled to an Award under the scheduled member statute for 500-weeks of compensation (9 2/3<sup>rd</sup> years at current salary) less any temporary

total that has been paid, due strictly and based solely on the fact that they have given him a job no matter how "benevolent."

Again, this an integral part of this entire appeal, it is that position that has been addressed and has served as the basis for the denial of benefits to this injured worker. To be intentionally redundant, there is absolutely nothing that will prevent the Respondents from re-asserting that position or arguing that there is not a total loss of earning capacity or that will prevent the Commission from denying an award for total and permanent on that basis alone, i.e. Claimant is working.

This last argument for Rehearing is redundant but it is reiterated for another reason. Mr. Clemmons, at the time of his injury, was thirty-nine (39) years old and while there is no way he can be compensated for the devastating effect this injury has had and will have on his life from a compensation and income standpoint, there is another benefit that very few people seem to be concerned with in reference to an award for total and permanent disability which has nothing to do with compensation. Where a worker is found to be entitled to an award for total and permanent disability, the worker is also entitled to lifetime medical benefits for anything causally related to that work-related injury under S.C. Code §42-15-60(C). If the Commission awards anything less than total and permanent disability, they have to carve out and the worker will only be entitled to that

medical care which they specifically designate under current existing law. The Petitioner, in requesting rehearing or reconsideration of the substitute Opinion, asks the members of the Court to specifically consider that aspect of a total and permanent disability Award.

5. That in the Court's 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 substitute Opinion, the Court 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". (Emp. add.).

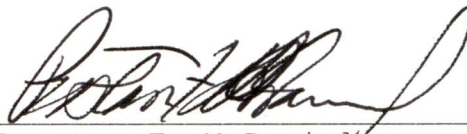
The Petitioner would simply ask the Court to consider changing the words "percentage of impairment" in the last sentence from "impairment" to the decision that is to be made by the Commission under the scheduled-member statute and what the statute requires, which is to determine the, "loss of use" of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

## CONCLUSION

For all of the foregoing reasons, this Court should grant Rehearing and further argument specifically on the points raised and particularly as to the type or character of the evidence that the Commission should consider on remand. Every member of this Court that heard this case, without citation, has written opinions on behalf of the Court finding that the Court is bound to apply strictly the language of the Act as written by the Legislature. The Court is the, "interpreters, not Legislators and are bound by the language", Bentley v. Spartanburg County, supra, of the section as written by the Legislature. It is a general fundamental principle that the Act is to be liberally construed in favor of benefits to the injured worker and if the Legislature intended to infuse wage loss, they should have tied the presumption to subsection (A) of §42-9-10 but they did not do that. They continued to tie it to the character of the injury under subsection (B). If the Legislature wants to change that, it is the responsibility of the Legislature to do that. This Court is required to interpret the law as written by the Legislature. The Court is a purveyor of the law and the Commission is the finder of facts applying the law as given to

it by this Court. The Court must give guidance as to the law in this matter.

Respectfully submitted:

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

Preston F. McDaniel  
SC Bar No. 3770  
McDANIEL LAW FIRM  
1315 Elmwood Avenue  
Columbia, South Carolina 29201  
(803) 771-7211  
Attorney for Petitioner

August 2, 2017

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

AUG 02 2017

APPEAL FROM THE APPELLATE PANEL  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

**S.C. SUPREME COURT**

Appellate Case No. 2015-001350

Henton T. Clemmons, Jr., Employee, ..... Petitioner,

v.

Lowe's Home Centers, Inc.-Harbison, Employer,  
and Sedgwick Claims Management Services, Inc.,  
Carrier, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the **AMENDED PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT TO THE REFILED OPINION NO. 27708 FILED JUNE 28, 2017** on August 2, 2017, addressed as follows to its Attorneys of Record:

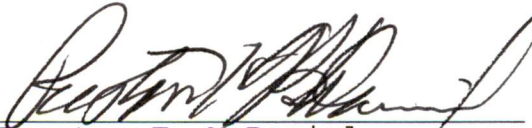
**VIA EMAIL - helen.hiser@mgclaw.com**  
**AND US MAIL**

Helen F. Hiser, Attorney at Law  
McAngus, Goudelock & Courie  
Post Office Box 650007  
Mt. Pleasant, SC 29465

**VIA EMAIL - kmorrow@mgclaw.com**  
**AND US MAIL**

Kelly F. Morrow, Attorney at Law  
McAngus, Goudelock & Courie  
Post Office Box 12519  
Columbia, SC 29211

Dated: August 2, 2017



Preston F. McDaniel  
SC Bar No.: 3770  
MCDANIEL LAW FIRM  
1315 Elmwood Avenue  
Columbia, South Carolina 29201  
(803) 771-7211  
Attorney for Petitioner