

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

Supreme Court Opinion No. 27708
(Refiled June 28, 2017)

RECEIVED

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S.C. SUPREME COURT

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

v.

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

**AMENDED RETURN IN OPPOSITION TO
AMENDED PETITION FOR REHEARING**

Pursuant to Rules 221 and 240, SCACR, Respondents Lowe's Home Centers, Inc.-Harbison and Sedgwick Claims Management Services, Inc. hereby oppose Petitioner Henton T. Clemmons, Jr.'s Amended Petition for Rehearing and Request for Oral Argument ("Petition") to the Refiled Opinion No. 27708 filed June 28, 2017 ("Rehearing Opinion"). Petitioner has not stated with particularity any points that this Court overlooked or misapprehended; instead, he simply is asking this Court to reinstate its prior decision granting him all of the relief he seeks. However, "[t]he purpose of a petition for rehearing is not ... to have the case tried in the appellate court a second time." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011).

1. This Court should reject Petitioner's request to add or reinstate its prior ruling with regard to rebutting the Section 42-9-30(21) presumption.

This Court should deny Petitioner's request to revise or to add the language as requested by Petitioner to the Rehearing Opinion. Previously on rehearing, this Court carefully considered Respondents' Petition for Rehearing and Petitioner's Return in Opposition, and consciously omitted the rulings contained on page eight (8) of the Petition. This was appropriate, as the Commission has not had an opportunity in this case to rule on the issue of whether the presumption of total and permanent disability has been rebutted.

By asking this Court to "reinstate" that portion of this Court's March 8, 2017 Opinion ("March Opinion") that analyzed whether Respondents had rebutted the presumption of total and permanent disability, Petitioner essentially is asking this Court to pre-ordain the result to be reached by the Commission, which this Court should decline to do. Presumably, this Court understood that to pre-emptively rule on this issue would deprive Respondents of due process and the Commission of the opportunity to determine, in the first instance, whether Respondents are able to successfully rebut the presumption. Because both the Single Commissioner and the Full Commission found Petitioner had lost less than 50% of the use of his back, the Commission has never reached or considered this question.

In South Carolina, administrative agencies have the authority to interpret their governing statutes in the first instance. "The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." Kiawah Dev. Partners, II v. South Carolina Dep't of Health & Envtl. Control, 411 S.C. 16, 33, 766

S.E.2d 707, 718 (2014); Brown v. South Carolina Dep't of Health & Env'tl. Control, 348 S.C. 507, 516, 560 S.E.2d 410, 414 (2002) (an agency's construction of its statute is "accorded the most respectful consideration and will not be overruled absent compelling reasons"). This Court's remand does exactly that: it allows the Commission to interpret the presumption language in Section 42-9-30(21) in the first instance, and then apply it to the facts of this case.

Petitioner's prediction regarding what position Respondents and/or the Commission will take on remand is premature and baseless. Likewise, his disparagement of the Commissioners as lacking the legal background or intellect to decide this issue and/or properly interpret the Act, (Pet. pp. 4-5), is inappropriate and unfounded. A commission such as the Workers' Compensation Commission, "sits as the trier of the facts, akin to a jury of experts ... this is so because the Commission is a body of experts 'composed of men [sic] of special knowledge, observation and experience' in the field ..." Southern Bell Tel. & Tel. Co. v. Public Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978). The Commission is aware of what the applicable "law" is – which is found in the words and provisions of the Act. While Petitioner may lack confidence that the Commissioners are capable of reading and interpreting the Act, Respondents believe they will be able to apply the law (as found in the various provisions of the Act) to the facts before them appropriately. The Commission has both the right and obligation to make this determination in the first instance without the constraints urged by Petitioner that would pre-ordain the result in this case.

Petitioner suggests that this Court should reinstate the rulings, and even the precise language employed in the March Opinion regarding whether the presumption has

been rebutted, because he asserts this Court often “gives its opinion and guidance on other issues involved or presented,” citing Labouseur v. Harleystville Mut. Ins. Co., 302 S.C. 540, 397 S.E.2d 526 (1990) and Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Neither case stands for the proposition that this Court should decide factual issues not first resolved by the fact-finding tribunal. In fact, in Elam, the Court of Appeals dismissed the appeal as untimely. After explaining why the Court of Appeals’ dismissal was erroneous, and clarifying prior appellate precedent regarding post-trial and/or Rule 59(e) motions and subsequent appeals, this Court decided the merits of the appeal, but did not usurp the Circuit Court’s fact finding role. 361 S.C. at 26-28, 602 S.E.2d at 781-782. As the ultimate appellate forum, this Court was well within its power and precedent to resolve the appeal without remanding to the Court of Appeals.

In Labouseur, this Court affirmed the Court of Appeals’ dismissal of a coverage action, clarifying when coverage actions by employers against their workers’ compensation insurers fell within the sole jurisdiction of the Commission and when they should be brought in Circuit Court. Without this clarification and this Court’s explanation that the employer had recourse to bring his action in Circuit Court once the Commission proceeding had concluded, the employer would not have understood that he still had a cause of action for bad faith/wrongful cancellation of its workers’ compensation coverage, once the Commission proceeding concluded. 302 S.C. at 543-544, 397 S.E.2d at 528-529.

Elam and Labouseur are distinctly different from the case at hand, both in substance and in posture. The instant case does not involve this Court clarifying

appellate timing rules, as in Elam, nor does it involve clarification of the proper forum and timing for bringing a coverage claim, as in Labouseur. Instead, what is at issue here is the Commission's interpretation of the Act and application of the Act to the facts of this case.¹

In addition, neither the Dissent in the March Opinion nor this Court's Rehearing Opinion recommends or provides Respondents with a "second bite of the apple," as Petitioner claims.² The Commission has never addressed the rebuttal issue, as the Single Commissioner held that Petitioner had lost less than 50% of the use of his back and the Commission affirmed.

As he has done previously, Petitioner cites to a third party/Westlaw keynote summation of the Court of Appeals' decision in this case in an attempt to cast a fateful doom over the remand proceedings. (Pet. p. 6). However, key notes included in legal research sources are not authoritative and, oftentimes, inaccurately describe the holding in a case. Furthermore, because this Court reversed the Court of Appeals and remanded to the Commission to determine whether the presumption has been rebutted, Petitioner's

¹ Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947), does not advance Petitioner's argument, as that case did not consider "a private controversy between individuals," but, "[o]n the contrary, [was] defended by an intended governmental agency which the legislature undertook to create by their enactments" and involved "public questions of importance," including the extent of the General Assembly's power to create what this Court termed "Special Taxing Districts." 211 S.C. at 96, 44 S.E.2d at 97. This case, in contrast, involves a private controversy between two private parties and the Commission is well-equipped to address the remand issue in the first instance.

² Respondents also note that, along with his "second bite of the apple" argument, Petitioner again attempts to argue issues that were never accepted by this Court for review. (Pet. pp. 12-13). These arguments must be rejected outright. And, while there is no denying that Petitioner's case is a sympathetic one, given his age and likability, the well-considered adage that hard cases make bad laws, *e.g.*, Wallace v. Campbell Limestone Co., 198 S.C. 196, 202, 17 S.E.2d 309, 311 (1941), must be kept in mind here.

concerns are premature and unfounded. This Court has expressed its opinion regarding the sole existing precedent addressing the Section 42-9-30(21) rebuttal, Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012), of which the Commission undoubtedly is aware.

In an attempt to thwart this Court's remand, Petitioner mis-states Justice Pleicones's Dissent to the March Opinion in order to poke holes in it. First, the Dissent does not argue that a return to work alone is sufficient to rebut the Section 42-9-30(21) presumption but that it may be relevant evidence. Furthermore, Respondents' position on the rebuttal issue was not based solely on the fact that Petitioner had returned to work. Instead, their argument was based on Petitioner's successful return to work for nearly two years, performing the exact same job he had performed prior to his injury with virtually no accommodation. Respondents' position is based on the uncontroverted testimony of Lynn Council, his supervisor and of Petitioner himself. That uncontested testimony showed that Petitioner was not simply "collecting a paycheck," and was not working a "make-shift" or "benevolent" job, but that both before and after his injury, Petitioner worked 40-hour weeks as a Lowe's cashier – the same position he had prior to his injury – standing throughout his eight-hour shifts, dumping trash, and putting sodas in coolers. (Appx. p. 407, lines 8-25). Ms. Council, testified that, although the Employer provided accommodations for Petitioner in the form of a chair to sit on if he needed it, he never asked to use the chair. (Appx. p. 368, lines 13-22) (Appx. p. 370, line 24 – p. 371, line 23) (Appx. p. 375, lines 22-25). Petitioner made no complaints to his employer regarding any problems or limitations he was having with performing the physical functions of his job, and did not seek any additional medical treatment. (Appx. p. 369, lines 12-18).

Petitioner testified that the lifting assistance available to Petitioner was equally available to all other Lowe's employees. (Appx. p. 409, line 19 – p. 410, line 15). In addition, Petitioner testified that he would be able to perform a cashiering job. (Appx. p. 384, lines 18-20; p. 413, lines 4-7).

If, however, this Court is to provide guidance to the Commission on remand, Petitioner's statutory interpretation of Section 42-9-30(21) is flawed, both legally and logically. While Petitioner is correct that, generally under the scheduled member statute, the ability to work or earn wages is not relevant to the disability award, the presumption under Section 42-9-30(21) carves out an exception to that general rule. The Act is premised on two competing models of compensation – the "economic" and "medical" models. Section 42-9-30 generally falls within the medical model; however, by providing that the presumption of total and permanent disability that arises under Section 42-9-30(21) may be rebuttable, in 2007 the Legislature carved out an exception to that general rule.

Petitioner fails to acknowledge that both Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) and Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996), were decided before the rebuttal language was added to section 42-9-30(21). Furthermore, this Court recognized in Wigfall that, "[t]he two models are distinct in parts of the *S.C. Workers' Compensation Act* and intertwined in other parts." 354 S.C. at 104, 580 S.E.2d at 102. For example, while Subsection (A) of Section 42-9-10 follows the economic model, requiring proof of "the incapacity for work," Subsections (B)&(C) of Section 42-9-10 follow the medical model, providing compensation regardless of a

claimant's ability to work. In other words, Section 42-9-10, although premised on the economic model, contains provisions that are "intertwined" with the medical model.

In addition, although a claimant can be deemed partially disabled and receive compensation "even though the claimant is able to work," (which is entirely true under all of the subsections of Section 42-9-30 except, to a certain extent, under Subsection 21), this Court observed in Wigfall that, "South Carolina has never recognized that a claimant can suffer a single scheduled injury and as a result become totally, permanently disabled." 354 S.C. at 109, 580 S.E.2d at 104. Clearly, the presumption of total and permanent disability under the current version of Section 42-9-30(21), as well as the ability to rebut that presumption, was not under consideration in Wigfall. Therefore, the language from Wigfall that underpins Respondent's statutory analysis simply does not apply to the current version of Section 42-9-30(21).

Thus, if this Court remands to the Commission with any instructions, those instructions should be based on a proper understanding of the legislative history and a correct statutory interpretation of Section 42-9-30(21). As a starting point, under all of the subsections of Section 42-9-30 except for Subsection 21, "the disability in each case is considered to continue" as listed in the various subsections. In other words, the inability to earn wages is conclusively established based on the degree of loss of use. That is how the predecessor to Section 42-9-30(21) was interpreted and applied.

Prior to July 1, 2007, loss of use of the back was governed by S.C. Code Ann. § 42-9-30(19), which provided in relevant part, that, "in cases where there is fifty percent or more loss of use of the back ... the injured employee shall be deemed to have suffered total and permanent disability and compensated therefor under paragraph two of § 42-9-

10.” Although Petitioner has argued to this Court that that presumption “was always rebuttable,” (Appx. p. 26), the conclusive presumption under 42-9-30(19), along with others, were of such concern that Governor Mark Sanford formed a Task Force on Workers’ Compensation Reform. In December 2005, that Task Force recommended that the conclusive presumption of total disability in back cases be repealed because it did not reflect “the true disability in many cases.” (See Final Report of Governor’s Task Force on Workers’ Compensation Reform, December 7, 2005, p. 27). As was explained by the Amicus Curiae, which this Court declined to allow to participate in the appeal, some employees were being awarded windfalls under the conclusive presumption embodied in prior Section 42-9-30(19), which was seen by many (including the Governor and the Legislature) as inequitable. As a result, in the 2007-2008 legislative session, a compromise was reached in the Senate that retained the presumption of total and permanent disability in cases where there is a 50% or greater loss of use of the back; however, the previously conclusive presumption of total disability under former Section 42-9-30(19) was made rebuttable. (See S.332, 2007-2008; Act No. 111, Pt. I § 18, eff. July 1, 2007). It is precisely this compromise that currently is embodied in S.C. Code Ann. § 42-9-30(21).

Under the current version of Section 42-9-30(21), “where there is fifty percent or more loss of use of the back the injured employee shall be *presumed* to have suffered total and permanent *disability*,” which “*presumption* ... is rebuttable.” S.C. Code Ann. § 42-9-30(21) (emphasis added). The word presumption clearly is tied to the phrase “total and permanent disability,” which informs what kind of evidence should be probative to

rebut the presumption. Any other reading produces an absurd result. Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

Under the proper statutory analysis, the initial determination under Section 42-9-30(21), the degree of loss of use of the back, is made strictly under the medical model. Both expert and lay evidence and testimony are relevant. If the degree of loss of use is determined to be 50% or greater, the claimant is entitled to a presumption of total and permanent disability and, unless the presumption is successfully rebutted, is entitled to the same compensation that a claimant who lost “both hands, arms, shoulders, feet, legs, hips or vision in both eyes, or any two thereof,” is entitled to under Section 42-9-10(B). Note that, once the conditions set out in Section 42-9-10(B) are met, total and permanent disability is deemed to exist conclusively.³ In contrast, in Section 42-9-30(21), once the disability threshold of 50% or greater is met, total and permanent disability is merely presumed, which presumption is rebuttable.

Petitioner questions why, if the Legislature intended evidence regarding the ability to earn wages relevant to rebut the Section 42-9-30(21) presumption, it did not tie the presumption to Section 42-9-10(A) “or delete the reference to any subsection?” (Pet. p. 3, n. 1). Petitioner has consistently and incorrectly attempted to tie the issue of what constitutes probative rebuttal evidence to Section 42-9-10(B), based on Section 42-9-30(21)’s language regarding *payment* under the presumption.⁴ If the presumption is

³ Section 42-9-10(B) contains no provisions regarding partial loss of use of the back or of any other body party but, instead, speaks to a total “loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof,” which constitutes “total and permanent disability to be compensated according to the provisions of this section.” S.C. Code Ann. § 42-9-10(B).

⁴ Petitioner incorrectly asserts that this Court “emphasize[d] that the presumption to be rebutted is tied to Section 42-9-10(**B**).” (Pet. p. 7). This Court simply quoted Section 42-

triggered and not rebutted, payment of benefits is to be made pursuant to Section 42-9-10(B). Thus, the *compensation* under the presumption (if unrebutted) is linked to Subsection (B), but not the *presumption* itself.

Furthermore, the compensation referenced in Subsection (B) is actually set forth in Subsection (A): “When the incapacity for work resulting from an injury is total, the employer shall pay ... to the injured employee during the total disability a weekly compensation” not to exceed 500 weeks. S.C. Code Ann. § 42-9-10(A). Thus, the compensation envisioned under Subsection (B) encompasses a claimant’s statutorily deemed “incapacity for work,” which is paid during the period of “total disability.”

Key to the analysis of Section 42-9-30(21) is the term “disability,” which is defined in the Act. “The General Assembly has power to prescribe legal definitions of its own language, and such definitions are generally binding upon the Courts, and should prevail.” Brown v. Martin, 203 S.C. 84, 88, 26 S.E.2d 317, 318 (1943). “[S]tatutory definitions should be followed in interpreting [a] statute.” Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 404, 401 S.E.2d 161, 164-165 (1991), *citing* Bell Fin. Co. v. South Carolina Dept. of Consumer Affairs, 297 S.C. 111, 114, 374 S.E.2d 918, 920 (Ct. App. 1988). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Wigfall, 354 S.C. at 110, 580 S.E.2d at 105. Here, the Legislature has defined the term “disability” to mean “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” S.C. Code Ann. § 42-1-120. Courts are not free to ignore that definition.

9-30(21), highlighting relevant language but made no statements tying the presumption to Subsection (B).

It is “presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing.” Beaufort County v. South Carolina State Elec. Comm’n, 395 S.C. 366, 376, 718 S.E.2d 432, 438 (2011). Furthermore, “[w]hen interpreting a statute, the Court must read the language in a sense which harmonizes with its subject matter and accords with its general purpose.” Allen v. South Carolina Pub. Emp. Ben. Auth., 411 S.C. 611, 769 S.E.2d 666 (2015). As stated in Stephenson, the purpose of the Act is “to compensate workers for reductions in their earning power caused by work-related injuries or accidents.” 323 S.C. at 116, 473 S.E.2d at 700. Because the Act is “in derogation of the common law,” it must be strictly construed. Wigfall, 354 S.C. at 110, 580 S.E.2d at 105. Thus, the use of the term disability, which inherently and inarguably includes the capacity to earn wages, to describe the presumption that arises once a claimant proves a 50% or greater loss of use of the back, dictates what kind of evidence is probative and sufficient to rebut that presumption, *i.e.*, evidence of a claimant’s capacity or “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” S.C. Code Ann. § 42-1-120.

Although the Act must be construed liberally in favor of coverage, this “does not empower the courts to employ semantics to stretch the Act or its attendant regulations and extend benefits” where they are not warranted under the Act. *See* Johnson v. Beauty Unlimited Landscape Co., 379 S.C. 403, 410, 665 S.E.2d 656, 660 (Ct. App. 2008); Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 167, 64 S.E.2d 396, 400 (1951) (courts are not justified in construing the Act so “as to do violence to a specific requirement ... ‘Such Statutes apply with full force to the most meritorious claims’”). Indeed, the Act “must

not be construed so as to work a hardship on the employer and/or the carrier by the interpolation of words or conditions not found in the act The act must be construed in justice to both parties and must not impose a burden on either.” Hill v. Skinner, 195 S.C. 330, 340, 11 S.E.2d 386, 390 (1940). Petitioner’s construction of Section 42-9-30(21) would erroneously expand and contort the Act to reach a result that is neither fair nor just, and is, in fact, in conflict with the Legislature’s stated intent.

Petitioner’s interpretation essentially would neutralize the Section 42-9-30(21) rebuttal provision. According to Petitioner, only medical or expert evidence is probative with regard to whether the presumption has been rebutted. In short, Petitioner is arguing for a statutory interpretation that results in a battle of expert ratings and means, effectively, that the Section 42-9-30(21) presumption will never be rebutted. If the Commission relies on medical or expert evidence to determine that a claimant has lost 50% or greater of the use of his back, it is unlikely to look at that same medical/expert evidence and find that the employer has rebutted the presumption of total and permanent disability. *See Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (courts “should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless”). The addition of the presumption and the ability to rebut it transforms Section 42-9-30(21) from a strictly medical model provision to an “intertwined” or hybrid provision, Wigfall, 354 S.C. at 104, 580 S.E.2d at 102, as is the case with Section 42-9-10. Given the clear statutory definition of “disability,” which informs the presumption to be rebutted, there simply is no valid reason to discredit any of the types of evidence that normally are accepted to prove or disprove disability.

Petitioner points to Stephenson in support of his argument that, the mere fact that a claimant is earning wages does not mean he is not totally and permanent disabled, and for the proposition that claimants can (and do) continue to work after being deemed totally and permanently disabled under “one of the specific statutory presumptions of total disability.” 323 S.C. at 118 n.1, 473 S.E.2d at 701 n.1, *citing* Lyles v. Quantum Chem. Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993). While this is true, as the Dissent noted, Stephenson was decided before the presumption and rebuttal language was added to Section 42-9-30(21). Therefore, Stephenson does not limit the types of evidence that are probative in rebutting the Subsection 21 presumption.

Petitioner asserts, without any evidence whatsoever in support, that “the Legislature meant for it to be a hard presumption to rebut.” (Pet. p. 10). As explained in more detail above, the legislative history does not support Petitioner’s assertion. Neither does Barr’s Next of Kin v. Cherokee, Inc., 220 S.C. 447, 68 S.E.2d 440 (1951), which considered whether the claimant’s next of kin or alleged illegitimate daughter were entitled to the decedent’s workers’ compensation benefits. This Court’s discussion of the presumption of the legitimacy of a child born “in lawful wedlock” had nothing to do with any presumption arising under the Act, although the Act allows for an illegitimate child to be considered a dependent for compensation purposes. Instead, this Court discussed the strength of the common law presumption of legitimacy based “on broad grounds of public policy founded on the very highest grounds of public policy, decency, and morality,” which aimed to promote family unity. 220 S.C. at 463-464, 68 S.E.2d at 447.

Petitioner also repeatedly describes his position at Lowe’s as “make-shift, pseudo-employment commonly referred to as ‘benevolent’ employment or shelter employment

available only to avoid paying only the balance of 500-weeks of compensation,” (Pet. pp. 5-6, 9, 11, 13), suggesting that he was fired “after a decision by the Commission affirming the Hearing Commissioner’s Award.” (Pet. p. 9). However, there is no evidence whatsoever to support this assertion. As explained above, Petitioner was working the same job he held prior to his injury, with minimal to no accommodation required. Second, there is no evidence that he was fired after the Full Commission Decision.⁵ Patently, argument and advocacy by counsel does not constitute evidence. *See, e.g., Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). As the Appellant, Petitioner bore the responsibility of providing this Court with a sufficient record. *See, e.g., Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (the appellant bears “the burden of providing a sufficient record” for appellate review); *Windham v. Honeycutt*, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (same, and advising that appellate courts, “will not consider facts that do not appear in the transcript of record”). Because there is no record evidence to support these assertions, they should be stricken from Petitioner’s Petition and disregarded by this Court.

This Court should reject Petitioner’s request to pre-ordain the result to be reached on remand. To the extent, however, this Court believes guidance is warranted on remand, it should be based on the legislative history and proper statutory interpretation of Section 42-9-30(21) as set forth herein.

⁵ For the sake of argument, even if there was such evidence, there is no evidence that any alleged discharge was not for cause.

2. There is no need to revise this Court's Rehearing Opinion in order to substitute the phrase "loss of use" for the term "impairment."

It is unnecessary for this Court to rephrase its Rehearing Opinion to substitute the phrase "loss of use" for the term "impairment." Petitioner's main argument below was that only *he* presented medical evidence couched in terms of loss of use or loss of function and, therefore, only *his* medical experts used the "magic words" that a medical professional must use in order to offer an impairment rating that will support an award under Section 42-9-30 – the magic words being "loss of use" or "loss of function." Alternatively and at a minimum, he argued that his medical opinions couched in terms of loss of use or loss of function should trump other medical evidence simply expressed in terms of impairment, as was the case with Dr. Dye's rating.

As Respondents pointed out previously, however, South Carolina appellate courts routinely use the term impairment in relation to loss of use determinations under Section 42-9-30. *E.g.*, Bundrick v. Powell's Garage & Wreckage Serv., 248 S.C. 496, 151 S.E.2d 437 (1966) (relying on medical evidence stated in terms of "disability" and "impairment" to determine the claimant's loss of use of his right arm under what is currently Section 42-9-30); Bateman v. Town & Country Furn. Co., 287 S.C. 158, 159, 336 S.E.2d 890, 890 (Ct. App. 1985) (Court of Appeals finding medical testimony rating the claimant's "present impairment at 50%" and "50% permanent partial functional impairment of the spine" sufficient to support loss of use award); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 464 (Ct. App. 1989) (Court of Appeals relying on medical opinion that the claimant "had a 60 percent impairment of his spine" sufficient to uphold finding of greater than 50% loss of use and presumption of total disability); Lyles v. Quantum Chem. Co., 315 S.C. 440, 443, 434 S.E.2d 292, 294 (Ct. App. 1993) (relying on a

physician's 35% impairment rating to the whole body to support the Commission's finding of 58% loss of use of his back)⁶; Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009) (the Court of Appeals relying on medical reports expressed in terms of "impairment" and "physical impairment" to support "a permanent partial disability benefit of ten percent loss for her back"). Our courts have never required medical evidence in a Section 42-9-30(21) claim to be stated in terms of "loss of use," or "functional loss of use" and certainly not, as Petitioner stated repeatedly below, "functional loss of use to do work requiring the use of the back." (*See, e.g.*, Appx. pp. 194, 196, 321-322, 323, 486 and p. 434, lines 12-14).

This was the *only* argument Petitioner raised to the Commission concerning Dr. Drye's impairment rating. (*See* Appx. pp. 323-324 (setting forth the ratings provided by Drs. Forrest and Margalit, as well as Petitioner's testimony that he believed he had lost "'about 80%' of the functional use of his back to do work requiring the use of his back," and asserting, "[t]here is simply no other evidence concerning the loss of use"), p. 287 (Claimant's Form 30 arguing the Hearing Commissioner erred "by placing greater weight in the authorized treating neurosurgeon's [Dr. Drye] reports"), and p. 432, lines 1-3). He did not argue before any forum that Dr. Drye's rating actually *supported* his claim that he had lost more than 50% of the use of his back until petitioning this Court for review. As a result, that argument was not preserved for this Court's review and should never have been considered by this Court. Elam, 361 S.C. at 23-24, 602 S.E.2d at 779-780 (explaining that this Court's "mandatory preservation requirements" dictate that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled

⁶ In Lyles, the Commission was careful to note that it was "not equating 35% of the whole man to 58% of the back ..." 315 S.C. at 443, 434 S.E.2d at 294.

on by the lower court South Carolina appellate courts do not recognize the ‘plain error rule,’ under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party”).

Furthermore, there is no record evidence converting Dr. Drye’s whole person rating to the cervical spine, let alone to the whole back. Pursuant to Rule 210, SCACR, this Court “will not consider any fact which does not appear in the Record on Appeal,” which, in turn, is limited to only those matters which were presented to the lower court or tribunal. Petitioner did not present any argument or evidence to the Commission that converted Dr. Drye’s impairment rating.

As explained in more detail in Respondents’ prior Petition for Rehearing, converting a whole person rating to a regional spine rating is not the equivalent of a physician rendering a whole back rating. This is because there is no simple mathematical formula by which the Commission or this Court can convert a whole person rating to a whole back rating under the AMA Guides. To begin with, the cervical spine is only a portion (38% per the AMA Guides) of the spine as a whole.⁷ Thus, if this Court persists in converting Dr. Drye’s whole person impairment rating to the whole back, it must complete the process, including dividing Dr. Drye’s 25% whole person rating by .35, which produces a 71% impairment rating to the *cervical region* of the spine, and then multiplying that by 38% (the percentage of the whole spine represented by the cervical spine) to arrive at a 26.98% impairment to the *whole back*. Respondents maintain that

⁷ Pursuant to Figure 15-19 of the AMA Guides, the maximum whole person impairment represented by a total impairment of one region of the spine is as follows: the cervical spine 80%, the thoracic spine 40% and the lumbar spine 90%, for a total of 210. Under these values, the relative portion of the spine to the whole back is 38% (80 divided by 210 = 38%).

converting Dr. Drye's whole person impairment rating constitutes impermissible judicial fact finding; however, if this Court perseveres in its intent to convert Dr. Drye's rating, it must complete the analysis and not stop half-way through. As this Court properly noted, Section 42-9-30(21) provides compensation for loss of use of the back. It does not provide for loss of use of the whole person; however, neither does it provide for loss of use of a region of the spine, but for loss of use of the whole back.

This Court's Rehearing Opinion cites case law in support of its conversion of Dr. Drye's whole person impairment rating, including Therrell v. Jerry's Inc., 370 S.C. 22, 633 S.E.2d 893 (2006), Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), and Lawson v. Hanson Brick Am., Inc., 393 S.C. 87, 710 S.E.2d 711 (Ct. App. 2011). However, none of these cases justifies this Court's reliance on non-record medical evidence and unpreserved arguments in order to support its decision. Instead, Therrell considered whether the shoulder was a part of the arm for purposes of the scheduled member statute.⁸ In both Burnette and Lawson, the medical evidence this Court highlights was contained in the records of the two cases before the Commission, in stark contrast to the instant case. Critically, the conversions relied on in Burnette and Lawson were provided by treating/evaluating physicians, not the Commission or the courts. The same is not true for Dr. Drye's converted rating in this case.

Even setting aside the problems with converting Dr. Drye's whole person rating, this Court's reliance solely on the impairment ratings disregards the long-standing rule

⁸ Respondents note that, subsequent to this Court's decision in Therrell, the Act was revised by the Legislature to add the shoulder as a scheduled member. See S.C. Code Ann. 42-9-30(14). Ironically, this Court is currently engaging in what its result in Therrell avoided, *i.e.*, "performing the complicated calculus involved in translating" a whole person rating into a rating for a listed body part, here the whole back.

that, “the determination of an injured employee’s impairment rating is more art than science, involving consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses.” Burnette, 401 S.C. at 429, 737 S.E.2d at 206-297; *see also* Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-70, 332 S.E.2d 211, 212 (1985) (considering medical evidence along with lay and vocational evidence to reach loss of use determination); Lyles, 315 S.C. at 445, 434 S.E.2d at 295 (impairment rating under Section 42-9-30 “need not be shown by mathematical precision and it may rely on lay testimony”); Sanders v. MeadWestvaco Corp., 371 S.C. 284, 291-292, 638 S.E.2d 66, 70 (Ct. App. 2006) (accepting the agreement that impairment to the whole back is equal to impairment of the whole person, and explaining that, “[u]nless the question of the extent of partial loss of use under [section] 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible”). Indeed, “[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. [citation omitted] Once admitted, expert testimony is to be considered just like any other testimony.” Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999).

In fact, in Lyles, the Court of Appeals specifically held that the claimant, “testified at length to the character and extent of his back injury, the restrictions the injury has placed on his physical activities, and his inability to do the type of work he did at the time of injury. Although the testimony of [other witnesses] suggests Lyles is not impaired by his back injury, we conclude there is substantial evidence Lyles has suffered more than a 50% impairment to his back.” 315 S.C. at 445, 434 S.E.2d at 295. Similarly,

in Linen, this Court weighed the claimant's testimony regarding his physical abilities including how long he could stand, *etc.* 286 S.C. at 69, 332 S.E.2d at 212.⁹ This Court's Rehearing Opinion essentially overrules all prior cases in which it has been held that, in making a determination regarding loss of use or impairment, lay testimony about how an injury does or does not affect a claimant's physical activities and his or her ability to perform certain functions is relevant.

This ruling – that only medical evidence of impairment is relevant or, at best, that medical evidence trumps any lay evidence – will apply to the detriment of any number of claimants. Note that, in many cases, lay evidence is relied on in order to *increase* the impairment rating over the numerical rating assigned by the physician. *See, e.g., Linen*, 286 S.C. at 69, 332 S.E.2d at 212 (finding a 50% loss of use of the back based on consideration of lay and other testimony, despite the fact that the physician's impairment rating was 20-30% of the spine); Lyles, 315 S.C. at 445, 434 S.E.2d at 295 (finding a greater than 50% loss of use of the back based on 35% impairment rating to the whole body, which the Court agreed had not been converted, in conjunction with lay testimony); Cropf v. The Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986) (upholding a Commission determination that the claimant lost 30% of the use of her back even though her physicians gave her a 15% impairment rating to her neck). Logically, if lay testimony is sufficient to *increase* a disability award over a physician-assigned

⁹ Here, uncontroverted testimony established that Petitioner worked, standing, for eight-hour shifts, 40 hours per week for two years, without ever asking to use the accommodation of sitting down, never asking for additional medical treatment or complaining about physical limitations on his ability to do his job. The only other accommodation, lifting assistance, was available to all Lowe's employees equally. (Appx. p. 407, lines 8-25; p. 368, lines 13-22; p. 370, line 24 – p. 371, line 23; p. 375, lines 22-25; p. 369, lines 12-18; p. 409, line 19 – p. 410, line 15).

impairment rating, such testimony also should be competent to *decrease* a finding of disability or loss of use. Conversely, if lay testimony is insufficient to support an award *lower* than the physician-assigned impairment rating, it is also insufficient to support a *higher* award. In finding that the Commission's award of 48% impairment to Petitioner's back is not supported by substantial evidence, this Court essentially is overruling Linen, Lyles, Croft and all the other cases wherein a disability award is higher than the medical impairment rating, based on lay testimony regarding a claimant's physical abilities and/or the effects of an injury. Instead, as a result of this Court's Rehearing Opinion, and contrary to the ruling in Tiller, 334 S.C. at 340, 513 S.E.2d at 846, under Section 42-9-30 only expert testimony will be deemed relevant and will outweigh any other evidence in the record.

This Court either should withdraw its conversion of Dr. Drye's whole person rating or, in the alternative, carry the conversion through to account for the whole back and not just a region of the spine. Also, this Court should affirm that lay testimony regarding a claimant's ability to perform physical tasks, such as standing for eight hours a day, 40 hours per week, without needing any accommodation in the form of sitting, is relevant to determining the claimant's degree of impairment or loss of use. In any event, there is no need to revise the Remand Opinion in order to replace the term impairment with the phrase loss of use.

3. There is no need for oral argument.

Finally, Petitioner's request for oral argument should be denied. Petitioner is incorrect that "the issue of the type and character of evidence necessary to rebut the presumption" was not specifically argued to this Court. A significant amount of time was

spent at oral argument concerning this issue, which does not need to be repeated. Furthermore, because the Commission now must consider whether the presumption has been rebutted, Petitioner will be free to make all of his arguments regarding the proper measure or test to the Commission.

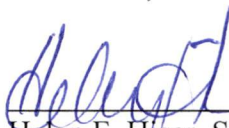
CONCLUSION

For all the reasons stated herein, this Court should deny Petitioner's Petition. Unless this Court is willing to revisit the decision to perform the conversion of Dr. Drye's rating, there is no need for further rehearing and Respondents request that this Court uphold the remand to the Commission for further proceedings.

August 14, 2017

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

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

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

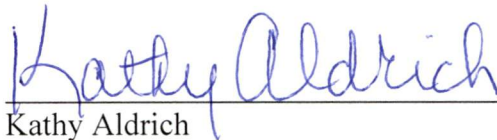
v.

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 Respondents' **Amended Return in Opposition to Amended Petition for Rehearing** on Henton T. Clemmons, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on August 14, 2017, addressed to his attorney of record:

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