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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

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

v.

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

REPLY TO
AMENDED RETURN IN OPPOSITION TO
AMENDED PETITION FOR REHEARING

By way of Reply to the Return filed by the Respondents to the Amended Petition for Rehearing, the Petitioner would respectfully submit:

I. **This Court must give direction to the Commission in regards to the rebutting of the §42-9-30(21) presumption under §42-9-10 (B).**

The Respondents are simply wrong in reference to their argument, this Court should allow the Commission to first rule on this issue. That is only the case, and the Decisions of this

Court simply state that, where this Court has not spoken on a particular issue that arises before the Commission, the Court will give deference to the Commission's Decision. Those Decisions are generally in reference to Regulations that have been implemented pursuant to the Act.

Contrary to the Respondents' argument, this Court has always given direction to the parties on Remand on the key issues which are remanded.

Quoting **Justice Hearn** from Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114, 116 (SC App. 1995):

> "For the reasons stated, we reverse the Circuit Court and remand for the Commission to determine whether Creech suffered an, 'injury by accident' as is defined in Stokes V. First National Bank and Sigmund v. Dayco Corp. ...
>
> **II. Medical Expenses**
>
> Because the issue may arise again on remand, we address the alternative argument Creech makes on appeal."

Quoting **Chief Justice Beatty** from Bartley v. Allendale County School Dist., 392 S.C. 300, 709 S.E.2d 619 (2011):

> "The Commission's Decision was affected by an error of law; therefore, we reverse the Decision of the Court of Appeals and remand the matter to the Commission for consideration of Bartley's claims in light of this Court's Decision in Ellison II."

Chief Justice Beatty also said:

> "The Commission had it considered the application of the law in Ellison II would have

> made additional Findings of Fact pertinent to this analysis that are missing from the Record."

In fact, both this Court and the Court of Appeals in addition to the above-cited references, and previously cited in the Petition, have repeatedly held where the Court decides to Remand that the Court will address issues that will arise upon Remand.

> "Because the issue will arise again on remand, we address it for the **guidance of the Commission**."

Hamilton v Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (SC App. 1999). See also: American Security Ins. Co. v. Howard, 315 S.C. 47, 431 S.E.2d 604 (SC App. 1993) and 27A S.C. Digest 2d. Workers' Compensation §1950, "Instructions on Remand".

In the original Opinion of this Court, Acting Justice Pleicones in his dissenting argument stated the same:

> "I disagree with the majority that by holding that evidence of 'gainful employment' is insufficient, **and by refusing to identify what type of evidence would be germane**, we may deny the Respondents the opportunity on remand to present rebuttal evidence.[5]" (Emp. add).

[5] "**Respondents are entitled to know what other type of evidence** the majority deems relevant to a rebuttal, **and the opportunity to present that evidence on remand**."

It is the responsibility of this Court to speak as to what the law is, and again, since this Court is remanding this case on the very issue which is what type of evidence is necessary to rebut the presumption as established in SC Code §42-9-30(21)

under SC Code §42-9-10(**B**), this Court must give its direction and address that issue.

Further, the Respondents state in Argument I that the Commission is well aware of this Court's opinion regarding the sole existing precedent concerning rebuttal and refers to the Court of Appeals' Decision and makes the statement then that, "of which the Commission undoubtedly is aware". That is exactly in accord with what the Petitioner is arguing, which is that you cannot "un-ring the bell". That Opinion was withdrawn and the substituted Opinion was entered. There is rampant violation of the use of Unpublished Opinions by the Court of Appeals and the Respondents candidly admit that they will use the Dissent, the failure to speak by this Court on the issues, and the Watson decision as guidelines on Remand to impose a wage loss analysis. This Court must speak.

The Respondents also make an argument and accuse the Petitioner of "disparagement of the Commissioners as lacking the legal background or intellect to decide this issue and/or properly interpret the Act ...". Outside of this argument being untrue and actually being fallacious, this Court and the Court of Appeals are the purveyors of the law, just like a Judge in a jury trial, and the Commissioners are charged with the responsibility of deciding the facts in accordance with the law

as given to them by the Court. The Commissioners are the fact-finders and they need this Court's direction.

This Court has always stated that position since the inception of the Act and has set it out repeatedly in its Decisions, quoting the Court from the decision in Schwartz v. Mt. Vernon-Woodberry Mills, 206 S.C. 227, 33 S.E.2d 517 (1945):

> "**The Industrial Commission is not a 'Court'** . . . but is an administrative tribunal exercising some quasi-judicial functions, whose powers are found in statute . . . .
>
> It is an administerial and administrative body, and that although some of its powers are quasi-judicial or judicial in their nature, and although it may perform some incidental judicial functions, it has no judicial power within the general acceptation of that term or in the sense in which the term is used in Constitutions and **the members are not considered as judicial officers**, nor as a judicial body, nor as a Court of general nor even of limited common law jurisdiction." (Emp. add.)

This Court said it, the Petitioner did not.

II. The Court should revise the Court's substituted Opinion to substitute the phrase "loss of use" for the term "impairment".

Without recitation, this Court is committed to a liberal interpretation of the Act in favor of benefits to the injured worker; and any restrictions are to be strictly construed; and any ambiguities or clarifications in the Act need to be made by the Legislature. You will not find the word "impairment" in the Workers' Compensation Act. You will find "loss of earning

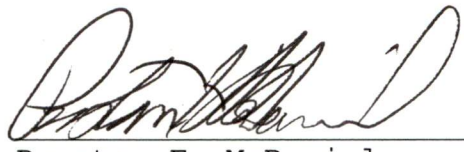
capacity" in reference to wage loss and you will find "loss of use" in reference to scheduled member Awards. Such cases as Ellison and Glover by Cauthen v. Suitt Constr. Co. will not be reiterated but the wording is to be strictly construed but is to be given its ordinary meaning. Loss of use is what the Commission is required to determined.

Medical impairment evidence can be considered as all evidence can be considered by the Commission but where the uncontradicted evidence on the specific essential issue of, "loss of use" in the Record, including the testimony, the claimant, vocational opinion, functional capacity evaluation testing results and opinion, and the medical opinions of two doctors specifically on loss of use that the claimant had lost more than 50% of the functional use of his back to do work requiring the use of the back, the Court should make a distinction, at least in reference to medical opinion evidence on impairment versus medical opinion evidence on loss of use, the essential issue for decision where it exists in the Record.

CONCLUSION

For all the foregoing reasons by way of Reply, the Petitioner respectfully requests argument and rehearing, or a substituted Opinion giving direction to the Commission on the critical issue it will have to decide upon remand.

Respectfully submitted,



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August 18, 2017

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PROOF OF SERVICE

I certify that I have served the **REPLY TO AMENDED RETURN IN OPPOSITION TO AMENDED PETITION FOR REHEARING** on August 18, 2017, addressed as follows to its Attorneys of Record:

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