THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee,.....Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier,.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Although the underlying facts of this case are fairly straightforward, it has a complicated procedural history. Appellant John McDaniel ("Claimant") was injured in a work-related accident on November 21, 2011, when a forklift injured his left foot. (Transcript of Hearing before Commissioner James, held Nov. 28, 2012 ("Hr'g Tr.") p. 27, lines 6-18) (Id., p. 51, lines 21-24) (Cl. APA p. 21). At the time of his injury, Claimant was employed by Respondent Career Employment Professional d/b/a Snelling Staffing ("Snelling Staffing").

On May 18, 2012, Claimant filed a Form 50 seeking additional medical care, Temporary Total Disability ("TTD") benefits from the date of injury and continuing, as well as Permanent Partial Disability benefits. Claimant sought an average weekly wage ("AWW") calculation based on the increased salary he was making at the time of his injury. (Cl. Form 50, dated May 18, 2012). Snelling Staffing and its insurer, United Wisconsin Insurance Company (Respondents herein) filed a Form 51 denying the nature and extent of injury and any resulting disability, as well as Claimant's calculation of the AWW and entitlement to temporary benefits. (Resp. Form 51, dated June 15, 2012). On September 17, 2012, Respondents filed a Form 21 request for hearing, seeking credit for overpayment of TTD. (Resp. Form 21, dated Sept. 17, 2012).

Claimant submitted his Form 58, Pre-Hearing Brief, and APA pages 1-119, under cover of letter dated October 31, 2012, (Cl. Form 58, Pre-Hearing Brief, served October 31, 2012), and supplemental APAs, pages 120-122, on November 15, 2012. (Cl. Suppl. APAs, submitted under cover of letter dated Nov. 15, 2012). Respondents submitted a

Pre-Hearing Brief and APAs. (Defs' Form 58, Pre-Hearing Brief and APAs, dated Nov. 5, 2012).

The parties were heard by Hearing Commissioner Melody James on November 28, 2012. Commissioner James stated on the record, without objection, that the parties agreed that Claimant had reached MMI. (Hr'g Tr. p. 5, lines 13-14). Claimant submitted wages of three other employees who worked the same job at Alside Revere that Claimant was working when he was injured – Wayne Atkins, Alvin Clark and Jarod Lampkin. (Hr'g Tr. p. 8, lines 5-10). Claimant's counsel asserted that Jerod Lampkin's AWW was $618.50. (Hr'g Tr. p. 8, lines 510).

Commissioner James issued a Decision and Order on January 4, 2013. (Hearing Commissioner Decision, filed Jan. 4, 2013 ("Jan. Commissioner Decision")).[1] Commissioner James noted that Claimant "agrees that the treating physician says he is at maximum medical improvement." (Jan. Commissioner Decision, p. 3). She determined Claimant's AWW to be $537.91, with a corresponding compensation rate of $358.62. "The Claimant's twenty weeks of work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing. However, there is no guarantee he would have continued with the assignment at Alside Revere." (Id., p. 11). Commissioner James concluded that "[a] fair and just method to calculate the wages of the Claimant is to take an average of the wages along with the three other employee wages provided. The Claimant - $492.84; Atkins - $506.88; Lampkin - $618.50; and Clark - $533.41." (Id.). She found that Claimant reached MMI on August 13, 2012 and awarded him a 34% disability to the left leg pursuant to Section 42-9-30. She awarded

[1] Commissioner James requested that Claimant's counsel draft a proposed decision based on her findings. (Request for Proposed Order, dated Dec. 3, 2012).

Respondents a credit for TTD benefits paid after Claimant reached MMI, and held that Claimant was entitled to future medical care as indicated by Dr. Ohlson. (Id., p. 12).

Claimant filed a timely Form 30 Request for Commission Review. (Form 30, dated Jan. 14, 2013) ("Cl. Form 30"). He raised six specific issues that centered on the calculation of the AWW, the 34% disability rating, the credit awarded to Respondents for TTD paid after the date of MMI, and whether Respondents should be subject to fines and penalties for alleged late payment of TTD. (Id.).[2]

On March 8, 2013, Claimant's counsel filed a motion to have the pay records of Jerod Lampkin as a direct employee of Alside Revere admitted. (Motion Pursuant to Regulation 67-707 to Admit Additional and Newly Discovered Evidence, dated Mar. 8, 2013 ("Motion to Admit")).

Subsequently, Claimant filed, through his counsel, an appellate Brief with the Full Commission, which reduced to three the issues raised on appeal: 1) the calculation of his AWW; 2) Claimant's disability award; and 3) the credit awarded to Respondents. (Brief on Behalf of Claimant/Appellant, dated March 26, 2013).

On March 29, 2013, Claimant notified the Commission that he was relieving his counsel. (Order Relieving Counsel, dated March 29, 2013).

Subsequently, Full Commission review was scheduled for April 16, 2013. (Notice of Appellate Hearing, dated March 29, 2013). Respondents filed their Brief to the Full Commission on April 10, 2013, responding to the three issues raised by Claimant in his opening Brief. (Respondents' Brief to the Full Commission, dated April 10, 2013).

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[2] Respondents note that this last issue was not raised in Claimant's Form 50, (Cl. Form 50), his Form 58 Pre-Hearing Brief, (Cl. Form 58), or at hearing before Commissioner James. (Hr'g Tr.). Although Claimant attempted to raise an issue regarding the timeliness of the medical care he had been provided, Commissioner James reminded him that the hearing was to determine permanency, not his medical care. (Hr'g Tr. p. 28, line 13 – p. 34, line 11).

On April 15, 2013, the Commission granted Claimant's Motion to Admit, and noted that the matter was "set for Appellate Hearing on all issues." (Judicial Conference Decision and Order, dated April 15, 2013). Claimant, now proceeding *pro se*, contacted the Commission directly and asked that the matter be remanded to Commissioner James for consideration of the new evidence.[3]

On May 6, 2013, Claimant filed a motion to admit additional evidence, seeking to add pages 126-209 to his APA submissions. (Claimant's Motion for additional Evidence to Complete the Record and Notice of Additional Evidence and Additional APA Submissions on behalf of the Claimant, dated May 6, 2013 ("May 6 Motion")). On May 10, 2013, he filed another motion in an attempt to submit his deposition transcript into the Record. (Claimant's Motion for additional Evidence and Testimony to Complete the Record, dated May 10, 2013 ("May 10 Motion")).[4] Respondents opposed both of these motions. (Defendants' Response to Claimant's 2nd Motion to Add Additional and Newly Discovered Evidence and Notice of Additional APA Submissions, dated May 16, 2013).

Claimant filed a 28-page Reply to Respondents' Brief, raising a number of issues not raised in his Form 30, his opening Brief or in Respondents' Brief. (Appellant's Reply to Respondents' Brief, served by the Commission on May 15, 2013).[5]

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[3] (*See* Email correspondence between Eugenia Hollmon and John McDaniel, "Re: motion for new evidence," dated April 15, 2013).

[4] Claimant sought to waive the filing fees for these two motions, which request was denied pursuant to an Administrative Order. (Administrative Order re Form 32(s), dated June 3, 2013).

[5] For example, Claimant argued that Commissioner James's calculation of Lampkin's AWW at $618.50 was incorrect, even though this was the amount his counsel asserted at the hearing. (Hr'g Tr. p. 7, line 4 – p. 8, line 10). He also challenged Commissioner James's finding that he had reached MMI on August 13, 2012, even though he had conceded that fact at the hearing. (Hr'g Tr. p. 5, lines 10-18; p. 28, lines 1-12; p. 53, lines 1-6 (Claimant agreeing he had been released from Dr. Ohlson's care on August 13, 2012)).

Under cover of a letter dated May 17, 2013, Claimant submitted Lampkin's pay records. (Claimant's Notice of Additional Evidence to be Introduced into the Record, APA pp. 210-278, dated May 17, 2013). On May 20, 2013, the Commission issued an order granting Claimant's motion to remand the matter to Commissioner James. (Judicial Conference Decision and Order, dated May 20, 2013 ("May 20 Order")). Upon inquiry, the Commission clarified that its May 20 Order was "solely based on the prior Judicial Conference Order" granting Claimant's Motion to Admit Lampkin's pay records. Because Claimant asked that the additional evidence be addressed by Commissioner James, the May 20 Order remanded the matter to Commissioner James to consider that newly admitted evidence. (Letter from Valerie D. Deller to Allison Nussbaum, dated May 29, 2013).

Claimant filed another motion on June 11, 2013, raising an issue regarding timeliness of treatment reaching back to January of 2012. (Claimant's Motion for Penalties and Sanctions for Failure to provide Medical Treatment and Failure to Provide Medical Treatment in a Timely Manner, dated June 11, 2013 and filed with the Commission on June 14, 2013 ("Motion for Penalties")). Respondents filed an opposition. (Defendants' Response to Claimant's Motion for Penalties and Sanctions for Failure to Provide Medical Treatment and Failure to Provide Medical Treatment in a Timely Manner, dated June 21, 2013).

On June 17, 2013, the Commission issued orders denying Claimant's May 6 and May 10 Motions, both of which sought to admit additional evidence. (Judicial Conference Decision and Order concerning Motion for Additional Evidence Dated May

6, 2013, filed June 17, 2013) (Judicial Conference Decision and Order concerning Motion for Additional Evidence Dated May 10, 2013, filed June 17, 2013).

A hearing was set before Commissioner James for July 8, 2013 to consider Lampkin's newly admitted pay records. The hearing notice indicated that it was a "[r]emand on issues as set forth by Full Commission Order." (Notice of Hearing, dated June 19, 2013). Upon inquiry, Claimant was advised several times that the remand hearing was solely to consider the additional evidence in the form of Lampkin's pay records.[6]

Nonetheless, Claimant served subpoenas in an attempt to require Jim Pascutti, Angela Baldwin and Nicole Service to appear at the remand hearing before Commissioner James. (Subpoenas to Jim Pascutti, Angela Baldwin and Nicole Service, served on Respondents under cover of letter dated June 27, 2013). Respondents duly moved to quash the Subpoenas. (Motion to Quash Claimant's June 27, 2013 Subpoenas to Angela Baldwin, Jim Pascutti, and Nicole Service, dated July 2, 2013).

At the July 8, 2013 hearing, Commissioner James first clarified that the remand was "for consideration of [Lampkin's pay records] and the impact with regards to those records to the original decision and order." (Transcript of Hearing before Commissioner James, held July 8, 2013 ("July 8 Hr'g Tr."), p. 3, line 21 – p. 4, line 1). She next granted Respondents' Motion to Quash, because the individuals subpoenaed were two employees of Snelling Staffing and the claims adjuster for its insurer, who could not speak to anything regarding employment records from Alside Revere that post-dated the time that Claimant worked there. (July 8 Hr'g Tr. p. 4, line 15 – p. 6, line 11; p. 16, line 13 – p.

[6] (Email correspondence between John McDaniel and Tamara Morris, "Re: wcc file # 1116275", dated June 26, 2013 and June 27, 2013).

18, line 7). Commissioner James reiterated several times during the hearing that the sole purpose of and the single issue under consideration at the remand hearing was "the interpretation of [Lampkin's] pay records and any impact that they have on the decision and order ..." (July 8 Hr'g Tr. p. 16, lines 16-19; p. 15, lines 14-21; p. 18, lines 21-23; p. 33, lines 4-5; p. 44, lines 19-20; p. 46, lines 13-24; p. 48, lines 17-21).

Commissioner James issued a Request for Proposed Order, instructing Commission Staff Attorney Keith Roberts to prepare the proposed Order. (Request for Proposed Order, dated Aug. 6, 2013).

Subsequently, Claimant's Motion for Penalties and Sanctions was denied. (Judicial Conference Decision and Order, dated August 12, 2013).

Although Claimant was not specifically requested to draft a proposed order, he submitted seven pages of proposed findings of fact to Staff Attorney Roberts.[7] Staff Attorney Roberts drafted a proposed Order pursuant to Commissioner James' instructions and provided a copy to both parties for review.[8] In a series of emails dated September 13, 2013, Staff Attorney Roberts reiterated that all of the comments and proposed findings had been forwarded to Commissioner James, who would make the final decision regarding her Decision and Order.[9]

Commissioner James issued her Decision and Order on September 30, 2013. (Decision and Order of Hearing Commissioner Melody L. James, filed Sept. 30, 2013 ("Sept. Commissioner Decision")). She found, as had been found "in the previous order,

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[7] (Email correspondence from John McDaniel to Keith Roberts and Allison Nussbaum, "Re: Proposed Findings of Fact RE:SWCC file #1116275," dated Aug. 30, 2013).

[8] (Email correspondence between Keith Roberts, Tamara Morris, John McDaniel and Allison Nussbaum, "Re: John McDaniel Charleston Order Instructions from Commissioner James for Keith to prepare Order," dated Sept. 10, 2013, with attachment).

[9] (Email correspondence between Keith Roberts, Gary Cannon, John McDaniel and Allison Nussbaum, "Re: Proposed order language," dated Sept. 13, 2013).

whether the Claimant would have been permanently hired by Alside Revere, is unknown," but that, given the "shortness of the duration of Claimant's work at the assignment on which he was injured, Claimant has shown exceptional reasons why the methods of calculating his average weekly wage provided for in the first paragraph of 42-1-40 would be unfair." She concluded that "[t]he method which would most nearly approximate [Claimant's] average weekly wage at the time of his injury is to average Claimant's wages with the three 'like employees' that were earning wages with the Employer, Snelling." This resulted in an AWW of $537.91 with a corresponding compensation rate of $358.62. Commissioner James granted the Respondents' Motion to Quash, and noted that no other discovery or motions were properly before her. (Id.).

On October 1, 2013, the Commission provided notice that the Full Commission hearing on the previously-filed Form 30 Notice of Appeal was scheduled for October 14, 2013. (Notice of Appellate Hearing, dated Oct. 1, 2013). Upon inquiry from Claimant, the Commission staff confirmed on multiple occasions, that the Full Commission hearing was based on his Form 30 appeal of the Jan. Commissioner Decision.[10] In particular, Ms. Crocker informed Claimant that, "[t]he matter on appeal on October 14, 2013 is your appeal of the Decision and Order of Commissioner James dated January 4, 2013. The order served on September 30, 2013 is not currently on appeal although you are still within the time period for appeal of that order."[11]

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[10] (Email correspondence between John McDaniel, Eugenia Hollmon, Gary Cannon, Valerie Deller, Virginia Crocker, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013).

[11] (Email correspondence between Virginia Crocker, John McDaniel, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013). Nonetheless, Claimant served subpoenas on Pascutti, Baldwin and Service to appear at the appellate panel hearing set for October 14, 2013, (Subpoenas to Jim Pascutti, Angela Baldwin and Nicole Service, served on Respondents under cover of letter dated Oct. 4, 2013), which Respondents moved to quash.

In response to a long list of questions from Claimant, Staff Attorney Roberts confirmed that, "[t]he purpose of [the] Appellate Hearing set for October 14th, 2013 is to determine the issues your former attorney raised on the Form 30 filed on January 14th, 2013, which appealed the Decision and Order of Commissioner James dated January 4th, 2013. You were served with a copy of the Brief Request notifying you that the matter was on the appellate docket on June 19th, 2013. You were served with a notice of the time and date of the Oral Arguments on October 1st, 2013 ... The Decision and Order of Commissioner James filed September 30th, 2013 is not under review at the Hearing set for October 14th, 2013."[12]

Claimant sought further clarification in an October 10 email, to which Staff Attorney Roberts responded: "The issues to be heard at the October 14th, 2013 [hearing] are all the issues that you raised on your Form 30 filed on January 14th, 2013 that were not remanded to Commissioner James for adjudication ..."[13]

On Saturday, October 12, 2013, Claimant emailed a self-styled "Amended Form 30 for the upcoming review hearing ...," which was dated October 8, 2013 and accompanied by numerous attachments.[14] Claimant's self-styled "Amended Form 30" attempted to raise a number of issues concerning the Jan. Commissioner Decision, as well as subsequent motions and rulings, including arguments he made to Commissioner

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(Motion to Quash Claimant's October 14, 2013 Subpoenas to Angela Baldwin, Jim Pascutti, and Nicole Service, dated Oct. 10, 2013).

[12] (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 8, 2013).

[13] (Email correspondence between Keith Roberts, John McDaniel, Gary Cannon, Virginia Crocker, Allison Nussbaum, "Re: Application for notice wcc #1116275," dated Oct. 10, 2013).

[14] (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker, Gary Cannon, E. Boyd, and Elizabeth McDaniel, "Re: FW: FW: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 12, 2013).

James in the July 8, 2013 hearing regarding additional evidence. Claimant's "Amended Form 30" was not accompanied by any filing fee or a request for waiver of same. (Cl. Amended Form 30, dated Oct. 9, 2013, and transmittal email dated Oct. 12, 2013).

An Appellate Panel of the Full Commission heard oral argument on October 14, 2013, first granting Respondents' Motion to Quash the additional subpoenas that Claimant had served on Pascutti, Baldwin and Service. Claimant, proceeding *pro se*,[15] asserted, among other things, that he had been given inadequate notice of the appellate panel hearing and that he had submitted an Amended Form 30, to which Commissioner Barden replied: "We have that in front of us, yes, sir." (2013 Full Comm'n Tr., p. 5, lines 3-19).

The Appellate Panel unanimously affirmed the Jan. Commissioner Decision in its entirety. (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed Dec. 19, 2013 ("2013 Commission Decision").[16] The Commission noted the admission of the pay records of Jarod Lampkin and included the same in its review. However, in reaching its decision, the Commission "did not consider any documents outside the record because the Claimant's Amended Form 30 was not

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[15] Throughout his *pro se* representation before the Commission, the Commission and its staff advised Claimant of his right to have a lawyer represent him and offered to reschedule hearings in order to allow him time to engage counsel. (July 8 Hr'g Tr. p. 4, lines 9-11) (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re FW; FW: remanded or bifurcated? SCWCC file #1116275," dated Oct. 9, 2013 (advising Claimant that, "[m]isunderstanding legal terms is a risk that you run by choosing to remain pro se. If you are having trouble understanding any aspect of your case, you are permitted to retain a private attorney to represent you in all proceedings before the Workers' Compensation Commission," and cautioning Claimant against further *ex parte* communications with the Commission)) (Transcript of Full Commission Panel Hearing, held October 14, 2013 ("2013 Full Comm'n Tr.") p. 3, lines 10-17).

[16] Although the Commission requested that Respondents draft a proposed order, Claimant again submitted a lengthy set of proposed findings to the Commission. (*See* Email correspondence between John McDaniel, Allison Nussbaum, Gary Cannon, Virginia Crocker, et al., "Re: Proposed Findings of Fact RE:SCWCC file #1116275," dated Dec. 2, 2013, with attachment).

timely served; therefore, any records submitted with the Amended Form 30 were not considered by the Panel." (2013 Commission Decision, p. 6).

Claimant timely appealed the 2013 Commission Decision to this Court. In an unpublished opinion issued on June 22, 2016, this Court reversed and remanded, holding that Claimant had not been provided the minimum 30 days' notice of the Appellate Panel review, as is required by S.C. Code Reg. § 67-704. The case was remanded for the Commission to provide Claimant with "the required thirty days' notice and his review hearing." (Unpublished Opinion, Appellate Case No. 2014-000186, June 22, 2016).

The parties filed another round of appellate briefs, and were heard by an Appellate Panel on March 21, 2017. Over objection and although Claimant was the appellant, he was allowed to reserve the majority of his opening argument time for rebuttal. (Transcript of Full Commission Panel Hearing, held March 21, 2017, p. 4, line 16 – p. 6, line 22) ("2017 Full Comm'n Tr."). The Appellate Panel confirmed that Claimant's Amended Form 30 was not in the Commission file. (2017 Full Comm'n Tr. p. 9, line 6 – p. 10, line 15).

The Commission again affirmed the Jan. Commissioner Decision. The Commission advised that, in reaching its decision, it "did not consider any documents outside the record because the Claimant's Amended Form 30 was not properly before th[e] Panel," and, as a result, "any records submitted with the Amended Form 30 were not considered by the Panel." (Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed April 28, 2017, p.7) ("Commission Decision").[17] Specifically, the Commission affirmed that Claimant's AWW was

[17] Again, although the Commission requested that Respondents draft a proposed order, (Email correspondence between Eugenia Hollmon, Allison Nussbaum, Helen Hiser, John McDaniel, and

$537.901 with a corresponding compensation rate of $358.62, that he reached MMI on August 13, 2012, that he was entitled to a disability award pursuant to Section 42-9-30 to the left leg of 34% as well as on-going medical care with Drs. Ohlson and Tavel per Dr. Ohlson's August 13, 2012 medical report, and granted Respondents a credit for weekly benefits paid after the date of MMI. (Commission Decision, pp. 11-14).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Claimant began working for Snelling Staffing, a temp staffing agency, in May 2011. (Hr'g Tr. p. 7, line 23; p. 16, lines 15-20).[18] Claimant testified that he understood that his pay rate depended on the assignment he received through Snelling Staffing, and that there was no guarantee of a permanent placement with any temporary assignment. (Hr'g Tr. p. 43, line 2 – p. 44, line 18). Working as a temporary employee for Snelling Staffing, Claimant first was placed with Ben Arnold. He worked at Ben Arnold from May to September 2011, making $11.50/hour. He was let go by Ben Arnold because of a scheduling conflict with his classes. (Hr'g Tr. p. 16, line 15 – p. 17, line 7; p. 20, line 15 – p. 21, line 1; p. 45, line 5 – p. 46, line 14). At that time, Claimant was enrolled at Trident Technical College, studying civil engineering. (Hr'g Tr. p. 12, lines 15-23). He

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Marguerite Karnilaw, "Re: McDaniel", dated April 5, 2017), Claimant submitted a lengthy set of proposed findings to the Commission. (*See* Email correspondence between John McDaniel, Marguerite Karnilaw, Keith Roberts, Amy Bracy, Eugenia Hollman, Allison Nussbaum, and Helen Hiser, et al., "Re: John McDaniel v. Career Employment Professionals d/b/a Snelling (Claim No.: 041100021048)" dated April 11, 2017, with attachment).

[18] Between the time that Claimant graduated from high school in 2000, (Hr'g Tr. p. 12, lines 5-7), and the time he began working for Snelling Staffing, he held a number of different positions ranging from vehicle sales, to waiting tables at "various establishments," to construction debris removal, to caddying, to bar sales and auditing inventory, moving from Texas to South Carolina, to Florida, to North Carolina, to Wisconsin, and back to South Carolina. (Hr'g Tr. p. 13, line 5 – p. 16, line 7).

has since moved to Michigan to attend law school. (2017 Full Comm'n Tr., p. 20, lines 17-19).

After being let go by Ben Arnold, Smelling Staffing had no temporary placement positions for Claimant and he was unemployed for approximately six weeks. (Hr'g Tr. p. 46, lines 15-18). He was called by Snelling Staffing with a temporary offer to work at Alside Revere, making $13/hour. (Hr'g Tr. p. 21, lines 2-19). Claimant acknowledged that, during the time he worked with both Ben Arnold and Alside Revere, he was a Snelling Staffing employee and was paid by Snelling. (Hr'g Tr. p. 48, lines 9-13). Claimant started working at Alside Revere on Friday, November 11, 2011, and then worked the full week of November 14-18. He was injured on the following Monday, November 21. (Hr'g Tr. p. 22, lines 12-20; p. 47, lines 6-15). Thus, he worked one full week and two days, or ten calendar days, at Alside Revere. (Hr'g Tr. p. 47, lines 16-21).

Claimant's supervisor at Alside Revere was Daniel J. Cobb, (Hr'g Tr. p. 22, lines 21-22), who testified that temporary employees sent to Alside Revere through Snelling Staffing have to work at approximately 550 hours, or three months, before Alside Revere can take them on as direct employees. (Cobb Dep. p. 12, line 21 – p. 13, line 5; p. 14, lines 15-21) (Hr'g Tr. p. 24, lines 3-8). Cobb testified that Claimant "was a very good employee," but that it was too early to tell whether Alside Revere would take him on as a permanent employee. He explained, "I know he had plans on going back to school. So that would probably – whether it might have interfered with that or not I don't know. Again, it was just too early in it." (Cobb Dep. p. 14, lines 1-14). Cobb reiterated that there was no guarantee that a temporary employee ever would be offered a permanent position with Alside Revere, and that the ten days Claimant worked there was an

insufficient amount of time to determine whether he would be offered a permanent position. (Cobb Dep. p. 16, line 24 – p. 17, line 14).[19]

Following his injury on November 21, 2011, emergency treatment was provided to Claimant at Roper Hospital in Charleston, (Cl. APA pp. 1-15), after which Claimant came under the care of Dr. Blake L. Ohlson and Orthopaedic Specialists of Charleston. (Cl. APA pp. 21-55). Starting in April 2012, Dr. Ohlson began advising Claimant "to quit smoking ... as this affects the rate of healing." (Cl. APA pp. 36, 40-41) (Hr'g Tr. p. 52, lines 10-25). Although Dr. Ohlson recommended that Claimant be "evaluated by wound care," (APA p. 29), a few months later he concluded that the "[w]ound is nearly healed on the foot ... it is very superficial in nature there is no purulence no evidence of infection," and noted that since the wound was nearly healed, "wound care specialist will not be necessary." (APA p. 36).

On August 13, 2012, Dr. Ohlson stated that Claimant "has reached maximum medical improvement." Dr. Ohlson assigned Claimant an impairment rating of "17% impairment to the left lower extremity" using the "AMA fifth edition guidelines." Dr. Ohlson discussed final work restrictions with Claimant, which included lifting capacity of approximately 10 pounds, and recommendations against climbing ladders, roof work, running and prolonged periods of standing. (Cl. APA pp. 52-53) (Form 14-B, dated Sept. 16, 2012).

Dr. Howard L. Brilliant conducted an IME on October 11, 2012, and opined that Claimant "does not need any special treatment. No surgery is indicated. He may benefit by getting a supportive made-to-order shoe so he can get around more. It will probably

[19] Although Claimant alleges that Cobb's testimony was "inaccurate," this testimony is not contradicted by any evidence in the Commission Record.

be about another year until he is fully improved." Dr. Brilliant estimated Claimant's impairment rating to be 50% to the left foot. (Cl. APA pp. 59-60).

Claimant began seeing Dr. Edward M. Tavel for pain management in October 2012. (Cl. APA pp. 123-125). At the time of the January 2013 hearing, he was continuing to be treated by Dr. Tavel for pain. (Hr'g Tr. p. 28, line 5 – p. 29, line 5).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2011). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Full

Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

"The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Finally, the burden is on the claimant to prove he is entitled to benefits, which award cannot be based "on surmise, conjecture or speculation." *E.g.*, Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630-31, 142 S.E.2d 43, 45 (1965); Cross v. Concrete Materials, 236 S.C. 440, 446, 114 S.E.2d 828, 832 (1960) (noting "rule which is applicable to the finding of facts is that a claimant must establish by the preponderance of the evidence the facts which will entitle him to an award; the burden of proof is upon him. He cannot prevail by the resolution of doubts").

ARGUMENTS

I. A number of Claimant's arguments are not properly before this Court. (Issue Nos. 1, 2, 8, 11, 18 and 19)

A number of the arguments raised in Claimant's Brief are not properly before this Court as they either were not raised in his Form 30 and/or attempt to challenge the Sept. Commissioner Decision, which was never effectively appealed and is now the final decision of the Commission and the law of this case. *See, e.g.*, Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) ("only issues within the application for review are preserved for the full commission"); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (only those issues

within the scope of the appellant's exception to the full commission and its notice to the respondent are preserved for appeal to the commission), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that "all findings of fact and law by the hearing commissioner became and are the law of th[e] case," unless appealed to the Commission). These include Issue Nos. 1, 2, 8, 11 (to the extent it attempts to raise issues regarding medical treatment), 18 and 19). (*See* Cl. Form 30).

Moreover, issues decided in the Sept. Commissioner Decision, which was never effectively appealed,[20] are the law of this case and cannot be challenged at this point. These include, among other things, the findings that: "whether the Claimant would have been permanently hired by Alside Revere, is unknown"; the determination that exceptional reasons exist to devise an alternative method to calculate Claimant's AWW; "[t]he method which would most nearly approximate his average weekly wage at the time of his injury is to average Claimant's wages with the three 'like employees' that were earning wages with the Employer, Snelling"; and the determination that Claimant's AWW "shall be $537.91 with a corresponding compensation rate of $358.62." (Sept. Commissioner Decision, pp. 3, 4). It also includes the grant of Respondents' Motion to Quash Claimant's attempt to subpoena Pascutti, Service and Baldwin, as well as the finding "that any and all issues regarding additional discovery and motions were not before the undersigned at the Hearing on July 12th, 2012, as the sole issue to be decided was the impact of the pay records of Jared Lampkin on the determination of Claimant's average weekly wage." (Id., p. 5). None of these issues can be reviewed and/or reversed at this point because they are the law of the case. Nucor Corp. v. South Carolina Dept. of

[20] Clearly, Claimant cannot appeal the Sept. Commissioner Decision directly to this Court. *See* Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 34, 402 S.E.2d 893, 895 (Ct. App. 1991).

Emp't & Workforce, 410 S.C. 507, 514-515, 765 S.E.2d 558, 561 (2014) ("an unappealed ruling, right or wrong, is the law of the case").

Out of an abundance of caution, Respondents address these arguments below but preserve their position that each is barred as discussed above.

II. The Commission properly calculated Claimant's Average Weekly Wage. (Issues Nos. 14, 15, & 16)

Claimant raises several arguments concerning the Commission's calculation of his AWW in this case. First, Claimant asserts that he believes he would have been hired as a permanent Alside Revere employee. Next, Claimant takes issue with the actual calculation of his and the similar employee wages of Lampkin, Clark and Atkins. Finally, he argues that "Lampkin's earnings most accurately reflect what the Appellant would be earning were it not for the injury."

Section 42-1-40 provides "four alternative methods for the commission to use to calculate the average wage." Pilgrim v. Eaton, 392 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). In a majority of cases, AWW is "calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred ... divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40. However, Section 42-1-40 provides three alternative methods of calculating AWW where employment prior to the injury was less than 52 weeks.

> When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to

> compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.[21]

Finally, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40. In calculating AWW under this provision, the Commission exercises flexibility, always keeping in mind that the "objective of the AWW calculation is to arrive at a figure that is fair to both the employee and the employer." Bennett v. Gary Smith Builders, 271 S.C. 94, 99, 245 S.E.2d 129, 131 (1978).

Here, the Commission found that "Claimant's twenty weeks of work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing." (Commission Decision, p. 11). The unappealed Sept. Commissioner Decision found, as had been found "in the previous order, that whether Claimant would have been permanently hired by Alside Revere, is unknown," and that, given the "shortness of the duration of Claimant's work at the assignment on which he was injured, Claimant has shown exceptional reasons why the methods of calculating his average weekly wage provided for in the first paragraph of 42-1-40 would be unfair." (Sept. Commissioner Decision, p. 3). The Commission agreed, finding that there was "no guarantee [Claimant] would have continued with the assignment at Alside Revere (Testimony of Dan Cobb by way of Deposition). Employer provides temporary

[21] Note that this calculation looks at the wages being earned in the 52 weeks prior to, not following, a work-related injury.

assignments with a goal of permanent placement. The third employee wages submitted do not provide for fifty-two weeks and they were all employed by Alside Revere." (Commission Decision, p. 11).

Claimant erroneously argues that his AWW should have been calculated on the wages he was earning at the job with Alside Revere at the time of his injury. This argument, apparently derived from the first alternative under Section 42-1-40, must be rejected for a number of reasons. First, Claimant's argument ignores the fact that he was employed by Snelling Staffing, not Alside Revere. He had been in the employment of Snelling Staffing, a temporary staffing agency, for some 20 weeks at different rates of pay. He was never in the employment of either Ben Arnold or Alside Revere. By his own admission, he had been working at the Alside Revere site only ten calendar days, or seven actual work days, and the rest of the time that he was employed by Snelling Staffing he worked at the Ben Arnold site at a lower pay rate. There was no guarantee whatsoever that he would be placed permanently at the Alside Revere site and he worked there for far too short of a time to determine whether he would be offered a full-time position as an employee of Alside Revere. (Cobb Dep. p. 14, lines 1-14). Thus, it would be both irrational and patently unfair to the employer to base his AWW solely on the ten calendar days (seven actual work days) he worked at the Alside Revere site at a higher wage. Pugh v. Piedmont Mechanical, 396 S.C. 31, 39, 719 S.E.2d 676, 680-81 (Ct. App. 2011) (overturning AWW calculated solely on 17-week period claimant had been working prior to his injury because it was not "fair and just to **both** parties") (emphasis added). As explained in Pugh, calculating AWW under the first alternative listed under Section 42-1-40 "is proper if two 'predicate conditions' exist: (1) it is 'practicable' to use

the alternative method and (2) the calculation yields a result 'fair and just' to both parties." 396 S.C. at 39, 719 S.E.2d at 680. Here, Claimant's proposed approach may or may not satisfy the first prong but certainly does not meet the second. Furthermore, this approach was rejected in Pilgrim as impermissible. Pilgrim, 392 S.C. at 45, 703 S.E.2d at 244 (overturning calculation of AWW based on hourly wage being earned by the claimant where he had worked only a few days prior to the injury).

Claimant relies heavily on Sellers v. Pinedale Res. Ctr., 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002). However, what he fails to understand is that, although the AWW calculation is intended to fairly reflect a claimant's **future** earning potential, that does not mean it is based on wages that were earned by a claimant or another employee **after** Claimant's injury. *See* Roberts v. McNair Law Firm, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005) (post-injury wage increase not relevant to calculation of AWW).

Furthermore, Claimant's situation is strikingly different from that of the claimant in Sellers. In Sellers, the claimant was sixteen years old when he was injured. The Commission found that "but for the severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician. At the time of his injury, Sellers was a full-time student and was working several part-time jobs. He had worked with his father, who is an electrician, since he was twelve years old." Sellers, 350 S.C. at 191, 564 S.E.2d at 699. Here, in contrast, Claimant had a history of jobs since graduating, moving from vehicle sales, to waiting tables at "various establishments," to construction debris removal, to caddying, to bar sales and auditing inventory. (Hr'g Tr. p. 13, line 5 – p. 16, line 7). While working at Ben Arnold, he was pursuing a degree in engineering at

Trident Tech, (Hr'g Tr. p. 12, lines 15-23), and has now enrolled in law school in Michigan. (2017 Full Comm'n Tr., p. 20, lines 17-19).

With all due respect to Claimant, and acknowledging that he had obtained a CDL license, there is no evidence that he had trained and planned specifically for a career at Alside Revere; in fact, Claimant's primary concern with regard to job placement appeared to be the hourly wage. (Hr'g Tr. p. 42, line 23 – p. 44, line 9). There is no indication that Claimant would have left the position with Ben Arnold, where he was making $11.50 per hour, but for the fact that Ben Arnold let him go due to a scheduling conflict with his Trident Tech school schedule. (Hr'g Tr. p. 17, lines 1-16; p. 20, line 15 – p. 21, line 1).

Claimant asserts that "Lampkin's earnings most accurately reflect what the Appellant would be earning were it not for the injury." However, the Record reveals the speculative nature of this assertion. First, as noted above, Claimant had been dismissed from his previous assignment with Ben Arnold because of conflicts with his school schedule. There is no guarantee the same would not happen with Alside Revere, as Cobb noted. (Cobb Dep. p. 14, lines 1-14) (indicating it was too early to tell whether Claimant's school schedule would interfere with his work schedule). Second, Claimant had worked far too short of a time at Alside Revere for his supervisor to make any prediction as to whether they might offer him a full-time position or not. (Cobb Dep. p. 16, line 24 – p. 17, line 11). Finally, Claimant has a history of moving from one job to another, (Hr'g Tr. p. 13, line 5 – p. 16, line 7), having been unemployed for most of the six weeks between being let go by Ben Arnold and being placed with Alside Revere by Snelling Staffing. (Hr'g Tr. p. 46, lines 15-18).

The above-referenced portions of the record constitute credible, reliable and substantial evidence supporting the Commission's determination that there was no guarantee that Claimant "would have continued with the assignment at Alside Revere." (Commission Decision, p. 11). Claimant cites to his own testimony as support for his assertion that he would have continued working at Alside Revere permanently. His own testimony is understandably self-serving and, in part, based on hearsay, *i.e.*, Claimant's own testimony about what Cobb allegedly told him. The extremely edited snippets from Cobb's deposition are misleading. For example, the full statement from page 10 of Cobb's deposition is "Yeah. We brought him on to be full-time. **Full-time temp agency person** at the time, yes." (Cobb Dep. p. 10, lines 11-12) (emphasis added).[22] When asked whether he had had any discussions with Claimant about the possibility of him "staying on" at Alside Revere, Cobb's uncontroverted testimony was, "[v]ery early discussed it probably in the initial interview that if he worked out, we would make him a permanent employee, but basically that was about it ... I know he had plans on going back to school. So that would probably – whether it might have interfered with that or not I don't know. Again, it was just too early in it." (Cobb Dep. p. 14, lines 3-14).

> Q: And the temporary employees that you have used through Snelling, is there any guarantee they will receive a permanent job offer from you?
>
> A: No.
>
> Q: It's my understanding that you typically look at performance to determine whether you'll make a job offer?
>
> A: Correct.
>
> Q: In this, I think it was only ten days that John worked for you before his accident. In those ten days, would that have been enough time to determine whether he would have been a permanent employee?

[22] Simply because the position at Alside Revere is permanent does not mean Claimant himself would have filled that position permanently.

A: No.

Q: Typically, now long before you make that decision?

A: I usually don't do anything prior to 60 days.

(Cobb Dep. p. 16, line 24 – p. 17, line 14).

Claimant's arguments regarding "at-will employment," and that terminations are "incidental to normal employer/employee relations,"[23] are no more than an attempt to side-step the fact that, during his assignment to Alside Revere, he was employed by a temporary employment agency, Snelling Staffing. He readily acknowledged this fact. (Hr'g Tr. p. 48, lines 9-13).[24] Furthermore, the at-will nature of employment in South Carolina applies to a majority of employees, whether working for a temporary agency or not, and does not provide a basis for re-calculating Claimant's AWW. Certainly, the Legislature, Commission and Courts are aware of the nature of employment in South Carolina and have developed the statutes, regulations and jurisprudence governing how AWW is calculated for all claimants with that reality in mind.

Claimant's arguments about whether a new employment relationship existed are misdirected and irrelevant. At all relevant times, Claimant was in the employment of Snelling Staffing and was placed by Snelling at the Ben Arnold and Alside Revere sites with different hours, different job duties and different hourly rates of pay. (Hr'g Tr. p.

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[23] S.C. Code Ann. § 42-1-160(C). Claimant takes this language entirely out of context, as Section 42-1-160 contains the Act's definition of 'injury" and "personal injury." Subsection C provides that "[s]tress, mental injuries, heart attacks, strokes ... arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations including ... terminations ..." Section 42-1-160(C) has nothing whatsoever to do with AWW or whether Claimant might have been hired at Alside Revere as a permanent employee.

[24] Claimant did not assert before the Commission that either Alside Revere or Ben Arnold were his actual or statutory employers. Instead, Claimant conceded that he was employed by Snelling Staffing. (Hr'g Tr. p. 16, lines 15-20; p. 48, lines 9-13). He is bound by those statements on appeal. JASDIP Props SC, LLC v. Estate of Stewart Richardson, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011) (an issue conceded below cannot be raised on appeal).

45, line 5 – p. 48, line 13). In both instances, he was working in the employment of a temporary staffing agency. The comparable employee wages that were utilized to derive his AWW, (Lampkin, Clark and Atkins), also were derived from employment with the same temporary staffing agency. It is to Claimant's advantage that the Commission used the wages of other Snelling Staffing employees assigned to the Alside Revere site and not employees assigned to both the Alside Revere and Ben Arnold sites, which likely would have reduced his AWW. The briefness of his work with Alside Revere, however, results in two conclusions: 1) any assertion that Claimant would have been hired for the position at Alside Revere on a permanent basis is purely speculative, and 2) the Commission's decision that these circumstances warranted a flexible approach to determining Claimant's AWW is amply supported by the Record and entirely appropriate.

Finally, Claimant takes issue with the actual calculation of the AWW. Referring back to the first alternative under Section 42-1-40, Claimant argues that the Commission must calculate wages by taking into account the "actual number of weeks worked and *parts thereof*." As noted above, the first alternative under Section 42-1-40, where this language is found, is not appropriate in this case because it would produce an AWW that is not fair to **both** the employee **and** the employer. Consequently, that is not the approach applied by the Commission and, as a result, Claimant's insistence that partial weeks be treated in a specific manner is irrelevant. Instead, as noted above, the Commission is afforded "[a]n elasticity or flexibility ... with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett, 271 S.C. at 98, 245 S.E.2d at 131.

The Commission found that twenty weeks of work with Snelling Staffing was insufficient to calculate Claimant's AWW, "especially in light of his assignment and wages changing." The Commission also found that there was no guarantee that Claimant would have continued to a permanent assignment with Alside Revere and that his employer, Snelling Staffing, "provides temporary assignments with a goal of permanent placement." Acknowledging that the third employee wages did not "provide for fifty-two weeks," and were all for Alside Revere, the Commission concluded that "[a] fair and just method to calculate the wages of the Claimant is to take an average of the wages along with ... three other employee wages provided." (Commission Decision, p. 11). Thus, here, Commission made the requisite findings to justify its choice of alternate methods of calculating AWW. *See* Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 187, 736 S.E.2d 672, 676 (Ct. App. 2012) (either the Commission must find or the record must clearly show "the necessary conditions to deviate exist before employing one of the alternative methods of calculating average weekly wage").

Claimant's hourly analysis of Clark's, Atkins' and Lampkin's wage records, and his insistence that each partial day or week be excluded from the calculation of those workers' wages misses the point. The calculation is for the period of time worked – in reality, workers work part-days and part weeks for all kinds of reasons. The reported wages are the reported wages for the relevant periods of time. The Commission properly calculated Claimant's AWW based on the submitted wage reports, which the Commission had before it, and his, Atkins', Clark's and Lampkin's wages were properly divided by the number of periods for which they were paid. (Cl. APA pp. 120-122).

Furthermore, although Claimant now challenges the calculation of Lampkin's average wage, at the November 2012 hearing, both parties agreed that $618.50 was the correct amount. (Hr'g Tr. p. 8, lines 21-22; p. 10, lines 16-17). A party is bound by concessions made at trial. JASDIP Props, 395 S.C. at 641, 720 S.E.2d at 489. Although Claimant successfully moved to have Lampkin's actual pay records from his "subsequent, permanent" employment by Alside Revere entered into the Record, Commissioner James correctly declined to rely on those pay records in order to change Claimant's AWW. (Sept. Commissioner Decision, p. 3). As noted above, that decision was not appealed and is now the law of this case. *See, e.g.*, Creech, 320 S.C. at 564, 467 S.E.2d at 117; Ham, 193 S.C. 66, 7 S.E.2d 712. In any event, post-injury wages are not relevant to the calculation of AWW. *See* Roberts, 366 S.C. at 54, 619 S.E.2d at 456.

This Court should affirm the Commission's determination that Claimant's AWW is $537.91 with a corresponding compensation rate of $358.62.

III. The Commission properly awarded Claimant 34% disability to the left leg pursuant to Section 42-9-30. (Issue Nos. 17 & 18)

The Commission's determination, pursuant to S.C. Code. Ann. § 42-9-30, that Claimant sustained a 34% disability to his left leg is supported by substantial evidence and should be affirmed. Claimant's treating physician, Dr. Ohlson, assigned him a 17% impairment rating to his lower left extremity on August 13, 2012, the date Claimant reached MMI. (APA pp. 52-53) (Form 14-B). Taking the evidence and testimony into account, the Commission doubled that rating to arrive at a permanent partial disability award of 34% to the leg. Even if, solely for the sake of argument, it were possible to draw two inconsistent conclusions from the evidence, the Commission's award is supported by substantial evidence, (APA pp. 52- 53) (Form 14-B), and should be

affirmed. *See* Lee v. Harborside Cafe, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002); *see also* Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive).

Claimant's attempt to compare himself to the claimant in Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005), is misplaced. Claimant cites Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995), suggesting he has been denied equal protection because his disability award was lower than that in Peoples. Grant has no application here, where each claimant bears the burden of proving he or she is entitled to workers' compensation benefits. *See* Shealy v. Algernon Blaire, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967); *see also* Forrest v. A.S. Price Mechanical, 373 S.C. 303, 311, 644 S.E.2d 784, 788 (Ct. App. 2007) (noting that "[t]he law mandates the Commission evaluate each case ... in accordance with its particular facts").

Furthermore, in Grant, the Court found no equal protection violation because the plaintiff, who was not allowed to fill in part of his property, failed to show he was similarly situated to his neighbors, who were permitted to do so. 319 S.C. at 354-55, 461 S.E.2d at 391-92. Similarly, and at a minimum, Claimant is not similarly situated to the claimant in Peoples. Here Claimant's injury was to his left leg/foot whereas in Peoples, the claimant established that the injury to his Achilles tendon also affected his leg. In Peoples, the claimant testified that he had lost 70% of the use of his leg, 364 S.C. at 129, 611 S.E.2d at 530, whereas here there was no similar testimony. Unlike Claimant, the claimant in Peoples underwent two surgeries and a third was recommended, which the claimant refused because it likely would require a fusion of his ankle bones. 364 S.C. at

125, 611 S.E.2d at 528. Here, future surgery was recognized as a possibility but not ordered by Dr. Ohlson. (APA 52-53). Thus, Claimant's superficial attempt to compare the facts in this case to the facts in Peoples, along with his unsupported equal protection argument, should be rejected.

Claimant incorrectly asserts that the Commission erred by awarding him compensation under Section 42-9-30 instead of Sections 42-9-10 or 42-9-20. First, this issue is not preserved for appeal. Claimant's Form 50 alleged injury only to his left foot. (Cl. Form 50). Claimant's Form 58, Pre-Hearing Brief likewise alleged injury only to his left foot, and asserted a 17% impairment rating to the lower left extremity and/or a 50% loss of the left foot. (Cl. Form 58). Although Claimant's Form 30 raised the issue of **the amount of** his disability rating, he did not raise the issue that the wrong statutory section had been applied and/or that he should have been allowed to proceed under Sections 42-9-10 or 42-9-20. (Cl. Form 30). As noted above, matters not raised to the Full Commission in a Form 30 become and are the law of the case. *See, e.g.,* Creech, 320 S.C. at 564, 467 S.E.2d at 117; Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712; *see also* Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561.

Furthermore, Claimant's argument fails for the simple reason that he has not proven injury to two body parts. In the case he relies on, Lee, the hearing commissioner found the claimant had suffered injury to two distinct body parts. 350 S.C. at 77, 564 S.E.2d at 355-56. Where a claimant proves injury to two scheduled members or a scheduled and an unscheduled member, he "may proceed under either the general disability *sections* 42-9-10 and 42-9-20 or under the schedule member *section* 42-9-30 in order to maximize recovery under," the Act. Lee; 350 S.C. at 78, 564 S.E.2d at 356.

However, where a scheduled loss is **not** accompanied by injury to another body part, the claimant is limited to disability payments as set forth in the scheduled member provisions of Section 42-9-30. *See, e.g.*, Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Under the scheduled member provisions, payment is made regardless of whether the claimant suffers any loss of earning capacity as the result of a work-related injury. Id. at 470, 114 S.E.2d at 845. Conversely, even if a claimant is totally unable to earn a living as a result of a compensable injury to a single, scheduled member, he is limited to recovery under the provisions of section 42-9-30. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).[25]

Subsequent cases make it clear that "the Singleton Court intended 'impairment' to encompass a physical deficiency," and requires some injury or impairment to a second body part. Wigfall, 354 S.C. at 106, 580 S.E.2d at 103 (explaining that Singleton stands for the proposition that "an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury"); *see also* Bass v. Kenco Group, 366 S.C. 450, 462-65, 622 S.E.2d 577, 583-85 (Ct. App. 2005) (finding claimant had incurred two compensable injuries); Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (finding the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual disability as a result" of the compensable injury). In this case, Claimant alleged and testified to an injury only to his left foot. (Cl. Form 50) (Cl. Form

[25] The two cases Claimant relies on regarding the proof of total or partial disability, Outlaw v. Johnson Serv. Co., 254 S.C. 486, 176 S.E.2d 152 (1970), and Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 142 S.E.2d 43 (1965), are inapplicable to this case because they were decided under the "economic model" provisions of the Act, now codified at Sections 42-9-10 and 42-9-20, whereas, Claimant's award in this case was made under the "medical model" scheduled member provision, Section 42-9-30.

58) (Hr'g. Tr. p. 51, lines 21-24 (Q: "The only body part you injured in this accident is your left foot; is that correct?" A: "Yes, Ma'am")).

Claimant's assertions regarding his alleged "multiple complications affecting other parts of the body," his hip and his use of a cane were not raised in his Form 50, his Form 58, or his Form 30 and, in any event, do not change the result. His alleged use of a cane does not constitute an injury to a second body part. Claimant has provided no proof of injury to other body parts, including his hip. Patently, just because Claimant alleges "multiple complications affecting other parts of the body," does not mean he has proven injury to a second body part pursuant to Singleton, 236 S.C. at 471, 114 S.E.2d at 845, and its progeny such that he is entitled to pursue an award under either Section 42-9-10 or 42-9-20. Claimant is limited to recovery under Section 42-9-30.

Substantial evidence supports the Commission's 34% disability award. Claimant did not raise this issue in his Form 30 and has not proven that he suffered a compensable injury or impairment to a second body part. He is, therefore, restricted to recovery under Section 42-9-30, and the Commission's 34% disability award should be affirmed.

IV. The Commission properly held that Claimant was at Maximum Medical Improvement as of August 13, 2012. (Issue No. 19)

First, this issue is not preserved for appellate review because Claimant did not raise it on his Form 30. (Cl. Form 30). As noted above, matters not raised to the Full Commission in a Form 30 become and are the law of the case. *See, e.g.,* Creech, 320 S.C. at 564, 467 S.E.2d at 117; Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712; *see also* Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561.

Second, this issue has been conceded by Claimant. Regardless of Claimant's assertions on appeal, he conceded at the November 28, 2012 hearing that he had reached

MMI. (Hr'g Tr. p. 5, lines 13-14). Claimant asserted on his Form 58, Pre-Hearing Brief that he reached MMI on August 13, 2012. (Cl. Form 58). He stated he reached MMI on August 13, 2012 in his March 26, 2013 Brief to the Full Commission. (Brief on Behalf of Claimant/Appellant, pp. 7-8). Parties are bound by the statements and concessions made on the record and in briefs filed by their counsel. *See* JASDIP Props., 395 S.C. at 641, 720 S.E.2d at 489 ("[a]n issue conceded in the trial court cannot be argued on appeal"); Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S.C. 550, 558, 684 S.E.2d 79, 784 (Ct. App. 2009) (parties are bound by concessions made in their briefs); State v. Dicapua, 373 S.C. 452, 456, 646 S.E.2d 150, 152 (Ct. App. 2007) (parties are "bound by the actions and concessions of counsel"). Therefore, Claimant is barred from challenging the finding that he reached MMI on August 13, 2012.

Furthermore, whether a claimant has reached MMI is a factual determination to be made by the Commission. Curiel v. Environmental Mgmt Servs. (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). So long as the Commission's finding is supported by substantial evidence, it should be upheld on appeal. McGuffin, 307 S.C. at 186, 414 S.E.2d at 163; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. Here, the Commission's determination that Claimant reached MMI on August 13, 2012 is supported by reliable, probative and substantial evidence in the form of his treating physician's medical notes. Dr. Ohlson stated, without limitation, that "[p]atient has reached maximum medical improvement." (APA pp. 52-53) (Form 14-B).

Claimant erroneously asserts that Dr. Ohlson's opinion that he had reached MMI was "from an orthopedic standpoint" only. Dr. Ohlson, who was Claimant's authorized treating physician, did not limit his opinion in any way. (APA pp. 52-53). He did refer

Claimant to a chronic pain management specialist; however, that does not mean Claimant was not at MMI for his work-related injury. *See, e.g.*, Dodge v. Broccoli, 334 S.C. 574, 582, 514 S.E.2d 593, 596-597 (Ct. App. 1999) (the fact that a claimant continues to receive medical care does not preclude a finding that he has reached MMI).

Even if there is conflicting medical evidence in the Record, which Respondents do not concede, the Commission's determination is supported by substantial evidence, (APA pp. 52-53) (Form 14-B), and must be affirmed. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528.

This Court should affirm the Commission's determination that Claimant reached MMI on August 13, 2012.

V. The Commission properly awarded Respondents credit for Total Temporary Disability benefits paid after Claimant reached maximum medical improvement. (Issue Nos. 12 & 13)

Claimant argues that the Commission misapplied Curiel. However, Claimant mis-reads Curiel, which does **not** stand for the proposition that, once a claimant reaches MMI, he is entitled to TTD so long as he is not able to work and/or so long as he did not exaggerate or obfuscate the degree to which he was injured. Instead, in Curiel the issue was whether the claimant was entitled to TTD for the period from the date he was fired, January 21, 2002, up and until the date he reached MMI, or October 3, 2002. Thus, even in Curiel, the proposed TTD would not have been paid after the claimant reached MMI, but only up to that date. 376 S.C. at 29-30, 655 S.E.2d at 845-86. Here, Claimant is arguing that, even once he reached MMI, he was entitled to continued payments of TTD because he was not working. That is not the holding in Curiel and is not the law in South Carolina.

The Commission correctly applied the law as stated in Curiel and elsewhere:

> Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. [citation omitted] Accordingly, **the date of maximum medical improvement signals the end of entitlement to temporary total benefits.**

Curiel, 376 S.C. at 29, 655 S.E.2d at 485 (emphasis added). Where an employer has continued to pay TTD after the date a claimant reaches MMI, the employer may be awarded credit for those TTD payments made after the MMI date. *See, e.g.*, Hendricks v. Pickens County, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999) (once a claimant reaches MMI, it is "appropriate to terminate TTD benefits in favor of either permanent partial or permanent total disability benefits"); O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 27-28, 459 S.E.2d 324, 326 (Ct. App. 1995) (upholding credit of TTD payments back to the date of MMI, despite the fact that the claimant continued to receive pain medications and was not able to return to work).[26]

Claimant's reliance on Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994) is misplaced. Swinton involved an employer who unilaterally suspended TTD payments under former Reg. 67-504, which required proof that the claimant both had reached MMI and was capable of returning to work without restriction. Neither that regulation nor fact pattern is at issue in this case and, therefore, both the reasoning and result reached in Swinton are inapposite.

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[26] Claimant's citation to and discussion of cases dealing with *stare decisis*, is perplexing at best. To the extent he is arguing that the Commission should not follow Curiel, he fails to note the numerous other South Carolina decisions that are consistent with the holding in Curiel, and that should be followed here.

The provisions applicable to this claim for termination of TTD are now codified at S.C. Code Reg. § 67-506. Reg. 67-506(A) provides that, "[d]isability is presumed to continue until the employee returns to work, **except as provided here**." S.C. Code Reg. § 67-506(A) (emphasis added). Reg. 67-506(B) provides that TTD may be stopped when the claimant reaches MMI and the Commission finds the employer may terminate TTD. S.C. Code Reg. § 67-506(B). There is no requirement that a claimant be provided with full-time employment, or that his injury be susceptible to "corrective treatment."

Thus, this Court should affirm the Commission's award of a credit to Respondents for TTD paid to Claimant after the date he reached MMI.

VI. The Commission properly rejected Claimant's request for penalties and/or sanctions related to medical treatment and/or alleged late payments. (Issue Nos. 11 & 12)

Claimant incorrectly asserts that the Commission erred in not applying penalties against Respondents. His arguments in this respect are somewhat confusing in that he details his complaints about medical treatment as well as alleging late payment of both TTD and Temporary Partial Disability. First, this issue is not preserved for appellate review. Claimant did not raise these allegations or seek sanctions in either his Form 50 or Form 58. (*See* Cl. Form 50) (Cl. Form 58). Although Claimant raised the issue of late payment of TTD in his Form 30, he abandoned it in his March 26, 2013 Brief on Behalf of Claimant/Appellant, where Claimant reduced his exceptions on appeal to three arguments that excluded the sanctions issue. (Brief on Behalf of Claimant/Appellant).[27]

Furthermore, both of these issues are meritless. With regard to medical treatment, Claimant's complaints relate to care provided prior to the November 28, 2012 hearing

[27] Mixson, 304 S.C. at 33, 402 S.E.2d at 894 (explaining that, "[t]he failure to argue an exception in a brief ordinarily amounts to an abandonment of it").

and, in fact, much of it pre-dates his first Form 50, filed in May 2012. There were no allegations of refusal to provide medical care in either Claimant's Form 50 or Form 58. (Form 50) (Cl. Form 58). At the November 28, 2012 hearing, Commissioner James clarified that the hearing concerned permanency and not Claimant's medical treatment. (Hr'g Tr. p. 33, line 5 – p. 34, line 11 (advising Claimant that she would look at the pictures of his foot wound, but "what we're determining is permanency")).[28] Under the Act, "there is no liability on the part of an employer to furnish medical treatment to an injured employee beyond ten weeks from the date of injury unless in the judgment of the Commission it 'will tend to lessen the period of disability.'" Dykes v. Daniel Constr. Co., 262 S.C. 98, 109, 202 S.E.2d 646, 652 (1974). There is no Commission order directing any of the medical care that Claimant alleges was improperly refused or denied. There simply is no evidence of or legitimacy to Claimant's claims that Respondents failed to provide "reasonably ... required" medical care. S.C. Code Ann. § 42-15-60.

With regard to his allegations regarding late payment, the date-stamps on Claimant's checks, (APA pp. 91-109), are unidentified and, therefore, lack any probative value. There was no testimony elicited at the hearing indicating who put the date-stamps on the copies of Claimant's checks or for what purpose.[29] It is more likely than not that

[28] Furthermore, with respect to Claimant's attempt to move for penalties regarding medical treatment at the July 8, 2013 hearing, the Sept. Hearing Commissioner Decision specifically held that "any and all issues regarding additional discovery and motions were not before the undersigned at the Hearing on July [8]th, 201[3]," (Sept. Commissioner Decision, p. 5), which was not appealed. Thus, whether right or wrong, the decision to not award penalties or sanctions is the law of the case. Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561.

[29] Claimant's arguments at this stage as to what those date stamps are or are not do not constitute facts in the Record. Argument of counsel is not evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991); S.C. Code Ann. § 1-23-380(4) ("[t]he review ... must be confined to the record"); Martin v. Rapid Plumbing, 369 S.C. 278, 288, 631 S.E.2d 547, 553 (Ct. App. 2006) (appellate "review is restricted to the evidence considered by the appellate panel in reaching its decision," and may not rely on evidence not considered by the Commission).

these are the dates on which Claimant provided his attorney with a copy of the checks than that they are the date that Claimant himself received them. Any conclusion that Claimant was paid benefits late based on unexplained and unidentified date stamps on copies of checks would amount to impermissible speculation. *E.g.*, Coleman, 245 S.C. at 630-31, 142 S.E.2d at 45. Claimant mistakenly asserts that Respondents were allowed to stop payment pursuant to S.C. Code Ann. § 42-9-260. (*See* Curiel, 376 S.C. at 29, 655 S.E.2d at 485 (entitlement to TTD ends at MMI)). Finally, without any support for his argument that he is entitled to penalties, Claimant's assertion that he is entitled to a ten percent increase in compensation under S.C. Code Ann. § 42-9-90 is misplaced and also should be rejected.

This Court should deny Claimant's request for penalties and/or sanctions.

VII. The Commission properly denied Claimant's attempts to submit additional evidence and/or move to compel treatment at the July 8, 2013 hearing. (Issues Nos. 1, 2, & 4)

First, these issues are not properly before the Commission as they relate to the July 8, 2013 hearing and subsequent Sept. Commissioner Decision. In that Decision, Commissioner James held that, "any and all issues regarding additional discovery and motions were not before the undersigned at the Hearing on July [8]th, 201[3], as the sole issue to be decided was the impact of the pay records of Jared Lampkin on the determination of Claimant's average weekly wage." (Sept. Commissioner Decision, p. 5). That Decision was not effectively appealed and, therefore, is not subject to appellate review. Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712; *see also* Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561.

Nonetheless, and solely out of an abundance of caution, Respondents address the arguments raised by Claimant that he should have been allowed to subpoena witnesses and submit documents, including his deposition transcript and other "rebuttal" evidence, at the July 8, 2013 hearing. Claimant cites Reg. 67-613(a)'s requirement that parties "shall arrange and present all evidence at the hearing." He also cites S.C. Code Ann. § 1-23-320(E) as authorizing him to present whatever additional evidence he wanted to add to the Record at the remand hearing. However, Claimant was represented by counsel at the November 28, 2012 hearing. Claimant had the opportunity and, in fact, was **required** to present all of the evidence that he deemed necessary at **that** initial hearing. The admission of Lampkin's additional pay records did not authorize or entitle Claimant to a full *de novo* hearing. Instead, as was repeatedly explained to him, the remand to the Hearing Commissioner was solely to consider the effect, if any, that Lampkin's pay records from Alside Revere had on the calculation of Claimant's AWW, (Letter from Valerie D. Deller to Allison Nussbaum, dated May 29, 2013) (Notice of Hearing, dated June 19, 2013 (indicating the remand was "on issues as set forth by Full Commission Order")), and not, as Claimant suggests, broadly on "all issues on review."

In addition, the evidence Claimant proposed to submit does not meet the standard set out in Reg. 67-707. At a minimum, his deposition was not newly discovered but, in fact, was known to him prior to the November 28, 2012 hearing before Commissioner James. In his May 10 Motion, Claimant admitted that he was under the mistaken impression that his deposition had been admitted into the Record – this explanation does not meet the requirements of Reg. 67-707. The Hearing Commissioner properly denied Claimant's attempt to submit his deposition at the remand hearing. (July 8 Hr'g Tr., p.

27, line 17 – p. 30, line 23; p. 44, line 12 – p. 45, line 13; p. 47, line 1 – p. 48, line 25). He had no right, pursuant to Rule 32, SCRCP[30] or otherwise, to submit it at the July 8, 2013 hearing. Again, to the extent he believed it was relevant, his deposition and other evidence[31] should have been submitted prior to or at the November 28, 2012 hearing.

Claimant asserts, incorrectly, that because the standard for admitting additional evidence after the November 28, 2012 hearing is that "the new evidence is of the same nature and character required for granting a new trial," Reg. § 67-707(C), that means he was entitled to a *de novo* hearing after Lampkin's Alside Revere pay records were accepted. While the standard for after-acquired or discovered evidence is understandably high, in light of the requirement that parties "arrange and present all evidence at the hearing," S.C. Code Reg. § 67-613(A), that does not mean that the result of admitting specific after-acquired evidence requires a second, full-blown evidentiary hearing or that Claimant was then entitled to submit whatever additional evidence he desired. As noted above, Claimant had the opportunity to and was obligated to present all of his relevant evidence at the November 28, 2011 hearing.

Claimant makes the illogical argument that all of the documents he sent to the Commission under cover of a motion, even motions that were denied, became part of the official Record. If this were the case, Reg. 67-707 and the standards for admitting additional and newly discovered evidence would be meaningless. Instead, when the

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[30] Claimant apparently misunderstands the function of Rule 32, SCRCP. A deposition may be used to impeach a witnesses' own trial testimony; however here, he was attempting to submit his deposition transcript to contradict the deposition testimony of another witness, Cobb.

[31] Citing no case law or other authority, Claimant asserts that, "[m]edical evidence is presumed to be relevant, material and non-repetitive in hearings before the Commission." This is not the test for admitting after discovered evidence. *See* Reg. 67-707(C). In addition, an argument not supported with case law is deemed abandoned. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

Commission granted his motion to include Lampkin's pay records, those and only those records were admitted into the official Commission Record. And, as noted above, the remand to Commissioner James was solely to determine the effect, if any, of those pay records on the calculation of Claimant's AWW. It was not an invitation for Claimant to attempt to completely retry his case.

Nonetheless, Claimant takes issue with the scope of the July 8, 2013 hearing, arguing that it was unlawful to limit that hearing to consideration of the newly-admitted Lampkin pay records. Reg. 67-707(C)(2)(d) provides that, if a motion to admit additional and newly discovered evidence is granted, "[t]he case will be remanded to the original Hearing Commissioner who may, *unless otherwise provided*, reconvene the hearing or admit the deposition of a witness into the record." S.C. Code Reg. § 67-707(C)(2)(d) (emphasis added). Here, contrary to Claimant's assertion, the hearing notice indicated that it was a "[r]emand on issues as set forth by Full Commission Order." (Notice of Hearing, dated June 19, 2013). The Commission also clarified for the parties that the remand was "solely based on the prior Judicial Conference Order that granted the Claimant's Motion for Additional Evidence." (Letter from Valerie D. Deller to Allison Nussbaum, dated May 29, 2013). Upon inquiry, Claimant was repeatedly advised that the remand hearing was solely to consider the newly admitted evidence.[32] In short, the Commission made clear to the parties that the remand was for a specific purpose, which it was authorized to do under Reg. 67-707(C)(2)(d).[33]

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[32] (Email correspondence between John McDaniel and Tamara Morris, "Re: wcc file # 1116275", dated June 26, 2013 and June 27, 2013).

[33] Claimant's assertions regarding bifurcation and limitations on the Commission's authority are not supported by any case law, McCracken, 346 S.C. at 92, 551 S.E.2d at 238, and, in any event, are without merit. The "Commission has broad discretion in procedural matters." Marquard v. Pacific Columbia Mills, 278 S.C. 323, 324, 295 S.E.2d 870, 871 (1982) (*see also* Email

Next, Claimant argues that he was denied due process when Commissioner James denied his attempt to subpoena two employees of Snelling Staffing and the claims adjuster for Snelling's insurer at the July 8, 2013 remand hearing.[34] At that hearing, Commissioner James clarified that the remand was solely to consider the recently-submitted Lampkin pay records from Alside Revere and their impact, if any, on the AWW calculation. (July 8 Hr'g Tr. p. 3, line 21 – p. 4, line 1). She properly granted Respondents' Motion to Quash, as the subpoenaed individuals were not Alside Revere employees and could not speak to anything regarding employment records from Alside Revere. (July 8 Hr'g Tr. p. 4, line 15 – p. 7, line 24; p. 16, line 13 – p. 18, line 7).

Claimant's arguments regarding the types of information Pascutti, Baldwin and Service would have provided are not supported by any facts in the Record and, instead, are incorrect (other than with respect to the facts that Pascutti and Baldwin worked for Snelling, and Service worked for the insurer). (*See* July 8 Hr'g Tr. p. 8, line 21 – p. 10, line 5 (Claimant speculating as to Pascutti and Baldwin's roles in "facilitating" Lampkin's permanent position at Alside Revere)).

This Court should dismiss Claimant's arguments as meritless.

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correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re FW; FW: remanded or bifurcated? SCWCC file #1116275," dated Oct. 9, 2013 (advising Claimant that bifurcation was a process unrelated to workers' compensation cases and explaining that "the issue of after discovered evidence had been separated from the remaining issues on appeal and remanded to the single Commissioner")).

[34] Neither Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012) nor State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), cited by Claimant, is applicable to this case. The issue in Adams was the method by which a portion of the initial hearing transcript, which was inaudible in part, was reconstructed. Mouzon involved a criminal trial wherein the defendant, who presented no evidence during trial, was denied his right to make the final closing argument to the jury, to which he was entitled.

VIII. The Commission properly rejected Claimant's attempt to file an Amended Form 30. (Issue No. 6)

Claimant's first attempt to submit an Amended Form 30 was both untimely, at least as to the Jan. Commissioner Decision, and defective as to both it and the Sept. Commissioner Decision because he failed to submit the required filing fee. Section 42-17-50 provides, in pertinent part, that an application for review must be filed with the Commission "within fourteen days from the date when notice of the award shall have been given," and that "[e]ach application for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review." S.C. Code Ann. § 42-17-50; *see also* S.C. Code Reg. §§ 67-701 & 67-702. The requirements of Section 42-17-50 delineate the Commission's appellate jurisdiction, and the Commission cannot expand its authority. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 188-189, 714 S.E.2d 547, 549-550 (2011) (the fourteen-day window for appeals is jurisdictional and cannot be extended).

Pursuant to S.C. Code Ann. § 42-17-50, the deadline to file an appeal of the Jan. Commissioner Decision with the Full Commission was January 18, 2013. Claimant, who was represented by counsel at that time, filed a timely Form 30, along with the appropriate filing fee, raising six issues on appeal to the Full Commission. (Cl. Form 30). Claimant filed an opening Brief with the Full Commission, Respondents filed their Brief, and Claimant filed a Reply Brief.[35]

Claimant's purported Amended Form 30 was dated October 9, 2013 and emailed to the Commission on October 12, 2013. (Amended Form 30). Filed over 10 months after the Jan. Commissioner Decision, it was neither timely to appeal that decision nor

[35] *See* (Brief on Behalf of Claimant/Appellant) (Respondents' Brief to the Full Commission) and (Appellant's Reply to Respondents' Brief).

accompanied by the requisite filing fee. Claimant's Amended Form 30 attempted to raise a number of issues, at least eight of which directly challenged the Jan. Commissioner Decision. It was clearly outside the 14-day window to appeal the Jan. Commissioner Decision and filed after the parties had fully briefed that appeal.

The Commission's regulations do not provide for amended Form 30s. *Compare* S.C. Code Reg. § 67-613 (amending requests for hearing and answers via Forms 15, 50 and 52) *with* S.C. Code Reg. § 67-701 (Form 30 request for review hearing with no provisions for amended filings). Claimant's reliance on Reg. 67-613(B)(4) is misplaced. The quoted portion specifically states that "if the nature of the claim or the relief requested changes, file a new **hearing** request according to Reg. 67-207 unless Reg. 67-610 applies." S.C. Code Reg. § 67-613(B)(4) (emphasis added). Reg. 67-207 specifically refers to hearing requests via Forms 15, 50 or 52, and does not refer to or implicate Form 30 appeals in any way. Reg. 67-610 likewise applies to "Requests for Hearing" and "Answers" and not Form 30 appeals. Furthermore, Reg. 67-610(B) allows a party to amend a form "once as a matter of course at any time before or within thirty days after it is served. Otherwise a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party." S.C. Code Reg. Ann. § 67-610(B). Here, even if this section applied to his Form 30 request for appellate review, which it does not, Claimant did not file his Amended Form 30 within thirty days of his original Form 30 and did not obtain either leave of the Commissioner or Respondents' consent. Claimant's Amended Form 30 was, therefore, ineffective to raise new or additional issues regarding the Jan. Commissioner Decision.

Although Claimant's Amended Form 30 may have been timely to appeal issues decided in the Sept. Commissioner Decision, he failed to submit the statutorily-required filing fee with his Amended Form 30, as required by Section 42-17-50, which requires that "[e]**ach application** for commission review" be accompanied by the filing fee," S.C. Code Ann. § 42-17-50 (emphasis added), and did not file a Form 32 request for waiver of filing fees.[36] As a result, he failed to effectively appeal the Sept. Commissioner Decision. Thus, the unappealed Sept. Commissioner Decision is the law of the case with respect to the issues decided therein. *See, e.g.*, Creech, 320 S.C. at 564, 467 S.E.2d at 117; Green, 311 S.C. at 80, 427 S.E.2d at 687; Ham, 193 S.C. 66, 7 S.E.2d 712; *see also* Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561. As a result, findings of fact and Conclusions of Law set forth in the Sept. Commissioner Decision cannot be challenged on appeal now.

In addition, because the Commission properly rejected Claimant's attempt to file an Amended Form 30 and accompanying attachments, as well as his other attempts to add material to the Commission Record, those items may not be considered by this Court on appellate review.[37] It is well-established that appellate review of a Commission decision is confined to the record before the Commission. S.C. Code Ann. § 1-23-380(4) ("[t]he review ... must be confined to the record"); *see also* Terry v. South Carolina Dept. of Health & Env'l Control, 377 S.C. 569, 574, 660 S.E.2d 291, 294 (Ct. App. 2008) (appellate review of agency decisions "is confined to the record ..."). Moreover, "[t]his

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[36] Claimant was aware of the Form 32 process. *See* Note 4, *supra*. Moreover, a *pro se* litigant "who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003); Goodson v. American Bankers Ins. Co. of Fla., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1998) (*pro se* litigants held to the same standard as attorneys).

[37] This includes, without limitation, the materials attached to Claimant's May 6, 2013 and May 10, 2013 motions to admit evidence, his Amended Form 30 and attachments, proposed APA pp. 340-351, Dr. Tavel's MMI dated July 22, 2013, and Claimant's Affidavits I, II and III, *etc.*

Court's review is restricted to the evidence considered by the appellate panel in reaching its decision," and the Court may not rely on evidence not considered by the Commission. Martin, 369 S.C. at 288, 631 S.E.2d at 553.

This Court should hold that the Appellate Panel properly rejected Claimant's Amended Form 30, including the attachments, as untimely filed to appeal the Jan. Commissioner Decision and ineffectively filed to appeal both the Jan. and Sept. Commissioner Decisions. Furthermore, this Court should restrict its review to the Record before the Commission and disregard all of Claimant's arguments that are based on non-Record evidence.

IX. Claimant's remaining arguments regarding alleged fraud, procedural defects and Due Process rights violations are meritless. (Issues Nos. 2, 3, 5, 7, 8, 9 & 10)

First, to the extent these issues relate to the Sept. Commissioner Decision, they are not properly before this Court because that Decision, which was not appealed, is now the law of this case, *see, e.g.*, Creech, 320 S.C. at 564, 467 S.E.2d at 117; Ham, 193 S.C. 66, 7 S.E.2d 712; Nucor Corp., 410 S.C. at 514-515, 765 S.E.2d at 561, and cannot be challenged on appeal.

Nonetheless, and solely out of an abundance of caution, Respondents address Claimant's various arguments. Claimant's allegations regarding allegedly incorrect information on the Form 20, as well as his unfounded assertion concerning Respondents' Counsel's statements at the July 8, 2013 hearing, are both unsupported by the Record and incorrect. Claimant filed no motion with regard to the errors he claims were made on the Form 20, and his attempts to raise this issue at the July 8, 2013 hearing were properly denied. As counsel explained, the dispute appears to revolve around whether Claimant's

wages with Snelling should be divided over 20.7143 weeks, as is the case on the Form 20, or over 19 weeks, which Claimant believes to be correct. (July 8 Hr'g Tr. p. 38, lines 9-18). Respondents note that Commissioner James had all of Claimant's pay records before her when she determined the proper AWW. (Cl. APAs pp. 61-90) (Defs' APAs). Claimant should be cautioned about making unfounded accusations of Counsel "misleading the court." There is no fraud; instead, the parties disagree over the proper method for calculating Claimant's AWW.

Furthermore, by his own admission, the alleged "evidence" he relies on as the basis for his fraud allegations pre-date the November 28, 2012 hearing, (July 8 Hr'g Tr. p. 40, lines 13-25), and should have been raised and presented at that hearing. S.C. Code Reg. § 67-613(A) ("[e]ach party shall arrange and present **all** evidence at the hearing") (emphasis added). It was not. Claimant is not entitled to on-going multiple bites at the apple simply because he is dissatisfied with the results of the first hearing.

In addition, Claimant asserts that his averments of insurance fraud should have been reported to the State Attorney General and the Department of Insurance. First, unless the Commission suspects insurance fraud has been committed, it is under no obligation to report meritless claims of fraud. Section 42-9-440 provides that, "[t]he commission shall report all cases of suspected false statement or misrepresentation, as defined in Section 38-55-530(D), to the Insurance Fraud Division of the Office of the Attorney General for investigation and prosecution, if warranted, pursuant to the Omnibus Insurance Fraud and Reporting Immunity Act." S.C. Code Ann. § 42-9-440. A disagreement about the proper way to calculate wages on a Form 20 does not constitute a misstatement, misrepresentation or fraud.

Contrary to Claimant's assertions otherwise, he has not been denied any due process to which he is entitled. Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Jones v. South Carolina Dept. of Health & Envt'l Control, 384 S.C. 295, 316, 682 S.E.2d 282, 294 (Ct. App. 2009). Due process "requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). In order to prevail on a claim that he was denied due process in an administrative setting, Claimant must show he has been substantially prejudiced. Jones, 384 S.C. at 316, 682 S.E.2d at 294. Claimant has not been prejudiced by the process at the Commission. Instead, he was provided proper notice, an initial hearing at which he was allowed and obligated to present all his evidence and to examine/cross-examine any witnesses, a remand hearing, two appellate Panel hearings and rulings on numerous motions. He relied heavily on the Commission staff throughout the Commission proceedings.[38] Claimant has not been denied due process.

Claimant alleges that he had improper notice of the 2017 remand hearing before the Appellate Panel. However, this Court's order instructed the Commission to provide Claimant with "the required thirty days' notice and his review hearing." (Unpublished Opinion, Appellate Case No. 2014-000186, June 22, 2016).[39] This Court declined to rule on any other issues. Thus, the "review hearing," was on the same issues that were heard

[38] (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re FW; FW: remanded or bifurcated? SCWCC file #1116275," dated Oct. 9, 2013).

[39] Claimant erroneously suggests that this Court's remand was because "14 days was insufficient time between the issuance of the decision and order from Commissioner James second hearing and the full commission review hearing." Instead, the remand was due to the Commission's failure to provide him a full 30 days' notice, as is required by Reg. 67-704.

in October 2014, albeit with the required 30 days' notice. As had been repeatedly explained to Claimant before, that review hearing was to determine the issues raised on his Form 30.[40] Nothing about the remand changed the scope of the Appellate Panel's review, as this Court did not decide any substantive issues.

Claimant's argument regarding the scope of the remanded Appellate Panel review restates his arguments that his Amended Form 30 should have been accepted and considered, which Respondents address above. Claimant indeed was required to submit all his evidence at the initial November 28, 2012 hearing, with the exception of the Lampkin Alside Revere pay records that were admitted pursuant to Reg. 67-707. That does not mean he was required or allowed to submit additional documentation at the remanded Appellate Panel hearing or that the Commission was required to admit the same. To the extent Claimant argues that the Commission somehow misled him into believing his Amended Form 30 had been accepted but later held that it was not, his arguments lack both merit and support. (2017 Full Comm'n Tr. p. 9, line 6 – p. 10, line 15 (Appellate Panel confirming that Claimant's Amended Form 30 was not part of the Commission file); p. 14, line 1 – p. 16, line 21 (Claimant arguing that his Amended Form 30 should be accepted but receiving no ruling on that issue)).

Claimant alleges that the Commission failed to provide any reason for denying his request for extended oral argument. However, they explained that they had the extensive briefings and the Record, and did not see a need for extended oral argument. In addition,

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[40] *See* (Email correspondence between Virginia Crocker, John McDaniel, and Allison Nussbaum, "Re: receipt of order 'scwcc # 1116275'", dated Oct. 4, 2013 (explaining the matter on appeal was limited to the issues raised on his Form 30)) (Email correspondence between Keith Roberts, John McDaniel, Allison Nussbaum, Virginia Crocker and Gary Cannon, "Re: remanded or bifurcated? SCWCC file # 1116275," dated Oct. 8, 2013 (same)) (Email correspondence between Keith Roberts, John McDaniel, Gary Cannon, Virginia Crocker, Allison Nussbaum, "Re: Application for notice wcc #1116275," dated Oct. 10, 2013 (same)).

the Appellate Panel allowed Claimant, over objection, to reserve the majority of his time for his rebuttal argument, even though he bore the burden of going forward with his appeal. (2017 Full Comm'n Tr., p. 4, line 16 – p. 6, line 22; p. 23, lines 13-14). Again, Claimant has been provided with all the due process, and more, to which he is entitled.

Claimant misreads Section 1-23-350, which provides, in pertinent part that, "**[i]f, in accordance with agency rules**, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." S.C. Code Ann. § 1-23-350 (emphasis added). The Commission does not have rules or regulations governing or allowing for each party to submit proposed findings of fact in the workers' compensation context. Thus, Section 1-23-350 does not require the Commission to rule separately on the nearly three-hundred proposed findings of fact submitted by Claimant.[41] Furthermore, Claimant's suggestion would render workers' compensation proceedings uncontrollably unwieldy. Parties could submit lengthy proposed findings, as Claimant has done here, that would require the Commission essentially to rehear the entire matter each time it proposed to enter a written decision.

Finally, Claimant objects to the Commission requesting Counsel for Respondents to draft a proposed Decision and Order. However, what he fails to note is that the Request for Proposed Order specifically and unambiguously reserves to the Commission "the right to modify and/or delete any or all portions of the submitted Decision and Order."[42] The 2017 Commission Decision was signed by all three members of the Appellate Panel, signifying their approval of the decision as issued. (2017 Commission Decision, p. 14).

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[41] *See* Claimant's Aug. 30, 2013; Dec. 2, 2013; and, April 11, 2017 proposed findings.

[42] (Email correspondence between Eugenia Hollmon, Allison Nussbaum, Helen Hiser, John McDaniel, and Marguerite Karnilaw, "Re: McDaniel", dated April 5, 2017).

Courts and administrative bodies often request one side or the other to draft a proposed order. There is nothing wrong, unconstitutional or unethical in doing so, so long as the decision-maker makes the final decision and reserves the right to revise any proposed order, which was the case here. This argument has been considered by this Court in other cases and found to have no merit. Brown v. Peoplease Corp., 402 S.C. 476, 486, 741 S.E.2d 761, 766 (Ct. App. 2013).

This Court should reject Claimant's due process arguments as meritless and unsupported.

CONCLUSION

For all the reasons stated herein, Respondents respectfully request that this Court affirm the Commission Decision in its entirety and dismiss this appeal.

Respectfully submitted,

August 30, 2017

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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee,.....Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier,.....Respondents.

PROOF OF SERVICE

I certify that on the 30th day of August, 2017, I served the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

John C. McDaniel
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Kathy Aldrich

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Reply To
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August 30, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: John McDaniel v. Career Employment Professionals d/b/a Snelling Staffing Services and United Wisconsin Insurance Company c/o United Heartland
Date of Accident: November 21, 2011
WCC File No.: 1116275
Our File No.: 20638.12027
Claim No.: 041100021048
Appellate Tracking No.: 2017-001217

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Brief of Respondents;
2. original and one copy of the Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: John C. McDaniel, *pro se*

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The Honorable Jenny Abbot Kitchings
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