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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

S.C. SUPREME COURT

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

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

v.

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

AFFIDAVIT OF PRESTON F. MCDANIEL

The affiant, Preston F. McDaniel, having been duly and properly sworn, do depose and state:

1. That I am Counsel for the Petitioner in the above-referenced matter.

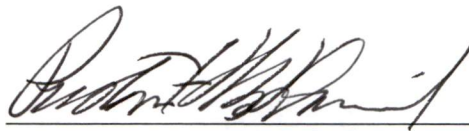
2. That during the week of August 28th, 2017, while a Petition for Rehearing was pending before the SC Supreme Court, Petitioner's Counsel became aware on or about Tuesday, August 29th, of certain comments, statements, positions and advice that had been given by members of the SC Workers' Compensation Commission in reference to the above-referenced matter which was

pending decision by the SC Supreme Court in reference to the Petitioner's Petition for Rehearing.

3. That on or about August 31, 2017, Counsel for the Petitioner was provided with a copy of an article written by an attendee of that conference confirming the information as to the comments, statements, opinions, position and tips that had been given by the Commission in reference to this Court's Opinion and decision in the above-referenced matter reversing and remanding this case to the Commission for a new hearing on specific issues. A copy of that article is available on the Internet at: www.yrclaw.com/YCR-Blog/July-2017/Clemmons-Wars-A-New-Hope.aspx and is attached hereto and incorporated herein by reference as Exhibit "A".

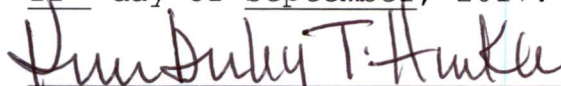
4. That the Petitioner received a copy of this Court's decision denying the Petition for Rehearing on Tuesday, September 5, 2017.

FURTHER THE AFFIANT SAYETH NOT.



Preston F. McDaniel

SWORN TO BEFORE ME this
12th day of September, 2017.



Notary Public for South Carolina (L.S.)
My Commission Expires: 4/26/20



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Clemmons Wars: A New Hope?

I attended the summer meeting of the South Carolina Defense Trial Attorneys Association in Asheville this past weekend. Five of our seven commissioners attended as well, and the Clemmons case dominated every aspect of every discussion. It was sort of like being at the Twelve Oaks BBQ right before the Civil War started, except instead of talking about "war, war, war," we talked about "Clemmons, Clemmons, Clemmons." We did get some insight from our commissioners.



Post By Robert P. Gruber

First of all, the Commission does not like the Clemmons decision nor do they like the position that they have been put in with this recent remand Order. It does not make sense for a claimant to be permanently and totally disabled while they are still working, especially to the group of people charged with overseeing the compensation paid to injured workers. Second of all, the Commission does not know how it will address regional spine ratings. Regional spine ratings do not exist in our South Carolina Workers' Compensation statute, and the issue of regional spine ratings did not appear in the Clemmons case until the oral arguments before the Supreme Court. These two anomalies will create a population of the "Working Disabled" to rival the "Walking Dead" if left unchecked! But necessity being the mother of all invention, the Commission gave some tips on how to comply with (or circumvent) the Clemmons decision:

1. We must make sure that any back ratings we send to the Commission are ratings to the spine and not to any region of the spine. This is particularly important for cervical spine injuries where a 25% impairment of the whole person would end up being a 71% rating to the cervical spine. A claimant who has had a cervical fusion would end up receiving a 25-28 percent impairment of the whole person under the 5th Edition of the AMA Guides. There are many, many people working and performing their activities of daily living just fine with a cervical fusion. But if the 25% rating is converted to a regional spine rating that person would be presumed permanently and totally disabled under the Clemmons decision. Therefore, it may be necessary for your defense lawyers to depose the doctors who assigned the impairment ratings in back cases – at least until either the Appellate Courts or our legislature address the issue of regional spine ratings. This will increase the cost of defending back cases, but the increase in cost will pale in comparison to the increased exposure associated with a regional spine rating.
2. Stop talking about "work." This seems counter intuitive in the context of "workers' compensation," but the Commission and the defense bar have long recognized that a claimant's employability or wage earning ability really aren't relevant to a determination of

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permanent partial disability schedule loss cases — including back cases. This is because the legislature defined the disability levels for each body part when it assigned each body part a maximum number of weeks. However, the physical and mental tasks that a claimant must perform in order to work are certainly relevant to a determination of permanent partial disability for scheduled loss injuries. Therefore, the Commission recommends that we present our evidence of a claimants' ability to work in terms of when they have to get out of bed in the morning to get to work, how many hours a day they work, how many days a week they work and all of the specific physical and mental tasks a claimant has to perform each and every day to do their job effectively. Detailed job descriptions are very helpful in this regard.

- 3. The problems caused by the Clemmons decision will most likely require a legislative fix. The section 42-9-30(21) was not written very clearly and our statute simply does not address the issue of regional spine ratings, but perhaps it should. The broader legislative issue may be whether or not our state needs a presumption of permanent and total disability at all. Remember that our statute was written in the early 1930s at a time when our state's economic base was supported by agriculture and textiles. A serious back injury in an economy like that probably would end the career of a doffer or a millwright, but our economy has changed substantially since then and perhaps our concept of "disability" should change as well.

Please contact the lawyers at YCRLAW if you have any questions about your back cases. We are always happy to help you.

Posted: 7/20/2017 by Annette Massarotto | with 0 comment(s)

Comments

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On behalf of YCRLAW, thank you to all of our clients for putting your trust in us for another year. **CONTINUE**

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PROOF OF SERVICE

I certify that I have served the NOTICE OF AND PETITION TO STAY THE REMITTITUR AND FOR A HEARING BEFORE THE COURT TO DETERMINE WHETHER OR NOT THE PETITIONER IS ENTITLED TO RELIEF UNDER THE REVERSE AND REMAND OPINION OF THE COURT AND FOR THE REASONS SET FORTH IN THE PETITION on September 12, 2017, addressed as follows to its Attorneys of Record:

Helen F. Hiser, Attorney at Law
McAngus, Goudelock & Courie
Post Office Box 650007
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Kelly F. Morrow, Attorney at Law
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Dated: September 12, 2017



Preston F. McDaniel
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