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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

SEP 12 2017

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION  
**S.C. SUPREME COURT**

Appeal No: 2015-001350

**RECEIVED**

SEP 18 2017

Henton T. Clemmons, Jr., Employee, ..... Petitioner  
**SC Court of Appeals**

v.

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

**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**

The Petitioner respectfully requests and petitions the Court for a Stay of the Remittitur until after a hearing before the Court and/or a decision by the Court on the issues as set forth in this Petition:

1. That this Court initially entered its Opinion on March 8, 2017 reversing the Decision of the SC Workers' Compensation Commission and the SC Court of Appeals.

2. That subsequent thereto, the Respondents petitioned for Rehearing which was granted and a substituted Opinion was entered and refiled by the Court on June 28, 2017. In that substituted Opinion, the Court reversed and remanded the case to the Commission, "for a new hearing to determine his percentage of impairment and whether the presumption of permanent and total disability under §42-9-30(21) has been rebutted". The Petitioner filed a Petition for Rehearing as to the substituted Opinion on which the Court entered a decision denying the Petition for Rehearing on September 5, 2017.

3. That as set forth in the Affidavit and Exhibit as attached hereto, during the week of August 28<sup>th</sup> and on or about August 29<sup>th</sup>, Petitioner's Counsel was made aware of public comments and the discussion involving the SC Workers' Compensation Commission at a convention during the pendency of his Petition for Rehearing as to the substituted Opinion that was filed by this Court on June 28<sup>th</sup>. Petitioner's Counsel, as is set forth in the Affidavit, subsequently received written confirmation concerning the public comments made by and discussions with the Commission. A copy of an Article written by an attendee at that conference setting forth the alleged public comments and position and discussions, and recommendations of the SC Workers' Compensation Commission is attached as Exhibit "A".

4. That according to the representations made in the Article, the Commission made statements that the Commission did not like the, "Clemmons" Decision, nor do they like the position 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." The Article goes on and further attributes to the Commission comments that certain issues were not brought up until, "the oral argument before the Supreme Court". The Article then goes on and states that, "but necessity being the mother of invention, the Commission gave some tips on how to comply with (or circumvent) the Clemmons Decision".

The Article then goes on to provide three (3) different tips from the Commission as to how to circumvent the Clemmons decision issued by this Court. See Affidavit and Exhibit "A" attached hereto and incorporated herein by reference.

5. That in addition to a general principle of law as to an entitlement of a litigant to a hearing before a fair and impartial judicial officer, SC Code §42-3-250 provides that the Commissioners are bound by the Code of Judicial Conduct as contained in Rule 501 of the SC Appellate Court Rules and that the SC State Ethics Commission is responsible for the enforcement of the administration of that Rule.

Rule 501, Canon 1, provides that an independent judiciary is the cornerstone to our society.

Canon 2 provides specifically that a Judge shall respect and comply with the law and shall act at all times in a matter that promotes public confidence and the integrity and impartiality of the judiciary.

Canon 3, in pertinent part, provides that a Judge shall perform the duties of the office to which he is elected or appointed and shall conduct his judicial functions in a fair and impartial manner which instills confidence in the judicial system, that the Judge shall be faithful to the law and that the Judge shall not be swayed by partisan interest, public clamor, or fear of criticism. In the Comments to Canon 3, the Judge must perform judicial duties impartially and fairly, and a judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrespect.

6. That after review of the briefs, oral arguments of the parties, and the positions of the parties, and based on its review of the substantive law, this honorable Court in its Opinion reversed and remanded this matter to the SC Workers' Compensation Commission for a de novo hearing before that Commission on the enumerated specific issues. The Petitioner is entitled as a general principle of law without citation to a

fair and impartial hearing based on the law as directed to the Commission by this Court and before a fair and impartial Commissioner that is committed without personal bias, prejudice, or being subject to public clamor, or influenced for any other reason, and before a Commissioner that will faithfully apply the law as given to it by this Court. Based on the comments and statements attributed to the Commission, the Petitioner would respectfully submit to the Court that the Petitioner cannot obtain and will not be subject to a fair and impartial hearing before the Commission.

7. That further as stated in the preamble to Rule 501,

"our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law."

Under Canon 3(B), Adjudicative Functions (9),

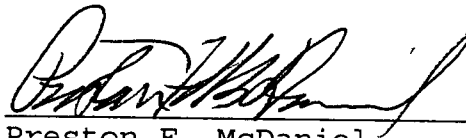
"a Judge shall not, while a proceeding is pending or impending in any Court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any non-public comment that might substantially interfere with a fair trial or hearing."

(E) Disqualification (1) of that same Canon, Canon 3, a Judge shall disqualify himself or herself in any proceeding in which the Judge's impartiality might, "reasonably be questioned".

Again, the Petitioner would submit that under these standards, the Petitioner cannot be assured of a fair and impartial hearing and that the Decision will be based upon the law as is established by this Court.

Wherefore, for all the foregoing reasons, the Petitioner would respectfully request a hearing before the Court to determine whether or not the Petitioner is entitled to relief, and as to what relief the Petitioner is entitled based on the Decision and Opinion of this Court, reversing and remanding this case to the SC Workers' Compensation Commission for a de novo on these specified issues.

Respectfully submitted:



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

September 12, 2017

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**THE STATE OF SOUTH CAROLINA  
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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

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**SCC**

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

v.

Lowes 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.

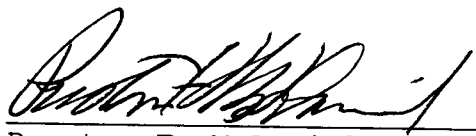
2. That during the week of August 28th, 2017, while a Petition for Rehearing was pending before the SC Supreme Court, Petitioner's Counsel became aware on or about Tuesday, August 29th, of certain comments, statements, positions and advice that had been given by members of the SC Workers' Compensation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

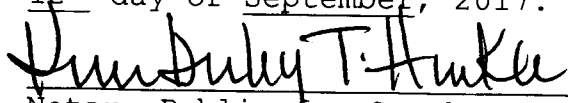
3. That on or about August 31, 2017, Counsel for the Petitioner was provided with a copy of an article written by an attendee of that conference confirming the information as to the comments, statements, opinions, position and tips that had been given by the Commission in reference to this Court's Opinion 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](http://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  
12<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina (L.S.)

My Commission Expires: 4/26/20



YOUNG CLEMENT RIVERS, LLP | 25 CALHOUN ST, SUITE 400  
CHARLESTON, SC 29401 | 843-577-4000

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Home / Workers' Compensation Blog / July 2017 / Clemmons Wars: A New Hope?

## 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.

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 5<sup>th</sup> 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



Post By Robert P. Gruber

### Recent Posts

- SCWCC Update in Advance of Hurricane Irma
- The Independent Contractor test
- Preventing Solar Eclipse WC Claims
- Fundamentals Series: The All-Important First 150 Days
- Electronic Payment of Compensation

### Post Archives

- September 2017(1)
- August 2017(3)
- July 2017(2)
- June 2017(2)
- May 2017(2)
- April 2017(2)
- March 2017(3)
- February 2017(1)
- January 2017(3)
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- May 2016(2)
- April 2016(3)
- March 2016(2)
- February 2016(4)
- January 2016(3)



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

Blog post currently doesn't have any comments.

- December 2015(1)
- November 2015(1)
- October 2015(2)
- September 2015(3)
- August 2015(2)
- July 2015(2)
- June 2015(2)
- May 2015(1)
- April 2015(2)
- March 2015(3)
- February 2015(1)
- January 2015(4)
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- April 2013(4)
- March 2013(2)
- February 2013(5)
- January 2013(2)
- December 2012(3)
- November 2012(3)
- October(3)

## News

### YCRLAW 2017 Firm Update

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

**READING »**

### YCRLAW Best Lawyers

YCRLAW is pleased to announce that the following YCRLAW attorneys have been selected as part of the 2018 edition of ...

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In the Supreme Court

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

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NOTICE OF PETITION TO STAY THE REMITTITUR  
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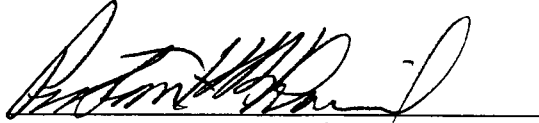
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TO: HELEN F. HISER, ATTORNEY, AND KELLY F. MORROW, ATTORNEY,  
COUNSEL FOR THE RESPONDENTS:

YOU WILL PLEASE TAKE NOTICE that pursuant to Rules 240 and  
221(b), SCACR, the Petitioner respectfully petitions for a Stay  
of the Remittitur and for a hearing before the Court to  
determine what relief, if any, to which the Petitioner is  
entitled based on the Opinion of the Court issued in the above-  
referenced matter to Reverse and Remand the case to the SC

Workers' Compensation Commission for a new hearing and for the reasons as set forth in the Petition, which is attached hereto and incorporated herein by reference.

Respectfully submitted:

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

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

September 12, 2017

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Appellate Case No. 2015-001350

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

v.

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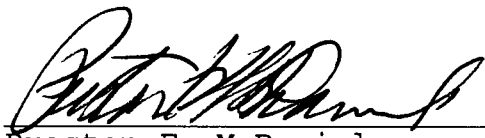
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I certify that I have served a filed copy of the NOTICE OF AND PETITION TO STAY THE REMITTITUR AND FOR A HEARING BEFORE THE COURT TO DETERMINE WHETHER OR NOT THE PETITIONER IS ENTITLED TO RELIEF UNDER THE REVERSE AND REMAND OPINION OF THE COURT AND FOR THE REASONS SET FORTH IN THE PETITION on September 13, 2017, addressed as follows:

Honorable Amy Bracy  
SC Workers' Compensation Commission  
Post Office Box 1715  
Columbia, SC 29202

Honorable Jenny Kitchings  
Clerk, SC Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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SEP 18 2017  
SOUTH CAROLINA  
COURT OF APPEALS

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

Dated: September 13, 2017

**McDANIEL LAW FIRM**  
ATTORNEYS AND COUNSELORS AT LAW  
1315 ELMWOOD AVENUE  
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers  
for over 30 years.

Preston F. McDaniel

Telephone (803) 771-7211

Matthew C. Robertson

Facsimile (803) 252-0709

September 13, 2017

HAND DELIVERED

Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, SC 29201

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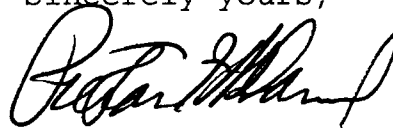
RE: Henton T. Clemmons v. Lowes Home Improvement  
WCC File No. 1015200

Dear Mr. Shearouse:

Please find attached a Proof of Service on the SC Workers' Compensation Commission and the SC Court of Appeals of the Petition to Stay the Remittitur filed with the Court on Tuesday, September 12<sup>th</sup>. By copy of this letter, I am serving same on the SC Workers' Compensation and SC Court of Appeals, and am notifying all Counsel of Record of the service of the Petition.

As always, I appreciate all the courtesies and kindnesses shown to me by the Court and hopefully this is sufficient for filing the Proof of Service with the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth  
Enclosures

cc: Honorable Amy Bracy  
Honorable Jenny Kitchings ✓  
Helen F. Hiser, Attorney at Law  
Kelly F. Morrow, Attorney at Law



McDaniel Law Firm  
1315 Elmwood Avenue  
Columbia, SC 29201

Honorable Jenny A. Kitchings  
Clerk of Court  
SC Court of Appeals  
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Columbia, SC 29211

