THE STATE OF SOUTH CAROLIONA

IN THE COURT OF APPEALS

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Full Commission Order Dated April 28, 2017 Affirming Commissioner Melody L. James orders dated January 04, 2013 And September 30, 2013

Case No: 2017-0001217

John McDaniel, Employee, Claimant, Appellant

v.

Career Employment Professional D/B/A Snelling Staffing, Employer and United Wisconsin Insurance Co., Carrier, Respondents

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INITIAL REPLY BRIEF OF APPELLANT

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Objections to Respondent's Statement of the Case

1) Respondents state that the case has, "a complicated procedural history."

This case does not have a complicated procedural history. The Respondents simply don't understand how a remand works within the confines of the workers compensation schema. After the Appellant's initial hearing, in front of the single Commissioner (James), an appeal was filed. Under the heading "Review and Hearing," S.C. Code of Regulations chapter 67, article 7, controls the manner of appeals from the single Commissioner to the full commission. Proceeding under R. 67-707, a motion for new evidence was granted and the appeal of the 1st James Hearing was stayed while new evidence was taken back before Commissioner James. The Commissioner **reconvened** the hearing in order to take the testimony and new evidence into consideration. According to R. 67-707, the initial appeal was stayed while James issued a new order (2nd James Order). After the 2nd James order was issued, and in accordance with 67 – 708, which included by reference R 67-613 which included by reference R. 67 – 610 which allows for the amending of forms, the Appellant amended his form 30 to include the issues from the 1st and 2nd James Hearing. After James 2nd Order, the commission held the review hearing. In the first appearance of this case, in front of this Court of Appeals, the court held the commission had improperly noticed the review hearing and remanded it to be properly noticed, briefed and reheard.

The Worker's Compensation commission gave notice for briefs and held a hearing. At that hearing they disregarded the Amended form 30, the issues arising at James 2nd Hearing and by extension, the brief of the Appellant which had been specifically ordered by the Court of Appeals.

When the Worker's Compensation commission did not consider any of the issues raised on the Appellant's Amended Form 30, or the issues raised in the brief, they once again created a structural deficiency in the hearing that cannot be overcome, and a remand is warranted.

2) Respondents argue Appellants former counsel agreed to an AWW (AWW) of $618.50 for Jared Lampkin, and thus Appellant is bound by that number.

a) Appellant's former attorney directly after he stated "$618.50" a week disclaimed that the number would have to be clarified. (Having presented the records then in possession of the counsel.) (hr'g Tr. P. 7)

b) Appellants former attorney disclaimed previously that the AWW numbers being put forth for Atkins, Clark and Lampkin were all inaccurate, stating, "if you look at them they are not,--they came on either in the middle of the weeks, so they are not the full-time weeks," when speaking of the averages of the three other workers. (hr'g Tr. P. 8)

c) After this number had been argued of $618.50 an entire remand hearing was held challenging that that AWW should have been $727.10. The Respondents are trying to mislead the court into believing the Appellant should be held to a statement that was made prior to the discovery of new evidence, that was contrary to the above (disclaimed) assertion. The Respondents are disregarding that an entire hearing was held to that effect.

3) Respondent state, "on March 29, 2013, Appellant notified the commission he was relieving his counsel."

a) Appellant relieved his counsel on March 29, three days after Appellants former counsel submitted a brief on behalf of Appellant dated March 26, 2013 against the expressed direction of the Appellant. The Appellant's former counsel was under express instruction that he was not to send the brief to the commission without it first being reviewed by the Appellant. Appellant's former counsel, without authorization to do so, reduced the Appellants issues from six to three.

b) After reading the brief, I immediately fired him. I have been trying to undo his mistakes ever since. (When the remand hearing was had, the opportunity to fix his mistakes was present.

However, the commission has unreasonably stood in the way of a fair hearing ever since. For close to 5 years now. Once telling me that my case had been unlawfully bifurcated because I "argued" with them.)

4) Respondents argue that when the Appellant agreed Dr. Olson had placed him at maximum medical improvement from an orthopedic standpoint, that was in fact a (a) concession or (b) stipulation of reaching MMI on August 13, 2012.

a) Simply admitting the fact that a report had been published by Dr. Olson, regarding MMI on August 13, 2012 is not the same as stipulating that the Appellant reached MMI as of that date. The Respondents engage here in a false equivalency. The first single Commissioner order is clear that the Appellant agreed Dr. Olson had placed him at MMI. To say that that is the same as the Appellant admitting he is at MMI is a false equivalency and intellectually dishonest.

b) At no point, in any of the orders issued by the commission, is there a stipulation of MMI on the date of August 13, 2012. The only stipulations were to jurisdiction and venue.

5) As to Respondents footnote 15, Respondents argue a) Appellant was warned of further ex parte communications, b) misunderstanding legal terms is a risk that is run by choosing to remain pro se, c) that among other things, the Appellant asserted, an inadequate notice of the Appellant panel hearing, and d) that the commission had the Appellants amended form 30 in front of them.

a) There are no expectations on pro se Appellants in the Worker's Compensation setting to provide the defendants/Respondents with records of all communication with the comp commission. The onus of providing copies of communications between pro se Appellants and the Worker's Compensation commission falls solely on the commission. Ex parte communications

and prohibitions against them, do not have the same meaning in the Worker's Compensation commission when an Appellant is acting pro se.

b) The "misunderstanding legal terms" email was sent to the Appellant by the commission after the judicial director told the Appellant his case have been "bifurcated," when the Appellant challenged the ability of the commission to bifurcate the case a lengthy response email was written by the commission's counsel exclaiming that the non-attorney member of the staff had no idea the term bifurcated could be taken to mean a legal term. And that in using the term bifurcated the judicial director was simply trying to explain to a layman how the case is being handled. The problem was not that the Appellant did not understand the legal term. The problem was that the commission tried to use legal terms to confuse the Appellant in direct violation of the meaning and purpose of the Worker's Compensation act.

c) The Respondents attempt to belittle the Appellants assertion that he had been given inadequate notice of the first review hearing. However, this argument is baffling because this court previously found in the Appellants favor due to inadequate notice, and remanded this case back to the Worker's Compensation commission because of it.

d) The Respondents here give credibility to the assertion that the amended form 30 was in front of the full commission, during the 1st Review Hearing. The entirety of the Respondents issue I is based on whether or not the commission properly excluded the Appellants amended form 30. The Respondents recognize in their statement of case that the full commission had accepted the amended form 30. Based on this fact alone this court should find in favor of the Appellant, that the commission violated the Appellants right to seek remedy of injury through the laws of the state.

6) As to Respondents footnote 16, claiming Appellant "again submitted a lengthy set of proposed findings to the commission."

a) Title I provides in contested cases that a party may submit proposed findings of fact. The Appellant tried multiple times to propose findings of fact to be ruled on by the finder of fact, the Worker's Compensation commission. The commission failed to provide a ruling on each of the proposed facts in violation of title I. Respondents have previously argued that instead of allowing proposed findings of fact the commission has a long-standing tradition of making one side write the order. The Respondents failed to understand that a long-standing tradition does not have the ability to supplant the Administrative Procedures Act. Chapter 67 of the code of regulations is inferior to Title 42. Title 42 is inferior to Title 1. When the Appellant moves for actions guaranteed under Title 1 and the Respondents argue that chapter 67 controls, the respondent's position must be rebuked and the court should find in favor of the appellant.

Objections to factual background

1) Respondents assert Snelling staffing was a temporary staffing agency. This is an attempt by the Respondents to trick the court into thinking that the Appellant was employed in a day labor position by a temporary staffing agency. This is intellectually dishonest, the name of the company is "Career Employment Professionals." Snelling was a Professional Staffing Agency. The jobs offered were temporary-to-hire positions, not as Respondents would have the court believe just "temporary assignments." Snelling staffing staffed CEOs and CFOs, nurses and truck drivers. Snelling staffing did not staff for day labor needs, Snelling Staffing staffed professionals and other individuals with particular industry licensing. This distinction is incredibly important. The employment the Appellant was engaged in at the time of injury was not an amalgamation of two previous assignments. The employment the Appellant was engaged in when he was injured was for Alside Revere, a building supply company. "Ben Arnold" was a wine distribution company.

It cannot be said that Alside Revere and Ben Arnold partake in the same industry or would otherwise be considered equal **employments**. Title 42 defines "AWW" to be determined in the employ**ment** worked at the time of injury. The Respondents confuse the employ**er** "Snelling staffing" with the employ**ment** of the Appellant at "Alside Revere." AWW is to be determined by the **employment** not the **employer.** Title 42 was crafted well enough to include a definition for employment. By definition Ben Arnold was not the employment of the Appellant at the time of injury. By definition Snelling staffing was not the employment of the Appellant at the time of injury. By definition the job at Alside Revere was the Appellant's **employment** at the time of injury.

2) As to Respondents footnote 19, "although Appellant alleges that Cobb's testimony was 'inaccurate,' this testimony is not contradicted by any evidence in the commission record."

This argument from the Respondents is especially rich. Dan Cobb testified that overtime ranged between two and five hours a week, and that over time was not every week or anything like that. Lampkin's pay records (the topic of the remand hearing) show that overtime ranged between 5 and 20 hours a week and every week that did not contain a federal holiday worked by Lampkin at Alside Revere, included overtime. The Appellant asserts that this absolutely shows the Dan Cobb's testimony was at best "inaccurate" and at worst perjury. The former reflects negatively on Cobb's accuracy of recollection, and the latter is detrimental to his credibility.

Argument

Once again, the Respondents have engaged in a tactical sleight-of-hand in order to obfuscate the issues. Although the Respondents are free to frame their legal arguments in any way they deem, the order of their brief is meant to muddy and confuse the issues.

For instance, the Respondents have tried to reduce issues 14, 15 and 16 in the Appellant's brief to a single issue and then mischaracterize the Appellant's issues as arguments. Issues 14, 15 and 16 are all independent issues. Each issue relates to the determination of AWW but to mischaracterize the issues as arguments is intellectually dishonest. The Respondents hope to receive, by this sleight-of-hand, an analysis by the court of the overall AWW ruling instead of a ruling on each of the underlying issues regarding that finding. Broad discretion is given to the Commission to determine AWW, but that determination must stay within the confines of the minutia of law. This appeal is based as much on the details of the actions of the Commission, as it is on their findings.

The Appellant prays that this wise court will not fall victim to these contrivances by the Respondent, and will look at each of the issues raised in the Appellant's brief thoroughly, thoughtfully and independently.

The Appellant's 19 concisely stated issues on appeal could have been responded to line by line, but in further evidence of the Respondents attempt to confuse the issues, they have grouped as many issues together as possible and then put them in no particular order. A line by line, issue by issue retort to the Respondents brief would be ordered as such; 1, 2, 8, 11, 18, 19, 14, 15, 16, 17, 18, 19, 12, 13, 11, 12, 1, 2, 4, 6, 3, 5, 7, 8, 9 and then issue 10.

In order to organize this the best way possible, the Appellant will follow the original order of the issues on appeal, briefly summarizing the Respondents argument on each. The Exception being the Respondent's argument I. The Appellant will directly address Respondent's Issue I, the challenge to whether or not Appellant's issues 1, 2, 8, 11, 18 and 19 are properly before this court, then will address each issue in turn.

As to Respondents Issue I;

Respondents argue that a multitude of the Appellant's issues are not properly before the court. This argument is based on the logic that 1) the 2nd James order was never appealed, 2) any rulings contained in the 2nd James order are now the law of the case, and 3) the only issues the Appellant may bring forward are from the original form 30, the one filed after the 1st James Order.

In addition to the specific rebuttals below, the Appellant would like to remind the court that this issue was discussed at great length by the Appellant in response to Respondent's motion to strike Appellant's brief and designation of matter. But for the restrictions on length of reply briefs, the Appellant would restate the entire argument put forth in the Appellant's reply to the Respondents motion, and would ask the court that it consider the totality of the argument put forth by the Appellant before ruling on any of the individual issues.

1) The 2nd James order was appealed by the Appellant to the full commission. After receiving the 2nd James order, in accordance with chapter 67, and within the statutory 14 day period, the Appellant amended the form 30. This amended form 30 should have been served on the Respondents by the commission. Chapter 67 places the onus of service of documents from pro se Appellants on to the Worker's Compensation commission. When the Appellant amended his form 30 within the statutory period, the commission was mandated by regulation and law, to respect the due process right of the Appellant. This right includes the right to be heard, the right to present evidence, and the right to be correctly notified of the time, place, manner, topic and controlling regulations.

2) As argued above the 2nd James order was appealed to the full commission within the statutory time. And thus, the exceptions to the rulings of law and the findings of fact contained in the Appellant's amended form 30 initially delivered to the commission within 10 days of the 2nd commission order, is effective to raise the issues contained therein.

3) Respondents make a strange argument that the Appellant can only argue the issues raised on the original form 30, less any issues determined at the 2nd James hearing. This is obviously a case of the Respondents trying to have their cake and eat it too. The Respondents argument is disingenuous, in that, from one side of the mouth they say the Appellant must be bound to the issues raised in the original form 30 and that the 2nd James hearing was not a linear continuation of the 1st, while at the same time, out of the other side of the mouth, they say the 2nd James hearing was dispositive of issues raised in the original form 30, and that the Appellant's amended form 30 was insufficient to preserve any of the issues for review.

This results in a miscarriage of justice, where an injured worker, diligently following the published laws and regulations of the state is being denied the right of review.

As to the Appellant's 1st issue, DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO ENFORCE SUBPOENAS?

Respondents argue that the commission properly denied enforcement of the subpoenas when they granted Respondent's motion to quash, as 1) no information could be elicited from the individual subpoenaed in regards to Lampkin's pay records impacting the Appellant's AWW.

1) Respondents argue that Jim Pascutti and Angela Baldwin would not be able to testify to the hiring of Jared Lampkin by Alside Revere. This is an absolutely outrageous statement. Pascutti was the managing partner of a professional staffing agency, and Angela Baldwin was the account manager who handled Alside Revere and Ben Arnold. Their entire career is based

upon facilitating jobs for applicants to companies they have professional relationships with. For the Respondents to say they would have no knowledge of such subject is once again intellectually dishonest and an attempt to mislead the court.

As to Appellant's 2nd issue, DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO ACCEPT TESTEMONY AND RECORDS?

Respondents argue that the commission 1) may in its discretion reject testimony and evidence, and 2) Appellant apparently misunderstands the function of rule 32, as a) a deposition may **ONLY** be used to impeach a witness' own trial testimony, and b) however here he was attempting to submit his deposition transcript to contradict the deposition testimony of another witness.

1) The commission may only exercise discretion within the bounds of the law and the Appellant holds in the instant case that the commission overstepped their statutorily outlined bounds. Some of the evidence they rejected was medical in nature and that by rule may not be rejected and some of the evidence they rejected was rebuttal in nature which completely defeats the purpose of presenting evidence at a hearing. It would be unreasonable for the Claimant/Appellant to have to bring all evidence in existence into the record instead of just bringing necessary evidence and then presenting rebuttal evidence.

2) A) Respondents apparently argue that rule 32 only allows depositions to be used for the purpose of impeaching one's own testimony.

B) This is simply not true as rule 32 says "**any deposition** may be used by **any party** for **the purpose of contradicting... the testimony of deponent as a witness.**"

When the commission would not allow for the appellant's deposition to be entered into the record for the purpose of contradicting Cobb's deposition, the Appellant's rights of due process were violated. This is a structural defect, and warrants remand.

As to Appellant's 3rd issue, DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY PROVIDING INSUFFICIENT NOTICE OF THE REVIEW HEARING?

Respondents argue that Appellant received sufficient notice.

Sufficient notice must include, "the date, place, time, purpose of the review hearing, and the filing date for the Appellant's brief."

The Appellant concedes that the date, place, and time were all sufficiently noticed.

However, the Appellant once again asserts that the 1) purpose of the review hearing requirement, and 2) the filing date for the Appellant's brief requirement were not met in this case.

1) The commissions hearing notice was insufficient in that the purpose of the review hearing was not sufficiently set forth in the notice. This is evidenced by the fact that the Appellant believed the amended form 30 was the topic of the hearing, and the commission ruled at some point after the hearing that the amended form 30 was not the topic of the hearing.

2) Although the filing date for the Appellant's brief was on the notice of review hearing, the Appellant filed his brief based on the amended form 30, and when the commission after the hearing decided to exclude the amended form 30 that makes the brief a pointless exercise, as none of the issues contained in it were reviewed. Once again the Appellant was forced to argue blindly, and then have his arguments cast aside. This without doubt is against the intent of the judiciary in enforcing due process.

The appellant has full faith that this court will once again see that he was provided with insufficient notice of the review hearing and remand the case for further proceedings.

As to Appellant's 7th issue, DID THE COMMISSION ERR IN FAILING TO GRANT THE APPELLANT EXTENDED ORAL ARGUMENT?

Respondents argue Appellant's issue is meritless, as 1) Appellant alleges that the commission failed to provide any reason for denying his request, and 2) the commission explained that they had the extensive briefings and the record, and did not see a need for extended oral argument.

1) The commission did not rule on the Appellant's proposed findings of fact regarding why the Appellant's motion for extended oral argument was denied. The reason for denying the motion was not stated in the order, and this prejudices the Appellant as it does not allow for a basis for judicial review.

2) The Respondents recollection of the hearing is ambiguous at best, lacks all probative value and is hearsay. The court cannot rely on the self-serving recollection of the Respondents to know why the motion was denied. The fact is the commission failed to find as a fact why the motion for extended oral argument was denied. This substantially prejudices the Appellant's right to due process. When an administrative agency is given a discretionary function they must in fact exercise discretion. "A lack of use of discretion," this court has held, is an abuse of discretion, and an error of law.

In addition, the above brings in the question whether or not the Appellant was sufficiently noticed of the topic of the review hearing. The commission heard the motion for extended oral argument that was contained on the amended form 30. They heard the extended oral argument motion off of the amended form 30, accepted testimony about the issues on the amended form

30, are required by law to decide whether or not issues may go forward at the hearing, and ultimately disregarded the Appellant's request for review (amended form 30), his oral argument and his brief.

Due process is not formal, however, certain aspects of the Appellant's rights must be protected. These rights include the right to be heard in the right to know the manner and topic of the hearing at which he will be heard. When the commission failed to protect the injured workers rights the results was a nullity of a hearing, and warrants remand. Or in the alternative, this issue could be decided by the court as the finding of fact was based on error of law.

As to Appellant's 9th issue, DID THE FULL COMMISSION REVIEW PANEL VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACTS?

Respondents argue 1) "Appellant misreads Section § 1-23-350, 2) 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, and 3) Appellant's suggestion would render workers compensation proceedings uncontrollably unwieldy, with 4) Respondents argument last time we were in front of this court.

The Respondents argument here does not withstand any scrutiny. Apparently the Respondents believe that, 1) the plain meaning rule of statutory construction should not apply to the administrative procedures act, 2) parties are not ALLOWED to submit proposed findings of fact in workers compensation matters because no rules or regulations specifically address how to (even though Appellant inquired and was instructed by the SCWCC how and to whom he should submit them) and 3) that allowing parties to submit proposed findings would render SCWCC proceedings

"uncontrollably unwieldy" (these hearings are allotted limited time in a limited recovery scheme and the burden rests on the Appellant/Appellant to place enough material in the record to allow for substantial judicial review, this material includes judicially noted matters, findings of fact and conclusions of law, etc.,) where quite simply none of these holdings are correct.

1) Respondents would have the court believe that without specific regulations allowing for the submission of proposed findings of fact, findings of fact may not be proposed. This is simply not true. The plain meaning of the statute is clear. And when the plain meaning of the statute is clear no further construction is necessary.

2) Parties are allowed to submit proposed findings of fact. When one side is charged to author a proposed order, their proposed order is nothing more than a series of proposed facts. When the commissioners sign the opinion as written by the Respondents they are in fact making a ruling on each of the Respondents proposed findings of fact. To allow only one side, in a contested case, to have proposed findings of fact ruled on would be a miscarriage of justice. If the commission will rule on one side's proposed findings, they should be forced to rule on the other side's as codified in Title I.

3) The Worker's Compensation commission is the fact-finding body of Workmen's Compensation claims. The idea that their prime function, "fact-finding" would be burdensome to them is antithetical to the reason why the administrative branch would be operating in a quasi-judicial setting. The reason an administrative branch would be given a fact-finding role is so the burden of fact-finding is transferred from the judiciary to the executive. The respondents now argue that the fact-finding body should not be responsible for finding facts. The appellant patently rejects this assertion.

Of note, "uncontrollably unwieldy" is not a legal term, a legal threshold, or quantitative in any way, shape, or form. The term cannot be objectively measured and as such, the court should reject this argument as hogwash.

4) Respondents previous argument to why the commission does not have to address proposed findings of fact was omitted from their brief this time. Found in footnote 28 of the Respondents brief, filed during the 1st appeal to this court is as follows, "Instead, the Commission has a long standing practice of issuing a detailed request for proposed order, such as the ones sent to Appellants counsel, to staff attorney Roberts, and the request issued by the commission on October 31, 2013. (SCWCC Request for proposed decision and order, emailed and mailed October 31, 2013). In Such requests, the commission always reserves "the right to modify and or delete any or all portions of the submitted Decision and Order." (Id.).

As to Appellant's 10th issue, DID THE COMMISSION ERR IN FAILING TO SUSTAIN THE APPELLANT'S OBJECTION TO RESPONDENTS AUTHORING THE COMMISSION'S DECISION AND ORDER?

Respondents argue Appellant's issue is meritless.

Appellant disagrees and believes the Respondents argument lacks merit. Respondents cite Brown v. Peoplelease, as the bright line to be followed. However, in order for cases to have precedent they must be factually similar. Brown neither objected to the respondents authoring of the order, nor proposed findings of fact of his own. In the instant case, there was an objection to respondents authoring the order, and the appellant proposed findings of fact at every level. As discussed earlier, when the commission rules upon an order drafted by the respondents they are in fact giving a ruling on the findings of fact proposed by the respondents. It is only just, that the

appellant should be afforded the same opportunities to have proposed findings of fact ruled on that the respondents did. An equal playing field is the central element to a fair justice system.

In this case, failing to rule on the appellant's proposed findings of fact, while ruling on the respondent's amount to a structural defect, and thus the case should be remanded to the Worker's Compensation commission.

As to Appellant's 12th issue, DOES § 42-9-260 STATUTORILY BARR THE COMMISSION FROM GRANTING THE CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

Respondents argue penalties are not due, because 1) there is no evidence who put the date stamps on the checks, 2) "it is more likely than not that these are the dates on which the Appellant provided his attorney with a copy of the checks than that they are the date that the Appellant himself received them", and 3) any conclusion Appellant was paid benefits late based on unexplained and unidentified date stamps on copies of checks would amount to impermissible speculation.

1) The Appellant concedes that there was no testimony elicited as to who put the date stamps on the checks. However, it is immaterial who put the date stamps on the checks. The checks have a date of issue, and the Appellant could not have received the checks before the date of issue. The checks also denote for which benefit period they have been issued for. The law requires that the payments be made regularly and within 14 days of the benefit period. A thorough examination of the checks show that if a check shows that it was paid 2 months after the payment of the benefit was due then the payment was necessarily late.

2) This is another example of the Respondents actively misleading the court. The checks show where they were sent. The checks show that they were sent to the Appellant's former attorney. When the Respondents give the court a speculation that is binary as an argument, and neither of those binaries can be true, than the Respondents at best have misled the court, and at worst have lied.

3) The Respondents put forth that the only evidence of late payment of TTD or TPD are date stamps on Appellant's checks which are unidentified and therefore lack any probative value then state, "without any support for his argument that he is entitled to penalties, Appellant's assertion that he is entitled to a 10% increase in compensation under SC code and§ 42-9-90 is misplaced and also should be rejected."

Although Respondents have attempted to muddy the issues through 50 pages of rhetoric claiming that the Appellant's issues are all meritless, luckily, sometimes things speak for themselves.

APA p.107 (ROA p. ____) "Check # 21433899...Date:06/11/12...Check Amount: $896.56, Service Period FROM 04/21/12 THRU 05/25/12" this service period, along with the payment amount is clear evidence of the Respondents failure to pay these benefits in accordance with Title § 42.

APA pg. 113 (ROA p.___) shows that As of May 21, 2012 the Respondents had not paid TTD and/or TPD for the weeks ending April 6, April 13, April 27, May 4, and May 11, 2012. This letter was not refuted or rebutted in any of the proceedings.

When payments are late, penalties are mandatory. Additionally, when payments are late an increase in compensation of 10% is also mandatory. Finally an application for termination of

benefits may only be entertained by the commission if and when the carrier is current on all payments due. Thus Penalties should be applied and the credit to the carrier denied.

Additionally, the court should just ask the Respondents, "Were any of the benefit checks paid to the Appellant later than 14 days after they were due?" That would force the Respondents to finally give this court a straight answer instead of this continued deception. Throughout their entire response they simply cite reasons the evidence that proves they made late payments does not prove that they made late payments. But they never just came out and said that they did not make any late payments or that their clients did not make any late payments.

On this issue the commission's ruling was based on error of law, thus this court may take its own view of the facts and order that the increase in compensation and penalty be paid, or in the alternative remanded to the South Carolina Worker's Compensation commission for further hearings.

As to Appellant's 13th issue, DID THE COMMISSION ERR IN FINDING THAT, *PURSUANT TO CURIEL*, THE RESPONDENTS MUST RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MAXIMUM MEDICAL IMPROVEMENT?

Respondents argue that, *Curiel* mandates that a credit be given to the employer for any benefits paid after the date of MMI.

Respondents continually read permissive actions as mandatories when siting *Curiel and Watson* among others, if every credit should be given than the statute should no longer read, that it is the commissioners discretion. Approval of commission for deduction is required by this section and

its conclusions thereabout are binding on appeal unless there is absence of competent evidence to support them." Brittle v. Raybestos-Manhatten, Inc., (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884.

Here the only evidence supporting the granting of credit is the use of Curiel, and the Appellant has proved this inapplicable in this case, thus the credit should not be upheld.

As to Appellant's 14th issue, DID THE COMMISSION ERR IN EXCLUDING EARNINGS AT ALSIDE REVERE BY LAMPKIN?

Respondents argue Lampkin's wages should not be included as, 1) Lampkin did not work for Snelling staffing after he was hired by Alside Revere, 2) Appellant's AWW should be based on Snelling and not Alside Revere, and 3) that Lampkin's earning would not most nearly approximate what the Appellant would be earning were it not for the injury because a) Appellant had been dismissed previously from Ben Arnold due to school schedule conflicts, b) Appellant had worked too briefly for Dan Cobb to make final determination in regards to permanent employment, c) Appellant was unemployed between working for Ben Arnold and working for all side Revere.

Respondents argue, "Appellant's arguments about whether an employer-employee relationship existed are misdirected and irrelevant." The Appellant believes he may have confused the Respondents the purpose of pointing out that a new employer employee relationship had been formed between Snelling staffing and John McDaniel is important is because that relationship establishes "the employment working at the time of injury" S.C. Code Ann. § 42-1-40. The right to recover compensation based on the payment the Appellant was receiving at the time of the injury based on the increase in risk associated with an increase of hours worked in a new and more dangerous job.

1) Respondents argument here is based on the supposition that whenever Lampkin was hired by all side Revere from Snelling that his **employment** changed.

2) Basing the appellant's AWW, as defined in title 42, on his **employer,** "Snelling staffing," instead of on his **employment** at all side Revere is contrary to the law as written.

3) The Pilgrim court held that the methods available to determine average weekly wage must be applied sequentially if practicable. Lampkin's employment at all side Revere would meet the criteria of the fourth delineated alternative to calculate average weekly wage, § 42-1-40 "regard is to be had to the average weekly amount which during the 52 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." Or in the alternative, would at least establish the deference should be given to Lampkin's wages as a person of the same grade and character as the appellant.

a) The appellant was attending school whenever hired by all side Revere. Respondents assertion is not supported by the record.

b) As outlined in the appellant's first brief, Cobb was looking to hire permanent employee, the appellant was looking to be a permanent employee, the record supports that Cobb had tends different statements in support of hiring the appellant as opposed to only general and vague comments about not hiring **anyone** until the probationary period is over. The standard of review does not allow for the evidence to be viewed blindly from one side.

As to Appellant's 15th issue, DOES §42-1-40 STATUTORILY MANDATE THAT THE COMMISSION CALCULATE WEEKS AND PARTS THEREOF WHEN DETERMINING THE AVERAGE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK?

Respondents argue the commission 1) does not have to calculate weeks and parts thereof if they choose a different method to determine AWW, 2) doing so is "not appropriate in this case because it would produce in a AWW that is not fair to both the employee and the employer, 3) that the Appellant's insistence that the law be followed is irrelevant, and 4) in any case the Appellant is bound by the concession of $618.50 made at trial.

1) If the commission chooses to determine the Appellant's AWW, in a manner that utilizes the finding of AWW for 3 other persons, then the commission must adhere to the law when determining the AWW for those 3 persons. In this case, although an exceptional reason was shown why the Appellant should not have his AWW determined under the 1st, 2nd or 3rd method of determining AWW, there was never a finding that the 3 like employees should not have their AWW determined under the 1st method of calculating AWW. The pilgrim court held that the methods had to be applied sequentially. Due process requires that if the Appellant's AWW is to be based on the AWW of other people, then the same laws must be followed when determining all calculations of "AWW" under the workers compensation scheme.

2) The Respondents simply stating that one method would lead to an outcome not fair to the employer does not prove that the outcome would not be fair to the employer. Respondents make an unsubstantiated claim of "unfairness" if the court uses a method to determine AWW that properly accounts for "weeks and parts thereof." (Definition of AWW) An unsubstantiated claim is deemed abandoned. The Respondent's statement must not be considered by the court when determining AWW properly accounting for "weeks and parts thereof." The record does not contain any evidence supporting the Respondent's statement and Respondents failed to cite to any authority.

3) The Appellant's insistence is rooted in law, and the Appellant does not believe that the laws of the state of South Carolina should ever be called "irrelevant" in front of this court.

4) The Respondents make a curious argument that the Appellant is bound to the concession of Lampkin's wage being $618.50, and completely disregard that an entire remand hearing was held. The Appellant argued that Jared Lampkin's wages are reflected by the AWW of $727 and that those wages most accurately reflect what the Appellant would be earning were it not for the injury.

As to Appellant's 16th issue, DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AWW?

Respondents argue, 1) Appellant was employed by Snelling staffing, not all side Revere, 2) using the wages earned by the Appellant at all side Revere would be unjust to the Respondents, 3) there is no evidence that he had trained and plan specifically for a career at all side Revere, and 4) that the Appellant's AWW should be based on $11.50 an hour instead of $13 an hour due to the fact that he was pursuing a degree in engineering when injured and is currently enrolled in law school in Michigan.

1) The court must look directly to the laws to resolve this matter, specifically the definition of "AWW" which sites compensation should be based on the "employment" working at the time of injury. The Respondents continually assert that AWW should be based on the wages earned from the "employer" and not the wages earned in the "employment." This is simply contrary to the law.

2) When workers compensation premiums are determined upon the hourly wage of the employee to be covered, it is in no way, shape or form unfair to an insurance provider to provide

the benefits based on the premiums that were paid. The premiums paid on an $11.50 an hour job are lower than the premiums paid on a $13 an hour job. It would be an unjust enrichment of the insurance company to gain premiums based on a higher wage and then pay out based on a lower wage. Once again, the Respondents stating that it would be, "unfair," is an unsubstantiated claim and should be rejected by this court.

3) It is baffling that the Respondents would continue to say that there is no evidence that the Appellant had trained for a career at Alside Revere. The fact is, if someone is paid to do a job that requires a license to do, they have trained and planned as much as is necessary. One of the requirements to be hired by Alside Revere was a class A CDL. The Appellant's previous employment at Ben Arnold only required a class B CDL. A different job, a different scope of work, in a different location, in a different industry, with different dangers and a higher pay rate are all the reasons the Appellant should be compensated based on the wages at Alside Revere and not Ben Arnold.

4) Respondents argue that the Appellant is not similarly situated to that of the Appellant in Sellers by stating that Sellers clearly demonstrated an interest, aptitude, and ability to become an electrician. In the current case the Appellant was attending school to become a civil engineer, when injured. The biggest tactical mistake made by the Appellant's former attorney was not to ask that AWW be based on the average earnings of a civil engineer. The Appellant simply wanted to be compensated fairly, according to the rate he was being paid when he was injured. The Appellant is currently a Juris Doctor Candidate, however the Respondents imply that he has not demonstrated an interest, aptitude or ability to become anything more than an $11.50 an hour truck driver. This is simply not true when the Appellant prioritized his higher education over that of a poorly paying physical labor job.

As to Appellant's 17th issue, DID THE COMMISSION ERR IN THE DETERMINATION OF THE EXTENT OF APPELLANT'S DISABILITY?

Respondents argue the commission's determination of the extent of the Appellant's disability 1) was supported by substantial evidence, 2) the Appellant is not similarly situated to the Appellant in People's v. Henry co., and 3) Appellant has provided no proof of injury to other body parts, including his hip.

1) The single commissioner's finding was not supported by substantial evidence. However, the evidence when not blindly viewed from one side did support a greater award than the single commissioner found.

2) The Appellant is incredibly similarly situated to the claimant in Peoples as argued in the initial brief.

3) Dr. Olson's impairment rating included an impairment to the claimant's hip, as hip is included in the AMA guides in "lower left extremity." When the commission did not include the Appellant's hip in the compensation for injury, and there is medical documentation that the hip was impaired, absent a finding that it was not impaired, the commission should award for loss of use of the Appellant's hip.

Impairment must be considered in the impact that the impairment will have on the vocation of the Appellant. Although the Appellant was attending school to be a civil engineer at the time of the injury, and is currently attending law school, he will forever be burdened with the physical impairment that has doctors restrictions, including: lifting no more than 10 pounds, standing no more than 2 hours in a day and a restriction on working on roofs or ladders. Even when the Appellant (hopefully) passes the bar he will be bound by the physical restrictions placed on him

by his doctors. These restrictions amount to a classification of, "less than sedentary." The Appellant at the time of his injury had never held a job at even the, "sedentary," level of physical exertion according to the dictionary of occupational titles published by the United States Department of Labor.

When the commission failed to consider the Appellant's vocation in determining the extent of his disability, the Appellant's rights under title 42 were violated, and that warrants remand.

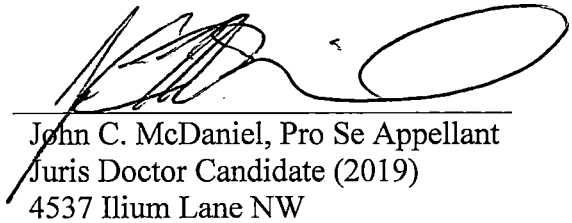
As to Appellant's 19th issue, DID THE COMMISSION ERR IN FINDING THAT MMI AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

Respondents argue that the there is no conflicting medical evidence.

The appellant holds that if only one out of four doctors places the appellant at MMI, and that MMI is only from an orthopedic standpoint the commission did not find substantial evidence.

CONCLUSION

The appellant prays this court find the commission erred in both their findings of fact and the rulings of law and a remand, with special instructions favorable to the appellant, should be issued in this case.



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September 20, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM South Carolina
Workers Compensation Commission

Full Commission Order Dated April 28, 2017 Affirming Commissioner Melody L. James orders dated January 04, 2013 And September 30, 2013

Case No.: 2017-001217

John C. McDaniel, Employee, Claimant, Appellant.....Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief and Designation of Matter by depositing a copy in the U.S. Mail, postage paid on September 20, 2017 addressed to the below:

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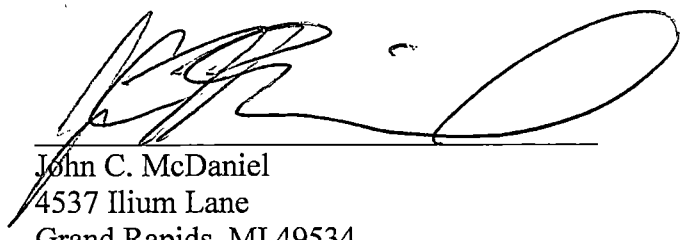

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September 20, 2017

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RE: John C. McDaniel v. Career Employment Professional d/b/a Snelling Staffing
DOI: 11/21/2011
WCC File: 1116275
Appellant Case No: 2017-001217

Dear Ms. Kitchings,

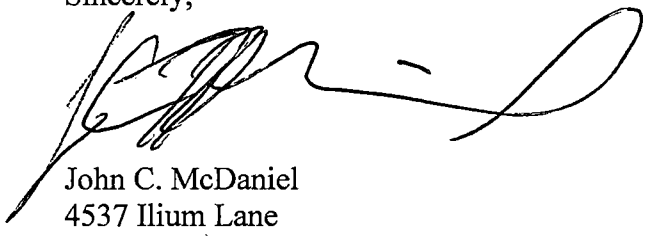
Enclosed for filing, please find Appellant's Reply Brief, Designation of Matter, along with proof of service. At your earliest conveniences please file the original.

Also, please be advised that my new address is 4537 Ilium Lane, Grand Rapids, MI 49434. Please have this updated in your records.

By copy of this letter, I am serving counsel of record with same.

Please call me if you have any questions about the enclosed. Thank you for your time.

Sincerely,



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