

THE STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

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SC 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.

FINAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

- 1) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO ENFORCE SUBPOENAS?
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Statement of the Case

This is a Workers Compensation case in which the Appellant was injured on November 21st, 2011 while working through a professional staffing agency for a building supply company. The Appellant's foot was crushed by a 9,000 pound forklift while working in a building supply warehouse (Alside Revere). The Employer, Career Employment Professionals (Snelling), admitted injury by accident, that arose out of and in the scope of employment, but denied the extent and duration of disability, argued preexisting conditions, the amount of compensation for Average Weekly Wage and for a credit for Temporary Total Disability payments paid after August 13th, 2012.

Four hearings were held on this case. The first hearing was held November 28th, 2012. The case was then remanded and reconvened on July 8th, 2013. The November 28th, 2012 and July 8th, 2013 hearings were presided over by Commissioner James. On, October 14th, 2013, a Review Hearing (1st review hearing) was held. Thereafter, the full commission decision and order was appealed to the court of appeals on multiple grounds. The Court of Appeals found the Appellant's rights had been violated by an insufficient notice of hearing and ordered the case remanded to the full commission. On, April 28, 2017, the full commission held a second review hearing (2nd review hearing).

The Single Commissioner issued her decision and order on January 4, 2013 (R. pp. 1). The Appellant filed a Form 30 Appealing this order (R. pp. 75).

Thereafter, Appellant's former attorney filed a Motion for Additional and Newly Discovered Evidence pursuant to S.C. Code Ann. Regs. § 67-707. (R. pp.79) This motion was granted by the Judicial Committee. On April 15, 2013 Appellant objected to the way in which the

Motion was granted. (R. pp. 164). The Commission granted the objection of the Appellant, which asked for remittance of the file to the Single Commissioner as outlined in § 67-707.(R. pp. 17)

Appellant filed a Motion for Additional Evidence to Complete the Record, Motion for Additional Testimony to Complete the Record and a Motion to Enforce Penalties after the first hearing, all of which were denied by the judicial committee. (R. pp. 86-94)

A remand hearing was held on July 8, 2013. At the remand hearing the Appellant attempted to submit records, enforce subpoena upon parties to appear, enforce compliance with records subpoenas, compel medical treatment and submit deposition testimony. (R. pp. 323-378)

All of the above actions were denied or disallowed.

On August 6, 2013 the Single Commissioner issued a request for proposed order and directives. (R. pp. 156). On August 30, 2013 Appellant submitted Proposed Findings of Facts for this Order. (R. pp. 518-521). On, September 30, 2013, the Single Commissioner issued her Order from the remand hearing. (R. pp. 22-26). This Order did not contain a ruling on Appellant's Proposed Findings of Fact.

On, October 3, 2013, the Appellant received Notice of Appellant Hearing. (R. pp. 59). On, October 4, 2013, the Appellant informed the Commission that he was not in receipt of the Order from the remand hearing and had a conversation with the Judicial Director regarding the bifurcation of Appellant's case. (R. pp. 535-537)

Later that day, on October 4, 2013, Appellant received the Decision and Order dated September 30, 2013 via Certified Mail. On October 12, 2013 Appellant submitted an Amended Form 30 (R. pp. 140-207).

The Full Commission Panel Hearing was held on October 14, 2013. At this hearing Commissioner Barden stated that the Appellant's Amended Form 30 was in front of the Full Commission Panel. (R. pp. 383)

On April 7, 2017 Respondents provided the full commission with a proposed decision and order. On April 11, 2017 Appellant submitted proposed findings of fact to be ruled on by the full commission. Appellant objected to Respondents being charged to author the full commission decision and order. Appellant notified the Commission that the Respondents proposed order contained errors and misrepresentations of the case. (R. pp. 549-565)

The Full Commission unanimously affirmed the Single Commissioners order dated January 4th, 2013, however, the remand hearing held on July 8, 2013, is not reflected and/or referenced in the Decision and Order dated April 28, 2017.

Notice of appeal was served May 23, 2017.

Argument

1) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO ENFORCE SUBPOENAS?

A) Statement of Fact

For the 1st hearing in front of the single Commissioner a record and appearance subpoena was served on Dan Cobb. Dan Cobb failed to appear. However, after the hearing Dan Cobb complied with the records portion of the subpoena. The information contained in the records show Dan Cobb's testimony to be inaccurate. Appellant's former attorney filed a motion for additional evidence that was granted by the commission. After the Appellant's motion for additional evidence had been granted by the commission and the remand hearing had been set in front of the single Commissioner, Appellant served appearance and document subpoenas for the 2nd hearing.

Respondents successfully Motioned to Quash the production of documents and the appearances of Jim Pascutti, Angela Baldwin and Nicole Service. The Commissioner stated that no information related to the issue at hand could be gained from any of the individuals complying with the subpoena. (R. pp. 22)

B) Discussion and Citations of Authority

The three individuals subpoenaed for the second hearing were all representatives of the Respondents. Jim Pascutti was the active managing partner of the employer. Angela Baldwin was the employer representative who handled the placement of Clark, Atkins, Lampkin and the Appellant. Nicole Service was the acting insurance adjuster.

Relevant and material, evidence and testimony could have been elicited from all three individuals. Even under the single commissioner's unreasonably narrow scope of the second hearing which will be discussed at length in later issues, all three individuals had information relating to the average weekly wage of the Appellant and of Lampkin.

Jim Pascutti as the managing partner has detailed and specific information regarding an employee being permanently placed with a company and any associated considerations. These associated considerations would include the wages agreed upon and any payment in lieu of wages. Both wages and payments in kind are applicable to the determination of average weekly wage.

Angela Baldwin as the employer representative, who actually interacted with Alside Revere on behalf of Snelling, also had personal and intimate knowledge of the placement of employees, the interest of Alside Revere to retain permanent employees, the personal work histories of Atkins, Clark, Lampkin and the Appellant. In addition to this information she also had information pertaining to weekly earnings of Atkins, Clark, Lampkin and the Appellant.

Nicole Service was the acting insurance adjuster and had received an email from Jim Pascutti, pertaining to the form 20 having incorrect information on it.

At the remand hearing Commissioner James clarified that purpose of hearing was limited to Lampkin's pay records and impact they have, if any, on the aww calculation" this is unlawfully limited in the scope of the hearing, as the threshold for a remand hearing is that the evidence must be so compelling that it demands a new trial.

Even if the remand hearing were so narrowly defined as to only include "Lampkin's pay records and impact they have, if any, on the aww calculation" then the subpoenas were

improperly quashed, as 1) Jim Pascutti was the managing partner of Snelling Staffing, and 2) Angela Baldwin was the account manager of the Alside Revere relationship, and 3) both had extensive dealings with Jared Lampkin, Alside Revere, Dan Cobb and the Appellant and 4) both of them had been involved with the hiring of Lampkin by Alside Revere through Snelling.

Appellant claims he should have been allowed to submit additional evidence at the remand hearing. Respondents argue that 1) the scope of the hearing was limited to Jared Lampkin's pay records impact on the Appellants AWW and that 2) R. 67-707 (B) sets strict guidelines to the admission of newly discovered evidence. Appellant relied on R. 67-707 (A) which addresses the submission of additional evidence to complete the commission file and Respondents' argument is apparently that the Appellant did not comply with R. 67-707 (B) which specifically addresses admitting new evidence. The evidence motioned to become part of the record is part of the reviewable record as, once the commission makes the entirety of the commission file part of the record than anything that is submitted whether in a cover letter, or in person at a hearing, or in a motion becomes and is part of the record and is available for judicial review.

The Appellant believes that he has the right to cross-examine and subpoena, witnesses and evidence.

The Appellant believes that his due process rights have been violated, pursuant to Adams v. HR Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (2012) "procedural due process requirements are not technical. Procedures before administrative agencies must provide adequate notice of a hearing, provide adequate opportunity for hearing, afford the right to present evidence and afford the right to cross examine witnesses."

Each of the due process requirements laid out by Adams are structural defects as referenced in *State v. Mouzon*, the South Carolina Supreme Court distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. ...the hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process."... (stating that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an Appellant's trial").

The Appellant's right to question and cross-examine witnesses is essential to a fair hearing. When the hearing Commissioner commits an error, and that error is deemed to be a structural defect of the hearing, that hearing is a nullity, and a remand is warranted.

2) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO ACCEPT TESTEMONY AND RECORDS?

A) Statement of Fact

On July 8, 2012, a Remand Hearing was held under § 67-707. The hearing notice stated that the regulations governing the 2nd hearing would be §§ 67-601 through 67-615. (R. pp. 166)

At the remand hearing, Claimant attempted to submit deposition testimony to impeach the deposition of Dan Cobb. The hearing Commissioner denied Claimant the ability to submit the deposition testimony.

B) Discussion and Citations of Authority

Under § 1-23-320 (E) and R. §67-613 Appellant tried repeatedly to present his deposition and additional evidence to the commissioner at the remand hearing. (R. pp. 349-352, 354:15-24, 362:22-23, 369:3-24) The Commissioner would not allow the entering of evidence into the record. (R. pp. 22)

The single commissioner would not allow the deposition admitted into the record. This is in direct contradiction to rule 32 of the South Carolina Rules of Civil Procedure. Subsection (a) (1) specifically states that “**any deposition** may be used by **any party** for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the rules of evidence.”

The hearing Commissioner can only exercise discretion within the bounds of the Rules of Civil Procedure. Failing to admit deposition testimony for the means of contradicting or impeaching a deponent’s testimony is a violation of the claimant’s right to due process and warrants reversal.

Some of the evidence sought to be added to the record was medical in nature. Medical evidence is presumed to be relevant, material and non-repetitive in hearings before the commission.

Some of the evidence sought to be added to the record was rebuttal in nature. At the remand hearing, the claimant attempted to offer rebuttal evidence, and accused the defendants of misleading the court and failing to update. When the commissioner denies the acceptance of direct rebuttal evidence it is a violation of the rules of evidence. The commissioner also failed to report to the department of insurance and the Attorney General an averment of insurance fraud made by the claimant, against the defendants, for failing to update the court on the accuracy of

the form 20. The claimant received an email from Jim Pascutti (the managing owner of Snelling) stating that he had informed his legal counsel of the inaccuracy contained on the form 20. When asked about this during the hearing, Respondents Counsel, Ms. Nussbaum, actively misled the court into believing that no error had been admitted to by her client. When the hearing commissioner denies the claimant the ability to present the email contradicting and rebutting Ms. Nussbaum's position, than it is a violation of the law and warrants remand so the commission can the accept the evidence and to file a report of fraud with the proper authorities.

The email from Pascutti alluded to the existence of documentary evidence in the possession of the insurance carrier that was contradictory to the position that the attorneys for the Respondents were putting forth. This documentary evidence was subject to the records subpoena served on the Respondents by the Appellant. However, these record subpoenas were quashed by the Commissioner as stated in issue #1.

The claimant arranged and attempted to present evidence at the remand hearing in accordance with R.67-613 (a) "each party shall arrange and present all evidence at the hearing." This evidence in direct contradiction to the defendant's assertions was rejected by the commissioner. This is in direct violation of § R.67-613 (a), and warrants reversal.

When the Commission denied the Appellant the right to enter evidence into the record the result is an award based on an incomplete record and warrants a new trial.

3) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY PROVIDING INSUFFICIENT NOTICE OF THE REVIEW HEARING?

A) Statement of Facts

After the Court of Appeals issued the remand to the Commission, to remedy the due process violation of insufficient notice, the commission served a new notice of hearing. This notice of hearing failed to specifically delineate the issues to be heard at the upcoming hearing.

In accordance with this new notice of hearing both sides fully briefed their arguments for the remand hearing. At this hearing, the Appellant was instructed to proceed, whenever he informed the commission that he was under the impression that the amended form 30 was the subject of the hearing.

During the hearing, the Appellant presented argument on the issues from the amended form 30. After the hearing, the commission ruled that the amended form 30 was not properly before them.

B) Discussion and Citations of Authority

S.C. Code Ann. § 1-23-320 (A)-(B), R. § 67-607 and 67-704, among others, lay out that sufficient notice includes at least 30 days prior; notice of date, place, time, purpose of the hearing, date for filing Appellant's brief, and "short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved."

When title I specifically delineates the content of the hearing notice in a contested case, the commission does not have the authority to abstain from meeting the requirements. The commission violates the Appellant's rights, if, insufficient notice prejudices the Appellant's ability to respond and present argument and evidence on all issues involved. It cannot be said that the commission afforded the Appellant an opportunity to be heard, if everything that was briefed for the hearing and everything that was testified at the hearing was thrown out, in favor

briefed for the hearing and everything that was testified at the hearing was thrown out, in favor of a stale pleading, that is no longer applicable in this case. When the commission holds a hearing where the subject matter of the hearing is limited in such a way that is not reflected in the notice of hearing the rights of the Appellant are violated.

The right of the Appellant to be heard and to give argument and evidence on all issues involved, is the basis of due process. The future of the judiciary is under attack when issues brought before the government are no longer ruled by law and order. There is no way for a pro se Appellant to navigate his way through with commission proceedings if the commission is not bound by the laws of the state. Title 42 is remedial in nature and must be given a liberal construction in order to further its stated purpose, "to protect the injured worker." The commission is not protecting the injured worker when they allow briefs to be written and a hearing to be had, only to turn around and exclude the Appellant's arguments, pleadings and evidence in their entirety.

When the commission violates the Appellant's right to proper notice of hearing by failing to specifically delineate the issues to be heard, it is a structural defect of the hearing and warrants remand.

4) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY LIMITING THE SCOPE OF THE REVIEW HEARING?

A) Statement of Facts

A motion for additional evidence was granted by the commission resulting in a remand hearing before the Single Commissioner. The Appellant received a notice of hearing that stated the hearing had set "all issues on review." At the remand hearing, the single Commissioner

limited the scope of the review hearing to the impact of Lampkin's pay records if any on the Appellant's average weekly wage.

B) Discussion and Citations of Authority

The single Commissioner improperly limited the scope of the review hearing in two ways.

- 1) The single Commissioner excluded any consideration that Lampkin's pay records may affect more than just the Appellant's average weekly wage.

Whenever the motion to admit new evidence was granted by the commission that evidence when taken before a single Commissioner must be considered in all aspects. When the single Commissioner limits the scope of the remand to only the impact on the Appellant's average weekly wage that Lampkin's records might have, the Commissioner excludes any consideration that the evidence might impact other parts of the workers compensation claim. In this case, Lampkin's records showed that Cobb's deposition was at least inaccurate, and at most perjury. The single Commissioner failed to find any impeachment to Cobb's deposition from the records of Lampkin's employment. To not reconsider the credibility of Cobb's deposition after it had been shown to be false through an examination of Lampkin's records, is prejudicial to the Appellant. The prejudice to the Appellant occurs when the Appellant is not allowed to present argument on all of the evidence presented. Once again, according to Hudson, due process is not technical but the commission must ensure the Appellant's right to present argument on all issues. When the commission grants the addition of newly discovered evidence to the record the commission is compelled to consider all impacts of that evidence.

- 2) The hearing notice served on the Appellant stated that all issues had been set on review.

Claimant contends that the notice of review hearing was insufficient in limiting the scope of the hearing specifically to Jared Lampkin's earnings only. The remand hearing was not treated as a linear continuation of the first hearing, but was treated like a bifurcated issue. The worker's compensation commission has no authority to bifurcate issues. The commission was in error and unlawfully limited the scope of the hearing by failing to provide proper notice of issues to be heard under § 1-23-320.

This amounts to a deprivation of the Appellant's right to due process and warrants remand.

5) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS BY LIMITING THE SCOPE OF THE RECORD ON REVIEW?

A) Statement of Facts

The Commission did **NOT** consider all records submitted, "In reaching this decision, the Appellant panel did not consider any documents outside the record because the claimant's Amended Form 30 was not properly before this panel; therefore, any records submitted with the Amended Form 30 were not considered by the panel." (R. pp. 46-47)

B) Discussion and Citations of Authority

It is the Appellant's obligation to furnish the record with substantial evidence. The Worker's Compensation commission is an administrative agency and as such must strictly adhere to Title I and Title 42. §§ 1-23-320 (B) through (E) statutorily obligate the commission to issue notices that contain "a short and plain statement of the matters asserted," and to hold hearings in such a manner that, "opportunity must be afforded all parties to respond and present evidence and argument on all issues involved."

It is long established that the plain meaning of a statute must be considered first, "When writing statutes, the legislature intends to use ordinary English words in their ordinary senses. The United States Supreme Court discussed the plain meaning rule in *Caminetti v. United States*, 242 U.S. 470 (1917), reasoning "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms." And if a statute's language is plain and clear, the Court further warned that "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."

The plain meaning rule of statutory construction was upheld by the courts of South Carolina, "In construing a statute, our primary goal is to ascertain and effectuate the intent of the Legislature. *Jackson v. Charleston County Sch. Dist.*, 316 S.C. 177, 447 S.E.2d 859 (1994); *Gilstrap v. S.C. Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992). Each provision, therefore, "should be given a reasonable construction consistent with the purpose and policy of the Act." *Jackson*, 316 S.C. at 181, 49*49 447 S.E.2d at 861; *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992). Legislative intent "should be ascertained primarily from the plain language of the statute." *Richland County Sch. Dist. Two*, 335 S.C. at 496, 517 S.E.2d at 447."

When the plain reading of the law is clear that the Appellant has the onus of placing substantial evidence into the record, the statutes concerning hearings require the Appellant to do so, the Appellant has attempted to do so, and the commission will not allow it, a miscarriage of justice has occurred.

6) DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS IN FINDING "THE CLAIMANT'S AMENDED FORM 30 WAS NOT PROPERLY BEFORE THE PANEL?"

A) Statement of Facts

After receipt of the Decision and Order on Oct 4, 2012 the Appellant tried to Amend the Form 30 to reflect a change in the nature of the relief requested on his request for review. (R. pp. 140-207) The original hearing was held Nov. 28, 2012 and then a Form 30 was timely served. (R. pp. 75) Thereafter, a Motion for Additional evidence was granted under R. 67-707. (R. pp. 79-85)

The remand hearing was held July 8, 2013. On October 3, 2013 Appellant received via U.S. mail "Notice of Appellate Review" setting a full commission review hearing for October 14, 2013. (R. pp. 535) On October 4, 2013 Appellant received via Certified Mail both the Decision and Order from the July 8, 2013 remand hearing and the "Notice for Appellate Review."

On October 12, 2013 Appellant delivered to the Commission the "Amended Form 30 with attachments" via Email. (R. pp. 140-207)

During the hearing, the Appellant informed the commission that he was under the impression that the pleading the hearing was operating under was the amended form 30. After asserting this, the Appellant was instructed to proceed by the commission. The entirety of the Appellant's brief and oral argument were based on the amended form 30.

There-after the Commission excluded the Amended Form 30 and its attachments. (R. pp. 32)

B) Discussion and Citations of Authority

In the first order from the full commission the commission stated, “in reaching this decision, the Appellant panel did not consider any documents outside the record because the claimant’s amended form 30 was not timely served; therefore, any records submitted with the amended form 30 were not considered by the panel.” After the Appellant put forth the argument that the commission was responsible for serving the amended form 30 the wording was changed in the second full commission decision and order.

It now reads, “in reaching this decision, the Appellant panel did not consider any documents outside the record because the claimant’s amended form 30 was not properly before this panel; therefore, any records submitted with the amended form 30 were not considered by the panel.” Of note, this wording was changed by the Respondents, without direction from the Commission, to include reference to the records submitted with the Amended Form 30.

The proposed decision and order written by the commission stated, “Claimant’s amended Form 30 is not properly before this Panel.” However, even when the Appellant objected to the Respondents changing the wording of the Commission’s own amendment, the Commission allowed the Respondents to draft whatever order would be most helpful to them.

When the commission fails to state why the Amended Form 30 is not properly before them, they do not allow for substantial judicial review. Simple declarations without any supporting evidence or explanation does not allow for substantial judicial review, this is contrary to law and incredibly prejudicial to the Appellant.

§ 42-17-50 “If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award”

The Appellant complied with § 42-17-50 when he informed the Commission of the intent to appeal both orders from the single commissioner on October 4, 2013 in an email objecting to the scheduling of the full commission hearing only 14 days after the issuance of the remand hearing order. The Court of Appeals found that the issue warranted a new review hearing, the 14 days was insufficient time between the issuance of the decision and order from Commissioner James second hearing and the full commission review hearing.

The commission failed to exercise their discretion when they rejected the Amended form 30. *“An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.”* *Fields v. Reg’l. Med. Ctr. Orangeburg*, 363 S.C. 248, 609 S.E.2d 506 (2005) *“The Workmen’s compensation act is remedial legislation which is entitled to a liberal construction to accomplish the ends and purposes for which it was enacted.”* *Flemon v. Dickert-Keowee, Inc.* 259 S.C. 99, 190 S.E.2d 751(1972)

1) Does the Appellant have the right and/or duty to amend forms and/or pleadings after a remand hearing?

The Appellant has an obligation to amend forms according to § 67-708 which incorporates § R.67-613 B (4) through reference, “If the nature of the claim or the relief requested changes, file a new hearing request according to § R.67-207 unless R.67-610 applies.”

The original form 30 filed on January 14, 2013 became stale the moment the motion for additional evidence which asked for the case to be remanded was granted. Once a remand

hearing is held, it would be ludicrous to demand that the Appellant pursue a line of appeals from a form that was filed prior to the remand hearing. The purpose of staying the case until the remand order is received, acts as a safety mechanism to keep stale pleadings from being heard. If Commissioner James had found in favor of the Appellant's position at the remand hearing than the Appellant would no longer have to pursue the average weekly wage issue stated on the original form 30. Forcing an Appellant to pursue an independent line of appeals does not increase judicial economic efficacy.

2) Did the Appellant timely serve the Amended Form 30?

R.67-211 C (2) "When the claimant does not serve the form or document, the Commission will serve it by depositing the form or document in the United States Postal Service first class postage, addressed to the opposing parties per R.67-210."

R.67-701 A "The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the hearing Commissioner's order." R.67-701 B. states for pro se claimants "the judicial department will prepare the additional copies of the Form 30 and serve the Form 30 on the opposing party."

R.67-701 (B) and R. 67-211 (C)(2) places the duty of service of the Form 30 with the Commission. The Commission was provided with the Amended Form 30 within eight (8) days of the receipt of the Decision and Order from the (July 8, 2013) remand hearing. The Full Commission review was held on the tenth (10th) day after receipt of the remand order by the Appellant.

R.67-701 (B) and R. 67-211 (C)(2) places the duty of service of *pro se* Form 30's with the Commission. The Commission was provided with the Amended Form 30 within eight (8)

days of the receipt of the Decision and Order from the (July 8, 2013) remand hearing. The Full Commission review was held on the tenth (10th) day after receipt of the remand order by the Appellant. At the review hearing the Appellant was notified by the Full Commission Panel that “We have that [amended form 30] in front of us, yes, sir.” The Appellant relied on this statement as an express declaration that the Amended Form 30 was accepted as timely filed.

The filing of the Amended Form 30 within the fourteen-day window tolls the statutory time limit and it would be contrary to law for the commission to exclude the issues raised. To disallow the Appellant the right of review is beyond the scope and latitude of the Commission’s discretion, is based on error of law and substantially prejudices the Appellant.

3) Is the Commission barred from retroactively excluding the Amended Form 30?

§ R.67-708 “A review hearing may be postponed for the reasons in § R.67-613.” § R.67-613 B.(4) “If the nature of the claim or the relief requested changes, file a new hearing request according to § R.67-207 unless § R.67-610 applies.” § R.67-610 C. “An amended form must be timely filed and served. The Commission will determine **at the hearing** whether to allow a party to rely on new facts or defenses.”

§ 1-23-320 (E) “Opportunity must be afforded all parties to respond and present evidence and argument on all issue involved.”

In preparation for the second full commission hearing, the Appellant has once again forwarded the Amended Form 30 for the upcoming review hearing to have the Commission prepare copies and serve them on the opposing parties as required under R.67-701 B., which states for pro se claimants “the judicial department will prepare the additional copies of the Form 30 and serve the Form 30 on the opposing party.”

The Appellant served the commission the amended form 30 on two separate occasions. The reason an amended form 30 was served the first time was that the Appellant's request for relief had changed. The reason the same amended form 30 was served the second time was that at the first full commission hearing the amended form 30 had been excluded as not timely served. The Worker's Compensation commission however unlawfully limited both of the full commission hearings to only the original form 30, which was filed prior to the granting of the motion for remand. The motion for remand that the Appellant is referring to was actually titled "motion for additional and newly discovered evidence." However, this motion was filed pursuant to § 67 – 707 and that particular regulation calls for remand and the motion itself asks for the issue to be remanded to the original hearing Commissioner.

When the commission fails to accept the amended form 30, they are no longer allowing for substantial judicial review, as it is the Appellant's responsibility to place enough evidence in the record to allow for substantial judicial review.

To allow the Commission to exclude pleadings after the hearing, that were relied on during the hearing is highly prejudicial to the Appellant, by not allowing him to present argument on all issues involved. If the commission had informed the Appellant that the Amended Form 30 was not before the panel, the Appellant would have motioned for postponement upon this ground.

When the commission determines that the new facts and defenses can be relied on, they, in accordance with R.67-610 (C), must be bound by that decision.

In conclusion, when the Commission excluded the Amended Form 30 they denied the Appellant of his right to due process. This error must not be held to be harmless, as exclusion of pleadings amount to a structural defect, making the review hearing a nullity.

7) DID THE COMMISSION ERR IN FAILING TO GRANT THE APPELLANT
EXTENDED ORAL ARGUMENT?

A) Statement of Facts

On the Appellant's amended form 30 the Appellant requested extended oral argument at the full commission review hearing. This motion for extended oral argument was heard prior to the hearing and was denied by the commission. (R. pp. 140) The commission gave the reason that they hold hearings in the allotted 25 minutes all the time, thus the request for extended oral argument was denied. The Appellant's oral argument was cut short by the particular time allotment and the commission did not allow for the Appellant to fully present argument and rebuttal argument on all issues presented.

B) Discussion and Citations of Authority

When the commission is given the ability to exercise discretion they must exercise that discretion. A lack of exercise of discretion is an abuse of discretion. An abuse of discretion warrants reversal. When the commission denied the Appellant's motion for extended oral argument and gave no case specific reasons why the motion was denied they have failed to exercise their discretion and an abuse of discretion shall not be upheld by the Court of Appeals. The commission is also obligated to give supporting facts for any finding of law. They failed to give any supporting reason for denying the Appellant's motion even when the Appellant presented the commission with a proposed finding of fact concerning the denial of the motion.

From the Appellant's proposed findings of fact, "97. The Appellant's motion for extended oral argument was denied at the full commission hearing. The reason that was given was that the commission holds Appellant hearings in the allotted 23 minutes "all the time," with the Appellant allotted 10 minutes oral argument and three minutes of rebuttal. The Appellant pointed out that with 27 legal points to cover 10 minutes would allow for less than 30 seconds each and the commission advised him to cover as much as possible, and once again denied his motion for extended oral argument."

It is prejudicial to the Appellant to not have the ability to present evidence and argument on all issues involved.

The commission was given a choice to substantiate the denial of the motion for extended oral argument by the Appellant and chose not to. This is prejudicial, an abuse of discretion and warrants a remand.

8) DID THE SINGLE COMMISSIONER VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACTS?

A) Statement of Facts

After the Full Commission Hearing, the Appellant submitted Proposed findings of Fact. Appellant received confirmation that the findings were received and would be reviewed. (R. pp. 518-521, 523-526, 952)

B) Discussion and Citations of Authority

S.C. Code Ann. § 1-23-350 obligates the commissioner to rule individually upon proposed findings of fact, "if, in accordance with agency rules, a party submitted proposed findings of fact, the decision **shall** include a ruling upon each proposed finding."

Appellants proposed findings of fact were not ruled upon by the single Commissioner and warrants remand, so that the Commissioner may enter a ruling on each of the proposed findings.

9) DID THE FULL COMMISSION REVIEW PANEL VIOLATE THE APPELLANT'S RIGHTS BY FAILING TO RULE ON APPELLANT'S PROPOSED FINDINGS OF FACTS?

A) Statement of Facts

After the Full Commission Hearing, the Appellant submitted Proposed findings of Fact. Appellant received confirmation that the findings were received and would be reviewed. (R. pp. 518-521)

B) Discussion and Citations of Authority

S.C. Code Ann. § 1-23-350 obligates the commission to rule individually upon proposed findings of fact, "if, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding."

Appellants proposed findings of fact were not ruled upon by the Commission and warrants remand, so that the Commission may enter a ruling on each of the proposed findings.

10) DID THE COMMISSION ERR IN FAILING TO SUSTAIN THE APPELLANT'S OBJECTION TO RESPONDENTS AUTHORIZING THE COMMISSION'S DECISION AND ORDER?

A) Statement of Facts

After the full commission hearing the Worker's Compensation commission requested the Respondents to authorize the decision and order. The Appellant objected to the Respondents

authoring the commission's decision and order and offered proposed findings of fact to be ruled on in accordance with Title I.

B) Discussion and Citations of Authority

The Respondents were allowed by the commission to write the Decision and Order signed by the commission on April 28, 2017. On, April 11, 2017, the Appellant objected to the Respondents authoring the decision and order for the commission. Allowing the Respondents to draft a decision and order after seeing the Appellant's issues and grounds for appeal, including having the issues fully briefed, is an obvious miscarriage of justice. This miscarriage allows the Respondents to preemptively respond to the Appellant's issues on appeal with the effect of the Commissioners' own words. The Appellant objected to the Respondents authoring the Commission's decision and order. The commission, in order to maintain the air or illusion of fairness, should have drafted the order themselves, or had their legal counsel draft it as had happened previously. It cannot be considered a liberal construction of the statutes, which must be construed as such, to protect the injured worker, to allow the Respondents to draft the words of the commission. The decision and order that was signed by the full commission panel on April 28, 2017 was verbatim the document sent to them by the Respondents. At the same time as the Appellant notified the commission of his objection to the Respondents drafting the decision and order, he provided them with proposed findings of fact to be ruled upon in accordance with Title I. None of the Appellant's approximately 100 findings of fact were ruled upon, yet the Respondents proposed order was signed without as much as a single word being changed. The judicial canons of conduct call for the commissioners to maintain impartiality. The judicial canons of conduct strictly prohibit the illusion of bias. Thus, when the commission signs every

word put forth by the Respondents and denies every word put forth by the Appellant they are not abiding by the judicial canons of conduct.

According to the judicial canons of conduct the commissioners must maintain an appearance of impartiality. When the Appellant raises the objection to the Respondents authoring the commission's words the commission should sustain the Appellant's objection. It cannot be said that the Appellant acquiesced to the Respondents authoring the order through silence. Concurrent with the Appellant's objection to the Respondents authoring the order, was a submission of 97 proposed findings of fact by the Appellant to the commission. When the commission allows the Respondents to craft their words, after seeing the Appellant's legal arguments, a miscarriage of justice occurs. The ability of the Respondents to preempt the Appellant's issues on appeal by subtly changing the commissions amendment, the Appellant's positions, the issues at hand and even slight adjustments to the statement of fact is prejudicial to the Appellant and must not be upheld by this court.

11) DOES §42-9-90 STATUTORILY MANDATE THE COMMISSION TO APPLY
PENALTIES AGAINST THE RESPONDENTS?

A) Statement of Facts

Dr. Olson initially recommended and prescribed Physical Therapy on 1/9/12. Claimant's first visit to Physical Therapy was on 2/27/13. Dr. Olson initially recommended and prescribed wound debridement/therapy on 1/27/12. Wound care was never approved or provided.

The Claimant's recovery was hindered due to the gross delay in approving physical therapy. "Potential barriers to patient's ability to reach maximum rehab potential: delayed attendance to PT" (R. pp. 845) Physical therapy was delayed for a second period from 4/10/12

till 5/1/12. Dr. Olson's reported dated 4/2/2012 states that there is no longer need for wound therapy.

Rehabilitation Centers of Charleston's physical therapy notes from 6/26/12 state that the wound is nearly healed. The Claimant's wound remained open at least until 6/26/12 resulting in Dr. Olson not proceeding with surgery (R. pp. 901). Dr. Olson's report dated 5/14/12 recommends and prescribes Chronic Pain Management. The Claimant attempted to facilitate and receive Chronic Pain Management as prescribed by Dr. Olson. The Claimant first received Chronic Pain Management on 10/30/12. Dr. Ohlson first recommended and prescribed orthotics on 7/2/12, United Heartland delayed approval of this until, on or after, 11/1/12. (R. pp. 102-125)

B) Discussion and Citations of Authority

The Commission erred in failing to find that the Respondents should be subject to fines and penalties for late payments of Temporary Total Disability and Temporary Partial Disability Benefits; the error being that the record reflects payments were made at least 14 days after they were due, the records reflect that Respondent's failed to make timely payments on multiple occasions and the fine is mandated by §42-9-90.

The first check paid to claimant has a received date stamp on it reflecting it was received 12/27/11, this is over one month after claimant's injury 11/21/11 (r. pp. 657).

There is no record of payment of the mandatory increase in compensation of 10% for the period of benefits from 11/22/11 till 12/02/11. There were multiple occasions of late payments (R. pp. 657-676)

No increase in compensation or penalties or fines were applied to these late payments, as mandated, and this is prejudicial to the Appellant.

The Commission erred in failing to find Respondents be subject to fines and penalties for not authorizing Appellant's treating physicians' prescribed medical care and not authorizing treating physicians' medical care in a timely manner; the error being that the record reflects the Appellant did not receive all treatment and did not receive all treatment in a timely manner and the motion for penalties should have been granted. (R. pp. 102-125)

The record contains substantial evidence that the carrier has failed to provide medical care as directed.

To not enforce penalties and/or sanctions against the Respondents for failing to provide medical care as ordered, recommended and prescribed, by the treating physicians encourages carriers to disregard the law. This violation of the simple trade-off of swift medical care and sure compensation for limited liability must not be upheld. To do so would tip the scale of justice away from protecting the injured worker and undermine the concept of workers compensation. In an exclusive recovery setting, penalties must be applied as the legislators intended.

The concept is elementary, if the injured worker endures additional loss and the carrier is responsible for it, additional compensation is due.

12) DOES § 42-9-260 STATUTORILY BARR THE COMMISSION FROM GRANTING THE CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

A) Statement of Facts

There were instances of late payments of total temporary disability. After these late payments, no penalties or any increase in compensation was paid to the Appellant. The application for the stop payment of benefits was made at the time that mandatory penalties were

due to the Appellant from the Respondents. The commission granted the Respondents application for stop payment with penalties due.

B) Discussion and Citations of Authority

The commission should have awarded at the minimum the mandatory penalties, thus, an application for suspension of benefits should not have been entertained by the commission on November 28, 2012.

Pursuant to § 42-9-260 (F) “Further, the commission may not entertain any application to terminate or suspend payments **unless and until** the employer or carrier is current with all payments due.”

If Appellant was due penalties for late payments of temporary disability payments can the commissioner grant a stop payment and then give a credit, with outstanding penalties due?

13) 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?

A) Statement of Facts

“My understanding of the decision of Curiel is at the date of maximum medical improvement, whatever that date is, that that is the date the temporary total and/or temporary partial **has to stop.**” Commissioner James (R. pp. 272)

B) Discussion and Citations of Authority

Curiel v. Environmental Services Inc., (2007) 376 S.C. 23, 655 S.E.2d 482 “Appellant was not entitled to Temporary total benefits because Appellant had exaggerated the degree of his vision

loss. The commission found: Had the Appellant been honest with his physicians concerning the sight in his right eye, a corrective lens could have been provided, and the Appellant could have worked."

The Commissioner erred in the application of *Curiel v. Environmental Management Services*. In *Curiel*, the Appellant failed to cooperate with his physician which resulted in his inability to return to work. The credit was based on his earning capacity.

The Commissioner's understanding of *Curiel* amounts to an error of law. To award the carrier a credit based on the understanding that any payments of support **MUST** be credited to the carrier supplants the legislative intent of the Act.

Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 248, 609 S.E.2d 506(2005), "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support."

Swinton v. South Carolina Dept. of Mental Health 314 S.C. 202, (S.C. App. 1994), since the finding of MMI did not establish the Appellant was no longer disabled, disability was presumed to continue.

Smith v. Daniel Construction Co., 253 S.C. 248, 169 S.E.2d (1969) "When the court is asked to follow the line marked out by a single precedent case, it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated." ... "The doctrine of stare decisis should not stand in the way. That doctrine has no application, where there is conflict in the decisions of the court. In that event the court is at liberty to adopt those decisions which are sound in principle and in accord with right and justice and the statute law, and, overrule those which are contrary thereto." "This

Court has always attached great importance to the doctrine of stare decisis, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application.” “Nonetheless, stare decisis will not be applied when it results in perpetuation of error or grievous wrong,” ...” since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible.”

In summary, Curiel is off-point with the current case in the following ways: (1) no evidence exists, nor has the defense asserted that the Appellant has been dishonest with his physicians. (2) No substantial corrective treatment exists for the Appellant’s injury that would instantly return him to work. (3) It is disability resulting from injury that has precluded him from employment.

In conclusion, where the only reason given for an award is based on error of law, that award must not be upheld. Curiel did not have the effect of overturning Swinton. The Appellants disability was presumed to continue. This presumption was not rebutted. The credit must not be awarded to the carrier in this case.

14) DID THE COMMISSION ERR IN EXCLUDING EARNINGS AT ALSIDE REVERE
BY LAMPKIN?

A) Statement of Facts

Appellant testified “Dan Cobb said they liked my work and that if I was on board, that he would like to hire me.(R. pp. 290:1-2)” I was looking for long term stability so I could finish school.(R. pp. 290:13-14)” “They [Snelling] try to put you with someone that would be a good long term fit for you to be hired on for (R. pp. 310:24-311:1)” “Snelling does not take you on a daily basis to go to different places. They are – their mission is to place people to be hired on at

basis to go to different places. They are – their mission is to place people to be hired on at companies rather than filling day labor needs.(R. pp. 309:7-11)” “me and Dan Cobb had had a conversation regarding... bring me on before the 550 hours because its an exorbitant cost for the company to outlay for the staffing agency.(R. pp. 315:21-25)” “Alside Revere did try to re-employ me simply as a driver until I was healed enough to take over full duties again...I believe that would speak to their intent of wanting to hire me.(R. pp. 316:19-317:1)”

Dan Cobb Testified that ultimately, he would make the final (hiring) decision (R. pp. 410) “We brought him on to be full time (R. pp. 413)” “would receive at least 40 hours a week (R. pp. 414)” “he was the only one” employed to make deliveries (R. pp. 414) “that he [Appellant] was working out” and had performed “so far so good (R. pp. 415)” That “It’s a permanent position” and “No, it’s permanent (R. pp. 419)” “He was a very good employee. He did very well in the limited time he was there (R. pp. 416)” That there was overtime ranging from two (2) to ten (10) hours of overtime a week.” “If he worked out we would make him a permanent employee” and “If they do well that is my intention.”

B) Discussion and Citations of Authority

The Appellant believes it is more likely than not that he would have been hired at Alside Revere, and that substantial evidence supports that contention, that his wages should be looked at as if he was hired permanently, as those wages should reflect likely earnings going forward.

South Carolina is an at-will employment state. *Prescott v. Farmers Telephone Cooperative, Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999) “A contract for permanent employment, ...is terminable by either party. At-will employment is generally terminable by either party at any time, for any reason or for no reason at all.”

The Single Commissioner penalized the injured worker by finding there was “No guarantee he would have continued with the assignment at Alside Revere.” (R. pp. 1)

To lower the AWW in this case, on this basis, would substantially prejudice the rights of the Appellant. §42-1-160 defines injury, and includes a non-inclusive list (§42-1-160 (C)) of “events which are incidental to normal employer/employee relations including but not limited to...terminations...” Any reference to what “might” have happened would be based on speculation, conjecture or surmise, and no award shall be based on speculation, conjecture or surmise.

In conclusion, there is no basis for the applicability of whether or not employment was guaranteed as consideration of guarantees are not accounted for under S.C. Code Ann. (1976) Title §42.

15) DOES §42-1-40 STATUTORILY MANDATE THAT THE COMMISSION
CALCULATE WEEKS AND PARTS THEREOF WHEN DETERMINING THE
AVERAGE WEEKLY WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND
CLARK.

A) Statement of Facts

None of the employees had worked 52 weeks and the calculations used do not take into consideration any partial weeks.

Appellant’s average wage was determined by dividing gross pay (\$9,856.96) by number of checks received (20) which equates to \$492.85 (which is approx. \$28 less than 40 hours per week at \$13 an hour.) (R. pp. 11) Respondents listed 20 weeks as the number of weeks worked. (R. pp. 65) Commissioner James used their calculation. (R. pp. 11)

Lampkin's average wage was determined by dividing gross pay (\$8,040.52) by number of checks received (13) which equates to \$618.50 (which is equal to approx. 5 hours of overtime per week.) (R. pp. 11)

Lampkin worked 78 hours of overtime over 11 full weeks resulting in 7.09 hours of overtime or actual wages of \$658.25.

Lampkin worked a partial week the week ending 11/25/11 (32 hours). Lampkin worked a partial week the week ending 2/17/12 (31 hours) (R. pp. 688). Jarod Lampkin's wage determination does not take into account any partial weeks.

Clark's average wage was determined by dividing gross pay (\$8,534.51) by number of checks (16) and equates to \$533.41 (which is equal to less than 2 hours of overtime). (R. pp. 11)

Clark's wage determination does not take into account any partial weeks. This is a violation of S.C. Code Ann. §42-1-40 (1976).

Clark worked partial weeks the weeks ending 7/29/11 (32 hours worked) and 11/11/11 (8 hours worked). (R. pp. 687) Both of these weeks are clearly fractional. Clark's average wage accounts both of the above weeks as full weeks.

Clark worked five other fractional weeks. (R. pp. 687) Excluding the partial weeks results in 5.61 hours of overtime or actual wages of \$629.40 weekly.

Wayne Atkins average wage was determined by dividing his gross pay (\$7,603.24) by paychecks received (15 checks) resulting in an average wage of \$506.88 (which is equal to less than 40 hours a week at \$13 an hour). (R. pp. 11)

Wayne Atkins wage the week ending 4/8/11 was for 8 hours but calculated as a full week (R. pp. 686)

Wayne Atkins worked 45 hours at \$8 an hour instead of \$13 an hour the last week of his employment, resulting in wages of \$344.35 (\$8 an hour x 45 hours) instead of his normal pay rate equal to \$606.25 (\$13 an hour x 45 hours) (R. pp. 685-686).

Atkins worked 3 other fractional weeks that the commission counted as full weeks. (R. pp. 686)

Excluding his first week Atkins actually worked 2.51 hours of overtime per week and earned actual wages of \$568.95 weekly.

B) Discussion and Citations of Authority

In Accordance with §42-1-40 If the time worked does not exceed 52 weeks the proper method to calculate AWW is to take earnings and divide them by actual number of weeks worked and parts thereof.

The commission did not calculate the AWW in accordance with §42-1-40 in the following instances.

A) Appellants AWW

Appellant only worked 19 weeks during the period in question and feels that this calculation is contrary to § 42-1-40, and using \$492 instead of \$518.79 does not properly account for actual number of weeks worked. Also, Counting the week of the injury as a full week when the Appellant only worked one day is prejudicial to the Appellant by not accurately reflecting the AWW “were in not for the injury.”

B) Jared Lampkin's Average Weekly Wage while employed through Snelling

In conclusion, the Commission should not have used \$618.50 for Lampkin's AWW, \$658.25 at the minimum or \$727.10 at the maximum, should be utilized as this calculation properly accounts for weeks and parts thereof.

C) Alvin Clark's Average Weekly Wage

The Commission determining Clark's AWW at \$533.41 instead of \$629.40 is clearly prejudicial to the Appellant and based on error of law, as the record shows that partial weeks were counted as full weeks, contrary to § 42-1-40.

D) Wayne Atkins' Average Weekly Wage

In conclusion, the Commission determining Clark's AWW at \$506.88 instead of \$568.95 is clearly prejudicial to the Appellant and based on error of law, as the record shows that partial weeks were counted as full weeks, contrary to § 42-1-40.

16) DID THE COMMISSION ERR IN THE DETERMINATION OF THE METHOD TO BE USED TO CALCULATE AVERAGE WEEKLY WAGE?

A) Statement of Facts

On, May 13, 2011, the Appellant became initially employed with Snelling Staffing working with Ben Arnold. The pay rate for this employment was \$11.50/hr. This employment was Tuesday thru Friday with an arrival time of approximately 6:00 am and a departure time varying from noon till 8:00 pm. This job required a Class B CDL (commercial driver's license). This job required constant lifting up to 50lbs, driving a class B vehicle, minimal warehouse

work, delivery, stocking and merchandising of beer and wine to various locations for Ben Arnold.

When this employment ended there was no guarantee of future employment, no timetable given for return and for all intents and purposes the Appellant was no longer employed.

On, November 11, 2011, the Appellant entered into a subsequent employee/employer relationship with Snelling Staffing to work for Alside Revere. This employment was for a construction distribution company. The pay rate for this employment was \$13/hr. This position was for Monday thru Friday work from 7:00 am till 4:00 pm with the understanding that there would be regular overtime. Requirement for employment involved possessing a Class A CDL. (R. pp. 417) This job included several hours of warehouse work daily and irregular delivery routes, twice a week going within 5 miles of the Georgia border.

On Nov. 22, 2011, Jared Lampkin replaced the Appellant at Alside Revere. Lampkin was the only person to work this job for the following year. Taking into account pay records from Alside Revere and Snelling, the period from Nov. 22, 2011 to Nov. 10, 2012 included forty-nine (49) full weeks and two (2) partial weeks. During this period Lampkin earned wages equal to \$36,544.61.

Lampkin's AWW excluding the partial weeks are equal to:

$(\text{Total wages} - \text{partial week wages}) / \text{full weeks worked} = \text{AWW}$ or $(\$36,544.61 - \$916.50) / 49$
full weeks = \$727.10

B) Discussion and Citations of Authority

The Commission erred in finding that a fair and just method to calculate the wages of the Appellant was to take an average of his wages from a previous job along with the three other employee wages provided; the error being that it was not fair and just to the Appellant as it did not reflect the earnings of the injured employee and the error being that the amount that should have been used should be the actual earnings in the employment at time of injury with the ultimate objective being to fairly reflect the Appellant's probable future earnings.

The weeks accounted for by the Commission includes, 44 weeks of various statutory employees working in the same employment in which the Appellant was injured (Alside Revere, a building supply company) and 20 weeks, only 19 of which the Appellant actually worked, in a different scope of employment for a different statutory employer (Ben Arnold, a wine distributor).

The appellate relies heavily on *Sellers v. Pinedale Residential Center* 350 S.C. 183(S.C. App. 2002). "The disability of a worker's compensation claimant reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, for the purposes of calculating the claimant's average weekly wage." "The workers compensation statute, which sets forth several different methods for calculating the claimants AWW, provides an elasticity or flexibility with a view towards always achieving the ultimate objective of reflecting fairly a claimant's probable future earnings loss."

1) Did the commission err in relying on a Form 20 from a different "**employment?**"

Although the Appellant worked as an employee of "Snelling" there were actually two different "EMPLOYMENTS" during that time period. The definition of "Average Weekly

Wage” says that the AWW is to be determined in the “EMPLOYMENT” working at the time of injury not by the “EMPLOYER.”

“Whether or not an employer-employee relationship exists within the meaning of the workers compensation law is a jurisdictional question for which the reviewing court can take its own view by a preponderance of the evidence.” Collins v. Charlotte (S.C.App. 2012) 2012 WL 3323345,”

The litmus test for the establishment of a new employment is clarified by *Chavis*, “*Unless claimant knew of and agreed to a new employer-employee relationship replacing the one theretofore existing, his rights under the Workman’s Compensation Act against his regular employer were unabridged. Chavis v. Watkins 256 S.C. 409(S.C. 1971).*”

When the Appellant agreed to a new job with Snelling, his right to compensation is based on his new “EMPLOYMENT.” To base AWW on wages from a previous employment, that included lower wages, a different scope of work, in a different industry, with different hours, needing a different license with less dangerous conditions does not comply with §42-1-40 which states AWW must be determined “in the employment working at the time of injury” and warrants reversal.

2) Do Jared Lampkin’s earnings most accurately reflect what the Appellant would be earning were it not for the injury?

Due to the fact that disability reaches into the future and not the past, loss must be calculated upon probable future earnings.

The compensation rate that would most closely reflect the claimant's earnings, "were it not for the injury," are represented by Lampkin's future earnings in the year following the claimant's injury. This would result in a compensation rate of \$727.10.

Lampkin's earnings most accurately reflect what the Appellant would be earning were it not for the injury. However, if Lampkin's future earnings are rejected as the most accurate representation of claimant's probable future earnings, then at a minimum, the earnings calculated must include the employment worked at the time of injury. But This would preclude any use of a former employment as basis for a compensation rate. Meaning that the one full week worked for Alside Revere, should be used as the average weekly wage of \$627.75. This average weekly wage would result in a compensation rate of \$418.91.

In conclusion, AWW should reflect probable future earnings, which in this case would be a minimum of \$727.10 a week.

17) DID THE COMMISSION ERR IN THE DETERMINATION OF THE EXTENT OF APPELLANT'S DISABILITY?

A) Statement of Facts

The Appellant was released to sedentary work with restrictions. Prior to the Appellant's injury he was performing Heavy work and all the Appellant's past job experience would constitute light work to heavy work according to the US Department of Labor, Dictionary of Occupational Titles (4th Ed., Rev. 1991 -- APPENDIX C.)

Appellant is restricted to lifting no more than 10 pounds, no more than 1 hour standing in an eight (8) hour day, and has to take multiple medications for pain. (R. pp. 74)

Appellant is permanently restricted to working in "less than sedentary" jobs according to the D.O.T. appendix.

B) Discussion and Citations of Authority

Did the Commission err in finding the Appellant has a disability to the left leg of thirty-four percent (34%); the error being that the Appellant's loss of use and disability greatly exceeded this amount based upon the permanent vocational impact and the Appellant's decrease in earning capacity?

Outlaw v. Johnson Services Co. 254 S.C 486, 176 S.E.2d 152 (1970). "the loss of earning capacity alone is the criterion for compensation under the Act." *Coleman v. Quality Concrete Products, Inc.* 245 S.C. 626, 142 S.2d 43 (1965) "Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment."

Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527(2005) " He takes medication, but his leg remains swollen and painful. He now has difficulty walking and standing for long periods of time. Peoples stated that he is unable to participate in sports, cannot lift heavy objects, and climbs stairs with difficulty. The single commissioner held that Peoples had undergone a sixty-eight percent permanent partial disability to his right lower extremity and awarded benefits accordingly."

"The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995)

An award of 34% to the leg is arbitrary and not supported by substantial evidence and fails to provide equal protection under the law.

The injured worker in *Peoples*, supra, had difficulty walking or standing for long periods of time, was able to return to his previous position, walked with a limp but did not rely on an assistive device to walk and estimated his loss to be seventy percent (70%.)

In contrast, the Appellant has lost his license on which his employment was based, has been unable to return to work since reaching MMI, has trouble standing and walking for short periods of time, walks with a limp, relies on a cane and has a total vocational loss.

Appellant cannot perform any job he has held in the past. (R. pp. 284)

In accordance with *Coleman*, the inability to work in even the lowest physical qualification class equates to a total loss of earning capacity for the Appellant.

18) DID THE COMMISSION ERR IN DETERMINING THE APPELLANT'S DISABILITY UNDER SCHEDULED LOSS?

A) Statement of Facts

The Commission Awarded a 34% permanent disability to the left leg. Dr. Ohlson's Form 14 B Stated that the impairment was to the lower extremity according to the AMA guides. AMA guides on disability include the hip in the definition of "lower extremity," while the commission excludes the hip in the definition of "leg." The claimant uses a cane. In no way are the impairments for the hip or for having to use a cane considered in the award from the commission.

B) Discussion and Citations of Authority

Pursuant to *Lee v. Harborside Café* 350 S.C. 74, 564 S.E.2d 354 (S.C. App. 2002) which states that claimant may proceed under either Workers Compensation Act's general disability section in order to maximize recovery and only when schedule loss is not accompanied by additional complications affecting other parts is scheduled loss exclusive, the Commissioner should have awarded disability compensation under §42-9-10 and/or §42-9-20. The single commissioner awarded for permanent loss of use of leg.

The Appellant has multiple complications affecting other parts of the body and thus scheduled recovery is NOT exclusive. Therefore, the Commission erred in strictly construing §42-9-30.

In conclusion, due to restrictions, work qualifications, education level, medical complications, injury to multiple scheduled loss body parts as well as non-scheduled body parts, impairment rating of multiple scheduled loss body parts and other applicable factors, the Appellant should receive general disability under permanent total disability or maximum partial disability under §42-9-10 or §42-9-20 and/or a finding of total and permanent disability under §42-9-30.

19) DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

A) Statement of Facts

The Appellant reached maximum medical improvement according to Dr. Ohlson "from an orthopedic standpoint" on Aug. 13, 2012 but stated Appellant would need further treatment (R. pp. 587), Dr. Tavel found Appellant to be at MMI on July 22, 2013 (R. pp. 906-917), Dr.

Brilliant opined that Appellant could still be up to a year away from MMI (R. pp. 625), Dr. Tavel found MMI on July 22, 2013 , and Dr. Gudas judged MMI to be premature (R. pp. 622-625).

B) Discussion and Citations of Authority

The term "maximum medical improvement" means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006)

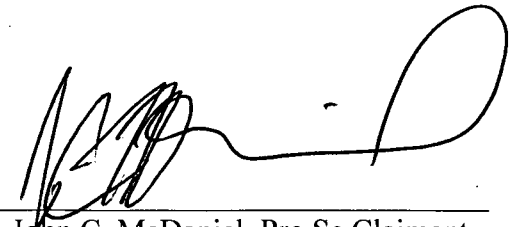
Dukes v. Daniel Const. Co. 262 SC 98 (SC 1974,) where the commission found that further medical care was necessary and should be furnished, implicit in such award is the finding that additional medical treatment will tend to lessen the period of disability, for on no other grounds could liability for additional treatment be based under §42-15-60.

Dr. Ohlson was clear in two aspects of finding MMI on August 13, 2013; 1) further treatment would be necessary 2) his opinion was limited in scope to his specialty and did not account for any further impairments or treatments. To only take into consideration one out of four medical opinions fails to reach the threshold of substantial evidence.

CONCLUSION

Title § 42 was authored and implemented with the sole purpose to protect the injured worker, the goal of keeping injured workers from becoming charges on society and an exclusive remedy in exchange for swift care and limited compensation. The Appellant is permanently disabled and must be protected by this court.

The Appellant prays that this court will seek justice and uphold the law by: remanding the case back to the South Carolina Workers Compensation Commission for a rehearing with specific instructions to at a minimum; accept the amended form 30, calculate AWW excluding partial weeks and reflect future and not past earnings, to reconsider disability and find no less than 68% to the leg, to apply mandatory penalties and reconsider discretionary penalties, deny the Respondents credit, accept evidence, enter Appellant's deposition into the record, rule on the Appellants proposed findings of fact and find MMI no earlier than July 22, 2013, or in the alternative, overturn all of the appealed issues and enter an award fair and just to the Appellant, and/or whatever other action the court may deem fair and just.



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