THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

David B. Lemon, Claimant, Appellant,

-vs.-

Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, Respondents.

REPLY BRIEF

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STANDARD OF REVIEW

Appellant maintains there has been an error of law, as opposed to an error of fact. As such, the appellate court may overturn a conclusion of the Workers' Compensation Commission if that conclusion is based on an error of law. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, S.E.2d 304 (1981).

ARGUMENT

1. The Respondents have misconstrued S.C. Code Ann. §42-9-170(B)

In its Brief, the Respondents go to great length to "split hairs" with the reference to the term "injury" and thereby torture the construction of §42-9-170(B). The relevant language of the Code Section is "receives a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B)." Simply stated, in the present case, the Employee did not receive a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B); to the contrary, he received a permanent injury as specified in Section 42-9-10(A). It would make no sense to construe the code section in any other manner, particularly since the Commission's Appellate Panel remanded the claim to the Single Commissioner to make a determination as to whether the award for permanent total disability benefits was pursuant to Section 42-9-10(A) or Section 42-9-10(B).

Respondents assert, without any authority, that "the basis

for the Legislature's inclusion of Section 42-9-170 is clear in light of the overall goal of the Workers' Compensation system to encourage employers to bring injured workers back to work after injuring themselves in prior Workers' Compensation claims." If this were the case, then why is there an exception to permanent injuries as specified in Section 42-9-10(A)? Additionally, the injured employee has protection from being discriminated because of having a prior workers' compensation related injury pursuant to the American With Disabilities Act.

Respondents apparently contend that since the Appellant had received permanent injuries as specified in section 42-9-30 or Section 42-9-10(B), then Section 42-9-170 applies as a basis for the credit for the prior injuries. However, the specific language of S.C. Code Section 42-9-170(B) states that "if an employee **receives** a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B)." The reference to the word "receives" would only make sense pertaining to the claim that is presented to the Commission for adjudication arising from the Claimant's work-related accident of May 8, 2012. If the reference to the permanent injury was to the prior claims, then the statutory language would have stated "if an employee **received** a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B). In short, the Respondents have misconstrued the statutory language and have overlooked the difference in the tenses of the present

injury as opposed to the past injuries referenced in the code section.

The second sentence of §42-9-170(B) does not apply in this case because, as stated in the Appellant's Brief, the Claimant in this case has not incurred total permanent disability due to the loss of another member. To the contrary, he has sustained permanent total disability through the loss of multiple members and was thus awarded permanent total disability pursuant to Code Section 42-9-10(A).

PRIOR INJURIES DO NOT APPLY TO JUSTIFY A CREDIT

Appellant maintains there is no reason for this Court to review the specific prior awards for disability that were referenced in the Respondent's Brief, because pursuant to Code Section 42-9-170(B) these prior payments would have no legal application. All the prior injuries and awards were pursuant to Code Section 42-9-30 and since the present award is pursuant to Section 42-9-10(A) they would have no application. However, if the Court were to review the individual payments for prior injuries, Appellant notes the following:

1. For the accident of 3/04/09, 3 weeks of temporary total disability were paid to the Appellant. There is certainly no provision pursuant to §42-9-170 or case law that would support a credit for payments of temporary total disability benefits. (R. pp. 122-124).

2. For the accident of 4/26/10, again, 25.4286 weeks of temporary total disability was designated pursuant to the Form 19 and there was no designated weeks for any additional disability. There is no legal basis to give a credit for temporary total disability benefits. (R. p. 125-126).

3. As to the accident that occurred on 4/13/11, according to the Form 19 no compensation was paid for disability. (R. p. 128). Although the settlement agreement references 25% to the right shoulder, there is no specific designation of number of weeks. Additionally, there is no way to conclude that the total settlement represented by 25% to the right shoulder was solely allocated to the right shoulder injury because there was additional consideration noted for future medical, future disability, disfigurement and change of condition. (R. p. 130).

4. As to the accident that occurred on 10/03/11, the Form 19 designates 20.5714 weeks for temporary total disability. Certainly there should be no credit for any payments of temporary total benefits. And, there are no additional weeks of disability that are designated on the Form 19. (R. p. 133). Again, the settlement agreement references an unallocated payment for 25% to

There is no specific designation of weeks. There is no consideration given for the release for future medicals, future disability, disfigurement or for a change of condition. (R. p. 136).

CASE LAW DOES NOT SUPPORT THE AWARD FOR THE OFFSET

Respondents cite several cases to support the offset awarded by the Commission. However, as stated in the Appellant's Brief, all of the cases cited by Respondents precede 2007, the year in which S.C. Code §42-9-170 was substantially amended. None of the cases are on point to provide for the credit that has been awarded in the present case.

Wyndam v. Thornley, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987), deals with a different code section, namely Section 42-9-150; not Section 42-9-170. Secondly, the case involved the application of the Second Injury Fund that served as a basis for awarding the Claimant additional compensation. The Second Injury Fund was essentially gutted when §42-9-170 was passed by the legislature in 2007.

Hopper v. Firestone Stores, 222 S.C. 143, 72 S.E.2d 71, (1952), does not apply in the present case. The *Hopper* court dealt with a situation where a Claimant had been awarded 100% loss of use of his leg because of a prior injury and was therefore not entitled to any additional compensation for the same injured leg. It should be noted that this was not a case

that dealt with disability pursuant to Code §42-9-170 or §42-9-10(A).

Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1990), has no application to the present case. In *Medlin*, the employee sustained a back injury and was awarded more than 50% loss of use of his back pursuant to §42-9-30 and was therefore awarded permanent total disability. The employee then returned to the same employer and received a subsequent back injury. The Court found that since the Claimant had already received an award for permanent total disability due to his back injury, he could not receive the additional compensation because of the limitation of §42-9-10. The Court specifically held that §42-9-170 did not apply in the *Medlin* case.

Another case cited by the Respondents, *United Technologies v. South Carolina Second Injury Fund*, 318 S.C. 213, 456 S.E.2d 901 (1995), has no application to the present case. The case was decided well before the relevant revisions to §42-9-170 and specifically deals with the application of the Second Injury Fund pursuant to a 1985 statute. The award of temporary total disability benefits was for the same accident that was the subject of the case, as opposed to other prior injuries. Appellant does not question the credit for the temporary total disability benefits paid to the Appellant for the subject accident. The cap of 500 weeks pursuant to §42-9-10(A) applies.

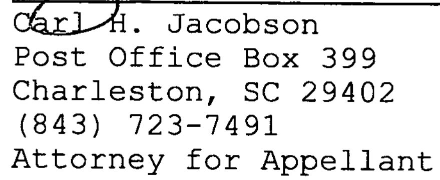
Similarly, *Getzinger v. Owens Corning Fiberglass*, 335 S.C. 77, 515 S.E.2d 104 (1999) has no application to the present case. There was no issue presented in *Getzinger* concerning whether the Commission had the authority to award credit for prior injuries. Secondly, the thrust of the opinion was that the Claimant had sustained a mental injury as a result of physical injuries to his foot. The legal issue presented in the present case was simply not presented to the *Getzinger* Court for determination.

With respect to the other cases cited by the Respondents in its Brief that stand for the proposition that the Appellant can receive no more than 500 weeks of benefits for a single injury, the Appellant agrees with this proposition. In fact, Appellant maintains that the only limitation on his receipt of 500 weeks of benefits is §42-9-10(A), that was the basis for the award in the present case. Appellant concedes that the Respondents would be entitled to the credit for any weeks of temporary total disability benefits paid for this particular accident that is a subject of this appeal.

CONCLUSION

Base upon the foregoing, Appellant maintains that the offset that was given to the Respondents for prior unrelated injuries was an error of law. There is no statutory or common law basis to justify such a credit.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR.

April 25, 2017

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