STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant.....Respondent

v.

Diversified Coatings, Inc., Employer, and AmGuard Ins. Co., Carrier.....Appellants.

INITIAL BRIEF OF THE APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Although medical impairment ratings are usually a question of fact for the Commission, they become an issue of law for the Court when the evidence points to one conclusion only or the Commission's findings are based on surmise, speculation, or conjecture. In this case, all the evidence points to a 12% impairment, and the Commission's finding is based on surmise, speculation, or conjecture. Did the Commission commit an error of law?
2. A decision is arbitrary if it has no rational basis or is based alone on will rather than a course of reasoning. In this case, the Commission assigned a "greater than 50%" impairment rating based on two unsubstantiated claims. Is the Commission's decision arbitrary?
3. "Substantial evidence" is evidence that allows reasonable minds to reach the conclusion that the administrative agency reached. Dr. Math assigned a 12% spinal impairment rating. To assign an impairment of "greater than 50%," the Commission relied on two unsubstantiated claims and the irrelevant fact that Paulino cannot speak English well. Would that evidence allow reasonable minds to reach the conclusion that the Commission reached?
4. The Commission is supposed to assign a definite spinal impairment rating. But the Commission assigned instead a "greater that 50%" impairment rating. Did the Commission commit an error of law?
5. When the Commission determined that Claimant was permanently and totally disabled, it disregarded the medical impairment rating assigned by a doctor and infused considerations regarding a loss of earning capacity. Loss of earning capacity is the model for obtaining disability benefits under sections 42-9-10 and 42-9-20, not the model for obtaining

disability benefits under section 42-9-30. Did the Commission err by infusing such considerations into a section 42-9-30(21) analysis?

6. Even if Paulino's spinal impairment rating is somehow "greater than 50%", Dr. Math's 14B, the only relevant medical evidence, rebuts the presumption of permanent and total disability. Did the Commission err when it determined that the Carrier failed to rebut the presumption?

STATEMENT OF THE CASE

Paulino's Workers' Compensation Claim arose from an injury he sustained around 02/06/2015. At a hearing on 03/05/2018, Paulino asked the single Commissioner to find him permanently and totally disabled under section 42-9-30(21), arguing he had a greater than 50% spinal impairment. The Employer and Carrier (hereinafter Carrier) sought to conclude the claim because Paulino had reached maximum medical improvement (MMI) and a doctor had assigned a 12% spinal impairment. On 04/13/2018, the Commissioner ruled (along with other things unrelated to this appeal) that Paulino sustained a greater than 50% spinal impairment. This finding, along with the Commission's determination that Carrier failed to rebut the presumption of total disability, rendered Paulino permanently and totally disabled under section 42-9-30(21), entitling him to 500 weeks of compensation. Paulino's compensation rate is $312.22, meaning the Commissioner awarded him $156,110. He also received lifetime medical benefits under section 42-15-60.

The full Commission hearing took place on 07/16/2018. The Commission (with modifications unrelated to this appeal) affirmed the single Commissioner's order on 10/03/2018. In its affirmance, the Commission noted that no medical professional gave a regional spinal impairment higher than 12%. But the Commission ruled that this rating was "very low based on the poor

surgical result." No definition of "poor surgical result" was given. The Commission also listed Paulino's inability to speak English fluently, part of his work history and training, and his medication list while concluding he is permanently and totally disabled. In fact, the Commission said that "based on [Paulino's] medication list alone, [he] has suffered a major disability." The Commission did not provide the medical basis of that opinion, or explain why a "major disability" equates to permanent and total disability under the South Carolina Workers' Compensation Law.[1] Carrier filed a Notice of Appeal on 11/02/2018.

STANDARD OF REVIEW

The standard of review set forth in the Administrative Procedures Act applies to Workers' Compensation cases.[2]

1. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because other error of law affects the administrative decision.[3]
2. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.[4]
3. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because it is clearly incorrect in light of the reliable, probative and substantial evidence on the whole record.[5]

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[1] "This title shall be known and cited as 'The South Carolina Workers' Compensation Law." S.C. Code Ann. §42-1-10.
[2] *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304, 305 (1981).
[3] S.C. Code Ann. §1-23-380(5)(d).
[4] S.C. Code Ann. §1-23-380(5)(f).
[5] S.C. Code Ann. §1-23-380(5)(e).

ARGUMENT

I. The Commission committed an error of law.

In *Clemmons*, the South Carolina Supreme Court made clear that impairment ratings, though usually a question of fact for the Commission, will become an issue of law for the Court if all the evidence points to one conclusion or "the Commission's findings are based on surmise, speculation or conjecture."[6] In addition, though the Claimant in *Clemmons* had significant work restrictions,[7] the Court focused exclusively on his spinal impairment ratings while determining the extent of his impairment under section 42-9-30(21).[8] Work restrictions, therefore, are not part of the analysis under the scheduled member statute.

In this case, Dr. Math assigned a spinal impairment of 12%. (Dr. McHenry assigned a whole person impairment rating, but whole person ratings are irrelevant under the scheduled member statute[9]). Despite the 12% rating, the Commission ruled that Paulino's spinal impairment is "greater than 50%." In doing so, it claimed that 1) "[his] impairment ratings are very low based on the poor surgical result,"[10] and that 2) "based on the medication list alone, [Paulino] suffered a major disability."[11]

The Commission did not define "poor surgical result" or "major disability." And, more importantly, the Commission did not substantiate these claims with any medical opinions or other

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[6] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 271 (2017) (internal quotations and citations omitted).
[7] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 269 n. 1.
[8] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 271.
[9] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 271 (internal citations omitted).
[10] Order of full Commission (October 3, 2018), p. 12, ¶9.
[11] *Id.*, ¶10.

evidence.[12] Consequently, these claims are based on nothing more than "surmise, speculation [,] or conjecture."

Conversely, Dr. Math based her medical opinion on the most recent edition of the premier medical treatise concerning impairments. [13] Given this, all the medical evidence points to a 12% spinal impairment, whereas the Commission based its rating on "surmise, speculation [,] or conjecture." Therefore, its decision constitutes an error of law. This Court should overturn the spinal impairment assigned by the Commission, and then remand the case for a determination of permanency that is less than 50%.

II. The Commission's decision is arbitrary.

In *Deese* the Supreme Court explained that, "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards."[14] As shown in the previous argument section, the Commission did not provide a reason, let alone a course of reasoning, that substantiated the basis of its "greater than 50%" rating. Consequently, its decision is arbitrary. This Court should overturn it and then remand the case for a determination of permanency that is less than 50%.

III. The Commission's decision is unsupported by substantial evidence.

The Commission's findings can be set aside if unsupported by substantial evidence.[15] "Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one

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[12] *See Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200, 206 (Ct. App. 2013) (The Court of Appeals rejected the Commission's adoption of the single Commissioner's medical opinion when no medical evidence supported it).
[13] Form 14B, referencing the AMA's *Guides to the Evaluation of Permanent Impairment*, 6th ed.
[14] *Deese v. S.C. State Bd. Of Dentistry*, 286 S.C. 182, 332 S.E.2d 539, 541 (Ct. App. 1985).
[15] *Clemmons*, 420 S.C. 282, 803 S.E.2d 268, 270 (internal citation omitted).

side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action."[16]

In this case, all the medical evidence supports a 12% spinal impairment. But the Commission disagreed with the medical evidence and multiplied the impairment rating by more than four. To do this, it relied on two unsubstantiated claims regarding a "poor surgical result" and a long medication list. In addition to these unsubstantiated claims, the Commission noted that Paulino cannot "speak much or any English" and provided part of his work history and training. Of course neither of these two pieces of information has any bearing on the extent of his spinal impairment. If these irrelevant pieces of information were part of the Commission's decision to assign a "greater than 50%" rating, then these along with the two unsubstantiated claims are too insubstantial to support that decision. No reasonable minds would reach the conclusion that the administrative agency reached based on this evidence. The Court should overturn the "greater than 50%" spinal impairment rating and then remand the case for a determination of permanency that is less than 50%.

IV. The Commission erred by failing to assign a definite spinal impairment rating.

In *Clemmons*, the Court determined that, based on the spinal impairment ratings, the Claimant had "lost more than fifty percent of the use of his back."[17] The Court then remanded the case to the Commission "for a new hearing to determine his percentage of impairment... ."[18] In this case, the Commission failed to provide a definite spinal impairment rating; instead, it assigned a "greater than 50%" impairment rating. Doing so was an error of law under *Clemmons*. This court should

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[16] *Clemmons*, 420 S.C. 282, 803 S.E.2d 268, 270 (internal quotations and citations omitted).
[17] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 272.
[18] *Id.*

reverse the Commission's decision, and then, based on the other arguments in this brief, remand the case for a determination of permanency that is less than 50%.

V. The Commission erred by infusing loss of earning capacity into its section 42-9-30 analysis.

There are three methods of obtaining disability compensation under the Workers' Compensation Law.[19] These methods occur under section 42-9-10, section 42-9-20, and section 42-9-30.[20] "The first two methods are premised on the economic model, in most instances, *while the third method conclusively relies upon the medical model with its presumption of lost earning capacity.*"[21] The economic model focuses on loss of earning capacity;[22] Claimants are seeking to show that their incapacity for work resulting from disability is either total or partial. In the case of section 42-9-10, they do this by showing an "inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable [job] market for them does not exist."[23] For section 42-9-20, they establish that they have lost wages because of their work injury.[24]

In this case, Paulino asked the Commission to award compensation under section 42-9-30(21), which conclusively relies on medical evidence.[25] Despite this fact, the Commission infused loss

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[19] *Dent v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 813 S.E.2d 886, 890 (Ct. App. 2018) (citing *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003)).
[20] *Id.*
[21] *Id.* (emphasis added).
[22] *Id.* (citing *Wynn v. Peoples Natural Gas Company of South Carolina*, 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961)) (internal citations omitted).
[23] *Id.*
[24] *Skinner v. Westinghouse Electric Corp.*, 394 S.C. 428, 716 S.E.2d 443, 445-46 (2011) (denying workers' compensation benefits under section 42-9-20 because Claimant could not prove that he lost wages because of the asbestosis he contracted).
[25] *Stephenson v. Rice Services*, 323 S.C. 113, 473 S.E.2d 699, 701 (1995) ("[W]ith schedule injuries, compensation depends upon the character of the injury rather than on loss of earnings") (citing and describing *Dunmore v. Brooks Veneer Co.*, 248 S.C. 326, 149 S.E.2d 766 (1966))).

of earning capacity considerations into its analysis and award. For example, the Commission's findings of fact include Paulino's inability to speak English and part of his prior work history and training.[26] Regarding Paulino's medical condition, these facts are irrelevant. They only have relevance if the Commission was considering Paulino's loss of earning capacity. Because considering loss of earning capacity while awarding benefits under section 42-9-30 is an error of law, this Court should reverse the Commission's decision. And then remand the case for a determination of permanency that is less than 50%.

VI. The medical evidence in the record rebuts the presumption of permanent and total disability.

Under section 42-9-30(21), if a Claimant has a 50% or more spinal impairment, a Carrier may still rebut the presumption of permanent and total disability.[27] As already shown, no medical evidence supports a spinal impairment rating higher than 12%, and the Commission based its contrary conclusion on surmise, speculation, or conjecture. But even if the Court somehow disagrees and determines Paulino's rating is "greater than 50%", Dr. Math's 14B rebuts the presumption of permanent and total disability. Dr. Math assigned a 12% spinal impairment and light duty work restrictions, with no lifting of items weighing more than 10 lbs. Based on her medical opinion, Paulino is not totally disabled. And section 42-9-30 conclusively relies on medical evidence. The Commission has none. Therefore, if the Court agrees with the "greater than 50%" impairment rating, then the Court should also determine that the Carrier rebutted the presumption of permanent and total disability.

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[26] Order of full Commission (October 3, 2018), p. 12, ¶¶5-6.
[27] S.C. Code Ann. §42-9-30(21); *Clemmons*, 420 S.C. 282, 803 S.E.2d 268, 271-72.

CONCLUSION

Errors of law undermine the Commission's decision, which is also without a rational basis. In fact, only insubstantial evidence could be said to support the decision. It should not stand. Carrier asks this Court to reverse the Commission's decision, and then remand the case for a determination of permanency that is less than 50%. On the other hand, if the Court somehow agrees with the "greater than 50%" impairment rating, then the Court should also determine that the Carrier rebutted the presumption of permanent and total disability.

Respectfully submitted,

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Dec. 31, 2018
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PROOF OF SERVICE

I certify that I have served the Carrier's Initial Brief, Designation of Matter, and Certification on Samuel Paulino by depositing a copy of it in the United States Mail, postage prepaid, **on December 31, 2018** addressed to his attorney, Stephen N. Garcia, at 604 Pettigru Street, Greenville, SC 29601.

Mailed Dec. 31, 2018

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