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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
Appellate Panel

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**RECEIVED**  
FEB 28 2019  
SC Court of Appeals

Appellate Case No. 2016-001992

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O'Shea L. Brown, Claimant

Appellant,

v.

Steel Technologies, Employer,  
and  
Twin City Fire Ins. Co., Carrier

Respondents.

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**RESPONDENTS' PETITION FOR REHEARING  
AND MEMORANDUM IN SUPPORT**

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Pursuant to Rule 221(a) and Rule 240(i), SCACR, Respondents, Steel Technologies and Twin City Fire Insurance Company ("Respondents") respectfully petitions this Court for a rehearing of Unpublished Opinion No. 2019-UP-070, filed February 13, 2019. Rehearing is appropriate where, as here, the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The Petition for Rehearing should be granted because the Court's Opinion misapprehends the argument being made by Respondents as to the issue of their entitlement to credit for overpayment. Respondents hereby

incorporate by reference their previously filed brief and the Record on Appeal for a substantive review of the facts and procedural history relevant to this matter.

**I. Background Facts.**

On or about April 30, 2012, Appellant, O'Shea Brown, sustained an injury to his right knee as he was climbing a ladder to get atop the bed of his trailer. Respondents accepted the right knee injury as compensable and thereafter provided him benefits as required by the South Carolina Workers' Compensation Act. Medical treatment included surgical correction of a partially torn medial meniscus. The surgery was successfully completed and repaired Appellant's partial medial meniscus tear. Following the surgery Appellant began experiencing an issue with his right lower extremity in the form of swelling. After much investigation it was determined that Appellant's swelling was due to a vascular condition known as chronic lymphedema, which Appellant contended was causally related to the injury and/or resulting treatment. Appellant further contended that, not only was the lymphedema compensable, but it caused an alteration of his gait effecting his hip and lower back rendering him permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10. The parties engaged in thorough discovery to address the issue of causation between the chronic lymphedema and the compensable accident, which included the deposition of Appellant's vascular surgeon, Dr. Edward Morrison. Dr. Morrison concluded the vascular condition did not occur as a result of or caused to be aggravated or exacerbated by the injury or necessary treatment related thereto. Therefore, Appellant's recovery was confined to S.C. Code Ann. § 42-9-30 as his claim related to a specific scheduled member.

**II. Procedural Posture.**

A hearing took place before Commissioner R. Michael Campbell, II, on February 6, 2015, in Isle of Palms, South Carolina. Commissioner Campbell, on November 9, 2015, issued

his order instructions in this matter. Specifically, Commissioner Campbell concluded Appellant sustained a compensable injury to his right knee, which necessitated in a partial medial meniscectomy. Commissioner Campbell further found that Appellant had, as to the compensable injury, reached maximum medical improvement on February 19, 2014. Commissioner Campbell finally concluded that Appellant had sustained 12% permanent partial disability to his right lower extremity and that no physician had required any future medical treatment specific to the compensable injury. Further, Commissioner Campbell ruled Appellant's vascular condition, right hip, and lower back conditions were not caused, activated or aggravated by his right knee injury. Therefore, Appellant was entitled only to the recovery associated with the scheduled member injured. Based upon these conclusions Commissioner Campbell found Appellant was not permanently and totally disabled. Appellant appealed several rulings made by the Single Commissioner. Respondents appealed only the Single Commissioner's finding that they were not entitled to credit for overpayment of those temporary total disability benefits paid from February 6, 2015 until November 9, 2015.

The Appellate Panel of the South Carolina Workers' Compensation Commission, upon hearing oral arguments by the parties, affirmed in part and reversed in part. Specifically, the Appellate Panel affirmed the findings of the Single Commissioner as to Appellant having reached maximum medical improvement, the chronic lymphedema and associated hip and lower back pain not being compensable, his not being permanently and totally disabled and his not being entitled to or in need of any future medical treatment to his right knee. Appellant was awarded, in accordance with his twelve percent (12%) permanent partial disability rating, Thirteen Thousand Three Hundred Sixty-Two and 34/100 (\$13,362.34) Dollars.

The Appellate Panel affirmed the Single Commissioner's Order in all regards except they reversed on the issue of Respondents' entitlement to a credit for overpayment of temporary total disability compensation. The Appellate Panel found Respondents continued to payment benefits that were not due and payable as contemplated by S.C. Code Ann. § 42-9-210. Specifically, the Appellate Panel found that Respondents were obligated to pay benefits from "February 6, 2015 through November 9, 2015, solely because of the delay by the Single Commissioner in issuing his ruling. Respondents; therefore, were found to have overpaid Appellant in the amount of Twenty-Two Thousand Five Hundred Ninety-Six and 85/100 (\$22,596.85) Dollars. The resulting effect Respondents' overpayment was Nine Thousand Two Hundred Thirty-Four and 51/100 (\$9,234.51) Dollars remaining as a credit after the award was deemed satisfied from the overpayment.

Appellant filed his Notice of Appeal on September 21, 2016.

**III. The Court of Appeals Misapprehended the legal issues and arguments regarding Respondents continued payment of temporary total disability from the date of hearing until the date of the Single Commissioner's ruling.**

In reversing the decision of the Appellate Panel as to Respondents' entitlement to a credit for overpayment of temporary total disability compensation the Court of Appeals misapprehended the legal issue and arguments presented by Respondents. Respondents' claim that Appellant, through no fault or delay caused by any of the parties is being inequitably permitted to retain benefits paid by Respondents despite not being due. The Court's conclusion that Respondents are not entitled to a credit for temporary total disability compensation paid when not due and payable is in error. The decision rendered by the Appellate Panel was supported by substantial evidence and was not affected by an error of law.

The issue raised by Respondents is governed by S.C. Code Ann. § 42-9-210, which addresses the deduction from compensation of payments made by employer when *not due and payable*. Specifically, S.C. Code Ann. § 42-9-210 states

[a]ny payments made by an employer to an injured employee during the period of his disability ... which by the terms of this title were not due and payable when made may, subject to the approval of the commission be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of weekly payments.

In the Single Commissioner's Decision and Order he concluded Claimant had reached maximum medical improvement on February 19, 2014 thereby ending his entitlement to temporary total disability compensation as of that date. Despite the foregoing conclusion Respondents were subjected, through no fault of any party to the action, to continued payment of temporary total disability compensation. Respondents, in fact, continued payment of temporary total disability compensation until November 9, 2015 when it was eventually determined that such payments were made despite not being due and payable. The Single Commissioner, contrary to the express provisions established by S.C. Code Ann. § 42-9-210 and applicable legal precedent, held that Respondents were not entitled to a credit. This decision was reversed by the Appellate Panel, which held Respondents were entitled to a partial credit for overpayment. The Appellate Panel concluded the period of time for the partial credit was strictly limited to the time spent await the ruling from the Single Commissioner; February 6, 2015 through November 9, 2015 as this delay was not occasioned by any fault of the parties.

In Unpublished Opinion No. 2019-UP-070 this Court appears to hold Respondents are not entitled to a credit because the additional payments made were not caused by any fault of Appellant. Respondents do not dispute the Court's conclusion that the delay in the court's order

was caused by any fault of Appellant. However, Court's reliance on that point clearly reflects the misapprehension that gives rise to this Petition.

S.C. Code Ann. § 42-9-210 does not require an employer to establish payments were made because of some delay caused by Claimant to be entitled to a credit for payment of benefits made when not due and payable, as it would appear the Court concludes here. In fact, the instant case is almost the exact converse of *Sanders v. MeadWestavco Corp.* wherein the issue of a credit for overpayment was at issue. 371 S.C. 284, 638 S.E.2d 66 (Ct.App. 2006). The Court, in *Sanders*, begins the analysis of determining when a credit is appropriate by addressing the termination of TTD benefits "in favor of either permanent partial or permanent total disability benefits" once it was determined the employee had reached MMI. *Id.* 371 S.C. at 294; (*quoting Hendricks v. Pickens County*, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct.App. 1999)). Appellant in the case at bar was found to have reached MMI on February 19, 2014 thereby supporting termination of temporary total disability compensation on that date. This conclusion renders, pursuant to S.C. Code § 42-9-210, any benefits paid thereafter not due or payable.

The Court, in *Sanders*, then turned its attention directly to the employer's entitlement to a credit, the focus of which related to the timeliness of the adjudication of the matter. The Court held that the "delay in having a timely hearing [fell] on both parties", which led to the Court reversing the "Appellate Panel's decision to overpay benefits to Sanders." *Id.* at 295. In the instant case, as the Court has noted in its opinion, the delay in the adjudication was not occasioned by fault of either party. It stands to reason, in keeping with precedent established in *Sanders*, that if the employer is entitled to a credit when both parties are at fault for a delay that the employer so to should be entitled to a credit when neither are at fault. Therefore, there was

substantial evidence supporting the Appellate Panel's decision to award a credit thus requiring the Court to leave that ruling undisturbed.

Moreover, Respondents submit that their credit for overpayment as awarded by the Appellate Panel is controlled by principles of equity either overlooked or misapprehended by the Court. The first equitable principle upended by the reversal of the Appellate Panel's award of a credit is the resulting windfall benefit imparted upon Appellant at great expense to Respondents. As was concluded by the Appellate Panel and this Court the period of delay from the date of the hearing to the date the order instructions were issued was not occasioned by fault attributable to either of the parties. Nonetheless, to reverse the ruling entitling Respondents to a credit results in an improper windfall benefit to Appellant of Twenty-Two Thousand Five Hundred Ninety-Six and (\$22,596.85) Dollars. In refusing to award Respondents a credit for the payment of benefits that were irrefutable not due or payable results in Appellant being permitted to realize the equivalent an award in excess of thirty-two percent (32%) permanent partial disability despite being found to be entitled to an award of twelve percent (12%) permanent partial disability. Appellant's recovery, without the credit awarded to Respondents, balloons from Thirteen Thousand Three Hundred Sixty-Two and 34/100 (\$13,362.34) to a total of Thirty-Five Thousand Nine Hundred Fifty-Nine and 19/100 (\$35,959.19) Dollars. The benefits received by Appellant between February 9, 2015 and November 9, 2015, without a credit for overpayment, results in an improper and substantial windfall to Appellant of receipt of benefits not owed to him by Respondents.

The other equitable doctrine that was either overlooked or misapprehended by the Court was unjust enrichment. Unjust enrichment is an equitable doctrine that permits one party to recover an amount from another unjustly enriched at the expense of the party seeking recovery.

*Chase Home Finance, LLC v. Risher*, 405 S.C. 202, 746 S.E.2d 471 (Ct.App. 2013); (quoting *Regions Bank v. Wingard Props., Inc.*, 349 S.C. 241, 256-57, 715 S.E.2d 348, 256 (Ct.App. 2011)). “One seeking to recover for unjust enrichment must show: ‘(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.’” *Id.*, 405 S.C. at 212; (quoting *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000)).

In the case at bar the doctrine of unjust enrichment is clearly applicable and warrants the credit awarded to Respondents by the Appellate Panel. It is irrefutable that the temporary total compensation payments made by Respondents to Appellant from February 6, 2015 through November 9, 2015 and represent a benefit conferred by Respondents upon and realized by Appellant. The record also inarguably establishes the remaining element of the doctrine of unjust enrichment as satisfied. Appellant was found to have reached maximum medical improvement, which pursuant to *Hendricks v. Pickens County*, supports termination of temporary total disability compensation in favor of an award of permanent partial disability. 335 S.C. 405, 517 S.E.2d 698 (Ct.App. 1999). The application of S.C. Code Ann. § 42-9-210 to the facts of this case establishes the benefits conferred upon Appellant were not due or payable. Moreover, the delay that led the payment of temporary total disability compensation during the period following the hearing was not caused by the fault of either Appellant or Respondents. Therefore, because Appellant was not lawfully entitled to receipt of the benefits and Respondents were not legally required to pay them it is inequitable to allow Appellant to retain those benefits without paying its value in the form the credit awarded by the Appellate Panel.

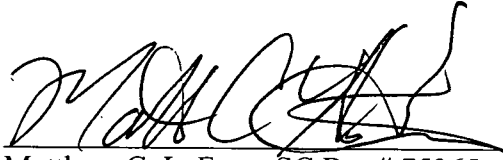
The final component of Appellant's argument for reversal of the credit awarded by the Appellate Panel appears to rest with the fact that Respondents did not file a Form 21, Request for Hearing to stop payment of benefits. In support of his position Appellant does not cite the Court to one case or statute establishing, as a prerequisite for an employer to be entitled to a credit, that a Form 21, Request for Hearing must be filed. Moreover, Respondents rely almost exclusively on a speculative assertion that the overpayment caused solely by the delay in receipt of the single commissioner's ruling could have been avoided had Respondents. There is no precedent in this State that requires an employer, to be entitled to a credit for payment of benefits when not due and payable, to first file a Form 21, Request for Hearing to stop compensation. Furthermore, there is likewise no precedent establishing S.C. Code Ann. § 42-9-210 as an affirmative defense that is waived if not raised thus Respondents' entitlement to a credit is proper and must be affirmed.

## **VI. Conclusion**

The Court of Appeals misapprehended Respondents arguments surrounding their entitlement to a credit and the prevailing law of this State in rendering Unpublished Opinion 2019-UP-070. Therefore, the petition for rehearing should be granted affirming the Appellate Panel's Order awarding Respondents a credit for temporary total disability compensation paid from February 6, 2015 through November 9, 2015.

*(SIGNATURE PAGE FOLLOWS)*

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. LaFave', written over a horizontal line.

Matthew C. LaFave, SC Bar # 75365

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Attorney for Respondents

This 28th Day of February 2019  
Columbia, South Carolina

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
Appellate Panel

Appellate Case No. 2016-001992

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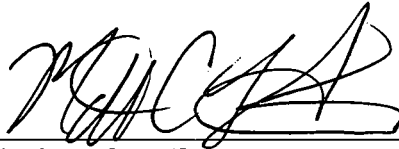
O'Shea L. Brown, Claimant ..... Appellant,

v.

Steel Technologies, Employer  
and  
Twin City Fire Ins. Co., Carrier ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the Respondents' Petition for Rehearing and Memorandum in Support by causing a copy of it to be deposited in the United States Mail, postage prepaid, on February 28, 2019, addressed to the attorney of record, Joe Ann Calvy, Esquire, P.O. Box 610, Kingstree, SC 29556.



Matthew C. LaFave  
CROWE LAFAVE, LLC  
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February 28, 2019

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February 28, 2019

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*Via Hand Delivery*

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29211

Re: O'Shea L. Brown v. Steel Technologies and Twin City Fire Ins. Co.  
Appellate Case No. 2016-001992  
Claim No. 001960-047574-WC-01

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven copies of Respondents' Petition for Rehearing and Memorandum in Support, along with an original and one copy of the Proof of Service, relative to the above-referenced matter. Also enclosed is a check in the amount of \$50.00 representing the filing fee. Once filing is complete, please return the clocked copies to the individual presenting these documents for filing.

By copy of this correspondence to the attorney for Appellant, I am hereby serving a copy of Respondents' Petition for Rehearing and Memorandum in Support upon Ms. Calvy.

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "M. LaFave", written over a horizontal line.

Matthew C. LaFave

MCL/dmb  
Enclosures

cc: Joe Ann Calvy, Esquire  
Linda Cannon-Rivera, Gallagher Bassett (via email only)