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 REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

I. No reasonable minds would reach the conclusion the Commission reached based on the evidence in this case.

In his first argument, Paulino described the following: (1) the treatment of Dr. McHenry of Southeastern Neuro and Spine; (2) the functional capacity exam performed by Elite Physical Therapy; (3) the treatment and opinion of Dr. Jyoti Math, a pain management physician; (4) the independent medical opinion of Dr. Scott; and (5) the testimony of Paulino.[1] He argued that this evidence supports the Commission's determination of greater than 50% loss of use of the spine.

But the Commission, in its order, only gave a description and analysis of Paulino's testimony, including the direct examination conducted by his attorney, as well as the cross examination conducted by George Gallagher, the attorney for Employer and Carrier (hereinafter Carrier).[2] Although the final opinion of Dr. McHenry does make an appearance in the Commission's findings of fact, the whole person rating that he assigned to Paulino is irrelevant under section 42-9-30(21).[3] What is more, medical opinion "regarding [Paulino's] permanent restrictions and future medical care were deferred to Dr. Jyoti Math, the inherited, authorized pain management specialist."[4]

Regarding the results of the FCE, Dr. Math had those results when she assigned a 12% spinal impairment and approved light duty work for Paulino.[5] (The FCE, by the way, approved medium duty work for him, despite noting the difficulties Paulino had while completing the exam).[6] The

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[1] Respondent's Brief, pp. 7-11.
[2] Order of full Commission (October 3, 2018), pp. 4-8.
[3] Appellant's Brief, p. 7 n. 9 (citing *Clemmons v. Lowe's Home Ctrs., Inc.*, 420 S.C. 282, 803 S.E.2d 268, 271 (2017) (internal citations omitted); *see also* Order of full Commission (October 3, 2018), p. 12 (Finding of Fact #7) (listing Dr. McHenry's whole person rating).
[4] Order of full Commission (October 3, 2018), p. 12 (Finding of Fact #7).
[5] *Id.* (Finding of Fact #8).
[6] Id.

only additional restriction Dr. Math assigned was a prohibition of lifting more than 10 lbs.[7] Though he would need work conditioning,[8] Paulino could walk, climb, stand, sit, twist, and bend without limit.[9]

For some reason, however, the Commission determined that "[Paulino's] work restrictions are extensive,"[10] despite the ability to perform light duty work, not to mention the ability to walk, climb, stand, sit, twist, and bend without limit. It then determined that Paulino has "a greater than 50% [loss of use of his back]."[11] It supported this with the following: (1) "Claimant's impairment ratings are very low based on the poor surgical result,"[12] and (2) "based on the medication list alone, Claimant has suffered a major disability."[13] The Commission did not reference any medical document or opinion—or any other type of evidence—to substantiate either of those statements.[14] More problematic, the Commission does not explain why either one or both supports a determination of greater than 50% loss of use of Paulino's back.[15] The only other findings that give any insight into the Commission's rationale for determining a greater than 50% loss of use of Paulino's back include: (1) "[Paulino's] [inability] to speak much or any English,"[16] and (2) the fact that he "was a teller in a bank and repaired computers while living in the Dominican Republic."[17] Neither of which supports a determination of greater than 50% loss of use of the back, obviously.

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[7] Form 14B
[8] *Id.*
[9] *Id.* (Dr. Math does not place any restrictions on these activities).
[10] Order of full Commission (October 3, 2018), p. 12 (Finding of Fact #8).
[11] *Id.* p. 13 (Finding of Fact #12).
[12] *Id.*, p. 12 (Finding of Fact #9).
[13] *Id.* (Finding of Fact #10).
[14] *Id.* (Finding of Fact #9 and#10).
[15] *Id.*
[16] Order of full Commission (October 3, 2018), p. 12 (Finding of Fact #6).
[17] *Id.* (Finding of Fact #5).

Instead, these are "wage loss" or "economic model" factors that may be relevant to establish "disability," which the statute defines as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[18] But these factors are irrelevant under a "medical model" determination of whether Paulino has sustained a greater than 50% loss of use of the back. Under the "medical model" of compensation, the nature and character of the injury controls.[19] Section 42-9-30 proceeds under the "medical model" of compensation,[20] so Paulino's inability to speak English and his work history are irrelevant.

Finally, even if a claimant can offer non-medical evidence of greater loss of use of a scheduled member than what the medical impairment rating denotes, which Appellants do not concede, Paulino has failed to offer any relevant evidence indicating he has lost more than 50% of the use of his back. As noted earlier, the Commission cites irrelevant "wage loss" or "economic" evidence to support its greater than 50% loss of use finding. This confuses "medical model" and "economic model" factors. Further, an impairment rating is the paramount factor for the Commission's consideration, as shown by the Supreme Court's focus upon the medical impairment ratings in *Clemmons*.[21] The question becomes, what other evidence in this case, if any, justifies a greater than 12% spinal impairment? The answer is, none. If the medical provider's impairment rating must form the substantial basis of a loss of use finding, as the Supreme Court indicated in

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[18] S.C. Code Ann. §42-1-120.

[19] *See Stephenson v. Rice Services*, 323 S.C. 113, 473 S.E.2d 699 (1996) ("with scheduled injuries injuries, compensation depends upon the character of the injury rather than loss of earnings") (describing *Dunmore v. Brooks Veneer Co.*, 248 S.C. 326, 149 S.E.2d 766 (1966)).

[20] Appellant's Brief, p. 10 n. 21 (citing *Dent v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 813 S.E.2d 886, 890 (Ct. App. 2018) (internal citation omitted) (Section 42-9-30 "conclusively relies" on medical evidence) (internal citation omitted)).

[21] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 270-72 (2017).

Clemmons, then secondary evidence of additional loss of use cannot supersede the proportion the rating bears to the final determination. Simply put, the 10-pound lifting restriction from Dr. Math, along with any other evidence of loss of use in the record, does not justify a finding of loss of use that is greater than four times the 12% impairment rating, especially as Claimant is approved for light duty work and can walk, climb, stand, sit, twist, and bend without limit.

All of which is to say that, none of what Paulino described in his brief provides substantial evidence of greater than 50% loss of use of his back, and the Commission did not cite any of it in support of its decision. Because "no reasonable minds would reach the conclusion that the [Commission] reached based on this evidence,"[22] the Court of Appeals should reverse the decision in this case and order a determination of loss of use that is less than 50%.

II. *Clemmons* determined that medical evidence was conclusive when determining loss of use under section 42-9-30(21).

The second part of Paulino's first argument concerns the type of evidence that is conclusive when determining loss of use under the scheduled member statute. Carrier contends medical evidence is conclusive, and it cited the Supreme Court[23] in support of that contention. In *Clemmons*, the Court referred only to medical evidence while reviewing the Commission's determination of a Claimant's loss of use of his back under section 42-9-30(21).[24] The Court rejected the Commission's determination of less than 50% loss of use of the back, because no medical evidence supported that determination.[25] All the medical evidence supported a greater

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[22] Appellant's Brief, p. 9 ("substantial evidence" is evidence that would enable reasonable minds to reach the same conclusion as the administrative agency).
[23] *Id.*, pp. 7-8.
[24] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 270-72.
[25] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 271.

than 50% loss of use of the back.[26] And this ruling occurred even though the Claimant in *Clemmons* had returned to his former position as a cashier.[27] Thus medical evidence regarding the degree of the Claimant's loss of use of his back was conclusive.

Understandably, Paulino disagrees with this reading of *Clemmons*. He first "offers that *Clemmons* stands for the narrow reading that medical evidence of a *regional impairment* of 50% or more to any region of the back *without any other evidence regarding impairment* is conclusive evidence so as to trigger the rebuttable presumption of permanent and total disability under S.C. Code [sic] §42-9-30(21)."[28] It's not clear why Paulino emphasized "regional impairment." Dr. Math assigned a 12% regional impairment to the lumbar spine.[29] What is meant by "without any other evidence regarding impairment" is also unclear. What is clear, is that the medical evidence concerning the Claimant's loss of use of his back was conclusive in *Clemmons* and, consequently, did "trigger the rebuttable presumption of permanent and total disability under S.C. Code [sic] §42-9-30(21)."[30] That fact strongly indicates that, if one would have wanted to try to undermine the medical opinions in the case, other medical evidence that was contrary to those medical opinions would have been necessary.

Paulino "further offers, that *Clemmons* stands for the proposition that evidence of subsequent employment may be insufficient to rebut the presumption of permanent and total disability under §42-9-30(21)."[31] But there is no "may" involved; it's obvious that a Claimant's employment is "insufficient to rebut the presumption of permanent and total disability under §42-9-30(21)." The

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[26] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 271.
[27] *Id.*, 420 S.C. 282, 803 S.E.2d 268, 269-70.
[28] Respondent's Brief, p. 12 (emphasis in original).
[29] Form 14B.
[30] Respondent's Brief, p. 12.
[31] *Id.*

question is, why? The answer seems apparent: A Claimant's ability to work in his former positon is irrelevant to the medical question concerning the degree to which he has lost the use of his back. That's why medical evidence regarding Claimant's loss of use was conclusive in *Clemmons*, even though the Claimant was working in his former capacity as a cashier.

Finally, Paulino cited *Sanders*, a 2006 Court of Appeals case, to oppose Carrier's reading of *Clemmons*. *Sanders*, Paulino contended, supports using other evidence, such as the Claimant's testimony, to overturn the opinion of medical experts concerning the degree to which a Claimant has lost the use of his back.[32] A few points here. First, *Sanders* is a Court of Appeals case, and the Court of Appeals must follow the Supreme Court's precedent, not the other way around.[33] Second, *Sanders* occurred a decade before *Clemmons*. Third, a 2018 Court of Appeals decision indicates that medical evidence is conclusive under the scheduled member statute.[34] Fourth, although the Supreme Court (which was comprised of different members then) declined to review *Sanders* at the time it was decided, *Clemmons* determined that medical evidence was conclusive when reviewing an impairment rating assigned by the Commission. The latter (and later) Supreme Court decision determines the outcome in this case.

Furthermore, if Paulino's reading of *Clemmons* while considering *Sanders* is correct, then a claimant could prove loss of use of the back greater than 50% by using evidence other than medical evidence, but employers and carriers could not prove less than 50% loss of use via evidence other than medical evidence. That result is not only unjust but is also unsupported by the method of

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[32] Respondent's Brief, p. 12 (citing *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006).

[33] *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent.") (citing S.C. Const. art. V., §9).

[34] Appellant's Brief, p. 10 n. 21 (citing *Dent v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 813 S.E.2d 886, 890 (Ct. App. 2018) (internal citation omitted) (Section 42-9-30 "conclusively relies" on medical evidence) (internal citation omitted)).

analysis used in *Clemmons*. If lay evidence is not probative of loss of use when arguing that an impairment rating is less than 50%, then lay evidence is not probative of loss of use when arguing that an impairment rating is more than 50%.

Because all the relevant medical evidence points to a 12% spinal impairment, the Court of Appeals should reverse the decision in this case and order a determination of loss of use that is less than 50%.

III. Because "impairment" is separate from "disability" and because Dr. Math assigned a 12% spinal impairment rating, the word "disability" should not have entered the Commission's order.

In the final part of Paulino's first argument, he cites the AMA Guides to show an impairment rating is separate from the extent of disability.[35] The statute makes that clear, too: "[W]here there is fifty percent or more loss of use of the back [,] the injured employee shall be presumed to have suffered total and permanent disability and compensated under Section 42-9-10(B)."[36] A Claimant is presumed to have a "total and permanent disability" only after the Commission determines he has 50% or more loss of use of the back; in other words, until a Claimant has sustained 50% or more of the loss of use of his back, permanent and total disability should not be considered. As stated earlier, the degree of a Claimant's loss of use of his back under the "medical model" is distinct from the extent of his disability under the "economic model."

In this case, Dr. Math assigned a 12% spinal impairment. That is the only relevant medical evidence concerning Paulino's loss of use of his back. Consequently, the word "disability" should not have entered the Commission's order.

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[35] Respondent's Brief, p. 13.
[36] S.C. Code Ann. §42-930(21).

IV. The failure to assign a specific rating is not "harmless error."

In *Clemmons*, the Supreme Court determined that the Claimant had lost "more than fifty percent of the use of his back."[37] The Court then remanded the case "for a new hearing to determine [1] [Claimant's] percentage of impairment and [2] whether the presumption of permanent and total disability under section 42-9-30(21) has been rebutted."[38] Under the Supreme Court's order, whatever percentage of impairment the Commission assigned, the Commission would have to address whether the presumption had been rebutted, yet the Court still required it to find a specific percentage of impairment. Because of this, Carrier maintains that the Commission's failure to assign a specific percentage of impairment was error.

Paulino opposed Carrier's position. He contended that, because the Commission already determined that Carrier failed to rebut the presumption of permanent and total disability, the Commission's failure to assign a definite impairment rating "has absolutely no bearing on the outcome of this Claim"[39] and, therefore, is "harmless error."[40]

But a definite impairment rating didn't have any "bearing on the outcome of [Clemmons'] claim," either. The Court had already determined that the percentage of impairment was over 50%.[41] Meaning no matter what percentage of impairment it assigned, the Commission would have to address the question concerning rebuttal of the presumption. Given that fact, one could argue that ordering a specific percentage of impairment was unnecessary and even irrelevant. But the Court in *Clemmons* did order the Commission to determine a specific percentage of impairment, in addition to ordering the Commission to address whether the Defendant had rebutted the

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[37] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 272.
[38] *Id.*
[39] Respondent's Brief, p. 14.
[40] *Id.*
[41] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 272.

presumption. Because the Supreme Court has indicated that the Commission must assign a specific percentage of impairment, the Commission's failure to do so is not "harmless error."

The failure to assign a specific percentage of the loss of use of Paulino's back is also not "harmless error," because that finding is based on nothing but "surmise, speculation or conjecture."[42] The Commission's determination of "greater than 50%" is an unknown percentage of loss of use that is greater than four times the medical impairment rating. Nothing substantiates the Commission' determination, which means it impermissibly rests on "surmise, speculation or conjecture" and, therefore, is not "harmless error."

V. The Commission's order indicates it did consider Paulino's inability to speak English and his work history while determining he had a greater than 50% loss of use of his back.

In its brief, Carrier argued that the Commission improperly infused wage loss considerations into its section 42-9-30 analysis.[43] Paulino contended that this is "patently false."[44] He argued that, "the Full Commission's findings regarding Claimant/Respondent's inability to speak English and his prior work history specifically address Defendants/Appellants' arguments in support of a finding that Defendants/Appellants failed to rebutted [sic] the presumption of permanent and total disability under S.C. Code [sic] § 42-9-30(21)."[45]

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[42] *Clemmons v. Lowe's Home Ctrs.*, Inc., 420 S.C. 282, 803 S.E.2d 268, 271 ("Although a claimant's degree of impairment is usually a question of fact for the Commission, if all evidence points to one conclusion or the Commission's findings are based on surmise, speculation or conjecture, then the issue becomes one of law for the Court....") (internal citations and quotations omitted).

[43] Appellant's Brief, pp. 10-11.

[44] Respondent's Brief, p. 15.

[45] *Id.*

But the Commission's order did not say that.[46] Neither did the Single Commissioner's order.[47] In fact, the Findings of Fact section, which is where to locate Paulino's inability to speak English and his work history, only addressed Paulino's spinal impairment.[48] Nothing in that section addressed whether Carrier rebutted the presumption of permanent and total disability after Paulino was found to have greater than 50% loss of use of his spine.[49] And nothing explains how or why the Carrier failed (or did not fail) to rebut the presumption.[50] Carrier only learned that it did somehow fail to rebut the presumption in the Conclusions of Law section of the Commission's order.[51] But, again, the Commission gave no explanation of how or why the Carrier failed to rebut it.[52]

So no, it's not clear that the Commission didn't improperly infuse wage loss considerations into its section 42-9-30 analysis. And given how the Commission structured its Findings of Fact section, it seems like the Commission did consider Paulino's inability to speak English and his work history when determining that he had a greater than 50% spinal impairment. After all, that is the only determination made in the Findings of Fact section; the question regarding rebuttal of the subsequent presumption is not addressed. And permanent and total disability only becomes an issue after the Commission determines that the Claimant has "fifty percent or more loss of use of the back."[53]

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[46] Order of full Commission (October 3, 2018), pp. 11-14; specifically, *see* p. 13 (Conclusion of Law #3).
[47] *Id.*, pp. 8-10 (reciting order of Single Commissioner); specifically, *see* p. 10 (Conclusion of Law #6).
[48] *Id.*, pp. 11-13 (Order of full Commission); specifically, see p. 13 (Finding of Fact #12).
[49] *Id.*, pp. 11-13.
[50] *Id.*
[51] Order of full Commission (October 3, 2018), p. 13 (Conclusion of Law #3).
[52] *Id.*
[53] S.C. Code Ann. §42-9-30(21).

VI. Carrier did rebut the presumption of permanent and total disability.

Carrier concluded that it rebutted the presumption of permanent and total disability. Paulino argued the opposite position, though he did not provide any reasons to support it: "There is little if any evidence in the record to rebut the presumption of permanent and total disability and the Full Commission's Decision and Order should remain undisturbed on appeal."[54]

Regardless of Paulino's unsupported contention, Carrier can give reasons to support its conclusion. First, the Form 14B, which Dr. Math completed and was in the record before the Commission, indicates Paulino can walk, climb, stand, sit, twist, and bend without limit.[55] Second, he can also perform light duty work.[56] Third, Paulino is a young man, "so there is no natural presumption that he could not adjust to new work [because] of his injury."[57] Finally, though the Commission was unimpressed by these facts, Paulino has a four-year degree from a college in the Dominican Republic and has worked as a computer repairman and as a bank teller; all of which indicates the skills and intellectual capacity necessary to perform light duty work in a suitable field of employment.

With all the above, Carrier rebutted the presumption of permanent and total disability.

CONCLUSION

Several errors of law, discussed here and in the first brief, support reversal of the Commission's decision. For example, as seen above, the Commission did not have substantial evidence to conclude Paulino had a greater than 50% spinal impairment. This is in addition to *Clemmons*, which indicates medical evidence is conclusive when determining impairment ratings; in this case,

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[54] Respondent's Brief, p. 16.
[55] Form 14B (Dr. Math does not place any restrictions on these activities).
[56] *Id.*
[57] Carrier's Amended Brief to Full Commission (June 15, 2018), p. 13; *see also* pp. 12-14 (discussing evidence that rebuts presumption of permanent and total disability).

the only relevant medical evidence supports a 12% spinal impairment. The Carrier also provided medical and other evidence that shows it rebutted the presumption of permanent and total disability. And although Paulino did not address the argument in his brief, the Commission's decision is arbitrary because it did not substantiate the basis of its greater than 50% spinal impairment rating with even one reason.[58]

Carrier respectfully asks the Court of Appeals to remand the case and to order the Commission to assign a percentage of impairment that is less than 50%.

Respectfully submitted,

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[58] Appellant's Brief, p. 8.

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Samuel Paulino, Claimant, Respondent

v.

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

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on Samuel Paulino, by depositing a copy of it in the United States Mail **on February 11, 2019,** with postage prepaid and with the envelope addressed to his attorney, Stephen N. Garcia (604 Pettigru Street, Greenville, SC 29601).

February 11, 2019

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RE: ***Samuel Paulino v. Diversified Coatings, Inc.***
Appellate Case No.: 2018-001964
WCC No.: 1508995
Claim No.: BIWC557786-004
Our File No.: 1700-0502

Dear Ms. Kitchings:

Enclosed please find the Appellant's Reply Brief in the above-referenced matter. By copy of this letter, I am serving Appellant's Reply Brief upon all counsel of record.

Sincerely,

Kevin Desmond Maroney

Kevin D. Maroney

KDM/kgl
Enclosures
cc: Stephen N. Garcia, Esquire (w/encl)