THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2013-001668

Henton T. Clemmons, Jr., Employee, ... Appellant,

v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant sustained a compensable work-related injury on September 12, 2010 which was initially accepted for the payment of both medical and compensation benefits. Those benefits were then stopped without reason. After notification to the Commission filing a formal claim and of representation by counsel on November 16, 2010, on November 30, 2010, Counsel for the Appellant filed a Request for Hearing concerning medical care and compensation benefits. (R. p. 44). The Appellant also filed a Motion on December 2, 2010 to reinstate benefits including the provision of medical care. (R. p. 46). On December 10, 2010, the Appellant filed an Addendum to the Motion adding an additional medical report from the neurosurgeon filed as Exhibit C wherein the neurosurgeon set forth the history of injury to the Appellant's back and the back of his head as part of the fall. (R. p. 58). On December 13, 2010, the Respondents filed a Reply admitting, "compensable injury to the **low back** and right knee," and providing causally related medical care but alleging that a request of benefits went to the merits. (R. p. 65; emphasis added). The Respondents also filed a responsive Form 51 to the Form 50 that had been filed admitting compensable injury again to the **low back** and right knee but denying injury to the

head or left lower extremity and the extent of injuries as alleged in the Form 50. (R. p. 68). A Consent Order was entered into resolving the issues of the Motion wherein the Respondents agreed to reinstate temporary total disability benefits and to provide treatment of the back, neck, and right leg and all, "causally-related treatment until the Claimant reaches maximum medical improvement for his admitted injuries". The Consent Order also provided that all other issues were held in abeyance and could be presented at a future hearing. (R. p. 1).

On October 3, 2011 a Commission Form 17 was filed with the Commission agreeing weekly compensation had stopped because the Appellant had returned to work with restrictions on September 10, 2011. (R. p. 69). Subsequently, on January 4, 2012 the Respondents filed a Form 21 seeking to pay compensation and also seeking credit for any overpayment of temporary compensation. (R. p. 72). Based on the Claimant's request for additional medical evaluation, that Form 21 was withdrawn but with the Respondents only specifically agreeing to provide a return evaluation visit with the authorized treating neurosurgeon.

On July 25, 2012, the Respondents again filed a Form 21 requesting only to pay compensation and a credit for any overpayment of temporary total on July 25, 2012 and a

hearing was set on that Form 21 for September 25, 2012. (R. p. 74; p. 77). As the moving party, the Respondents filed their Pre-Hearing Brief and APA Submissions on September 10, 2012 and the Appellant filed his responsive Pre-Hearing Brief and APA Submissions on September 14, 2012 (R. p. 78; p. 126). The hearing was held on September 25, 2012 and the Commissioner issued his notes requesting a proposed Order on September 27, 2012. (R. p. 292; R. p. 209). On October 2, 2012, the Appellant filed a Request for Reconsideration prior to the formal Order of the Commissioner to which a Reply was made by defense counsel on October 3, 2012. (R. p. 212; p. 215).

On October 3, 2012, Appellant filed a request that the Order be strictly limited to the Commissioner's findings and on October 15, 2012, withdrew a request for a lump sum award and requested the Award be paid weekly pursuant to the Act (R. pp. 388 & 390). On October 15, 2012, Counsel for the Respondents objected to the withdrawal of the lump sum request and to the payment of the Award weekly (R. p. 391). On October 16, 2012, Counsel for Appellant replied to the Respondents' objection to the payment of the Award weekly and on November 1, 2012 filed a Request for Clarification of the Commissioner's Award in his notes of, "Dodge" medicals as the Respondents had refused to provide

medicals as set out in the Notes. (R. pp. 392 & 393). Thereafter, the Commissioner issued his Order on December 6, 2012 and a Form 30 - Request for Commission Review was filed on December 20, 2012. (R. p. 4; p. 217).

The Appellant filed his Full Commission Brief on March 18, 2013 with the Respondents filing their Responsive Brief on April 2, 2013. (R. p. 240; p. 266). A hearing was held before a three-member Commission Panel on April 16, 2013. (R. p. 359). A Request for Proposed Order was forwarded to defense counsel by the Judicial Director on April 30, 2013. (R. p. 291). Objection to the Proposed Order submitted by defense counsel was filed on June 5, 2013 and subsequently the Order was filed as written and submitted on July 2, 2013. (R. p. 394; p. 22). A Notice of Intent to Appeal was timely filed and served and this Appeal follows.

STATEMENT OF FACTS

On September 12, 2010, Mr. Clemmons entered the straw trailer at Lowe's and slipped on wet straw causing his feet to fly out from under him and him landing flat on the truck floor on his back, neck and head. (Mr. Clemmons had had a shunt placed in his head as a child for hydrocephalus which had always been asymptomatic.) Medical care was initially provided on 10/07 - 10/19 through Doctor's Care for low back pain, radiculopathy and swollen knee. (R. pp. 83-89).

On 10/19 due to rapid deterioration, he was referred to Midlands Orthopaedics. (R. p. 89). Upon examination on November 1st, 2012, Dr. Armsey immediately referred him to Dr. Randall Drye. In his report, Dr. Armsey recorded that,

> "Mr. Clemmons and his mother report that he **was** a **perfectly functional 38-yr-old male** until his work-related accident. **Since that time** his gait has been severely ataxic, he cannot dress himself because of poor balance, has been bed ridden because of his inability to ambulate. He has had multiple falls because of his poor balance which is all reported as [no (sic)] beginning September 12, 2010. . ."
>
> * * *
>
> "I am concerned about a brain stem or cerebellar lesion, possibly complications from his intraventricular shunts with his recent trauma. I am certain that his ataxia is not coming from his lumbar spine and his right knee has no mechanical abnormalities on clinical exam and therefore his sensation of instability is likely neurologic at the knee as well. He is essentially wheelchair bound and will not return to work until cleared by a neurosurgeon/neurologist."

On November 8th, Dr. Randall Drye found significant cord compression and **myelopathy**,

> "which is advancing from what I believe is a disc herniation at C6-7 and a significant bulge at C5-6. I am quite alarmed at his presentation and the repetity of his symptoms."

At that point neither medical nor compensation were being paid. A request for hearing was filed and then by Consent Agreement, the employer's SIF agreed to provide medical care through Dr. Drye and compensation benefits. Of special

note, based on a review of Dr. Drye's initial evaluation and all of his records at the time of hospitalization and surgery, there is absolutely **no reference** to any problems with myelopathy or neurologic symptoms **prior to the accident of September 12, 2010.** (R. p. 101, emphasis added.) In fact, in no other record submitted by either party from any doctor is there any mention of any problems in reference to his back and/or myelopathy or radiculopathy or involving balance, memory or neurologic or any other type of problem in reference to the spinal cord, prior to the accident.

More importantly, quoting Dr. Randall G. Drye, M.D. on November 30, 2010:

> "When we **met in the office initially** and we garnered his history **he clearly reported no prior history of significant neck or neurologic problems prior to a fall at work.** This occurred, according to the patient, on 9/12/10 when he slipped on some straw in a trailer and impacted on his back and the back of his head. This mechanism of injury is completely consistent as the force and flexion of the head and neck can result in a tear in the vulnerable disc and subsequent herniation. . . .
>
> * * *
>
> For that reason, I believe that within a reasonable degree of medical certainty, his disc herniations, spinal cord impingement and subsequent myelopathy as well as the intervening surgery **were a direct result of his fall at work.**" (R. p. 105).

Mr. Clemmons continued under treatment by Dr. Randall

Drye including multi-level cervical fusion. He was subsequently released to return to work with restrictions by Dr. Drye and Mr. Clemmons signed a Form 17 agreeing that he was able to and did return to work for the employer on September 10, 2011.

Interestingly in his last evaluation note, Dr. Drye noted that Mr. Clemmons', "gait is still slightly unsteady and he has some difficulty with balance likely owing to some mild residual spasticity and perhaps proprioceptive deficits." (R. p. 110).

The Respondents first filed a Form 21 to pay compensation on January 4, 2012 at which time after discussion between Counsel for the parties wherein Mr. Clemmons requested a second opinion by a neurologist and/or a physical rehabilitation medicine specialist, the Respondents withdrew their Form 21 and sent Mr. Clemmons back to Dr. Randall Drye. While a second opinion was requested by a neurological specialist, no such second opinion was provided.

Subsequently in June, Mr. Clemmons saw Dr. Randall Drye who reiterated his opinion that he was at maximum medical improvement. However, for the first time in his report of June 18, 2012, Dr. Drye makes the following statement in his history,

> "At that point he has recovered nicely from surgery though he still has some symptoms referable to his **pre-operative** cord injury and myelopathy . . . he denies any radicular symptoms down the leg and continues to have some altered gait from his **previous myelopathy as well as a long standing, pre-injury inversion of his right foot and ankle.**" (R. p. 111).

He also reiterated his previous AMA impairment rating of 25% whole person for the cervical spine only. (R. p. 100).

After receipt of this report, the Respondents would not offer a second opinion, though requested, and instead immediately filed a Form 21 but only to pay compensation.

In his Form 58 Mr. Clemmons reiterated his request for a second opinion on his back and neurological dysfunction; noted that he had never had a second opinion and requested reimbursement for the evaluations by a neurologist and an orthopaedic surgeon.

After the refusal to provide a second opinion by a neurological specialist, Mr. Clemmons was seen for evaluation by Dr. Howard Mandell on September 5, 2012, who opinioned that in addition to any impairment to the back that he still suffered from, "spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run and difficulty with balance," and stated the opinion that Mr. Clemmons had sustained an, "additional" 15% whole person neurological injury.

He opinioned that in addition Mr. Clemmons suffered from significant low back pain, that he would perhaps benefit from ongoing physical therapy; may require further cervical intervention above or below the cervical fusion and would require ongoing low back pain management which certainly could include steroid injections or selected nerve block injections and/or medial facet nerve blocks to be determined by the pain management evaluation. He would need ongoing medications to control his ongoing significant low back pain. Dr. Mandell recommended a functional capacity evaluation be performed to objectively determine his limitations but opined Mr. Clemmons would definitely have limitations in bending, twisting, turning, lifting and carrying and would need the flexibility to be able to sit or stand at work as needed to reduce his pain.

More importantly in reference to the statement contained in Dr. Drye's last note of June 18, 2012, Dr. Mandell stated that:

> "With regards to the statement by Dr. Drye on 06/18/2012 indicating he "he had 'long standing pre-injury inversion of the right foot and ankle'. **This appears to be not corroborated by his mother, the patient, or my history or Dr. Armsey's history. I do not see it documented in any of the other physicians' history either.** From the history I get and the records I reviewed, there was absolutely no preexisting neurological condition limiting this gentleman and I think this is certainly substantiated by the fact that

he worked for three (3) years at Lowe's with heavy lifting, twisting, turning, carrying and a lot of walking without any limitations and able to do his job fully without any adjustments required. I do not believe any of his current problems are related to his previous hydrocephalus and shunting either." (R. pp 86 & 87).

A functional capacity evaluation, performed on September 11, 2012, found that Mr. Clemmons was limited to limited light duty work and that he could tolerate only occasional walking, stair climbing, kneeling, bending, twisting and reaching and that he did not tolerate occasional squatting. All of his lifting at various heights was limited to sedentary/light duty physical capacity levels under the DOT. The physical therapist also noted that Mr. Clemmons had decreased balance and that he was unable to stand single stance on either lower extremity with his eyes closed. (R. p. 143).

Dr. Leonard Forrest, board certified orthopaedic surgeon, saw Mr. Clemmons for an evaluation on September 6th and stated that in his opinion Mr. Clemmons was at maximum medical improvement but would require continuing treatment into the future which would most probably include physical therapy; although invasive treatment may prove to be necessary. Dr. Forrest placed limitations on Mr. Clemmons and found that he had a 40% whole person impairment due to

his neck and low back problems. He stated the opinion to a reasonable degree of medical certainty that Mr. Clemmons had sustained over a 50% loss of the functional use of his back to do work requiring the use of his back. (R. pp. 172 & 173).

An independent medical evaluation was also performed by Dr. Gal G. Margalit. He found Mr. Clemmons had an altered gait and concurred in the findings concerning the myelopathy involving cord compression and with the opinions concerning permanent work restrictions. After review of the functional capacity evaluation and based on his evaluation he stated the opinion Mr. Clemmons had sustained a 50% or greater functional loss of use of his back to do work requiring the use of his back. He recommended future treatment and specifically neuropsychological testing. (R. p. 170).

A vocational evaluation was performed by Ms. Harriet Fowler, CRC, M.Ed. who opined that per the FCE and the restrictions from the treating physician that without accommodation he would not be able to function in his capacity at Lowe's but that Lowe's was to be commended for accommodating his severe restrictions. She performed a labor market analysis using the U.S. Department of Labor's Dictionary of Occupational Titles based on the functional

capacity evaluation and the restrictions and opinions of the independent medical evaluations and of the authorized treating neurosurgeon, and opined that Mr. Clemmons had a residual labor market access to only approximately 417 sedentary unskilled/semi-skilled work titles, thus representing a 99.9400% loss of access to the job market. Even with the restrictions and the accommodations made by Lowe's, she questioned whether under the doctors restrictions and the findings of the FCE, Mr. Clemmons could continue to perform in his current job capacity and stated that work at a sedentary level would be more advisable into the future. (R. pp. 195 & 196).

At the hearing, the Respondents requested that the Commission make an Award based on the admitted back injury and that the Commissioner make an Award for a scheduled member injury permanency award of less than 50% loss of use to the back. In addition to the APA Submissions, the Respondents as the moving party only submitted the testimony of Ms. Lynn Council. Following her testimony, the Commissioner asked,

"Q: Any other witnesses for the employer/ carrier?

A: No, Your Honor."

(R, p. 309, ll. 18-20.)

At that point, the conclusion of the Respondents' case as the moving party, Appellant's Counsel moved for a ruling,

> "as to whether or not there has been any evidence to present it (sic, presented) to rebut the 50% loss of the use of the back." (R. p. 309, l. 23 - p. 310, l. 2).

The Commissioner would not rule on the evidence at that point and the Appellant then testified in addition to the medical evidence on that issue and testified he had lost 80% of the use of his back.

Also at the beginning of the Hearing in the off-the-Record pre-hearing conference but as is reflected in the Record, the Appellant reiterated his request for a second opinion and for reimbursement for the evaluations that were performed by Dr. Mandell and Dr. Forrest due to the refusal of the Respondents to offer a second opinion or evaluations from a neurological and orthopaedic standpoint. (R. p. 296, l. 19 - p. 297, l. 6; p. 298, l. 7 - p. 299, 12).

In his Pre-hearing Brief, the Appellant set forth his argument that, "the right to compensation for loss of use and/or loss of earning capacity is a property right of the Claimant and it is a denial of due process to determine his entitlement without his request."

The Appellant also argued that the presumption

applicable to injuries to the back as to the Claimant has sustained a 50% loss of the use of the back applies to the character of the injury and that consideration of loss of earning capacity is not a proper consideration under a scheduled member award and the presumption applied to the back.

In reference to the back presumption, the Respondents stated that the only rebuttal they were offering and that it was their position that,

> "the basis of the rebuttal presumption obviously is his return to work for almost two (2) years in response to the Appellant's position that he is perm total based on greater than 50% loss of use of the back."

In his Notes, the Commissioner stated in his Finding No. 7 that,

> "based on the Record as a whole, I find that the Claimant has sustained a 48% TTD to his back. This includes any radicular symptoms to his right leg. I do not find that he is permanently and totally disabled based on the evidence as a whole. This finding is based on the greater weight of the evidence, **including his ability to work for nearly two (2) years** (while being accommodated by sitting down), his lack of prescription medication, and the medical reports and conclusions of Dr. Drye."

That Finding is set out in the Order as Findings of Fact 8-12.

The Commissioner further denied reimbursement for the evaluations and ordered future medical care for, "causally

related medical treatment pursuant to Dodge".

ARGUMENTS

I. **WHERE THE APPELLANT WAS BACK AT WORK AND HAD NOT MADE A REQUEST FOR AN AWARD UNDER THE ACT, DID THE COMMISSION ERR BY SETTING THIS MATTER FOR HEARING BASED ON A REQUEST MADE BY THE DEFENDANTS TO PAY COMPENSATION UNDER THE SIXTY (60) DAY PROVISION IN SC CODE §42-9-260 WHICH PROVIDES ONLY THE STATUTORY AUTHORITY TO STOP PAYMENT OF TEMPORARY COMPENSATION THEREBY FORCING THE APPELLANT TO A PREMATURE DETERMINATION OF HIS PROPERTY RIGHTS TO AN AWARD IN VIOLATION OF HIS DUE PROCESS RIGHTS TO SUCH AN AWARD?**

There are two statutory interpretation principles that must be applied to this and all workers' compensation issues. The first principle is that:

> "It is the established law of this state that any reasonable doubt as to the construction of the workmen's' compensation law must be resolved in favor of the claimant, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage . . . "
>
> * * *
>
> "Compensation laws constitute a form of social legislation and were enacted for the benefit, protection and welfare of working men and their dependents to relieve them from the uncertainties of a trial in a suit by damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents from becoming charges on society. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emphasis added).

The second principle is that:

> "Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the Court must strictly

> construe such statutes, leaving it to the legislature to amend and define any ambiguities." Wigfall v. Tideland Utility, Inc., 354 S.C. 100, 580 S.E.2d 100, (2003), rehearing. den.

The Supreme Court has repeatedly held that the entitlement to benefits under the Workers' Compensation Act is a property right owned by the claimant, the injured worker. Last v. MSI Construction, Inc., 305 S.C. 349, 409 S.E.2d 334 (1991); Orzsula v. Orzsula, 292 S.C. 264, 356 S.E.2d 114 (1987). Under the Workers' Compensation Act, the injured worker, as the claimant, has the burden of proof to establish by a preponderance of the evidence that he is entitled to an Award under the Act. Walsh v. US Rubber Co., 238 S.C. 411, 120 S.E.2d, 685 (1961). Therefore, there is no question that the entitlement and right to benefits is a property right owned by the Claimant and that the Claimant has the burden of proof to establish his entitlement to an Award under the Act.

Under SC Code §42-3-30, the Commission is granted the authority to promulgate Regulations including forms necessary for the administration of the workers' compensation laws, but such Regulations must be in accordance with the provisions of the Title, "and consistent therewith". Further, while a Regulation has the force of law, it may not alter or add to a Statute; Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995)

and where the Regulation is not based on statutory authority, the Commission lacks the authority to enact the Regulations; in this case the Form 21 the Respondents used to file for a hearing for a determination of the employee's property rights to benefits. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011); S.C. Workers' Compensation Regulation 67-203(A) and (B)(31) [WCC Form 21].

There are only two Statutes, SC Code §42-17-20 and Code §42-9-260 that provide an employer a statutory basis to file for a hearing. SC Code §42-17-20 provides the statutory authority for both the employee and the employer to file for a hearing when the parties to an agreement to pay temporary compensation, "then disagree as to the continuance of any weekly payments under such agreement . . .". SC Code §42-9-260 commonly referred as to the stop payment section is ancillary to that statute and sets out the specific provisions for how an employer may stop those temporary weekly benefits and under what bases. WCC Form 21 addresses all of those statutory bases but adds a provision to pay compensation.

Under the current version of SC Code §42-9-260, the employer and/or its insurance carrier is given the right to file a stop payment application to terminate or suspend,

"temporary" compensation and under that section a hearing must be held within sixty (60) days. That statute is very clear as to the limited right that it gives to the employer under subsections D and E to ask for a hearing, subsection D specifically states in pertinent part:

> ". . . employer may request a hearing **to address the termination of temporary disability payments.** A hearing must be held within sixty (60) days of the date of the employer's request for a hearing."

Subsection E in pertinent part states:

> "an employer may request a hearing at any time to address termination or reduction of temporary disability payments."

At no place in that statute is the employer/carrier given the right to seek a hearing to pay compensation but again is only given the right to stop, "temporary" benefits. The Appellant would submit also that there is absolutely no right under any other provision of the Act for an employer to force a claimant to a premature determination of his property right to an award of benefits under the Workers' Compensation Act.

In fact in two (2) specific cases, the Supreme Court and Court of Appeals (in addition to having repeatedly determined and recognized that the claimant has the burden of proof of establishing that he is entitled to benefits under the Act and thus clearly recognizing that the

claimant must always be the moving party), have found in those cases that in a case where the claimant inadvertently omits production of the proof necessary to establish his case or where he seeks the opportunity to open the Record to present evidence after the hearing has been held that the Claimant should be afforded an opportunity to provide that proof of disability in, "the interest of justice". Brown v. LaFrance Industries, 286 S.C. 319, 333 S.E.2d 348 (S.C. App. 1985); Morgan v. JPS Automotive, Inc., 321 S.C. 201, 467 S.E.2d 457 (S.C. App. 1996), cert. dismissed, 326 S.C. 261, 486 S.E.2d 263 (1997).

Thus since the Appellant has a constitutionally protected property right in his entitlement to benefits which is a property right owned by the claimant, only the Claimant has a right to bring a cause of action for a determination of those benefits and it is a denial of due process to force the Claimant to a premature determination of those benefits where he has not made a request that he be awarded any benefits whatsoever under the Act. The Appellant has the burden of proof, it is his property right and the Commission lacked jurisdiction and erred by moving forward on an application filed by the Respondents to pay compensation which is not allowed for under the SC Workers' Compensation Act.

> "The rights and liabilities of employee and employer under the Workers' Compensation Act are purely statutory and are to be judged by terms of the Act." Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969).

If the Legislature intended to give an employer and its carrier the right to file for a determination of benefits **over the objection** of the employee-claimant when the employer wants to have a determination made, it is the responsibility of the legislature to set that out by statute. Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970)[1]. This constitutes both a substantive and procedural denial of due process to the injured worker in this case because the Commission lacks the statutory authority to order and hold such a hearing and thus lacks jurisdiction because again the employee has not made a claim for benefits.

> ". . . when there exists no pending **employee claim for compensation**, the Commission lacks the jurisdiction to decide such questions." SC Property & Casualty Ins. Co. Assoc. v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund, 303 S.C. 368, 401 S.E.2d. 144 (1991).

The Decision of the Commission should be reversed and vacated and the claim remanded to the Commission until such time as Mr. Clemmons files a claim for an award of benefits.

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[1] The Appellant does not believe such proviso would be constitutional but that issue is not pertinent to this appeal.

II. DID THE COMMISSION ERR AS A MATTER OF LAW UNDER THE SUBSTANTIAL EVIDENCE IN THE RECORD BY FAILING TO MAKE A DETERMINATION THAT THE APPELLANT HAD SUSTAINED A 50% OR GREATER LOSS OF USE OF THE BACK AND BY CONSIDERING WAGE LOSS AND BY NOT AWARDING THE APPELLANT AN AWARD FOR TOTAL AND PERMANENT DISABILITY FOR HAVING LOST 50% OR MORE OF THE USE OF HIS BACK UNDER THE BACK PRESUMPTION IN THE SCHEDULED MEMBER STATUTE?

AWARD IS PAID FOR CHARACTER OF THE INJURY.

[Precatory fundamental query to the Court: if wage loss (disability under the Act, S.C. Code §42-1-120) is a factor to be considered under the presumption created by S.C. Code §42-9-30(21), why is the presumption tied to S.C. Code §42-9-10(B) and not tied to S.C. Code §42-9-10(A)?]

While the presumption under SC Code §42-9-30(19) was always rebuttable [now SC Code §42-9-30(21)], the 2007 amendment was enacted to simply set that out in statutory language. The effect of any presumption under our Law was and is as is stated in the SC Rules of Evidence §301:

> "In all civil actions…, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion which remains throughout the trial upon the party on whom it was originally cast."

In other words the Claimant had, has and will always have the burden of proof to put forth a preponderance of evidence, to prove the fact that the injured worker has lost 50% or more of the functional use of the worker's back

to do work requiring the use of the worker's back. Walsh v. US Rubber Co., supra. Where the worker makes that prima facie case the burden to present evidence to rebut it shifts to the Defendants.

The misperception that the Claimant had to prove wage loss or loss of earning capacity under the scheduled member statute existed way before the back was made a scheduled member under SC Code §42-9-30 (See: Outlaw v. Johnson Service Co., supra), and persisted long before the 2007 amendments. However after the back became a scheduled member in 1974 that misperception was put to rest repeatedly by our Appellate Courts in the cases of Bateman v. Town & Country Furniture, 287 S.C. 158, 336 S.E.2d 890 (SC App 1985); McCollum v. Singer, 300 S.C. 103, 386 S.E.2d 471 (SC App. 1989); and Lyles v. Quantum Chemical Company, 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993).

> "The Workers' Compensation Commission properly ruled that a Claimant is entitled to benefits even though the injury did not affect his performance in his subsequent job because compensation is based on the **character and extent** of the injury **and not** whether the Claimant lost earnings or is otherwise employable in another occupation". Lyles, supra. (Emphasis added).

The fact that wage loss is not a factor to be considered under the presumption is clear from the statute. A worker

is entitled to an award for total and permanent disability for loss of earning capacity under the first paragraph of SC Code §42-9-10 which is subsection **(A)** after the 2007 Amendments.

The pertinent part of S.C. Code §42-9-30 (21) as Amended in 2007 (the scheduled member back section) reads:

> "Where 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 §42-9-10 **(B)**." (Emphasis Added)

Under previous SC Code §42-9-30(19) the subsection read,

> "and compensated therefore under paragraph two of §42-9-10". (Emphasis added.)

The link to the "second" paragraph now under SC Code §42-9-10**(B)** did not change.

S.C. Code §42-9-10 **(B)** (previously paragraph two) provides that the loss of both hands, arms, shoulders, feet, legs, hips or vision in both eyes or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of that section.

An Award under Section **(B)** of §42-9-10 like an Award under §42-9-30 (21) is paid due to the, "character of the injury" not wage loss, or in the words of the Supreme Court

the functional loss of use of the scheduled member, organ or bodily part:

> "Compensation depends on the functional loss rather than the loss of earnings. Hoke v. Cherokee County, 216 S.C. 376, 58 S.E.2d 330 (1950). Therefore, since compensation **is not based upon loss of earnings,** but is payable when the member or its function is impaired or lost, the testimony that the loss of vision in the injured eye might be reduced by use of corrective lens is not properly considered in determining whether Respondent has suffered a loss of vision in that eye . . ." Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646.

Therefore, Awards under §42-9-30 (21) are not paid nor have they ever been paid for wage loss as provided for under §42-9-10 (A)[2]. They are paid for the functional loss of use without any consideration of wage loss. A left handed lawyer is entitled to total and permanent disability if he loses his right foot and right hand and the same is true if he loses 50% of the use of his back; otherwise the connection to (B) not (A) is meaningless.

In this case, there is simply no substantial evidence in the Record that Mr. Clemmons has lost less than 50% of the functional use of his back to do work requiring the use

[2] Appellant's Counsel is extremely concerned with the lack of commitment to the wording of the Act and the use of the word, "disability" in reference to any Award made under SC Code §42-9-30, the scheduled member award section. Disability has nothing to do with loss of use. It is actually defined under SC Code §42-1-120. This mis-use is second only to the mis-use of the word impairment in reference to the Commission's responsibility as to the awards to be made. The Commission can only make Awards on two bases: 1) loss of earning capacity and 2) loss of use. Disability ≠ loss of use ≠ impairment.

of the back. Two medical doctors that evaluated him stated the opinion in reference to the functional loss of use of the back that he has to do work requiring the use of his back that in their opinion he had lost 50% or greater of the use of his back to do work requiring the use of his back. (R. pp. 170 & 173). In addition Mr. Clemmons testified that in his opinion he had lost more than 50% of the use of the back and in fact testified that he had lost, "about 80%" of the functional use of his back to do work requiring the use of his back. (R. p. 337, l. 10 - p. 338, l. 11). Based on the functional capacity evaluation that was performed, Mr. Clemmons is only capable of performing limited light duty work and under the U.S. Department of Labor's Dictionary of Occupational Titles, five (5) Physical Work Demand Categories of very heavy duty, heavy duty, medium duty, light duty and sedentary duty work, the Appellant is excluded from three (3) of those categories completely and another one of those categories partially. Based on the Vocational Evaluation considering all of those factors, he is excluded from over 99% of all of the jobs available to him in the marketplace. (R. p. 171 and p. 195). There is simply no other evidence concerning the loss of use that Mr. Clemmons had sustained as a result of the injury to his back; i.e., no rebuttal.

It is the responsibility of the Commission where an Award is requested under the Scheduled Member Statute for the Commission to base its decision on the substantial evidence in the Record to determine the functional loss of use that the Claimant has in reference to the particular body part involved; in this case the back. Where the Appellant puts forward evidence to support his claim as is set out above, under the presumption the Respondents are duty bound to present evidence to rebut that.

In addition, the Commission is duty bound where it is dealing with a scheduled member award to make detailed Findings of Fact and Conclusions of Law on that essential issue that are sufficiently definite and detailed enough to enable the Appellate Courts to determine whether the Findings of Fact are supported by the evidence and whether the law has been properly applied to them. Drake v. Raybestos-Manhatten, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962). The Commission must therefore make Findings of Fact as to the functional loss of use without regards to whether or not there is any loss of earning capacity. See Dykes v. Daniel Construction Co., supra. In addition, in Wigfall v. Tidelands Utilities, Inc., supra, our Supreme Court specifically affirmed this principle again by stating that there are three (3) methods of obtaining compensation,

one being for total disability (wage loss) and the second being for partial disability (wage loss) and the third being for a scheduled member award. The first two methods are premised on the economic model while the third method, "exclusively relies upon the medical model with its presumption of lost earning capacity."

Therefore, first since there is absolutely no substantial evidence in the Record that Mr. Clemmons has lost less than 50% of the functional use of his back, the Commission erred by not making that finding. Second, the Commission erred by considering wage loss in reaching its determination, which it clearly did (See Findings 8-12) in reference to the decision as to whether Mr. Clemmons had lost more than 50% of the functional use of his back, thus the Commission erred again as a matter of law in its Decision.

Finally, the Appellant is aware of the decision by the Court in Watson v. Extra Mile Drivers Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (SC App. 2012) on which a Petition requesting a Writ of Certiorari is pending and on which a request to argue against precedent will be filed to the extent that it infuses wage loss into a scheduled member award.

However, even applying the Watson standard, the

Appellant is entitled to an Award for total and permanent disability under SC Code §42-9-30(21), under the testimony and evidence in this case concerning his ability to work and the expert opinion of a vocational expert in reference to his job market access. Mr. Clemmons testified that without the special accommodations being made by Lowe's and the help of his fellow employees that he could not do his job with Lowe's. He also testified that the only conceivable job that he knew of that he may be able to do, if he lost his job at Lowe's, would be one where he would not have to stay on his feet. (R. p. 333, l. 1 - p. 335, l. 21). The vocational expert's opinion establishes that considering all the doctor's opinions including that of Dr. Drye, the authorized treating physician, and their restrictions and the restrictions found to exist under the functional capacity evaluation that in her opinion Mr. Clemmons had a 99.9400% loss of access to the job market in the United States (R. p. 195). The Commission had to rely on and had to make its decision based on the substantial evidence. Justice Gathers wrote in Watson citing Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (1996) and McCollum v. Singer Co., supra, [stating to the effect as is set out specifically in the McCollum decision citing from Colvin v. E.I. DuPont de Nemours Co., 227 S.C.

465, 88 S.E.2d 581 (1955)] that:

> "evidence that the claimant has been able to earn occasional wages or perform certain limited kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial."

Therefore, even applying this standard under the substantial evidence in the Record here that: the Appellant knows of no actual job he could perform except possibly some job where he did not have to stand and that he is excluded from 99.9400% of the entire job market in the United States under the Dictionary of Occupational Titles, the evidence clearly establishes that he is entitled to an Award for total and permanent disability. Again, that is assuming that wage loss is a factor that should be considered in a request for an Award under the schedule member statute; again the reference to (B) versus (A) would make no sense if it is.

III. DID THE COMMISSION ERR AS A MATTER OF LAW BY FAILING TO MAKE AN AWARD FOR THE APPELLANT'S SEPARATE NEUROLOGICAL DISORDER, MYELOPATHY, BASED ON THE SUBSTANTIAL EVIDENCE IN THE RECORD?

The only doctor to address this issue is Dr. Mandell, a board certified neurologist, who stated the opinion that separate and apart from any impairment to the back that in his opinion from a neurological standpoint that Mr. Clemmons had a 15% whole person impairment affecting his

back and upper extremities and lower extremities. The effect of the myelopathy on Mr. Clemmons was recognized by all doctors involved including the treating neurosurgeon, Dr. Randall Drye. Dr. Drye recognized and agreed that these central nervous system problems existed and were caused by the residual myelopathy. Therefore the only substantial evidence in the Record establishes that Mr. Clemmons is entitled to a separate Award for the separate neurological injury that he incurred. The Commission erred as a matter of law by not making an Award for the neurological deficits separate and apart from the injury to the back and by not making Findings of Fact and Conclusions of Law on that issue. Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957).

IV. DID THE COMMISSION ERR AS A MATTER OF LAW BY FAILING TO MAKE AN AWARD FOR APPELLANT'S LOW BACK INJURY?

The treating neurosurgeon Dr. Randall Drye recognized and found that Mr. Clemmons had problems with his low back, addressed those in his last report and set those out as a diagnosis. However, the only medical impairment rating he ever addressed and gave Mr. Clemmons was in reference to his cervical spine injury and there is no evidence he ever evaluated the lumbar spine for medical impairment.

There is a wealth of evidence in the Record concerning

the low back which comes first from Mr. Clemmons who testified as to the problems that he was having with his low back including low back pain, stiffness, limitation of motion, and the other activity limitations he has caused by these problems. In addition, the medical evidence includes: the opinion evidence from Dr. Leonard Forrest who opined that Mr. Clemmons was entitled to a separate 10% whole person impairment due to the problems with his low back; the impairment assessment performed by the physical therapist under the AMA Guidelines; and Dr. Mandell's opinion of permanent low back problems. There is simply no contrary substantial evidence in the Record concerning the low back and as such an Award should have been made addressing the low back problems and the loss of use for those problems. Here again the Commission failed in its responsibility to make detailed and definite Findings of Fact and Conclusions of Law in accordance with Drake v. Raybestos-Manhatten, Inc., supra, the Workers' Compensation Act and Administrative Procedures Act.

V. **DID THE COMMISSION ERR AS A MATTER OF LAW BY PLACING GREATER WEIGHT IN THE AUTHORIZED TREATING NEUROSURGEON'S REPORTS WHERE THERE IS AN ABSOLUTE CONTRADICTION OR PARADOX IN THAT DOCTOR'S REPORTS AS TO WHETHER THE MYOPATHY AND THE FUNCTIONAL LOSSES AND SYMPTOMS ASSOCIATED WITH IT PREEXISTED THE INJURY WHERE THERE IS ABSOLUTELY NO EVIDENCE IN THE RECORD TO SUBSTANTIATE THAT THE APPELLANT WAS HAVING ANY NEUROLOGICAL PROBLEMS PRIOR TO THE ACCIDENT?**

The Commission made a specific Finding giving, "great weight" to the treating physician's opinion and little or no weight to all of the other evidence in the Record. (R. p. 40).

As is set forth in the Statement of the Case and Facts, all of the evidence in the Record up until the very last visit with Dr. Drye establishes that all of the doctors were of the opinion the Appellant's problems with myelopathy, balance and other neurological problems referred to in Dr. Armsey's initial report stemmed from the work-related injury. However, Dr. Drye in his last report stated the exact opposite.

Quoting directly from Dr. Randall G. Drye, M.D., report of November 30, 2010, which state his and all doctors' opinions:

> "When we met in the office initially and we garnered his history he clearly reported **no prior** history of significant neck or neurologic problems prior to a fall at work. This occurred, according to the patient, on 9/12/10 when he slipped on some straw in a trailer and impacted on his back and the back of his head. This

> mechanism of injury is completely consistent as the force and flexion of the head and neck can result in a tear in the vulnerable disc and subsequent herniation. . . .
>
> * * *
>
> **For that reason, I believe that within a reasonable degree of medical certainty, his** disc herniations, spinal cord impingement **and subsequent myelopathy** as well as the intervening surgery **were a direct result of his fall at work.**" (R. p. 105).

The Appellant would submit again that the Court will find absolutely no medical record or reference to Mr. Clemmons having any problems prior to the date of the accident. Thus the statement made in Dr. Drye's last report that the myelopathy resulted from, "pre-existing problems" to the fall makes the neurosurgeon's testimony not credible. Therefore the Commission's Findings of Fact that they placed great weight in the treating neurosurgeon's opinions without addressing this critical factual issue in their Findings makes those Findings of Fact and Conclusions of Law inadequate for judicial review and the subject of surmise, speculation and innuendo and also being capricious. The evidence simply does not support any credence to be given to the credibility of the neurosurgeon. The two quoted statements are simply and totally contradictory. The Commission must make Findings on all "essential factual issues." Hill v. Jones, 255 S.C.

219, 178 S.E.2d 142 (1970).

CONCLUSION

For all the foregoing reasons, the Decision of the Commission should at the least be reversed, vacated, and the claim remanded pending the Appellant making a request for benefits under the Act.

Further, this Court should review the substantial evidence in the Record and since there is no contrary evidence, grant the Appellant an Award as a matter of law for total and permanent disability for having lost more than 50% of the use of his back.

Respectfully submitted,

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1/31/, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2013-001668

Henton T. Clemmons, Jr., Employee, ... Appellant,

v.

Lowes Home Centers, Inc.-Harbison, Employer, and Sedgwick Claims Management Services, Inc., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on 2/3, 2014, addressed to: Weston Adams, III, Esquire, M. McMullen Taylor, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211 and Helen F. Hiser, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 650007, Mt. Pleasant, SC 29465.

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