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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2015-001702

Opinion No. 5548
Heard February 8, 2017 - Filed March 28, 2018

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AUG 27 2019
SC Court of Appeals

Julie Dent, Widow/Dependent/Movant

IN RE: Appeal/Opinion:

James Dent, Employee, Appellant,

v.

East Richland County Public Service
District, Employer, and State Accident Fund,
Carrier, Respondents.

MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER
AND RECALL THE REMITTITUR AND TO OPEN THE RECORD
FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL
BUT NOT REACHED IN THE COURT'S OPINION NO. 5548

TO: ERIN FARTHING, ATTORNEY AT LAW AND DAVID H. KELLER, ESQUIRE,
ATTORNEYS FOR THE RESPONDENTS:

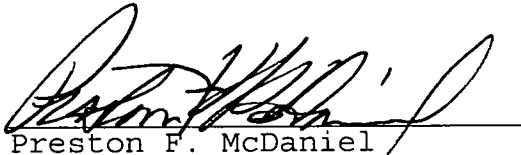
YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 240, SCACR,
and other applicable Appellate Court Rules, the Movant by and
through her attorneys will move for an Order of the Court
exercising its unusual power of recalling the Remittitur issued
subsequent to the Court's Opinion as referenced above for the
exceptional reasons that a decision on one of the issues presented

to the Court for decision but which was not reached by the Court in the Opinion because the decision on the other issues addressed in the Opinion were dispositive, due to the death of Mr. Dent, has become necessary and critical to the interests of the parties concerning the lump sum Award made as set forth more fully in the Memorandum in Support of Motion attached hereto and incorporated herein by reference.

As set forth in the Memorandum, the need for this Motion only came about after request for payment of the lump sum Award (law of the case) was made and after the lump sum Award value had been calculated when, due to the death of Mr. Dent during the appeal, Respondents denied payment alleging application of S.C. Code §42-9-280. This matter was then set for hearing before a Workers' Compensation Commissioner who issued an Order of Continuance for the specific purpose of filing this Motion to try to obtain a prompt opinion by the Court and/or a judicial ruling on this unreached issue.

WE SO MOVE.

Respectfully submitted,



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Widow/Dependent/Movant of
Appellant, James Dent, Deceased

August 27, 2019

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MEMORANDUM IN SUPPORT OF
MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER
AND RECALL THE REMITTITUR AND TO OPEN THE RECORD
FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL
BUT NOT REACHED IN THE COURT'S OPINION NO. 5548

The Movant in support of the Motion requesting the Court to exercise its unusual power to Recall the Remittitur to address issues not reached in the original Opinion of the Court would respectfully show unto the Court as follows:

1. That the Opinion of the Court was entered in the appeal filed by the Appellant that originally arose out of a workers' compensation claim filed by Mr. James Dent as Employee, the injured worker, with his Employer, the East Richland County Public

Service District and the State Accident Fund as their insurance carrier. After Mr. Dent filed for a Final Award of compensation, the matter was tried before Commissioner Susan Barden. The Appellant requested an Award for total and permanent disability at that hearing on the basis of both having a total loss of earning capacity under §42-9-10 and also for having a scheduled member loss of use of 50% or greater loss of the use of his back under S.C. §42-9-30(21). However, Commissioner Barden rendered a decision making an Award for less than 50% loss of use of the back but did order that the Award was to be paid in a lump sum.

Upon appeal to the Full Commission, the Full Commission remanded the case to the Hearing Commissioner to reconsider the evidence and the Award and directing the Hearing Commissioner to make Findings of Fact because she had found that the case was subject to the Singleton rule involving only a Single Member whereas the evidence clearly established the involvement of more than one body part.

Upon Remand as is set out in the Appellate Record filed with the Court, Commissioner Barden again made the same Award. That Award was again appealed on the basis that she failed to make an Award for total and permanent disability based on wage loss under S.C. Code §42-9-10 and also on the basis that she failed to make an Award for total and permanent disability under S.C. Code §42-9-30(21) wherein the uncontradicted evidence established that Mr. Dent had lost more than 50% of the functional use of his back to do work requiring the use of his back. The Full Commission (prior

to the Supreme Court decision in Clemmons, infra) affirmed that decision on appeal and that decision was appealed to this Court. In both of the Hearing Commissioner's decisions and Awards, the Hearing Commissioner had made a Finding of Fact that Mr. Dent was entitled to and ordered that the Award was to be paid in a lump sum Award. Those Findings of Fact and Conclusions of Law that any Award and the Final Award made in the case was to be paid in a lump sum were not appealed; law of the case.

2. That Appellant, Mr. James Dent appealed that decision concerning the Award to which he was entitled under law to this Court, and as is set forth in the Record and Briefs filed with this Court, on the basis that under both S.C. Code §42-9-10 (wage loss) and under the Scheduled Member statute S.C. Code §42-9-30(21) for having lost 50% or greater of the functional use of the back to do work requiring the use of the back the reliable, probative and substantial evidence in the Record established that Mr. Dent was entitled to an Award for total and permanent disability.

3. That on Appeal this Court, in its Opinion, held that the reliable, probative and substantial evidence established that Mr. Dent was entitled to an Award for total and permanent disability and had sustained a total loss of earning capacity under S.C. Code §42-9-10. In reference to the issue on appeal that Mr. Dent was entitled to an Award for total and permanent disability on the basis of having lost 50% or greater of the

functional use of his back to do work requiring the use of his back under S.C. Code §42-9-30(21), this Court held in its Opinion filed March 28, 2018 that:

"II. §42-9-30(21)

"Dent also contends the Appellate Panel erred in failing to find PTD under subsection 42-9-30(21) of the S.C. Code (2015). Given that resolution of the prior issue is dispositive of this Appeal, the Court need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (Holding an Appellate Court need not address remaining issues when disposition of a prior issue is dispositive." (emp. added).

In the Conclusion of the Opinion, the Court held that,

"the Appellate Panel's finding that Dent is not totally and permanently disabled due to his work injury is **REVERSED.**"

4. That during the pendency of the Appeals, Mr. Dent passed away. After this Court's decision became final and the Remittitur was issued, payment of the Final Award as made by the Court of Appeals was requested in a lump sum (again, the payment of the Award in a lump sum finding was never appealed and is the law of the case). It was the Claimant's position throughout the appeal that the lump sum finding was not appealed and vested at the time it was awarded; and also, that he was entitled to an Award for total and permanent disability under the Scheduled Member statute. When submitted for payment, the Respondents took the position that the Claimant was not entitled to the lump sum (awarded prior to his death) Award for total and permanent disability due to Mr. Dent having passed away during the pendency

of the appeal because a wage loss award abated under S.C. Code §42-9-280. In addition to the issues of the lump sum vesting prior to his death, it is agreed that S.C. Code §42-9-280 does not apply to an Award made under S.C. Code §42-9-30 as a Scheduled Member Award and thus it would not apply to an Award under that Code section for total and permanent disability based on having lost 50% or greater of the functional loss of use of the back to do work requiring the use of the back. Thus, a decision on that issue which was not reached by the Court as to whether Mr. Dent as a matter of law under S.C. Code §1-23-380(e) and the reliable, probative and substantial evidence in the Record had sustained 50% or greater of the loss of use of his back to do work requiring the use of the back is needed and a decision on that issue would be totally dispositive without further litigation before the Commission or on appeal.

Note: This Court has held in an identical situation involving the same Defendant, State Accident Fund, that if as a matter of law the Claimant under the reliable, probative and substantial evidence has lost 50% or more of the use of his back and dies during the pendency of the appeal, the Claimant's dependents are entitled to an Award for total and permanent disability. McMahan v. Department of Education - Transportation, 417 S.C. 481, 790 S.E.2d 393 (S.C. App. 2016), reh. den., cert. den.

5. That in addition to the above, at the time that the

Appeal was heard by this Court on February 8, 2017 by this Court, the Supreme Court had not filed its Opinion in Clemmons v. Lowe's Home Centers, Inc.-Harbison, 420 S.C. 282, 803 S.E.2d 268 (S.C., Refiled June 28, 2017), Rehearing Denied (9/5/17). The facts in this case on the issue of loss of use of the back are almost identical to and are on all-fours with the evidence submitted in that case wherein the Supreme Court found, based upon the reliable, probative and substantial evidence in the Record as a matter of law, that the evidence established that Mr. Clemmons had sustained a 50% or greater loss of use of the back. In that Opinion, the Supreme Court found that where Mr. Clemmons had testified that he had lost 50% or greater loss of use of his back to do work requiring the use of the back and where there was medical opinion evidence that he had lost 50% or greater of the use of his back and there was no contrary evidence addressing the loss of use of the back, that the evidence established that Mr. Clemmons had lost 50% or greater of the functional use of his back to do work requiring the use of his back. The Court also held that under the Scheduled Member statute the essential issue is, and the basis for the award is, "loss of use" of the specific body part involved and that having lost 50% of the use of his back he was entitled to the presumption of total and permanent disability. Identically in this case, there is absolutely no evidence in the Record of Mr. Dent having lost less than 50% of the use of his back to do work requiring the use of his back as a separately Scheduled Member. All of the evidence on the "essential" issue

for decision, "loss of use of the back" established that Mr. Dent had lost 50% or more of the use of his back to do work with his back. Most importantly, unlike Clemmons, this Court held Mr. Dent was totally and permanently disabled due to the injury; law of the case, res judicata.

6. That there is no case on point under S.C. Code §42-9-280, i.e., an Award for permanent and total disability as a Scheduled Member Award under S.C. Code §42-9-30(21) nor involving a situation as here where there are unappealed Findings of Fact (law of the case) holding that the Award is to be paid in a lump sum. However, due to the Respondents' position and refusal to pay the Award on the basis of §42-9-280 due to the death of Mr. Dent during the pendency of the Appeal, for these exceptional reasons and as a matter of judicial economy, the quickest and most efficient and least expensive way for all parties concerned to end this litigation would be for the Court to recall the Remittitur and address the issue that was not reached in the Court's Opinion due to the Court's decision on the other issues on appeal before the Court at that time. Specifically: applying the substantial evidence rule, as it did in finding Mr. Dent permanently and totally disabled, to the evidence in the Record on "loss of use" of the back the Court will find as a matter of law there is not only no substantial evidence but is there any evidence in the Record on "loss of use" other than that he had lost 50% or greater of the use of his back. If there is no substantial evidence reversal would apply. If this Court finds there is any

substantial evidence of less than 50% loss of use, then remand to the Commission would apply. McMahan v. Department of Education-Transportation, supra.

7. That our Appellate Courts have held and the Rules state that the Appellate Court loses jurisdiction once the Remittitur has been sent down and shall not be recalled except for, "exceptional circumstances" warranting the exercise of the Court's unusual power of recalling the Remittitur. That unusual power should only be exercised based on a very strong showing that the Remittitur was sent down through some mistake or inadvertence on the part of Court. State v. Keels, 39 S.C. 553, 17 S.E. 802, (1893); State v. Barnes, 413 S.C. 1, 774 S.E.2d 454, 2015). "When points arising in a case before the Court have been decided they become res judicata, . . ." and after Remittitur, the Court cannot render a different decision upon the points decided so as to offset the particular case "in which the decision was rendered." Earle v. City of Greenville, 84 S.C. 193, 65 S.E. 1050, (1909). The point was not decided by the Court.

This Court has held en banc:

" The decision of the appellate court is final as to all questions decided.. (internal citations omitted) (rule does not apply to matters which were raised on appeal but were not decided)" Charleston Lumbar Co. v. Miller Housing Corp; 329 SC 414,496 SE2d 637 (SC App 1998 en Banc).

A mistake, "exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or

omitted .", doing. Black's Law Dictionary, "Mistake", 4th Edition Rev., 1969, 8th Reprint 1972.

Having reviewed the Record on Appeal and having found the substantial evidence in the Record supported an Award in a lump sum under §42-9-10 for total and permanent disability and further in its "CONCLUSION" holding that,

"The Appellate Panel's finding that Mr. Dent is not totally and permanently disabled due to his work injury is REVERSED."

The Court was under the "erroneous conviction" of both law and fact that there was no need to reach, and it was proper under that conviction to omit, making a decision on the issue of whether the substantial evidence established Mr. Dent had lost 50% or more of the use of his back which would entitle him to the presumption and entitled under S.C. Code §42-9-30(21) to an Award for total and permanent disability based on the character of the injury due to loss of use of the back. Being under that conviction of both law and fact, the Court made a mistake as defined in law by not reaching that issue presented on appeal. The Court should grant relief where there is a mistake of law or a mistake of fact and especially a mistake of law. Brock v. O'Dell, 44 S.C. 22, 21 S.E.2d 976 (1895); Lawrence v. Beaubien, 2 Bail. 623, 18 S.C.L. 623 (S.C. App. 1832).

For all of the foregoing reasons, the Court should grant the Motion to Recall the Remittitur due to that mistake and should open the Record and address the unreached issue of whether or not

as a matter of law under S.C. Code §1-23-380(5)(e) the substantial evidence in the Record establishes that Mr. Dent is entitled to an Award for total and permanent disability based on having lost 50% or more of the functional use of his back to do work with his back under S.C. Code §42-9-30(21) and specifically based on this Court's holding that he was totally and permanently disabled due to his injury and in consideration of the Supreme Court's subsequent decision in Clemmons v. Lowe's Home Centers, Inc.- Harbison, supra. The Court has probably already considered this issue in its original consideration of the appeal but did not reach it in its Opinion. If the Court will grant this Motion and give its opinion on this unreached issue, justice may be prompt and the parties may be saved years of litigation, time and expense.

Respectfully submitted,



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Attorneys for Julie Dent
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August 27, 2019

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for over 30 years.

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August 27, 2019

VIA HAND DELIVERY

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

RE: Julie Dent, Widow/Dependent/Movant
IN RE: Original Appeal/Opinion:
James Dent, Employee, Appellant, v. East Richland County
Public Service District, Employer, and State Accident
Fund, Insurance Carrier, Respondents
Appellate Case No. 2015-001702

Dear Ms. Kitchings:

Please find attached the original and seven (7) copies of the MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER AND RECALL THE REMITTITUR AND TO OPEN THE RECORD FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL BUT NOT REACHED IN THE COURT'S OPINION NO. 5548 with MEMORANDUM IN SUPPORT OF MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER AND RECALL THE REMITTITUR AND TO OPEN THE RECORD FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL BUT NOT REACHED IN THE COURT'S OPINION NO. 5548 in the above-referenced matter. I would appreciate your returning the clocked-in copy to the courier.

By copy of this letter I am hereby serving Counsel of Record with a copy of these documents.

Sincerely yours


Preston F. McDaniel

RECEIVED

AUG 27 2019

SC Court of Appeals

PFM/abh/kth
Enclosures

cc: Page Snyder Hilton, Esquire
Erin Farthing, Esquire
David H. Keller, Esquire
Evelyn A. Norton, Esquire

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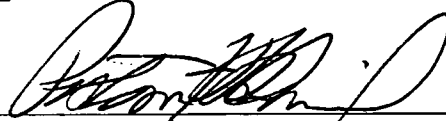
East Richland County Public Service
District, Employer, and State Accident Fund,
Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER AND RECALL THE REMITTITUR AND TO OPEN THE RECORD FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL BUT NOT REACHED IN THE COURT'S OPINION NO. 5548 with MEMORANDUM IN SUPPORT OF MOTION TO THE COURT TO EXERCISE ITS UNUSUAL POWER AND RECALL THE REMITTITUR AND TO OPEN THE RECORD FOR THE COURT TO ADDRESS ISSUES PRESENTED ON APPEAL BUT NOT REACHED IN THE COURT'S OPINION NO. 5548 by depositing a copy of it in the United States Mail, postage prepaid, on August 27, 2019, addressed to Counsel of Record as follows:

Page Snyder Hilton, Esquire
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