IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson Jr., Chair, Commissioner
T. Scott Beck, Commissioner
R. Michael Campbell, Commissioner

SCWCC File No. 1102937
S.C. Court of Appeals Case No. 2019-001141

Barry Adickes, Claimant, Respondent

v.

Philips Healthcare, Employer and Fidelity and
Guarantee Insurance Company, Carrier, Appellants.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL:

1. Did the Commission err in awarding permanent wage loss benefits for a period prior to Adickes reaching MMI?
2. Did the Commission err in awarding permanent wage loss benefits beyond 340 weeks from the date of accident?

STATEMENT OF THE CASE:

Adickes initiated these proceedings by filing a Form 50 Request for Hearing on September 23, 2014, alleging a loss of earning capacity as a result of his work injury under S.C. Code Ann. § 42-9-20. (9.13.14 Form 50). Appellants responded with a timely filed Form 51, arguing that a permanency determination was premature and denied that Respondent was entitled to a wage loss award. (10.15.14 Form 51).

Commissioner McCaskill issued an Order wherein he awarded Adickes 340 weeks of permanent partial disability benefits under S.C. Code Ann. § 42-9-20. (8.27.15 McCaskill Order). The McCaskill Order was affirmed by the Full Commission on February 8, 2016. (2.8.16 Appellate Panel Award).

Appellants filed a Notice of Appeal to the Court of Appeals on March 17, 2016 and properly commenced weekly benefits pursuant to the Appellate Panel Award. (3.17.16 NOA to COA). Appellants argued that the Appellate Division erred in not limiting the wage loss award to 340 weeks from the date of accident, pursuant to the language of S.C. Code Ann § 42-9-20. (Id.).

On November 9, 2017, this Court heard oral arguments in case No. 2016-000514. This Court issued an unpublished Opinion on January 17, 2018, noting that the applicable portion of S.C. Code Ann. § 42-9-20 reads "[I]n no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. We find this to be a limiting clause that restricts the time frame and amount of coverage and should be strictly interpreted." Adickes v. Philips Healthcare, Op. No. 2018-UP-027 (S.C.Ct.App filed January 17, 2018). This Court further held that the "plain language of the statute limits PPD benefits to 340 weeks from the date of injury, contrary to the Appellate Panel's interpretation and award. This statute explicitly mandates that in 'no case' will PPD benefits be available to a claimant beyond the term of 340

weeks 'from the date of injury.'" As such, this Court reversed the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014 and remanded to the Workers' Compensation Commission for a new calculation of benefits consistent with the plain language of S.C. Code Ann. § 42-9-20. (Id.).

The Full Commission issued a Remittitur Routing Sheet on July 16, 2018, assigning the case to a Single Commissioner. (7.16.18 Remittitur Routing Sheet). Counsel for Appellants inquired as to why the case was scheduled before a Single Commissioner, since the COA remand directed it to be calculated by the Appellate Panel. (7.18.18 emails). The Appellate Division Judicial Docketing Director responded that the panel felt the Single Commissioner that heard the case would be better, so they remanded it to him/her. (Id.).

The attorneys were informed on July 18, 2018 that the case was set before Commissioner Susan Barden. (Id.). On August 2, 2018, Adickes' counsel inquired into why it was set before Commissioner Barden as opposed to Commissioner McCaskill. (8.2.18 emails). Commissioner Barden's administrative assistant informed the attorneys that "the policy is to set the matter before the jurisdictional Commissioner, not the hearing Commissioner." (Id.). Counsel for Appellants inquired into whether Commissioner Barden was planning on performing the calculation as directed in the COA Order, or to have another hearing. (Id.). Commissioner Barden's office responded that she wanted it to remain set for a hearing. (Id.).

A hearing was set before Commissioner Susan Barden, at which time she allowed the parties to put their respective positions on the record, pursuant to the request by Adickes' counsel. Thereafter, Commissioner Barden executed the Order prepared by Adickes' counsel on January 17, 2019. (1.17.19 Barden Order). In this Order, the Commissioner held that the Court of Appeals did not agree with Appellants' contention that permanent wage loss awards begin as of the date of

MMI, since this Court "did not reverse or remand on that ground." (Id.). She further held that "the issue of MMI is immaterial in a wage loss claim," since S.C. Code Ann. § 42-9-20 does not distinguish between temporary and permanent benefits. (Id. at p. 6, 9). Even so, the Commissioner held that the Court of Appeals decision did not contain a date of MMI, only an affirmation that Adickes had reached MMI; therefore, a determination of the date of MMI was beyond the scope of the remand. (Id. at pp. 6-7). As such, Commissioner Barden held that the Court of Appeals did not reverse the date that the initial Single Commissioner had ordered wage loss benefits to begin, which was the date of Adickes' termination. (Id. at 9). Commissioner Barden held that Adickes' wage loss award should commence as of January 17, 2014, regardless of the fact that Adickes was not at MMI as of the date of his termination. (Id. at p. 9-10).

Lastly, Commissioner Barden held that the final sentence of S.C. Code Ann. § 42-9-20 operates to "prolong" a PPD award beyond the 340 week limitation, since the "plain reading" of the language does not entitle the Employer to a credit of TTD paid. (Id. at p. 8). As such, she held that Adickes was entitled to an additional 7 weeks and 5 days of PPD benefits beyond the 340 week limitation. (Id. at p. 10).

Appellants timely filed a Form 30 Request for Commission Review of Commissioner Barden's Award on January 18, 2019. (1.18.19 Form 30). Appellants asserted that the Single Commissioner erred in that her calculation of wage loss benefits was not only in contravention of the guiding statutory authority and case law, but also the directives from the Court of Appeals. (Id.).

Adickes also filed a timely appeal of Commissioner Barden's Award, arguing that the Single Commissioner erred in (1) failing to rule that limiting the award on both the front and back ends would be violative of due process, and (2) failing to rule that Applicants are precluded from

arguing that wage loss benefits may not be ordered before MMI as the issue was not properly preserved before the Court of Appeals. (1.28.19 Form 30).

The Appellate Panel executed the Order prepared by Adickes' counsel. (6.20.19 Appellate Panel Award). In its Order, the Appellate Panel found that Commissioner Barden "performed a detailed analysis of the issues, followed the directions from the Court of Appeals on remand, and issued an Order that follows the plain reading of Section 42-9-20 and supporting case law." (Id. at pp. 4-5). As such, the Appellate Panel confirmed Commissioner Barden's Order in full. (Id. at p. 5). The Appellate Panel acknowledged that all of the weeks owed to Adickes had accrued, yet ordered Appellants to pay interest of 7.5% on benefits owed between the dates of January 17, 2014 and when Appellants commenced benefits following the 2016 Appellate Panel decision. (Id. at p. 6).

STATEMENT OF THE FACTS:

This case has a complicated procedural history dating back to 2014. Given the current posture of this case, a full recitation of the facts is unnecessary. Appellants rely on and fully incorporate herein the Summary of Evidence detailed in Appellant's Final Brief to this Court filed in COA case No. 2016-000514, but point to the below facts relevant to this appeal:

Dr. Barron performed an IME on the Claimant on December 12, 2012, at which time Dr. Barron opined that "unfortunately, [the Claimant] has not responded to surgical treatment on his right shoulder." (Comm'r McCaskill Order, p. 8; Adickes' APA pp. 75 – 77). Dr. Barron did not place him at MMI when he performed the IME; rather, he specifically noted that the Claimant had not been rated in regard to his right shoulder and recommended that the Claimant undergo a right shoulder arthrogram. (Id. at p. 77).

The Claimant did not seek any additional treatment for his right shoulder after his IME with Dr. Barron. Prior to the hearing before Commissioner McCaskill, the Appellants scheduled a "rate and release" appointment with Dr. Rentz, the Claimant's authorized physician for his right shoulder. (Adickes' APA pp. 162 – 165). The Claimant was evaluated by Dr. Rentz on September 14, 2014, at which time he reported continued pain in his right shoulder, pain with overhead activities and some popping with motion. (Id. at p. 164). Rather than providing a rating, Dr. Rentz recommended that the Claimant undergo a right shoulder MRI scan and to return following same. (Id.).

The Claimant underwent a right shoulder MRI scan on October 10, 2014. (Adickes' APA p. 160). Rather than returning to Dr. Rentz to review, the Claimant provided the MRI scan to Dr. Barron. After review of same, Dr. Barron completed a questionnaire wherein he assigned the Claimant a 15% rating to his right shoulder. (Adickes' APA p. 77a). Specifically, Dr. Barron opined that the Claimant will "most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as the ongoing symptoms." (Id.). It was this questionnaire response, dated January 14, 2015, that persuaded Commissioner McCaskill that Adickes' was at MMI for all of his injuries, as discussed in his Order:

> 3. It is the defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI for his shoulder.
>
> 4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
>
> 5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
>
> 6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, " . . . has sustained a permanent impairment of 15% to the right shoulder and 0% to the left shoulder." (Claimant's APA's, p. 77a).
>
> 7. While ratings are necessary to determine disability to the shoulders, if any, the language is also determinative as to MMI. Assigning "permanent impairment" to

> the shoulders attests to Dr. Barron's opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of "permanent" — plain meaning of the word — impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders.
>
> (8.27.15 McCaskill Order, p. 11)

STANDARD OF REVIEW:

Judicial review of a Workers' Compensation Appellate Panel's Decision is governed by the substantial evidence rule of the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to the APA, the Court of Appeals' review in a workers' compensation proceeding is limited to deciding whether the decisions of the Appellate Panel of the Workers' Compensation Commission is unsupported by substantial evidence or is controlled by some error of law. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App 2007).

For purposes of judicial review of the Appellate Panel of the Workers' Compensation Commission, "substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Appellate Panel reached in order to justify its action. Pratt v. Morris Roofing, Inc. 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health and Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).

Under the scope of review established by the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but

may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs. Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(d)(2005).

ARGUMENT AND CITATION OF AUTHORITY:

A. THE COMMISSION ERRED IN AWARDING PERMANENT WAGE LOSS BENEFITS FOR A PERIOD PRIOR TO ADICKES REACHING MMI.

Adickes argues that the Court of Appeals did not overturn the Commission's findings that his wage loss benefits are to commence as of the date of his termination (January 17, 2014) and, therefore, the date of commencement cannot be changed on remand. (3.26.19 Adickes' Appeal Brief to the FC, p. 3). This is completely incorrect. The last line of Op. No. 2018-UP-027 states, "[a]ccordingly, we reverse the Appellate Panel's award of 340 weeks' compensation **commencing January 17, 2014**, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20." Thus, the date of commencement of the wage loss award was specifically reversed, was properly before the Single Commissioner on remand and is now back before this Court over a year after the remand.

The Commission erred in ruling that the issue of MMI is immaterial in a wage loss claim. It is well established in South Carolina that workers' compensation benefits run on a certain timeline, and that permanent benefits are awarded after a Claimant has reached MMI. The South Carolina Supreme Court held that "workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as

permanent total or partial disability, or as a percentage of impairment to a scheduled member." Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Likewise, in Smith v. S.C. Dep't of Mental Health, the Court explained that the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, and noted that the degree of permanent disability cannot be determined prior to MMI. 335 S.C. 396, 399, 517, S.E.2d 694 (1994), citing Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975).

As discussed above, the Supreme Court in Curiel held that workers' compensation benefits accrue on a time continuum: temporary total disability (TTD) benefits are available from the date of injury through the date of MMI, and post-MMI benefits may be awarded either as permanent total or permanent partial disability, or as a percentage impairment to a scheduled member. 376 S.C. 23, 29 (2007) (citing Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)). Thus, any wage loss benefits awarded to the Respondent should not commence until the date of MMI.

It is undisputed that Adickes had been placed at MMI for his head and cervical spine prior to the first hearing in this case, so the question was whether Adickes was at MMI for his last body part, the right shoulder.

Based on his medical records detailed above, there is a clear date in which Adickes can be found to have reached "MMI for all work-related injuries," which is the date that Dr. Barron completed the questionnaire response that assigned a rating to the last body part injured. Dr. Barron did not find Adickes to be at MMI when he evaluated him in 2012; rather, he recommended that Adickes undergo a right shoulder MRI scan. Following that IME, Adickes returned to his authorized physician, and was sent for an MRI scan as opposed to being placed at MMI and rated.

It was not until Dr. Barron reviewed Adickes' October 2014 MRI scan that Dr. Barron assigned an impairment rating, which was the rating that compelled Commissioner McCaskill to deem Adickes at MMI for his right shoulder.

In his Order, Commissioner McCaskill discussed the findings that led him to this conclusion that the Claimant's case was ripe for a permanency determination:

> 5. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
> 6. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
>
> (8.27.15 McCaskill Order, p. 11).

Adickes was placed at MMI for all of his work-related injuries as of the date of Dr. Barron's questionnaire response, January 14, 2015, which is when his wage loss award should commence.

1. Adickes' Arguments to the Contrary Should be Disregarded:

Adickes positions and arguments while this case has been on remand are diametrically opposed to those made in pleadings leading up to this Court's issuance of Op. No. 2018-UP-027, so they should be disregarded by this Court as he is judicially estopped from making these assertions. See Generally Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (S.C. 1997) stating in part that "judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."

Prior to this Court's 2018 Opinion in this case, Op. No. 2018-UP-027 a Claimant could receive an award of 340 weeks of permanent wage loss benefits by proving 2 things: (1) they were at MMI for all work-related injuries and (2) they suffered from a loss of earning capacity as a result of the injury. The date of MMI and receipt of temporary benefits earlier in the case was irrelevant up to that point. Op. No. 2018-UP-027explicitly limited wage loss awards to 340 weeks from the date of accident so, on remand, Adickes' arguments have been an attempt to extend the award on

the front-end. In doing so, he has not only argued against the well-established legal authorities but has impermissibly taken positions in direct contravention to those made in pleadings at earlier stages in this claim.

a. Adickes Is Estopped from Seeking Temporary Disability Benefits:

Adickes has unequivocally sought permanent disability benefits throughout the pendency of this claim. In all of his initial pleadings, all of which are unamended and/or stricken, Adickes specifically indicated the type of disability benefits he was seeking: permanent. In the very first pleading filed in this case, Adickes' 9.30.14 Form 50 Request for Hearing, in response to whether he was seeking Temporary Total Disability Benefits, Adickes responded: *TTD has been paid.* He left the box next to "A determination of permanency is premature at this time" unchecked. (Id.) Rather, he placed a check next to the box indicating that he was seeking a permanency disability of the following nature and extent: *Wage Loss.* (Id.). Similarly, in his 1.21.15 Form 58 Pre-Hearing Brief, Adickes indicated that the legal issues involved were as follows: *Extent of Permanent Wage Loss under 42-9-20; lump sum payment; Dodge medicals under § 42-15-60.* He made no request for temporary benefits.

Following the McCaskill Order, Adickes maintained his request for permanent benefits to the Full Commission and this Court through the following arguments: *Claimant is entitled to* ***permanent*** *partial wage loss disability benefits for 340 weeks*; *Here, the Claimant's* ***permanent*** *partial disability began after two separate periods of total disability*;... *a review of the relevant evidence and testimony supports Mr. Leonard's expert vocational opinion that Claimant suffered a* ***permanent*** *loss of earning capacity as a result of his work-related injury* (12.4.15 Adickes' Response Brief to the Full Commission, pp. 23, 27, 28); *Dr. Barron's* ***permanent*** *impairment*

rating to Barry's right shoulder is evidence that a permanency award is appropriate. (8.9.16 Adickes' 2016 COA Final Brief, p.6).

Yet, in complete contrast to the above arguments and in a veiled attempt to recover benefits for which he didn't seek, Adickes is now taking the position that the statute makes no distinction between temporary and permanent benefits, so he is entitled to wage loss benefits from the date of disability. Adickes points to the definition of "disability" contained in § 42-1-120, arguing that it does not distinguish between temporary or permanent disability. (4.8.19 Adickes' Response Brief to the FC, p. 5).

Appellants agree that those two words are not found within the language of § 42-1-120 - they don't need to be. The distinction between temporary and permanent benefits has been contemplated by the courts and legislature. In summary, the South Carolina courts have held: the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, noting that a degree of permanent disability cannot be determined prior to MMI (Hines v. Hendricks Canning Co., 263, S.C. 399), termination of temporary benefits and replacement with permanent benefits is proper upon finding of MMI (Gilliam v. Woodside Mills, 319 S.C. 385), and an explicit finding by the WC Commission as to whether the Claimant had reached MMI from injuries to his arms from a work-related accident was necessary because it was relevant to Claimant's entitlement to permanent benefits (Cranford v. Hutchinson Const., 731 S.E.2d 303).

Adickes didn't seek temporary benefits, so he is barred from recovering them, period.

b. Adickes Is Estopped from Arguing that MMI is required for All Body Parts and that he Reached MMI Prior to January 14, 2015:

Adickes has consistently acknowledged that permanent wage loss awards are predicated upon a finding of MMI for all work-related injuries, which is why he has maintained that he was at MMI for his right shoulder, the only injury in dispute. In fact, Adickes supported the MMI

designation as of the date of the questionnaire response, arguing to the Full Commission: Therefore the Single Commissioner was correct in finding that Claimant reached maximum medical improvement for all of his work-related injuries as of Dr. Barron's January 14, 2015 statement. (12.4.15 Adickes' Brief to FC, p. 19).

Leading up to Op. No. 2018-UP-027, Adickes made the following arguments to the Full Commission: *Here, the overwhelming preponderance of evidence in the record clearly indicates that Claimant reached Maximum Medical Improvement for the work-related injuries sustained on March 22, 2011; The medical evidence supports that Claimant reached* ***MMI for all of his work-related injuries****; If a surgical recommendation prevented MMI designation...they could ostensibly never reach MMI under Defendant's logic and remain in a perpetual legal limbo; ...as the ratings are permanent in nature, this* ***language is also determinative as to MMI****; It is only logical for a determination of MMI upon the assignment of such ratings. Therefore, the Single Commissioner was correct in finding that Claimant reached MMI for all of his work-related injuries as of Dr. Barron's January 14, 2015 statement.* (12.4.15 Adickes' Response Brief to the Full Commission, pp. 16, 18 - 19, 28).

Adickes maintained his argument for that Dr. Barron's opinion indicated he was at MMI before this Court issued Op. No. 2018-UP-027, arguing the following: *No physician has opined Barry is not at MMI; ...they said the claim was not ripe; that Barry had not reached MMI because Barry did not have disability ratings for his shoulders. Barry would actually have those ratings by the hearing.* (8.4.16 Adickes' COA Final Brief, p. 4, 7).

Adickes apparently recognized that maintaining the above arguments would be detrimental to his award under Op. No. 2018-UP-027, so he's wholly abandoned the arguments and is also turning a blind eye to the controlling legal authorities. Adickes and now argues that MMI is

immaterial to a wage loss award, so the date of the designation is unnecessary. (4.8.19 Adickes' Response Brief to the FC, p. 4). Specifically, Adickes new positions on the MMI issue are as follows:

> *The only relevance of MMI is that it determines whether medical care is wide open or limited in scope by the final order.*
>
> *It is not unexpected that no commissioner, panel or court found a date of MMI, for the date at which Claimant reached MMI is irrelevant.*
>
> *When a Claimant pursues wage loss benefits, the commission has no need to determine a date at which that Claimant reached MMI.*
>
> *To predicate his entitlement to wage loss benefits on anything other than the date he began losing wages is either illogical or a gross conflation of wage loss benefits and benefits for loss of use.*
>
> (Adickes' April 2019 FC Brief pp. 4 – 6, 8).

Inexplicably, especially considering Adickes' counsel drafted the McCaskill Order, Adickes now claims that Appellants picked this date out of thin air:

> *January 14, 2016 (sic), the week arbitrarily set by Defendants as the date Claimant reached MMI.*
>
> (Adickes' April 2019 FC Brief p. 8).

Alternatively, and unsupported by legal authority for the obvious reason that there is none, Adickes argues that the only MMI date that should matter is the injury that led to the wage loss award:

> *If the date at which the Claimant reached MMI did matter and making a finding of MMI at this time was proper, then this Panel should find Claimant reached MMI on November 2, 2012, the date at which he was found to have reached MMI for his cognitive injuries by Dr. Welshover.*
>
> (Adickes' April 2019 FC Brief p. 7, 8).

Adickes is estopped from taking the counter-position that the date of MMI designation is immaterial in a wage loss claim, as well as his alternative argument that MMI is based on the injury leading to the wage loss award.

B. THE COMMISSION ERRED IN AWARDING WAGE LOSS BENEFITS BEYOND 340 WEEKS FROM THE DATE OF ACCIDENT.

The Court of Appeals has explicitly stated that that "where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." Bobo v. Marshane Corp., 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). The Commission had an obligation to comply with the 2016 Remand Order from this Court, which it failed to do.

After this Court issued Op. No. 2018-UP-027, the only task for the Commission was to complete a renewed review of the original commissioner's order under proper principles of law, as discussed in Russell v. Wal-Mart, yet this case has remained on remand for over a year due to the Full Commission unilaterally choosing to remand it for a hearing before a Single Commissioner. 426 S.C. 281 (2019). Humorously, Adickes argues that Appellants have "attempted to turn the simple math problem on remand to a retrial of issues that are not on remand," when the only party that requested that the Full Commission issue an Order and questioned why a hearing was necessary before Commissioner Barden was the Appellants. (3.27.19 Adickes' Appeal Brief to FC, p. 2).

The Commission erred in ruling that the proper application of § 42-9-20 allows for a Claimant to receive credit for TTD benefits received, extending the award beyond the 340 week limitation. We disagree.

There are two forms of permanent benefits under the South Carolina workers' compensation act which compensate for decreased wage earning capacity: permanent total disability ("PTD") benefits and permanent partial disability ("PPD wage loss") benefits. While

both are predicated on a showing of loss of earning capacity (partial vs. total), they differ significantly when it comes to how the awards are calculated.

In a PTD award under S.C. Code Ann. § 42-9-10(A), the Claimant is entitled to a payout of 500 total weeks of total disability benefits, temporary and permanent combined. Thus, calculation of a PTD award is simple math: 500 weeks less the number of weeks of benefits paid to date. In contrast, PPD wage loss awards are limited by the timeframe in which a Claimant could potentially be entitled to same. It is this very difference that necessitated the inclusion of the last line of SC Code Ann. § 42-9-20, which states:

> In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

Just as with the other sections of this statute, the plain language of this sentence is unambiguous. Simply put, since wage loss awards are much more restricted than PTD awards, the legislature saw it fit to place this safeguard within SC Code Ann. § 42-9-20 in order to prevent the award from any additional reductions.

The facts of this case help illustrate this sentence in action: Adickes was out of work for nearly 8 weeks after the date of accident, and received temporary total disability benefits for that period. This is the "period of total disability" under the statute. He is now being awarded permanent partial disability benefits. This is the "partial disability beginning after a period of total disability." The "period of total disability" is the "latter period" in the above sentence, and the statute directs that "the latter period shall not be deducted from the maximum period allowed in this section for partial disability." Here, 340 weeks from the Adickes' date of accident fell on September 24, 2017. Although Adickes received temporary benefits early on in the claim, the last

sentence of § 42-9-20 operates to keep the 340-week date in place, preventing Appellants from arguing that Adickes is now only entitled to 332 weeks and 2 days of wage loss benefits. Thus, this sentence operates as a protection to Adickes, and Appellants have never argued otherwise.

While this sentence is certainly for the benefit of a Claimant, it unquestionably does not extend the 340-week limitation as argued by the Adickes. Frankly, Appellants are confounded as to how this sentence could be interpreted to extend the 340 week limitation period; regardless, the Commissions "application" of this provision amounts to a double recovery for Adickes, which was certainly not the legislature's intent.

CONCLUSION

Pursuant to the applicable legal authorities and directives from the Court of Appeals set out in Op. No. 2018-UP-027, Adickes is entitled to a wage loss award of 141 weeks – commencing on the date he reached MMI for all of his compensable injuries (1/14/2015) through 340 weeks from his date of accident (9/24/2017).

WHEREFORE, Appellants pray that this Court reverse the Commission Order in its entirety and issue an appropriate award.

Respectfully submitted this September 11, 2019.

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I, Lori Wittel, do hereby certify that a copy of Appellants' Initial Brief and Designation of Matters were sent to all counsel for the Respondent via United State Mail as follows, on September 11, 2019:

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By: Lori Wittel
Lori Wittel, Paralegal

Mt. Pleasant, South Carolina
Dated: 9.11.19

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RECEIVED
SEP 13 2019
SC Court of Appeals

September 11, 2019

VIA US MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Barry Adickes v. Phillips Healthcare and Fidelity & Guaranty Ins. Co. c/o Gallagher Bassett Services, Inc.
SCWCC No. : 1102937
DOI : 03/22/2011
GBS Clm No. : 002380-009116-WC-01
SC Court of Appeals File No.: 2019-001141

Dear Ms. Kitchings:

Enclosed for filing in the above refenced matter, please find the following:

1. The original of the Initial Brief of Appellants;
2. The original of Appellants' Designation of Matters to be Included in the Record on Appeal; and
3. The original of Proof of Service of Initial Brief of Appellants and Appellants' Designation of Matters to be Included in the Record on A?ppeal.

If you have any questions, please do not hesitate to contact me at 843-732-6280. Thank you in advance for your assistance in this matter.

Sincerely,

Lori Wittel
Paralegal

Encl: As Stated
cc: William L. Smith (via US Mail)

Payne Law Group, LLC
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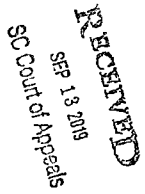
Mt. Pleasant, SC 29465



The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211