

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE  
SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Gene McCaskill, Commissioner  
R. Michael Campbell, II, Commissioner  
T. Scott Beck, Commissioner

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SCWCC File No. 1508995

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Appellate Case No. 2018-001964

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**RECEIVED**

MAY 23 2019

SC Court of Appeals

Samuel Paulino, Claimant

Respondent,

v.

Diversified Coatings, Inc.,  
Employer, and AmGuard Ins.  
Co., Carrier

Appellant.

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**FINAL BRIEF OF THE RESPONDENT**

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## STATEMENT OF THE CASE

This case was heard by the Single Commissioner on March 5, 2018 in Spartanburg, South Carolina and by the Full Commission on July 16, 2018 in Columbia, SC. All parties were present for the hearing: The Claimant, Samuel Paulino, the Claimant's attorney, Stephen N. Garcia; the Defendants, Diversified Coating System and AmGuard Ins. represented by their attorney, George Gallagher.

The Single Commissioner Hearing was called at the request of Defendants/Appellants. The Defendants/Appellants sought a finding of permanency and argued that Claimant/Respondent was not permanently and totally disabled.<sup>1</sup> Defendants/Appellants further argued Claimant/Respondent had *not* sustained a 50% or greater disability to the spine and that there was no evidence of vocational disability on the part of the Claimant/Respondent citing Claimant/Respondent's age, educational background and work history in the Dominican Republic.<sup>2</sup> Defendants/Appellants admitted that Claimant/Respondent's alleged psychological condition was related to the work incident, however, Defendants/Appellants denied liability for the cost of medical treatment, and as grounds, cited that the psychological treatment was not performed by a physician of the Defendants/Appellant's choosing.<sup>3</sup>

The Claimant/Respondent argued that Claimant *was* permanently and totally disabled under S.C. Code § 42-9-10 or, alternatively, S.C. Code §42-9-30(21), and that he was entitled to future medical care, compensability as to a denied psychological claim, continuing medical treatment, and a lump sum award.<sup>4</sup> The Single Commissioner found that Claimant/Respondent had sustained a disability of greater than 50%, that Defendant/Appellant failed to rebut the

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<sup>1</sup> Appendix to Record p. 28, lines 20-22; *See also* p. 29, lines 10-12.

<sup>2</sup> *Id.* at p. 28, line 23 through p. 29, line 12.

<sup>3</sup> *Id.* at p. 35, line 25 through p. 36, line 9.

<sup>4</sup> *Id.* at p. 30, line 5 through p. 32, line 20.

presumption of permanent and total disability, and therefore, Claimant/Respondent was permanently and totally disabled pursuant to S.C. Code § 42-9-30(21) and entitled to future medical care to maintain his current level of function.<sup>5</sup> Defendants/Appellants timely filed their Form 30 Request for Review. The Full Commission hearing was held on July 16, 2018. The Full Commission affirmed the Order of the Single Commissioner with a minor modification (by Consent of the Parties) that terminated the Claimant/Respondent's treatment benefits for psychological injury.<sup>6</sup> Defendants/Respondents now appeal the Decision and Order of the Full Commission.

### STANDARD OF REVIEW

The standard of review in the instant matter is governed by S.C. Code § 1-23-380. The review must be confined to the record.<sup>7</sup> The Court may not substitute its judgment for the judgment of the Full Commission as to the weight of the evidence on questions of fact and may only affirm or remand the case for further proceedings.<sup>8</sup> However, the Court may reverse or modify the decision of the Full Commission if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of reliable, probative, and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>9</sup> Although Claimant/Respondent asserts that no such grounds exist for reversal and/or modification of the

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<sup>5</sup> Appendix to Record p. 2, Single Commissioner Order dated April 12, 2018.

<sup>6</sup> Record p. 2, Full Commission Order dated October 3, 2018.

<sup>7</sup> S.C. Code § 1-23-380(4).

<sup>8</sup> S.C. Code § 1-23-380(5); *see also Potter v. Spartanburg*, 395 S.C. 17, 716 S.E.2d 123 (S.C.App. 2011)

<sup>9</sup> *Id.*

Full Commission's Order, Defendants/Appellants have asserted only the aforementioned (d), (e) and (f) as grounds for Appeal.<sup>10</sup>

## ARGUMENT

- I. **THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE TO SUPPORT A FINDING AND CONCLUSION OF LAW THAT CLAIMANT SUFFERED AN IMPAIRMENT OF 50% OR MORE TO THE SPINE SUCH THAT THE REBUTTABLE PRESUMPTION OF PERMANENT AND TOTAL DISABILITY IS TRIGGERED PURSUANT TO S.C. CODE § 42-9-30(21).**
- II. **APPELLANTS' RELIANCE ON CLEMMONS FOR THE POSITION THAT THE COMMISSION MAY NOT CONSIDER OTHER FACTORS BEYOND MEDICAL IMPAIRMENT IN DETERMINING THE EXTENT OF CLAIMANT'S DISABILITY IS MISPLACED.**

The Defendants/Appellants argues that the Full Commission's award of permanent and total disability is based on surmise, speculation or conjecture, that the Commission's award is arbitrary, and that the Commission's award is unsupported by substantial evidence. The Claimant/Respondent disagrees. The Court of Appeals may not substitute its judgment for the judgement of the Full Commission as to the weight of evidence on questions of fact.<sup>11</sup> The *Clemmons* Court—a case heavily relied upon by Defendants/Appellants—states:

“Although a claimant's degree of impairment is usually a question of fact for the Commission, if all the evidence points to one conclusion or the Commission's findings ‘are based on surmise, speculation or conjecture, then the issue becomes one of law for the court....’ *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968) (citing *Hines v. Pacific Mills*, 214 S.C. 125, 131, 51 S.E.2d 383, 385 (1949)); see also *Randolph v. Fiske-Carter Constr. Co.*, 240 S.C. 182, 189, 125 S.E.2d 267, 270 (1962) (holding where there is absolutely no evidence to support the Commission's findings, the question becomes a question of law).”<sup>12</sup>

Although this Court may not ordinarily substitute its judgment for the judgement of the

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<sup>10</sup> See Defendants/Appellants' Brief, p. 6.

<sup>11</sup> S.C. Code § 1-23-380(5).

<sup>12</sup> *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282 at 287, 803 S.E.2d 268 at 270 (2017) (Emphasis added.)

Full Commission as to the weight of evidence on questions of fact, where the Full Commission's findings are based on surmise, speculation or conjecture, the issue then becomes one of law for the Court.<sup>13</sup> The Claimant/Respondent argues that the overwhelming evidence in the record as a whole supports the Full Commission's Findings and Conclusion, including that the Claimant has suffered a disability of greater than 50%, to wit:

**Southeastern Neuro and Spine, Dr. Timothy McHenry, Neurosurgeon**

- 8/19/15—First appointment following surgery; patient states stabbing, burning and pins/needles radiating from right side low back and down leg; initially better after surgery but has gradually worsened over the last couple of weeks.<sup>14</sup>
- 9/28/15—Continues with right leg pain; now ambulating with walker; R Lower leg pain described as burning and aching along with numbness; patient thinks he is slightly better but continues to be plagued by persistent right leg pain and back pain.<sup>15</sup>
- 10/21/15—Continues to not do well overall; continued back pain; continues right radicular leg pain; decreased sensation on the right L3 and L4 distributions worse on the L4 distribution; straight leg raise on the right side reproduces radicular leg pain to his foot and ankle; it would be beneficial to get him to pain management to consider other treatment options including possible spine injection.<sup>16</sup>
- Returns—with persistent low back pain and right leg pain; improved from before surgery, but he is having persistent symptoms that are limiting his activities; he is unable to work; positive for back pain and gait problems; positive for dysphoric mood; he has persistent radiculopathy.<sup>17</sup>
- 4/12/17—He returns today with persistent right radicular leg pain, unchanged from previously; positive for back pain and gait problem; positive for sleep disturbance and dysphoric mood; I do not think he will benefit from further surgical intervention; he would like to consider other treatment options through pain management, We'll place the referral.<sup>18</sup>

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<sup>13</sup> *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282 at 287, 803 S.E.2d 268 at 270 (2017) (Emphasis added.)

<sup>14</sup> Appendix to Record pp. 110-111.

<sup>15</sup> *Id.* p. 115-116.

<sup>16</sup> *Id.* p. 120-121.

<sup>17</sup> *Id.* p. 125.

<sup>18</sup> Appendix to Record p. 130-131.

### **Functional Capacity Evaluation, Elite Physical Therapy (11/20/17)**

- Claimant demonstrated various compensations throughout testing including, but not limited to: decreased stances time on R LE, decreased R hip/knee flexion in swing phase, overall antalgic gait pattern, increased trunk flexion, knees do not flex beyond 90 deg, requires use of hands to steady self, facial grimace, favors LEFT side, decreased weight bearing in R LE for all repetitions, mild slouched posture, R LE extended out in front, pt reported slow increase in low back pain throughout sit, decreased lumbar curve reversal, only able to rotate 75% lumbar ROM, required use of UEs on chair to return to standing, multiple attempts made without use of furniture that results in short drop back to ground.<sup>19</sup>
- Walking (20 min): Patient demonstrated the ability to walk 20 minutes indicating a constant level. Aerobic capacity was unable to be determined because of intense pain and antalgic gait on treadmill. Pt. was unable to tolerate 5% grade and the minimum walking speed to complete the test. Pt. was able to walk the 20 min. at 1.5mph with significant compensations. Heart rate response was appropriate with HR of 147 bpm. The following compensations were observed: decreased stance time on R LE creating asymmetrical stride length, decreased R hip/knew flexion in swing phase, labored breathing and mild sweating, forward flexed hip/trunk, B midfoot strike instead of heel strike, overall antalgic gait pattern, 8/10 low back pain reported after.<sup>20</sup>
- Static standing (30 min): Patient demonstrated the ability to stand for 30 minutes indicating a constant level. The following compensations were noted: Frequent weight shift onto LEFT side, slow increase in pain reported in low back and numbness down R LE to foot as stand progressed.<sup>21</sup>
- High pain focus noted according to Million Visual Analog Scale scoring 114.5.<sup>22</sup>
- Observed body mechanics and material handling ability: Samuel was noted to have decreased range of motion with lumbar/trunk rotational and flexion movements, and when lifting floor to waist with decreased body mechanics to decrease weight bearing on R LE.<sup>23</sup>
- Are Observed Efforts consistent from task to task? Yes. The Coefficient of Variation for  $\frac{3}{4}$  static tests were found to be below the accepted cutoff of 155 indicating consistent effort. The coefficient of variation was below the

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<sup>19</sup> *Id.* at p. 99-100.

<sup>20</sup> *Id.* at p. 99.

<sup>21</sup> *Id.*

<sup>22</sup> 2<sup>nd</sup> Appendix to Record p. 3.

<sup>23</sup> 2<sup>nd</sup> Appendix to Record p. 3.

accepted cutoff for grip testing on 10/10 trials indicating consistent effort. The curve formed by the grip testing did approximate the expected bell shaped curve for 2/2 trials indicating consistent effort. Heart rate response was appropriate for 7/8 trials.<sup>24</sup>

- Self-limiting behavior was not demonstrated. Patient also had mac lift/to modified PILE floor to waist of 33% and waist to overhead of 43%. Consistent effort for this shows the ratio to be within 50%-70%.<sup>25</sup>
- Aerobic capacity was unable to be determined due to inability to complete test due to safety concerns associated with an antalgic gait pattern while walking at the required speed and incline.<sup>26</sup>

### **Ortho-Neuro Patewood / Physiatry Crosscreek 111, Dr. Jyoti K. Math, Pain Management**

- 8/2/17—Clinical progression has not changed, worse with prolonged sitting and walking, relieves with a medication, he has been taking Flexeril and Gabapentin, which helps; He has not received the functional capacity evaluation yet; He ambulates with a cane with antalgic gait; Lumbar range of motion causes pain; Lumbar radiculopathy, chronic; We will refill Gabapentin and Flexeril; We will order a functional capacity evaluation; He will stay out of work until he gets the functional capacity evaluation.<sup>27</sup>
- 12/6/17—Patient had FCE on 11/20/17; Patient reports he tried his best during FCE, but the pain aggravated after FCE was completed for next couple of days; Patient reports persistent pain in right lower extremity L5 distribution; He reports his pain is activity limiting; He feels his pain is not adequately controlled; Considering duration of pain, most likely will have chronic pain issues; He and his wife became very tearful and emotional; He exhibits tenderness; He has decreased stance and right lower extremity.<sup>28</sup>
- 12/6/17—I do believe that his symptoms are due to work-related injury. Today, I am going to place him at MMI with impairment rating 12% as per AMA Guidelines 6<sup>th</sup> edition. He will require chronic pain management in the form of pain medication, neuropathic medication, muscle relaxants, interventions like steroid injection. He may also be a candidate for spinal cord stimulator for his chronic R radiculopathy.<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at p. 4.

<sup>27</sup> Appendix to Record pp. 270-273.

<sup>28</sup> *Id.* at pp. 277-278.

<sup>29</sup> Appendix to Record p. 280.

- 12/6/17—Form 14B Permanent limitations are: light work duty, no lifting greater than 10 lbs., Future Medical: Medical Care or Treatment needed; Chronic pain management requiring pain medications, injections and spinal cord stimulator trial.<sup>30</sup>

#### **Independent Medical Evaluation, Dr. Glenn L. Scott**

- 12/27/17—After reviewing the FCE, it is my opinion, within a reasonable degree of medical certainty, that Mr. Paulino would not be able to sustain the workplace activities indicated by the FCE for a full eight-hour day, particularly not on a day-after-day basis. His alteration of back and gait mechanics along with his lumbar spasm and nerve root irritation, in my opinion, preclude this on a sustained basis with resultant progressively increasing pain as he attempted to sustain these activities.<sup>31</sup>
- At this point, it would be my recommendation that the EMG-NCV studies be provided for him to assist in recommendation regarding a spinal cord stimulator versus continued pain management.<sup>32</sup>

#### **Testimony of Claimant/Respondent**

- Claimant/Respondent testified he was born on April 22, 1980 in the Dominican Republic and that he moved to the United States in May of 2014; Claimant further testified that he does not speak English.<sup>33</sup>
- Claimant/Respondent would drive before the work injury, but he no longer drives.<sup>34</sup>
- Claimant/Respondent graduated from high school in the Dominican Republic and attended a 4-year college in the Dominican Republic as well; however, Claimant/Respondent has not attended any classes in the United States.<sup>35</sup>
- Since moving to the United States, Claimant/Respondent has held two jobs: one as an ice cream truck driver and the other for the Defendant Employer as a janitor, but also testified that he could not perform those jobs today in his current physical state.<sup>36</sup>

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<sup>30</sup> *Id.* at p. 288.

<sup>31</sup> *Id.* at p. 318.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at p. 39, line 21 through p. 41, line 10.

<sup>34</sup> *Id.*

<sup>35</sup> Appendix to Record p. 41, line 11 through p. 44 line 20.

<sup>36</sup> *Id.*

- All the jobs Claimant/Respondent has performed in the United States required lifting and physical exertion in excess of his permanent work restrictions.<sup>37</sup>
- Claimant/Respondent has attempted to find work within his restrictions, including work in a computer-related field, and he has been repeatedly denied employment because of a lack of formal training in the United States and because of his language barrier.<sup>38</sup>
- Claimant testified that he approached the exam with maximum effort as a reference point for his resultant physical capacity following the work injury. Claimant testified that as a result of the effort exerted, he experienced a lot of pain and needed help for the next three days just to get out of bed. Claimant indicated that the FCE lasted only two hours and twenty minutes or so, but that he did not believe he could perform a repeat FCE at the same level the very next day. Claimant also stated that it would be impossible for him to perform the activities that comprised the FCE for eight hours per day and forty hours per week.<sup>39</sup>

Defendants/Appellants do not stop there. Despite the *Clemmons* holding stating that the issue of disability is a question of fact to be determined by the Commission,<sup>40</sup> the Defendants/Appellants argue that *Clemmons* stands for the proposition that the only consideration for the Commission in determining the extent of impairment under S.C. Code § 42-9-30 is the medical evidence. However, the Commission may indeed rely on the Claimant/Respondent's testimony regarding the character and extent of a claimant's back injury, the restrictions that the injury has placed on his physical activities, the pain a claimant feels in his back, and even the medication taken to walk normally.<sup>41</sup> Stated plainly, Defendants/Appellants assert that the *Clemmons* holding requires that the medical evidence regarding an impairment percentage alone, without consideration of any other factors, is the only consideration when determining the extent of a claimant's disability. This is an entirely different position that what the Defendants/Appellants

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<sup>37</sup> *Id.* at p. 44, line 21 through p. 45, line 16.

<sup>38</sup> *Id.* at p. 45, line 17 through p. 47, line 20.

<sup>39</sup> *Id.* at p. 47, line 21 through p. 48, line 19

<sup>40</sup> *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282 at 287, 803 S.E.2d 268 at 270 (2017).

<sup>41</sup> *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (S.C.App. 2006)(rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785).

took at the Single Commissioner Hearing, where Defendants/Appellants argued:

“We would admit that [Claimant/Respondent] is entitled to a -- an award of -- of permanent partial disability in excess of [Dr. Math’s 12% rating] based on whatever subjective testimony he is going to present today and in conjunction with the [Functional Capacity Evaluation] but we don’t believe it rises to the level of a disability case.”<sup>42</sup>

Claimant/Respondent denies such a broad reading of *Clemmons*. Instead, Claimant/Respondent offers that *Clemmons* stands for the narrow reading that medical evidence of a *regional impairment* of 50% or more to any region of the back *without any other evidence regarding impairment* is conclusive evidence so as to trigger the rebuttable presumption of permanent and total disability under S.C. Code § 42-9-30(21). Claimant/Respondent further offers, that *Clemmons* stands for the proposition that evidence of subsequent employment may be insufficient by itself to rebut the presumption of permanent and total disability under § 42-9-30(21). Claimant/Respondent denies that *Clemmons* creates an objective standard regarding a Claimant’s impairment.

Defendants/Appellants also point to the impairment rating of 12% as opined by the treating physician, Dr. Math, in support of their position that the Claimant/Respondent in the instant matter has not sustained a greater than 50% impairment to the back. Dr. Math’s rating is derived from the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 6<sup>TH</sup> EDITION. It is worth noting, however, that the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 5<sup>TH</sup> EDITION addresses the connection between impairment derived from the GUIDES and the direct estimate of disability and the additional considerations necessary to determine the extent of disability:

“Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability.”<sup>43</sup>

<sup>42</sup> Appendix to Record p. 29, lines 19-25.

<sup>43</sup> *Id.* at 13.

The evidence in the record demonstrates a significant impact on the Claimant/Respondent's use of his back in the vocational setting. The Full Commission is not limited to the medical impairment rating alone in determining the extent of a claimant's disability. The Full Commission's Decision and Order in the instant matter is not arbitrary, nor is it based on surmise or conjecture. The Full Commission's Decision and Order should remain undisturbed on appeal.

**III. THE APPELLANTS' RELIANCE ON CLEMMONS FOR THE POSITION THAT A FINDING OF PERMANENT AND TOTAL DISABILITY UNDER S.C. CODE § 42-9-30(21) REQUIRES A FINDING OF A CERTAIN PERCENTAGE IS MISPLACED, BUT IF IT IS NOT MISPLACED, IT IS HARMLESS ERROR AT WORST.**

The Defendants/Appellants again point to *Clemmons*, but this time for the proposition that the Full Commission's finding that the Claimant/Respondent has suffered a disability of greater than 50% is error because, in their opinion, *Clemmons* requires a definite impairment rating to be stated by the Commission. Defendants/Appellants argue that because the *Clemmons* Court remanded the case for a finding of permanent impairment, therefore, the Full Commission committed an error of law in the instant matter for failing to state a definite impairment. Claimant/Respondent disagrees.

In *Clemmons*, the Full Commission had found that the Claimant had *not* suffered a disability of greater than 50%, and therefore, the Full Commission failed to address whether the defendants had rebutted the presumption of disability pursuant to S.C. Code § 42-9-30. After finding that the claimant *had* suffered at least 50% disability, the Court of Appeals remanded for a determination of impairment *and to address whether the Defendant had rebutted the presumption of disability*. The *Clemmons* Court holding does not establish a bright line rule that requires a precise finding of impairment. However, even if it did, the Full Commission's failure to make a

definite finding as to percentage of impairment is harmless at worst.

The Full Commission's award of disability of greater than 50% triggered the presumption of permanent and total disability pursuant to S.C. Code § 42-9-30(21). Having found that the Defendants/Appellants failed to rebut the presumption of disability—an issue that was clearly addressed by the Commission—whether the Full Commission found that Claimant/Respondent had suffered a definite impairment of 50% or 100% (or somewhere in between) to his back has absolutely no bearing on the outcome of this Claim. Even if *Clemmons* requires a finding of definite impairment, the error is harmless.<sup>44</sup> The Full Commission's Decision and Order should not be disturbed on Appeal.

**IV. APPELLANTS FAILED TO REBUTT PRESUMPTION OF PERMANENT AND TOTAL DISABILITY; APPELLANTS ATTEMPTED TO RELY ON CLAIMANT'S PRIOR WORK HISTORY AND EDUCATIONAL BACKGROUND AT THE SINGLE COMMISSIONER HEARING AND THE FULL COMMISSION HEARING TO REBUTT THE PRESUMPTION OF PERMANENT AND TOTAL DISABILITY, HOWEVER, APPELLANTS NOW IMPROPERLY ARGUE THAT LOOKING TO CLAIMANT'S EDUCATIONAL BACKGROUND AND WORK HISTORY IN DETERMINING EXTENT OF DISABILITY UNDER S.C. CODE § 42-9-30 IS AN ERROR OF LAW.**

Finally, Defendants/Appellants argue that the Full Commission (1) improperly infused wage loss considerations into the determination that Claimant/Respondent had suffered a disability of greater than 50%, and (2) that Defendants/Appellants have rebutted the presumption of permanent and total disability. Claimant/Respondent disagrees. For clarity, these two positions are addressed together.

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<sup>44</sup> *State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) (“Error is harmless when it could not reasonably have affected the result of the trial.”)

Defendants/Appellants argue that the Full Commission improperly infused loss of earning capacity in looking to Claimant/Respondent's inability to speak English and part of Claimant/Respondent's work history in support of the award for disability of greater than 50%. This is patently false. Instead, Claimant/Respondent offers that the Full Commission's findings regarding Claimant/Respondent's inability to speak English and his prior work history specifically address Defendants/Appellants' arguments in support of a finding that Defendants/Appellants failed to rebutted the presumption of permanent and total disability under S.C. Code § 42-9-30(21). In fact, at the Single Commissioner Hearing, Defendants/Appellants argued:

“Dr. Math reviewed [the Claimant's Functional Capacity Evaluation] and imposed some -- some more stringent restrictions than the FCE indicated; that is what it is, as they say. So, but we still don't think this case rises to the level of permanent and total disability. Mr. Paulino is a -- is a fairly young man, a fairly well-educated man, albeit he was originally educated in the Dominican Republic, but he does have a four (4) year degree in information technology, worked as a software programmer; those are math-heavy kind of things, which is kind of -- even if there are some -- some obvious cultural and -- and language issues, would seem to me that those kind of math and science and engineering and technical based transferrable skills kind of transcend those issues to large degree. So, we don't think there is any evidence of vocational disability.”<sup>45</sup>

At the Single Commissioner Hearing, Defendants/Respondents argued that the Single Commissioner should consider what they now style as “improper earning capacity considerations” to determine that the Claimant/Respondent is not permanently and totally disabled. The Commission acknowledged the facts upon which the Defendants/Appellants relied in support of their rebuttal. However, the Commission was not persuaded.

Continuing, the Defendants/Appellants argue that the Commission erred in finding that the Defendants/Appellants failed to rebut the presumption of permanent and total disability. However, the Defendants did not offer *any* evidence to rebut the presumption of permanent and total

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<sup>45</sup> Appendix to Record p. 28, line 17 through p. 29, line 9.

disability except for the evidence that the Defendants/Appellants now argue should not have been relied upon by the Commission. The Defendants/Appellants position is untenable. There is little if any evidence in the record to rebut the presumption of permanent and total disability and the Full Commission's Decision and Order should remain undisturbed on appeal.

### **CONCLUSION**

The Full Commissions Findings and Conclusions of Law are supported by substantial evidence. Defendants/Appellants position regarding an error of law is unfounded. For the reasons stated, it is respectfully submitted that the Full Commission's Order should remain undisturbed.

Respectfully submitted,

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**CERTIFICATION**

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I certify that the Respondents' Final Brief complies with Rule 211(b), SCACR

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