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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

R. Michael Campbell, III, Commissioner

Appellate Case No. 2016-002321
W.C.C. 1205924

David B. Lemon, Employee/Claimant,.....Appellant,

v.

Mt. Pleasant Waterworks, Employer, and
State Accident Fund, Carrier,.....Respondents.

PETITION FOR REHEARING

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Issues

I. Did the Court of Appeals overlook the fact that Lemon stipulated that the Respondents are entitled to a credit for his prior back claim?

II. Did the Court of Appeals misconstrue the plain meaning of the statutorily-defined term "injury" to reach its conclusion that S.C. Code Ann. § 42-1-170 is "inapplicable" in the case *sub judice?*

III. Did the Court of Appeals misconstrue the holding of Medlin v. Greenville *County* by concluding that Lemon is not bound by the 500 week maximum mandated by S.C. Code Ann. § 42-9-10?

IV. Did the Court of Appeals misconstrue S.C. Code Ann. § 42-1-170 as creating an exception to the 500 week maximum mandated by S.C. Code Ann. § 42-9-10?

V. Did the Court of Appeals misconstrue the benefit provided by S.C. Code Ann. § 42-9-10(A) and the Workers' Compensation Commission's discretionary authority thereunder to produce an absurd result?

Statement of the Case

The Appellant, David B. Lemon, was employed by the Respondent/Petitioner, Mount Pleasant Waterworks. He sustained permanent injuries to his back and shoulders by accidents arising out of and in the course of this employment in 2009, 2010, and 2011. On May 8, 2012, he sustained another "permanent injury to his back," which affected both legs in an accident arising out of and in the course of his employment. (R. p.77 #4; p.78 #12). The Workers' Compensation Commission

concluded that Lemon is permanently and totally disabled under the general disability statute, S.C. Code Ann. § 42-9-10.

In accordance with that statute and S.C. Code Ann. § 42-9-170(B), the Commission awarded Lemon 179 weeks of additional total disability compensation. Section 42-9-10 strictly limits disability compensation to 500 weeks in all cases, with the sole exception of paraplegia, quadriplegia, or physical brain damage, which are inapplicable here. Because Lemon had already received 199 weeks of disability compensation in his four prior claims, as well as 122 weeks of disability compensation the 2012 claim, the award of 179 additional weeks resulted in Lemon's aggregate disability compensation for his successive injuries equaling the maximum 500 weeks mandated by S.C. Code Ann. § 42-9-10 and referenced in S.C. Code Ann. § 42-9-170. Lemon appealed, arguing that the statutory 500 week maximum does not apply to him.

By Order filed December 31, 2019, the Court of Appeals reversed the Commission and concluded that the statutory 500 week maximum was offset only by the 122 weeks paid in the 2012 claim, ostensibly due to a "strict construction" of S.C. Code Ann. § 42-9-170(B). The Respondents respectfully contend that the Court's "construction" of that statute is based on the misapprehension of the plain meaning of statutory terms of art contained therein, specifically the terms "injury" and "compensation" and "disability." Furthermore, the Court clearly misapprehends the Supreme Court's holding in Medlin v. Greenville County and overlooks the fact that Medlin's holding applies irrespective of S.C. Code Ann. § 42-9-170's applicability and limits benefit to 500 weeks even in cases of successive injuries. The Court otherwise misconstrued the plain language of S.C. Code Ann. § 42-9-10 and the Claimant's own stipulation that the Respondents were entitled to "a credit for 20.5714 weeks due to a prior back claim" (R. p.4) in reaching

what appears to be an admittedly absurd result. As such, the Respondents respectfully request rehearing and reconsideration by the Court of Appeals

Arguments

I. The Court of Appeals overlooked the fact that Lemon stipulated that the Respondents are entitled to a credit for his prior back claim.

The Commission's January 7, 2015 Order states

> "the Claimant [Lemon]...asserts that the Defendant is entitled to only a credit for 20.5714 weeks due to a prior back claim with the Employer." (R. p.4).

This stipulation was not (and could not be) properly challenged on appeal and is the law of the case. (R. pp.25—29). *See* Reeves v. S.C. Mun. Ins. & Risk Fin. Fund, 427 S.C. 613, 641–42, 832 S.E.2d 312, 327 (Ct. App. 2019), reh'g denied (Sept. 19, 2019) (holding that a court must construe a stipulation like a contract that will not be reversed on appeal absent an abuse of discretion).

However, the Court of Appeals concluded that Lemon's total disability award should not be offset by disability benefits he received in prior claims, including the compensation paid as a result of a 2011 back injury that was settled only 11 days prior to the present claim, despite Lemon's own stipulation to the contrary. (R. p.133;). Clearly, the Court of Appeals must have overlooked or misconstrued this stipulation in rendering its conclusion, as the stipulation is not mentioned in the Court's decision, nor factored

into its analysis, nor is there any purported justification for nullifying the binding effect of this stipulation. Therefore, the Respondents respectfully request rehearing and reconsideration by the Court of Appeals.

II. The Court of Appeals misconstrued the plain meaning of the statutorily-defined term "injury" to reach its conclusion that S.C. Code Ann. § 42-1-170 is "inapplicable" in the case *sub judice*.

The Court of Appeals purportedly applied a "strict construction" of S.C. Code Ann. § 42-1-170(B) to reach its conclusion that § 42-1-170(B) is "inapplicable" in the present case and that; therefore, the 500 week maximum prescribed by S.C. Code Ann. § 42-9-10 does not apply to Lemon. However, Section 42-9-170 is not an exception to the 500 week maximum prescribed by § 42-9-10 and does authorize any award in excess of 500 weeks. Instead, § 42-9-170 governs the payment of compensation where there are successive permanent injuries in the same employment, prohibits an increase in weekly compensation in such cases, and merely provides that the period of compensation may be extended subject to § 42-9-10's universal 500 week maximum. The statute reads, in pertinent part:

> "If an employee receives a permanent **injury** as specified in section 42-9-30 or section 42-9-10(B) after having sustained another permanent **injury** in the same employment, he is entitled to compensation for both **injuries**, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation and in no case exceeding 500 weeks." (emphasis added).

Therefore, to determine whether S.C. Code Ann. § 42-9-170 applies to the case *sub judice*, the first question is whether Lemon (a) sustained an "injury" as a result of the May 8, 2012 accident that is both (b) "permanent" and (c) specifically listed in S.C. Code Ann. § 42-9-30 or § 42-9-10(B).[1]

It is clear that Lemon did, in fact, sustain an "injury" on May 8, 2012, as defined by the South Carolina Workers' Compensation Act. Specifically, S.C. Code Ann. § 42-1-160, defines the term "injury" to mean "injury by accident arising out of and in the course of employment." It is generally recognized that "identical words and phrases within the same statute should normally be given the same meaning."[2] Therefore, when the Legislature chose to employ the term "injury" in S.C. Code Ann. § 42-1-170, the term should be accorded the same meaning as defined by the Legislature in S.C. Code Ann. § 42-1-160. Furthermore, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not

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[1] The second question raised by the first sentence of S.C. Code Ann. § 42-9-170(B) is whether the permanent injury was sustained "after having another permanent injury in the same employment."

[2] Travelscape, LLC v. South Carolina Dep't. of Revenue, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011) (quoting Powerex Corp. v. Reliant Energy Serv., Inc., 441 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007)); *see also* Busby v. State Farm, 280 S.C. 330, 333, 212 S.E.2d 716, 718 (Ct. App. 1984) (*citing* Pampanga Sugar Mills v. Trinidad, 279 U.S. 211, 218, 49 S.Ct. 308, 310, 73 L.Ed. 665 (1929) for the proposition that "[w]here the same word is use more than once in a statute it is presumed to have the same meaning throughout.").

needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Not only do both Lemon and the Respondents agree that Lemon sustained an "injury" on May 8, 2012 as defined by the Act, the parties agree that this "injury" involved his back and both legs. In addition, the Commission concluded that these back and leg injuries were "permanent" by specifically finding

> "[t]he Claimant has sustained **permanent injuries** to more than one body part, namely, his back and both legs." (R. p.13 #1) (emphasis added).

This finding is unappealed and is, therefore, the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

Furthermore, it is undisputed that both the "back" and "leg" injury are of the type of injury "specified" in S.C. Code Ann. § 42-9-30 (subsections 16 and 21). Therefore, the factual question of whether Lemon (a) sustained an "injury" as a result of the May 8, 2012 accident that is both (b) "permanent" and (c) specifically listed in S.C. Code Ann. § 42-9-30 or § 42-9-10(B) must be answered in the affirmative, as a matter of law.

The second question raised by S.C. Code Ann. § 42-1-170(B) is whether the May 8, 2012 injuries were "receive[d]...after having sustained another permanent injury in the same employment." The law similarly compels an affirmative answer to this question because Lemon admittedly sustained injuries by accidents arising out of and in

the course of his employment with the Respondent, Mount Pleasant Waterworks, involving his shoulder in 2010 and 2011 and his back in 2009 and 2011, all of which resulted in the payment of permanent disability benefits. The fact that these four prior claims resulted in "permanent injury" is undisputed, as Lemon admits that "the awards that he had received for prior unrelated injuries" was "pursuant to S.C. Code Ann. § 42-9-30." (*See* Lemon's Brief to the Court of Appeals at p.12, ¶1).

Because Lemon sustained "a permanent injury as specified in section 42-9-30" (*i.e.,* injuries to his back and legs, which are scheduled body members) "after having sustained another permanent injury in the same employment" (involving his back and shoulders in 2009, 2010, and 2011), S.C. Code Ann. § 42-9-170(B) applies as a matter of law, such that Lemon "is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation and in no case exceeding 500 weeks." Despite these undisputed facts, the Court of Appeals concluded that "§ 42-9-170 applies only to § 42-9-10(B) **awards**." (emphasis added). This statement is plainly inaccurate, especially in light of the Court's purported application of strict construction, because the § 42-9-170 does not employ the term "award" whatsoever.[3] I

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[3] The Court's December 31, 2019 Order necessarily suggests that S.C. Code Ann. § 42-9-170 only applies "[i]f an employee receives an **award** as specified in Section 42-9-30 or the second paragraph of Section 42-9-10." However, the statute plainly requires something altogether different: "an **injury** as specified in Section 42-9-30 or the second paragraph of Section 42-9-10" (emphasis added). The terms "injury" and "award" are not synonymous and the Court was not at liberty to simply redefine a statutory term of art or to force an interpretation contrary to the plain language of the statute. *See* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

As explained above, § 42-9-170 only requires a permanent "injury" by its plain and unambiguous terms; however, it would appear that the Court tortuously construed the term "injury" to mean an "award." This was plain error because the Court should not resort to subtle or forced construction to limit or expand a statute's operation when interpreting the plain meaning of a statute. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010). Had the Legislature intended for S.C. Code Ann. § 42-9-170 to apply only to certain types of "awards," the Legislature would have employed the term "award." Instead, the Legislature employed the term "injury" and because the meaning of the term "injury" is, in the words of our Supreme Court "plain and unambiguous, and conveys a clear and definite meaning...the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (*citing* Hodges v. Rainey, *supra*); *see also* Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (holding that words of a statute "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation" and citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

The language employed by the Legislature in the second sentence of S.C. Code Ann. § 42-1-170[4], which actually speaks in terms of "disability" awards in the context of

[4] This provision concerns whether general disability benefits under S.C. Code Ann. § 42-9-10 or § 42-9-20 are available when there are successive injuries to single body members. *See* Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (holding that an employee with one scheduled injury is limited to the recovery under § 42-9-30 alone); *see also* Ellison v. Frigidaire Home Products, 371 S.C. 159, 638

limiting an employee's access to the general disability statute, further evinces the clear difference and distinction between "injuries" and *awards* intended by the Legislature. The second sentence of § 42-1-170 states:

> "If an employee has previously incurred permanent partial **disability** through the loss of a hand, arm, shoulder, foot, leg, hip or eye, and by subsequent accident incurs total permanent **disability** through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of section 42-9-35." (emphasis added).

S.C. Code Ann. § 42-1-120 defines the term "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." Awards of benefits for varying types of "disability" are provided by S.C. Code Ann. §§ 42-9-10, 42-9-20, and 42-9-30. *See* Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003). However, in none of these statutes is the term "disability" synonymous with the term "injury." Furthermore, it is well-settled that a "word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." Travelscape, LLC v. South Carolina Dep't. of Revenue, 391 S.C. 89, 100,

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S.E.2d 664 (2006) (holding that an employee may be entitled to benefits for general disability based on the combined effect of his pre-existing condition and a subsequent workplace injury to a single, scheduled body member). In 2007, the S.C. Code Ann. § 42-9-35 was specifically enacted to modify the Supreme Court's holding in Ellison.

705 S.E.2d 28, 34 (2011) ("As a general rule, 'identical words and phrases within the same statute should normally be given the same meaning.'"). Therefore, use of the term "injury" in the first sentence of S.C. Code Ann. § 42-9-170 and "disability" in the second sentence constitutes a material variation, by which the Legislature implied a clear variation in meaning. Travelscape, *supra*. Had the Legislature intended for S.C. Code Ann. § 42-1-170 to apply only to certain *awards* of *disability*, it would have utilized the term in the first sentence, as it did second.

Additionally, the title of S.C. Code Ann. § 42-1-170 is itself instructive, as it also employs the term "injury" and not "award." The title reads,

> "Permanent **injury** after sustaining another permanent **injury** in the same employment; entitlement to compensation; extension of payment." (emphasis added).

If the Legislature had intended the S.C. Code Ann. § 42-9-170 to apply to certain classes of *awards*, as opposed to certain classes of *injuries*, the Legislature would have actually employed the term *award*. Having chosen to use the statutorily defined term "injury," the Court should have interpreted the statute as enacted and defined its requirements according to its explicit terms, including the term "injury" employed in the very title. As noted by the Supreme Court in Beaufort County v. South Carolina State Election Comm'n, 395 S.C. 366, 373 n. 2, 718 S.E.2d 432, 436 n. 2 (2011), a statute's title is an indicator of meaning and, here, it indicates that the Court of Appeals has misconstrued the statute.

Regardless, whether or not S.C. Code Ann. § 42-9-170 applies is irrelevant, as Lemon's entitlement to benefits, and the 500 week limitation thereon, stems from the plain language of S.C. Code Ann. § 42-9-10, as explained in Medlin v. Greenville County. As such, the Respondents respectfully request Rehearing and affirmation of the Commission's award.

III. The Court of Appeals misconstrued the holding of *Medlin v. Greenville County* by concluding that Lemon is not bound by the 500 week maximum mandated by S.C. Code Ann. § 42-9-10.

The fallacy of the Court's conclusion is further exemplified by the necessary corollary of its own interpretation: if S.C. Code Ann. § 42-9-170 does not apply to Lemon, Medlin v. Greenville Co. controls, and Lemon is only "entitled to compensation for the degree of disability which would have resulted from the later [May 8, 2012] accident," because his previous disability (totaling 321 weeks) was "non-existent in so far as the Act is concerned." 303 S.C. 484, 488, 401 S.E.2d 667, 669(1991). Thus, the Commission correctly awarded Lemon the balance of 500 weeks (179 weeks) under S.C. Code Ann. § 42-9-10 because Lemon is *not* "entitled to compensation for both injuries" and the 500 week maximum mandated therein is not a "per accident" limitation. Medlin v. Greenville Co., *supra*.

In Medlin, the employee had a previous injury while working for Greenville County that resulted in a compromise settlement, just as Lemon has received compromise settlements for his four prior claims against Mount Pleasant Waterworks. Medlin then suffered another injury working for Greenville County and filed a claim seeking payment of permanent and total disability compensation, just as Lemon has

done. The Commission awarded Medlin an additional 500 weeks, contending that the 500 week limitation in S.C. Code Ann. § 42-9-10 "was a per accident limitation." The circuit court affirmed the Commission, "holding that the five hundred week limitation was a per accident limitation." The Court of Appeals expressly reversed this conclusion.

In reversing the "per accident limitation" construct, the Court of Appeals reasoned that, having "already received an award of five hundred weeks compensation from his first injury, [Medlin] had no basis to recover in the second accident." However, the Court of Appeals premised their on an interpretation of S.C. Code Ann. § 42-9-170. While the Supreme Court agreed with reasoning of the Court of Appeals, the Supreme Court concluded that

> "Section 42-9-170 is not applicable to this case as here, employee was not drawing compensation for his 1983 injury at the time his second injury occurred." 303 S.C. 484, 488, 401 S.E.2d 667, 669(1991).[5]

However, because the Supreme Court agreed that the 500 week limitation in S.C. Code Ann. § 42-9-10 is not a "per accident" limitation and because there is "no statute that would entitle [Medlin] to receive compensation" in excess of 500 weeks "there [was] no basis upon which [Medlin] can recover.

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[5] The Court's December 31, 2019 Order does not address whether Lemon was drawing compensation for his prior injuries at the time of the May 8, 2012 accident such that S.C. Code Ann. § 42-9-170 should apply. The Record reflects that Lemon received a lump sum payment of $32,005.50 in compensation on April 27, 2012, eleven days prior to the accident *sub judice*.

As such, the Medlin Court overruled Wyndham v. Thornley, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987), which had expressed a similar "per accident" analysis in a case of successive injuries. The Court mistakenly suggests that Wyndham v. Thornley was "*overruled on other grounds*" by Medlin. This is incorrect. Medlin expressly overruled a Commission and circuit court ruling that "the five hundred week limitation was a per accident limitation." Wyndham had also held, almost identically, that "the five hundred week limit does not apply to successive injuries," but did so in the context of "successive injuries while working for different employers." Therefore, Medlin expressly overruled the holding in Wyndham and went on to make it clear that it matters not whether the successive injuries were sustained in the same or different employment. As explained in plain language by the Medlin court:

> "These principles would hold true in any case regardless of whether the successive injury occurred while working for the same or different employers." 303 S.C. 484, 488, 401 S.E.2d 667, 669(1991).

Therefore, this Court erred in relying on Wyndham for any purpose.

This Court curiously quoted Medlin v. Greenville County with approval, suggesting that it "does not dictate a different result" in this case, but then in a footnote concluded that Medlin "is inapplicable due to the plain language of S.C. Code Ann. § 42-9-70(B)." This makes no sense of course, since Medlin's holding was an interpretation of S.C. Code Ann. § 42-9-10, irrespective of § 42-9-70, because that statute was also inapplicable in Medlin. More importantly, the Court fails to reconcile the fact that Medlin expressly overruled the Commission and the circuit court's conclusion that the

500 week maximum mandated by S.C. Code Ann. § 42-9-10 is a "per accident" maximum and the fact that no statute authorized an award of benefits in excess of 500 weeks, even where there are successive accidents.

When the holding of Medlin is properly applied to the undisputed facts of the present case, it is clear that the Worker' Compensation Commission award of only the balance of 500 weeks (179 weeks) under S.C. Code Ann. § 42-9-10 should be affirmed. This is because the Supreme Court has already decisively concluded that the 500 week maximum mandated by S.C. Code Ann. § 42-9-10 applies to successive injuries – irrespective of S.C. Code Ann. § 42-9-170 -- and that there is no other statutory authority for an award of compensation in excess of 500 weeks, save claims of paraplegia, quadriplegia, or brain damage. Those entities being inapplicable here, the Court should withdraw its December 31, 2019 Order and affirm the Commission's award of 179 weeks of compensation.[6]

IV. The Court of Appeals misconstrued S.C. Code Ann. § 42-1-170 as creating an exception to the 500 week maximum mandated by S.C. Code Ann. § 42-9-10.

[6] This court, in footnote 8 of the December 31, 2019 Order, indicated that it was troubled by the Commission's analysis (or lack thereof) regarding Lemon's prior payments of disability compensation in his four prior workers' compensation claims. Should this remain a concern after rehearing and reconsideration, the matter could be remanded to the Commission to clarify the basis for its award of 179 weeks of compensation under S.C. Code Ann. § 42-9-10.

The Court's December 31, 2019 Order misconstrues the plain terms of S.C. Code Ann. § 42-9-170 by holding that it provides an exception to the 500 week maximum prescribed by S.C. Code Ann. § 42-9-10. The Court purportedly relies solely on Wyndham v. Thornley, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987) for this proposition. However, as explained more fully above, Wyndham – its holding and analysis -- was expressly reversed by the Supreme Court in Medlin v. Greenville County based on the plain language of S.C. Code Ann. § 42-9-10.

That plain language reads,

> "When the incapacity for work resulting for an injury is total, the employer shall pay...to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages...**In no case** may the period covered by the compensation exceed five hundred weeks **except as provided in subsection (C)**." (emphasis added).

This sole exception – S.C. Code Ann. § 42-9-10(C) applies only in cases of paraplegia, quadriplegia, or physical brain damage "[n]otwithstanding the five-hundred week limitation **prescribed** in this section or elsewhere in this title." (emphasis added). This language makes it clear that the 500 week maximum is mandatory and has only a single exception --§ 42-9-10(C)—and in no other case – not other types of injuries or successive injuries or even death.

Furthermore, interpreting any other statute to provide an exception to S.C. Code Ann. § 42-9-10 would render meaningless the words "[i]n no case may the period

covered by the compensation exceed five hundred weeks except at provided in subsection (C)," which is untenable. *See* 16 Jade Street, LLC v. R. Design Const. Co., LLC., 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (holding that Courts are to construe a statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."). Indeed, S.C. Code Ann. § 42-9-10's strict 500 week limit was enacted at the same time as S.C. Code Ann. § 42-9-170[7]. If the Legislature had intended for S.C. Code Ann. § 42-9-170 to be an *additional* exception to S.C. Code Ann. § 42-9-10, that statute would have read "[i]n no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C)" *and S.C. Code Ann. § 42-9-170* from the outset. But the statute does not and has not ever read this way. Instead, by enumerating only a single exception to the statutory maximum expressed in S.C. Code Ann. § 42-9-10, the Legislature created a negative implication, as the expression of one thing implies the exclusion of others. *See* City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)(holding that "when determining the effect of statutory language, the canon of construction *expressio unius est exclusio alterius* or *inclusio unius exclusio alterius* holds that to express or include one thing implies the exclusion of another, or the alternative.").

When S.C. Code Ann. § 42-1-170 references that compensation is to be paid "in no case exceeding five hundred weeks," it is simply reiterating the clear mandate of S.C. Code Ann. § 42-9-10, lest the provision "extending the period" of compensation for successive injuries be presumed an exception to that rule. Not only does § 42-1-170 not

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[7] The predecessor statutes were S.C. Code § 72-151 and § 72-168. Originally, there was no exception to the 500 week limit and no mention of paraplegia, quadriplegia, or brain damage.

create another exception to the limitation prescribed by § 42-9-10, not only does § 42-1-170 not state provide compensation in excess of 500 weeks under any scenario, it reinforces the 500 week limit mandated by § 42-9-10. For example, S.C. Code Ann. § 42-9-10(C) clearly specifies that benefits in excess of 500 weeks are payable in cases of paraplegia, quadriplegia, and physical brain damage "[n]otwithstanding the five-hundred week limitation prescribed [by § 42-9-10(A)]." If § 42-9-170 actually provided a similar exception or extension of benefits, it would have employed similar, express language. However, it does not and the suggestion of an implied exception to an express statute is unfounded. Essentially, the Court of Appeals is implying rights beyond those which the Legislature has provided. Because the Workers' Compensation Act is a statute in derogation of common law, the Court must "strictly construe its terms." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). *See also* Medlin v. Greenville Co., 303 S.C. 484, 401 S.E.2d 667 (1991) (holding that there is no provision of the South Carolina Workers' Compensation Act that authorizes compensation in excess of 500 weeks other than S.C. Code Ann. § 42-9-10(C)).

Instead, S.C. Code Ann. § 42-9-10(C) remains the sole exception to the strict 500 week limit and provisions of both § 42-9-10 and § 42-9-170 "should be interpreted in a way that renders them compatible, not contradictory." Davis v. School District of Greenville County, 374 S.C. 39, 45, 647 S.E.2d 219,222 (2007) (holding that the "goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.'"). Therefore, the Court of Appeals should withdraw and reconsider its December 31, 2019 Order and affirm the Commission in accordance with the plain language of S.C. Code Ann. § 42-9-10.

V. The Court of Appeals misconstrued the benefit provided by S.C. Code Ann. § 42-9-10(A) and the Workers' Compensation Commission's discretionary authority thereunder to produce an absurd result.

The South Carolina Workers' Compensation Act establishes no minimum award in cases of disability, only statutory maximums. *See* S.C. Code Ann. §§ 42-9-10, 42-9-20, 42-9-30, 42-9-290. According to the plain language of S.C. Code Ann. § 42-9-10,

> "When the incapacity for work resulting for an injury is total, the employer shall pay...to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages...In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C)."

The Commission has the sole discretion to determine the period during which an employee is incapable of earning wages as a result of a particular injury. In this case, the Commission properly determined that period was 301 weeks (of which 122 has already been paid), as Lemon had previously been compensated for disability covering 199 weeks between 2009 and 2011. *See* Medlin v. Greenville County, 303 S.C. 484, 488, 401 S.E.2d 667, 669(1991) (holding that once an employee receives benefits for disability, that degree of disability is "fully 'written-off' and is non-existent in so far as the Act is concerned."). This determination is consistent with the 500 week maximum mandated S.C. Code Ann. § 42-9-10(A) and the undisputed facts of this case.

In addition, the South Carolina Workers' Compensation Act establishes but a single exception to the statutory maximum of 500 weeks by specifically setting forth the criteria in S.C. Code Ann. § 42-9-10(C): paraplegia, quadriplegia, and permanent brain damage. According to S.C. Code Ann. § 42-9-10(A), "[i]n no case may be the period of covered by the compensation exceed five hundred weeks except as provided in subsection (C)." Despite the fact that § 42-9-10(C) is wholly inapplicable, this Court ruled that Lemon is not limited to 500 weeks, but is instead entitled to 699 weeks of compensation as a result of his five workers' compensation claims over a four year period. Essentially, the Court concluded that Lemon's was a fate worse than death, as an employee mortally-injured at work would be limited to only 500 weeks of compensation. *See* S.C. Code Ann. § 42-9-290. The Court apparently considers Lemon's back injury as more valuable than the amputation of both legs or both arms or blindness in both eyes --or even all three combined – because such persons are also limited to the 500 week maximum required by S.C. Code Ann. § 42-9-10(C). Obviously, this would be an absurd result, which was never intended by the Legislature. *See* Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (holding that Courts should reject a statutory interpretation that leads to a result so plainly absurd that it could not have been intended by the Legislature).

Conclusion

Based upon the arguments presented herein above, the Petitioners/Respondents, Mount Pleasant Waterworks and the South Carolina State Accident Fund, respectfully request that the Court of Appeals grant the Petition for Rehearing, reconsider the issues presented, withdraw the Order dated December 31, 2019, and issue a new Order

affirming the unanimous Decision and Order of the South Carolina Workers' Compensation Commission in accordance with undisputed evidence in the record and the applicable law.

Respectfully submitted,

Mount Pleasant, S.C.
January 14, 2020

Kirsten Leslie Barr

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ATTORNEY FOR THE
PETITIONERS/RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

R. Michael Campbell, III, Commissioner

Appellate Case No. 2016-002321
W.C.C. 1205924

David B. Lemon, Employee/Claimant,.....Appellant,

v.

Mt. Pleasant Waterworks, Employer, and
State Accident Fund, Carrier,.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant, David Lemon, was served with a copy of the attached Petition for Rehearing this 14th day of January 2020, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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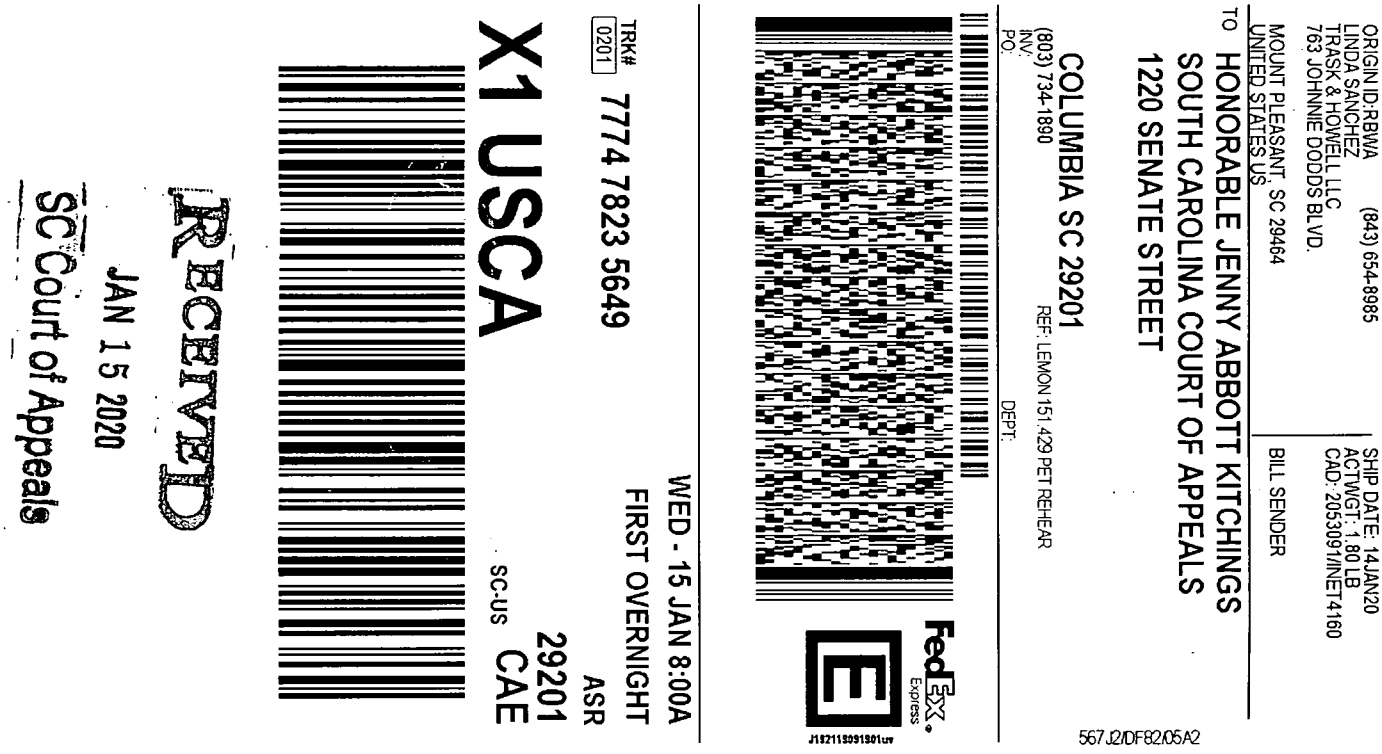
January 14, 2020



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TRASK
HOWELL
WORKERS' COMPENSATION DEFENSE

Reply to
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January 14, 2020

Via Overnight Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: David Lemon v. Mount Pleasant Waterworks
W.C.C. File No.: 1205924
Appellate Case No.: 2016-002321
Carrier File No.: 2012-001473
Date of Accident: May 8, 2012

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the original and six (6) copies of our Petition for Rehearing and original Proof of Service of the same in the above-referenced case. By a copy of this correspondence, I am serving the other counsel of record with a copy of our Motion. Also enclosed, please find our check in the amount of $50.00 for the filing of this Petition.

Yours very truly,

Kirsten L. Barr

KLB/cab/les
Enc.
cc: David Edwards, South Carolina State Accident Fund (w/enc.) (email only)
Erin Farthing, Esq. (w/enc.) (email only)
Carl H. Jacobson, Esq. (w/enc.)
J. Gabriel Coggiola, Esq. (w/enc.)