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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

R. Michael Campbell, III, Commissioner

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

Opinion No. 5703
Heard April 1, 2019 – Filed December 31, 2019

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

v.

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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

David Lemon, Claimant, Appellant,

v

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

RECORD ON APPEAL

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SC Court of Appeals

**OPINION, ORDER AND AWARD OF
THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File NUMBER 1205924**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

David Lemon,)

Claimant,)

vs.)

Mt. Pleasant Waterworks,)

Employer,)

and)

State Accident Fund,)

Carrier/Defendants.)

HEARING: APPEARANCES:

Held in Goose Creek, South Carolina on
September 11, 2014

Claimant was represented at the hearing by
Carl H. Jacobson of Uricchio, Howe & Krell,
P.A.

Defendants were represented by Matthew A.
Schenfeld of Willson, Carter & Baxley, P.A.

PURPOSE OF HEARING: DECISION AND

To determine issues as set forth on Forms
50/51 and Form 21 to determine if the
employer/carrier may stop payment, and if so,
to determine if claimant is entitled to any
further benefits.

ORDER:

ORDER FILED:

Commissioner T. Scott Beck

, 2014

CLAIMANT'S APA SUBMISSIONS

NAME OF REPORT(S)/PHYSICIAN OR OTHER EVIDENCE	DATE OF REPORT(S)	PAGES
CL1. Thomas Due, Jr., M.D.	03/12/14- 08/26/13	01-25
CL2. Orthopaedic Specialists of Charleston	03/11/14- 06/08/12	26-67
CL3. Rehabilitation Centers of Charleston 06/14/13 <u>EXHIBITS</u>		68-69
EX1. Vocational Assessment of David Price, M.Ed. EX2. Deposition Transcript of Jan Westmoreland, M.Ed.		

DEFENDANT'S APA SUBMISSIONS

<u>NAME OF PHYSICIAN/OTHER</u>	<u>DATE OF REPORT</u>	<u>PAGE</u>
Exhibit (1) CBD Medical Enterprises, PA - Dr. Thomas Due, MD	4/9/14-7/11/14	70-80
Exhibit (2) Tri-County Radiology	4/23/13	81-82
<u>NAME OF EXHIBIT</u>	<u>DATE OF REPORT</u>	<u>PAGE</u>
Exhibit (A) Pleadings filed relating to Claimant's 03/05/05 work accidents with other employer		83-86
Exhibit (B) Vocational Assessment of Jan 7/18/14 Westmoreland, M.Ed, CRC		87-100
Exhibit (C) Excerpts of Claimant's Personnel File		101-117
Exhibit (D) Documents relating to Claimant's prior injuries while working for Mt. Pleasant Waterworks		118-134
Exhibit (E) Deposition Transcript of David Price 8/6/14		135-218

STIPULATIONS

This case was heard by the undersigned Commissioner in Goose Creek, South Carolina on September 11, 2014

The parties stipulated at the hearing to the following issues:

- (1) No objections to the jurisdiction or venue.
- (2) The Claimant's average weekly wage is \$636.04, yielding a compensation rate of \$424.05.

STATEMENT OF THE CASE

The Claimant maintains that he sustained an injury to his back and legs as a result of a work-related accident that occurred on May 8, 2012. Although the Claimant concedes that he had achieved maximum medical improvement on February 12, 2014, he is seeking a finding of permanent and total disability, seeking an award for lifetime causally related medical care and asserts that the Defendant is entitled to only a credit for 20.5714 weeks due to a prior back claim with the Employer. He is also seeking an award in a lump sum and is requesting Unica/James vs. Anne's allocation language in the Order.

The Claimant maintains that the Defendants are not entitled to any additional credit for any other payments of disability on any prior claims because the payments were for body parts other than the back and that the settlement documents and the Form 19s relating to the settlements do not specifically allocate a number of weeks for the prior injuries. It would be purely speculative for the fact finder to allocate credit for the prior claims when the documents are ambiguous and do not delineate the applicable number of weeks for prior injuries. Additionally, the seminal case on this issue Medlin vs Greenville

County. 401 S.E. 2d 667(SC 1991), only presented "the issue of whether an employee can recover total and permanent benefits under the Workers' Compensation Act for a successive total and permanent injury to *the same body part*." (emphasis added). In the present case, the only prior injury for which the Claimant recovered any disability benefits for his back while working for the Employer was the prior back injury of 10/03/2011 and the specific number of weeks allocated on the Form 19 was 20.5714 weeks. The language in the Clincher that applied to the specific prior injury to the back allocated a sum certain for the "disability claims to include 25% to the spine." However, the Clincher also included an unallocated sum for "compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability and claim for disfigurement or for a change of condition." The settlement also included an unallocated sum for medical and future medical.

The Claimant contends that he has sustained an injury not only to his back but also to his legs because of radiculopathy and he has been assigned a 24% impairment to the lumbar spine and 7% impairment to his right and 7% impairment to his left legs. (APA 4). As such, since he has sustained injuries to more than one body part, he maintains that he is entitled to permanent and total disability benefits because of his lost earnings capacity. Singleton vs. Young Lumber Company. 114 S.E. 2d 837 (SC 1960).

In addition to the above, Claimant maintains that he is entitled to a lump sum award of benefits and also seeks appropriate language in the Order pursuant to James vs. Anne's, Inc. He is planning to file for Social Security Disability benefits. The Claimant is seeking lifetime causally related medical pursuant to the recommendations of his current

authorized treating physician, Dr. Thomas Due.

The Defendants assert that the Claimant is only entitled to an award for permanent partial disability of the back and he would only be entitled to causally related medical care in the future in accordance with Dr. Aymond's recommendations. The Defendants also seek a credit for temporary total disability benefits paid beyond the date of maximum medical improvement or, alternatively, back to the filing of the Form 21 which was on May 13, 2013.

The Defendants seek a credit for all weeks paid for any awards while the Claimant was employed with the Employer. The Defendants rely on SC Code §42-9-170 as the sole determination of whether the Claimant is entitled to a maximum of 500 weeks worth of benefits while under the employment of Mt. Pleasant Waterworks. The Defendants also contend that the language in the prior settlement agreements is clear and unambiguous with respect to the amount that was paid for specific percentages of permanent disability. The Defendants did not state any objection on the record to the Claimant's seeking a lump sum award for his indemnity payments or for the insertion of Utica/James vs. Anne's language in the final Order.

EVIDENCE OF THE CASE The Claimant testified that he is fifty-two (52) years old and married with four (4) children, two of whom are still dependant on him. He was born and raised in Charleston and attended Charleston High School. He graduated with a diploma from Charleston High School but had to repeat the 1st grade and he was socially promoted to the 2nd grade. When he went to Charleston High School, he was provided a vocational diploma, as

opposed to an academic type diploma. After graduating from high school, he worked for the City of Charleston in the Parks Department doing grounds maintenance. He then went into the military and served six (6) years in the Army as a Cannoneer and four (4) years in the Reserves. He did a tour at Desert Storm in the Infantry and was awarded an honorable discharge from the Army.

The Claimant has been working since he was fourteen (14) years old. After getting out of the Army, the Claimant worked at Trident Security as a security guard and did some landscaping and sprinkler installation work. He then worked at Home Depot in the plumbing department stocking shelves on the floor, warehouse and other various duties. He performed similar work at Lowe's. He then did warehouse work for Northern where he stocked tools and equipment. Lastly, he started working for the Employer, Mt. Pleasant Waterworks, and was injured on May 8, 2012. He had been working there for approximately seven (7) years. He was initially hired as a Maintenance Mechanic I and had been promoted to Maintenance Mechanic II. As a Maintenance Mechanic, he repaired metal lined pipes, sewage lines, gravity lines, air release valves, man hole repairs and excavation of anything that involved waste water maintenance.

After he was injured while working for the Employer, he attempted to go back to work but his Employer was unable to accommodate him. He was essentially informed by Human Resources that they couldn't use him anymore and they didn't have suitable employment and he was laid off. (Tr. 14, Lines 4-8). He was informed that he should apply for State Disability Retirement and he has qualified for these benefits.

The Claimant had a prior back injury while working for the Employer before the

accident of May 8, 2012. He had been treated and released by Dr. Aymond with no restrictions, full duty. He testified that he was "perfectly fine" and was "working full duty with no restrictions" at the time of his accident. (Tr. 15, Lines 7-16).

On May 8, 2012, the Claimant injured his back when he was repairing a water line. He was pulling on a pry bar when there was a release of pressure, he came back with the bar and injured his back. The Defendants have admitted the back injury.

The Claimant had spinal surgery on October 31, 2012 consisting of a two level fusion. Dr. Aymond was treating him not only for his low back pain, but also for pain in the backside of both legs and numbness in his toes. The surgery did help to some degree but after he had physical therapy his back started getting weaker and his condition deteriorated. He had numbness in his legs and had problems with his balance. His condition worsened and Dr. Aymond released him as a patient and referred him to Dr. Due for pain management. He has been treated by Dr. Due since August 26, 2013 on a regular basis. The Carrier authorized the referral from Dr. Aymond to Dr. Due and has been paying Dr. Due for the medical services rendered. The Claimant has not seen Dr. Aymond since he was released on June 20, 2013. Dr. Due has been his only authorized treating physician.

The Claimant testified that he is on multiple medications that give him pain relief and relaxes his muscles and eases his spasms. His medication also helps him sleep through the night. However, he still normally wakes up every night and his sleeplessness causes him to be tired, sluggish and lethargic. His medication causes side effects, including dizziness, drowsiness and "messes" with his memory. (Tr. 24, Line 4-Tr. 25, Line 1).

The Claimant testified that if he did not follow the recommendations and limitations as set forth by Dr. Due, he could hurt himself worse. Additionally, if he followed his doctors instructions with respect to limitations, there is no work that he has performed in the past that he could perform within those restrictions. He also stated that if he were to follow the instructions, he did not know of any job that he could perform. (Tr. 26, Line 17-Tr. 27, Line 9).

The Claimant testified that his pain level fluctuates between four (4) and seven (7), depending on whether he has a good day or bad day. (zero (0) being no pain, ten (10) being worst imaginable pain). During an average month, he believes that he would miss approximately eight (8) days from work, even if he could obtain employment. He does some limited gardening for recreation, but has to use clamps to assist him pick up small objects and self limits himself with respect to lifting heavy objects. He has had to hire an individual to do his lawn. He has purchased a "handicap toilet" and grab bars out of his own pocket money. He is limited as far as walking, standing and sitting. He has loss of balance and walks with a limp. He does not feel comfortable walking on uneven surfaces because of his lack of balance. From time to time he feels as if he is falling and has to catch himself. He's limited as far as climbing stairs.

The Claimant testified that he attempted to apply for the various jobs that had been identified by the vocational expert retained by the Carrier. All of the jobs required that he apply online. He does not have sufficient internet skills to do so. One of the jobs that was identified by the Carrier's vocational expert was to work as a security guard. The Claimant testified that he does not believe that he could restrain a violator until a police arrived

based on his physical limitations. This job also required an online application. Another job identified was Headway Workforce Solution to recruit perspective households to participate in the Nielsen TV Ratings. The Claimant testified that he had no experience in educating and recruiting prospective households. Similarly, the Claimant testified that he could not perform the essential functions of the jobs that were identified by the vocational consultant, including a job with the Department of Motor Vehicles, LabCorp and the other jobs that were identified by the Carrier's vocational expert.

The Claimant testified that he went to the SC Department of Vocational Rehabilitation for assistance. They couldn't do anything for him. He was planning on filing for Social Security Disability benefits.

Christopher OUic also testified. He stated that he worked for the Claimant's law firm and physically took the Claimant to the various jobs that had been identified in the report that was completed by the Carrier's vocational expert. One of the jobs that was identified was actually located in Fayetteville, North Carolina. When the Claimant came out from the different job locations, he did not have any written application forms. Instead, he had business cards and a couple of flyers. Mr. OUic testified that he called Hertz that was identified as one of the potential employers. They informed him that the application had to be online.

MEDICAL EVIDENCE After the Claimant's injury, he was referred to Dr. Aymond who is a spinal specialist. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond. He had a fusion at the L4-S, L5-S1 levels. Interbody fusion cages were also implemented.

Following surgery, the Claimant continued to have back and leg pain and Dr. Aymond referred the Claimant to Dr. Thomas Due. Dr. Due has been the Claimant's authorized treating physician since August 26, 2013.

Prior to his referral by Dr. Aymond to Dr. Due, the Claimant was last seen by Dr. Aymond on June 20, 2013. On June 20, 2013, Dr. Aymond assigned the Claimant a 24% impairment rating to the spine as it relates to motion segment integrity loss as well as intermittent radicular pain into his feet...limitations included: lifting restriction of 15 pounds or less and avoid repetitive bending or twisting activities...He is not able to return back to his previous line of work." (APA 30). Dr. Aymond also stated that he had assigned a 24% impairment rating to the spine (whole man)...a percentage of the impairment rating includes as part of the rating consideration for Mr. Lemon's permanent impairment to his feet caused by his back injury and accident of May 8, 2012. (APA 26).

Dr. Due has continued to treat the Claimant on a regular basis. He sees him approximately once every month since the initial date of treatment. On February 28, 2014, Dr. Due assigned the Claimant a "24% impairment to his lumbar spine, a 7% impairment to the right and a 7% impairment to the left legs, Dr. Due stated that the Claimant is unable to return to work at his current employment...limitations include: unable to lift greater than ten (10) pounds, no sitting/standing over 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

Dr. Due has treated the Claimant through medication and injections. Medication includes Norca, Amrix and Flector patches. His diagnoses include "sacroiliac pain, lumbar

facet arthralgia, and post laminectomy lumbar radiculopathy." (APA 1). According to Dr. Due, the Claimant "will need future medical treatment, including, most probable need for ongoing treatment including but not limited to medication, epidurals, facet injections, sacro-ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), surgical consultations. (APA 4).

SUMMARY OF VOCATIONAL EVALUATIONS

The Claimant was interviewed by two (2) vocational experts, namely, David Price, M.Ed., for the Claimant and Jan Westmoreland, M.Ed., for the Defendants.

During her deposition, Ms. Westmoreland conceded that she has never testified or been qualified as an expert witness in the public sector. (Tr. 9, Lines 17-24). The most current medical information that she had available in order to determine the Claimant's employability at the time that she generated her report was from Dr. Due, as opposed to Dr. Aymond. Yet, she relied upon Dr. Aymond's evaluation as well as Dr. Due's evaluation in performing her Labor Market Survey. (Tr. 17, Line 22-Tr. 18, Line 3). She testified that based upon her education, training and experience as a vocational expert she has been instructed to rely on the most current medical information that is available in determining an individual's employability. (Tr. 18, Line 24-Tr. 19, Line 4). She testified that all of the jobs that she identified in her Labor Market Survey required online applications and Mr. Lemon does not have sufficient computer literacy in order to apply online for the various jobs that she identified. (Tr. 43, Lines 2-20). Lastly, Ms. Westmoreland testified that Mr. Lemon would probably miss more than four (4) days of work a month because of his medical condition and that by definition an individual who misses more than four (4) days

of work during a month is considered vocationally disabled. (Tr. 44, Line 14-Tr. 45, Line 5). She also stated that based on Dr. Due's limitations it would be difficult for the Claimant to compete in the open labor market. (Tr. 46, Lines 20-25).

According to the Claimant's vocational expert, David Price, "in my opinion he is completely disabled. Mr. Lemon has reached a point of MMI and is not expected to further improve. As such his disability is most probably permanent. He is not a candidate for vocational rehabilitation. The Claimant has also qualified for State Disability Retirement. (EX 1). Although the Claimant graduated from high school, according to his test scores, his Word Reading was at a 7.5 grade equivalent; Sentence Comprehension, 8.9 grade equivalent; Math Computation, 5.1 grade equivalent; with reading scores falling in the low range. (EX 1).

Based upon the above, the following Finding of Fact are accordingly made:

FINDINGS OF FACT IT IS

FOUND AS A FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. Singleton v. Young Lumber, 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain

radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.

3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25,4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20,5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.

As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.

4. I find that the award is to be paid in a lump sum.

5. I find that the Claimant is entitled to ~~Utica-Mohawk Mills v. Orr~~ language in this order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to ~~James v. Anne's~~ he is entitled to an award for a lump sum with the insertion of ~~Utica-Mohawk Mills v. Orr~~ language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.

6. The Claimant sustained an admitted injury to his back that occurred on May

8,2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).

7. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).

8. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).

9. The Claimant underwent back surgery on October 31,2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).

10. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.

11. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required

online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

CONCLUSIONS OF LAW Accordingly, as provided in Section 42-17-40 of the South Carolina Worker's Compensation Act, it is the determination of this Commissioner that:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

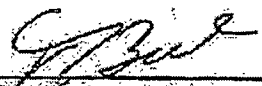
ORDER AND AWARD IT IS THEREFORE ORDERED that the Defendants shall pay all medical expenses that are causally related to the Claimant's compensable injuries and shall continue to

provide medical treatment by Dr. Thomas Due, the authorized treating physician, and shall provide lifetime causally related medical, including medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRTs), and surgical consultations.

IT IS FURTHER ORDERED that the Defendants shall pay permanent total disability benefits to the Claimant at the weekly comp rate of \$424.05 and that said payments shall be made in a lump sum payment, giving the Defendants credit for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing. The Claimant is entitled to Utica, language in the final order. The specific allocation of weeks, taking into consideration attorney's fees and expenses, with the appropriate Utica v. Orr/James v. Anne's language can be done by supplemental order.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
January 7, 2015

By: Shawn DeBruhl, Administrative Assistant to Commissioner Beck

David R. Price M.ED., CRC
222 King Rail Lane
Huger, S.C. 29450

Vocational & Occupational Counseling Services, LLC
Phone & Fax: 843-336-4902
Cell: 843-810-6592

Date: March 26, 2014

VOCATIONAL ASSESSMENT OF DAVID LEMON

Introduction:

David Lemon is a 52 year old former Maintenance Mechanic employed by the Mt. Peasant Water Works where he worked installing and maintaining water lines. On May 8, 2012 he injured his back at work pulling and straining to put a heavy coupling onto a water main. He was evaluated by spine surgeon James Aymond, M.D. and diagnosed with two herniated lumbar discs L4-5 and L5-S1. On October 31, 2012 Dr. Aymond intervened surgically for Discectomy and Posterior Lumbar Interbody Fusion L4-5-S1. Maximum Medical Improvement was achieved on June 20, 2014. Mr. Lemon had a Functional Capacity Evaluation recommending him for Sedentary-Light Physical Demand. He was rated by Dr. Aymond with 24% impairment of the spine and permanently restricted to lifts of fifteen pounds or less with no repetitive bending and twisting. As per Mr. Lemon he was not helped by the surgery. He continues to report severe back and lower extremity pain and remains under the care of Thomas Duc, M.D. for ongoing pain management. On February 28, 2014 Dr. Duc assessed impairment as 24% of the lumbar spine with 7% added for each lower extremity. Mr. Lemon was restricted to no lifting greater than ten pounds, no sitting/standing greater than two hours, no crawling, climbing, pulling, pushing, and no operation of machinery secondary to impairments in judgment from narcotic medication. Since injury Mr. Lemon has not been able to return to his job or any other form of employment. He cannot tolerate prolonged time on his feet, extended periods of sitting, or any use of the lumbar spine for strenuous or repetitive activity. Mr. Lemon has lower extremity weakness, walks with a limp, and continues to require narcotic pain medication several times daily. He is also battling depression and anxiety over an uncertain future. He has been approved for total disability benefits by the South Carolina State Disability Retirement System and is receiving monthly benefits.

Mr. Lemon's present concern is an open worker's compensation claim with unresolved issues of disability compensation. It is in this respect that he is referred today for vocational assessment and opinion on how the impairments from the work injury have impacted his ability to participate in gainful employment. To that end on March 26, 2014 a vocational interview was conducted. Mr. Lemon's medical file was reviewed and he was

asked to provide a detailed symptoms report and estimate of his current physical ability. His medical, educational, and employment histories were taken. Standardized intelligence and achievement testing was administered. Based on the available medical reports, information provided by Mr. Lemon and objective test results, the conclusions and recommendations contained in this report are given with a reasonable degree of vocational certainty and represent my professional opinion as a certified vocational rehabilitation counselor.

Records Reviewed:

James K. Aymond, M.D.
Thomas A. Duc, M.D.
James A. Theising, D.O.
Jay B. Robards, M.D.
David Goltra, M.D.
Jennifer Wetzel, PT, CFCE
Doctors Care
Roper Hospital

Observations:

Mr. Lemon appeared early for vocational assessment. He was noted to be African-America, 5'11", 177 lbs. He walked without aid of a cane but was observed to have a slight antalgic gait. When seated for interview Mr. Lemon frequently shifted positions and got up at about fifteen minute intervals to stand and stretch. He was stoic and did not complain. Mood was depressed as evidenced by one episode of tearfulness when describing the impact of injury on his life. Affect was appropriate. Mr. Lemon was oriented to person, place, time, and situation. Speech was fluent and memory grossly intact. He answered interview questions in an apparent honest manner with no suspicion of deceit, embellishment, or secondary gain. His presentation of symptoms was supported by the medical record and accepted as genuine. Good effort was given on standardized testing. Results are considered valid.

Symptoms Report:

Mr. Lemon described constant low back pain that radiates bilaterally into the lower extremities. Pain is equal on both sides. There is report of weakness, easy fatigue, limping and giving way of the legs. Mr. Lemon has fallen on several occasions. There is

numbness in the toes of both feet. Pace of gait is slow and a lumbar brace is worn whenever Mr. Lemon is ambulatory. He states that he can stand or walk for about 20-30 minutes. In a typical day he is on his feet no more than 2-3 hours total. Mr. Lemon reports that he can sit in a straight chair such as is required for desk work for about 10-15 minutes at a time. He can occasionally lift 10-15 pounds from waist to chest level. He states that he cannot comfortably lift from floor to waist level. Overhead lifting and repetitive lifting, pushing and pulling are avoided. At night Mr. Lemon is frequently awakened by pain. He manages to get about 4-5 hours of non-restorative sleep. Typically he must nap in the daytime to combat fatigue. He is unable to run, jump, or climb ladders. Mr. Lemon avoids repetitive stairs, steep inclines, and rough uneven surfaces. He cannot repetitively twist, bend, stoop, crouch, or crawl. Driving is limited to short durations. Most days Mr. Lemon can be found at home. If he is too active or overexerts, pain is exacerbated and may extend into a prolonged flare of several days. Consequently he avoids most activity. He is able to perform some housework, cook from a stool, cut his grass, and do light vehicle maintenance by working slowly and taking frequent breaks. Occasionally he must lie supine to rest his spine. To occupy his time Mr. Lemon volunteers to read and mentor children at his daughter's school. He does not engage in any strenuous or aerobic hobby activity. He attends church, Bible study, and sings in his choir. He walks his dog.

Pain is managed with Lortab 7.5 mg taken twice daily as needed. Mr. Lemon reports that the medication make him sleepy and causes him to periodically nod off to sleep. He states that his mentation and reaction times are slowed by the medication. Memory, attention, concentration, and judgment are reported to be impaired. Mr. Lemon states that the medications cause him to feel anxious and irritable. Occasionally he experiences disorientation and confusion. There is report of constipation and erectile dysfunction.

As a result of chronic pain, stress, and physical impairment Mr. Lemon admits to periods of depression. He states that he has good days and bad days. On bad days he feels sad, lethargic, unmotivated, and low on energy. He is less social and more withdrawn. He has experienced suicidal thoughts but states that this is no longer present. He tries to dwell on positives.

Past Medical History:

Mr. Lemon reports that he injured his back about eight months prior to the May 2012 injury. He was treated and returned to full duty. There have been surgeries on the left and right shoulders for rotator cuff repair. Mr. Lemon reports history of hypertension

and chest pain with negative heart cathertization. No history is given for alcohol abuse, substance abuse, or mental illness. There are no known major allergies.

Social History:

Mr. Lemon lives in Charleston, S.C. with his wife. He has been married to his second wife for two years. They have no biological children. He was married the first time for sixteen year and has a sixteen year old daughter that lives with her mother. He has three children and eight grandchildren from other relationships. Mr. Lemon has a valid driver's license with no history of DUI, DUS, or felony conviction. Current income consists of \$424 per week in worker's compensation benefits and \$525 per month is disability retirement income from the state.

Education:

Mr. Lemon reports that he graduated from Charleston High School in 1980. He attended classes at the Clemson University Agriculture Extension for six months and earned a certificate in Horticulture. Through a process of work experience and testing he earned a Wastewater Operator Class B License. Mr. Lemon served ten years in the U.S. Army. He is a veteran of Desert Storm I. He was active for 6 years as a Cannoneer and served 4 years in a reserve unit as an Artillery Observer.

Results of *The Wide Range Achievement Tests, 3rd Revision, Blue Form* are:

<u>Standard Score Percentile Grade Equivalent</u>			
Word Reading-	81	10	7.5
Sentence Comprehension-	82	12	8.9
Math Computation-	80	9	5.1
Reading Composite-	79	8	N.A.

Reading Scores fall in the *Low Range*. Math Score is in the *Low to Below Average Range*.

Intelligence was assessed with *Revised BETA III IQ Test*:

IQ- 84

Percentile- 6

Scores fall in the *Low-Average of intelligence*.

Employment History:

Mr. Lemon was employed by The Mt. Pleasant Water Works as a Maintenance Mechanic for 6 ½ years. He reports that he was earning \$16.75 per hour at the time of injury. He worked six months as a Sales Associate at Northern Tool. Mr. Lemon worked 3 years at Lowes Home Improvement as Head of the Plumbing Department. He worked 5 years as a Sales Associate in the Plumbing Department of Home Depot. Mr. Lemon states that his occupation at the time of injury required him to lift heavy water pipe weighing from 50 to 100 pounds. This would be consistent with the U.S. Department of Labor's definition for HEAVY WORK or:

"Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects."

Conclusions and Recommendations:

David Lemon is a fifty-two year old Maintenance Mechanic for the Mt. Pleasant Water Works. He injured his back at work on May 8, 2012 and was diagnosed with two levels of disc herniations in his lumbar spine. He had surgery for Posterior Lumbar Interbody Fusion L4-5 and L5-S1 on October 5, 2012. He has attained MMI and is rated with 24% permanent impairment of the spine by his spine surgeon James Aymond, M.D. Permanent restrictions on activity provided by Dr. Aymond are designated Sedentary-Light with a 15 pound weight limit and no repetitive bending and twisting of the lumbar spine. Treating pain management physician Thomas Duc, M.D. rated impairment as 24% to the lumbar spine with 7% added to the left lower extremity and 7% added to the right lower extremity. Activity restrictions limit lifting to ten pounds, no sitting or standing greater than two hours, no crawling, climbing, pushing or pulling. Narcotic pain medications are noted by Dr. Duc to impair judgment and preclude Mr. Lemon from operating machinery. In addition Mr. Lemon requires position changes frequently for comfort. He cannot run, jump, climb or crawl. He is unable to easily walk over rough uneven ground or steep inclines. He cannot use his spine or lower extremities for strenuous or repetitive activity. Mr. Lemon is slow and compromised in all functions of daily living. He is also experiencing periods of disruptive depression. At this time he is living a highly sheltered sedentary lifestyle. Mr. Lemon reports little benefit obtained

from surgery as pain levels remain high and regular administrations of narcotic medication are required daily for symptoms management. This of course has led to significant cognitive impairment as well as issues of impaired coordination and reaction times. Mr. Lemon has not been able to work since the day of his accident and reports that he was terminated from employment in June 2012. He was subsequently awarded total disability retirement benefits from the S.C. State Disability Retirement System.

As to his future Mr. Lemon is in a difficult place. All of his past work experience has been dependent on good physical conditioning, being able to walk and stand for long periods, and use his back for exerting significant force. He has no experience with sedentary clerical, administrative, managerial, or technical work. With his current limitations Mr. Lemon will be excluded from production and manufacturing work, agriculture, construction, and forestry occupations. His medications will prevent work in commercial driving, equipment operation, and being around dangerous machinery. He is precluded from the food and beverage industry, service occupations, and any other occupation requiring the exertion of significant forces, meaningful standing, sitting, or repetitive use of the spine. Mr. Lemon has lower extremity pain and weakness that will prevent him from working on his feet. He has sitting intolerance that precludes desk and bench work. With sedentary-light restriction, this essentially rules out all forms of employment. There is of course the medication issue and side effects that will interfere with attention, concentration, alertness, and potentially could lead to errors in the workplace. Any employer that hires Mr. Lemon must assume this liability. Furthermore Mr. Lemon did not adequately profit from his educational experience and has significant academic deficits that likely will disqualify him from sedentary work. Typically, these jobs are reserved for those with higher education or technical skills. As someone who has performed physical work his entire life Mr. Lemon is not adequately prepared for work behind a desk.

Before Mr. Lemon can perform work he must be able to actually obtain employment. With his history this is likely to be extremely difficult. Mr. Lemon is known to have been injured at work and required spine surgery. All employers know that there is a high rate of recurrent back injury. None want it to happen in their workplace. Mr. Lemon's history of worker's compensation claims will not endear him to prospective employers. Mr. Lemon has medical restrictions that require major workplace accommodations. He has not demonstrated an ability to consistently work at a sustained productive pace, meet daily attendance expectations, or adhere to the standards of 8-hour days and 40-hour week. There are the issues of liability associated with pain medications. Mr. Lemon has basically been reduced to a nonskilled level and has been absent from the workforce for

nearly two years. He presents with so many red-flag issues that I do not believe there is a reasonable chance employers will give him serious consideration for a job. In the unlikely situation that he does get an opportunity to work, I do not believe Mr. Lemon is capable of performing it to the expectations or standards of gainful employment.

Therefore, based on the available information and with a reasonable degree of vocational certainty, it is my opinion that the impairments from the 2012 work injury have rendered David Lemon incapable of performing gainful employment. In my opinion he is completely disabled. Mr. Lemon has reached a point of maximum medical improvement and is not expected to further improve. As such his disability is most probably permanent. He is not a candidate for vocational rehabilitation. Mr. Lemon has been determined totally disabled by the state disability system. I believe that he meets the criteria for social security disability retirement and see this as a viable option. Unfortunately, I have nothing to offer Mr. Lemon from the vocational perspective.

Submitted by:



David R. Price M. ED., CRC

Certified Vocational Rehabilitation Counselor

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1205924
Carrier File #: 2012-001473
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: David Lemon SSN: _____ Employer's Name: Mt. Pleasant Waterworks
Address: _____ Address: 1619 Rifle Range Road
City: _____ State: SC Zip: _____ City: Mt. Pleasant State: SC Zip: 29465
Home Phone: _____ Work Phone: () _____ Insurance Carrier: State Accident Fund
Preparer's Name: Carl H. Jacobson Law Firm: Urchio, Howe & Krell Preparer's Phone #: (843) 723-7491

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 05/08/2012
(m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Matt Schonfeld, Esq., Wilson, Jones, Carter & Baxley address 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464 on the 20 day of January 2015 by ☒ first class postage _____ certifi-
mail _____ personal service.

Preparer's Signature

Attorney for Claimant
Title

Carl@urchio.com
Email

January 20, 2015
Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

S.C. WORKERS' COMPENSATION COMMISSION
P.O. BOX 1715, 1512 Marion Street
Columbia, South Carolina 29202-1715

WCC FILE #1205924
Carrier File #2012-001473
Employer FEIN #

1. Did the Single Commissioner err by finding "as of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170." (Finding of Fact No. 3).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this

case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

2. The Single Commissioner erred in concluding that "§42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive." (Conclusion of Law No. 3)

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

3. The Single Commissioner erred in ordering that the Defendants be credited "for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing." (Order and Award).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability

benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10(A), §42-9-170(B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

Respectfully Submitted,

Carl H. Jacobson

January 20, 2015

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1205924

David B. Lemon,)
)
Claimant,)
)
v.)
)
Mt. Pleasant Waterworks,)
)
Employer,)
)
and)
)
State Accident Fund,)
)
Carrier/Defendants.)
)

COPY

FULL COMMISSION HEARING

Monday, April 20, 2015
1:33 p.m. - 1:57 p.m.

The Full Commission Hearing was heard before Commissioners Melody L. James, Aisha Taylor and Avery B. Wilkerson, Jr. at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 20th day of April, 2015, before Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina.



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APPEARANCES

Carl H. Jacobson, Esquire
 Uricchio, Howe, Krell, Jacobson, Toporek, Theos, &
 Keith, P.A.
 17 ½ Broad Street
 Post Office Box 399
 Charleston, South Carolina 29402-0399
 Attorney for the Claimant

Matthew A. Schonfeld, Esquire
 Holder, Padgett, Littlejohn, & Prickett, L.L.C.
 210 Wingo Way, Suite 201
 Mt. Pleasant, South Carolina 29464
 Attorney for the Respondent

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



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1 COURT REPORTER: Today is Monday, April 20, 2015.
2 This is South Carolina Workers' Compensation
3 Case number 1205924. This is the case of David
4 B. Lemon, Claimant versus Mt. Pleasant Water
5 Works, Employer, and the State Accident Fund.
6 The Appellant is the Claimant represented by
7 Carl H. Jacobson. The Respondent is
8 represented by Matthew Schonfeld. Each side is
9 allowed 10 minutes for oral argument, and the
10 appellant three minutes in reply. You are
11 requested to argue the grounds of exception and
12 stay within the record.

13 ARGUMENT BY MR. JACOBSON:

14 MR. JACOBSON: Good afternoon. I'm Carl Jacobson and
15 I represent David Lemon. He is the Appellant
16 in this case. It's unusual to appeal a case
17 where an Employee was awarded permanent total
18 disability benefits. But we are appealing one
19 part of that Order. In addition to awarding
20 the Claimant permanent total disability
21 benefits, the Hearing Commissioner awarded the
22 Defendants a credit for weeks that have been
23 paid to the Claimant for prior injuries while
24 employed by the same Employer. We maintain
25 that the code section that the commissioner



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1. referenced for his authority to award credit
2 for multiple claims by the same Employer does
3 not provide the statutory authority for the
4 commissioner. I would like you to look, if you
5 would please -- I would like to refer you to
6 the order of the single commissioner to the
7 findings of fact. Finding of fact number one,
8 which is on page 12 of the Order, I find, based
9 upon the greater weight of the evidence, the
10 Claimant is permanently and totally disabled
11 pursuant to South Carolina Code Section 42-9-
12 10, 42-9-10, not 42-9-30, not 42-9-20, but 42-
13 9-10. And as such his claim for permanency not
14 restricted to the schedule, because he has an
15 injury to both body parts, his back, and his
16 legs. And he cited Singleton versus Young
17 Lumber. As you know, Singleton versus Young
18 Lumber indicates that when a claimant has an
19 injury to more than one body part, he can
20 claim general disability under wage earning,
21 wage earning which is 42-9-10. Commissioner
22 then went on to state that under paragraph
23 three, I find that this is the Claimant's fifth
24 work accident while employed by Mt. Pleasant
25 Water Works. He referenced injuries to the



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1 shoulders and to the back. And the
2 commissioner gave a credit for 321 weeks and
3 I am representing to you that 199 weeks -- and
4 I will -- I'm sure that defense counsel will
5 stipulate 199 weeks is the total number of
6 weeks that we're talking about today. That's
7 the credit for the prior benefits that the
8 Claimant received for the multiple injuries
9 while employed by the same Employer. One-
10 hundred and ninety-nine weeks, that's the
11 subject of today's case. Now, the commissioner
12 said that -

13 COMMISSIONER WILKERSON: I mean, do y'all agree on
14 that?

15 MR. JACOBSON: We agree on 199, don't we?

16 MR. SCHONFELD: Yeah.

17 MR. JACOBSON: Now, the question, but the question
18 is this. The question is, did the commissioner
19 error by awarding the credit for the 199 weeks.
20 Page 15, commissioner found 42-9-10 provides
21 for permanent total disability. 43-9-170
22 provides for the maximum exposure, the payment
23 of disability benefits is 500 weeks for
24 multiple claims filed by an employee by the
25 same employer. The maximum number is 500



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1 weeks. I specifically find there's no need to
2 look any further than the plain language of 42-
3 9-170 to determine the number of weeks of
4 credit the defendant's entitled to receive,
5 that's the error. That is an error of law.
6 There's no factual disputes here. Now, I also
7 have included with my brief, the code section
8 42-9-170, because that is the authority the
9 commissioner relied on in this case. And the
10 only authority that he relied on and decided to
11 give the employer credit for multiple -- for
12 when you have prior injuries on the same
13 employer. 42-9-170 is broken down in two
14 different sub-sections A & B. A doesn't apply
15 because that sub-section was effective only
16 until June 30, 2008. It doesn't apply. Now,
17 the only sub-section that could possibly apply
18 is B. Does that apply in this case. The
19 answer's clearly no. Why, because this code
20 section says that if an employee receives a
21 permanent injury, as specified in 42-9-30,
22 which is a scheduled or the second paragraph in
23 section 42-9-10, which is a paragraph dealing
24 with the total loss of use of two hands, two
25 feet, two legs, and so forth. After having



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1 sustained another permanent injury in the same
2 employment, then in no case can the total
3 amount exceed 500 weeks. So if the -

4 **COMMISSIONER TAYLOR:** It doesn't say then, it says
5 and.

6 **MR. JACOBSON:** But it says, if an employee receives a
7 permanent injury as specified in 42-9-30, and
8 in this case the permanent injury that the
9 commissioner awarded is permanent total
10 pursuant to 42-9-10. What the second paragraph
11 of 42-9-10, and that's this paragraph right
12 here (indicating). Yeah, 42-9-10 is broken out
13 in several paragraphs. A is the general
14 disability statute dealing with Singleton,
15 where you have the loss of use of the back and
16 multiple members to make a lost wage capacity.
17 The commissioner didn't say in his Order, 42-9-
18 10(a), he said 42-9-10 and referenced
19 Singleton. So it has to be 42-9-10(a). It
20 can't be the quadriplegic statute. It can't be
21 this section because we don't have a loss of
22 use -- a total loss of use of hands, arms,
23 shoulders, legs and hips. B applies in the
24 case where you have a claimant who has both
25 hands chopped off by a press or something like



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1 that. A is the general disability statute
2 dealing with lost earnings where you have a
3 Singleton type case. So that's the type of
4 disability that's been awarded in this case.
5 So let's go back to 42-9-170. There's a
6 preface -- there's a preface to this particular
7 code section. In order for this code section
8 to apply, an employee has to receive a
9 permanent injury, as sustained in 30, which we
10 don't have in this case. But the second
11 paragraph for 42-9-10, that is the only way
12 that this statute can be read to apply in this
13 case. Now, if this award in this case were
14 made pursuant to 42-9-30, the 500 weeks would
15 apply. If by some strange coincidence, the
16 commissioner made a finding of 42-9-10(b),
17 which we don't have total loss of the use of
18 the hands, feet, and so forth, then this would
19 apply. I don't know why the legislature did
20 this. I suspect I know why, that's because
21 before they had the statute an interim employee
22 could receive Second Injury Fund benefits.
23 Where the employer would pay permanent total,
24 then be reimbursed by the Second Injury Fund.
25 But the legislature, whether they meant to or



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1 not, only allows for a credit and for this
2 section of 500 weeks to apply only when you
3 have permanency awarded pursuant to 42-9-30, or
4 the second paragraph of 42-9-10(b). Now,
5 defense counsel is going to argue in this case
6 that the commissioner's finding of perm total
7 was pursuant to 42-9-10(b). And that's a real
8 stretch of the imagination, because in this
9 case we don't have the loss -- the kind of loss
10 that's actually covered by B. 42-9-10(b)
11 contemplates the total loss of the use of the
12 hands, or a total loss of use of the feet, or
13 the hips and so forth. And that's a schedule,
14 it's not -

15 COMMISSIONER WILKERSON: Tell me where it says the
16 total loss?

17 COMMISSIONER TAYLOR: It doesn't say total.

18 MR. JACOBSON: It doesn't say total loss, but it says
19 contemplate ---

20 COMMISSIONER WILKERSON: It says the loss of.

21 MR. JACOBSON: That means it's contemplating to be
22 the loss of. Otherwise, if you have the loss,
23 does that mean if you have a claimant that has
24 10 percent loss of use of both hands, he's
25 entitled to perm total and the 42-9-10(b)?



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1 COMMISSIONER WILKERSON: Depends on what his job is.

2 If he's a taxi car driver.

3 MR. JACOBSON: But I don't -- well, and that
4 wouldn't be the Singleton case. And the
5 commissioner specifically found and 42-9 -- and
6 under findings of fact awarded benefits
7 pursuant to 42-9-10 and referenced Singleton,
8 which is a general disability statute. I think
9 in this particular case, considering the fact
10 that the Claimant only had a seven percent loss
11 of use of both legs, it would hard to believe
12 that he was awarded perm total because of seven
13 percent loss of use of both legs.

14 COMMISSIONER TAYLOR: Well, again, doesn't that
15 depend on what his job is and whether that
16 seven percent affected the job. Because B does
17 not say total. It doesn't say total.

18 COMMISSIONER WILKERSON: It just says loss of.

19 COMMISSIONER TAYLOR: It just says loss of. And in
20 this case, he lost seven percent to each leg.

21 MR. JACOBSON: I guess you have to look at the
22 contents of the findings. You have to look at
23 the whole Order in its entirety to make sense.
24 And see what is the commissioner awarding in
25 this case. To look at -- the simplest answer



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1 to that is you look at finding number one,
2 where it says 42-9-10, he talks about
3 Singleton. He doesn't say I'm finding that
4 this man is permanently totally disabled
5 because of the loss of use of both hands or
6 both feet. Now, you can remand this back to
7 the commissioner and ask, did you mean 42-9-10
8 A or B, if you want, or you can just read the
9 Order in its entirety and look at the evidence
10 that was presented and give it a meaning that
11 just is consistent with the evidence in this
12 case. The commissioner also relied upon the
13 vocational expert testimony and that also was
14 based on wage earning. Wage earning which is
15 Singleton, which is 42-9-10(a). But we could
16 have it remanded, but I think it would be a
17 waste of time. I think it's only one common
18 sense practical application that if the reading
19 of this to be 42-9-10(a).

20 COMMISSIONER TAYLOR: And you'll have a few minutes,
21 but I do want you to address. So even if we,
22 you know, look at the various points of the
23 statute. Essentially, your argument is that a
24 person could collect more than 500 weeks from
25 the same employer, generally speaking.



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1 MR. JACOBSON: Only -- but no more than 500 weeks
2 per accident. And that's what I think is the
3 limitation. I think that if this statute 42-9-
4 170 doesn't apply, then you're back to 42-9-
5 10(a). And I think there's a limitation of 500
6 weeks. So I believe that an individual who's
7 injured and has multiple injuries with the same
8 employer can receive 50 weeks for this
9 accident, 100 weeks for this accident, 500
10 weeks for this accident. As long as there's no
11 more than 500 weeks per accident. Because 42-
12 9-10(a) talks about the limitation being -

13 COMMISSIONER WILKERSON: Tell me where the law says
14 per accident.

15 MR. JACOBSON: Under 42-9-10(a).. It says when -

16 COMMISSIONER WILKERSON: We don't know that he chose
17 42-9-10 -

18 MR. JACOBSON: 42-9-10(a) says that when incapacity
19 for work resulting from an injury is total,
20 then the amount, the compensation cannot exceed
21 500 weeks. So if 42-9-170 doesn't apply, and
22 it doesn't, if it doesn't apply then they're
23 limited to 500 weeks. So therefore, the
24 employee is in no -- the legislature maybe,
25 they made a mistake, maybe they did make a



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1 mistake. All I can do is read the statute.
2 And 42-9-170 clearly does not apply when the
3 individual is awarded benefits under 42-9-
4 10(a). Now, if you want a find 42-9-10 that
5 the commissioner meant 42-9-10(b), I think
6 that's a stretch in this case, based on a seven
7 percent impairment to the legs and no reference
8 to the code section.

9 COMMISSIONER WILKERSON: He doesn't say what section
10 that he found it under.

11 MR. JACOBSON: He doesn't, we can remand it back to
12 the commissioner and find what section he
13 wanted.

14 COMMISSIONER WILKERSON: If it's the entire section
15 and you would take the encompassing entire
16 section and apply the law as opposed to pick A
17 or B or C, would you not?

18 MR. JACOBSON: Well, you know, it's not C because
19 that deals with -

20 COMMISSIONER WILKERSON: Absolutely. I don't
21 disagree with that.

22 MR. JACOBSON: You know it's not B because that
23 really is -- I don't how many people -

24 COMMISSIONER WILKERSON: Tell me how we know that.
25 Tell me how we know that.



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1 MR. JACOBSON: Because the common interpretation of
2 B is when you have loss of use of both hands
3 and both feet, such that the injury and the
4 disability is resulting from that. Now, how do
5 I know what -- why am I saying 42-9-10(a),
6 because the commissioner specifically used the
7 word Singleton, which is -- Singleton stands
8 for the proposition of wage earning. There are
9 two ways of getting permanent total. One is
10 under the schedule and one is under general
11 disability.. Now, if you look at the -- go
12 ahead.

13 COMMISSIONER JAMES: I don't want to cut you off,
14 but I thought if we go ahead and hear, unless
15 some of the commissioner's wants to go ahead
16 and hear the other argument, then we're going
17 to have questions for both.

18 MR. JACOBSON: Okay. Sure.

19 COMMISSIONER JAMES: I'm sure we won't cut it off at
20 three minutes. We'll probably have some
21 additional questions and I'm sure we'll have
22 some additional questions of his response.

23 ARGUMENT BY MR. SCHONFELD:

24 MR. SCHONFELD: All right. Good afternoon,
25 Commissioners. May it please the Commission.



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1 Looking at the context of the injury and the
2 nature of it and how Mr. Lemon was found to be
3 permanently and totally disabled it's going to
4 become clear that the single commissioner's
5 decision to award the credit to Defendants for
6 the 199 week was the correct decision.

7 COMMISSIONER JAMES: Did he do it under B? Is that
8 your theory. That's what Mr. Jacobson says
9 it's going to be.

10 MR. SCHONFELD: I believe it's under B,
11 Commissioner.

12 COMMISSIONER JAMES: Well, let me ask you this. If
13 you read B, the loss of both hands, and you
14 read it not to be the entire loss of both
15 hands, just some loss of hands. Then a severe
16 carpal tunnel syndrome case that a person can
17 do something else, they wouldn't have to prove
18 the loss of income. They could just go under
19 this and say they were P&T, so you basically
20 just change the whole construction of all of
21 the act. Tell me how that wouldn't be complete
22 loss?

23 MR. SCHONFELD: Because there are claimants -- under
24 42-9-10, you still have to prove A. Just
25 because you have loss of use -



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1 COMMISSIONER JAMES: It says loss of both hands, if
2 you read B, okay, because we've got A, B, and
3 C. If you read B, it says loss of both hands
4 and then, of course, you can have two arms.
5 You get combination of anything. And then it
6 says, it constitutes total and permanent
7 disability. Okay, as opposed to A, with the
8 Singleton -- going beyond Singleton and then
9 showing the continued disability. So how --
10 and I'm just trying to read everything
11 together. But I've got to read it also as an
12 act. And I don't know if perhaps,
13 legislatively, you know -- and if it is that
14 way, it is that way. But if you interpret B to
15 be that way, and I read it's plain meaning, it
16 says loss of those body parts constitutes P&T.
17 It doesn't say you have to come in with both.
18 So in that case somebody could come in -- if
19 you argue it's any loss, they could come in and
20 say, well, this was my carpal tunnel with both
21 hands and I don't have to show you anything
22 else, Commissioner, other than B. And I don't
23 think that your construction in that case would
24 be the same construction that you're arguing
25 today. So I'm just trying to, you know -- I'm



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1 trying to put everything together here. So
2 that's my question.

3 MR. SCHONFELD: Commissioner, first of all, the
4 reference to Singleton doesn't mean that the
5 commissioner was only talking about A just by
6 virtue of the fact that Singleton's referenced.
7 Singleton -

8 COMMISSIONER JAMES: I didn't say that. I don't
9 know what the commissioner was talking about.
10 We may have to make that decision or we may
11 have to remand it to him. But what I'm asking
12 you, your position then would be that it would
13 be in B. I'm not saying just because he
14 happened to mention Singleton. But your
15 construction in B -- and you think the
16 commissioner meant B. How did the commissioner
17 mean B, and B not mean what I just said, that
18 it could possibly mean under your construction.

19 MR. SCHONFELD: Commissioner, B, first of all,
20 there's no qualification as to the extent of
21 the loss. And just like 42-9-30, the schedule
22 member that uses the same language, loss of
23 this member, loss of that member. So -- and it
24 doesn't say total loss. It's loss of use of
25 his member, you get a max of max weeks. So the



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1 language is consistent in the 42-9-10, 20, and
2 30 as far as loss. The second -

3 COMMISSIONER JAMES: So someone can come in with
4 carpal tunnel in both hands -- or let's say
5 their a desk person and they have some loss of
6 use in their legs. And they could do -- and
7 you read this it says the loss constitutes
8 total and permanent disability. So any loss is
9 how you're interpreting that.

10 MR. SCHÖNFELD: It can be proven under B with any
11 extent of loss. So someone that relies heavily
12 on both of their hands, somebody in the
13 logging industry that has to be maneuvering
14 heavy items, it doesn't -- it may not take
15 much loss of use of each hand. For example, as
16 a result of carpal tunnel syndrome and surgery
17 and the resulting disability thereafter, it may
18 not take much disability for a person like
19 that, given their extent of education, or lack
20 thereof, to be found permanently and totally
21 disabled. I don't believe that B stands for
22 the proposition that the Claimant is removed of
23 the duty to still prove -

24 COMMISSIONER JAMES: It says constitutes. If I read
25 it the way you say it, it says constitutes.



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1 Whereas A has to do with continuing disability.
2 Which then you see people get out and they show
3 the evidence of the disability voc assessment
4 or whatever avenues.

5 **MR. SCHONFELD:** Commissioner, B, it can't be read in
6 a vacuum just in and of itself.

7 **COMMISSIONER JAMES:** That's what I'm saying. That's
8 why I'm reading all of it. I'm looking at the
9 whole act. And if I read it that way I have to
10 look and say how it's going to be interpreted
11 on another day too.

12 **MR. SCHONFELD:** Commissioner, I think B still
13 references back to A, because it says to be
14 compensated according to the provisions of this
15 section. So the two of them are inextricably
16 intertwined. I think when the legislature in
17 42-9-170 was making a distinction, when it
18 specifically wrote the second paragraph of 42-
19 9-10, I think the only reason why they were
20 doing that was to make sure that we're not
21 talking about C. We're not talking about
22 permanent brain injury. We're not talking
23 about lifetime benefits. Because it could be
24 talking about lifetime benefits if there's
25 limitation of 500 weeks. Because they say,



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1 okay, it's got be under the second paragraph.
2 So that coupled with the language and the
3 injury as described by the commissioner makes
4 its clear that although he didn't put 42-9-(b)
5 (sic) in there, when he says here's why I find
6 that the claim is entitled to permanent and
7 total disability under 42-9-10. It's because
8 of loss of use of the back and injury to both
9 legs, which puts it squarely within paragraph
10 B. And that's why the decision that it applies
11 was correct. And then moving on to the
12 decision to award credit was also correct.
13 Because 42-9-170 makes it clear that when an
14 injury under 42-9-30, or the second paragraph
15 of 42-9-10 happens after some other permanent
16 injury and it doesn't have that limiting
17 language. It doesn't limit it to body parts.
18 It doesn't limit the compensation either. It
19 doesn't limit the compensation to temporary
20 compensation, or compensation that's awarded
21 for permanent partial disability. It just says
22 permanent injuries, same employment and
23 compensation. Mr. Lemon was awarded
24 compensation for prior injuries that were
25 permanent in nature with the same employer.



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1 Therefore, the max amount he can get in total
2 is 500 weeks. And he would have exceeded that
3 were he to be awarded a permanent and total
4 disability from this injury, in and of itself.
5 So not only was the decision to find that 42-9-
6 170 applied in this case, but the decision to
7 award the credit as it was awarded, which is
8 199 weeks, was also proper.

9 COMMISSIONER WILKERSON: Y'all agreed to some credit
10 on the record anyway.

11 MR. JACOBSON: If the commission had ruled that way,
12 we would have agreed to that. That was only 20
13 weeks -- if you look at all the Form 19s in the
14 case. The only Form 19 that actually laid out
15 a certain number of weeks for a back injury was
16 like 22 weeks. And that was a -- my argument
17 to commission was if you were going to find a
18 credit, that would be the only credit that would
19 apply.

20 MR. SCHONFELD: Thank you. I haven't yielded any of
21 my time.. I appreciate it.

22 MR. JACOBSON: Well, he asked me a question.

23 COMMISSIONER JAMES: We're not going -- we're letting
24 everybody go at it.

25 COMMISSIONER WILKERSON: We'll give you some extra



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1 time.

2 COMMISSIONER JAMES: Yeah.

3 MR. SCHONFELD: And just to briefly talk about
4 whether a remand would appropriate in this
5 case. I don't know that it's needed,
6 especially given the language that was used in
7 the findings of fact and that this is a very
8 specific question of law and interpretation of
9 statute. The full commission is perfectly
10 within its purview of finding additional facts
11 of its own, which it can do per the statute.
12 So I don't that remand gets us any further than
13 we need to get. I think it's clear from the
14 findings of fact, the language and the type of
15 injury that the commissioner took into account
16 when he found that Mr. Lemon was at permanently
17 total disability.

18 MS. JAMES: Well, whether it's the single
19 commissioner or whether it's us someone has to
20 address whether it was under B or A, how the
21 award was given in order to be able to apply
22 42-9-170. Because the legislatures is specific
23 with how they want the credit applied.

24 MR. SCHONFELD: Which can be done in this case,
25 Commissioner, based on all of the findings, the



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1 fact and the evidence that was submitted.
2 There can be a finding extrapolated from all of
3 that it was really under the second paragraph
4 of 42-9-10 making 42-9-170 applicable in this
5 case. There's enough evidence that was
6 considered and is findings of fact. I think
7 we're explicit enough for there to be an
8 additional finding of fact or at least an
9 addendum to that finding of fact sustaining the
10 single commissioner's decision in this case.
11 Thank you.

12 REPLY BY MR. JACOBSON:

13 MR. JACOBSON: I think we are at the point that you
14 have to look at 42-9-170. That only applies to
15 give the employer a credit, if in this
16 particular case, the commissioner made specific
17 findings with regards to this particular
18 permanent and total disability claim. If the
19 commissioner had intended to give a credit
20 pursuant to this statute, he also would have
21 specifically had to find perm total pursuant
22 to 42-9-30 or he would have had to make a
23 specific finding of 42-9-10. He did not. To
24 the contrary, he found the greater weight of
25 the evidence was permanent and total disability



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1 and referenced Singleton. That clearly puts
2 into focus the economic model of disability.

3 COMMISSIONER WILKERSON: How do we know that, based
4 on his findings? He says it is clearly under
5 42 -

6 MR. JACOBSON: Because 42-9-10, the second paragraph
7 of 42-9-10 just simply doesn't apply in this
8 case, because I agree with Commissioner James
9 that if you were to interpret it that way, then
10 all a claimant would have to do is come into
11 the court and say I've got a partial loss of
12 use of both hands and both feet, partial loss
13 and that would constitute perm total
14 disability. I don't know if any commissioners
15 that made any awards based, as a matter of law,
16 that just when you have partial loss of use of
17 a hand, both hands, that that constitutes perm
18 total.

19 COMMISSIONER WILKERSON: I've had one. Five percent
20 carpel tunnel syndrome, perm total disabled.

21 MR. JACOBSON: But there would be no discretion
22 under that statute if you have -- under 42-9-
23 10, second paragraph there wouldn't be
24 discretionary for the commissioner. It says it
25 constitutes as a matter of law. Any partial



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1 loss of use whether or not the persons back to
2 work or not. So under that code section, you
3 could have somebody who has partial loss of use
4 of the hands and working and get perm total.
5 I don't think that was the intent of 42-9-10,
6 the second paragraph. Now, I've read this code
7 section hundreds of times and never really --
8 it didn't make any sense. I didn't have to
9 interpret it until this case. So I think maybe
10 in the past a lot of commissioners or a lot of
11 cases have been -- just automatically employers
12 were given credits for prior awards or maybe
13 not. It may just have happened. But now that
14 you're looking at the statute, there's no way
15 around it. Now, I have a reason why I think
16 the statute's written this way. And that's
17 this, why should an employee who's permanently
18 totally from an injury, why should that
19 employee be treated any differently than an
20 employee who's injured on the job and didn't
21 have injuries from any other employer. In
22 other words, if I'm injured and I get a
23 permanent injury from job A and I go to work
24 for job B and I get perm total, there's no
25 credit from this second job for the



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1 compensation I received from the first job.
2 But the reason this statute was designed or
3 written this way was because under the old law
4 there was an incentive for employers to
5 continue to have their employees employed even
6 after successive injuries and they were limited
7 to no more than 500 weeks. But the employee
8 could get additional benefits by the Second
9 Injury Fund. And that's the missing link.

10 COMMISSIONER WILKERSON: You can't get additional
11 benefits -

12 MR. JACOBSON: Under the old law -

13 COMMISSIONER WILKERSON: -- a recovery for the
14 amount paid because of that.

15 MR. JACOBSON: Right. So the incentive for the,
16 under the old law the incentive for the
17 employer was I'll keep this person employed and
18 I may have to pay perm total, but I'm going to
19 get my money back from the Second Injury Fund
20 because I'm being a good employer by keeping
21 this injured employee on the job. When the
22 legislature changed this particular law, they
23 left that part out.

24 COMMISSIONER WILKERSON: Well, let me ask a
25 question. The part you may have -



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1 COMMISSIONER JAMES: That may be the point. They
2 may have constructed it in a way that they
3 meant to take the B out and just say 42-9-10,
4 because it almost mirrors the one that they
5 said is no longer valid.

6 COMMISSIONER WILKERSON: Let me ask how do you
7 interpret, and in no case exceeding 500 weeks?

8 MR. JACOBSON: That only applies if the first part
9 applies. In other words, you have to read --
10 it says under B, if an employee receives a perm
11 injury -

12 COMMISSIONER WILKERSON: He included both A and B in
13 his decision, did he not?

14 MR. JACOBSON: In his decision he said -- in the
15 decision the commissioner simply found that the
16 Claimant's permanently total disabled pursuant
17 to 42-9-10. He did not say anything about 42-
18 9-10(b). He did not say anything about 42-9-
19 30.

20 COMMISSIONER WILKERSON: He just said 42-9 -

21 MR. JACOBSON: 42-9-10.

22 COMMISSIONER WILKERSON: Yeah, but he also said -

23 MR. JACOBSON: And then he also said, I'm
24 interpreting this as, you know, Singleton
25 applies in this case.



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1 COMMISSIONER WILKERSON: It says, I specifically find
2 that I need not look any further than the plain
3 language of SC Code 42-9-170 -

4 MR. JACOBSON: That's the error. That's what we're
5 alleging is error law. Because what he did is
6 he said, I'm looking at 42-9-170 and I'm seeing
7 that -- what he said, was that if you look 42-
8 9-170(b) --

9 COMMISSIONER WILKERSON: He didn't say B.

10 MR. JACOBSON: Well he said, 42-9-170, he also said
11 that A doesn't apply, so B has to apply. If
12 you look at 42-9-170.

13 COMMISSIONER WILKERSON: That's fair.

14 MR. JACOBSON: You know, I mean, if you look at that
15 then the commissioner's saying, you don't have
16 to look any further than this. He says under
17 that code section, nobody can get more than 500
18 weeks. But that's not what that law says at
19 all. The law says that section only says that
20 you can't get more than 500 weeks if you're
21 disabled pursuant to 42-9-30 for the second
22 paragraph 42-9-10.

23 COMMISSIONER WILKERSON: That's fine.

24 MR. JACOBSON: Any other questions?

25 COMMISSIONER JAMES: No. This concludes the



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1 hearing.

2 (There being nothing further, the hearing concluded
3 at 1:57 p.m.)
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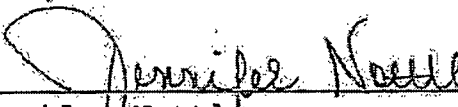
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CERTIFICATE

This is to certify that the within hearing consisting of twenty nine (29) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on December 2, 2016.



Jennifer Nottle
Court Reporter

Notary Public for South Carolina
My Commission Expires: July 11, 2023



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APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1205924

DAVID LEMON,
vs.

EMPLOYEE,
CLAIMANT/APPELLANT,

MT. PLEASANT WATERWORKS,
AND

EMPLOYER,

S.C. STATE ACCIDENT FUND,

CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina
on April 20, 2015, upon notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

September 11th 2015

REMANDED

APPEARANCES:

Claimant represented by Carl H. Jacobson, Esquire,
of Unicehio, Howe, Krell, Jacobson, Toporek, Theos
& Keith, P.A., Charleston, South Carolina.

Defendants represented by Matthew A. Schonfeld,
Esquire, of Willson Jones Carter & Baxley, P.A.,
Mount Pleasant, South Carolina.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This claim involves an admitted work accident and related injury which occurred on March 8, 2012. As a result of this injury, Defendants admitted injury to the lower back only and provided causally related medical treatment for the same. Claimant alleges causally related injuries to the lower back and both legs. A hearing on permanency was held before Commissioner T. Scott Beck on September 11, 2014.

At the single Commissioner hearing, it was Defendants' position that Claimant's entitlement to permanency was limited to permanent partial disability to the back in an amount less than 50% pursuant to § 42-9-30(21). In the alternative, if Claimant was found to be permanently and totally disabled, Defendants asserted entitlement to a credit of 321 weeks of benefits against such an award, 199 weeks of which were paid to Claimant in the form of TTD and PPD relating to prior injuries while working with the same employer, Mount Pleasant Waterworks, pursuant to §42-9-170.

It was Claimant's position that as a result of injuries to the lower back and both legs he has been rendered permanently and totally disabled under §42-9-10. Claimant further asserted that §42-9-170 does not apply to the facts of this case, so with respect to credit against an award of permanent and total disability, Claimant argued that Defendants should only be entitled to credit for TTD paid on the present claim, which by the date of hearing before the single Commissioner was 122 weeks.

On January 7, 2015, a Decision and Order was issued by the single Commissioner containing the following findings of fact, conclusions of law and order/award:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. *Singleton v. Young Lumber*, 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.

3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.

4. I find that the award is to be paid in a lump sum.

5. I find that the Claimant is entitled to *Utica- Mohawk Mills v. Orr* language in this

order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to *James v. Anne's* he is entitled to an award for a lump sum with the insertion of *Utica-Mohawk Mills v. Orr* language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the *Utica* language.

6. The Claimant sustained an admitted injury to his back that occurred on May 8, 2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).

7. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).

8. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).

9. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).

10. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.

11. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery."

(APA 4).

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40 of the South Carolina Worker's Compensation Act, it is the determination of this Commissioner that:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

ORDER AND AWARD

IT IS THEREFORE ORDERED that the Defendants shall pay all medical expenses that

are causally related to the Claimant's compensable injuries and shall continue to provide medical treatment by Dr. Thomas Due, the authorized treating physician, and shall provide lifetime causally related medical, including medications, epidurals, facet injections, sacro-lvac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRTs), and surgical consultations.

IT IS FURTHER ORDERED that the Defendants shall pay permanent total disability benefits to the Claimant at the weekly comp rate of \$424.05 and that said payments shall be made in a lump sum payment, giving the Defendants credit for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing. The Claimant is entitled to Utica, language in the final order. The specific allocation of weeks, taking into consideration attorney's fees and expenses, with the appropriate Utica v. Orr/James v. Anne's language can be done by supplemental order.

AND IT IS SO ORDERED.

Claimant timely appealed from the portions of the Decision and Order dated January 7, 2015, that relate to credit awarded to Defendants under §42-9-170.

Based on his brief and oral arguments, the thrust of Claimant's argument on appeal is that §42-9-170 does not apply to the facts of this claim and it was therefore error for the single Commissioner to order credit to Defendants for 199 weeks of TTD and PPD paid on prior claims while Claimant was with the same employer, Mount Pleasant Waterworks. Specifically, Claimant argues that the 199 weeks of credit awarded would have been proper had his present permanent injury been under §42-9-30 or the second paragraph of §42-9-10 (which is §42-9-10(B)). However, Claimant insists that he sustained permanent and total disability under §42-9-10(A), therefore the credit should not apply.

In response, Defendants argue that the ordering of credit under §42-9-170 was proper, pointing out that Claimant was deemed to have sustained permanent injury and resulting disability to both legs, a fact and conclusion that is not disputed by Claimant, therefore making Claimant's award of permanent and total disability proper under §42-9-10(B). In light of the lack of specificity in the single Commissioner's Decision and Order with respect to which paragraph of §42-9-10 applies to Claimant's award, Defendants argue that the full Commission should make its own findings of fact based on the evidence, pursuant to the authority granted under §42-17-50, and find that Claimant was properly awarded permanent and total disability benefits under §42-9-10(B).

On appeal, the parties agree the relevant and operative statutory provision, the applicability of which is in dispute, is §42-9-170(B), which states:

If an employee receives a permanent injury as specified in Section 42-9-30 or the second paragraph of Section 42-9-10 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 five hundred weeks. If an employee previously has 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. This subsection is effective on July 1, 2008.

All proffered testimony has been taken. Such, together with all documentary evidence and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration.

STANDARD OF REVIEW

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or

inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Cl. App. 1984).

FULL COMMISSION APPELLATE PANEL DECISION

After a thorough review of the evidence, including the hearing testimony, medical evidence, exhibits, other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel, WE, THE APPELLATE PANEL, REMAND TO THE SINGLE COMMISSIONER FOR:

1. A determination of the particular subsection of §42-9-10 used for the award of the present case.
2. A determination of the statutes under which the prior awards were issued.
3. Any facts, analysis, conclusions of law, or order provisions that the single Commissioner should deem necessary in the analysis of the §42-9-170 credit issue.

ORDER/AWARD

IT IS HEREBY ORDERED that this claim is hereby remanded to Commissioner T. Scott Beck for a determination of the matters set forth above.

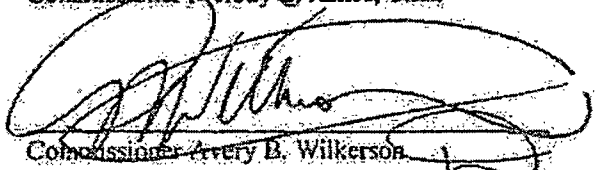
IT IS SO ORDERED.

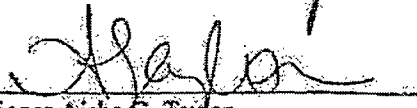
CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 11, 2015


Commissioner Melody L. James, Chair


Commissioner Avery B. Wilkerson


Commissioner Aisha G. Taylor

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1205924

David B. Lemon,
Employee,
Claimant,

vs.

Mt. Pleasant Waterworks,

and
Employer,

State Accident Fund,

Carrier,
Defendants.

HEARING:

Original hearing held in Goose Creek, South Carolina on September 11, 2014. Issues on remand decided on December 2, 2015.

APPEARANCES:

Claimant represented by Carl H. Jacobson, Esquire of Charleston, South Carolina.

Defendants represented by Matthew Schonfeld, Esquire of Willson Jones Carter & Baxley, P.A., Mount Pleasant, South Carolina.

PURPOSE OF HEARING:

To address specific questions proposed by the Full Commission Panel and to address any other issues which may come before the Commissioner.

DECISION AND ORDER:

By T. Scott Beck, Commissioner

FILED:

May 9, 2016

I. APA SUBMISSIONS and STIPULATIONS

All evidence received in the case was outlined in the original January 7, 2015 Order and, along with the Claimant's testimony, remains a part of the Commission's file and serves as the basis upon which this decision was issued. The questions on remand are being responded to herein without the necessity of oral arguments without the necessity of oral arguments or additional submissions.

II. STATEMENT OF THE CASE

This claim involves an admitted work related injury, which occurred on March 8, 2012. As a result of this injury, Defendants admitted an injury to the low back only and provided causally related medical treatment for the same. Claimant alleged he injured not only his low back but also both legs (radiculopathy). A hearing on permanency was held on September 11, 2014.

On January 7, 2015, I issued a Decision and Order which found that the Claimant was permanently and totally disabled pursuant to S.C. Code §42-9-10 and that he had sustained permanent injuries to his back and both legs as a result of this work accident. I awarded ongoing medical care per Dodge and instructed that the Claimant's award be structured pursuant to Utica-Mohawk. I found that the Defendants were entitled to 199 weeks of credit for TTD and PPD paid on previous claims with the same employer plus an additional credit for all TTD paid per the instant claim, all of which is taken against the Claimant's 500 week award.

The Claimant timely appealed the portion of the January 7, 2015 order that related to the credit awarded to Defendants.

Defense Position Regarding the Credit

Defendants assert that the Claimant is entitled to a maximum of 500 weeks of indemnity benefits during his entire employment at Mt. Pleasant Waterworks. Because the Claimant had

already received 199 weeks for prior claims and 122 weeks of TTD as of the date of the hearing, Defendants assert that, as of the date of the hearing, the Claimant had only 179 weeks remaining to be awarded, subject to additional decrease for any other TTD benefits paid during the pendency of this action.

Claimant's Position Regarding the Credit

The Claimant's position is that the 500 week limitation is per *claim*, not per *employer*. Thus, Claimant's position is that he is entitled to 500 weeks total for this injury and would have been entitled to 500 weeks of benefits (if appropriate) for each and every one of his prior injuries with Mount Pleasant Waterworks. Claimant concedes that the TTD paid for this claim is to be subtracted from the max of 500 weeks in determining his current award but asserts that, otherwise, there is no "credit" or offset to be taken for the Claimant's prior four claims, despite the undisputed fact that TTD and PPD were paid.

Full Commission Proceedings

The Appellate Panel reviewed all evidence, including the September 11, 2014 hearing testimony, medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and the oral arguments of counsel, and remanded the following questions to be addressed:

1. A determination of the particular subsection of 42-9-10 used for the award of the present case.
2. A determination of the statutes under which the prior awards were issued.
3. Any fact, analysis, conclusions of law, or order provisions that I deem necessary in the analysis of the 42-9-170 credit issue.

Summary of Prior Claims and Awards

As outlined above, the issue in dispute is the Defendants' entitlement to a credit or offset for workers' compensation indemnity benefits paid on the Claimant's prior claims.¹ It is undisputed that the Claimant received the following benefits via prior claims with Mt. Pleasant Waterworks:

- WCC #0902321, DOI 3/4/09, with 3 weeks of TTD paid. Per the Form 12A, this case involved a back injury.
- WCC #1006927, DOI 4/26/10, with 25.4286 weeks of TTD paid and WCC # 1103641, DOI 4/13/11, with no TTD paid. WCC #1006927 involved a shoulder injury which was aggravated/re-injured by WCC # 1103641 (see Forms 12A). Per the clincher agreement, Dr. Rudolph "gave a rating of 12% to the right shoulder." These two files were closed via a single, joint clincher agreement for \$30,357.75 which, per agreement of the parties, "represents any and all disability claims to include 25% to the right shoulder." The carrier agreed to waive overpayment of temporary total disability in exchange for this agreement.
- WCC # 1114198, DOI 10/3/11, 20.5714 weeks of TTD paid. This file involved a low back injury which was settled via a clincher agreement. Per the clincher agreement, Dr. Aymond "gave a rating of 7% to the spine." The parties resolved the case for \$32,005.50, which per agreement of the parties "represents any and all disability claims to include 25% to the spine."

¹ While the Claimant's Form 30 lists several grounds for appeal, his brief addresses only whether Defendants are entitled to a credit for "the prior awards" and/or "payments pursuant to prior claims" that the Claimant received in workers' compensation cases which occurred prior to the instant case but with the same employer. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (citing *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993); *Bell v. Bennett*, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992)). See also *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal)." and *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 186, 564 S.E.2d 694, 696 (Ct. App. 2002).

It is noted by the Undersigned, and is not disputed by the parties, that 25% to the right shoulder equals payment of 75 weeks under the Act. Similarly, 25% to the back equals payment of 75 weeks under the Act. It is further noted that the above figures, including 75 weeks each for the shoulder and the back, total 199 weeks ($3 + 25.4286 + 75 + 20.5714 + 75 = 199$). Finally, it is further noted that, as of the date of the merits hearing, the Claimant received 122 weeks of TTD for the instant injury. Thus, as of the date of the merits hearing, the Claimant has received 321 weeks of indemnity benefits under the workers' compensation system during his employment with Mt. Pleasant Waterworks.

Legal Analysis

As an initial matter, Wyndham v. R.A. & E.M. Thornley and Co., 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987) states that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." Thus, according to Wyndham, the Defendants are entitled to a full credit or offset for both TTD and PPD paid for his prior claims.

Beyond Wyndham, both the Claimant and Defendants turn to Section 42-9-170 to provide guidance on this issue. Section 42-9-170 provides

(B) If an employee receives a permanent injury as specified in Section 42-9-30 or the second paragraph of Section 42-9-10 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 five hundred weeks. If an employee previously has 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. This subsection is effective on July 1, 2003 (emphasis added).

For reasons outlined fully in my September 11, 2014 Decision & Order, I find as a fact that

the award in the present case is awarded under 42-9-10(A). This finding is based on the Claimant's age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.

Thus, the first sentence of (B) above does not apply. The second sentence does apply. The Claimant has previously incurred permanent partial disability through the loss of his shoulder per WCC claims #1006927 and # 1103641. He subsequently has incurred total permanent disability through the loss of another member, which is his instant back claim with radiculopathy. Thus, pursuant to Section 42-9-170, Defendants' liability is for the subsequent injury only, which clearly means that the Legislature intended that Defendants be able to take a credit for all benefits paid for the shoulder for prior claims. If that were not the intent of the legislature, then there would have been no need to include the provision that "the employer's liability is for the subsequent injury only" (emphasis added).

Because Defendants' liability is limited to the "subsequent injury only" with regard to his shoulder claims, I find that the Defendants are entitled to a credit or an offset for all indemnity benefits paid for claims #1006927 and #1103614, which are 25.4286 weeks of TTD and 75 weeks of PPD.

Regarding the credit or offset for benefits paid on the Claimant's back claims, I first review the terms of Section 42-9-10. Section 42-9-10(A), under which I find the Claimant to be totally disabled, provides that "when the incapacity for work resulting from an injury is total," the Claimant receives benefits but "in no case may the period covered by the compensation exceed five hundred weeks" except in cases involving paraplegia, quadriplegia, and physical brain damage. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage in the instant case.

I also have reviewed and considered Hopper v. Firestone Stores, 222 S.C. 143, 72 S.E.2d 71 (1952). Mr. Hopper was involved in a motorcycle accident, not connected with his employment, where he sustained amputation of his right leg above the knee. He wore an artificial leg. During the course of his employment with Firestone Stores, he sustained an injury to his residual leg which caused amputation of about four inches of his remaining residual leg. Mr. Hopper received TTD and medical care for his compensable work injury and further alleged loss of use of his leg and/or disfigurement. Firestone Stores argued that Mr. Hopper had already lost 100% of his leg prior to his work injury and thus "there was no basis upon which an award for permanent disability or specific loss could be computed."

~~The Supreme Court agreed with the Defendants. The Court found that~~

An examination of the entire record in this case in the light of the [statute] leads us to no other conclusion than that the Legislature intended that the compensation here, if there is to be such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto...." (emphasis added)

In the instant case, the parties agreed that the Claimant sustained 25% disability to the Claimant's back as a result of WCC # 1114198. Thus, based on 42-9-170 and Hopper, as well as other relevant cases, the Claimant, already having been paid for 25% to the back (75 weeks of disability), had only 75% of his back remaining to be awarded. In order for the intent of Hopper to be effectuated, Defendants must be given a credit or an offset for the PPD paid to the Claimant already pursuant to his prior claim, and I so rule.

The parties also turn to the case of Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991). In Medlin, Mr. Medlin sustained a compensable back injury in 1983 while working for Greenville County. He was found to have sustained greater than 50% loss of use of his back, which entitled him to the "maximum compensation of five hundred weeks" for total and permanent disability. The parties settled the 1983 case for a lump sum payment, and Mr. Medlin returned to

work with Greenville County. In 1985, Mr. Medlin had another work injury for which he again claimed permanent and total disability. Greenville County admitted that the second accident occurred but denied the Claimant was entitled to PPD because he had already been paid "the maximum compensation of five hundred weeks."

The Supreme Court held that Mr. Medlin was not allowed to recover under the Act for the loss of his back because he had already received total disability benefits for a back injury. Thus, per the Supreme Court, the "loss of use to his back has already been fully 'written-off' and is non-existent in so far as the Act is concerned." While the instant case addresses a prior partial loss (25% of the back) instead of total loss (as in Medlin), the reasoning is the same – on the Claimant's date of injury, he had only 75% of his back to lose, with the other 25% having been "written off" because loss of that 25% was paid pursuant to WCC # 1114198. Thus, Defendants are entitled to a credit or offset from the Claimant's instant permanent and total disability finding for the 75 weeks PPD paid under WCC # 1114198.

Regarding the TTD paid pursuant to WCC #0902321 and #1114198, I note the findings of United Technologies v. S.C. Second Injury Fund. Mr. Kelly was injured in Michigan while working for United. He received 63 weeks of temporary benefits "under Michigan law at a higher compensation rate" than that allowed in SC. His PPD was determined in South Carolina pursuant to SC law. The Commission deemed it appropriate for United to receive a credit for the 63 weeks of TTD the Claimant received under Michigan's workers' compensation scheme. When United requested Second Injury Fund reimbursement, the SIF asserted that United and its carrier had paid 78 weeks of benefits prior to notifying the Fund of a possible claim. The crux of the issue was that, if the 63 weeks paid in Michigan "counted" towards the 78 week limit, then the SIF was correct and no SIF reimbursement was possible. If the 63 weeks did not count, then the claim was

eligible for reimbursement by the SIF if the other conditions were met.

The Court of Appeals found that the 63 weeks did count as compensation pursuant to the SC Act, despite the fact that it was paid in another state at a higher rate than appropriate under SC law. Clearly, the Court of Appeals believed and ruled that temporary benefits are weeks of compensation per the Act and thus "count" as part of Mr. Kelly's 500 week recovery. Similarly, the Court of Appeals in Roberts v. McNair found that payment of temporary partial benefits counted as weeks, not "half-weeks" of compensation to be taken "against the statutory 500-week recovery period." The court stated that "the period for compensation may not exceed 500 weeks."

Based on the relevant law, and the undeniable fact that temporary benefits are part of compensation just as permanent benefits are, I hereby further find that the Defendants are entitled to a credit or offset for the 3 weeks of TTD paid pursuant to WCC # 0902321 and for the 20,5714 weeks of TTD paid pursuant to WCC # 1114198.

In support of my ruling that the Defendants are entitled to a credit or offset for all indemnity benefits paid to the Claimant for his four prior claims, I also note Getsinger v. Owens-Corning Fiberglass, 335 S.C. 77, 515 S.E.2d 104 (1999). Mr. Getsinger sustained a 30% disability to his right foot in June 1993. He then sustained another 10% disability in October 1995. By December 1995, his impairment had increased to 50%. Mr. Getsinger was ultimately found totally disabled based on the loss of use of his foot and psych overlay. The Commissioner "awarded Getsinger 500 weeks compensation, offset by previous payments." (emphasis added).

See also for support of this decision Roberts v. McNair Law Firm, 366 S.C. 50, 691 S.E.2d 453 (2005), which provides that "Section 42-9-10 of the Workers' Compensation Act provides that, except under circumstances not applicable in this case, the period for compensation may not exceed 500 weeks. S.C. Code Ann. § 42-9-10 (Supp.2004)."

See also Crisp v. SouthCo, Inc., Appellate Case No. 2010-180906, Opinion No. 27230, holding that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks. See S.C. Code Ann. Section 42-9-10(A) (Supp. 2011; S.C. Code Ann. Reg 67-1101 (Supp. 2011))."

See also Reed-Richards v. Clemson University, 638 S.E.2d 77 (2006), stating that, in SC, "the normal statutory maximum [is] 500 weeks." See also James v. Anne's, 390 S.C. 188, 701 S.E.2d 730 (2010), holding that "the maximum period for benefits is generally 500 weeks" and quoting Section 42-9-10(A) which states that "In no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage.

III. FINDINGS OF FACT

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

IT IS FOUND AS A FACT:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.

6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.
7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. ~~The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."~~
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of

paraplegia, quadriplegia, or physical brain damage.

15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.
17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper, Medlin, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies, Roberts, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

IV. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment."

3. Section 42-9-170 provides that if an employee previously has 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.
4. Hopper provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto."
5. Medlin provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned."
6. United Technologies provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation.
7. Roberts provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks."
8. Gestinger provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments.
9. Crisp provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A).
10. Reed-Richards provides that, in SC, "the normal statutory maximum [is] 500 weeks."
11. James provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in

cases of paraplegia, quadriplegia, and physical brain damage.

V. ORDER/AWARD

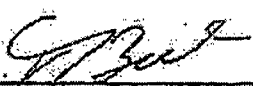
IT IS HEREBY ORDERED that the Claimant is permanently and totally disabled and entitled to 500 weeks of compensation, but that Claimant's 500 weeks is offset not only by temporary benefits paid in the instant claim but also by TTD and PPD paid in each of his prior four claims as outlined herein.

IT IS FURTHER ORDERED that Claimant's request for Utica-Mohawk language is again granted, with the specific language to be issued via supplemental order.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States. certified mail addressed to any unrepresented party.

May 9, 2016

By: Shawn DeBruhl, Administrative Assistant to Commissioner Beck

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1205924
Carrier File #: 2012-001473
Carrier Code #:
Employer FEIN #:

Claimant's Name: David Lemon SSN: _____ Employer's Name: MT Pleasant Waterworks
Address: _____ Address: 1619 Rifle Range Road
City: _____ State: SC Zip: _____ City: Mt Pleasant State: SC Zip: 29465
Home Phone: _____ Work Phone: () _____ Insurance Carrier: State Accident Fund
Preparer's Name: Carl H. Jacobson Law Firm: Uricchio, Howe & Krell Preparer's Phone #: (843) 723-7491

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 05/08/2012
(m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Matt Schonfeld, Esq. and Morgan T. McQueeney, Esq. Willson, Jones, Carter & Baxley address 421 Wando Park Blvd, Suite 100, Mt. Pleasant, SC 29464 on the _____ day of May 2016 by X ☐ class postage ☐ certified mail ☐ personal service.

Preparer's Signature

Attorney for Claimant
Title

Carl@urichio.com
Email

May 23, 2016
Date

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

S.C. WORKERS' COMPENSATION COMMISSION
P.O. BOX 1715, 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC FILE #1205924
Carrier File #2012-001473
Employer FEIN #

1. The Single Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, namely: 1) a determination of the particular subsection of §42-9-10 used for the award of the present case.

2) the determination of the statutes under which the prior awards were issued. 3) any fact, analysis, conclusions of law, or provisions that are necessary in an analysis of the §42-9-170 credit issue.

2. The Single Commissioner erred in finding that "the Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy" (Finding of Fact No. 12). The error being that the present award for permanent total disability is pursuant to §42-9-10(A) and not based upon the loss of another member pursuant to §42-9-30.

3. The Single Commissioner erred in finding that "Defendants' liability per §42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims...Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks." (Finding of Fact No. 13). The error being that the Single Commissioner determined that the

Claimant is entitled to permanent total disability benefits pursuant to §42-9-10(A) and is not based upon a finding of a subsequent injury to the back. This Finding is inconsistent with the award pursuant to §42-9-10(A).

4. The Single Commissioner erred in finding "because the Claimant has already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012. (Finding of Fact No. 17). The error being that the award pursuant to §42-9-10(A)

was based on the Claimant's loss of earning capacity and was not based upon §42-9-30 and the specific loss of use of the back is totally irrelevant and inconsistent with the award made pursuant to §42-9-10(A) for lost earnings capacity. Additionally, 75% disability of the back is presumed to be permanent total disability.

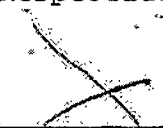
5. The Single Commissioner erred in Finding of Fact 19 awarding the Defendants a credit or off set for prior awards. The error being that the applicable credit statute, §42-9-170, does not apply to awards pursuant to §42-9-10(A).

6. The Single Commissioner in Conclusions of Law items 2-11. The error being that the cited cases do not apply to allow credits to the Defendants for prior awards; most of the cases precede the 2007 amendment to §42-9-170; and the only statutory basis for the credits, §42-9-170, does not apply to

§42-9-10(A).

7. The Single Commissioner erred in awarding the Defendants a credit for the prior awards. The Commissioner has expressly found and concluded that §42-9-170 applies in this case. Said code section does not provide any credit for an award of permanent total disability pursuant to §42-9-10.

Respectfully Submitted,



Carl H. Jacobson

May 23, 2016

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1205924

David Lemon,

Claimant,

v.

Mt. Pleasant Waterworks,

Employer,

and

State Accident Fund,

Carrier/Defendants.

FULL COMMISSION HEARING

Monday, August 15, 2016

2:58 p.m. - 3:20 p.m.

The Full Commission Hearing was heard before Commissioners Avery B. Wilkerson, Jr., Melody L. James and R. Michael Campbell, II, Chair, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 15th day of August, 2016, before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES

Carl H. Jacobson, Esquire
LAW OFFICE OF ANDREW N. SAFRAN, LLC
1400 Pickens Street, Suite 104
Kingstree, South Carolina 29201
Attorney for the Claimant

J. Gabriel Coggiola, Esquire
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Columbia, South Carolina 29209
Attorney for the Defendants

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this
deposition is being taken pursuant to the
Administrative Procedures Act and the South
Carolina Rules of Civil Procedure.

1 COURT REPORTER: Today is Monday, this is South
2 Carolina Worker's Compensation case number
3 1205924. This is the case of David Lemon,
4 the claimant versus Mt. Pleasant Waterworks,
5 the employer, and the State Accident Fund,
6 the carrier. The appellant is the claimant,
7 represented by Carl H. Jacobson, and the
8 respondent is represented by J. Gabriel
9 Coggiola. Each side is allowed 10 minutes
10 for oral argument, and the appellant three
11 minutes in reply. You're requested to argue
12 the grounds of exception and stay within the
13 record.

14 MR. COGGIOLA: Thank you.

15 COMMISSIONER CAMPBELL: Mr. Jacobson.

16 MR. JACOBSON: Good afternoon.

17 COMMISSIONER CAMPBELL: Good afternoon.

18 MR. JACOBSON: I feel like this is a D, j... vu second
19 time I've been up here on this particular
20 case, basically on the same issue. Things
21 haven't changed from the original order as
22 far as I can tell. As you recall, Mr. Lemon
23 was awarded permanent total disability
24 benefits by Commissioner Beck, and under
25 findings of fact number one in the original

1 Order, Commissioner Beck found, I find, based
2 upon the greater weight of the evidence, the
3 claimant is permanently and totally disabled,
4 pursuant to South Carolina code section 42-9-
5 10. The claimant has sustained permanent
6 injuries to more than one body part, namely
7 his back and both legs. As such, his claim
8 for permanency is not restricted to the
9 scheduled benefits as provided by South
10 Carolina code section 42-9-30, and he cites
11 Singleton versus Young Lumber, 114
12 southeastern Second 837, a 1960's decision.
13 There Commissioner Beck gave -- awarded the
14 carrier benefits, or a credit I should say,
15 not only for the weeks of temporary total
16 disability that had been consumed with respect
17 to this particular accident, but went back
18 and awarded the defendants a credit for all
19 prior awards for perm partial disability while
20 this claimant had been employed by the
21 employer over the many years. And then under
22 conclusions of law, the Commissioner stated
23 42-9-170 provides that the maximum exposure
24 for payment of disability benefits is 500
25 weeks for the multiple claims filed by an

1 employee with the same employer. The maximum
2 number of disability is 500 weeks. I
3 specifically find that there is no need to
4 look any further than the plain language of
5 42-9-170 to determine the number of weeks of
6 credit that the defendant is entitled to
7 receive. We appealed that decision because
8 when you look at section 42-9-170, we
9 maintain that there is a clear error of law
10 in that if you look at the particular
11 statute, the code section of 42-9-10(A), which
12 was -- 42-9-10, which was the basis for the
13 award of perm total to Mr. Lemon, and is not
14 mentioned and has not a -- give a credit for
15 any prior awards while the claimant is
16 employed by the same employer. Let's see if
17 we can agree on a couple of principles. The
18 first principle is this, that the South
19 Carolina Worker's Compensation act is a
20 creature statute, and that the authority for
21 the Commission, whether it's to award benefits
22 or to take away benefits, is pursuant to
23 legis- -- the legislature, pursuant to a
24 specific act or code section in the act. I
25 think we can all agree on that, that's the --

1 that's the long standing law in South
2 Carolina, has been for years. The second
3 premise I'd like you to adopt and to recall
4 is that when you do construe a statute, under
5 the law the Commission is supposed to
6 construe statutes deliberately, and in favor
7 of coverage and benefits as opposed to taking
8 away benefits from the injured employee. But
9 let's just look at the statute again, and
10 let's look at the clear reading of the
11 statute. We have two sec- -- we have two --
12 as far as I know ---

13 COMMISSIONER WILKERSON Is it the statute or is it
14 the coverage were supposed to look at?

15 MR. JACOBSON: Coverage, and I believe -- you're
16 supposed to look at the statute for
17 legislative authority ---

18 COMMISSIONER WILKERSON: I heard that.

19 MR. JACOBSON: --- to either award or to take away
20 benefits. The general construction of
21 statutes by the Commission is to favor
22 coverage and liberally supposed to be
23 construed in favor of the claimant is my
24 understanding of the law. So the question is
25 what do we do with -- how do we construe

1 about this ga--- this limit of 500 weeks?
2 There is a limit of 500 weeks of
3 compensation, and 42-9-10(A) -- and section
4 42-9-10 specifically says that the amount of
5 compensation for total disability, when the
6 capacity [sic] for work is total, the period
7 covered by the compensation cannot exceed 500
8 weeks except as provided by the statute
9 dealing with quadriplegics and brain damage
10 ~~and so forth. And as amount of compensation~~
11 for total disability resulting from an injury,
12 from one injury, in this particular cases we
13 have one accident, one injury, it's our
14 contention that there is indeed a cap. The
15 cap is 500 weeks for the injury that Mr.
16 Lemon was awarded permanent total disability
17 benefits. So we don't question that the
18 carrier is entitled to a credit for the path
19 for the TTD payments that were made. The
20 Commissioner went ahead and awarded benefits
21 for awards made pursuant to other injuries,
22 other accidents. Now, where does he get that
23 authority? He says he looked at 42-9-170.
24 You know, I agree. If there's going to be a
25 credit at all you look at 42-9-170. And

1 under 42-9-170 there's a subparagraph A that
2 is no longer effective because that was
3 effective until June 30th, 2008. So we can
4 eliminate subsection A as a code provision.
5 Now let's look at subsection B. And I don't
6 know whether this was a mistake that was made
7 by the legislature, I don't know if they
8 meant to do this, but I can tell you what the
9 clear reading of the statute says. It says if
10 an employee receives a permanent injury as
11 specified in section 42-9-30 -- in our
12 particular case it was not a 42-9-30 award,
13 it was a 42-9-10 award for perm total -- or
14 receives a permanent injury as specified under
15 the second paragraph of section 42-9-10, in
16 this particular case the reason why we had to
17 remend this case, as you all recall, is that
18 we came here and we argued that the
19 Commissioner awarded benefits pursuant to 42-
20 9-10(A). Defense counsel argued, well, it's
21 not clear, it could have been A, it could
22 have been B. If it's B, then he could award
23 this credit because there's no exclusion, or
24 there's nothing stopping him from giving
25 additional credit to the employer if it's

1 under 42-9(B) [sic], the second paragraph.
2 But if -- that second paragraph in 42-9-10
3 doesn't apply in this case because when the
4 C- -- when y'all remanded it to Commissioner
5 Beck, he specifically found the paragraph that
6 I'm referring to in this award is [sic] 42-9-
7 10A, which is the first paragraph. So in
8 this particular case, since the claimant was
9 not awarded perm total under 42-9-10-30 [sic]
10 or the second paragraph of 42-9-10(A), we
11 couldn't see who was awarded benefits. I
12 mean -- I mean, since it was awarded benefits
13 pursuant to A, then this -- the rest of this
14 paragraph has nothing to do about giving a
15 credit for any prior awards made to the
16 claimant, there's no legislative authority for
17 that. Now here's another disingenuous
18 argument that's now raised for the first time
19 by the defendants. The defendants now say
20 this -- and I believe this -- I believe that
21 this, under the clear reading the statute,
22 either you meet this or don't meet this. If
23 it's under 42-9-10(A), you don't get a
24 credit, period, but the defendants now have
25 come up with another argument. They say,

1 well if an employee previously has incurred
2 permanent partial disability through the loss
3 of a hand, arm, shoulder, foot, leg, hip, or
4 eye, and by subsequent it incurs total
5 permanent disability through the loss of
6 another member, the employees liability is for
7 the subsequent injury only. So what they're
8 arguing in this case is that since Mr. Lemon
9 had received a prior award for benefits for a
10 shoulder, therefore he's only entitled to
11 benefits in this case for total permanent
12 disability, but only for the subsequent injury
13 only. Now I don't know what that means, but
14 I can tell you this, in this particular case
15 that paragraph doesn't apply either. Why?
16 Because it says, if an employee previously
17 has incurred perm partial disability, and by
18 subsequent accident incurs total permanent
19 disability through loss of use of another
20 member. In this particular case, the
21 claimant is not receiving benefits and was
22 not awarded benefits for loss of use of
23 another member. To the contrary, the
24 claimant was specifically awarded benefits
25 under perm total disability for loss of use

1 of multiple members under the Singleton
2 guidance. And in this particular case, the
3 Commissioner specifically found on remand
4 under number one, conclusion of law, pursuant
5 to 42-9-10(A), the claimant is permanently and
6 totally disabled based upon age, education --
7 education level, ongoing complaints of
8 medications, restrictions, limitations, an
9 inability to identify work they could complete
10 construing the ma- -- condition. So what the
11 Commissioner awarded in this case for
12 permanent total disability, not based upon the
13 loss of use of another member, not pursuant
14 to 42-9-30 -- if he had made an award of 42-
15 9-30 for the back, then perhaps that
16 provision would apply, but it doesn't; because
17 in this particular case there was not an
18 award made pursuant to loss of use of another
19 member. It's pursuant to 42-9-10(A). So
20 there's no legislative authority. Now, the
21 reason we have this statute is because we
22 used to have a second injury fund, and at
23 that point this statute made a lot more sense
24 than it does now. And the reason we had the
25 second injury fund was to try to encourage

1 employers to maintain employer -- employment
2 which a -- one of their employees was
3 injured.

4 CHAIRMAN: Go ahead and finish your thought.

5 MR. JACOBSON: What -- thank you. One very quick
6 note, please. After going through -- after
7 the employer in this case tries to come up
8 with some contorted basis legislatively under
9 that statute to give the credit, it -- the
10 Commission -- the Commissioner then starts
11 citing cases. The first case that's cited by
12 the Commissioner in favor of the position
13 that there's a credit to be given in this
14 particular case is the Wyndham case, which
15 the -- which -- related to the same code
16 section, but the Wyndham case was decided in
17 1987. This law was amended and changed
18 substantially in 2007. Half the ca- --
19 almost all the cases, almost all the cases
20 the are cited in this brief precede 2007 when
21 this statute was changed and passed. And the
22 rest of the cases absolutely don't apply at
23 all factually to this particular case. Do
24 you have any questions?

25 COMMISSIONER WILKERSON: Not at this point.

1 CHAIRMAN: No, and you'll have three minutes in
2 reply.

3 MR. JACOBSON: Thank you.

4 CHAIRMAN: Mr. Coggiola.

5 MR. COGGIOLA: Good afternoon, Your Honors. May it
6 please the Court. I agree with counsel, it
7 is a difficult statute and it is one that was
8 created in the time of the second injury fund
9 when there was avenues -- and -- and the

10 ~~reason for that is the policy behind the~~
11 Worker's Compensation Commission. One of --
12 and -- and the whole system. One of the
13 biggest parts of the system is that we've
14 tried to create a system where employers will
15 continue to bring back injured workers to
16 work. Whether through their employer or
17 whether it was injured through somewhere
18 before, part of the basis of this all is to
19 allow employers an avenue to bring someone
20 who already has some kind of disability back
21 to work. To say that the statute allows you
22 to not get credit for that is A, in practical
23 application, going to stop all employers from
24 being people back to work if they've got
25 previous disability if they know they're not

1 going to get any credit towards it. Now
2 looking at the statute, first off, we would
3 argue that A really, I mean A and B is -- A,
4 if you read section 42-9-10, A is really the
5 definition of permanent -- of permanent and
6 total, whether it's temporary, partial, it
7 gives the 500 week cap. But A doesn't really
8 set forth the avenue of how you can get
9 there. To get there, you've gotta have one
10 of several things, you've got to have
11 combination of body parts or you gotta be
12 under 42-9-30 for 50 percent or greater to
13 the back. Under A, if I walked in with my
14 arm cut off (indicating) and five vocational
15 evaluations saying I'm permanent and total,
16 it's too bad. The Wigfall case clarified
17 Singleton and everything and it says that's
18 not enough, you've got to have one of these
19 other things.

20 COMMISSIONER WILKERSON: Unless it got your
21 shoulder.

22 MR. COGGIOLA: I'm sorry?

23 COMMISSIONER WILKERSON: Unless it got your
24 shoulder?

25 MR. COGGIOLA: What, I -- I don't ---

1 COMMISSIONER WILKERSON: I said unless it got your
2 shoulder, would that get you disabled?

3 MR. COGGIOLA: Well, let's say they cut off the arm
4 just above ---

5 COMMISSIONER WILKERSON: Okay, I know -- I just
6 watch ---

7 MR. COGGIOLA: Very astute point ---

8 COMMISSIONER WILKERSON: Because you went up here
9 (indicating), I just want to make sure.

10 MR. COGGIOLA: Very astute point, Commissioner. I
11 should have dropped it down to here
12 (indicating).

13 COMMISSIONER WILKERSON: Okay.

14 MR. COGGIOLA: But if you walk in -- my only point
15 is, all the voc reports, all the age, all the
16 lack of job training in the world don't make
17 a difference if it's a single scheduled
18 member. A is really the -- the framework of
19 what is permanent and total disability. B
20 provides the ability to get there with the
21 combination of body parts. And then C
22 provides -- or the 3rd subsection is just the
23 exception to the rule, which obviously we
24 count here because it's a lifetime benefit.
25 So, it would go out of there. In addition to

1 that, the Commissioner did, as he was
2 instructed by the Commission on remand, not
3 only to go back to the statute but go back to
4 any analysis, anything he thought necessary.
5 And he went through an extensive list of case
6 law. He cited the Hopper case, which goes to
7 the credit towards the back. In that case
8 the claimant lost half his leg in an
9 unrelated accident and then injured a part
10 and this Court held that the legislative
11 intended compensation to be based solely on
12 the extent of -- to which the loss of the
13 existing after the last injury exceeds that
14 which it was prior to. They looked at the
15 Medlin case wherein the claimant was found to
16 be permanently and totally disabled, came back
17 later, reapplied with the same employer, tried
18 to get another award and they said there's no
19 compensation due. There is a 500 week cap.
20 And the 500 week cap isn't only in 42-9-170,
21 there is a 500 week cap on Worker's
22 Compensation benefits in the State of South
23 Carolina. Unless you are going to meet the
24 requirements of a paraplegic, a quadriplegic,
25 or physical brain damage, there is a cap of

1 500 weeks on benefits. The practical
2 application, again, of what you're asking here
3 is you could allow a claimant to collect 40 -
4 - 490 weeks of benefits, go back to work, and
5 then re-injure that body part the next day
6 and start over with a whole new 490 -- you
7 know, 500 weeks to go after. The legislative
8 intent -- and it's especially clear if you
9 read Wigfall. Because in Wigfall they go
10 into, you know, the claimant is asking us to
11 do this because it seems that's what's fair;
12 and although we agree that might make sense,
13 we're stuck to the legislative creation of
14 the statute. And in that case they -- you
15 know, they held that although there was all
16 these other vocational factors, you were
17 limited to that. So our position essentially
18 is that, you know, you can't just have 42-9-
19 10(A). It -- I don't think the Commissioner
20 erred by saying he's totaled under that, he
21 is totaled under 42-9(A) [sic], but to get
22 there, you have to have one of two things,
23 you gotta have a combination of body parts or
24 you gotta have 50 percent greater to the back
25 which is now even a rebuttable presumption.

1- And I would go -- again, go back to exactly
2 what counsel said, the public policy of this,
3 the -- at the time that statute was created
4 we had another method to encourage employers
5 to continue employing people who have had
6 injuries whether they had them before they
7 worked for them, during the course of their
8 employment with them. To -- to hold that
9 you're enti- -- you don't get credit for
10 permanency that you've paid on a claimant,
11 the practical effect is that no ones going to
12 bring anybody back to work. No one is -- no
13 one's ever going to -- there's no incentive
14 to resolve the claim if knowing that as soon
15 as that's resolved, the next day they can
16 star over with a whole new one and you're
17 going to end up with a lot of employees out
18 of -- out of work. I would further just
19 argue that the Commissioner in his subsequent
20 Order, the May 2016 Order, you know, he also
21 cites in addition to the Medlin case, the
22 Wyndham case that was referenced, it says
23 it's clear, 500 weeks total. There is no way
24 around that. That language is even further
25 buttressed in Crisp, Sparks, James v. Zant.

1 I mean all the cases stand for the premise
2 that that is the cap. And the only way
3 around that cap is the third subsection of
4 42-9-10, not by getting a second accident
5 with the same employer to get another bite
6 after. Still have a few minutes left. And I
7 would also point to Commissioner Beck's
8 language in that he finds with regards to the
9 -- basically with the back, he cites more
10 specifically the Hopper case wherein you get
11 with what is -- what's left after the last
12 injury to measure it. So if he had 25
13 percent to the back from his last injury,
14 that's what he's coming in with. There's
15 only 75 percent of the back left. You gotta
16 get that credit. And then with respect to
17 the shoulder, you know, he cites to, I mean,
18 look at the Getsinger case. Three previous
19 foot claims and then finally the last claim
20 they add psych overlay to get a total claim.
21 They were entitled to credit for all of that
22 leading up to that point for every one. If
23 we didn't allow employers to get credit for
24 previously-paid disability to an employee
25 that's suffered an injury with them, there

1 would be no point for this -- this statute. --
2 I mean it's -- there's a separate statute for
3 people that are injured in other employment,
4 and this one's clear that under this if
5 you've re- -- suffer subsequent injuries,
6 there is a 500 week cap on benefits. Unless
7 the Commission has any questions for me?

8 CHAIRMAN: No. Thank you, sir.

9 MR. COGGIOLA: Thank you very much.

10 CHAIRMAN: Mr. Jacobson?

11 MR. JACOBSON: I don't know how we're going to get
12 around what the clear reading of the statute
13 is. If you -- if you want to give a credit
14 to the employer for the subsequent -- for the
15 other weeks, you're going to be just reading
16 something into the statute that's not there
17 and you'll be committing an error of law in
18 my respect for -- opinion. Because there is
19 -- there are plenty, plenty situations where
20 an employer's entitled to a credit -- prior
21 credits for prior awards. And one of the
22 examples that was just cited or questioned by
23 defense counsel would apply in this case. He
24 said what would happen if an injured employee
25 had received 490 weeks of disability

1 compensation over the multiple injuries he had
2 while working for the same employer and then
3 gets a subsequent injury to his arm, are you
4 claiming he can get perm total for that
5 without giving a credit? No. No. The
6 statute provides a credit for that situation.
7 It specifically says if you have a subsequent
8 disability award pursuant to 42-9-30, the
9 employer gets a credit for all prior awards.

10 The statute also could possibly be
11 interpreted, I don't believe it says this,
12 that if you have a prior permanent partial
13 award for the shoulder and then you have a
14 subsequent award for -- based on loss of a
15 member, they're entitled arguably to a credit.
16 It doesn't really say that, but arguably you
17 could argue that. But that's not what this
18 statute says. The statute says -- the
19 statute doesn't apply in this case. The
20 statute doesn't apply for two reasons.
21 Number one, the Commissioner has already found
22 this specifically, that he made an award
23 pursuant to 42-9-10(A). And again, this
24 statute says that you'll only receive a
25 credit if the subsequent award is pursuant to

--1-- 42-9-30. Or the second paragraph, which
2 would be 42-9-10(B), doesn't apply. Second
3 part of this statute, which I don't believe
4 is a -- precludes recovery in this case
5 either. This says if an employee previously
6 has incurred permanent partial disability,
7 through let's say a shoulder, and then by
8 subsequent accident incurs total permanent
9 disability through the loss of use of another
10 member, then they're -- then arguably I don't
11 see a credit there. That doesn't say they're
12 entitled to a credit, I guess they could try
13 to bootstrap it that way. But in this case,
14 the subsequent accident, which -- for which
15 incurred permanent total disability, was not
16 through the loss of use of another member, it
17 was pursuant to 42-9-10(A), and Commissioner
18 Beck specifically found he wasn't making an
19 award pursuant to loss of use of a member.
20 It was multiple members, so it doesn't apply.
21 As to the argument that if you eliminate
22 credits to the employers for prior injuries
23 and awards for they're injured employees, that
24 that would stop them from hiring -- keeping
25 their employees hired, that's not true. I

1 haven't see -- I haven't -- I've seen more
2 claimants laid off, terminated, laid off
3 because they can't come back to work with
4 restrictions, asked to sign resignation forms,
5 resigning from work. It's prevalent more
6 today than it ever has been. And the second
7 injury fund, which is no longer in existence,
8 does not apply in this particular case. Are
9 there any questions at all?

10 COMMISSIONER WILKERSON: No.

11 CHAIRMAN: Thank y'all.

12 (There being nothing further, the hearing concluded
13 at 3:20 p.m.)

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1205924

David B. Lemon,

CLAIMANT/APPELLANT,

vs.

Mt. Pleasant Waterworks,

EMPLOYER,

AND

State Accident Fund,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina,
on August 15, 2016 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
October 26th, 2016

APPEARANCES:

Appellant David B. Lemon, Claimant of Charleston, South Carolina represented by Carl H. Jacobson, Esquire of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A. in Charleston, South Carolina.

Defendants/Respondents represented by John Gabriel Coggiola, Esquire of Willson Jones Carter & Baxley, P.A. in Columbia, South Carolina.

STATEMENT OF THE CASE

Claimant/Appellant ("Appellant") was involved in an admitted work accident on May 8, 2012, when he injured his lower back while pulling a device designed to provide leverage on a sewer line. As a result of his accident, Defendants/Respondents ("Respondents") provided Appellant with authorized causally related medical treatment pursuant to S.C. Code Ann. §42-15-60, with multiple medical providers, including but not limited to, Dr. James Aymond and Dr. Thomas Duc. On June 20, 2013, Dr. Aymond found the Appellant to be at maximum medical improvement ("MMI") and assigned 24% impairment to the Appellant's spine. On February 12, 2014, Dr. Duc found the Appellant to be at MMI, and February 28, 2014, Dr. Duc completed a ~~Form 14B Physician's Statement wherein he assigned Appellant impairment ratings of 24% to the lumbar spine, 7% to the right lower extremity, and 7% to the left lower extremity.~~

On March 6, 2014, Appellant filed a Form 50 request for hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability, lifetime medical treatment, and a lump sum award. On April 7, 2014, Respondents timely filed a Form 51 response. In addition, on May 1, 2014, Respondents filed a Form 21 request for hearing, seeking stop payment of temporary compensation, a determination of permanency, and a requesting credit for overpayment of temporary compensation.

On September 11, 2014, a hearing was held on all pleadings before the Single Commissioner, Commissioner Scott Beck ("Single Commissioner"). On January 7, 2015, the Single Commissioner issued a decision and order, wherein he set forth the following findings of fact and conclusions of law:

Findings of Fact:

1. Find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. *Singleton v.*

Young Lumber. 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.
3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.
4. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.
5. I find that the award is to be paid in a lump sum.
6. I find that the Claimant is entitled to Utica- Mohawk Mills v. Orr language in this order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to James v. Anne's he is entitled to an award for a lump sum with the insertion of Utica-Mohawk Mills v. Orr language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.
7. The Claimant sustained an admitted injury to his back that occurred on May 8, 2012 and the average weekly wage is \$636.04 yielding a weekly compensation rate of \$424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).
8. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthralgia, and post laminectomy lumbar radiculopathy. (APA 1).
9. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-lvac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).
10. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).
11. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.
12. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing,

narcotic medications may cause judgement impairment unable to operate machinery." (APA 4).

13. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.
14. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disabled and is not a candidate for vocational rehabilitation. (EX 1).

Conclusions of Law:

1. §42-9-10 provides for permanent total disability benefits; and
2. §42-15-60 governs the payment of medical benefits; and
3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

On January 20, 2015, Appellant filed a Form 30 Request for Commission Review, listing the following grounds for appeal:

1. Did the Single Commissioner err by finding "as of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170." (Finding of Fact No. 3).

The Commissioner erred as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170 (B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170 (B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinicians in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

2. The Single Commissioner erred in concluding that "§42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive." (Conclusion of Law No. 3).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170(B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170(B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinicians in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

3. The Single Commissioner erred in ordering that the Defendants be credited "for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the hearing." (Order and Award).

The Commissioner erred, as a matter of law, because S.C. Code §42-9-170 does not apply in this case. The Hearing Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code §42-9-10. §42-9-170 (B), provides that "if an employee receives a permanent injury as specified in §42-9-30 or the second paragraph of §42-9-10 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."

Since the Single Commissioner found that the Claimant is entitled to permanent total disability benefits pursuant to S.C. Code §42-9-10 (A), §42-9-170 (B) does not apply in this case.

Additionally, even if §42-9-170 (B) did apply, which is specifically denied, the Single Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. The alleged credit provided by the clinchers in the prior claims did not provide specific consideration for the permanent partial disability awards for which the Commissioner gave credit to the Employer.

Copies of the above assignments of error were furnished to all parties prior to the oral arguments scheduled before the Full Commission Appellate Panel ("Appellate Panel") on April 20, 2015. On September 11, 2015, the Appellate Panel issued a decision and order, remanding the case back to the Single Commissioner (1) for a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) for a determination of the statutes under which prior awards were issued; and (3) for any facts, analysis, conclusions of law, or order provisions that the Single Commissioner should deem necessary in the analysis of the §42-9-170 issue.

On May 9, 2016, the Single Commissioner issued a second decision and order in response to the Appellate Panel's instructions on remand. At the outset, Single Commissioner noted that all evidence received in the case was outlined in the original January 7, 2015 order, and, along with the Appellant's testimony, remained part of the commission's file and served as the basis upon which the current decision was issued. The Single Commissioner found that the questions on remand would be responded to without the necessity of oral arguments or additional submissions, and he issued a Decision and Order wherein he set forth the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.
6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.
7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.
15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of

his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.

17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper v. Firestone Stores, Medlin v. Greenville County, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies v. S.C. Second Injury Fund, Roberts v. McNair, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

Conclusions of Law:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wynham v. R.A. & E.M. Thornley and Co. provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).
3. Section 42-9-170 provides that if an employee previously has 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.
4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C. 1952).
5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2d 667 (S.C. 1991).
6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).
7. Roberts v. McNair Law Firm provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2d 453 (S.C. 2005).
8. Gestinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2d 104 (S.C. 1999).
9. Crisp v. SouthCo, Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-

9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).

10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 304, 638 S.E.2d 77 (S.C. 2006).
11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2d 730 (S.C. 2010).

On May 23, 2016, Appellant filed a second Form 30 Request for Commission Review,

listing the following grounds for appeal:

1. The Single Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, namely: 1) a determination of the particular subsection of §42-9-10 used for the award of the present case. 2) the determination of the statutes under which the prior awards were issued. 3) any fact, analysis, conclusions of law, or provisions that are necessary in an analysis of the §42-9-170 credit issue.
2. The Single Commissioner erred in finding that "the Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy" (Finding of Fact No. 12). The error being that the present award for permanent total disability is pursuant to §42-9-10(A) and not based upon the loss of another member pursuant to §42-9-30.
3. The Single Commissioner erred in finding that "Defendants' liability per §42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims . . . Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks." (Finding of Fact No. 13). The error being that the Single Commissioner determined that the Claimant is entitled to permanent total disability benefits pursuant to §42-9-10(A) and is not based upon a finding of a subsequent injury to the back. This finding is inconsistent with the award pursuant to §42-9-10(A).
4. The Single Commissioner erred in finding "because the Claimant has already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012. (Finding of Fact No. 17). The error being that the award pursuant to §42-9-10(A) was based on the Claimant's loss of earning capacity and was not based upon §42-9-30 and the specific loss of use of the back is totally irrelevant and inconsistent with the award made pursuant to §42-9-10(A) for lost earnings capacity. Additionally, 75% disability of the back is presumed to be permanent total disability.
5. The Single Commissioner erred in Finding of Fact No. 19 awarding the Defendants a credit or offset for prior awards. The error being that the applicable credit statute, §42-9-170, does not apply to awards pursuant to §42-9-10 (A).
6. The Single Commissioner in Conclusions of Law items 2-11. The error being that the cited cases do not apply to allow credits to the Defendants for prior awards; most of the cases precede the 2007 amendment to §42-9-170; and the only statutory basis for the

credits, §42-9-170, does not apply to §42-9-10(A).

7. The Single Commissioner erred in awarding the Defendants a credit for the prior awards. The Commissioner has expressly found and concluded that §42-9-170 applies in this case. Said code section does not provide any credit for an award of permanent total disability pursuant to §42-9-10.

Copies of the above assignments of error were furnished to all parties prior to the oral arguments scheduled before the Full Commission on August 15, 2016.

Pursuant to S.C. Code Ann. §42-17-50 (1985), the Full Commission reviewed the award and weighed all of the evidence in the record as presented at the prior hearings. The Appellate Panel also considered all issues raised in the briefs of both Appellant and Respondents. Following their review, the Appellate Panel has determined that the May 6, 2016 Order of the Single Commissioner is hereby **AFFIRMED IN FULL**. The Findings Fact and Conclusions of Law found in the Single Commissioner's May 6, 2016 Decision and Order, as specified above, are hereby **AFFIRMED IN FULL**.

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, **WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:**

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 week limitation.
6. While the Single Commissioner initially stated that he needed to not look any further than the plain language of S.C. Code Section 42-91-70, upon expanding his research to other cases and

statutes, he became even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.

7. The Claimant was paid 3 week of TTD for his back claim, WCC # 0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.
15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for WCC #1114198.
17. Because the Claimant had already been compensated for a 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper, Medlin, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use his back, i.e. 75 weeks, per WCC # 1114198.
19. Pursuant to United Technologies, Roberts, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws,
**WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF
LAW:**

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham v. R.A. & E.M. Thornley and Co. provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).
3. Section 42-9-170 provides that if an employee previously has 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.
4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C. 1952).
5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2d 667 (S.C. 1991).
6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).
7. Roberts v. McNair Law Firm provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2d 453 (S.C. 2005).
8. Gesinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2d 104 (S.C. 1999).
9. Crisp v. SouthCo, Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).
10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 404, 638 S.E.2d 77 (S.C. 2006).

11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2nd 730 (S.C. 2010).

ORDER:

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner from which this appeal has been taken is hereby **AFFIRMED IN FULL**.

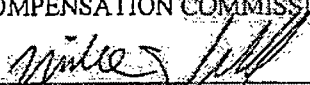
IT IS HEREBY ORDERED that the Appellant is permanently and totally disabled and entitled to five hundred (500) weeks of compensation, but that Appellant's five hundred (500) weeks is offset not only by temporary benefits paid in the instant claim but also by TTD and PPD paid in each of his prior four claims as outlined herein.

IT IS FURTHER ORDERED that claimant's request for Utica-Mohawk language is again granted, with specific language to be issued via supplemental order.

IT IS SO ORDERED.

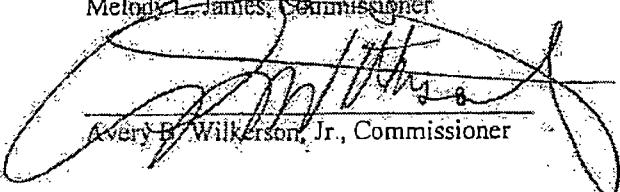
AFFIRMED

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


R. Michael Campbell, III, Commissioner
Chair for Appellate Panel

CONCUR:


Melody L. James, Commissioner


Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on October 26, 2016

WFO FORM 13-A REV. DATE 200

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

David Lemon

WCC File # 0902321
Carrier File # 2009-000940
Carrier Code # 500 - SF
Employer FEIN 576001080

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(home) (work)

Preparer's name: Mee Ling Khoo-Gould (803) 895-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.	TT 3.0000	10-MAR-09	30-MAR-09	1,243.35
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release				

Total Compensation Paid

1,243.35

6. Total Medical Benefits* Paid

7. Funeral Benefits

() Case Denied

Date of Injury: 03/04/2009

By signing this receipt, I acknowledge that I have received the compensation shown above.

By:

Claimant

By:

Employer's Representative

Date:

4/9/09

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By:

Report of additional Fees and Recoupment

A. Carrier Reimbursement by Third Party

B. Attorney's Fee Paid by Employer

C. Attorney's Fee Paid by Claimant
(Non contingent fees, only)

File this form with the Claims Department according to R.67-414 and R.67-1204. A person other than the claimant receiving benefits should sign on the line provided. Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and hospital examination. Form 19 must be filed within six (6) days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marlon Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0902321
Carrier File # 2009-000940
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29485

Preparer's name: Mee Ling Khor-Gould (803) 696-5834 State Accident Fund, Insurance Carrier

TT 3.0000

10-MAR-09

30-MAR-09

1,243.35

FD-302 (Rev. 11-27-70) PAGE 1

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700
David Lemon

WCC File # 1006927
Carrier File # 2010-001561
Carrier Code # 500 - SF
Employer FEIN 576001080

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(home) (work)

Preparer's name: Mee Ling Khoo-Gould (803) 896-5834 State Accident Fund, Insurance Carrier

Preparer's Name, Address, and Phone Number		Number of Weeks	From	To	Amount
Compensation Paid					
1. Number of weeks T.T.	TT	25.4286	29-JUN-10	23-DEC-10	10,292.72
2. Number of weeks T.P.					
3. Number of weeks P.P.					
4. Disfigurement					
5. Agreement and Final Release					
Total Compensation Paid					30,357.75
					40,650.47
					18,853.59

RECEIVED
MAY 18 2011
(FRONT DESK)
SC Workers' Comp Comm

File this form with the Claims Department according to R.C.F. 414 and R.C.F. 420. A person, other than the claimant, receiving benefits should sign on the line provided. *Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within fifteen days of final payment of compensation. Form 13 must be filed when a claim is denied.

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

To: SAF

From: nboean@compendiumusa.net 4/14/2011 9:30:48 AM (Page 2 of 2)

SC WORKERS COMPENSATION FIRST REPORT OF INJURY OR ILLNESS									
EMPLOYER (NAME, ADDRESS & PHONE)			EMPLOYEE (NAME, ADDRESS & PHONE)			DATE OF INJURY		STATE	
Mount Pleasant Waterworks Water Operations 823 Waterworks Blvd Mt Pleasant SC 29564			Lemon, David L. 823 Waterworks Blvd Mt Pleasant SC 29564			04-13-2011		SC	
CARRIER/CLAIMS ADMINISTRATOR			POLICY PERIOD			CLAIMS ADDRESS (NAME, ADDRESS & PHONE)		LOCATION	
State Accident Fund of South Carolina P.O. Box 102100 Columbia, SC 29221-5000 800-621-6578			TO					PHONE	
EMPLOYEE'S SOCIAL SECURITY NUMBER			EMPLOYEE'S DATE OF BIRTH			EMPLOYEE'S SEX		EMPLOYEE'S MARITAL STATUS	
EMPLOYEE'S RACE			EMPLOYEE'S RELIGION			EMPLOYEE'S OCCUPATION		EMPLOYEE'S STATUS	
Lemon, David L.						Mechanics		Regular Employment	
EMPLOYEE'S PHONE			EMPLOYEE'S FAX			EMPLOYEE'S EMAIL		EMPLOYEE'S ADDRESS	
EMPLOYEE'S RATE			EMPLOYEE'S HOURS PER WEEK			EMPLOYEE'S FULL PAY FOR DAY OF INJURY		EMPLOYEE'S SECONDARY EMPLOYMENT	
234,174.40			5			X YES		X YES	
DATE OF OCCURRENCE			TIME OF OCCURRENCE			DATE EMPLOYER NOTIFIED		DATE DISABILITY BEGAN	
07:00			11:00			04/13/2011			
CONTACT PERSON (NAME & PHONE)			TYPE OF INJURY/ILLNESS			PART OF BODY AFFECTED			
Ronnie Freeman, safety dir. 843-376-5468			Strain			R shoulder			
CO-EMPLOYER'S ADDRESS (NAME, ADDRESS & PHONE)			CO-EMPLOYER'S PHONE			CO-EMPLOYER'S FAX			
REMARKS (DATE OF OCCURRENCE, DATE OF INJURY, DATE OF DISABILITY BEGAN)			REMARKS (DATE OF OCCURRENCE, DATE OF INJURY, DATE OF DISABILITY BEGAN)			REMARKS (DATE OF OCCURRENCE, DATE OF INJURY, DATE OF DISABILITY BEGAN)			
Playing Volleyball			Playing Volleyball			Playing Volleyball			
DATE RETURNED TO WORK			DATE RETURNED TO WORK			DATE RETURNED TO WORK			
04-13-2011			04-13-2011			04-13-2011			
PHYSICIAN'S NAME & ADDRESS			HOSPITAL NAME & ADDRESS			PHYSICIAN'S PHONE			
Doctors Care - Mt Pleasant 631 Johnnie Dobbs Blvd Mt Pleasant, SC 29564						843-376-5468			
DATE OF REPORT			DATE OF REPORT			DATE OF REPORT			
04-14-2011			04-14-2011			04-14-2011			
REPORTED BY (NAME & PHONE)			REPORTED BY (NAME & PHONE)			REPORTED BY (NAME & PHONE)			
Ronnie Freeman, Safety Dir.			Ronnie Freeman, Safety Dir.			Ronnie Freeman, Safety Dir.			

WCC FORM 12-A

REV DATE 3/09

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700
David Lemon

WCC File # 1103841
Carrier File # 2011-001072
Carrier Code # 500 - SF
Employer FEIN 578001080

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(home) (work)

Preparer's name: Mee Ling Khor-Gould (803) 886-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.				
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release				

(Case settled with claim #2010-001561. See WCC # 1006927)

Total Compensation Paid

6. Total Medical Benefits* Paid 175.00

7. Funeral Benefits

() Case Denied

Date of Injury: 04/13/2011

By signing this receipt, I acknowledge that I have received the compensation shown above.

By:

Claimant

By:

Employer's Representative

Date: 5/13/11

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By:

Report of additional Fees and Recoupment

A. Carrier Reimbursement by Third Party

B. Attorney's Fee Paid by Employer

C. Attorney's Fee Paid by Claimant

(Non-contingent fees, only)

File this form with the Claims Department according to R.67-414 and R.67-1304. A person other than the claimant receiving benefits should sign on the line provided. Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within fifteen days of final payment of compensation. Form 19 must be filed when a claim is denied.

WCC FORM # 19 REV. DATE 3/95 19

STATUS REPORT AND COMPENSATION RECEIPT

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NOS.: 1006927 and 1103641

David Lemon,

#2010-001561

Employee-Claimant

RECEIVED
SETTLEMENT

vs.

MAY 18 2011

PETITION FOR APPROVAL
OF
COMPROMISE SETTLEMENT
AGREEMENT

Mt. Pleasant Waterworks
Division of Claims
SC Workers Comp. Comm.

Employer, and

State Accident Fund,

Carrier-Defendants.

The Petition of David Lemon, Employee, and Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, respectfully shows:

1. That the Employee sustained an injury by accident arising out of and in the course of employment by Employer on or about April 26, 2010 and April 13, 2011, in Charleston County, South Carolina. Employee suffered an injury to the right shoulder.

2. That Employee received medical treatment for the above injury. That on March 14, 2011, Dr. Harry P. Rudolph, IV gave a rating of 12% to the right shoulder.

3. That Employee has an average weekly wage of \$607.13, making a compensation rate of \$404.77.

4. That an actual bona fide disagreement exists between Employee on the one hand and Employer and Carrier on the other as to the extent of residual disability, if any, and the amount of compensation for disability, if any, and the amount of compensation for any disfigurement to which Employee might be due and for which Employer and Carrier may be liable under the South Carolina Workers' Compensation Law based upon the aforesaid accident and injury.

5. That an agreement has been reached between Employee and Employer and Carrier whereunder Employer and Carrier will pay and Employee will accept the sum of Thirty Thousand Three Hundred Fifty-Seven and 75/100 (\$30,357.75) Dollars in full

payment and compromise settlement of all rights and claims of Employee under South Carolina Workers' Compensation Law for the above accidents. That this agreement shall act as a full and final release of all claims of Employee against Employer and Carrier. That this agreement shall release Employer and Carrier of all claims of Employee for compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability, and claim for disfigurement or for a change of condition.

6. That this agreement shall release Employer and Carrier for all medical care and treatment including hospital, surgical, nursing, physician, prescriptions and any other medical expenses for which Employee has incurred or will incur in the future. Medicals authorized by Carrier prior to the date of this agreement will be paid by Carrier. Medicals previously denied or unknown will remain denied by Carrier and will be the responsibility of Employee.

7. That the payment of the sum of Thirty Thousand Three Hundred Fifty-Six and 75/100 (\$30,351.75) Dollars represents any and all disability claims to include 25% to the right shoulder. Carrier has agreed to waive overpayment of temporary total benefits.

8. That Employer and Carrier do not waive any right to a third party lien or the proceeds of any third party recovery from the above accidents.

9. That both parties believe this final release and compromise settlement agreement to be in their best interests and is fair, reasonable, and proper under all of the circumstances of the matter.

WHEREFORE, The Petitioners each pray that the South Carolina Workers' Compensation Commission does consider the said compromise settlement agreement, and enter an Order confirming and approving the same and authorizing the parties hereto to carry the said compromise settlement agreement out and make and receive the aforesaid payment in full settlement, acquittance and discharge of all of the rights of Employer and Carrier based upon the aforesaid accidents and injuries, and all disability and expenses resulting or hereafter to result therefrom.

Paul B. Carr
Employee

[Signature]
Attorney for Employee

[Signature]
Attorneys for Employer and Carrier/Defendants

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1006927 and 1103641

David Lemon,

Employee-Claimant,

vs.

Mt. Pleasant Waterworks,

Employer, and

State Accident Fund,

Carrier-Defendants.

ORDER APPROVING
SETTLEMENT AGREEMENT

The foregoing settlement was examined after a review of the Workers' Compensation Commission file relative to these cases. Relying upon the representations of the parties and/or counsel, the same are hereby approved this ____ day of _____, and these cases are dismissed with prejudice. All orders, awards and opinions heretofore issued in these cases are hereby set aside, atrogated, and nullified.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By: _____

Columbia, South Carolina

FEE SUBJECT TO FORM 61

From: areiz@compendiumusa.net 10/5/2011 8:22:54 AM (Page 2 of 2)

REC FORM 17-A REV. DATE 1964

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

David Lemon

WCC File # 1114198
Carrier File # 2011-003224
Carrier Code # 500 - SF
Employer FEIN 576001088

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

(home) (work)

Preparer's name: Meeling Khor-gould (803) 896-5834 State Accident Fund, Insurance Carrier

Compensation Paid	Number of Weeks	From	To	Amount
1. Number of weeks T.T.	20.5714	Details on Page 2 *		7,559.40
2. Number of weeks T.P.				
3. Number of weeks P.P.				
4. Disfigurement				
5. Agreement and Final Release				32,006.50
Total Compensation Paid				39,564.90
6. Total Medical Benefits* Paid				6,090.64
7. Funeral Benefits				

() Case Denied

Date of Injury: 10/03/2011

By signing this receipt, I acknowledge that I have received the compensation shown above.

By: David B. Lemon
Claimant

By: Meeling Khor-gould
Employer's Representative

Date: 4/27/12

Print or type the name of the person, other than the claimant, receiving benefits and sign below.

By: _____

Report of additional Fees and Recoupment

- A. Carrier Reimbursement by Third Party \$.00
B. Attorney's Fee Paid by Employer \$
C. Attorney's Fee Paid by Claimant \$
(Non contingent fees only)

File this form with the Claims Department according to R67-414 and R67-1204. A person, other than the claimant, receiving benefits should sign on the line provided. Do not include as medical costs fees paid for expert testimony, fees for determining carrier's liability, costs of autopsy, birth and death certificates and impartial examination. Form 19 must be filed within sixteen days of total payment of compensation. Form 19 must be filed when a claim is denied.

WCC FORM # 19 REV. DATE 3/96 19

STATUS REPORT AND COMPENSATION RECEIPT

South Carolina Workers' Compensation Commission
P.O. Box 1715 - 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 1114198
Carrier File # 2011-003224
Carrier Code # 500 - SF
Employer FEIN 576001080

David Lemon

MT PLEASANT WATERWORKS
P. O. BOX 330, Mount Pleasant, SC 29465

Preparer's name: Mee Ling Khor-gould (803) 896-5834 State Accident Fund, Insurance Carrier

TT	1.8571	05-OCT-11	17-OCT-11	840.12
TT	2.8571	05-OCT-11	24-OCT-11	234.46
TT	15.8571	18-OCT-11	05-FEB-12	6,684.82

2011-003224

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1114198

David Lemon,
Employee-Claimant,
vs.
Mt. Pleasant Waterworks,
Employer, and
State Accident Fund,
Carrier-Defendants.

PETITION FOR APPROVAL
OF
COMPROMISE SETTLEMENT
RECEIVED
APR 16 2012
Division of Claims
SC Workers Comp. Comm.

The Petition of David Lemon, Employee, and Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, respectfully shows:

1. That the Employee sustained an injury by accident arising out of and in the course of employment by Employer on or about October 3, 2011, in Charleston County, South Carolina. Employee suffered an injury to lower back.
2. That Employee received medical treatment for the above injuries. That on February 24, 2012, Dr. James Aymond gave a rating of 7% to the spine.
3. That Employee has an average weekly wage of \$640.08, making a compensation rate of \$426.74.
4. That an actual bona fide disagreement exists between Employee on the one hand and Employer and Carrier on the other as to the extent of residual disability, if any, and the amount of compensation for disability, if any, and the amount of compensation for any disfigurement to which Employee might be due and for which Employer and Carrier may be liable under the South Carolina Workers' Compensation Law based upon the aforesaid accident and injury.
5. That an agreement has been reached between Employee and Employer and Carrier whereunder Employer and Carrier will pay and Employee will accept the sum of

Thirty-Two Thousand Five and 50/100 (\$32,005.50) Dollars in full payment and compromise settlement of all rights and claims of Employee under South Carolina Workers' Compensation Law for the above accident. That this agreement shall act as a full and final release of all claims of Employee against Employer and Carrier. That this agreement shall release Employer and Carrier of all claims of Employee for compensation of any and every kind under the law for disability to include temporary and permanent, total and partial, past, present and future disability, and claim for disfigurement or for a change of condition.

6. That this agreement shall release Employer and Carrier for all medical care and treatment including hospital, surgical, nursing, physician, prescriptions and any other medical expenses for which Employee has incurred or will incur in the future. Medicals authorized by Carrier prior to the date of this agreement will be paid by Carrier. Medicals previously denied or unknown will remain denied by Carrier and will be the responsibility of Employee.

7. That the payment of the sum of Thirty-Two Thousand Five and 50/100 (\$32,005.50) Dollars represents any and all disability claims to include 25% to the spine.

8. The Employer and Carrier express no opinion regarding the above allocation of the settlement proceeds. The Employer and Carrier have not given any advice concerning the distribution of money per the above Ujica Mohawk language.

9. That Employer and Carrier do not waive any right to a third party lien or the proceeds of any third party recovery from the above accident.

10. That both parties believe this final release and compromise settlement agreement to be in their best interests and is fair, reasonable, and proper under all of the circumstances of the matter.

WHEREFORE, The Petitioners each pray that the South Carolina Workers' Compensation Commission does consider the said compromise settlement agreement, and enter an Order confirming and approving the same and authorizing the parties hereto to carry the said compromise settlement agreement out and make and receive the aforesaid payment in full settlement, acquittance and discharge of all of the rights of Employer and Carrier based upon the aforesaid accident and injuries, and all disability

and expenses resulting or hereafter to result therefrom.

Don B. Lewis
Employee

Matthew
Attorney for Employee

Attorneys for Employer and Carrier/Defendants

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1114198

David Lemon,

Employee-Claimant,

vs.

Mt. Pleasant Waterworks,

Employer, and

State Accident Fund,

Carrier-Defendants.

ORDER APPROVING
SETTLEMENT AGREEMENT

The foregoing settlement was examined after a review of the Workers' Compensation Commission file relative to this case. Relying upon the representations of the parties and/or counsel, the same is hereby approved this ____ day of _____, and this case is dismissed with prejudice. All orders, awards and opinions heretofore issued in this case are hereby set aside, abrogated, and nullified.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By _____

Columbia, South Carolina

FEE SUBJECT TO FORM 61

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

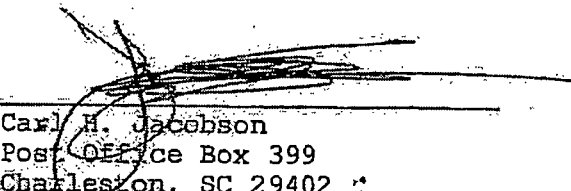
David Lemon, Claimant, Appellant,

v

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

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by the parties and not any other material.



Carl H. Jacobson
Post Office Box 399
Charleston, SC 29402
(843) 723-7491
Attorney for Appellant

April 12, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

DAVID B. LEMON, Claimant, Appellant,

-vs.-

MT. PLEASANT WATERWORKS, Employer,
and STATE ACCIDENT FUND, Carrier, ... Respondents.

BRIEF OF APPELLANT

Carl H. Jacobson
Post Office Box 399
Charleston, SC 29402-0399
(843) 723-7491
Attorney for Appellant

RECEIVED

APR 28 2017

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

Did the Workers' Compensation Commission Err, as a matter of law, by offsetting the Claimant's award of permanent and total disability by awards he had received for prior claims?

STATEMENT OF THE CASE

This is a workers' compensation appeal from the Decision and Order of the S.C. Workers' Compensation Commission issued on October 26, 2016.

Claimant/Appellant (hereinafter referred to as "Appellant") was involved in an admitted work accident on May 8, 2012 when he injured his lower back and legs while pulling a device designed to provide leverage on a sewer line. (R. p. 110, lines 1-3). As a result of his accident, Defendants/Respondents (hereinafter referred to as "Respondents") provided Appellant medical treatment and also paid him temporary total disability benefits.

On March 6, 2014, Appellant filed a Request for Hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability. On April 7, 2014, Respondents timely filed a Response. In addition, on May 1, 2014, Respondents filed a Request for Hearing, seeking a stop payment of temporary total disability compensation, a determination of permanency, and a request for credit for overpayment of temporary compensation.

On September 11, 2014, a hearing was held on all pleadings before Single Commissioner Scott Beck ("Single Commissioner"). On January 7, 2015, the Single Commissioner issued a decision and

order (R. pp. 2-17), wherein he set forth the following relevant Findings of Fact:

FINDINGS OF FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. Singleton v. Young Lumber, 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Duc. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.
3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of

TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.

4. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. **I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170. (emphasis added)**
12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.
13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disability and is not a candidate

for vocational rehabilitation. (EX 1). (See, R. pp. 18-24).

The Single Commissioner then concluded, as a matter of law, as follows:

1. §42-9-10 provides for permanent total disability benefits; and
3. **§42-9-170** provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. **I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive. (emphasis added)**

On January 20, 2015, Appellant filed a Form 30 request for Commission review. (R. pp. 25-29). The essential basis for the appeal from the Single Commissioner's order was that he had erred by finding and awarding the Respondents a credit for the awards that the Appellant had received from prior claims when there was no statutory basis to do so. Certainly no credit was due pursuant to the specific code section stated in his order, Code Section 42-9-170, because this code section only applies to Code §42-9-10(B) awards but not to Code §42-9-10(A) awards.

It should be noted that the Respondents did not appeal any part of the Single Commissioner's order.

Oral arguments on the appeal from the Single Commissioner's

Order to the Commission's Appellate Panel (hereinafter "Appellate Panel") was scheduled and heard on April 20, 2015 (R. pp. 30-59).

Most of the discussion before the Appellate Panel involved whether the Single Commissioner intended to award the Claimant permanent total disability benefits pursuant to Code §42-9-10(A) or Code §42-9-10(B) since the order only referenced §42-9-10, without specifying which subsection. Appellant argued that if the award was pursuant to Code §42-9-10(A) then Code §42-9-170 could not apply.

On September 11, 2015, the Appellate Panel issued a decision and order (R. pp. 60-67), remanding the case back to the Single Commissioner (1) for a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) for a determination of the statutes under which prior awards were issued; and (3) for any facts, analysis, conclusions of law, or other provisions that the Single Commissioner should deem necessary in the analysis of the §42-9-170 issue.

On May 9, 2016, the Single Commissioner issued a second decision and order (R. pp. 68-81) in which he set forth the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.
2. The award in this case is based on 42-9-10(A).
3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.
4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.
5. As a result of these additional findings of fact, the Claimant is subject to the 500 weeks limitation.
6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-9-170, upon expanding my

research to other cases and statutes, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.

7. The Claimant was paid 3 weeks of TTD for his back claim, WCC #0902321, DOI 3/4/09.
8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for \$30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."
9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.
10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.
11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).
12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.
13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.
14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.
15. The Claimant's incapacity for work is total due to his current condition.
16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for SCC #1114198.
17. Because the Claimant had already been compensated for 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.
18. Pursuant to Hopper v. Firestone Stores, Medlin v. Greenville County, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use of his back, i.e. 75 weeks, per WCC #1114198.
19. Pursuant to United Technologies v. S.C. Second Injury Fund, Roberts v. McNair, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

Conclusions of Law:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.
2. Wyndham v. R.A. & E.M. Thornley and Co., provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).
3. Section 42-9-170 provides that if an employee previously has 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.

4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C.1952).
5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2d 667 (S.C. 1991).
6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another state's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).
7. Roberts v. McNair Law Firm provides that temporary compensation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2d 453 (S.C. 2005).
8. Gestinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2d 104 (S.C. 1999).
9. Crisp v. SouthCo., Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).
10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 304, 638 S.E.2d 77 (S.C. 2006).
11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2d 730 (S.C. 2010).

On May 23, 2016, Appellant filed a second Form 30 Request for Commission Review (R. pp. 82-85) from the Single Commissioner's second order. Again, the Appellant maintained that the offset from the award for permanent total disability for awards relating to prior unrelated claims was unlawful.

The second appeal to the Appellate Panel was heard by the Panel on August 15, 2016. (R. pp. 86-108). The Full Commission reviewed the Single Commissioner's order of May 9, 2016 and on October 26, 2016, issued a Decision and Order affirming the Single Commissioner's May 9, 2016 Decision and Order in full. (R. pp. 109-121).

On November 10, 2016, Appellant filed his notice of appeal to the Court of Appeals, appealing the Decision and Order of the Workers' Compensation Commission dated October 26, 2016.

FACTS

There are no factual issues in dispute. The only issue presented is a matter of law.

ARGUMENT

The S.C. Workers' Compensation Commission erred, as a matter of law, by offsetting the Appellant's award for permanent and total disability by awards he had received for unrelated prior claims when there was no statutory or common law basis to do so.

On January 7, 2015, the Single Commissioner awarded the Appellant permanent and total disability benefits pursuant to S.C. Code §42-9-10. (R. pp. 2-17). This disability award has never been challenged by the Respondent.

As stated above, the Appellant was injured on May 8, 2012 while performing heavy manual labor. He injured his low back and legs while pulling a device designed to provide leverage on a sewer line. (R. p. 110, lines 1-3). At the time of his injury, the Appellant was earning \$636.04. (R. p. 4, line 5). According to the Single Commissioner, the Appellant was awarded permanent and total disability benefits because of the permanent injuries to his back and both legs. The primary injuries to the back that affected both legs was documented by both of his treating physicians, Dr. Aymond (R. p. 10, lines 4-11) and Dr. Duc (R. pp. 10, Lines 13-15). Accordingly, benefits were awarded pursuant to S.C. Code §42-9-10.

Benefits were not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. (R. pp. 13-14, Finding of Fact 1).

On remand from the Single Commissioner, the Appellate Panel specifically found that the award for permanent and total disability benefits was pursuant to S.C. Code §42-9-10(A). (R. p. 115, Finding of Fact 2). The Panel also concluded as a matter of law:

1. "Pursuant to §42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition." (R. p. 116, Conclusion of Law 1).

THE OFFSET FOR §42-9-10(A) APPLIES

The Appellant maintains that the only limitation on the number of weeks that he can receive for permanent and total disability benefits is 500 weeks pursuant to S.C. Code §42-9-10(A). As such, the Appellant also concedes that the Respondents are entitled to a credit for the weeks of temporary total disability benefits that have been paid to the Claimant for the injury resulting from the subject accident.

S.C. Code §42-9-10(A) provides that "when the incapacity for work resulting for an **injury** is total, the employer shall pay...to the injured employee...a weekly compensation...in no case may the period covered by the compensation exceed 500 weeks."

S.C. Code §42-1-160 provides "**injury**" and "personal injury"

meaning only injury by **accident** arising out of and in the course of employment."

Based upon the above, it is submitted that the cap of 500 weeks only applies to an injury arising from an accident; one accident, not multiple accidents. In the present case, the injury sustained by the Claimant from his accident of May 8, 2012 can only result in the maximum award of 500 weeks, inclusive of any weeks paid for temporary total disability benefits. As such, the Claimant does not dispute the credit awarded by the Single Commissioner with respect to the prior weeks that had been paid for temporary total disability benefits relating to the subject accident.

"Under South Carolina workers compensation law, a claimant is entitled to compensation for a total disability resulting from a work-related injury. S.C. Code Ann. §42-9-10 (1985 and Supp. 1995). The term "disability" is defined as "incapacity because of injury to earn the wages that the employee was receiving at the time of the injury in the same or any other employment." Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996).

In Wicfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), the Supreme Court distinguished between the "two competing models" of workers' compensation. "The first, the economic model, defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury. The second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts." Supra, at 104.

The Court went on to state that "South Carolina provides three methods to obtain disability compensation: 1) total disability under S.C. Code Ann §42-9-10; 2) partial disability under S.C. Code Ann. §42-9-20; and 3) scheduled disability under S.C. Code Ann. §42-9-30. The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity." Supra, at 105.¹

Significantly, in the present case, the award for permanent total disability was pursuant to §42-9-10(A). Such an injury, which is not a §42-9-30 scheduled injury, causes sufficient loss of earning capacity to render an injured employee totally disabled. An example cited by the Court is one in which an employee experiences a double hernia after being injured while at work. In Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 403 (1965), "the Claimant established the double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment. The injury, combined with those other factors, diminished his earning capacity to such an extent as to entitle him to total disability." Wigfall, at 105-106.

Thus, the Appellant reiterates that since the finding of permanent total disability benefits in the present case was pursuant to Code §42-9-10(A), then the medical impairment model of

¹Another manner in which an injured employee may be deemed to be entitled to permanent and total disability benefits is pursuant to §42-9-10(B), that does not apply in the present case. This loss of earning capacity is like a scheduled loss in §42-9-30, conclusively presumed based upon "the loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two there of." See, footnote 4, Wigfall, at 118

disability consistent with §42-9-30 does not apply. Nor does disability based upon S.C. Code §42-9-10(B) apply.

THE OFFSET FOR S.C. CODE §42-9-170 DOES NOT APPLY

Although the Appellant takes no issue with the Commission's crediting the Respondents for the prior payments of temporary total disability compensation for the subject claim, the Appellant vehemently opposes the offset that was given to the Respondents for the awards that he had received for prior unrelated injuries pursuant to S.C. Code §42-9-30. Additionally, the specific code section that the Commission has relied on as a basis for such an offset, S.C. Code §42-9-170, does not apply.

S.C. Code §42-9-170(B)² states:

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 five hundred weeks. If an employee previously has 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. This subsection is effective on July 1, 2008. (Emphasis added)

It is well settled that the Workers' Compensation Act is an Act that is created by statute. Therefore, it is also well recognized that the law that is applicable to the Act and the

²S.C. Code Section 42-9-170(A) does not apply because it was only effective until June 30, 2008.

Commission's authority to render decisions and orders are derived from the plain reading from the statutes contained in the Act. "Workers' compensation is a creature of statute. As such, we are bound to strictly construe the terms of the statute." Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836, (2003). "Workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights. See, Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948). As such, when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

As to the general construction of the Workers Compensation Act, workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment. (S.C. Code Ann. §42-1-310). In determining whether a work-related injury is compensable, the Workers' Compensation Act (Act) is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed. Shealy v. Aiken Cnty, 341 S.C. 448, 535 S.E.2d 438 (2000) (citation omitted). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).

The primary issue on appeal is whether the Respondents are entitled to an offset for payments of prior awards to the Claimant.

In order to credit the Employer for any payments from prior awards, it would have to be specifically authorized pursuant to §42-9-170(B) or specific case law.

The above Code Section specifically states that "if an employee received a permanent injury as specified in §42-9-30 or §42-9-10(B) after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries...and in no case exceeding 500 weeks."

The clear reading of the statute is that this code section **only applies** if the Employee received an award for permanent injury as specified in §42-9-30 or §42-9-10(B). In the present case, since the Commission determined that the award was pursuant to §42-9-10(A) and not §42-9-10(B) [and certainly not §42-9-30], §42-9-170(B) simply does not apply.

The Commission then cites the second sentence of §42-9-170(B) as support for the credit for the prior awards. To do so would torture the plain meaning of the statute. The second sentence of this subsection does not apply because this provision only applies when a Claimant sustains total permanent disability by a subsequent accident through the loss of another member. In this case the Claimant's award for permanent total disability was not based upon a loss of another member pursuant to Code §42-9-30. To the contrary, the award was pursuant to §42-9-10(A)³. There is absolutely no reference to S.C. Code §42-9-10(A) in Code §42-9-

³ Even if the present award was "through the loss of another member," the Employer's liability is for the subsequent injury only. In the present case, Appellant maintains and the Commissioner found that the subsequent injury caused the Claimant to become totally disabled, so the liability would be for permanent total disability benefits.

170(B). Its omission from the triggering statutes is significant.

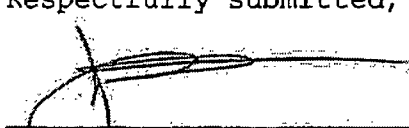
The Commission also cites various cases as common law support for the offset attributable to the prior awards. Interestingly, most, if not all of, the cited cases precede the 2007 amendment to S.C. Code §42-9-170. As such, they do not apply in the present case. Lastly, none of the cases are on point to the specific issue presented in this appeal.

CONCLUSION

Based upon the above, it is respectfully submitted that the Commission erred by awarding the Respondents a setoff for the awards that the Claimant had received for his prior unrelated injuries. Simply stated, there is no lawful basis to do so in the present case.

Appellant urges this Court to reverse the Commission's ordering that the Appellant's award for permanent total disability benefits be offset by his prior awards for unrelated claims.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

DAVID LEMON, Employee, ... Appellant,

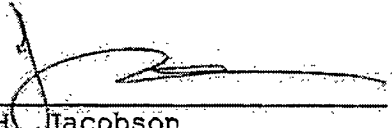
-vs.-

MT. PLEASANT WATERWORKS, Employer,
and STATE ACCIDENT FUND, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant
complies with Rule 211(b); SCACR.

April 25, 2017.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2016-002321
WCC File No.: 1205924

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SC Court of Appeals

David Lemon, (Employee/Claimant), ... Appellant,

vs.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Workers' Compensation Commission correctly offset Appellant's Five-Hundred (500) week maximum award for permanent and total disability by applying credit for 199 weeks of compensation benefits paid to Appellant as a result of his four (4) prior workers' compensation claims with the same Respondent Employer.

STATEMENT OF THE CASE

Appellant was involved in an admitted work accident on May 8, 2012 while pulling a device designed to provide leverage on a sewer line, causing injury to his low back, affecting his bilateral legs. Prior to his May 8, 2012 accident, Appellant was involved in four (4) previous workers compensation claims against Respondent Employer, including a March 4, 2009 injury to the back (R. p.122), an April 26, 2010 injury to the right shoulder (R. p.125), an April 13, 2011 injury to the right shoulder (R. p.,127), and an October 3, 2011 injury to the back (R. p.132). As a result of his four (4) previous claims, Appellant received 199 weeks of compensation benefits, both as temporary and permanent disability benefits. (R. pp. 78, 123-124, 126, 128, 129-130, 133-137).

Following Appellant's May 8, 2012 work accident, Respondents provided Appellant with authorized causally related medical treatment, with multiple medical providers, including but not limited to, Dr. James Aymond and Dr. Thomas Duc. On June 20, 2013, Dr. Aymond found the Appellant to be at maximum medical improvement ("MMI") and assigned 24% impairment to the Appellant's back. (R. p. 11). On February 12, 2014, Dr. Duc found the Appellant to be at MMI and assigned Appellant impairment ratings of 24% to the lumbar spine, 7% to the right lower extremity, and 7% to the left lower extremity. (R. p. 11).

On March 6, 2014, Appellant filed a Form 50 request for hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability and lifetime medical treatment. (R. p. 4). Respondents timely filed both a form 51 response and a Form 21 request for

hearing, seeking stop payment of temporary compensation; a determination of permanent disability, and a request for credit for overpayment of temporary compensation paid after the date of MMI. (R. p. 6). In addition, Respondents argued for credit for the 199 weeks of benefits Appellant received in his four (4) prior claims against Respondent Employer, to be applied as an offset against his current award of permanent disability. (R. p.6).

A hearing was before Commissioner Scott Beck ("Hearing Commissioner"), on September 11, 2014. On January 7, 2015, the Hearing Commissioner issued an order, wherein he set forth a number of findings, including the following:

1. Based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code Ann. §42-9-30 (R. pp. 13-14, Finding of Fact # 1);
2. Appellant is entitled to lifetime causally related medical care (R. p.13, FOF# 2);
3. Appellant's May 8, 2012 work accident was his fifth work accident as an employee of Respondent Mount Pleasant waterworks, and he has received previously received temporary or permanent disability compensation in the amount of 199 weeks (R. p.13, Finding of Fact # 3);
4. By the date of the hearing, claimant received 122 weeks of temporary total disability benefits related to his May 8, 2012 work accident. (R. p. 13, Finding of Fact # 3).

Based on the findings above, the Hearing Commissioners ordered that Appellant was entitled to an award of permanent total disability; however, Respondents were entitled to 321 weeks of credit against the maximum five-hundred (500) week award of permanent and total disability benefits, including the 199 weeks of benefits from his four (4) prior worker's compensation claims with the same employer pursuant to S.C. Code Ann. §42-9-170, and the 122 weeks of temporary disability benefits for the current claim. (R. p.15, Conclusion of Law #3).

On January 20, 2015, Appellant filed a Form 30 request for Full Commission review. (R. pp. 25-29). Appellant argued that the Hearing Commissioner erred as a matter of law in offsetting

Appellant's five-hundred (500) week award with credit for compensation benefits paid for as a result of his four (4) prior claims with Respondent Employer. Appellant argued that S.C. Code §42-9-170 did not apply because the Hearing Commissioner awarded Appellant permanent and total disability benefits pursuant to S.C. Code §42-9-10(A). (R. p.p. 26-27). Appellant further argued that even if §42-9-170(B) did apply, the Hearing Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. (R. p. 27).

After the matter was briefed by both parties, the Full Commission held oral arguments on April 20, 2015. On September 11, 2015, the Full Commission remanded the case to the Hearing Commissioner for (1) a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) a determination of the statutes under which prior awards were issued; and (3) any facts, analysis, conclusions of law, or order provisions that the Hearing Commissioner should deem necessary in the analysis of the §42-9-170 issue. (R. p. 67).

On May 9, 2016, the Hearing Commissioner issued a second Decision and Order in response to the Full Commission's request on remand. (R. pp. 68-81). At the outset, the Hearing Commissioner stated that all evidence received in the case was outlined in his original January 7, 2015 Order, and, along with the Appellant's testimony, remains part of the Commission's file and serves as the basis upon which the current decision was issued. (R. p. 77). The Hearing Commissioner then proceeded to go through a legal analysis of S.C. Code Ann. §42-9-10, §42-9-170, and supporting case law. (R. pp. 72-77). Following a careful consideration of the evidence in the record, the Hearing Commissioner issued several findings of fact, including a finding that all previous Findings of Fact issued via his January 7, 2015 decision and order not inconsistent with the instant opinion are hereby reaffirmed herein (R. p. 77, Finding of Fact # 1); the award in this

case is based on §42-9-10(A) (R. pp.77, Finding of Fact #2); the previous awards for injuries sustained with the same employer were awarded under §42-9-30 (05/06/16, FOF#3); and the phrase “receives a permanent injury” in §42-9-170(B) refers to the present claim and “another permanent injury in the same employment” refers to the claimant’s prior injuries.” (R. p.77, Finding of Fact #4). The Hearing Commissioner concluded that the Appellant was subject to the five-hundred (500) week cap on benefits under the Workers’ Compensation Act, and his previous reliance on §42-9-170 was further supported by his expanded research of other cases and statutes, and he was “even more convinced that the law allows that Respondents be given a credit for all indemnity benefits paid during the Appellant’s employment with Mt. Pleasant Waterworks.” (R. p. 78, Finding of Fact #6, p.81).

On May 23, 2016, Claimant filed a second Form 30 request for Full Commission review, wherein he set forth his issues on appeal and argued that the Hearing Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, and again Appellant argued that the Hearing Commissioner’s award for credit to be applied against the current disability award was not supported by the law. (R. pp. 82-85).

Following review of briefs from both parties, the Full Commission held oral arguments on August 15, 2016. On October 26, 2016, the Full Commission issued an Appellate Panel Decision and Order affirming the Single Commissioner’s May 6, 2016 Decision and Order in Full. (R. p.118). On November 9, 2016, Appellant filed his Notice of Appeal before this Court.

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). An appellate court, in workers’ compensation appeals, may overturn a conclusion of the

Workers' Compensation Commission if that conclusion Affected by error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, unless effected by error of law, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

ARGUMENT

I. The Workers' Compensation Commission Appellate Panel correctly awarded Respondents credit against Appellant's award of permanent and total disability for the benefits Appellant received as a result of his four (4) prior claims with the same employer.

Appellants May 8, 2012 work accident was his fifth (5th) work accident while working for Respondent/employer for which he received compensation benefits. Specifically, Appellant previously received a combined 25.4286 weeks of temporary disability benefits and 75 weeks of permanent partial disability ("PPD") benefits as a result of two (2) injuries by accident to his right shoulder on April 26, 2010 and April 13, 2011. (R. pp. 126, 130). In addition, Appellant received a combined 23.5714 weeks of temporary benefits and 75 weeks of PPD benefits as a

result of two (2) injuries by accident to his back on March 4, 2009 and October 3, 2011. (R. pp. 123, 133, 136). In sum, Appellant received a total of 199 weeks of compensation benefits as a result of his four (4) prior claims with Respondent Employer.

Appellant correctly asserts that the Worker's Compensation Act is created by statute, and as such, "when reading a worker's compensation statute, we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." *Wigfall v. Tideland Utilities, Inc.* 354 S.C. 100, 580 S.E.2nd 100 (2003). Appellant incorrectly asserts that when determining compensability, the Workers Compensation Act is liberally construed in favor of the injured worker. The case law is clear that issues involving "coverage" and whether an employer is to be brought into the Act as a potential defendant is to be liberally construed in favor of the injured workers, but there is nothing in the case law that supports the position that the Workers Compensation Act is to be liberally construed in favor of the injured worker when deciding compensability.

The South Carolina Workers' Compensation Act includes a specific statute dealing with permanent injuries sustained by an employee after he or she previously sustained permanent injuries in the same employment. S.C Code Ann. §42-9-170(B) states:

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*. If an employee previously has *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. This subsection is effective on July 1, 2008.(emphasis added)

The basis for the Legislature's inclusion of §42-9-170 is clear in light of the overall goal of the Worker's Compensation system to encourage employers to bring injured workers back to work after injuring themselves in prior Worker's Compensation claims. Without the guarantee of credit for benefits paid on previous claims against the same employer set forth in §42-9-170, there is little incentive for South Carolina businesses to continue to employ workers following an accident and resulting workers' compensation claim.

Appellant's argument that §42-9-170 does not support the Commission's award of credit for his previous claims is flawed based on a clear reading of the statute. The first sentence states that an employee must "receive a permanent "injury" as specified in §42-9-30 (scheduled members) or §42-9-10(B)(combination of multiple body parts). The statute does not say the employee must have received an award of "disability" under §42-9-30 or §42-9-10(B) as a result of his current claim after having sustained another permanent injury in the same employment in order to receive compensation for both claims. Instead, §42-9-170 states only that the injured worker "receive permanent injuries" as specified in §42-9-30 or §42-9-10(B). It is significant to note that the second sentence of §42-9-170 requires that an employee previously sustain permanent partial "disability" and not "injury" in order to determine the employer's liability for permanent disability, delineating the difference between "injury" and "disability" within the language of §42-9-170 itself.

In this case, although the Hearing Commissioner awarded permanent disability pursuant to §42-9-10(A), the question still turns on whether Appellant received a permanent injury as specified in §42-9-30 (a single schedule member injury) or §42-9-10(B)(a combination of injuries to multiple body parts) as a result of his May 2, 2012 work accident. With regard to credit for compensation Appellant received for his prior claims involving injuries to his back, the

offset against the current award of permanent and total disability is appropriate pursuant to §42-9-170 since Appellant "received permanent injuries" to the back, affecting the bilateral legs, which would qualify as permanent injuries under §42-9-30 or §42-9-10(B), after having sustained previous permanent injuries with the same employer. The Hearing Commissioner's ultimate award of permanent "disability" under §42-9-10(A) is irrelevant in light of the language of §42-9-170, and the Commission's decision to award Respondent credit for compensation benefits Appellant received for his prior back claims is supported by statute and should be affirmed.

With regard to Appellant's two (2) previous claims for right shoulder injuries, the second sentence of §42-9-170 controls. Specifically, the second sentence of §42-9-170 states:

If an employee previously has 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.

In this case, Appellant received 25.4286 weeks of temporary benefits and 75 weeks of PPD (total 100.4286 weeks of compensation benefits) for the two (2) prior right shoulder claims that he sustained on April 26, 2010 and April 13, 2011.

The Commission correctly affirmed credit for 100.4286 weeks of benefits for Appellant's previous right shoulder injuries because Appellant sustained permanent partial "disability" for the loss of use to his right shoulder in the April 26, 2010 and April 13, 2011 accidents, and he subsequently incurred permanent total disability through the loss of use of another member, specifically the back and affected bilateral legs. Therefore, pursuant to the clear language in the second sentence of §42-9-170, Respondents' liability is for the subsequent injury only, and the

100.4286 weeks were properly credited against the five-hundred (500) week maximum award allowed for permanent total disability.

In addition to the statutory support for the Commission's award for credit against Appellant's five-hundred (500) week award for permanent total disability, our appellate courts have addressed relevant issues in further support of the Commission's award of credit to Respondents for the 199 weeks of compensation benefits appellant received from his four (4) previous worker's compensation claims.

In *Wyndam v. R.A. & E.M. Thornley and Co.*, this Court held that although the 500 week limit on benefits does not apply to successive injuries while working for different employers, "when the legislature wished to impose a 500 week limit on successive injuries, it did so explicitly. See section 42-9-170 (limiting to 500 weeks the total compensation available for successive permanent injuries sustained in the same employment)." 354 S.E.2nd 399, 402, 291 S.C. 496 (Ct. App. 1986).

In *Hopper v. Firestone Stores*, the Supreme Court was faced with the issue of whether an injured worker who previously sustained an amputation to his right leg below the knee, and was subsequently involved in a work accident causing additional amputation above the knee, was entitled to additional permanent disability benefits to his leg. 222 S.C. 143, 152, 72 S.E.2nd 71, (1952). The Supreme Court found that the injured worker had already lost one hundred percent (100%) of his leg prior to the work injury, and therefore, "there was no basis upon which an award for permanent disability or specific loss could be computed." (*Id.*). The Court went on to state that "an examination of the entire record in the case in light of the statute leads us to no other conclusion than that the Legislature intended that the compensation here, if there is to be

such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." (*Id.* at 153).

In this case, Appellant previously sustained twenty-five percent (25%) disability to the back as a result of one of his previous workers' compensation claims (R. p.136), and therefore the Commission correctly found that pursuant to §42-9-170 and *Hopper*, Appellant had only seventy-five percent (75%) of his back remaining to be awarded, and Respondents were properly awarded credit against the current award of permanent and total disability paid to Appellant as a result of his prior back claims.

In *Medlin v. Greenville County*, the Supreme Court dealt with an injured worker who sustained a compensable back injury while working for Greenville County, resulting in an award of permanent and total disability based on fifty percent (50%) or greater loss of use to the back. 303 S.C. 484, 401 S.E.2nd 667 (1990). After the injured worker's case settled and Appellant received payment for permanent and total disability, the injured worker returned to work with Greenville County and sustained a second injury by accident, for which he claimed permanent and total disability. The Supreme Court held that the injured worker was not allowed to recover under the Act for the loss of use of his back, because he had already received permanent and total disability benefits for a back injury. Specifically, the Supreme Court stated that "Under *Hopper*, we find that employee is not entitled to any further benefits for loss of use to the same body part as the loss of use to his back has already been "written off" and is non-existent insofar as the Act is concerned." (*Id.* at 487).

In addition to permanent disability benefits, the Commission also appropriately awarded credit for temporary disability benefits that Appellant received from his previous workers' compensation claims. In *United Technologies v. South Carolina Second Injury Fund*, the issue

before the Court was whether the sixty-three (63) weeks of temporary benefits the injured worker received as a result of his accident under Michigan law at a higher compensation rate than allowed in South Carolina still counted as weeks of benefits to be included as credit against a five-hundred (500) week award of permanent and total disability. 318 S.C. 213, 456 S.E.2nd 901 (1995). The Court ruled that the sixty-three (63) weeks did count as compensation pursuant to the South Carolina Workers' Compensation Act, despite the fact that they were paid in another state at a different compensation rate. (*Id.* at 904). Further, in *Roberts v. McNair*, the Court concluded that payment of temporary partial benefits counted as full weeks of compensation, and not "half weeks" of compensation when calculated as credit against the statutory five-hundred (500) week cap on permanent disability. 366 S.C. 50, 691 S.E.2nd 453 (Ct. App. 2005).

In *Getzinger v. Owens Corning Fiberglass*, the Supreme Court dealt with an injured worker that received a thirty percent (30%) PPD award to his right foot in June of 1993, and subsequently obtained another ten percent (10%) PPD award in October of 1995. By December of 1995, the injured worker's impairment had increased to fifty percent (50%), and the injured worker was ultimately found to be totally disabled based on the combined loss of use of his foot and psychological overlay. In awarding the injured worker permanent and total disability, the Order specifically stated that the Commissioner "awarded Getzinger 500 weeks of compensation, offset by previous payments." (emphasis added)(335 S.C.77, 515 S.E.2nd 104 (1999).

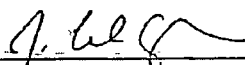
Finally, our Supreme Court has issued a number of decisions that solidify the long standing principle that unless an injured workers meets the single exception to the five-hundred (500) week cap on benefits found in §42-9-10(C) as a result of physical brain damage, paraplegia, or quadriplegia, a person injured within the Workers' Compensation Act may not receive benefits for a period exceeding 500 weeks. (see *Crisp v. Southco, Inc.*, 401 S.C. 627, 738

S.E.2nd 835 (2013)(“In general, a person injured within the act may not receive compensation for a period exceeding 500 weeks.”); *Reed-Richards v. Clemson University*, 371 S.C. 304, 678 S.E.2nd 77 (Ct. App. 2006)(“ the normal statutory maximum is 500 weeks.”).

CONCLUSION

The Workers Compensation Commission correctly held that Appellant’s five hundred (500) week maximum award of permanent and total disability resulting from his May 8, 2012 work accident was appropriately offset by credit for 199 weeks of compensation benefits Appellant received from as a result of his four (4) previous workers compensation claims with Respondent Employer, and Respondents respectfully request that this court affirm the October 26, 2016 Decision and Order of the Worker’s Compensation Commission.

Respectfully Submitted,



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May 8, 2017
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

David B. Lemon, Claimant; Appellant,

-vs.-

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

REPLY BRIEF

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SC Court of Appeals

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STANDARD OF REVIEW

Appellant maintains there has been an error of law, as opposed to an error of fact. As such, the appellate court may overturn a conclusion of the Workers' Compensation Commission if that conclusion is based on an error of law. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, S.E.2d 304 (1981).

ARGUMENT

1. The Respondents have misconstrued S.C. Code Ann. §42-9-170(B)

In its Brief, the Respondents go to great length to "split hairs" with the reference to the term "injury" and thereby torture the construction of §42-9-170(B). The relevant language of the Code Section is "receives a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B)." Simply stated, in the present case, the Employee did not receive a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B); to the contrary, he received a permanent injury as specified in Section 42-9-10(A). It would make no sense to construe the code section in any other manner, particularly since the Commission's Appellate Panel remanded the claim to the Single Commissioner to make a determination as to whether the award for permanent total disability benefits was pursuant to Section 42-9-10(A) or Section 42-9-10(B).

Respondents assert, without any authority, that "the basis

for the Legislature's inclusion of Section 42-9-170 is clear in light of the overall goal of the Workers' Compensation system to encourage employers to bring injured workers back to work after injuring themselves in prior Workers' Compensation claims." If this were the case, then why is there an exception to permanent injuries as specified in Section 42-9-10(A)? Additionally, the injured employee has protection from being discriminated because of having a prior workers' compensation related injury pursuant to the American With Disabilities Act.

Respondents apparently contend that since the Appellant had received permanent injuries as specified in section 42-9-30 or Section 42-9-10(B), then Section 42-9-170 applies as a basis for the credit for the prior injuries. However, the specific language of S.C. Code Section 42-9-170(B) states that "if an employee **receives** a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B)." The reference to the word "receives" would only make sense pertaining to the claim that is presented to the Commission for adjudication arising from the Claimant's work-related accident of May 8, 2012. If the reference to the permanent injury was to the prior claims, then the statutory language would have stated "if an employee **received** a permanent injury as specified in Section 42-9-30 or Section 42-9-10(B). In short, the Respondents have misconstrued the statutory language and have overlooked the difference in the tenses of the present

injury as opposed to the past injuries referenced in the code section.

The second sentence of §42-9-170(B) does not apply in this case because, as stated in the Appellant's Brief, the Claimant in this case has not incurred total permanent disability due to the loss of another member. To the contrary, he has sustained permanent total disability through the loss of multiple members and was thus awarded permanent total disability pursuant to Code Section 42-9-10(A).

PRIOR INJURIES DO NOT APPLY TO JUSTIFY A CREDIT

Appellant maintains there is no reason for this Court to review the specific prior awards for disability that were referenced in the Respondent's Brief, because pursuant to Code Section 42-9-170(B) these prior payments would have no legal application. All the prior injuries and awards were pursuant to Code Section 42-9-30 and since the present award is pursuant to Section 42-9-10(A) they would have no application. However, if the Court were to review the individual payments for prior injuries, Appellant notes the following:

1. For the accident of 3/04/09, 3 weeks of temporary total disability were paid to the Appellant. There is certainly no provision pursuant to §42-9-170 or case law that would support a credit for payments of temporary total disability benefits. (R. pp. 122-124).

2. For the accident of 4/26/10, again, 25.4286 weeks of temporary total disability was designated pursuant to the Form 19 and there was no designated weeks for any additional disability. There is no legal basis to give a credit for temporary total disability benefits. (R. p. 125-126).
3. As to the accident that occurred on 4/13/11, according to the Form 19 no compensation was paid for disability. (R. p. 128). Although the settlement agreement references 25% to the right shoulder, there is no specific designation of number of weeks. Additionally, there is no way to conclude that the total settlement represented by 25% to the right shoulder was solely allocated to the right shoulder injury because there was additional consideration noted for future medical, future disability, disfigurement and change of condition. (R. p. 130).
4. As to the accident that occurred on 10/03/11, the Form 19 designates 20.5714 weeks for temporary total disability. Certainly there should be no credit for any payments of temporary total benefits. And, there are no additional weeks of disability that are designated on the Form 19. (R. p. 133). Again, the settlement agreement references an unallocated payment for 25% to

There is no specific designation of weeks. There is no consideration given for the release for future medicals, future disability, disfigurement or for a change of condition. (R. p. 136).

CASE LAW DOES NOT SUPPORT THE AWARD FOR THE OFFSET

Respondents cite several cases to support the offset awarded by the Commission. However, as stated in the Appellant's Brief, all of the cases cited by Respondents precede 2007, the year in which S.C. Code §42-9-170 was substantially amended. None of the cases are on point to provide for the credit that has been awarded in the present case.

Wyndam v. Thornley, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987), deals with a different code section, namely Section 42-9-150; not Section 42-9-170. Secondly, the case involved the application of the Second Injury Fund that served as a basis for awarding the Claimant additional compensation. The Second Injury Fund was essentially gutted when §42-9-170 was passed by the legislature in 2007.

Hopper v. Firestone Stores, 222 S.C. 143, 72 S.E.2d 71, (1952), does not apply in the present case. The *Hopper* court dealt with a situation where a Claimant had been awarded 100% loss of use of his leg because of a prior injury and was therefore not entitled to any additional compensation for the same injured leg. It should be noted that this was not a case

that dealt with disability pursuant to Code §42-9-170 or §42-9-10(A).

Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1990), has no application to the present case. In *Medlin*, the employee sustained a back injury and was awarded more than 50% loss of use of his back pursuant to §42-9-30 and was therefore awarded permanent total disability. The employee then returned to the same employer and received a subsequent back injury. The Court found that since the Claimant had already received an award for permanent total disability due to his back injury, he could not receive the additional compensation because of the limitation of §42-9-10. The Court specifically held that §42-9-170 did not apply in the *Medlin* case.

Another case cited by the Respondents, *United Technologies v. South Carolina Second Injury Fund*, 318 S.C. 213, 456 S.E.2d 901 (1995), has no application to the present case. The case was decided well before the relevant revisions to §42-9-170 and specifically deals with the application of the Second Injury Fund pursuant to a 1985 statute. The award of temporary total disability benefits was for the same accident that was the subject of the case, as opposed to other prior injuries. Appellant does not question the credit for the temporary total disability benefits paid to the Appellant for the subject accident. The cap of 500 weeks pursuant to §42-9-10(A) applies.

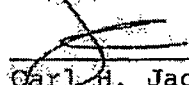
Similarly, *Getzinger v. Owens Corning Fiberglass*, 335 S.C. 77, 515 S.E.2d 104 (1999) has no application to the present case. There was no issue presented in *Getzinger* concerning whether the Commission had the authority to award credit for prior injuries. Secondly, the thrust of the opinion was that the Claimant had sustained a mental injury as a result of physical injuries to his foot. The legal issue presented in the present case was simply not presented to the *Getzinger* Court for determination.

With respect to the other cases cited by the Respondents in its Brief that stand for the proposition that the Appellant can receive no more than 500 weeks of benefits for a single injury, the Appellant agrees with this proposition. In fact, Appellant maintains that the only limitation on his receipt of 500 weeks of benefits is S42-9-10(A), that was the basis for the award in the present case. Appellant concedes that the Respondents would be entitled to the credit for any weeks of temporary total disability benefits paid for this particular accident that is a subject of this appeal.

CONCLUSION

Base upon the foregoing, Appellant maintains that the offset that was given to the Respondents for prior unrelated injuries was an error of law. There is no statutory or common law basis to justify such a credit.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

DAVID LEMON, Employee, ... Appellant,

-vs.-

MT. PLEASANT WATERWORKS, Employer,
and STATE ACCIDENT FUND, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies
with Rule 211(b), SCACR.

April 25, 2017


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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David B. Lemon, Claimant, Appellant,

v.

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

Appellate Case No. 2016-002321

Appeal From The Workers' Compensation Commission

Opinion No. 5703

Heard April 1, 2019 – Filed December 31, 2019

AFFIRMED IN PART, REVERSED IN PART

Carl H. Jacobson, of Uricchio Howe Krell Jacobson
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Appellant.

John Gabriel Coggiola, of Willson Jones Carter &
Baxley, P.A., of Columbia, for Respondents.

MCDONALD, J.: David Lemon (Claimant) appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), arguing it erred in offsetting his award of permanent and total disability benefits against prior benefits received for unrelated claims. We affirm in part and reverse in part.

Facts and Procedural History¹

Claimant was involved in an admitted work accident on May 8, 2012, while pulling a device designed to provide leverage on a sewer line. He suffered an injury to his low back, affecting both legs. At the time of the accident, Claimant's average weekly wage was \$636.04, yielding a compensation rate of \$424.05 under the Workers' Compensation Act (the Act). Prior to the 2012 accident, Claimant suffered four separate workplace injuries resulting in workers' compensation claims against Mount Pleasant Waterworks (Employer) and the State Accident Fund (Carrier), including a March 4, 2009 injury to the back, an April 26, 2010 injury to the right shoulder, an April 13, 2011 injury to the right shoulder, and an October 3, 2011 injury to the back. As a result of the four prior claims, Claimant received 199 weeks of compensation benefits, both as temporary and permanent disability benefits.

Employer and Carrier (collectively, Respondents) provided Claimant with medical treatment through multiple medical providers, including Dr. James Aymond and Dr. Thomas Due. On June 20, 2013, Dr. Aymond found Claimant to be at maximum medical improvement (MMI) and assigned a 24% impairment to Claimant's back. On February 12, 2014, Dr. Due found Claimant to be at MMI and assigned him impairment ratings of 24% to the lumbar spine, 7% to the right lower leg, and 7% to the left lower leg.

Claimant filed a Form 50 request for a hearing, alleging injuries to the back and legs and seeking permanent and total disability benefits and lifetime medical treatment. Respondents timely filed both a Form 51 response and a Form 21 request for a hearing, seeking to stop payment of temporary compensation, a determination of permanent disability, and credit for overpayment of temporary compensation paid after the date of MMI. In addition, Respondents sought credit for the 199 weeks of benefits Claimant received in his four prior claims against Employer to be applied as an offset against his current award of permanent disability.

Following a hearing, the Single Commissioner issued an order setting forth a number of findings, including:

¹ There are no factual issues in dispute.

1. Based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code Ann. §42-9-30.

2. [Claimant] is entitled to lifetime causally related medical care.

3. [Claimant's] May 8, 2012 work accident was his fifth work accident as an employee of Respondent Mount Pleasant Waterworks, and he has previously received temporary or permanent disability compensation in the amount of 199 weeks;

4. By the date of the hearing, [C]laimant received 122 weeks of temporary total disability benefits related to his May 8, 2012 work accident.

The Single Commissioner found Claimant was entitled to an award of permanent and total disability;² however, he further found Respondents were entitled to 321 weeks of credit against a maximum 500-week award of permanent and total disability benefits, including credit under § 42-9-170(B) for 199 weeks of benefits from Claimant's prior unrelated workers' compensation claims and credit for 122 weeks of temporary disability benefits received on the current claim.

Claimant filed a Form 30 request for Appellate Panel review, arguing § 42-9-170(B) did not apply because the Single Commissioner awarded him permanent and total disability benefits under § 42-9-10(A), not § 42-9-10(B). Claimant further argued that even if § 42-9-170(B) applied, the Single Commissioner erred in failing to analyze each of the settlements of his prior claims to determine if there had been separate allocations of benefits paid for temporary total disability and permanent partial disability.

² Respondents have not challenged this finding.

The Appellate Panel heard oral argument and remanded the case to the Single Commissioner for (1) a determination of which subsection of § 42-9-10 the Single Commissioner applied in making the award in the present case; (2) a determination of the statutes under which prior awards were issued; and (3) any facts, analyses, or conclusions of law the Single Commissioner deemed necessary in the analysis of the § 42-9-170 determination.

On remand, the Single Commissioner reaffirmed all previous findings of fact from his prior decision and order "not inconsistent with the instant opinion" and found: Claimant was permanently and totally disabled under § 42-9-10(A); Claimant's previous awards for injuries sustained with the same employer were awarded under § 42-9-30; the phrase "receives a permanent injury" in § 42-9-170(B) referred to the present claim; and "another permanent injury in the same employment" referred to Claimant's prior injuries. The Single Commissioner concluded Claimant was subject to the 500-week cap on benefits and stated "upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the [Respondents] be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks."

Claimant again requested Appellate Panel review, arguing the Single Commissioner erred in submitting a revised order that far exceeded the questions presented on remand. Claimant again argued the Single Commissioner erred in crediting Respondents for the 199 weeks of benefits Claimant received in his prior workers' compensation claims and in failing to analyze the prior claims. After hearing arguments, the Appellate Panel affirmed the Single Commissioner's second order.

Standard of Review

The Administrative Procedures Act provides the standard of judicial review for decisions of the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133–35, 276 S.E.2d 304, 306 (1981). "An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); see also S.C. Code Ann. § 1-23-380(5) (Supp. 2019).

Law and Analysis

Claimant concedes Respondents are entitled to credit for 122 weeks of temporary total disability benefits paid on his current claim, however, he challenges the credit of 199 weeks related to benefits paid on his four prior claims. Claimant asserts the Single Commissioner and Appellate Panel erred in applying § 42-9-170 to award this credit because § 42-9-170 addresses benefits awarded under § 42-9-10(B), not § 42-9-10(A). We agree.

Claimant's May 8, 2012 work accident was the fifth work accident for which he received workers' compensation benefits while working for the same employer. Claimant previously received a combined 25.4286 weeks of temporary disability benefits and 75 weeks of permanent partial disability (PPD) benefits as a result of two injuries by accident to his right shoulder in 2010 and 2011. Additionally, Claimant received a combined 23.5714 weeks of temporary benefits and 75 weeks of PPD benefits as a result of two injuries by accident to his back in 2009 and 2011. Claimant received a total of 199 weeks of compensation benefits as a result of his four prior claims.

Claimant correctly asserts that the Act is created by statute, and as such, "when reading a workers' compensation statute, we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003); *see also Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015) ("Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of [the Act]; only exceptions and restrictions on coverage are to be strictly construed.").

Here, the Single Commissioner found Claimant is "permanently and totally disabled" pursuant to Section 42-9-10(A) of the South Carolina Code (2015), which provides:

When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-

six and two-thirds percent of his average weekly wages, but not less than seventy-five dollars a week so long as this amount does not exceed his average weekly salary; if this amount does exceed his average weekly salary, the injured employee may not be paid, each week, less than his average weekly salary. The injured employee may not be paid more each week than the average weekly wage in this State for the preceding fiscal year. In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C).³

Claimant submits the 500-week cap applies only to an injury arising from a single accident, not the sum of multiple accidents. Therefore, Claimant argues the injury he sustained as a result of this accident can result in a maximum award of 500 weeks, offset by any benefits received for temporary total disability benefits paid on the same claim. Claimant does not dispute the credit awarded to Employer for the 122 weeks of temporary total disability benefits he received as a result of the current accident and injuries.

However, Claimant challenges the application of the Act's language addressing permanent injuries sustained by an employee after he or she has sustained prior permanent injuries in the same employment. Section 42-9-170(B) states:

³ Section 42-9-170(C) is inapplicable here. It provides, "Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." S.C. Code Ann. § 42-9-170(C).

If an employee receives a permanent injury as specified in section 42-9-30^[4] or section 42-9-10(B)^[5] 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. If an employee previously has 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.^[6] This subsection is effective on July 1, 2008.

S.C. Code Ann. § 42-9-170(B).

Respondents persuasively argue that § 42-9-170(B) reflects the goal of our workers' compensation system to encourage employers to bring injured workers back to work after they have suffered certain compensable injuries. However, by its own terms, § 42-9-170 applies only to § 42-9-10(B) awards. *See, e.g., Wyndham v. R.A. & E.M. Thornley & Co.*, 291 S.C. 496, 500, 354 S.E.2d 399, 402 (Ct. App. 1987), *overruled on other grounds by Medlin v. Greenville Cty.*, 303 S.C.

⁴ Section 42-9-30 sets forth the schedule for which disabilities are deemed to continue and the resulting compensation paid for injuries to various parts of the body.

⁵ "The loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section." S.C. Code Ann. § 42-9-10(B).

⁶ Section 42-9-35 addresses evidence of preexisting injury or condition.

484, 401 S.E.2d 667 (1991) (explaining "[w]hen the Legislature wished to impose a five hundred week limit on successive injuries, it did so explicitly.").

Here, the Single Commissioner specified "the award in the present case is awarded under [§] 42-9-10(A)"; thus the Single Commissioner and Appellate Panel erred in applying § 42-9-170 to credit Respondents with 199 weeks of compensation paid for Claimant's prior benefits.

Medlin v. Greenville County does not dictate a different result. There, the claimant suffered a work-related injury to his spine in 1983 and was found to have sustained a greater than fifty percent loss of use of his back, therefore entitling him to the maximum compensation of five hundred weeks for total and permanent disability under §§ 42-9-10 and 42-9-30(19) of the South Carolina Code. 303 S.C. 484, 486, 401 S.E.2d 667, 667-68 (1991). Thereafter, the claimant returned to work for Greenville County. *Id.* In 1985, the claimant sustained a second work-related injury and again filed a claim for workers' compensation benefits, seeking total and permanent disability benefits. *Id.* Although the County admitted the second accident occurred, it denied the claimant was entitled to receive an award for permanent disability due to the prior award of total disability benefits for injury to the same body part injured in 1983. *Id.* Our supreme court explained:

This case is substantially the same as *Hopper* [*v. Firestone Stores, et al.*, 222 S.C. 143, 72 S.E.2d 71 (1952)], in that employee, having already suffered a total and permanent loss of use of a body part, specifically in this case, his back, as a result of his first accident, is seeking total and permanent benefits for a successive injury to the same body part. Under *Hopper*, we find that employee is not entitled to any further benefits for loss of use to the same body part as the loss of use to his back has already been fully "written-off," and is non-existent in so far as the Act is concerned. Thus, there is no basis upon which employee can recover. Only if employee had suffered less than fifty percent loss of use to his back in the first accident, would he have been entitled to compensation for the degree of disability which would have resulted from the later accident. These principles would hold true in any case regardless of whether the

successive injury occurred while working for the same or different employers. To the extent that *Wyndham v. R.A. & E.M. Thornley and Co.*, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987) distinguishes between successive injuries incurred while working for the same rather than for different employers, it is overruled.

303 S.C. 484, 488, 401 S.E.2d 667, 669 (1991).⁷

Here, the Appellate Panel affirmed the Single Commissioner's second order finding Claimant permanently and totally disabled pursuant to § 42-9-10(A) and relied on § 42-9-170(B) to cut Claimant's award. However, the plain language of § 42-9-170 renders it inapplicable to § 42-9-10(A). Thus, we reverse the decision of the Appellate Panel as to the 199-week credit.⁸

Conclusion

For the foregoing reasons, we affirm as to 122 weeks credited to Employer and reverse as to the 199 weeks.

⁷ *Medlin* preceded the enactment of the 2007 statutes upon which Claimant's award is based. In any event, *Medlin* is inapplicable due to the plain language of § 42-9-170(B), the Single Commissioner's finding that Claimant's award was made pursuant to § 42-9-10(A), and the Appellate Panel's finding that pursuant to § 42-9-10(A), Claimant is permanently and totally disabled.

⁸ The 199-week offset is also troubling because neither the Single Commissioner nor the Appellate Panel undertook any analysis of the four prior claims to determine whether the injuries for which they awarded the 199-week credit were in any way related to the current claim as the back injury in *Medlin* was. For example, several of the payments apparently credited were for temporary total disability benefits, which § 42-9-170(B) does not address. Further, one of the prior settlement agreements referenced a 25% impairment to the right shoulder but had no designation as to the specific number of weeks. Claimant's injury here was to the low back, with bilateral leg pain.

AFFIRMED IN PART, REVERSED IN PART.

LOCKEMY, C.J. and SHORT, J., concur.

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

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

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.” Vaughan 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. § 42-1-170⁴, 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. Erigidaire 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,

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.

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 as 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. § 42-9-170⁷. 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

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 Unison 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

Kirsten Leslie Barr, S.C. Bar # 015525
Trask & Howell, LLC
P.O. Box 2167
Mount Pleasant, S.C. 29465

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:

Carl H. Jacobson, Esq.
P.O. Box 399
Charleston, SC 29402

J. Gabriel Coggiola, Esq.
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Kirsten Leslie Barr

Kirsten Leslie Barr, Bar #15525
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Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for the Respondents

January 14, 2020

The South Carolina Court of Appeals

David B. Lemon, Claimant, Appellant,

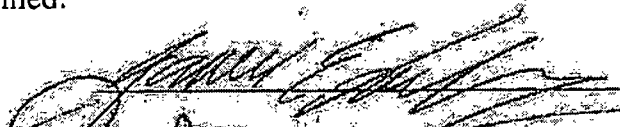
v.

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

Appellate Case No. 2016-002321

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

FILED

cc:

Carl H. Jacobson, Esquire
John Gabriel Coggiola, Esquire
Kirsten Leslie Barr, Esquire
Amy Bracy

February 13, 2020

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,

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

PETITION FOR WITHDRAWAL AND
SUBSTITUTION OF COUNSEL

Pursuant to Rule 264, S.C.A.C.R., the undersigned hereby respectfully request that the Court of Appeals issue an order permitting John Gabriel Coggiola of Wilson, Jones, Carter, and Baxley, P.A., attorney of record for the Respondents, to withdraw as counsel. Mr. Coggiola is leaving private practice imminently. The Respondents further respectfully request that Kirsten Leslie Barr of Trask & Howell, LLC be substituted as counsel for the Respondents effective immediately. These requests are made with the consent and at the request of Mount Pleasant Waterworks and the State Accident Fund.

Respectfully submitted,


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ATTORNEYS FOR THE RESPONDENTS

January 9, 2020
Mount Pleasant, South Carolina

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,

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 Withdrawal and Substitution of Counsel this 13 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:

Carl H. Jacobson, Esq.
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Attorneys for the Respondents

January 13, 2020

The South Carolina Court of Appeals

David B. Lemon, Claimant, Appellant,

v.

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

Appellate Case No. 2016-002321

Trial Court Case No. 1205924

ORDER

John Gabriel Coggiola, Esquire, moves the Court for an order relieving him as counsel for Respondents because he will be leaving private practice. Mr. Coggiola requests Kristen Leslie Barr of Trask & Howell, LLC be substituted as counsel for the Respondents effective immediately. The Court has not received a return.

Accordingly, the motion is Granted. John Gabriel Coggiola, Esquire, is hereby relieved as counsel in this matter and shall not be copied on any future correspondence with regard to this appeal.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Carl H. Jacobson, Esquire
John Gabriel Coggiola, Esquire
Kirsten Leslie Barr

FILED

February 10, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

R. Michael Campbell, III, Commissioner

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

Opinion No. 5703
Heard April 1, 2019 – Filed December 31, 2019

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

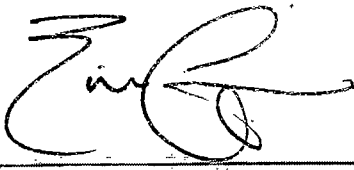
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appendix of the Petitioners complies with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

March 20, 2020


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