THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Trial Court Case No. 1102937
Appellate Case No. 2019-001141

Barry Adickes, Claimant.....Respondent,

v.

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

RESPONDENT'S INITIAL BRIEF

William L. Smith, II (SC Bar No. 5226)
James David George, Jr. (SC Bar No. 103634)
CHAPPELL SMITH & ARDEN
P.O. Box 12330
Columbia, SC 29211
(803) 929-3600
(803) 929-3604 (facsimile)
bsmith@csa-law.com
Attorneys for Respondent

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Statement of the Case

In September of 2014, Barry Adickes (Respondent) requested a hearing with the Workers' Compensation Commission claiming reduced earning capacity after an injury. (2019 R. p. 73).

Phillips Healthcare (Employer) and Fidelity & Guaranty Insurance Company (Carrier), (collectively, Appellants), disputed this and also argued the hearing was premature. (R. p. 74).

A single commissioner heard the claim in January of 2015. (R. p. 255). He issued an award in August of 2015, finding the claim was timely and awarding benefits. (R. pp. 1-18).

The Defendants, Employer/ Carrier, appealed to the Commission's Appellate Panel, which heard oral arguments in December of 2015. (R. p. 561). The Panel affirmed the single commissioner's decision the following February. (R. pp. 19-34).

The Defendants, Employer/ Carrier, further appealed to this Court alleging three points of error. (R. pp. 35-39). Employer/ Carrier argued the Commission erred in finding Respondent Adickes had reached maximum medical improvement, erred in finding he sustained permanent partial disability, and erred in awarding 340 weeks of benefits. (R. pp. 35-39). This Court affirmed the Commission on the former two points, but found the Commission erred in making a 340-week award. (R. pp. 38-39). The case was therefore remanded to the Commission for a calculation of benefits consistent with the order of this Court. (R. p. 39).

The Commission then remanded the case to a single commissioner for a calculation of benefits. The parties were heard on October 9, 2018, and the Commissioner issued an order on January 17, 2019, finding Respondent Adickes was entitled to benefits beginning the date he was terminated by Employer and limiting the award to 340 weeks from date of injury, and finding Employer/ Carrier were not entitled to a set-off for the weeks Adickes was totally disabled. (R. pp. 41-51). Appellants, Phillips Healthcare and Fidelity & Guaranty Insurance Company then

appealed to the Appellate Panel of the full Commission, which heard oral arguments on April 30, 2019. (R. p. 623). An Order affirming the single commissioner's decision was issued on June 20, 2019. (R. pp. 59-64). Appellants appealed that order to this Court.

Additionally, Respondents initiated supplemental proceeding on September 5, 2018, filing a Form 50 requesting a hearing regarding Appellant's noncompliance with prior order, specifically a failure to make weekly benefits and a failure to authorize payment of medications ordered by the authorized treating physician. (9.5.18 Form 50). That matter was heard and adjudicated by Commissioner Melody James on April 19, 2019, and she issued an order imposing a ten percent penalty for unpaid weekly benefits and a $200.00 per day penalty for 27 days of willful disobedience of the order requiring payments of medications. (James Order). Appellant's appealed that order to the appellate panel of the Commission, which affirmed the order the order of Commissioner James and increased the fine for failure to pay medical benefits to $500.00 per day. (Full Comm. Order 11.8.19). Appellants then appealed that order to this court.

Appellants then moved this court consolidate the two appeals. Respondent did not oppose consolidation. By order of this court, the two separate appeals were consolidated on January 24, 2020. (Order, consolidate 1.24.20).

Statement of Facts

Respondent's summary of this case's history follows. Several of the medical records contain similar accounts of his car wreck, and the original hearing commissioner's decision has a synopsis of this case, including citations.

On March 22, 2011, Respondent Adickes, while in a company car, went off the side of a mountain road in North Carolina crashing into a ravine. He lost consciousness for a period of time and spent five hours trapped in his car about one hundred feet down the side of the mountain. He was rescued after he used his mobile phone to call EMS early the next morning. (R. pp. 269-71).

Respondent Adickes saw several physicians in the months that followed. Dr. James Rentz examined Mr. Adickes and eventually performed surgery. (R. pp. 531, 553-54). Dr. Nicholas Tuttle, Respondent's family doctor, sent Respondent to Dr. Howard Mandell, a neurologist, about two weeks after the wreck. (R. pp 504-07). Extensive records document Respondent's concussion, neck injury, and damage to his right shoulder. (R. pp. 422-560). Doctors eventually gave Mr. Adickes a 15% impairment rating to his right shoulder, a 10% rating to his spine, and a 15% rating to his brain. (R. pp. 452, 457, 471).

The Respondent's case is peculiar in part because he returned to work shortly after his injury and continued working for over two years before he was terminated by the Employer. Respondent was out of work for just a few weeks—the wreck was March 22, 2011, and he returned to work May 1. (R. p. 283). The Employer terminated Respondent thirty-two months later, in January of 2014.

The parties disputed the details of the termination. Employer claimed it was part of a company-wide reduction-in-force and had nothing to do with Respondent's work. (R. p. 382).

Mr. Adickes testified to a conversation with his boss wherein his boss specifically told him the firing was performance related.

Regardless, Mr. Adickes's job with employer ended and he sought further employment. He ultimately accepted a new job in May, 2014, but made substantially less money than he did with Employer. Respondent Adickes argued before the Commission that the wreck left him with cognitive defects; persistent headaches, as well as, impaired "executive function" impacting his focus, concentration, ability to multi-task, and similar tasks. (R. pp. 75-77). Further, he argued those deficits prevented him from working a demanding, high paying job like he had with Employer. (R. pp. 75-77). He supported that claim with testimony from his wife, his doctors, and a vocational expert. (R. pp. 75-77). The Commission agreed awarding partial wage loss benefits and on-going medical care as ordered by the treating physician. (Order, Comm. 2015). This Court affirmed that order with the exception of the calculation of wage loss benefits and remanded for a calculation of the weeks owed to Respondent for wage loss.

During the pendency of that remand, Appellants sought permission from this court and from the Commission to cease making weekly benefits payments. This Court stated it did not have jurisdiction and that the Commission was the correct body to hear the request. Appellant's requested a stop payment from the Commission, and it was denied. Appellants nonetheless stopped making weekly payments in contravention of the Order of the Commission. During this time, Appellants also began failing to approve medications for the Respondent that were ordered by the authorized treating physician and required by order of the Commission.

As a result, the Respondent filed a Form 50 in January of 2019 seeking a hearing on Appellant's violation of prior orders. Commissioner James heard the parties on the failures on April 19, 2019. There, Respondent submitted evidence of the failures including Commissioner

Barden's denial of Appellants' stop payment request, various emails between counsel for the parties regarding Respondent's inability to receive his needed medications, the prescription denial letter, and documents from the providers. Commissioner James found Appellants illegally terminated weekly wage loss benefits and willfully disobeyed prior orders of the commission compelling provision of medication as ordered by the authorized treating physician. Commissioner James imposed a ten percent penalty for past due wage loss benefits and a $200.00 per day fine for failure to provide medications for twenty-seven days.

Appellants appealed that order to the Commission's appellate panel, which issued an opinion on November 8, 2019, affirming the order of Commissioner James, but increasing the fines for failure to provide medications from $200.00 per day to $500.00 per day. Appellants then appealed that order to this Court as well. This Court consolidated the two appeals on January 24, 2020.

Standard of Review

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. See *Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Gibson v. Spartanburg Sch. Dist. No. 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Bursey v. South Carolina Dep't of Health and Envtl.*, 360 S.C. 135, 600 S.E.2d 80 (2004); S.C. Code Ann. § 1-23-380(5). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact but, may reverse where the decision is affected by an error of law. *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(5).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. *Frame*, 357 S.C. at 527, 593 S.E.2d at 494; *Corbin v. Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002). This Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. *See Gibson*, 338 S.C. at 517, 526 S.E.2d at 728–29; *see also Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing a decision of the Workers' Compensation Commission, the Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Argument

Claimant's position is not complex in regard to the opinion of the 2018 opinion of the Court and a plain reading of S.C. Code Ann. section 42-9-20. Namely, that he is entitled to two thirds of the difference between his preinjury wages and his post-injury wages up to the average weekly wage of the state for the year preceding his accident for a total of 347 and 5/7 weeks. For most of the first 147 weeks post-accident, Claimant remained in the employ of Employer and received the same or similar salary as before the accident. Thus, pursuant to the opinion of this Court, those weeks are credited against the 340-week maximum recovery allowed from the date of injury and 193 weeks remain. For the remaining 193 weeks, however, Claimant earned, as a result of his on the job injury, substantially less than he earned pre-injury and is therefore entitled to wage loss benefits in the amount of $704.92 per week.[1]

This number of weeks is then increased by seven and five sevenths weeks, for Claimant received temporary total disability benefits for that number of weeks over the course of two periods. The South Carolina Code at section 42-9-20 plainly states that when a period of total disability benefits is paid, the number of weeks such benefits were paid "shall not be deducted from the maximum period allowed in [section 42-9-20] for partial disability." Therefore, Claimant is entitled to compensation for an additional seven and five sevenths weeks of partial disability benefits.

Lastly, Respondent simply believes the fines and penalties imposed by the Commission for Appellant's violation of prior orders were appropriate. Appellants asked permission to stop payment; that request was denied. They stopped despite the denial. Appellants failed to approve medication Respondent needed. This was not a one-off mistake. It happened on five occasions,

[1] The amount of Claimant's reduced earning capacity is not in dispute at this time.

and for extended periods of time in violation of an order with multiple demands to comply with the order. The failures were willful and fines were appropriate.

I. The Appellate Panel of the Workers' Compensation Commission correctly awarded benefits for all weeks in the 340-week period following Respondent's accident during which he experienced partial wage loss.

The Commission correctly awarded benefits for all weeks in the 340-week period following Respondent's accident during which he experienced wage loss. In 2018, this Court found the Commission erred in making a 340-week award. Appellants now seek to further restrict his benefits by pushing back the date those benefits could start. This argument is illogical and unsupported according to this Court's guidance provided in 2018.

Adickes's position here is straightforward: Pursuant to this Court's guidance, Respondent can only receive wage loss benefits for a set number of weeks that follow his accident. Respondent suffered no wage loss from his resulting disabilities while he remained in the employ of Employer. He is not entitled to benefits for those weeks; however, since his termination by Employer he suffered disability through partial wage loss—which has not changed—, and he is entitled to compensation for those remaining weeks.

The appellate courts have stated as much on multiple occasions: "PPD benefits are intended to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks. . ." *Adickes v. Phillips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. filed January 17, 2018). "By the clear terms of [section 42-9-20], compensation is not awarded for the physical injury, but for disability produced by the injury. The disability is measured by the employee's capacity or incapacity to earn the wages that he was receiving at the time of his injury. Loss of earning capacity is the criterion." *Owens v. Hendon*, 252 S.C. 166, 169, 165 S.E.2d 696, 698 (1969). "It is well-settled that an award under the general disability statutes must be predicated

upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing." *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432, 716 S.E.2d 443, 445–46 (2011) (quoting *Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990)).

Specifically, this Court has held, "Although a finding of MMI often coincides with an award of permanent disability benefits . . . an individual can also be permanently disabled and still have yet to achieve MMI." *McMahan v. S.C. Dept. of Ed.-Trans.*, 417 S.C. 481, 489, 790 S.E.2d 393, 397 (Ct. App. 2016). In that case, the Court sought to determine if the family of a deceased claimant could receive benefits under the Act even if the claimant had not reached MMI prior to his unrelated death. *Id.* The Court found they could, ruling that a finding of MMI is not required for a claimant to be permanently disabled. *Id.* Notably here, Respondent Adickes' partial wage loss resulting from his disability has remained unchanged since his termination. Hence, it is factually and legally permanent.

In *Bass v. Kenco*, the Court addressed a situation where the Commission found the claimant at MMI for certain injuries but not for others and awarded permanent benefits pursuant to section 42-9-20. 366 S.C. 450, 466-67, 622 S.E.2d 577, 585-86 (Ct. App. 2005). There, the Commission found the claimant at MMI for his physical injuries but not his mental injuries. *Id.* The Defendants in that case argued the claimant was not entitled to permanent benefits until he reached MMI for all injuries. *Id.* The Court, however, disagreed stating, "A declaration of maximum medical improvement is irrelevant to the award of permanent partial disability . . . [m]aximum medical improvement is a distinctly different concept from disability." *Id.* The Court went further, explaining, "It is true that when a claimant receiving temporary benefits reaches maximum medical improvement and is still disabled, temporary benefits are terminated and the claimant is awarded

permanent benefits. It does not follow, however, that a claimant who has not reached maximum medical improvement is precluded from an award of permanent benefits." *Id.*

In a similar vein, the *McMahan* Court also addressed the issue of awarding permanent benefits prior to a finding of maximum medical improvement. The Court, in a footnote stated, "the Appellate Panel misstated the law. . . when it found "it is well settled in South Carolina that the award of disability benefits is premature prior to a claimant reaching MMI." *McMahan*, at 489 n.3, 790 S.E.2d at 397 n.3. In that case, the Appellate Panel cited *Smith v. S.C. Dep't of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 696 (1999) in which the supreme court stated permanent disability cannot be determined before MMI. *Id.* However, the Court distinguished that case, for it regarded an employers' ability to cease paying TTD, and "never held an individual was precluded from a permanent disability award without a finding of MMI." *Id.* Instead, the Court stated the correct proposition is found in *Bass*, which held a claimant who has not reached MMI is not precluded from an award of permanent benefits. *Id.*

In the case at bar, the Appellants assert a legal error similar to that of the Commission in *McMahan* by citing *Smith* for the proposition that benefits pursuant to section 42-9-20 cannot be awarded prior to a finding of MMI. Specifically, the Appellants' cite *Smith* and *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482, 485 (2007), which cites *Smith*, to support their argument that benefits are awarded on a locked continuum in which MMI must occur prior to awarding any permanent benefits. However, as held by *McMahan*, "MMI and disability are not always inextricably intertwined." *McMahan*, at 488-89, 790 S.E.2d 397 (citing *Dodge v. Broccoli, Clark, Layman, Inc.*, 334 S.C. 574, 581, 514 S.E.2d 593, 596 (Ct. App. 1999)). Furthermore, the *Bass* Court offered the most pointed and relevant statement to the facts at bar, stating "a declaration of maximum medical improvement is irrelevant to the award of *permanent*

partial disability in this case. 'Maximum medical improvement is a distinctly different concept from disability.'" *Bass*, at 466, 622 S.E.2d 585 (citing *Dodge*, at 581, 514 S.E.2d 596) (emphasis added). Moreover, *Smith* and *Curiel* importantly dealt with issues of credit to the employer/ carrier for overpayment of temporary benefits towards a scheduled member (section 42-9-30) award. Such credit is inapplicable to the case *sub judice*.

The facts of this case are most aligned, for purposes of this legal question, with those in *Bass*. Both cases involve section 42-9-20, and in both cases, benefits were correctly awarded for a loss that accrued prior to and/or irrespective of maximum medical improvement. As stated by the Court in 2018, "PPD benefits are intended to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks from the injury." *Adickes*, Op. No. 2018-UP-027 (citing *Owens*, 252 S.C. at 169, 165 S.E.2d at 698). Once Employer terminated Respondent, he began to suffer wage loss that is well documented and is no longer in dispute. As this Court affirmed in 2018, Respondent suffered a decrease in his ability to earn wages, which was caused by his workplace injury, and which manifested itself when he was terminated on January 17, 2014. *Adickes*, Op. No. 2018-UP-027. Section 42-9-20 provides compensation for that decrease in ability to earn wages. Whether the loss in capacity manifested itself before or after MMI is irrelevant. The wage loss Respondent began to suffer in January of 2014 was permanent as of that date, for he never again earned his preinjury wages. This was a direct result of the disability that was wrought by Mr. Adickes' work related injuries.

Furthermore, in contrast to other benefits awarded under the Act, section 42-9-20 makes no distinction between temporary and permanent benefits. The words "temporary" and "permanent" do not appear in this general disability statute. The statute awards benefits based only on disability, which is defined under section 42-1-120 as, "the incapacity because of injury

to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." S.C. Code Ann. § 42-1-120. Because there is no distinction between temporary and permanent, the only issue is whether the definition of disability has been met. *See Outlaw v. Johnson Service Co.*, 254 S.C. 486, 176 S.E.2d 152 (1970) (Loss of earning capacity alone is the criterion for compensation under the Act).

The workers' compensation act contemplates two models for recovery: The medical model and the economic model. *Wigfall v. Tideland, Inc.*, 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003). S.C. Code Ann. section 42-9-30 codifies the medical model where recovery for workplace injuries is based upon the permanent impairment to a specific body part. Sections 42-9-10 and 42-9-20 represent the economic or wage loss where recovery is based on economics, or the incapacity to earn wages. This case involves the economic model, which therefore turns on Respondent's disability, or his inability to earn his pre-accident wages. *Keeter v. Clifton Mfg. Co.*, 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954) ("compensation under the Act is not awarded for the physical injury as such, but for disability produced by such injury. The disability is to be measured by the employee's capacity or incapacity to earn wages which he was receiving at the time of injury. Loss of earning capacity is the criterion.").

To limit an award under the economic model to 340 weeks from the date of injury on the back end and at the same time limit the award at the front end, by waiting until MMI to award benefits, is nonsensical. Under this approach, the compensation due a claimant who suffered partial wage loss would, in essence, depend on how long it took her to reach MMI. This is not the intended result of the Act. The ability to procced under sections 42-9-10 and 20 are vested rights of claimants who sustain injuries to multiple body parts. *Brown v. Owen Steel Co., Inc.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994) ("The policy behind allowing a claimant to proceed

under the general disability sections 42-9-10 and 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section."). The argument posited by Appellants, if accepted, would effectively remove the right of a claimant to establish the combined effects of his disability were greater than the sum of the presumptive losses provided for in section 42-9-30.

Correspondingly, the Court in remanding for a calculation of benefits, took no issue with and did not reverse the original finding that Respondent's disability manifested itself on January 17, 2014. Instead, the Court simply found Respondent's award must be reduced by the number of weeks he worked for Employer before his disability manifested itself. The original commissioner found correctly that Respondent's wage loss began on January 17, 2014. That finding has not been overturned and is consequently the law of the case. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. Appeal & Error § 991 (2007) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").

No fact finder has found a date of MMI in this matter, for the date of MMI is irrelevant to benefits awarded under section 42-9-20. Appellants argue for a date of MMI. The Commission, however, correctly found that it was precluded from doing so concluding, "The affirmed order does not contain a date of maximum medical improvement and to find such a date would be determining an issue beyond the scope of the remand from the Court of Appeals." (R. p. 63).

The only expectation on the Commission on remand was to solve a math problem, which it did. In his Order of August 27, 2015, Commissioner McCaskill found that Respondent's wage loss

began on January 17, 2014, when he was terminated. The Appellate Panel affirmed. Despite the arguments of Appellants, the Court did not reverse this finding. Rather, the court said,

> The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. Under the Appellate Panel's interpretation, Adickes would receive PPD wage loss compensation for the period he worked full time and earned a full time salary. We hold the Appellate Panel erred by expanding the timeframe and award for PPD benefits in contravention of the plain language of section 42-9-20 and the legislative intent for compensation. Accordingly, we reverse the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20.

Adickes, Op. No. 2018-UP-027. Therefore, the Court affirmed that wage loss began on January 17, 2014. It only reversed the award to reduce the award by the number of weeks (147) that elapsed between the date of injury (March 22, 2011) and the date the wage loss began (January 17, 2014) which lessens the total award from 340 weeks to 193 weeks. The only instruction from the Court on remand is to make the award fit this holding.

The Court has stated "where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen's Compensation* § 790 at 37 (1958)). Further, the court opined, "[i]n such a case, the order limits the authority of the commission." *Id.* The supreme court has additionally held that an administrative body cannot consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for a determination pursuant to specific instructions. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

Respondent's position here is simple, logical, and consistent with case law and the plain language of the statute. The Commission correctly awarded benefits from the date his wage loss began. His disability was permanent as of that date, and MMI has no relevance as to the awarding of wage loss benefits pursuant to section 42-9-20. Respondent is entitled to benefits as awarded by the Commission. He therefore respectfully asks this Court affirm the order of the Commission.

II. The Workers' Compensation Commission correctly extended Respondent's award by the number of weeks he was totally disabled.

The Commission correctly extended Respondent's award by the number of weeks Respondent received TTD benefits. This conclusion of the Commission is consistent with prior case law interpreting section 42-9-20, consistent with a plain reading of section 42-9-20, and consistent with the intent of the Court's 2018 opinion in this matter.

In *Bass*, the defendants also argued the Commission erred in not giving them a credit for TTD benefits paid. *Bass*, at 465, 622 S.E.2d at 585. There, the claimant was totally, but temporarily, disabled for a period of time prior to an award of partial wage loss. *Bass v. Kenco*, 2003 WL 22977624 (S.C. Workers' Compensation Commission) (March 20, 2003). There, the Commission awarded 340 of weeks of compensation following the period of total disability. *Id.* ("It is hereby ordered that the defendants shall pay John Bass, Jr. 340 weeks of compensation . . . without credit for temporary total disability benefits paid. The employer claimed the Commission erred in finding and holding "that the claimant's partial disability began after a period of total disability and therefore . . . the amounts paid for temporary total disability shall not be deducted from the maximum of 340 weeks allowed." (*Bass v. Kenco* Employer brief to circuit court p. 4). Specifically, Kenco sought credit for weeks of TTD paid after the claimant reached MMI. *Bass*, at 465, 622 S.E.2d at 585. However, even though Kenco only sought to reduce the award by the weeks it overpaid TTD, the Court held, "Bass was paid temporary total

benefits only for the uncontested period of his physical disability. Accordingly, the commissioner correctly applied section 42-9-20 and declined to give Kenco a credit of temporary benefits paid." *Id.*

In *Bass*, similar to the case at bar, the claimant suffered a mental or cognitive injury and physical injuries. *Id.* at 466, 622 S.E.2d 585. The claimant's mental injuries were the proximate cause of his loss in earning capacity, while his physical injuries were the direct cause of his temporary total disability. *Id.* The Court stated "[t]he period of total disability of the [physical injury] [was] separate and distinct from the subsequent period of permanent partial general disability stemming from the physiological issues." *Id.* Consequently, the Court affirmed the Commission's award of 340 weeks without reduction for TTD paid.

Here, the period that Respondent argues should not be deducted from the maximum period allowed is the period during which he received temporary total disability benefits for his physical injuries. The facts are thus parallel to those in *Bass.* Respondent Adickes' brain injury with loss of executive function was the primary cause of his wage loss, while his neck and shoulder injuries and treatment of those injuries were the cause of his temporary total disability. The periods are separate and distinct, and the Commission correctly declined to give Appellants credit for the temporary total benefits paid.

Likewise, a plain reading of section 42-9-20 supports the position taken by the Commission. The final sentence of that section states, "In case the partial disability begins after a period of total disability, the [period of total disability] shall not be deducted from the maximum period allowed in this section for partial disability." S.C. Code. Ann. 42-9-20. The "maximum period" described being 340 weeks post-accident. That sentence is not redundant or superfluous. *See* 82 C.J.S. Statutes § 433 (2012) ("Courts are loath to read statutes in a manner that would

render parts of them entirely superfluous, meaningless, or inoperative."). Instead, it provides an exception to the maximum period allowable stated in the previous sentence.

According to the position argued by Appellants, the final sentence operates to prevent a claimant from having two weeks reduced from his award for every one week he was totally disabled.[2] This is an incongruous result and would not be the default position if the final sentence were to be excluded from the statute. To wit, previous versions of the code specifically mandated such a result. *See e.g.* S.C. Code Ann. § 72-152 (1962). The removal of such provision thus disallows that procedure, and the addition of the final sentence as it reads currently, allows partial wage loss benefits to extend beyond 340 weeks by the number of weeks the claimant was totally disabled.

Further, this position is consistent with the prior 2018 Opinion of the Court in his matter. At that time, the Court addressed the larger question of whether claimants who suffer wage loss are entitled to a 340-week award or an award over the course of 340 weeks from the date of injury. The Court stated the latter was correct and most in line with the legislature's intent. What the Court did not address was the final sentence of section 42-9-20, which provides an exception to the court's holding that claimants receive benefits over the course of 340 weeks from the date of injury. Extending the award beyond 340 weeks for weeks paid in TTD is consistent with both the opinion of the Court and the plain language of the statute.

Respondent is entitled to further wage loss benefits for the number of weeks he was totally disabled. Prior case law and section 42-9-20 support the position taken by the Commission, and its Decision and Order should be affirmed.

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[2] Under this position, if the final sentence of 42-9-20 was excluded, a claimant who receives 170 weeks of TTD would not be entitled to any week of partial wage loss benefits, for the employer would get a credit for the remaining 170 weeks.

III. The Commissioner Correctly Imposed Sanctions on the Appellant.

The Commission correctly imposed fines and penalties on the Appellant for its termination of weekly benefits and its failure to provide medications as prescribed by the authorized treating physician and order by the Commission. S.C. Code Ann. section 42-9-90 plainly states that when compensation from an award of the Commission is not paid within fourteen days, the unpaid amount shall be increased by ten percent. Likewise, the code at section 42-3-175 gives the Commission the authority to impose sanctions for willful disobedience of an order, including a refusal to authorize medical treatment, of a fine of five hundred dollars for each day of violation. The Commission chose to impose both penalties in this case, and its decision should be upheld.

Respondents asked this Court and the Commission for permission to stop paying benefits. This Court deferred to the Commission and the Commission declined their request. The Commission awarded wage loss benefits in 2016. Respondents appealed that Order but were obligated to continue making payments pursuant to section 42-17-60.

> In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with provisions of this title. S.C. Code Ann. § 42-17-60.

Respondents initially made payments as required but later stopped despite being told by the Commission that they were not permitted to stop payment. Section 42-17-60 makes clear the employer is required to make weekly payments of compensation until the questions at issue have been fully determined. Here, Defendants were ordered to make payment of 340 weeks of wage loss benefits. This Court affirmed the wage loss and remanded the issue for a new calculation of benefits consistent with the plain language of section 42-9-20. The remand did not completely resolve the questions at issue and section 42-17-60 requires continued payments until the

questions at issue have been fully determined. Since questions at issue were not fully resolved, the Appellants could not lawfully terminate weekly payments.

Making the stop payment here especially egregious, however, is that the Appellants did not stop making weekly payments as soon as this Court ruled, in reliance on their understanding of what this Court's order meant, they waited until the Commission had ruled they were responsible for additional weekly benefits. Commissioner Barden heard this case on remand, and determined the amount owed. That ruling could have finally determined the issues, but Appellant's again appealed that order. Thus, the issues were still not fully determined. The legislature intended that the weekly payments entered into an award are to be made until the questions are fully determined on appeal. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 165, 4 S.E.2d 7 (1955).

Moreover, Appellants requested permission to stop payment twice, once of this Court and once of the Commission. This court issued an order on May 11, 2018, declining to address the petition and finding the motion was more appropriate for the Workers' Compensation Commission since the matter had been remanded. Appellants then petitioned the Commission for permission to stop payment. That motion was summarily denied by Commissioner Barden. Despite having asked permission to stop payment and being denied, the Appellants still stopped payment.

In support of their position, Appellants rely upon *Case v. Hermitage Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960) for the proposition that they are no longer under order to continue payment of benefits after the Court of Appeals decision and while the case is on remand. However, the holding from *Case* does not support their position. The *Case* court actually held "the express provision in [the predecessor to 42-17-60] that after the expiration of 30 days following his appeal from the Commission's award the employer shall be required to make payment until the questions at issue shall have been fully determined seems clearly to mean that there shall be no supersedeas

of the Commission's award, or of a circuit court judgment affirming it." *Case*, at 532, 115 S.E.2d 67. *Case*, therefore, was an extension of the limitation of supersedeas, as to weekly benefits, to aid in the goal of workers' compensation of preventing a person from becoming a charge on society. Appellants were under no obligation to make full payment of the award, but they were required to make weekly payments until final determination.

Appellants also cite to *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (1984) for the proposition that they were somehow relieved of responsibility to continue payments during their continued appeal. However, the McLeod court stated,

> Finally, regarding the issue of whether the employers appeal of the Circuit Court order to the Supreme Court operated to stay the payment of permanent partial disability awarded by the Commission, we conclude that *Case v. Hermitage Cotton Mills*, supra, and Section 42-9-20 of the Code of Laws of South Carolina (1976) control the result which we must reach. We hold that an appeal does not suspend payment of weekly benefits awarded pursuant to Section 42-9-20. Cf. *Walsh v. US Rubber Co.*, 238 S.C. 422, 120 S.E.2d 685 (1961). These payments, like temporary total disability payments, are in the nature of support.

McLeod, at 472, 313 S.E.2d at 41. Here, as in *McLeod*, benefits were awarded pursuant to section 42-9-20 and the appeal does not suspend those benefits. The weekly benefits must continue until the questions at issue have been fully determined.

Appellants were compelled by statute, case law, and most importantly, orders of the Commission, to continue weekly payments. The failure to do so subjected the Appellants to penalties. The Commission chose to impose penalties and its decision should be upheld.

In addition to Appellants' conscious acts in direct contravention of the order of the Commission regarding the continuance of weekly benefits, Appellants also began denying medications that were ordered by Respondent's authorized treating physician. Appellants were placed under order to provide medications as prescribed by Dr. Howard Mandell. Appellants never appealed that portion of the order and, as such, it became the law of the case. In July of 2018,

Appellants began denying Respondent's prescribed medication. Those refusals encompassed the periods of July 9 through July 12, August 31 through September 6, September 17 through September 25, and most egregiously, October 16 through November 12, 2018. Medications were denied for a total of forty-four days over a four-month period.

Respondent presented to the single commissioner and to the appellate panel evidence showing that Appellants were under order to provide medication; showing that Dr. Mandell prescribed medication for Respondent's causally related medical condition; showing pharmacy records of the delays in filling the medications, showing Respondent's counsel's numerous emails requesting and demanding authorization for the medications in addition to responses from Appellants' counsel, and a denial letter from the carrier.

The single commissioner imposed fines under section 42-3-175. The appellate panel increased those fines from $200.00 per day for 27 days to $500.00 per day for 27 days. Section 42-3-175 provides:

> If a claimant brings an action before the commission to enforce an order authorizing medical treatment or payment of benefits and the commission determines that an insurer, a self-insured employer, a self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits when ordered to so by the commission, the insurer, the self-insured employer, the self-insured fund, or the adjuster must pay the claimant's attorneys' fees and cost of enforcing the order. The commission may impose sanctions for willful disobedience of an order, including but not limited to a fine of up to five hundred dollars for each day of the violation.

Appellants argue they did not willfully disobey the order. However, their conduct shows otherwise and case law supports the imposition of fine.

"Contempt results from the willful disobedience of an order of the court." *Bigham v. Bigham,* 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *Smith v. Smith,* 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct.App.2004); S.C. Code Ann. § 20–7–1350 (A party may be found in contempt

of court for the willful violation of a lawful court order.). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.' " *Widman v. Widman,* 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct.App.2001) (quoting *Spartanburg County Dep't of Soc. Servs. v. Padgett,* 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988)). "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." *Smith–Cooper v. Cooper,* 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001).

The determination of contempt ordinarily resides in the sound discretion of the trial judge. *State v. Bevilacqua,* 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). "In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." *Hawkins v. Mullins,* 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004); *Eaddy v. Oliver,* 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." *Widman,* 348 S.C. at 119, 557 S.E.2d at 705. "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." *Id.* at 120, 557 S.E.2d at 705.

"It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court." *Brandt v. Gooding,* 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006) (citing S.C. Code Ann. § 14-5-320 (1976)). "In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." *Id.* (citing *State ex rel. McLeod v. Hite,* 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979)).

Here, Appellants have shown no reason or excuse for failure to provide the ordered medications. Instead, counsel for the Appellants instead reported on some occasions that the adjuster and the adjuster's supervisor were simply not responding. (Wittle Email October 21, 2018 email APA p. 96; Wittle Email November 2, 2018 APA p. 100 ("It seems this office isn't answering anyone, not even their own client."). Likewise, the adjuster denied Respondent's prescription for nadolol, a prescription the authorized treating physician had prescribed and the carrier had approved for years, because it "is a cardiovascular medication and she wasn't clear on why they are paying for that." (Wittle Email November 12, 2018 APA p. 107). After twenty-seven days, the prescription was finally filled as it had routinely been done in the past.

Appellants argue fines are not appropriate because "Appellants remained in constant communications with Adickes' counsel about the status of the approval." While it is true Appellants' *counsel* and her paralegal remained in contact with Respondent's counsel, it is clear the adjuster and insurer were not in contact and refused to respond to even their own client and their counsel. Likewise, the adjuster made a conscious choice to deny the medications for twenty-seven days, not by mistake, but in an effort to save costs. To the extent counsel worked to comply with the order of the Commission, her efforts did not prevent the insurer and adjuster from acting contemptuous. The fines were imposed upon the insurer for its failures, and those failures were willful as demonstrated in the emails between counsel.

Therefore, Respondent respectfully asserts the fine and penalties imposed by the Commission were proper. Appellants, by law, were required to continue making weekly payments to the Respondent. They asked permission of this Court and the Commission to stop making weekly payments and were ultimately denied. They stopped making those payments nonetheless. Appellants were required to provide causally related medical treatment as ordered by the

authorized treating physician. The adjuster and insurance company became unresponsive and represented that they intentionally and willfully denied Respondent's medications. Consequently, the fines and penalties were proper and Respondent respectfully requests this Court affirm the order of the Commission in whole.

Conclusion

This Court should affirm the Appellate Panel's Order *in toto*. First, the Commission correctly awarded Respondent wage loss benefits for every week he suffered wage loss during the statutory period. Second, the Commission correctly did not give Appellants credit for the weeks Respondent was totally disabled. The Commission's Order is consistent with a plain reading of section 42-9-20 and the cases interpreting it. The Appellants disobeyed orders of the Commission willfully and were correctly penalized by the Commission for those acts. The Commission committed no errors of law, and the Court should affirm.

Respectfully submitted,

William L. Smith, II (SC Bar No. 5226)
James David George, Jr.(SC Bar No. 103634)
Chappell, Smith & Arden, PA
P.O. Box 12330
Columbia, SC 29211
(803) 929 3600
(803) 929 3604 (facsimile)
bsmith@csa-law.com
Attorneys for Respondent

June 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Trial Court Case No. 1102937
Appellate Case No. 2019-001141

Barry Adickes, Claimant.....Respondent,

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on June 30, 2020, he served counsel for Appellants with the *Respondent's Initial Brief and Designation of Matters to be Included in the Record on Appeal* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

Brooke A. Payne, Esquire
Ryan D. Oxford, Esquire
P.O. Box 2449
Mt. Pleasant, SC 29465

William L. Smith II (SC Bar No. 5226)
James David George, Jr. (SC Bar No. 103634)
Chappell, Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 509-5839

June 30, 2020

Licensed to practice
in South Carolina,
North Carolina,
Georgia and the
District of Columbia

CSA LAW

CHAPPELL SMITH & ARDEN, P.A.

Part of the CSA-LAW NETWORK

PO Box 12330
Columbia, SC 29211
803.929.3600
Fax 803.929.3604
800.531.9780
www.CSA-LAW.com

June 30, 2020

Via Email - ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Barry Adickes, Claimant, Respondent v. Philips Healthcare, Employer, and Fidelity & Guarantee Insurance Company, Carrier, Appellants
Appellate Case No.: 2019-001141
Trial Court Case No. 1102937

Dear Ms. Kitchings:

Enclosed please find the following documents for filing regarding the above referenced matter:

1. *Respondent's Initial Brief*
2. *Respondent's Designation of Matters to be Included in the Record on Appeal*
3. *Proof of Service*

Thank you for your assistance in this matter.

Very truly yours,

William L. Smith II
James David George, Jr.
Attorneys for the Respondent

WLS/kll

cc: Brooke A. Payne, Esquire
Ryan D. Oxford, Esquire