

South Carolina Workers' Compensation Update: Clemmons v. Lowe's

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SC Supreme Court Overrules the SC Workers' Compensation Commission and the Court of Appeals in Scheduled Member Case Involving the Back

Clemmons v. Lowe's (March 8, 2017)

The Facts

Clemmons, a cashier at Lowe's, slipped and fell, injuring his upper back. After treatment, he was released by his authorized treating physician who assigned Clemmons a 25% whole person impairment rating based on the injury to his cervical spine. Clemmons was assigned work restrictions and returned to work for Lowe's in the same position as a cashier, working eight-hour days, 40-hours per week, for two years with only minor accommodations. The Employer made a chair available for him, but he never asked for it and did not seek further medical care.

Lowe's later moved to terminate temporary total disability benefits and for a determination of permanency, if any. Clemmons obtained two other physician opinions, both stating he had lost more than 50% of the use of his back, and an opinion by a physical therapist that he had sustained a 28% impairment to his whole person, which she converted to an 80% cervical spine impairment rating. Based on the authorized treating physician's impairment rating, the Commission awarded Clemmons a 48% disability to his back under § 42-9-30(21), and also determined that he had not proven he was totally disabled under § 42-9-10.

Clemmons appealed and the Court of Appeals affirmed. The Supreme Court, however, reversed based on arguments that Clemmons raised for the first time before that Court. Relying on Clemmons' argument that the authorized treating physician's 25% whole person impairment rating converted to a 78% impairment to the cervical spine, the Supreme Court held that the Commission's 48% disability award was not supported by substantial evidence because, in that Court's view, all of the medical evidence supported a finding that the Claimant suffered a greater than 50% loss of use of the back. That finding raised the presumption under § 42-9-30(21) that Clemmons was totally and permanently disabled, which presumption is rebuttable.

The Supreme Court also held that Lowe's failed to rebut the statutory presumption of total and permanent disability despite the fact that Clemmons not only could work, but was working his same job for two years with minor accommodations. The Court said the ability to work, alone, was insufficient to rebut the presumption and indicated that, because this award was under the scheduled member part of the Act, the Employer needed to present medical evidence that the Claimant was not permanently and totally disabled. In doing so, the Court overturned *Watson v. Xtra Mile Driver Training, Inc.*, on which the Employer had relied heavily in their case before the Commission. However, the Court refused to remand to allow Lowe's an opportunity to rebut the presumption.

Former Chief Justice Pleicones dissented and, although he agreed with the Majority that the Claimant had sustained a greater than 50% loss of use of his back, argued that the case should be remanded to the Commission and that the Employer should be given a chance to rebut the presumption in light of the fact that the Court overruled *Watson*.

The Employer is considering seeking rehearing. The Supreme Court's decision is not final until any rehearing petitions that are filed have been decided.

The Key Takeaways

- The Court held that the mere fact that a Claimant continues to work is insufficient to rebut the presumption of permanent and total disability.
- The Court did its own conversion of a whole person rating for a back injury to a regional impairment rating to the spine. This leads to a need for greater clarification from physicians on whole person/spine ratings.

For questions about the impact of this case on claims, please contact one of MGC's South Carolina workers' compensation [attorneys](#).

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