

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court Of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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Appellate Case No.: 2013-000312  
Case No: 2012-CP-42-2329

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**RECEIVED**  
JUN 12 2013  
SC Court of Appeals

Daljit Roopra, ..... Respondent,

v.

Spartanburg Automotive, Inc., and  
Liberty Mutual Insurance Company, ..... Appellants.

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INITIAL REPLY BRIEF OF APPELLANTS

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## ARGUMENT

### **I. THE COMMISSION'S AWARD FOR ROOPRA'S LEFT SHOULDER INJURY IS EXCESSIVE AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The award in this case cannot stand because it is excessive, fails to account for a substantial award for the same body part stemming from an earlier injury, and disregards the much lower impairment rating assigned by Roopra's own treating physician, as well as Roopra's current abilities and earning capacity. Accordingly, the Commission's impairment rating is not "based upon evidence which fairly proves the extent or percentage of disability" and cannot stand. *Dickey v. Springs Cotton Mills*, 209 S.C. 204, 210, 39 S.E.2d 501 (1946); *Linen v. Ruscon Construction Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) ("the award may not rest on surmise, conjecture, or speculation; it must be founded on evidence of substance to afford it a reasonable basis.") (internal citation omitted).

#### **A. Roopra's Disability Ratings Do Not Fall Within The Act's Definition of Disability Given His Current Capabilities.**

The single commissioner, affirmed by the Full Commission and the circuit court, awarded a 39% permanent partial disability to the left shoulder. (November 7, 2011 Decision and Order, Finding of Fact 11) In contrast, on March 8, 2006, treating physician Dr. Kana assigned an impairment rating of 21% to the left upper extremity, which he revised down to 18% as of August 14, 2006, and again on August 18, 2007. (APA #1, pp. 18, 22, 29) Similarly, Dr. Mourtada completed a Form 14B on July 25, 2011, wherein he observed that Roopra had a 21% impairment to the left shoulder and neck. (APA #11, p. 108) Further, while Roopra was released to work with restrictions, the fact that he was released with no additional recommended treatment beyond pain management militates against the excessive disability ratings awarded by the single

commissioner. (November 7, 2011 Decision and Order, p. 6) While Roopra correctly notes the work restrictions imposed by his treating physicians, he does not disagree that the highest impairment rating imposed in connection with the 2004 re-injury of the left shoulder was the 21% rating by Dr. Mourtada. (Resp.'t's Initial Br., pp. 3-4)

Additional substantial evidence supports Appellants' contention that Roopra's impairment rating is excessive. For example, Roopra has continued to work for Spartanburg Automotive since his November 14, 2003 injury, and his wages exceed his pre-injury compensation. (October 5, 2011 Hr'g Trans., p. 12, lines 19-21) He is gainfully employed without any restrictions on his ability to perform his job duties. (*Id.* p. 12, lines 5-6, 19-21) Roopra works more than 40 hours per week, is right hand dominant, and is not required to lift, push, or pull. (*Id.*, p. 22, lines 1, 7, 10-11; p. 24, lines 6-7; November 7, 2011 Decision and Order, p. 7)

While he neglects even to address the issue in his Initial Brief, Roopra's lifestyle choices and activities further belie the excessive impairment rating awarded in this case. Following his November 14, 2003 injury, Roopra travelled to India for six weeks in 2007 and to California and Arizona, where he enjoyed his friends' company and smoked marijuana, in February 2011. (October 5, 2011 Hr'g Trans., p. 9, lines 9-15; p. 24, lines 16-23) While he testified he has difficulty sitting for more than 15 to 20 minutes, he was able to ride in a car for the trip from South Carolina to the Grand Canyon. (*Id.*, p. 24, line 22; Depo. Trans., p. 31, line 10) Roopra is able to drive, stand for extended periods without pain, and has no difficulty walking. (Depo. Trans., p. 30, lines 23-34; p. 31, lines 3-5; p. 34, lines 19-25) He is still able to carry his young son and plays around with his children as much as he can. (*Id.*, p. 33, lines 4-5)

In light of Roopra's current employment, potential for alternative employment, and lifestyle, it is evident that the exaggerated disability ratings are excessive and inconsistent with the definition of disability as set forth in S.C. Code Ann. § 42-1-120 (1976). Inasmuch as Roopra's ratings are against the greater weight of the substantial evidence, including the impairment ratings assigned by his own treating physicians, and because his ability to earn income has not been impaired, Appellants are entitled to an order reversing the order of the circuit court and remanding this matter to the Full Commission for imposition of an impairment rating that is consistent with the evidence.

**B. The Commission And The Circuit Court Improperly Failed To Take Into Account Roopra's Prior Award Of 20% Permanent Partial Disability To The Left Shoulder.**

The single commissioner's misapprehension of the substantial record evidence was compounded by his failure to consider Roopra's prior award of 20% permanent partial disability for a work-related injury to the same body part in 1996. An additional award of 39% for the same body part, particularly in light of Roopra's abilities, is unjustly high and not substantiated by the greater weight of the evidence in this case.

The 2000 surgical repair to Roopra's left shoulder successfully relieved his pain and left him with full range of motion. (APA #1, p. 1) Roopra himself testified that his left shoulder was "decently functional" following the 1996 injury and surgeries, and he was able to return to work. (*Id.*; Depo. Trans., p. 19, lines 6-7) Following Roopra's 2003 injury, Dr. Kana noted Roopra "seems to be doing very well," lowered his impairment rating to 18%, and observed that Roopra would not need additional surgeries. (APA #1, pp. 10, 14, 22, 27) Roopra's minimal treatment following the second injury further supports Appellants' contention that his degree of disability with respect to the left shoulder does not rise to the level of 39%. The only recommended treatment

immediately following his 2005 shoulder surgery was deep tissue massage and a work hardening program. (*Id.*, pp. 14, 21) He responded well to physical therapy and by July 2011 only required pain management. (APA #12, pp. 110-116; APA #14, p. 108) Further, Roopra continues to work without significant difficulties even after re-injuring the left shoulder.

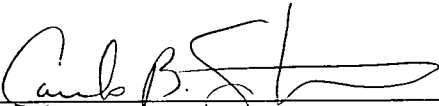
**C. *Wigfall* Is Not Controlling Because The Shoulder Was Not A Scheduled Body Part At The Time Of Roopra's Re-Injury.**

Relying upon *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003), Roopra contends he is not required to show lost earning capacity for “a scheduled physical injury included in S.C. Code Ann. § 42-9-30.” (Resp.’t’s Initial Br., pp. 5-6) Roopra’s reliance on *Wigfall* is misplaced for one simple reason: Roopra’s injury occurred in 2004, well before the South Carolina Legislature added the shoulder to the list of scheduled body parts set forth in S.C. Code Ann. § 42-9-30 in 2007. *See* S.C. Code Ann. § 42-9-30(14) (“for the loss of a shoulder, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks); *see also* Effect of Amendment (“The 2007 amendment added item (14) relating to loss of a shoulder”). As such, the *Wigfall* decision is inapplicable, and Roopra should have been required to demonstrate “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.” S.C. Code Ann. §§ 42-1-120, 42-9-20; *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 463, 732 S.E.2d 190, 194 (Ct. App. 2012) (“The extent of disability is a question of fact to be proved as any other fact is proved . . . . Disability in compensation cases is to be measured by loss of earning capacity.”) (*quoting Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961)).

## CONCLUSION

Based on the foregoing, Appellants respectfully submit that the orders of the circuit court and the Full Commission affirming the single commissioner's assignment of Roopra's disability ratings are not supported by substantial evidence and should, therefore, be reversed.

June 12, 2013

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PROOF OF SERVICE

I hereby certify that this 12th day of June 2013 a copy of the INITIAL REPLY BRIEF OF APPELLANTS<sup>1</sup> has been served upon other counsel of record, by mailing same, postage prepaid in the United States Mail, addressed to the following:

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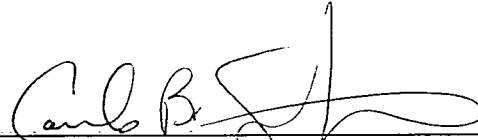
**ATTORNEYS FOR RESPONDENT**

(Signature page to follow.)

<sup>1</sup> The carrier is mis-identified via scrivener's error in the Order entered by Judge Roger L. Couch on January 16, 2013. Specialty Risk Services, Inc. is the actual carrier.

June 12, 2013

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