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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Jun 08 2023

S.C. SUPREME COURT

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Opinion No. 2023-UP-164 (S.C. Ct. App. filed April 26, 2023)

Randall Dalton, Employee,.....Petitioner,

v.

The Muffin Mam, Employer,
and Amerisure Mutual Insurance Company, Inc., Carrier,.....Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on April 26, 2023. Petitioner's counsel certifies a Petition for Rehearing was filed May 4, 2023. The Court of Appeals denied rehearing on May 18, 2023.

QUESTIONS PRESENTED FOR REVIEW

- I. DID THE COURT OF APPEALS ERR IN FAILING TO ADJUDICATE THE QUESTION OF WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT REQUIRES DISABILITY UNDER S.C. CODE ANN § 42-9-10 TO BE BASED ON A CLAIMANT'S CAPACITY TO WORK INSTEAD OF A CLAIMANT MERELY HOLDING AN EMPLOYMENT POSITION – OFTEN REFERRED TO AS “SHELTERED EMPLOYMENT” DOCTRINE?
- II. CAN A “FINDING OF FACT” THAT A CLAIMANT IS MAKING MONEY SUBSTITUTE FOR SUBSTANTIAL EVIDENCE REGARDING THE CAPACITY THAT A CLAIMANT HAS TO OBTAIN EMPLOYMENT?
- III. DID THE COURT OF APPEALS ERR OTHERWISE IN FAILING TO ADJUDICATE AN INCREASED AMOUNT OF DISABILITY TO PETITIONER'S SCHEDULED MEMBER INJURIES?

STATEMENT OF THE CASE

At its core, the question presented by this case is whether a claimant's capacity for employment must be the basis of the South Carolina Workers' Compensation Commission's adjudication of disability pursuant to S.C. Code Ann. § 42-9-10 (1976). The Court of Appeals does not cite even a scintilla of a factual basis supporting its affirmation of the Workers' Compensation Commission in either page of its opinion justifying its ultimate conclusion that the Workers' Compensation Commission did not err in denying Petitioner permanent and total disability pursuant to S.C. Code Ann. § 42-9-10 (1976). Based on the fact that the Court of Appeals' first parenthetical citation to case law was Burnett v. City of Greensboro, 401 S.C. 417, 429, 737 S.E.2d 200, 206 (Ct. App. 2012) regarding the lack of the court's "authority to find facts," it must

be assumed that the fundamental basis of the court of appeals' opinion affirming the full Commission was that a factual basis for the Commission's opinion existed.

What the Court of Appeals' opinion fails to acknowledge is South Carolina's longstanding precedent of analyzing the capacity that claimant has to obtain employment. Neither the Court in its opinion nor the Respondents hereto in any of their arguments to date has ever adduced a single factual statement from the record that Petitioner has the "capacity" to obtain employment. The reason for the Court's and Respondents' omission is simple: no piece of evidence, at all, exists in the record to substantiate the allegation that must be proved for Respondents to succeed if the standard of disability in South Carolina is, as it is in every jurisdiction that has addressed the issue, that a claimant must have the capacity to obtain employment and not merely have a position that pays wages.

The longstanding rule under South Carolina's interpretation of the Administrative Procedures Act is that the Commission's findings must be supported by substantial evidence. Substantial evidence is a relatively low bar and has been defined as “[...] 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 or must have reached in order to justify its action.” Lark v. Bi-Lo, Inc., 276 S.C 130, 136, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978)). In the case at bar, there does not exist even a mere scintilla of evidence of claimant's capacity for employment. The only factual statement in the record is the finding by the single commissioner, affirmed by the full Commission, that Petitioner was making more money after his injury than he did before it.

Not only did the Court of Appeals fail to address the fundamental question of whether capacity to work was the fulcrum of the disability analysis under SC Code Ann. § 42-9-10 (1976)—typically referred to in most jurisdictions as "make work" or "sheltered employment" doctrine – the Court of Appeals made no attempt to articulate any evidence that existed in the record to substantiate the Commission findings that it affirmed.

On September 3, 2020, Petitioner instituted this action by filing a hearing request. (R. pp. 30). The Form 50 hearing request alleged Petitioner was permanently and totally disabled. (R. pp. 31). On October 1, 2020, Respondents filed a Form 51 admitting that Petitioner sustained injuries to his shoulder and back but denied that he was permanently and totally disabled. (R. pp. 35).

On June 30, 2021, the single Commissioner issued his order and awarded 15% impairment to Petitioner's right shoulder and 15% impairment to Petitioner's spine. (R. pp. 1) Petitioner appealed the single Commissioner's order on July 7, 2021, and a hearing was held before the full Commission on November 23, 2021. The full Commission increased claimant's rating to his shoulder from 15% to 25% and increased his rating to his back from 15% to 25% in its decision and order of January 7, 2022. (R. pp. 17). On January 26, 2022, Petitioner filed his notice of appeal; on April 26, 2023, the Court of Appeals issued its opinion affirming the full Commission. On May 4, 2023, Petitioner filed his petition for rehearing, which was denied on May 18, 2023. Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion.

ARGUMENT

I. Summary of grounds for granting certiorari.

Rule 242 of the South Carolina Appellate Court Rules (Rule 242, SCACR) provides a nonexclusive list of considerations for the Court when determining whether a writ of certiorari is warranted. Two of those considerations are necessarily implicated in the present action and weigh

in favor of the Court issuing a writ of certiorari to review and reverse the Court of Appeals' opinion. Specifically, Rule 242(b)(1) and (3) of the Appellate Court Rules are implicated because the primary question at issue in the case at bar must be either a novel question of law or is in conflict with a prior decision of the Supreme Court.

First, the Court of Appeals' decision does not address whether South Carolina formally accepts "sheltered employment" doctrine. South Carolina has never officially taken a position about whether the doctrine exists in the State of South Carolina. Nevertheless, precedent that goes back nearly to the inception of the workers' compensation system in the State strongly suggests that the fulcrum of any analysis of total disability under the South Carolina Workers' Compensation Act must be the claimant's capacity to obtain employment in the marketplace and not the mere receipt of wages. As the South Carolina Supreme Court succinctly stated in Stephenson v. Rice Svcs., Inc., 323 S.C. 113, 119, 473 S.E. 2d 699, 702 (1996), "*the mere fact of employment is not always indicative of earning capacity.*" (Emphasis added). The purpose of workers' compensation law is to exist as a "grand bargain" by which a claimant yields her right to sue her employer and obtain compensation commensurate with "made whole" doctrine in exchange for the certainty of obtaining the limited benefits provided under the workers' compensation system. The maximum recovery possible to even a totally disabled claimant under the workers' compensation system may be miniscule in the history of South Carolina jurisprudence, but, for the injured employee herself, it can be literally the difference between having or not having food to eat. For example, for the year 2017, the year of Petitioner's injury, the maximum possible award that a totally disabled person could receive under the South Carolina Workers' Compensation system, when reduced to present value as required by the Act, is a mere \$366,971.08. That is, the 2017 maximum compensation rate of \$806.92, when the 500 week maximum benefit is reduced

to the 2017 present value of 454.78 weeks pursuant to S.C. Reg. 67-1605, would yield this number. An individual who was at the minimum compensation rate of \$75.00 and was totally disabled would receive only \$34,108.50. This same individual with the same injury in a civil context may be entitled to several million dollars because of the absence of a cap upon his wages and because of entitlement to additional benefits for pain and suffering and the full range of future medical care he may need. The natural temptation in analyzing a workers' compensation claim with a factual finding that the claimant is making more money on the date of the single commissioner hearing than he was on the date of his injury is to simply disregard the statutory and precedential analysis of work capacity based on a vague concept fairness and the assumption that a claimant making more money on the date of his single-commissioner hearing must have continued to make money after that hearing. To do so would be to disregard a longstanding, tried-and-true evaluation that has been universally adopted by every jurisdiction that has undertaken to perform the analysis of why it is appropriate to look to a claimant's work capacity and not to his mere receipt of wages to determine total disability.

Failing to engage in the work capacity analysis acknowledged by the State of South Carolina sets the dangerous precedent that an employer can simply keep an unemployable worker on the books for 60 days (the period within which an employer's request for a hearing must be set under S.C. Code Ann § 42-9-260 (1976) so that a hearing can go forward with the uncontradicted evidence that the "employee" has a job and absolve the factfinder of making any determination of whether the employee actually has the capacity to work until after the adjudication is final - at which point the job the employee is performing can simply disappear and leave the employee with a fraction of the recovery he would otherwise be entitled to under workers' compensation law. The entire case against Petitioner rests upon an assumption. The assumption that the job he held on

the date of the single commissioner hearing would exist after that hearing and into the indefinite future. Because the benefits possible for a claimant at the maximum extreme are so minimal, the commission and courts are required to engage in a comprehensive analysis of the facts existing in each case because workers compensation law “is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers’ Compensation Act; only exceptions and restrictions on coverage are to be strictly construed.” Nicholson v. S.C. Dept. of Social Svcs, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015) *quoting James v. Anne’s Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010). If Petitioner had the capacity to obtain employment, the record, of necessity, would have an answer to the simple question that no contrivance or prestidigitation can cause the record in the case at bar to answer: “What job could the Petitioner apply to and perform if he obtained it?” Because that question cannot be answered from the record, the Court of Appeals must have erred.

II. South Carolina has always recognized that work capacity must form the basis for a determination of disability under S.C. Code Ann. § 42-9-10 (1976), and, therefore, South Carolina, like nearly every other jurisdiction, has at least tacitly acknowledged sheltered employment doctrine.

A. Disability has always been analyzed as capacity to obtain employment under S.C. Code Ann. § 42-9-10 (1976).

Under S.C. Code Ann. § 41-1-120 (1976), “disability means *incapacity* because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” (Emphasis Added). The definition for disability has been identical since at least 1952.¹ In analyzing the identical provision in 1954, the Supreme Court explained that “disability is to be measured by the employee’s *capacity or incapacity* to earn the wages which he was receiving at the time of his injury. *Loss of earning capacity* is the criterion.” Keeter v. Clifton Mfg. Co. et al., 225 S.C. 389, 392, 82 S.E. 2d 520, 522. (1954) (Emphasis Added). In Wynn v.

¹ See S.C. Code Ann. § 72-10 (1952), for example.

Peoples Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E. 2d 812 (1961) the Supreme Court elaborated on the analysis that needed to be performed:

Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. On the other hand, the rule in most states is that an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. The generally accepted test of total disability is inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

Id. at 11, 817-18 (Internal citations and quotations omitted). In short, therefore, the test for total disability under S.C. Code Ann. § 42-9-10 (1976) is not to calculate the amount of the check being given to the injured worker after his injury but to look at the “capacity” the injured worker has to “earn” wages after the injury. Many states have already formally adopted sheltered work doctrine, including North Carolina.

As South Carolina courts have articulated repeatedly, “[b]ecause South Carolina adopted large portions of the North Carolina Workers’ Compensation legislation, we rely on North Carolina precedent in Workers’ Compensation cases, Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432 (1992). North Carolina law expressly recognizes “sheltered employment.” In Peoples v. Cone Mills Corporation, 342 S.E.2d 798 (N.C. 1986), the North Carolina Supreme Court ruled, “[a]n injured employee’s earning capacity must be measured not by the largesse of a particular employer, but rather by the employee’s own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity.” Id. at 806. Larson defines the doctrine as follows:

Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly.

The same is true if the injured man's friends help him to hold his job by doing much of his work for him, *or if he manages to continue only by delegating his more onerous tasks to a helper*, or if the work for which claimant is paid is 'made work' or 'sheltered work.'

4, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 57.21, § 57.34 (1983) (Emphasis Added) (Footnotes Omitted). Therefore, the hallmark of the "sheltered employment" or "make work" doctrine is that disability must be analyzed without reference to actual income but instead must be based on the claimant's ability to compete in the marketplace for a job he can perform despite his injury-related work restrictions.

The South Carolina definition of total disability based on the "economic" model from S.C. Code Ann. § 42-9-10 (1976) already parallels the sheltered work model. Total economic disability exists under S.C. Code Ann. § 42-9-10 (1976) when the services that a claimant can offer are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." See Wynn v. Peoples Natural Gas Company, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The South Carolina Workers' Compensation Act statutorily and explicitly recognizes that actually earning wages and having the physical ability to obtain employment in the marketplace are distinguishable in its definition of "permanent physical impairment" in at least two separate contexts, where it is defined as an injury that is so serious that it is an obstacle to "obtaining reemployment if the employee should become unemployed." See, e.g., S.C. Code Ann. § 42-13-10 (1976) and § 42-9-400 (1976).

Accordingly, South Carolina law recognizes the same policy rationale as North Carolina's sheltered employment rule, which has been articulated by North Carolina as follows:

The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated. Termination of the employee would not necessarily signal a bad motive on the part of the employer. An employer facing a business decline reasonably could determine that continued retention of

the employee was not feasible. The employee also could be dismissed for misconduct. The employer could, for reasons beyond its control, simply cease doing business.

Peoples, 316 N.C. at 438, 342 S.E.2d at 806. In sum, therefore, even if South Carolina has never expressly stated that sheltered work doctrine exists under the Act, the proper analysis of what constitutes disability under South Carolina law has long been based on determining the “capacity” of a claimant to compete in the marketplace for wages without reference to actual earnings he or she is receiving from a specific employer in specific circumstances. As the South Carolina Supreme Court stated in Stephenson v. Rice Svcs., Inc., 323 S.C. 113, 119, 473 S.E. 2d 699, 702, “the mere fact of employment is not always indicative of earning capacity.” Thus, it is clear that, regardless of the name attributed to it, that South Carolina law has long recognized that the fact that the calculation of wages being provided to a claimant is not the measure of disability under South Carolina Workers’ Compensation Law.

B. The Court’s Apparent Reliance Upon Coleman and Peoples v. Cone Mills is Misplaced.

Petitioner has never argued that South Carolina should adopt, *in toto*, North Carolina workers' compensation law’s methodology of determining whether an employee who is receiving wages is totally disabled, but, because South Carolina workers’ compensation law originally germinated in North Carolina soil, it is significant that North Carolina has formally recognized that a claimant who is receiving wages can nevertheless be totally disabled, *i.e.*, receipt of wages is not dispositive of whether a claimant is totally disabled. South Carolina's definition of economic-based disability, a definition entirely neglected by Respondents, the Workers’ Compensation Commission, and the Court of Appeals, is derived, as it must be, from the total disability statute, S.C. Code Ann. § 42-9-10 (1976).

South Carolina's definition of total disability based on the economic model has always held that a claimant is statutorily disabled when the services that she can offer are “so limited in quality, dependability, or quantity that a *reasonably stable market* for them does not exist.” Wynn v. Peoples Natural Gas Co., 238 SC 1, 118 SE2d 812 (1961) (emphasis added). Wynn cited Lee v. Minneapolis St Ry. Co., 41 N.W.2d 433 (Minn. 1950), a Minnesota case that elucidates that the basis of economic disability is generally the ability of an injured employee to compete in the marketplace for wages. The Lee Court held that:

although an injured person may be able to perform some parts of his occupation, he may be held to be totally disabled if he is unable to perform the substantial and material parts of some gainful work or occupation with reasonable continuity. This rule *can only mean that the injured employe [sic] must be in such condition that prospective employers will normally and reasonably be willing to hire him despite his handicaps.*

Id. at 316, 434 (emphasis added). As the Lee Court highlights, therefore, total disability does not focus on present receipt of wages but on “prospective” employment potential.

The absence of any analysis of South Carolina's statutory definition of “disability” by the Court of Appeals and by Respondents is telling. Instead of looking at South Carolina’s definition, the court of appeals parenthetically cites Peoples v. Cone Mills Corp., 316 NC. 426, 342 SE 2d 798 (N.C.1986), presumably relying on the “rebuttable presumption” analysis raised by Respondents in their brief to the Court of Appeals regarding how North Carolina analyzes a claimant’s capacity to earn wages. The Order affirmed by the Court of Appeals did hold that Petitioner had failed to establish disability under Peoples, an analysis that is not identical to whether Appellant can establish disability under the pertinent standard found at S.C. Code Ann. § 42-9-10 (1976).

Nevertheless, assuming, *arguendo*, that South Carolina were to adopt the methodology found in Peoples, it should be noted that the case at bar is less distinguishable from Peoples than

is alleged by Respondents, and the substantial evidence in the record would require a finding that Appellant met the Peoples standard. The employer in Peoples “modified an existing [. . .] position.” 316 N.C. at 428, 342 SE 2d at 801. The North Carolina Supreme Court specifically held that this modified version of an existing position was one that the claimant “*was capable of performing,*” but that such “tendered employment, as a matter of law, is no indication of [claimant’s] ability to earn wages. Disability is defined by the Act as impairment of one’s earning capacity rather than physical disablement.” Id. at 434, 801. The Peoples Court went on to explain why “post-injury earnings of an employee may under some conditions not accurately reflect the employee’s earning capacity” by asking questions including “*How long will employer continue to employ claimant if his condition remains unchanged? What would become of claimant if employer should not continue his business? Must claimant continue to be employed by the same employer against his will in order to receive payment of compensation . . . ?*” Id. at 436, 805 (quoting Branham v. Panel Co., 223 N.C.233, 25 S.E.2d 865 (N.C. 1943) (italics in original). Larson’s Workers’ Compensation Law, in fact, explicitly recognizes that total disability may exist even when post-injury wages exceed pre-injury wages, as in the instant case: “[i]t is ***uniformly held***, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling ***or exceeding those received before the accident.***” Larson’s Workers’ Compensation Law § 81.01[3] (2021) (emphasis added).

The Peoples Court favorably cited Allen v. Industrial Comm, 87 Ariz. 56, 347 P.2d 710 (1959). In Allen, an Arizona case, the claimant’s job consisted “primarily of making scheduled calls on commercial accounts to sell tires, other equipment and services, and, at times, to change tires on automobiles or trucks belonging to customers.” Allen at 58, 711. In Allen, the claimant

was 36 years old and had permanent restrictions with the result that “his grip was weaker and more limited (it was estimated that the grip of his right hand was 35 to 40 pounds less than before the accident); his fingers were deformed and snapped when in use; and the dexterity of his fingers was reduced as the result of limitation of motion in his finger and knuckle joints.” *Id.* at 58, 712. The claimant’s doctor testified that the claimant “*could do the same work but not as well, as easily, as quickly or to the same degree as before the accident.*” *Id.* at 59, 712. (emphasis added). The claimant’s employer testified that the claimant would “have little or no chance to be employed by other similar companies” and that “his own company would in fact not hire a man in the condition of petitioner.” *Id.* at 59, 711. The Allen Court outlined that the commission was required to look at “the employee’s previous disability, his occupational history, the nature and extent of his physical disability, the type of work he is able to perform, wages received for work performed subsequent to the injury, and his age at the time of the injury.” *Id.* at 60, 713. The Allen Court concluded that the claimant’s “wages may reflect not the employee’s earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or to secure equivalent employment.” *Id.* at 68, 718.

Relying in large part on Allen, the Peoples Court did not hold that post-injury employment created a “presumption” of disability. Instead, it held that when an employer offers a job within the restrictions of an injured worker, “[i]f the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee’s earning capacity.” Peoples at 440, 807 (emphasis added). Accordingly, a job provided to a claimant with work-restrictions is not a presumption under Peoples; instead, it is merely “strong, if not conclusive” evidence. Most importantly, the evidence is only strong “if” that “proffered job is

generally available *in the market*.” That is, if the job a claimant is performing can only be performed with accommodations that are not generally allowed by the market, its existence does not create even “strong” evidence of work capacity.

C. Petitioner’s physical capacity (i.e, his work restrictions) are uncontradicted in the record.

Under any analysis, the first element of evaluating Petitioner’s vocational ability is to determine what injury-related limitations he has. The Commission is required to look at what “tasks” or “services” the employee is capable of performing in spite of her injury-related impairments. See, *eg.*, Stephenson at 118, 702.

According to Petitioner’s treating physician, Dr. James Behr, Petitioner has a 4% impairment to his cervical spine and an 8% impairment to his lumbar spine. His permanent work restriction from Dr. Behr as to his spine is “no lifting over 30 pounds.” (R. p. 180). Dr. Hoenig, Petitioner’s treating physician for the shoulder injury, assigned an 8% rating and limited him to not lifting more than ten pounds overhead. (R. p. 164). On October 10, 2020, Petitioner’s family physician, after writing Petitioner out of work for his back injury, allowed him to return to work but only with the “caveat to do no lifting greater than 10 lbs.” (R. p. 198). In an FCE performed December 16, 2020, Petitioner’s maximum lifting from waist to shoulder level was ten pounds, and his maximum lifting above shoulder level was only seven pounds. (R. p. 209). Accordingly, every piece of evidence in existence demonstrates that Petitioner cannot lift more than ten pounds overhead. Although Dr. Behr opined that Petitioner was capable of lifting as much as thirty pounds below shoulder level, Petitioner’s family doctor limits Petitioner’s lifting to only ten pounds. The valid FCE notes that Petitioner could lift a maximum of twenty pounds from floor level and was “unable to lift” twenty-five pounds. (R. p. 214). The Order of the Single Commissioner, in fact,

found “[Petitioner] exerted full effort during his FCE, and the restrictions recommended in the FCE are a reliable and accurate representation of Claimant’s permanent restrictions.”

D. Not even a scintilla of evidence exists in the record to support a finding that Petitioner has the capacity to obtain employment.

Other Courts, such as the Arizona Allen court cited above, rely, in the absence of expert vocational opinion, on the testimony of a claimant’s employer regarding what “in house” positions other than the purportedly sheltered employment the claimant would be capable of performing. In the case at bar, not only did the employer have a witness present at the hearing to testify, but Petitioner also deposed the two agents of the Employer who were in the best possible position of stating the title of a position that an individual of Petitioner’s age, education, and work experience could perform, and no Employer witness was able to name such a position. To begin with, Petitioner deposed a witness pursuant to Rule 30(b)(6). Under longstanding precedent, a corporation is bound by the statements of its agent designated pursuant to Rule 30(b)(6). *See, e.g., Covol Fuels No. 4, LLC v. Pinnacle Min. Co., LLC* 785 F.3d 104, FN 13 (4th Cir. 2015). (“The organization is permitted to designate a person to testify on its behalf, and the organization is bound by that testimony”). South Carolina Rule of Civil Procedure 801 (Rule 801, SCRPC) allows any statement made by a person “authorized by the party to make a statement concerning the subject” to be admitted in spite of a general prohibition against hearsay, and SCRPC 32(a)(2) (Rule 32, SCRPC) specifically outlines that “a person designated under Rule 30(b)(6) [. . .] to testify on behalf of a public or private corporation [. . .] which is a party may be used by an adverse party for any purpose.”

Petitioner noticed a 30(b)(6) deposition of an employee designated by Respondents. The topics of the deposition were the following:

1. [Petitioner]’s job title and job duties from the date of his hiring to the present, including the physical requirements necessary for any person who wishes to apply to obtain such positions.
2. All employment positions at The Muffin Mam in the State of South Carolina that are open to applications from a person with no more than a high school education and the physical restriction of being unable to lift more than 10 pounds overhead and no lifting more than 30 pounds; the training required to perform such a job; and the rate of pay of such a job.
3. What accommodations are being made since [Petitioner]’s injury to enable him to undertake his job duties.
4. Knowledge of the provenance of the job descriptions and job postings for any employment position that falls within topics 1-3 (above) and requested pursuant to the Form 27 subpoena served concurrently with this Notice.
5. Whether any person with restricted use of one arm as well as lifting restrictions of no more than 10 pounds overhead and no more than 30 pounds lifting, has been hired for any position falling into the categories in questions 1-4 (above) and how long such person(s) remained in such position(s) from the date of [Petitioner]’s hiring to the present.

(R. p. 378). Respondents produced only one witness, Terri Jermon, to testify regarding all of these topics, and her 30 (b)(6) deposition took place June 9, 2020. (R. p. 357). In conjunction with the deposition notice, Petitioner served a Form 27 subpoena that requested all documents in Respondents’ possession that were responsive to the topics outlined in the notice. (R. p. 375). Respondents produced three (3) pages of documents. (R. p. 380-382). The witness confirmed that the three (3) pages of documents produced were the only existing documents that corresponded with the topics outlined above during her deposition testimony. (R. p. 362). Ms. Jermon testified that she did not know what the physical requirements were for Petitioner’s current or past position, or for any position in his department: “I can’t answer that question because I’m not in that department.” (R. p. 370). Again, in response to Petitioner’s subpoena for any evidence of any jobs for a person with only a high school education who was unable to lift more than ten pounds overhead and no more than thirty pounds total (Petitioner’s maximum work abilities according to

his authorized physicians at the time of the 30 (b)(6) deposition), Respondents produced evidence of no position at all. When asked about Petitioner's ability to perform his current job, Jermon testified, "If there's anything that he can't do [. . .] somebody else has been able to take over for him." (R. pp. 369-370). Respondents' 30(b)(6) designee, *in testimony that binds Respondents*, testified "I don't know if there's actually a lot of heavy lifting." (R. pp. 367). The official position, to which Respondents are bound, therefore, is that they do not know how much lifting is required for any position in Petitioner's department, and they produced no evidence of any position that existed within the company that would be available to a person who could not lift 30 pounds (The Commission's finding in the record is that Petitioner's FCE encapsulated his actual work abilities, and it limited him to 20 pounds of maximum lifting, as noted herein). Instead, Respondents produced evidence that can only be interpreted to conclusively establish that Petitioner was able to maintain employment only because he had accommodations that included a helper to assist him with physical activities that all similarly situated employees were required to perform as a condition of employment. As Respondents' Rule 30(b)(6) designee also testified, "[w]hen he started having his restrictions, we dialed that down, what he was able to lift." (R. p. 367). The designee, when asked if a person off the street would be hired with Petitioner's restrictions, testified "I don't know that I can answer that questions as far as if he had just walked off the street." (R. p. 369). She thereafter testified, "If there's anything that he can't do, as I said, somebody else has been able to take over for him." (R. pp. 369-370). She further testified that, because she could not answer with specificity, "Ronnie Williams [. . .] could probably answer those same questions as well." (R. p. 370).

So that no stone was left unturned and no room could be left for conjecture, Petitioner thereafter deposed Ronnie Williams. Mr. Williams testified that a supervisor like Petitioner would

be “required physically to do all the same duties that a regular maintenance tech would do.” (R. p. 394). Mr. Williams thereafter testified, in an exchange with Petitioner's counsel, as follows:

Q. Okay. So, if he couldn't lift 30 pounds of weight, you don't think that person would be able to do the physical grind required for a maintenance tech. Is that what you're saying?

A. If he couldn't do that with both arms, yeah. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do.

Q. Okay.

A. It depends on the individual.

(R. p. 397).

Although this employer representative makes the self-serving statement that he would hire any employee “who could do what he needed to do,” he specifically concedes that he a person who applied for the job who could not lift 30 pounds with both arms would not be able to compete for a job with Respondent Employer. As noted above, the FCE adopted in full by the Commission limited Petitioner in excess of his doctor’s restrictions.

Accordingly, despite having the opportunity at two depositions and the hearing to articulate the title of any job with the defendant-employer that Petitioner could perform without assistance, Respondents failed to ever state any such position; therefore, the record would have to contain evidence that Petitioner was capable of performing some position in the marketplace that did not exist with his employer on the date of the single-commissioner hearing in order for the Court of Appeals’ decision to be rooted in evidence that exists in the record.

E. Not even a scintilla of evidence exists in the record that Petitioner can perform any other work available in the marketplace.

In order to determine to what extent a claimant’s earning capacity remains “intact,” it is necessary to use expert vocational evidence. See Clark v. Phillips Electronics/Shakespeare, 433

S.C. 186, 857 S.E.2d 378 (Ct. App. 2021). In Clark, the claimant procured a vocational evaluation, and the defendants also procured a vocational evaluation. The Full Commission's findings of fact did not discuss either vocational report in the record, and, therefore, the Court of Appeals had "no way of knowing what the Panel used to find [the claimant's] earning capacity was intact;" therefore, the holding that it was intact merely "float[ed] on air." Clark at 194, 382. In the instant case, the only expert vocational opinion in the record is from Adger Brown, who opines that Petitioner is capable of engaging only in "modified work" and that he would be "incapable of returning to work with a new employer as a maintenance mechanic" and therefore would be "unhireable in any other capacity" if he were to lose his job with Respondents for any reason. (R. p. 237). In the case at bar, not only does the Order affirmed by the Court of Appeals fail to account for Brown's unequivocal statement that Petitioner's earning capacity was destroyed, but, unlike Clark where another report at least existed, there is no other vocational evidence in the record that Petitioner's earning capacity is intact.

In a workers' compensation proceeding, the Commission's findings must be supported by "*competent evidence*." See, e.g., Robinson v. City of Cayce, 265 S.C. 441, 219 S.E.2d 835 (1975) (emphasis added). Competent evidence has been defined to encompass both admissible evidence and relevant evidence. See Black's Law Dictionary (11th ed., 2019), *available at* Westlaw. Evidence is relevant under South Carolina law when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRPC. Apodictically, a statement may be a fact but not be competent evidence. Every case has a pile of factual materials that must be used to build a bridge across gulf between what is alleged and what must be proved. Only relevant evidence can act as a plank that forms part of the bridge. The size of the pile of factual material is

irrelevant. In the case at bar, Respondents attempt to substitute volume for relevance. *In lieu* of engaging in an analysis of Petitioner’s ability to compete for wages in the marketplace, Respondents heap mounds of facts regarding Petitioner’s “value” to the Respondent Employer on the day of the Single Commissioner Hearing, and they placed particular emphasis on Petitioner’s own lay testimony regarding his “value” to Respondent Employer. The Commission’s Order also focus on the fact that Petitioner is a “valued employee” because, although he has “major lifetime restrictions” he is “the only person who understands and knows the old equipment, and nobody else can do his job at the Muffin Mam.” (R. p. 24). Even if Respondents could establish that, on the day of his Single Commissioner Hearing, Petitioner was the most “valuable” employee in the history of the company, that fact would not be relevant evidence that could assist in determining the relevant issue in the case. The question at issue in the case is whether the Petitioner could compete for wages in the marketplace if he lost the job he had on the day of the Single Commissioner Hearing. How valuable lay witnesses, including Petitioner himself, thought he was in the context of his employment with a single employer at a single point in time cannot help to answer that relevant question. Petitioner’s value to Respondent Employer on the day of his hearing is not the relevant question; the relevant question is what his “market value” is, or, as South Carolina workers’ compensation law denominates it—his “work capacity.”

South Carolina law makes it abundantly clear that lay testimony about market value or work capacity does not rise to the level of being competent evidence and, by extension, cannot constitute substantial evidence. The Supreme Court of South Carolina stated in Hutson v. South Carolina State Ports Authority, 399 SC 381, 732 SE 2d 500 (2012), that such an analysis must be based on:

two principles which form the lens through which we view this case. First is the guiding principle undergirding our workers' compensation system that the Act is to

be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an Award may not rest upon surmise, conjecture, or speculation. Instead, an Award must be founded on evidence of sufficient substance to afford a reasonable basis for it.

Hutson at 387, 503.

In Hutson it was “undisputed that the claimant’s admitted injury prevents him from continuing in his life’s occupation as a crane operator. The sole question before us, therefore, is whether his injury will also prevent him from earning the same wages in another job.” The Court then outlined the evidence in the case upon which the Commission’s decision rested. The “evidence” in favor of the Commission’s holding that the claimant could engage in other employment was his own testimony that he could open a restaurant because he was a good cook. Id. at 503, 388. The information in the record that the Court held constituted relevant and competent evidence, on the other hand, was an “employability evaluation report” from a vocational expert that stated that the claimant could not earn the same wages as he could before the accident. Id. at 384, 501. The Court went on to explain that testimony, even if it came from a claimant, must be set against expert opinion from a vocational expert when the issue in question was work capacity. Id. at 389, 504.

Thus, the test for disability based upon the general disability, or “economic,” model found at S.C. Code Ann. § 42-9-10 (1976) and § 42-9-20 (1976) has always been a two-part test that looks first at the claimant’s occupation and, second, at what his wages would be if he could no longer perform in his occupation. Although Respondents do not concede in the case at bar that Petitioner cannot maintain his current occupation as a maintenance mechanic, their witnesses concede, as noted above, that his restrictions would not allow him to perform the job functions required of all other maintenance mechanics without accommodations being made for him;

accordingly, the relevant test in the case at bar, as in Hutson, is what other work Petitioner could perform outside of the field of being a maintenance mechanic.

As the Peoples and Allen Courts both outlined, as summarized above, when a disability system looks at work *capacity* as the determinative factor, the analysis must focus *prospectively* on what would happen in the event the claimant lost the job he was provided. In Allen, the 36-year-old claimant maintained *the same job* and performed *the same duties*, but, because he did the job less effectually than prior to his injury, the Allen Court looked to the economic loss he sustained by analyzing the wages he had the capacity to make before and after the accident. The Allen Court made the determination by looking at the claimant's age, work history/experience, and post-injury disability and determined the market value the claimant would provide based on those criteria using the expert testimony of his physician and the statement from his employer that no job would likely be available within his abilities outside of his work for the employer. The claimant clearly provided value to his employer, as he was performing the *identical functions he had before his injury*—but the court employed the economic model of disability analysis because he could not compete in the marketplace for work with another employer at the same rate of pay.

“Value” to one particular employer at one point in time has never been relevant evidence for a determination of work capacity. It cannot be. The last stagecoach driver on earth, who had been a stagecoach driver for 50 years and was unlicensed to operate motor vehicles, on the last day any stagecoach ever operated, would probably be the most valuable employee in the history of his stagecoach employer, and, as such, may have commanded excellent wages. On the day the stagecoach was replaced by a bus, however, his “market value” or “work capacity” would be either diminished or eradicated. The extent of his lost market value would require, as outlined in Hutson, the analysis of a vocational expert. In the case at bar, the record contains only one vocational

analysis. That analysis, although it recites the *fact* that Petitioner continued his employment with Respondents on the day of the evaluation, makes only one *relevant evidentiary* statement about Petitioner’s market value or work capacity, namely that Petitioner would be “incapable of returning to work with a new employer as a maintenance mechanic” and therefore would be “unhireable in any other capacity” if he were to lose his job with Respondent for any reason. (R. p. 237).

The only conceivable analysis of relevant evidence that any factfinder could use to determine whether an individual could obtain employment in the marketplace is the opinion of a vocational expert who is qualified to make that assessment. In Peoples, the Court determined that the claimant was not disabled because the “bare statement that he is unable to work is insufficient, in our opinion, to afford reasonable basis for the conclusion that he is totally disabled.” Peoples at 13, 818. The Peoples Court continued that the “question of the extent and probable duration of respondent's disability, if any, was not a simple one for the solution of which the Commission would be justified in accepting [the claimant's] testimony against that of the medical experts.” *Id.* The Court concluded, quoting *Larson*, that the

increasing tendency to accept Awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but the simple and routine cases [. . .] The principal thus stated concerning testimony as to causation is **equally applicable to testimony as to extent of disablement** in cases such as the one at bar.

Id. quoting *Larson's Workers' Compensation Law*, Section 79.54.

It is true, as Respondents have argued, that South Carolina has not expressly held that only vocational expertise can analyze whether a claimant is totally disabled under the economic model. Because it is the “economic” model, it requires an analysis of what careers are available in the economy and what prerequisites are required for the job applicant to obtain the jobs that are

available. Respondents had opportunities at two depositions and a hearing to state a single in-house position Respondent was qualified to hold, so, even if such lay evidence had weight, none was ever presented despite the several opportunities. No method of economic disability analysis other than vocational expertise is, however, genuinely conceivable. Even if no South Carolina court has expressly held that a vocational expert statement is required, a long jurisprudential history has demonstrated what result the substantial evidence rule requires when the competent vocational evidence is as unambiguous and unequivocal as it is in the case at bar.

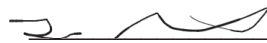
III. At minimum, the scheduled member ratings are too low.

At a minimum, the scheduled member ratings provided to Petitioner fail to account for the substantial functional deficits highlighted above. The Court should grant this Petition because the court of appeals' Opinion conflicts with all South Carolina precedent existing to date.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari, order briefing, schedule the case for oral argument, and vacate the decision of the Court of Appeals.

Respectfully Submitted,



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