THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Case No.: 2012-213610

Norge L. Gonzalez Torres, Employee, Claimant, Appellant,

v.

World Fiber Technologies, Inc., Employer, and The Standard Fire Insurance Company, c/o Travelers, Carrier, Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN CONCLUDING THAT THE APPELLANT WAS NOT ENTITLED TO ADDITIONAL MEDICAL CARE WHERE THE SUBSTANTIAL EVIDENCE OF RECORD DEMONSTRATES THAT HE REMAINS ENTITLED TO SUCH CARE?

II. IN THE ALTERNATIVE, IF THE APPELLANT IS DETERMINED TO HAVE REACHED MAXIMUM MEDICAL IMPROVEMENT, DID THE COMMISSION ERR AS A MATTER OF LAW IN FAILING TO GRANT HIM A PERMANENT PARTIAL DISABILITY AWARD IN EXCESS OF THE 12% IMPAIRMENT RATING ISSUED FOR THE LUMBAR SPINE?

III. DID THE COMMISSION ERR IN RULING THAT RESPONDENTS ARE ENTITLED TO A CREDIT FOR OVERPAYMENT FOR THE PERIOD BETWEEN MARCH 1, 2010 AND SEPTEMBER 19, 2011?

STATEMENT OF THE CASE

This is an appeal in a Workers' Compensation case. The Claimant and Appellant, Norge Gonzalez-Torres ("Gonzalez"), was injured in a work-related accident on February 26, 2010. The South Carolina Workers' Compensation Commission found that Gonzalez had reached Maximum Medical Improvement ("MMI") on September 19, 2011, cutting off temporary total disability ("TTD") payments. The Commission further found that Gonzalez was entitled to a 12% disability award pursuant to S.C. Code § 42-9-30, based solely on the fact that he had received a 12% impairment rating to the lumbar spine from Dr. Michael S. Scharf. The Commission's final finding was that the Respondents, World Fiber Technologies ("Employer") and The Standard Fire Insurance Company ("Carrier") (collectively, "Respondents"), are entitled to a credit for overpayment of TTD benefits for a period of eighteen months, despite the fact that the Respondents' initial error was the reason for this overpayment. This Court granted certiorari to review those decisions.

This matter arises from an admitted injury claim in which Gonzalez sustained an injury to his lower back on or about February 26, 2010. Gonzalez's back was injured while unloading heavy equipment from a truck at the beginning of a work day. (R. p. 44, lines 12-25). Gonzalez was on a temporary work assignment in Charleston, S.C., but lives in Jacksonville, Florida and received medical treatment there. Gonzalez received treatment from Dr. Robert J. Kleinhans, who reported that Gonzalez suffered from constant lower back pain, a decreased range of motion in the back, and radicular pain which radiated into both legs. (R. p. 78-80). Following the failure of conservative treatment, Gonzalez was ultimately forced to undergo surgery in the form of a two level fusion in his lower back due to a herniated disc. (R. p. 91).

Unfortunately, Gonzalez experienced no relief from this surgery or the physical therapy that followed it; he continues to suffer from the same level of pain as before his surgery, a permanent 50% limitation in the range of motion of the spine, and significant pain with movement, in addition to enduring an entire course of physical therapy which did nothing but exacerbate his pain. (R. p. 45-52, 66-67). An FCE concluded that he now functions in the light duty category, despite working in a heavy duty job prior to his injury. (R. p. 103).

Gonzalez spoke of his numerous problems since the accident, which include an inability to walk or sit for any lengthy period of time, an inability to work, trouble sleeping, inability to perform physical activities, inability to perform typical household chores, and an inability to do much of anything besides watch television. (R. p. 49-50, 67-68, 71). Furthermore, Gonzalez testified that he constantly feels severe pain, that he never received pain relief from the surgery, that he had his pain aggravated by physical

therapy, and that his pain is virtually always exacerbated by any physical activity. (R. p. 67-68). Despite these problems, once he was deemed to have reached MMI, he was left without any medical care whatsoever; he has been left to treat his pain with over the counter medications and does not receive pain management treatment. (R. p. 68-69). Additionally, while Gonzalez has stated his desire for further medical treatment, he is without health insurance and the Carrier has refused to authorize any additional medical care. *Id.* The Respondents have offered no evidence to dispute these facts, and they are uncontested within the record of this case.

A hearing was held in this matter on January 27, 2012, before the Single Commissioner. (R. p. 2). The issues before the Single Commissioner were whether Gonzalez had reached MMI, whether the Respondents could stop payment of TTD benefits, whether the Respondents were entitled to a credit for overpayment of TTD benefits for the period following MMI, and whether and to what extent Gonzalez had suffered from a permanent disability. (R. p. 57-60).

It was not until after the hearing, and nearly two years after the Respondents began TTD payments, that the Respondents submitted an updated Form 20 showing the initially computed average weekly wage ("AWW") and corresponding compensation rate had been calculated incorrectly. (R. p. 24). Initially, Respondents paid Gonzalez TTD benefits at the compensation rate of $304.02, based upon a calculated AWW of $456.03. (R. p. 25). However, the modified Form 20 from February 16, 2012 calculated the AWW at $327.00 and the compensation rate at $218.01. (R. p. 24). At this point, Respondents alleged that despite their initial error, they should be entitled to a credit for overpayment

of the TTD benefits from March 1, 2010, the first date TTD benefits were paid, to September 19, 2011, the alleged date of MMI.

Commissioner McCaskill issued a Decision & Order on April 23, 2012. (R. p. 2). He found that Gonzalez had reached MMI on September 19, 2011, that no evidence existed that additional medical treatment was needed, that Gonzalez suffered a 12% permanent partial disability to his back, and that the Respondents were entitled to a credit for overpayment of TTD benefits from September 19, 2011 until the date of the hearing. (R. p. 11-12). Additionally, the Single Commissioner found the Respondents were entitled to credit for overpayment between March 1, 2010 and September 19, 2011, in the amount of $43.85 per week, representing the difference between $304.02 (amount of weekly TTD paid under the initial compensation rate) and $260.17 (amount of weekly TTD under the modified compensation rate). (R. p. 11). These credits were to be applied against the award for permanent partial disability ordered therein. *Id.* Gonzalez appealed these findings to the Full Commission, which affirmed the Single Commissioner's Decision & Order in its entirety. (R. p. 14-23). Gonzalez filed Notice of Appeal in the Court of Appeals December 14, 2012.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, this Court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable,

probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

ARGUMENT

I. GONZALEZ REMAINS ENTITLED TO ONGOING MEDICAL CARE PURSUANT TO THE WORKERS' COMPENSATION ACT.

a. The Commission erred when it found Gonzalez had reached MMI, and therefore he remains entitled to continuing medical care and benefits until such time that he reaches MMI; Respondents are also not entitled to a credit for overpayment until Gonzalez reaches MMI.

Under the South Carolina Workers' Compensation Act, injured workers are entitled to causally-related medical care following a work injury. S.C. Code Ann. § 42-1-160 (2012), S.C. Code Ann. § 42-15-60 (2012). Claimants continue to be entitled to this care until such time that they reach MMI, when an enquiry into any permanent disability can be held. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care

or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) (citing *Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 47, 362 S.E.2d 319 (Ct. App.1987)).

In this case, it is clear that Gonzalez continues to suffer from a serious impairment and further medical care would tend to lessen the degree of impairment. Following his injury, Gonzalez underwent physical therapy and multiple epidural steroid injections, and when this conservative treatment failed, he ultimately underwent major back surgery. (R. p. 64-67, 91). The physical therapy actually aggravated his condition and the uncontested evidence of record shows he continues to suffer from pain and a loss of range of motion that is equal to or greater than the loss immediately following the injury. (R. p. 45-46). Despite releasing him from his care on September 19, 2011, Dr. Scharf nevertheless found Gonzalez had lost around 50% of the range of motion in his lumbar spine. (R. p. 96).

While Gonzalez concedes South Carolina courts have generally given deference to the opinions of treating physicians when it comes to determining whether Claimants have reached MMI, in this case the medical evidence shows Gonzalez has received no benefit from his medical treatment. His pain and loss of range of motion have failed to improve in any meaningful way since he began receiving medical treatment following his accident, and the evidence supports the contention that Gonzalez's condition has actually worsened since he began receiving medical treatment.

In the past, this Court has required that Carriers provide medical care for injured Claimants until they have attained some basic level of improvement – hence the 'plateau' language in *O'Banner*. Here, there is no evidence suggesting that Gonzalez experienced

any improvement in his condition as a result of the medical treatment authorized by the Carrier. These facts present a fairly rare situation, namely that Gonzalez has failed to receive any appreciable benefit from his medical treatment. There exists virtually no evidence in the record to suggest otherwise, and certainly not enough for the decision of the Commission to be supported by substantial evidence. Considering Gonzalez's failure to improve and his continuing serious problems, Gonzalez contends a finding that he has reached MMI ignores the fact that he has yet to see any improvement following his injury. For these reasons, Gonzalez has not reached MMI.

The Commission also awarded the Respondents a credit for overpayment from September 19, 2011, the date on which it found MMI, until the date of the hearing, January 27, 2012. Defendants are generally entitled to such credits only when MMI has been reached and a permanent disability award can be determined. S.C. Code Ann. § 42-9-10 (2012), *Hendricks v. Pickens County,* 335 S.C. 405, 415 n. 2, 517 S.E.2d 698, 704 n.2 (Ct. App. 1999). If this Court finds Gonzalez has not reached MMI, it should also find that any credits for overpayment are premature and that Gonzalez's TTD benefits should be restored until he reaches MMI.

b. In the alternative, if Gonzalez is determined to have reached MMI, he remains entitled to ongoing causally related *Dodge* medical care which would tend to lessen his disability.

Employers are also required to provide all causally-related medical care to Claimants following work-related injuries. S.C. Code Ann. § 42-15-60 (2012). Employers are required to provide any medical care before such time that a Claimant reaches MMI and an enquiry into a permanent disability can be made, but Employers

may also be required to provide causally related medical care so long as it tends to lessen the period of Claimant's disability, even if the Claimant has already reached MMI. *Dodge v. Bruccoli,* 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Even if this Court determines Gonzalez has not reached MMI, he remains entitled to additional medical treatment under the Workers' Compensation Act because additional medical treatment would tend to lessen the period of his disability.

Gonzalez continues to suffer from serious pain in his back which has not improved in any meaningful way despite months of physical therapy, multiple epidural steroid injections, and major back surgery. (R. p. 45-46). Gonzalez suffers from at least a 50% loss of range of motion in the spinal column due to his surgery and ongoing pain symptoms. (R. p. 96). He is unable to work, perform many regular daily activities that he could easily perform before the injury, and spends the vast majority of his time indoors managing his pain. (R. p. 45-52).

Despite all of these problems, Gonzalez manages his pain largely with over-the-counter medications, like Bayer or Tylenol. (R. p. 46). He only takes a more powerful pain relief medication, Oxycodone, when his pain is extremely severe. (R. p. 46-47). This prescription is the final vestige of the medical care once provided by the Carrier, and once Gonzalez runs out, he will receive no additional pain management medication, or, for that matter, any medical treatment of any kind. *Id.*

The evidence of record shows that Gonzalez is in dire need of ongoing pain management treatment to help with his condition. Furthermore, it is manifestly unfair and against the intent of the Act to force Gonzalez to provide for his own ongoing pain management out of pocket when this Court has ruled that Carriers and Employers remain

responsible for causally related medical care after MMI. Even if Gonzalez were able to obtain a prescription for pain management, he would be unable to afford this medication because he has no insurance. His inability to find gainful employment since his premature release from medical care is the reason for his lack of insurance, a responsibility which lies squarely on the shoulders of the Respondents. However, even if it is determined that Gonzalez has reached MMI, it defeats the purpose of the Act to expect a 40 year old man who has undergone major back surgery to live the rest of his life without *any* pain management whatsoever. Considering these ongoing problems and Gonzalez's inability to work because of his severe pain, Gonzalez contends he should receive additional medical treatment in order to assist him in reaching MMI and/or to lessen his period of disability.

II. IN THE ALTERNATIVE, IF GONZALEZ HAS REACHED MMI, THE COMMISSION ERRED, AS A MATTER OF LAW, WHEN IT DETERMINED THAT GONZALEZ SUFFERED A PERMANENT DISABILITY EQUAL TO THE IMPAIRMENT RATING HE RECEIVED FOR HIS LUMBAR SPINE.

As noted above, Gonzalez contends he has not reached MMI of the lumbar spine and is therefore entitled to additional medical treatment and TTD benefits. However, if this Court determines Gonzalez has reached MMI, Gonzalez contends he is entitled to a finding of permanent disability in excess of the finding of a 12% permanent partial disability to the back issued by the Single Commissioner.

In South Carolina, Workers' Compensation Claimants are entitled to a monetary award if they suffer a permanent disability to a scheduled member. S.C. Code Ann. § 42-9-30 (2012). South Carolina courts have set down the standard for computing a permanent partial disability pursuant to § 42-9-30:

> Unless the question of the extent of partial loss of use under Code § 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. The extent of loss of use need not be shown with mathematical precision. Nevertheless, the award may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis.

Linen v. Ruscon Constr. Co., 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) (citing *Bundrick v. Powell's Garage*, 248 S.C. 496, 151 S.E.2d 437 (1966)). "Loss of earnings is not required for recovery under this section; compensation is based on the character of the injury." *Bateman v. Town & Country Furniture Co.*, 287 S.C. 158, 160, 336 S.E.2d 890 (Ct. App. 1985) (citing *G.E. Moore Company v. Walker*, 232 S.C. 320, 102 S.E.2d 106 (1958)).

With these standards having been set forth by the courts, Gonzalez contends the Commission ignored or improperly disregarded *all* of the evidence concerning Gonzalez's permanent disability, with one exception: Dr. Scharf's report issuing Gonzalez a 12% permanent impairment to the lumbar spine. On September 19, 2011, when he released Gonzalez from his care, Dr. Scharf issued a 12% permanent impairment to the lumbar spine, based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). (R. p. 96).

While doctors typically evaluate injured workers in terms of impairment ratings, impairment ratings and a determination of disability are two entirely different and independent measurements to evaluate the impact of an injury on a person's life. Impairment ratings are the creation of the American Medical Association; for the spine, they are based on either the Diagnosis-Related Estimates method or a Range of Motion method. American Medical Association, Guides to the Evaluation of Permanent

Impairment 381-384, 398-404 (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2000) (hereinafter AMA Guides).

On the other hand, disability is a legal term that is a creature of statute, meaning "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (2012). It is this code section, not the impairment ratings, which gives a Claimant the ability to recover permanent disability awards. While impairment ratings are an important component of permanent disability, they are not intended to serve as an equivalent or replacement. The AMA Guides go so far as to specifically state that they are not meant to be used as a measure of disability:

> [Impairment ratings] reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL),** *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work,* as listed in Table 1-2.

AMA Guides 4 (emphasis in original). Table 1-2 has been attached as an exhibit for this Court's convenience. (Table 1-2).

The authors of the AMA Guides give further reasoning for their decision not to equate impairment with disability:

> Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involved many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age education and prior work experience to determine the extent of work disability. . . . As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it

> is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

AMA Guides 5.

While it is obvious that the activities listed in Table 1-2 do overlap somewhat with the skills and abilities needed to obtain and retain gainful employment, Table 1-2 does not include the entirety of work-related skills and abilities that must be taken into account in determining disability. These include the factors identified by the AMA Guides authors and any number of other factors unique to the workplace and not applicable to the very basic activities identified within the category of Activities of Daily Living. Therefore, considering the differing definitions of impairment ratings and disability, as well as the reservations of the AMA Guides authors about confusing or conflating the two, equating an impairment rating with a finding of disability is a serious error.

Gonzalez contends that while the impairment rating is an adequate starting point for an inquiry into disability, it cannot be the finishing line. When there are additional factors present, as there are in this case, the Commission must either use them in its determination of disability in addition to an impairment rating *or* give adequate reasons, supported by substantial evidence, as to why these additional factors should not be used to issue a disability award percentage in excess of an impairment rating.

When Gonzalez underwent FCE testing, he was tested for factors that included his Material Handling abilities (lifting, carrying, pushing, and pulling objects of a certain weight), Positional Tolerance abilities (frequency of ability to sit, stand, walk, climb stairs/ladders, reaching, balancing, stooping, kneeling, crouching, crawling),

Manipulative Abilities (frequency of ability to perform object handling, fingering, simple hand grasp, firm hand grasp, fine/gross manipulation), and the Consistency of performance (maximal voluntary effort, pinch strength testing, isometric push/pull, dynamic lift test, Waddell's objective signs). (R. p. 105). The majority of the skills and abilities tested in the FCE, and therefore recognized as crucial to the ability to engage in meaningful employment, are not included in Activities of Daily Living. The Commission gave no reason as to why these factors, which objectively show Gonzalez has serious work-related difficulties, do not serve to increase his disability more than the 12% impairment rating given by Dr. Scharf.

Gonzalez suffers from other difficulties as well. Gonzalez's difficulties with constant pain and loss of range of motion have been well documented in the medical record and previously within this brief. Gonzalez has suffered from constant pain, which has not been relieved since the time of the accident. (R. p. 66-67). Both conservative treatment and major back surgery have failed to alleviate Gonzalez's pain or improve his range of motion. (R. p. 45-46, 71) Both Dr. Scharf and Gonzalez stated that Gonzalez has lost 50% of the loss of use of his spine. (R. p. 71, 96). Gonzalez has been unable to return to work, has been unable to perform any kind of activities involving bending or manipulation of the spine, and has trouble staying in any position for any length of time. (R. p. 45-52, 67-71). Furthermore, Gonzalez is now forty years old and required a translator at the hearing because his English is extremely poor. (R. p. 61-62, 78).

These vocational factors, when combined with his poor physical health, make it extremely unlikely that he will ever be able to match his pre-injury earnings, and certainly to an extent greater than the 12% disability award issued. The serious manner

in which this problem has affected Gonzalez is clear from the record, and the Respondents have offered no evidence to diminish the effect of these factors, other than the 12% impairment rating issued by Dr. Scharf.

Perhaps, in the absence of any other evidence, medical or not, an impairment rating could serve as the entire basis of a permanent disability finding under § 42-9-30. However, the record is replete with the aforementioned additional evidence tending to show that Gonzalez suffers from a disability in excess of the 12% permanent partial disability to his back issued by the Commission. The evidence of record shows how seriously Gonzalez's back injury has affected his ability to perform work activities. If this Court determines that *any* of this evidence should be considered in addition to the 12% impairment rating, Gonzalez should be entitled to a finding of disability in excess of the 12% disability issued by the Single Commissioner.

Based on the previously presented background regarding the differences between impairment ratings and permanent disability, Gonzalez takes his argument one step further: As a matter of law, the Workers' Compensation Commission has acted in error when it allows its inquiry into permanent disability under the schedule (§42-9-30) to end when it merely translates the impairment rating directly into a permanent disability award, to the exclusion of all other evidence. In this case, the impairment rating was 12%, and the Commission mechanically translated this rating into a 12% permanent partial disability award to the back.

Gonzalez would encourage this Court to read the Full Commission order closely. While the Commissioners were clearly aware of the ongoing treatment problems suffered by Gonzalez and the profound impact it had on his life, going so far as to include many of

these factors in its "Findings of Fact" section, these factors were brushed aside in favor of conveniently applying the impairment rating to the permanent disability schedule. The Commission provided no real reasoning or evidence for the decision to discount these other factors, other than to say that its own decision was supported by "the preponderance of the evidence." (R. p. 19, 21).

Despite this, the Commission failed to attempt to examine this evidence closely or give a reason as to why these factors should not add to the 12% impairment rating when deciding on a permanent disability award. When the Workers' Compensation Commission does not properly evaluate the available evidence and relies on rote translation of impairment ratings into disability awards, it has failed to properly evaluate disability as required by the statute, and has committed a grave error of law.

III. THE COMMISSION ERRED BOTH WHEN ADJUSTING GONZALEZ'S AWW AND WHEN IT HELD THE RESPONDENTS ARE ENTITLED TO A CREDIT FOR OVERPAYMENT.

a. The Commission improperly calculated the Average Weekly Wage by failing to include overtime payments in its calculation.

When a Workers' Compensation claim is filed, an enquiry into the Claimant's average weekly wage is made in order to determine the Claimant's compensation rate for temporary disability payments and a permanent disability award. This calculation is made:

> by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by . . . the actual number of weeks for which wages were paid . . . . When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained.

S.C. Code Ann. § 42-1-40 (2012).

At the outset of this claim, Respondents calculated Gonzalez's average weekly wage at $456.03, giving him a compensation rate of $304.02. (R. p. 25). Around 23 months later, following the hearing, Respondents submitted an amended Form 20 reflecting an average weekly wage of $327.00, with a corresponding compensation rate of $218.01. (R. p. 24). In his Decision & Order, the Single Commissioner ultimately determined Gonzalez's average weekly wage was $390.23, with an applicable compensation rate of $260.17. (R. p. 8). The Full Commission affirmed these findings from the Single Commissioner in their entirety. (R. p. 19, 21).

The Commission appears to have based its decision on Gonzalez's average weekly wage by consulting Gonzalez's payment history for the two quarters preceding his injury. During that period of time, Gonzalez earned $8,195 in regular, non-overtime wages. (R. p. 118-19). When divided by 21, the number of weeks Gonzalez worked in the two quarters preceding his injury, a figure of $390.23 is the result. However, in making this calculation, the Single Commissioner failed to figure overtime payments into the calculation. Gonzalez's overtime pay records indicate that over that same period of 21 weeks, Gonzalez earned an additional $222.75 in overtime pay, making his gross wage total over those 21 weeks $8,417.75. (R. p. 119). When this figure is divided by 21, Gonzalez's AWW is $400.85, slightly higher than the $390.23 AWW calculated by the Commission. Gonzalez contends this is the properly calculated AWW with $267.25 as the companion compensation rate.

b. In the alternative, the Commission failed to calculate the Average Weekly Wage by requiring the Employer to compare Gonzalez's wage to that of a similarly situated employee.

If a Workers' Compensation Claimant has worked for an Employer for a short time or the nature of his employment was irregular, the Commission is authorized to consult the AWW of another similarly situated employee in setting a Claimant's AWW.

> "Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community."

S.C. Code Ann. § 42-1-40 (2012). Gonzalez worked for the Employer for 30 weeks prior to his injury. (R. p. 118). 21 of these weeks fell in the four quarters preceding the quarter in which he was injured. *Id.* During this period of time, Gonzalez worked wildly varying hours, despite being on location and far from his home in Jacksonville, Florida. *Id.* Including overtime, Gonzalez worked an average of 34.5 hours per week, yet worked as few as 13.5 hours in one week and as many as 49.5 hours in another. *Id.*

In light of the sporadic nature of his hours worked per week and the short time of his employment before his injury, it would be fairer to calculate Gonzalez's AWW by consulting the AWW of another employee "of the same grade and character employed in the same class of employment" as Claimant. S.C. Code Ann. § 42-1-40 (2012). If this Court determines Gonzalez's unique employment situation makes it difficult to fairly

calculate his AWW according to the primary method, Gonzalez is entitled to a recalculation of his AWW pursuant to the comparison method referenced under § 42-1-40.

c. Even assuming *arguendo* that the Commission correctly ruled that Respondents did not accurately calculate benefits at the outset of the claim, the Commission erred in failing to rule that Gonzalez is prejudiced and penalized by the carrier's error and the carrier should bear the burden of the mistake.

Gonzalez contends it would be unfair to give Respondents a credit for overpayment for the period from March 1, 2010 until September 19, 2011, considering Respondents' error in making the initial calculation in addition to the extremely long period of time that passed before correcting this error.

South Carolina courts have interpreted the objective of § 42-1-40 in calculating the AWW to be "a fair approximation of the claimant's probable future earning capacity." *Sellers v. Pinedale Residential Center*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002). However, the courts have allowed deviation from this principle in calculating the AWW for exceptional reasons if the normal methods would be unfair. *Pilgrim v. Eaton,* 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). This Court has further stated that "[t]he specific goal of section 42-1-40 is for the commission to calculate an average weekly wage that is fair to both the worker and the employer." *Id.* at 50, 703 S.E.2d at 427. Finally, this Court has allowed for some flexibility within this standard to achieve a fair result, holding § 42-1-40 "provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." *Sellers v. Pinedale Residential Ctr.,* 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002).

In this situation, Respondents initially calculated Gonzalez's AWW at a rate of $456.03 in March of 2010. It was not until February 2012, *nearly two years later*, that Respondents notified the Commission that their initial AWW calculation had been in error. (R. p. 24). During that period of time, Gonzalez's was 'overpaid' in the amount of $43.85 per week. During this 23 month period, Gonzalez structured his financial life with the expectation of receiving this weekly benefit on a consistent basis, and entered into strategic litigation and settlement planning with this figure as the baseline for valuation of his claim. In short, for the vast majority of the time this claim was litigated, Gonzalez has been working with the reasonable assumption that his claim would continue to be valued at this initial level.

Additionally, Gonzalez had no part in calculating the compensation rate for this claim. Respondents undertook this investigation shortly following his work-related injury and made the determination in order to set the proper payment level for TTD payments. Respondents used their own records to make these calculations, and did not rely on Gonzalez's recollection or records in making this determination. Allowing the Respondents to shift the burden of their own mistake to Gonzalez after such a lengthy period is surely enough to constitute the type of unfair result that this Court has not favored in the past.

CONCLUSION

South Carolina courts have traditionally construed the Workers' Compensation statutes "liberally in favor of coverage." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243, 647 S.E.2d 691, 694 (Ct. App. 2007). For many years, the precedent has been that "the basic purpose of the Compensation Act is the inclusion of employers and employees, and

not their exclusion." *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 72, 15 S.E.2d 833, 835 (1941). Gonzalez urges this Court to be mindful of this general presumption in favor of greater Workers' Compensation coverage on close issues such as this one.

The Commission's finding that Gonzalez has not yet reached MMI was not supported by substantial evidence. The evidence of record supports the conclusion that he has not yet reached any such "plateau" of improvement and therefore Gonzalez urges this Court to hold that he has not yet reached MMI, that he remains entitled to additional medical care until such time that he reaches MMI, and that his TTD benefits be reinstated from September 19, 2011, until such time that he is deemed to have reached MMI. Furthermore, even if this Court deems Gonzalez has reached MMI, he remains entitled to *Dodge* medical care because some kind of ongoing treatment is likely to help him become functional again and obtain the ability to re-enter the workforce.

In the alternative, if this Court deems Gonzalez to be at MMI, the substantial evidence of the record supports the conclusion that he suffers from a disability far in excess of the 12% permanent partial disability award issued by the Commission. Many additional physical and vocational factors have been identified which have an enormous impact on Gonzalez's ability to work, and these go far beyond the activities of daily living, on which the 12% impairment rating was based. Gonzalez urges this Court to remand his Claim to the Commission for a proper and detailed inquiry into the extent of his disability, fully evaluating the extent of the impact of numerous additional physical and vocational factors identified on his disability. Furthermore, Gonzalez urges this Court to hold that when the Commission relies on a rote translation of impairment ratings into disability awards to the exclusion of all other evidence, it has committed an error of

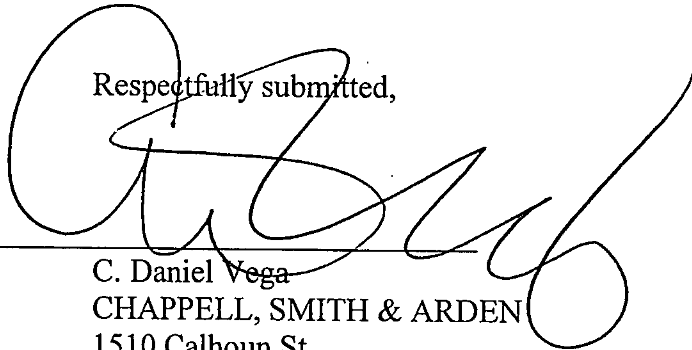
law; the Commission must closely examine and consider the additional evidence, and either determine the manner in which additional factors should 'add to' or 'take away from' the impairment rating percentages, or the Commission must show, with specificity, why additional evidence is unreliable or invalid and should not be considered.

Lastly, Gonzalez alleges that the Commission committed error in calculating his AWW and corresponding compensation rate, in addition to committing error when it found the Respondents were entitled to a credit for overpayment because of their initial error when calculating the AWW. Gonzalez contends initially that his AWW was mis-calculated, with the Commission using the wrong number of weeks and the wrong amount of gross pay when making its calculation under §42-1-40.. In the alternative, Gonzalez contends that because of the irregular nature of his work for the Employer, he is entitled to have his AWW re-calculated pursuant to another portion of §42-1-40, which allows calculation of the AWW by looking to the wages of a similarly situated employee. Finally, Gonzalez contends that regardless of what his AWW is actually determined to be, he should not be forced to pay the Respondents for overpayment issues which were of their own making. This result would be incongruous, unfair, and against the intent of the Act. The Respondents were in control of all of the relevant information when they began TTD benefits, and Gonzalez should not be responsible for their mistake, which went uncorrected for almost 2 years.

For the reasons stated above, the Appellant respectfully requests that this Court reverse the Commission's findings that Gonzalez has reached MMI and order that he remains entitled to ongoing medical care and continuing TTD benefits until he reaches MMI. In the alternative, if this Court deems Gonzalez to be at MMI, the Appellant

respectfully requests that this Court reverse the Commission's findings that Gonzalez is not entitled to ongoing *Dodge* medical care and that Gonzalez is entitled to a 12% permanent partial disability award, and order that Gonzalez is entitled to ongoing *Dodge* medical care and remand this claim for a proper inquiry into the extent of the Appellant's disability. Furthermore, Gonzalez urges this Court to hold that when the Commission relies on rote translation of impairment ratings into disability awards, without properly examining additional evidence, it has made an error of law. Finally, the Appellant respectfully requests that this Court reverse the Commission's finding on Gonzalez's AWW and order that he is entitled to a AWW of $400.85 or remand the claim to the Commission for a determination of AWW pursuant to the similarly situated employee portion of § 42-1-40. Regardless of the outcome on the AWW calculation, the Appellant respectfully requests that this Court reverse the Commission's finding on credit for overpayment from March 1, 2010 until September 19, 2011, and order that Gonzalez is not responsible for such a credit because of the Respondents' role in creating this initial error.

Respectfully submitted,



June 3, 2013

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CTHE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Case No.: 2012-213610

Norge L. Gonzalez-Torres..Appellant,

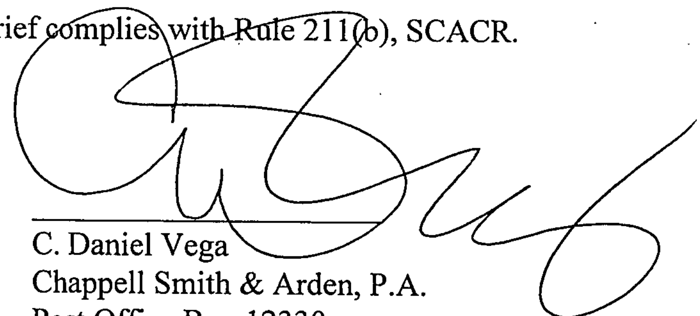
v.

World Fiber Technologies, Inc. and The Standard Fire Insurance Company, c/o Travelers...Respondent.

CERTIFICATE OF COUNSEL

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

June 3, 2013



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