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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No. 2015-000177

JUDY SANCHEZ, EMPLOYEE Appellant,

v.

PERRY ELLIS INTERNATIONAL, EMPLOYER AND
THE HARTFORD, CARRIER, ... Respondents

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE COMMISSION ERRED WHEN IT RELIED ON THE CONCLUSIONS OF THE FUNCTIONAL CAPACITY EXAM IN DETERMINING THAT SANCHEZ WAS NOT PERMANENTLY AND TOTALLY DISABLED.
- II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S FINDING SANCHEZ'S LEFT ARM WAS NOT COMPENSABLE.
 - A. THE FINDING THAT DR. BUCCI DID NOT LOOK AT THE MRI IS UNSUPPORTED BY THE EVIDENCE.
 - B. THE COMMISSION'S FINDING THAT DR. MARSH DECLINED TO ANSWER THE QUESTIONNAIRE IS UNSUPPORTED BY THE EVIDENCE.
 - C. THE COMMISSION'S FINDING THAT THE LEFT ARM IS NOT COMPENSABLE BECAUSE THERE ARE NO REFERENCES TO LEFT ARM IS ERROR BECAUSE IT IS UNREASONABLE CONSIDERING THE RECORD AS A WHOLE.
- III. THE COMMISSION'S FINDING THAT SANCHEZ'S EMPLOYMENT IS NOT SHELTERED OR GRATUITOUS IS UNSUPPORTED BY THE RECORD BASED ON THE UNCONTROVERTED OPINION OF THE VOCATIONAL EXPERT AND THE FACT THAT THE EMPLOYER HAS ALREADY ASKED HER TO RESIGN FOR INABILITY TO ACCOMMODATE HER RESTRICTIONS.

STATEMENT OF THE CASE

Judy Sanchez suffered an admitted work related injury to her neck on July 27, 2009 while working for Perry Ellis International (hereinafter "Perry Ellis"). Specifically, Sanchez was injured while lifting boxes of belts to fill an order. Perry Ellis and its insurance carrier, The Harford, provided medical treatment to Sanchez's neck as well as to her right hand for carpal tunnel syndrome.

A hearing was held before a single commissioner on January 8, 2013, at which time Sanchez alleged that she had also sustained an injury to her left arm and that she was totally and permanently disabled. On March 28, 2013, the Single Commissioner issued her Order finding that Sanchez was not totally and permanently disabled and awarded a 22% permanent partial disability to the her spine and a 10% permanent partial disability to her right hand. (R. p. 22). The Commissioner denied compensability for the Sanchez's left arm. (R. p. 13). The Appellate Panel of the Full Commission affirmed the decision of the single commissioner.¹ (*See generally* Panel Order, R. pp. 23-47). This appeal now follows

STATEMENT OF THE FACTS

Sanchez injured her neck while lifting boxes of belts to fill an order at work on July 27, 2009. After failing conservative treatment, she was ultimately referred to a neurosurgeon, Dr. Bucci, who diagnosed a herniated disc in the cervical spine at C5-C6 and double crush syndrome in the right upper extremity. She underwent single level

¹ Prior to the hearing before the Full Commission, Sanchez filed a Motion to Submit Additional Evidence in the form of a report from Dr. David Shallcross, a pain management specialist, and an EMG report which evidenced a diagnosis of carpal tunnel syndrome in her left wrist. Perry Ellis initially objected; however, it later joined in the Motion and by Consent Order, the evidence was admitted into the record for the Appellate Panel's consideration (R. p. 33).

fusion/decompression surgery at C5-C6. In addition, Dr. Bucci performed a carpal tunnel release on Claimant's right wrist in conjunction with her cervical spine surgery. (R. 69:24 – 70:2) Dr. Bucci ultimately released Claimant at maximum medical improvement as of November 8, 2011 and assigned Sanchez impairment ratings of 10% to the spine and 10% to the right hand relative to her CTS. Dr. Bucci also assigned her to Dr. Jay Patel for pain management (R. p. 82).

On November 9, 2011, Dr. Patel noted that Claimant was still having some ongoing pain in her neck and right shoulder but that she was essentially at MMI. (R. p. 96). Dr. Patel, saw the Claimant six (6) times and initially restricted Claimant to lifting no more than ten (10) lbs., no bending/stooping, occasional pushing/pulling, and to occasional kneeling/crouching; all on the same day that he found her at MMI. (R. pp. 96-97). In response to a letter from the carrier, Dr. Patel stated on November 23, 2011 that Claimant was MMI on November 9, 2011 and recommended an FCE to determine work restrictions. (R. p. 95). On November 23, 2011, Dr. Patel released Sanchez at MMI as of November 9, 2011 with a 10lb work restriction (R. p. 95). Dr. Patel also recommended a functional capacity exam (FCE) be performed to better determine any work restrictions. Id.

Sanchez underwent an FCE on December 13, 2011. (R. pp. 114-124). The FCE states that the Claimant's level of work should be light work, but provides a conclusory disclaimer that the performance on the self-limiting task indicates a minimum rather than a maximum ability. (R. p. 114). The FCE report generated found that Sanchez self-limited on 52% of the 21 tasks she was asked to complete. Id. The report provides that research indicates that when self-limiting exceeds 20%, then psychological and/or

motivational factors are affecting the test results. Id. The report also noted that the performance on the self-limiting tasks indicates a minimum rather than a maximum ability, and that the assigned 20-lb. limit through the FCE indicates a minimum amount for Claimant. Id.

The report also establishes a protocol by which it established formal consistency of effort. (R. p. 115). In particular, it states that the results [of grip strength testing date] are combined with any evidence of clinical inconsistencies or self-limiting behavior observed. Id. It further states that: "Combining the results of the clinical consistency comparison, the presence of self-limiting behavior and the three formal consistency comparisons of the grip strength data indicates that there is very strong evidence of low effort and inconsistent behavior." Id. However, aside from the hand grip testing, the report specifically states that "no additional significant clinical inconsistencies were noted during the FCE. (R. p. 119). After reviewing the FCE, Dr. Patel revised the lifting restriction upward to fifteen (15) lbs.

Sanchez developed acute left sided arm and hand pain in May of 2012 while not at work. (R. p. 67:8-10). In July 2012, Dr. Bucci opined in a questionnaire that Sanchez's left hand pain and numbness were causally related to the work injury and that she needed additional medical treatment for her left hand. (R. p. 127). Dr. Shallcross diagnosed Sanchez with carpal tunnel syndrome of the left arm on June 6, 2013 and referred her back to Dr. Bucci for left carpal tunnel release. (R. p. 194).

Sanchez was evaluated by Dr. Robert Brabham, a vocational rehabilitation expert. He opined to a reasonable degree of medical certainty that should the employer no longer accommodate the Appellant's limitations, she would be unemployable. (R. p.

190). Although she spells at the 12th grade level, her IQ of 85 places her in the “Low Average” range of intelligence, she reads at a 9th grade level, and she performs math at an 8th grade level. Moreover, the Appellant’s employer has specifically admitted that it will not be able to employ the Claimant in the future due to her limitations and asked for a resignation and employment release. (R. p. 192).

Sanchez testified that she can no longer bend, stoop, stretch, push, pull or lift like she used to do (R. p. 76:7-20). It takes her one to two hours to recover after work each day (R. p. 180). The Human Resources representative testified that the Appellant only performs “70 to 75 percent” of her duties and he qualified that by relating it only to the lifting restriction. (R. p. 78:7-22). He admitted that he has no direct knowledge of the Appellant’s capability. His assessment is based purely on what he had heard from others and not on his personal observations of her on her job. (R. p. 78:4-6).

Both the Single Commissioner and the Appellate Panel, in affirming the Single Commissioner, found that the Sanchez was not permanently and totally disabled, her left arm is not compensable, and that her employment was not sheltered or gratuitous. (*See generally* Order, R. pp. 1-22; Commission Order, R. pp. 23-47). The specific findings of the Commission are provided and addressed in detail below.

LEGAL ANALYSIS AND ARGUMENT

Standard of Review

The South Carolina Supreme Court has determined that the Administrative Procedures Act governs the standard of judicial review of decisions and awards issued by the Workers' Compensation Commission. The Court has held that it is empowered on review to reverse or modify a decision only "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions, are . . . (3) made upon unlawful procedures; (4) affected by other errors of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

"The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Id.* "Substantial evidence," for purposes of judicial review of decisions of the Appellate Panel of the Workers' Compensation Commission, is 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 the Appellate Panel reached in order to justify its action. *Hall v. Desert Aire, Inc.*, 376, S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (*rehearing denied*, 2008). "The Court may find the Commission's findings clearly erroneous if they are based on a mistaken view of the evidence." *State Acc. Fund v. S. Carolina Second Injury Fund*, 409 S.C. 240, 245, 762 S.E.2d 19, 21 (2014)

I. **THE COMMISSION ERRED WHEN IT RELIED ON THE CONCLUSIONS OF THE FUNCTIONAL CAPACITY EXAM IN DETERMINING THAT SANCHEZ WAS NOT PERMANENTLY AND TOTALLY DISABLED.**

The Commission gave greater weight to the conclusions of the FCE evaluator than to lifting restrictions imposed by Sanchez's authorized treating pain management physician, Dr. Patel. The Commission erred in placing greater weight on the FCE's conclusion as a result of a mistaken view of the FCE report's findings. Specifically, the report's findings were not supported by substantial evidence.

Dr. Patel, saw Sanchez six (6) times and initially restricted Sanchez to lifting no more than ten (10) lbs., no bending/stooping, occasional pushing/pulling, and to occasional kneeling/crouching; all on the same day that he found her at MMI which was November 9, 2011. (R. pp. 96-97). In response to a letter from the carrier, Dr. Patel stated on November 23, 2011 that Sanchez was MMI on November 9, 2011 and recommended an FCE to determine work restrictions. (R. p. 95). The FCE states that the Sanchez's level of work should be light work, but provides a conclusory disclaimer that the performance on the self-limiting task indicates a minimum rather than a maximum ability. (R. p. 114). After reviewing the FCE, Dr. Patel revised the lifting restriction upward to fifteen (15) lbs.

In Finding of Fact No. 27, the Appellate Panel states; "On paper, Claimant's summary lifting restriction is compelling evidence of significant disability. However, more weight is given to the notes of the FCE evaluator than to the restrictions imposed by Dr. Patel based upon the summary conclusions of the FCE." (R. p. 44). This Finding of the Commission is a revision of the Single Commissioner's finding which read, "On paper, Claimant's lifting restriction is compelling, and would have otherwise left the

undersigned to conclude Claimant is permanently and totally disabled.” (R. p. 18). To support its finding, the Panel made the following finding:

26. Claimant has a 15-lb. (**per Claimant’s APA #8, page 54 dated 12/20/2011**) lifting restriction (based upon Claimant’s FCE—**Defendants’ APA #2, page 14, states awaiting the results**). However, the findings of the FCE are not compelling or persuasive. Featuring prominently in the report is the statement that Claimant’s “significant self-limiting and inconsistent behavior heavily influenced the test results.” In fact, Claimant **self-limited in more than half of the 21 tasks**, when motivated persons, according to the report, self-limit on no more than 20% of test items. What bolsters the findings of the report is the fact that the evaluator specifies and documents the instances where he finds “low effort and inconsistent behavior,” such as the fact that Claimant did not produce the expected bell-shaped curve during grip testing. In sum, the evaluator concludes that the FCE results indicate **minimum** rather than **maximum ability**. After the date of the FCE, Dr. Patel assigned a 15-lb lifting restriction but no other restrictions, as [he] had imposed earlier. (R. p. 43,44), (emphasis in original).

Indeed, the FCE report does conclude that the restrictions it imposes represent a minimum rather than a maximum ability. But, the Commission is mistaken in its observation “that the report is bolstered in that the evaluator specifies and documents instances where he finds ‘low effort and inconsistent behavior,’ such as the fact that Claimant did not produce the expected bell-shaped curve during grip testing.” (emphasis in original).

First, it is important to note that the FCE’s methodology states that the final consistency of effort protocol which indicates the strength of all the FCE’s evidence is based upon a combination of the results of the three clinical comparisons, the presence of self-limiting behavior, and the grip testing. (R. p. 115). Sanchez performed 23 separate tasks for the evaluator, in addition to the hand grip testing. The hand grip test, cited by the Panel as bolstering the report, is the *only instance* in which the report specifically finds “low effort.” (R. p. 119). The evaluator did not note any “inconsistent behavior”

during the hand grip testing. As for the clinical consistency comparisons, the evaluator notes no clinical inconsistencies and, indeed, the report states that “[n]o additional significant clinical inconsistencies were noted during the FCE. (R. p. 119). In the task performance notes, there is not one single instance where the evaluator finds inconsistent behavior. Therefore, except for the hand grip testing, there is no evidence specifically finding low effort, and there is absolutely no finding of inconsistent behavior for any of the twenty-three (23) tasks performed by Sanchez. This particular FCE exam fails to follow its own established protocol, and moreover, substantial evidence does not support the Commission’s finding that the evaluator specifies and documents instances where he finds ‘low effort and inconsistent behavior,

Finally, the Commission finding that Dr. Patel’s restrictions were based solely on the FCE or a disregard for the report’s conclusion that the light work restriction represented a minimum rather than a maximum ability is without substantial evidence. Dr. Patel had previously established greater restrictions based upon his six (6) times of observing and providing care for the Sanchez. The FCE recommended a range of lifting from ten (10) to twenty (20) lbs. (R. p. 114). Accordingly, Dr. Patel interpreted the notes and results of the FCE and revised the lifting restriction he had previously imposed based upon his treatment of the Sanchez upward from 10 lbs. to 15 lbs.

Substantial evidence does not support the FCE’s conclusions, and the Commission erred when it gave greater weight to that report than to the lifting restrictions imposed by the authorized treating pain management physician. Therefore, the decision of the Commission should be reversed and remanded with instructions to reconsider this issue and enter findings of fact concerning Sanchez’s lifting restrictions supported by

substantial evidence in the record. Further, the Commission should then recalculate Sanchez's disability based upon the findings with regard to the lifting restrictions.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION'S FINDING SANCHEZ'S LEFT ARM WAS NOT COMPENSABLE.

Subsequent to the original injury and surgery, Sanchez developed numbness and tingling in her left arm and hand related to her injury that requires further evaluation. Sanchez testified that symptoms in her left arm and hand appeared in May 2012. In support of her claims regarding the left arm and hand, Sanchez submitted a questionnaire completed by Sanchez's treating neurosurgeon, Dr. Bucci, on July 6, 2012 in which Dr. Bucci opined to a reasonable degree of medical certainty that Sanchez's left hand pain and numbness are causally related to her injury July 27, 2009, and that she is in need of additional medical treatment of her left hand. Further, in records dated June 27, 2013, Dr. Shallcross diagnosed with left carpal tunnel release and referred Sanchez back to Dr. Bucci for left carpal tunnel release.

Despite the opinions of Dr. Bucci and Dr. Shallcross, the Commission denied the compensability of the left hand and arm, finding that (1) Dr. Bucci has not reviewed the MRI prior to rendering his opinion as to causation (R. p. 41); (2) that Dr. Marsh declined to answer the question with regard to compensability (R. p. 41); and (3) that the Commission "is unable to locate even a single reference by any physician during all the clinical examination relating to the left arm." (R. p. 40).

**A. THE FINDING THAT DR. BUCCI DID NOT LOOK AT THE MRI
IS UNSUPPORTED BY THE EVIDENCE.**

Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct.App. 2011). However, "[w]hile a finding of fact of the [C]ommission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Edwards v. Pettit Constr. Co., Inc.*, 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979); see also *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 309-10, 454 S.E.2d 320, 322 (1995) (affirming reversal of Commission's decision, which was supported by no evidence in the record).

In Finding of Fact 17 of its Order, the Commission stated it disregarded the questionnaire on the basis that Dr. Bucci had not seen Sanchez in months and nor had he reviewed the MRI per a communication submitted to the Commission. (R. p. 41). The Commission based this finding in part on the cover letter that was sent to Dr. Bucci² along with the questionnaire. (R. pp. 40-41). The complete body of the letter states:

As you know, we represent Judy Sanchez in her workers' compensation claim.

Since her release from your care, Ms. Sanchez has been evaluated by Dr. Byron Marsh and Dr. Phillip Hodge. She also had a follow up MRI in October of 2011. Those reports are attached for your review (if you would like to see the actual film, please let me know).

Ms. Sanchez has continued working at Perry Ellis under a modified light duty arrangement; however, this continues to cause her a great deal pain at

² The letter was submitted to the Single Commissioner after the hearing, at her request and without objection of either counsel.

the end of her work day. Additionally, she is now complaining of significant pain and numbness in her left hand.

Based on the new MRI findings, we need your opinion as to the causal between her left hand pain and numbness and her injury. I would also like your opinion on the need for future medical treatment that was mentioned by Dr. Hodge or any other treatment you think may be beneficial.

I have enclosed a questionnaire for your convenience; however, please feel free to forward a dictated note. Please forward your response at your earliest convenience.

The Commission erred because its finding that Dr. Bucci did not review the MRI is surmise and conjecture, and contradicted by the substantial evidence and its own subsequent finding. Although the above communication offered to provide the MRI information, Dr. Bucci *was* already in possession of the MRI images and radiology of October 12, 2011 referenced in the letter as evidenced in his October 20, 2011 medical note (R. p. 83). Dr. Bucci stated therein; "Cervical spine MRI scanning, to my review shows some minor disc bulging..." Id. Moreover, contrary to the Commission's Finding of Fact, in Finding of Fact 20 of its order, recognized that Dr. Bucci had reviewed MRI images and radiology report when it gave "greater weight to Dr. Bucci's interpretation [of the post-surgical MRI] to his interpretation than [it] gave to the radiologist's report" of the very same MRI reference in the communication. (R. p. 42).

The MRI of January 25, 2010, noted the following as it relates to the left side:

At the C4-5 level, there is desiccation and bulging of the disc and minor hypertrophic degenerative changes of the disc space.... *There are stenoses of both neural foramina.*

At the C5-6 level, there is desiccation and bulging of the disc and hypertrophic degenerative changes of the disc space.... *There are stenoses of both neural foramina.*

At the C6-7 level, there is desiccation and bulging of the disc and hypertrophic degenerative changes of the disc space. *There is a subtle left posterolateral broad-based herniation of the disc, which abuts the cord and possibly narrows the right AP*

diameter of the cord.... There are stenoses of both neural foramina.

(R. p. 140) (emphasis added)

The MRI of October 12, 2011 was markedly different. It states:

C3-4: Posterior bulging with a central disc protrusion *which has enlarged compared to prior....*

C4-5: Uncovertebral arthrosis and *posterior disc bulging with superimposed left paracentral and foraminal disc protrusion.... There is severe left foraminal stenosis.*

C5-6: Uncovertebral arthrosis with prominent posterior disc bulging.... Severe right foraminal stenosis and *moderate to severe left foraminal stenosis....*

C6-7: Uncovertebral arthrosis with prominent posterior disc bulging and a superimposed left paracentral and foraminal disc protrusion.... *Severe left foraminal stenosis. Moderate to severe right foraminal stenosis. Severe central stenosis. Changes to this level have increased compared to prior.*

(R. p. 138) (emphasis added)

When completing the questionnaire, Dr. Bucci, her treating neurosurgeon, had a complete and comprehensive knowledge of the Sanchez's condition and the benefit of reviewing both MRI images and report. Moreover, Dr. Bucci's causation questionnaire is the only competent medical evidence in the record and must be relied upon. Perry Ellis did not present any medical evidence countering the causation letter.

B. THE COMMISSION'S FINDING THAT DR. MARSH DECLINED TO ANSWER THE QUESTIONNAIRE IS UNSUPPORTED BY THE EVIDENCE.

In further denying compensability of the left arm and hand, the Commission noted in Finding of Fact 19 of its Order that Dr. Marsh was asked to sign a questionnaire regarding the compensability of left hand pain/numbness. (R. p. 41). The Commission found Dr. Marsh "understandably, declined to answer the question[naire]. To the

contrary, Dr. Marsh didn't *decline* to answer the questionnaire. Instead, the evidence reflects that he "deferred" to Dr. Bucci. (R. p. 133.).

C. THE COMMISSION'S FINDING THAT THE LEFT ARM IS NOT COMPENSABLE BECAUSE THERE ARE NO REFERENCES TO LEFT ARM IS ERROR BECAUSE IT IS UNREASONABLE CONSIDERING THE RECORD AS A WHOLE.

The Panel found that the Appellant's left arm was not compensable due to the fact that the medical records did not contain any reference to left arm complaints, aside from Dr. Bucci's questionnaire and the report of Dr. Shallcross. (R. pp. 38-41). However, the Sanchez's left arm complaints did not begin until after she was released by her medical doctors (See generally Claimaint's and Employer's APAs, R. pp. 82-197). Therefore, it is not unsurprising that the left arm and hand complaints not appear in records of her physicians that she saw only prior to the onset of her symptoms. Considering the record as a whole, it is unreasonable to reach the conclusion the Appellate Panel reached.

III. THE COMMISSION'S FINDING THAT SANCHEZ'S EMPLOYMENT IS NOT SHELTERED OR GRATUITOUS IS UNSUPPORTED BY THE RECORD BASED ON THE UNCONTROVERTED OPINION OF THE VOCATIONAL EXPERT AND THE FACT THAT THE EMPLOYER HAS ALREADY ASKED HER TO RESIGN FOR INABILITY TO ACCOMMODATE HER RESTRICTIONS.

Dr. Robert Brabham, the vocational expert, opined to a reasonable degree of medical certainty that should the employer no longer accommodate the Appellant's limitations, she would be unemployable. (R. p. 190). Although she spells at the 12th grade level, her IQ of 85 places her in the "Low Average" range of intelligence, she reads at a 9th grade level, and she performs math at an 8th grade level. Moreover, the Appellant's employer has specifically admitted that it will not be able to employ the Sanchez in the future due to her limitations and asked for a resignation and employment release. (R. p. 192).

Sanchez testified that she can no longer bend, stoop, stretch, push, pull or lift like she used to do (R. p. 76:7-20). It takes her one to two hours to recover after work each day (R. p. 180). The Human Resources representative testified that the Appellant only performs "70 to 75 percent" of her duties and he qualified that by relating it only to the lifting restriction. (R. p. 78:15-16). He admitted that he has no direct knowledge of the Appellant's capability. His assessment is based purely on what he had heard from others and not on his personal observations of her on her job. (R. p. 78:4-6).

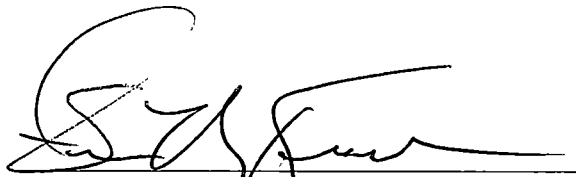
The record is devoid of any evidence that contradicts the Appellant's testimony or the expert opinion of Dr. Brabham. The employer has expressed a desire to terminate her employment. (R. p. 192). The Sanchez is 55 years old with a significant work restrictions and pre-existing health problems. When viewing the record as a whole, she is unemployable for any gainful work activity available in South Carolina or the national economy and should be considered totally and permanently disabled.

CONCLUSION

For the foregoing reasons, the Commission's Order should be reversed and remanded with instructions to enter findings of fact concerning Sanchez's lifting restrictions, left arm compensability, and sheltered employment that are supported by substantial evidence in the record.

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.

A handwritten signature in black ink, appearing to read 'S. M. Krause', is written over a horizontal line.

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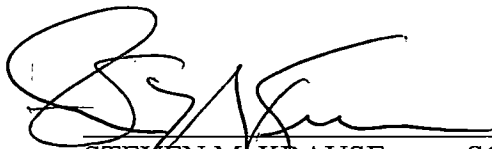
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CERTIFICATE OF COUNSEL

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

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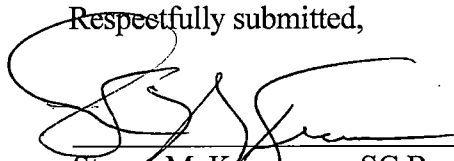
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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appellant on counsel for Perry Ellis International and The Hartford by depositing a copy of it in the United States Mail, certified postage prepaid, on October 21st, 2015, addressed to their attorney of record, George Gallagher, McKAY, CAUTHEN, SETTANA & STUBLEY, PO Box 7217, Columbia, SC 29202.

Respectfully submitted,



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