THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-000808

James Osment.....Appellant,

v.

The Timken Company,
and Phoenix Insurance Company, ...Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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I.

THE SUBSTANTIAL EVIDENCE OF THE CASE SUPPORTS BUT ONE CONCLUSION: THAT APPELLANT SUSTAINED A COMPENSABLE INJURY TO HIS BACK AND RIGHT HIP AND IS PERMANENTLY AND TOTALLY DISABLED.

The only medical opinion in the record consists of orthopedic expert and Appellant's Authorized Treating Physician, Dr. Anthony Sanchez, who opined, most probably and to a reasonable degree of medical certainty, that Appellant's right hip and back injuries are causally related to his admitted work-related injury to his right knee (R. pp. 302-303). Dr. Sanchez assigned a 50% permanent impairment rating to Appellant's right lower extremity (R. p. 258) and a 20% permanent impairment rating to Appellant's right hip (R. p. 305). Despite the fact that Appellant's initial injury to his right knee occurred on May 20, 2010, the Respondents have failed to produce any expert opinion to deny or contradict the above-referenced opinions of Dr. Sanchez.

Under authority of Beckman v. Sysco Columbia, 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014), Appellant is entitled to an award of permanent and total disability under the general disability model as he has permanent impairment ratings to two scheduled members, along with the report of a vocational expert Adger Brown, who opined that Appellant is permanently and totally disabled (R. p. 313). Again, despite the fact that this claim dates back to May 20, 2010, the Respondents have failed to produce any vocational expert of their own to deny or otherwise contradict the opinion of Adger Brown. The substantial permanent impairment ratings to two scheduled members, the Vocational Evaluation of Adger Brown and the fact that Dr. Sanchez

wrote Appellant out of work indefinitely with no return to work expected (R. p. 301), forcing Appellant into early retirement (at a reduced Social Security Benefit because he was not yet 65), require the conclusion that Appellant is permanently and totally disabled under Beckman and S.C. Code Ann. § 42-9-10.

II.

THE SUBSTANTIAL EVIDENCE OF THIS CASE MANDATES OVERTURNING FINDINGS AGAINST APPELLANT AS TO HIS CREDIBILITY

A. Inferences In Workers Compensation Cases Must Be Drawn In Favor Of The Injured Worker. The Inferences Behind Findings Of Fact #11 and #14 Were Improperly Drawn Against The Appellant

In the Decision and Order filed on November 24, 2014, the Single Commissioner gave the greatest weight - of all the evidence - to the records of Appellant's first family doctor visit post-accident (March 2014 – 4 years after the date of the accident and 6 months prior to the date of the hearing) and the records of Appellant's follow-up visit with his family doctor one week later, noting that the records do not contain any documentation of back or hip pain. (R. p. 37, Order of the Single Commissioner, Finding of Fact #11). The inference drawn by the Commission in this instance is that since there is no mention of back or hip pain in the records of the family doctor, the back and hip pain do not exist, and therefore, the Appellant is not credible. The purpose for Appellant's visits to his family doctor on March 19, 2014 and March 26, 2014 was primarily because he had been experiencing chest pains, a symptom of a potentially life-threatening condition, which makes it very unlikely that the Appellant, or anyone for that matter, would take

time or have the presence of mind to discuss back and hip pain under such circumstances when these symptoms are already being treated by an orthopedic specialist to begin with. (R. pp. 505-512)

The Commission next erroneously attributed a record from Appellant's cardiologist, Dr. Stephen Cherry, in April 2014 as being a record from Appellant's family doctor. Not surprisingly, no mention of back or hip pain is found in this medical record either, (R. pp. 513-514) yet the Commissioner used this record as well to draw an inference that Appellant's back and hip pain do not exist because no mention of these symptoms is made in the medical record of a cardiologist. (R. p. 38, Order of the Single Commissioner, Finding of Fact #14). These findings were crucial to the overall ruling against the Appellant with regard to his claim that he has injured body parts in addition to his right knee. Again, the above Findings required the Commission to draw inferences against the Appellant which are impermissible in a workers compensation case. Without these adverse Findings based upon impermissible inferences, the substantial evidence in this case invariably leads to a conclusion in favor of Appellant regarding all issues so impacted by these Findings.

As Appellant testified at the hearing, when walking on the cement floors at Timken, his [right] knee would swell and his pain level would be at a level of eight to nine on a scale of ten. (R. p. 109, line 20-p. 110, line 12) Any reasonable inference concerning Appellant's gait when walking while experiencing such a high degree of pain is that he would have almost certainly been walking with a limp. It is hard to imagine anyone experiencing such a high level of pain walking without a limp. Indeed, the Appellant has consistently maintained that walking on the cement floors at Timken caused pain in his right knee and, ultimately, in his lower back and right hip. (R.

p. 141, lines 9-19) Appellant never testified that he does not walk with a limp. Most importantly, Dr. Sanchez testified in his deposition that Appellant walks with a limp which exacerbated his symptoms. (R. p. 350, line 24-p. 351, line 3)

With the only medical expert in this case, a well-known and widely respected orthopedic surgeon, testifying under oath that Appellant walked with an altered gait, it is inconceivable that the Commission would construe Appellant's testimony to find that he "rejected an antalgic gait theory" as a medical cause for his back and hip pain when all he said is that walking on the cement floors at Timken caused his pain. The only logical and fair inference/conclusion to draw from Appellant's testimony is that walking on the cement floors caused pain which resulted in Appellant walking with a limp or altered gait.

III.

THE SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT APPELLANT HAS SUSTAINED FAR MORE THAN 60% PERMANENT PARTIAL DISABILITY TO HIS RIGHT KNEE AS A RESULT OF HIS MAY 20, 2010 WORK ACCIDENT.

While it is true that Appellant was experiencing pain in his right knee/leg, right hip and lower back when Dr. Sanchez wrote him out of work on September 9, 2013, the pain and problems with the right knee were the primary reason for Appellant being unable to continue to work. The medical records from Dr. Sanchez subsequent to Appellant's total knee replacement on October 12, 2011 are replete with references of substantial pain and swelling in the right knee, particularly after Appellant returned to work and he was walking on the cement floors at Timken. (R. pp. 247-281).

Appellant testified at the hearing concerning the pain in his right knee after a typical day that involved walking on the cement floors at Timken. Appellant indicated that after walking a good distance, his knee would swell and start stiffening up. His knee pain was rated as eight to nine on a scale to ten. When he got home from work, he would have to sit down and apply ice to his right knee. (R. p. 110, line 7-p. 111, line 11)

Moreover, on September 9, 2013, Dr. Sanchez stated in his narrative reports that Appellant "...is felt to be a candidate for permanent disability with respect to his knee. I do not believe he can return to work at his present employment." (emphasis added) (R. pp. 279-281) It was at this office visit on September 9, 2013 that Dr. Sanchez wrote Appellant out of work. Respondents' argument that the right knee was not the reason for Appellant being taken out of work is completely without merit.

As further evidence that the award of 60% Permanent Partial Disability to the right lower extremity is woefully insufficient under the facts of this case, it must be noted that Dr. Sanchez first assigned the 50% medical (permanent) impairment on August 22, 2012. Appellant was still able to continue working at Timken which he did for more than a year until September 9, 2013 when Dr. Sanchez determined he was a candidate for permanent disability with respect to his knee and wrote him out of work indefinitely. It is disingenuous for Respondents to argue in their brief that Timken had sedentary work available to accommodate Appellant's work restrictions when they know very well that they never effectively communicated any offer of sedentary employment to the Appellant, and the Commission indeed made a finding that no effective offer of sedentary employment was ever made to Appellant. Thus, given the vocational impact of Appellant's knee injury which caused him to lose his ability to continue working at Timken, the statement of Dr.

Sanchez in the medical records that Appellant was a candidate for permanent disability because of his knee, the vocational evaluation of Adger Brown (R. p. 313), together with the very significant pain, swelling and overall physical limitations the knee injury has caused Appellant, the substantial evidence in this case requires a much higher award of permanent partial disability to the right lower extremity than the mere 60% awarded by the Commission.

CONCLUSION

The evidence in this case is uncontradicted concerning Appellant's complete loss of earning capacity. If the Court determines that the substantial evidence in this case indicates that the subject accident has resulted in an injury affecting more than one body part, the Appellant must be found permanently and totally disabled under S.C. Code Ann. § 42-9-10.

If the Court concludes that the subject accident has only affected one body part (i.e. the right lower extremity), the substantial evidence in this case concerning the vocational and personal impact of the injury requires an award of permanent partial disability far greater than the 60% awarded by the Commission.

Finally, this case should not be remanded to allow Respondents an opportunity to obtain and introduce additional medical evaluations, vocational evaluations, or other evidence as their failure to obtain such evidence on a claim that originated over five years ago amounts to waiver or laches on the part of Respondents.

[SIGNATURE PAGE TO FOLLOW]

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November 9, 2015

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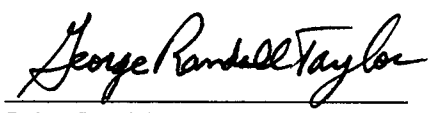
CERTIFICATE OF COUNSEL

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

November 9, 2015

Respectfully submitted,



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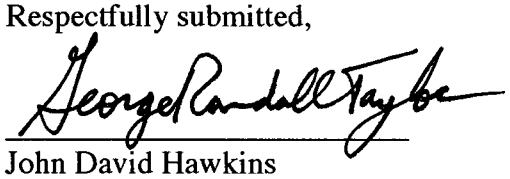
PROOF OF SERVICE

I certify that I have served one bound copy of the Final Reply Brief of Appellant on The Timken Company and Phoenix Insurance Company, via hand delivery, on November 9, 2015, to their attorney of record, J. South Lewis of Willson Jones Carter & Baxley, PA, 872 Pleasantburg Drive, Greenville, South Carolina 29607.

November 9, 2015

Respectfully submitted,



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