THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM APPELLATE PANEL OF THE
SC WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2010-174006

Geneva Watson ..... Petitioner,

Xtra Mile Driver Training, Inc. and
Hartford Underwriters Insurance Co., ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally denied by the Court of Appeals on September 20, 2012.

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October 17th, 2012

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE COMMISSION'S ADMISSION OF THE VOCATIONAL OPINION THAT CLAIMANT'S WORK RESTRICTIONS ALLOWED HER TO DO SEDENTARY WORK CONTAINED IN DEFENDANTS' FUNCTIONAL CAPACITY EVALUATION REPORT? (R. p. 229).

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE COMMISSION'S DENIAL OF TOTAL AND PERMANENT DISABILITY PURSUANT TO S.C. CODE §42-9-30(21)?

STATEMENT OF THE CASE

This is an admitted Workers' Compensation claim. On September 18, 2007, while working as a clerk for XTRA Mile Driver Training, Claimant slipped and fell onto her back. Claimant suffered an immediate onset of pain in her back and radiating pain in her right hip and right leg. Defendants accepted the claim and commenced weekly temporary total disability benefits by Consent Order dated February 13, 2008. (R. pp. 1-2).

The Claimant ultimately saw Dr. Rakesh Chokshi, orthopaedic surgeon. After epidural steroid injections did not improve the Claimant's condition significantly, Dr. Chokshi performed lumbar decompression surgery at L3-4 and L4-5 on March 31, 2009. (R. p. 221).

Dr. Chokshi sent the Claimant for a functional capacity evaluation to establish her permanent work restrictions. (R. p. 214). The functional capacity evaluation was performed at Tuomey Outpatient Rehabilitation Service on July 6, 2009. The functional capacity evaluation revealed, in pertinent part:

1. **Ms. Watson stood for 12 minutes. Her standing tolerance does not meet the Demand Minimum Functional Capacity requirement of standing for 30 minutes continuously.**

2. **Ms. Watson sat for 3 minutes. Her sitting tolerance does not meet the Demand Minimum Functional Capacity requirement of sitting for 30 minutes continuously.**

3. **Ms. Watson walked for 0.1 miles. Her walking tolerance does not meet the Demand Minimum Functional Capacity requirement of walking for one mile continuously (@ 2mph).**

4. **Ms. Watson has a maximum lifting capacity of 10.0 pounds. This places her into the light category for lifting capacity (as defined by the DOT).**

5. **Ms. Watson has an occasional lifting capacity (0% to 33% of the workday) of 10.0 pounds. Her frequent lifting capacity (34% to 66% of the workday) is 5.0 pounds. Her constant lifting capacity (67% to 100% of the workday) is 2.0 pounds.**

6. **Ms. Watson as a maximum carrying capacity of 10.0 pounds. This places her into the light category for carrying capacity (as defined by the DOT).**

7. **Ms. Watson has an occasional carrying capacity (0% to 33% of the workday) of 10.0 pounds. Her frequent carrying capacity (34% to 66% of the workday) is 5.0 pounds. Her constant carrying capacity (67% to 100% of the workday) is 2.0 pounds.**

8. **Ms. Watson has a pushing capacity of 20.0 pounds. Her pushing capacity does not meet the Demand Minimum Functional Capacity requirement of 100 pounds.**

9. **Ms. Watson has a pulling capacity of 20.0 pounds. Her pulling capacity does not meet the Demand Minimum Functional Capacity requirement of 80 pounds.**
(R. p. 230).

In Summary, the report discussed the Claimant's job factor restrictions and indicated:

> **In order for Ms. Watson to successfully return to work as a Director of Placement, the following job factor restrictions must be met:**
>
> **No standing for more than 12 minutes continuously. (reference section 1)**
> **No sitting for more than 3 minutes continuously. (reference section 2)**
> **No walking for more than 0.1 miles continuously. (reference section 3)**
> **No pushing more than 20 pounds. (reference section 6)**
> **No pulling more than 20 pounds. (reference section 7)**
> **No stooping. (reference section 14)**
> **No crawling on hands and feel. (reference section 16)**
> (R. p. 232).

Inexplicably, however, the report concluded:

> **The Dictionary of Occupational Titles places Ms. Watson's occupation as a Director of Placement in the sedentary strength category. Therefore, Ms. Watson meets these strength requirements and may return to work as a Director of Placement.**
>
> **Based on the strength classifications as established by the Dictionary of Occupational Titles, Ms. Watson is capable of assuming a position in the light strength category. Her maximum lifting capacity is 10.0 pounds, and her maximum carrying capacity is 10.0 pounds. According to the Dictionary of Occupational Titles, the light strength category is defined as having the ability to lift 10 to 20 pounds and carry 5 to 10 pounds.**
> (R. p. 232).

This conclusion is contradictory to the physical restrictions measured by the evaluator. In particular, the evaluation found restrictions of no standing more than 12 minutes continuously and no sitting more than 3 minutes continuously, no walking for more than .1 miles continuously. Each of these limitations (as the evaluation noted earlier) leave the claimant without the residual functional capacity to meet the demand minimal functional capacity requirements for her job or any sedentary job.

At deposition, the Functional Capacity Evaluator, Jerry Shadbolt, testified that while he performed the tests to establish the Claimant's restrictions, and opined that those tests were valid, he did not reach any vocational opinion as to whether the Claimant was qualified for particular types of work given those restrictions, nor was he qualified to so opine. He testified that the "opinion" contained in his report as to the Claimant's ability to perform sedentary work was not his opinion at all but, instead, was the product of a computer program.

At trial, and throughout the deposition of Mr. Shadbolt, the Claimant accepted Mr.

Shadbolt's qualification to render an opinion as to the Claimant's restrictions, based, as they were, on his measurements, but objected to the computer's "opinion" as to Claimant's vocational availability for sedentary work. (R. pp. 42-43, 47; R. p. 102).

In addition, the Claimant was interviewed and her records, including the functional capacity evaluation, were reviewed by J. Adger Brown, a vocational analyst. Mr. Brown agreed that, by definition, the restrictions provided by the functional capacity evaluation left the Claimant incapable of even sedentary employment. He further noted:

> **Based on the information available for my review, chiefly the functional capacity evaluation, it is my opinion that Ms. Watson is incapable of returning to her former work and would not be able to compete for any other type of employment for the same reason. When this is combined with an individual of advanced employment age who has been out of work for two years, with a history of back injury and back surgery, it becomes even more apparent that this lady is totally disabled.**
> (R. p. 251).

Claimant received a letter on September 22, 2009, from the employer instructing her to return to work on Monday, September 28, 2009. (R. p. 253). She returned to the job accompanied by her restrictions as listed in her functional capacity evaluation. Upon reviewing those restrictions, her employer declined to offer her any work within her restrictions and instead sent her home. (R. p. 113, line 14 - p. 114, line 10).

Thus, at hearing, it was the Claimant's contention that she was totally and permanently disabled.

In the Claimant's Pre-hearing Brief, (R. p. 143), at the hearing, (R. p. 103), and during Mr. Shadbolt's testimony, (R. pp. 42-43, p. 47), the Claimant objected to the

admission of any vocational opinions contained in the Functional Capacity Evaluation found at Claimant's APA No. 7, as well as in the deposition of Jerry Lee Shadolt. The Commissioner allowed the vocational opinions over Claimant's objection. Moreover, the Commissioner ruled:

> 2. The Claimant sustained an injury to her back which also radiates to her right hip in an admitted accident arising out of and in the course of her employment on September 18, 2007. However, the situs of her injury is her back. This finding is supported by the medical evidence as a whole and Dr. Chokshi's deposition.
>
> 3. I find the Claimant to be a credible witness. This finding is based on my observation of her and her testimony at the hearing. She testified truthfully and accurately to her physical limitations (compared to the medical evidence). She has no prior workers' compensation claims and no pre-existing issues with her back. She often stood during the hearing, which was not any indication of symptom magnification; rather, it correlated with the functional capacity evaluation restrictions of having to stand every three (3) minutes. My impressions as stated herein are limited to the testimony I heard and my observations of the Claimant's demeanor on the date of the hearing. Therefore, nothing in this Order precludes a future finding relating to the Claimant's credibility at another hearing regarding permanency, compensability, or any other issue.
>
> 4. The Claimant testified truthfully concerning her ongoing back and hip pain. She testified that her pain is constant, and that a fusion surgery was discussed; however, she opted for the less invasive decompression surgery to start. She has fairly severe restrictions, as noted in the functional capacity evaluation.
>
> 5. The Claimant underwent a function[sic] capacity evaluation, for which she gave valid effort. The

functional capacity evaluation placed her as greater than sedentary-level, but below light duty-level.

6. The Claimant has not returned to work with the Employer. The Claimant was offered work; however, the Employer could not accommodate her restrictions.

7. The Defendants provided the Claimant proper and adequate medical care and treatment for injuries causally related to the September 18, 2007 accident and the Claimant reached a level of maximum medical improvement for injuries related to the September 18, 2007 accident by August 12, 2009.

8. The Defendants shall be responsible for the causally related medical care and treatment which they authorized and which was incurred on or before August 12, 2009. The Claimant is entitled to future medical treatment that tends to lessen her causally related disability under Dodge per Dr. Chokshi.

9. The Defendants are entitled to stop payment of temporary disability compensation effective August 12, 2009, the date of maximum medical improvement per Dr. Chokshi.

10. The Defendants have paid all temporary disability compensation for which they are liable and have no liability for any further temporary disability compensation.

11. Based on the record as a whole, I find that the Claimant sustained a 50% permanent loss of use to her back pursuant to §42-9-30(21) as a result of the admitted accident arising out of and in the course of her employment on September 18, 2007. This takes into account the radicular effect of her back issues on her right hip as well. This finding is also based on her sedentary-level of work, her credible testimony, and the ongoing problems she experiences. I do not find that she is permanently and totally disabled. She testified that she would be willing to try to work, and given the sedentary nature of her job before this

> accident, when coupled with her restrictions, it is debatable whether or not she could actually return to work. In any event, based on the evidence as a whole, including all the medical evidence, the Claimant's testimony, the functional capacity evaluation, the depositions of Jerry Shadbolt[sic] and Dr. Chokshi, I find that even though she is not permanently and totally disabled, her disability is significantly greater than the 10% impairment rating assigned.
>
> 12. The Defendants are entitled to a credit of overpayment of temporary disability compensation paid for the period after August 12, 2009, the date of maximum medical improvement per Dr. Chokshi, against their liability for permanent disability awarded herein and all temporary disability compensation paid to the Claimant for the period after August 12, 2009 constitutes payment for permanent partial disability award set forth herein.
> (R. p. 12 ¶2 - p. 15, ¶12).

Defendants appealed to the Appellate Panel of the Workers' Compensation Commission. By Order dated September 10, 2010, the Appellate Panel affirmed and adopted as its own the factual findings and legal conclusions of the Single Commissioner.

The Claimant appealed to the Court of Appeals, which affirmed, with dissent. Claimant's Petition for Rehearing was similarly denied, with dissent. This Petition followed.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs this Court's review of decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Court can reverse or modify the Commission's decision if the substantial rights of the appellants 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. See S.C. Code Ann. §1-23-380(A)(6)(d), (e)(Supp. 1997).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S ADMISSION OF THE VOCATIONAL OPINION THAT CLAIMANT'S WORK RESTRICTIONS ALLOWED HER TO DO SEDENTARY WORK CONTAINED IN DEFENDANTS' FUNCTIONAL CAPACITY EVALUATION REPORT. (R. p. 229).

The Petitioner seeks the Court's review of the novel legal question of whether vocational opinions offered in Workers' Compensation cases, particularly those contained in reports generated by computers and not susceptible of cross-examination, must be excluded from evidence unless the party offering such evidence demonstrates that it meets the standards of reliability set by State v. Council, 335 S.C. 1 (1999), and State v. Jones, 273 S.C. 723 (S.C. 1979).

Claimant's authorized treating physician, Dr. Rakesh Chokshi, referred the Claimant for a Functional Capacity Evaluation which was performed on July 6, 2009 by Mr. Jerry Lee Shadbolt. Mr. Shadbolt testified at deposition that he is a certified athletic trainer with an undergraduate degree from Indiana University and Masters in Guidance and Counseling from Clemson University. He testified that he had performed a grand total of twelve (12) Functional Capacity Evaluations in his entire career as a Functional Capacity Evaluator. (R. p. 36, line 8). He further testified that:

> **Q. Ok. And you don't have any qualifications or training in vocational evaluation or knowledge**

about what kind of educational requirements or physical requirements there are for various jobs and what jobs are available in the marketplace. Is that right?

A. That's correct.

Q. All right. Your expertise is in doing those tests and seeing how long she can sit and how long she can stand and so forth?

A. Yes.

Q. And, in fact, you perform those tests and take those measurements, and then you input them into a computer.

A. Yes.

Q. And any opinions as to vocational ability tied to those tests is a product of that computer program?

A. Can you repeat that?

Q. Let me say it differently. You plug in how long she can sit or stand or walk or whatever and as to whether that meets light or sedentary or any other vocational level, that opinion is the product of the computer. Is that correct?

A. That's correct.
(R. p. 50, line 9 - p. 51, line 11).

He further testified that:

Q. Certainly. Do you agree that there was any inconsistency between the date collected and your opinion in the FCE?

A. I would disagree. My opinion is not — my opinion is not written in this FCE report. The FCE report only states what Ms. Watson performed that day.

MS. FIEHRER: Ok.

A. I indicated her comments and her mannerisms but did not include a opinion of anything in the report.

Q. As far as the indication that she could work sedentary duty. ---

A. Um-hum.

Q. — do you find that that was consistent with the restrictions during the Functional Capacity Evaluation?

A. Yes, under the light category of working. The FCE - what I input into the computer generates this report. --

MS. FIEHRER: Ok.

A. – so my opinion never went into it. This all is inputed into the computer and the computer generates the results.

Q. The result as far as sedentary duty was generated by a computer based on the –

A. By –

Q. – statistics that you entered?

A. Yes. Correct.
(R. p. 45, line 10 - p. 46, line 11).

* * *

A. Based on what she performed that day and what I input it, her performance into the computer, the computer, based on the Dictionary of Occupational Titles, placed her in that category.

Q. MR. WUKELA: Now, again, I object to him giving any vocational analysis —

A. MS. FIEHRER: That's fine.

Q. MR. WUKELA: – or to the computer giving any vocational analysis. I am not sure of the qualifications of the computer, but I don't dispute the accuracy of his measurements.

A. MS. FIEHRER CONTINUING:

Q. Is it correct, then that you could not make an accurate or inaccurate statement since you weren't the one actually making the statement as to sedentary duty?

A. I could not give, if I understand what you are asking me, if you wanted me to calculate on a piece of paper that date, I have not done that before.

MS. FIEHRER: Ok.
(R. p. 47, line 15 - p. 48, line 9).

In sum, Mr. Shadbolt, the individual who performed the Functional Capacity Evaluation, testified explicitly that he did not have any qualifications to give any vocational opinions and that his only qualifications were to test Claimant's physical restrictions and report the results of his findings. He testified that the vocational opinion as to whether the Claimant's restrictions qualify her for sedentary work which was found in the report, (R. p. 273), were not his opinions but instead were the product of a computer into which he had input the physical lifting and sitting and so forth requirements that he obtained. Mr. Shadbolt admitted that he had no vocational opinion whatsoever nor was he qualified to give one.

Nevertheless, the Commission admitted the computer generated opinion into evidence over the Claimant's objection. On appeal, the Court of Appeals affirmed, finding that the South Carolina Rules of Evidence did not apply in Workers' Compensation hearings.

In Gadson v. Mikasa, 368 S.C. 214, 628 S.E.2d 262 (S.C. App. 2006), the Court of Appeals evaluated the admissibility of vocational expert reports in Workers' Compensation hearings. Judge Anderson writing for the Court explained:

> The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). Rule 702, SCRE, articulates guidelines for the admissibility of expert testimony.
>
> Rule 702 provides:
>
> 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.' Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825. ...
>
> The party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." Henry, 329 S.C. at 274, 495 S.E.2d at 466. See also, Brown v. La France, 286 S.C. 319, 333 S.E.2d 348 (S.C. App. 1985), finding: (p. 6).
> Gadson v. Mikasa, 368 S.C. 214, 628 S.E.2d 262 (S.C. App. 2006)(emphasis added).

Here, Mr. Shadbolt, the FCE technician, admitted that he had no qualifications to render a vocational opinion:

> **Q. Ok. And you don't have any qualifications or training in vocational evaluation or knowledge about what kind of educational requirements or physical requirements there are for various jobs and what jobs are available in the marketplace. Is that right?**
>
> **A. That's correct.**
> (R. p. 50, lines 9-15).

The vocational "opinion" was provided by Defendants' computer program and Defendant failed to meet their burden or offer any evidence in support of reliability as expert scientific evidence as required by Gadson.

The Court of Appeals here, citing S.C. Code §1-23-330(1) and this Court's decision in Hamilton v. Bob Bennett Ford, 339 S.C. 68, 528 S.E.2d 667 (S.C. 2000), correctly noted that " the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission." However, the Hamilton Court went on to, in the next paragraph, exclude hearsay testimony in a Workers' Compensation hearing:

> However, even under the proper standard, Powell's hearsay testimony is still inadmissable. Hearsay testimony may be admissible in workers' compensation matters if corroborated by facts, circumstances, or other evidence. Ham, 193 S.C. at 82, 7 S.E.2d at 719. We find that Powell's hearsay was not corroborated by any evidence presented at the hearing. Moreover, Powell's testimony regarding her conversation with Mr. Keith does not meet the requirements of an admission against interest by a party opponent and thus was not admissible on that ground. See Burch v. Cobb, 273 S.C. 445, 257 S.E.2d 225 (1979).

Thus, the Hamilton Court acknowledged that while the formal rules of evidence do not apply in Workers' Compensation hearings; nevertheless, uncorroborated hearsay testimony must be excluded. One may reconcile this Court's hearsay exclusion in Hamilton

and its finding that, pursuant to S.C. Code §1-23-330, the Rules of Evidence do not apply, by acknowledging that even where formal Rules of Evidence do not apply, due process and common law require that, to be admissible, evidence must be subject to cross-examination or otherwise established as reliable by corroboration.

The evidentiary requirements of confrontation and cross-examination necessary for due process in Workers' Compensation hearings were also acknowledged recently by the Court of Appeals in the case of Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (S.C. App. 2012). In Adams the Court of Appeals reversed the Workers' Compensation Commission's attempt to reconstruct a lost transcript through a hybrid rehearing procedure which allowed witnesses to testify without cross-examination. The Court noted:

> The South Carolina Constitution provides that in procedures before administrative agencies:
>
> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... Art. I, §22 (2009 & Supp. 2011). The South Carolina Supreme Court has explained:
>
> > Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.
>
> In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751(2011)(quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)).

Thus, the Adams Court held that because cross-examination was an essential element

of due process, a Workers' Compensation Commission's procedure allowing witnesses to testify without cross-examination was in error. Adams, at 658; see also S.C. Code §1-23-330(3)(providing: "any party may conduct cross-examination").

Thus, even in the absence of formal rules of evidence, this Court's limitations of hearsay testimony in Hamilton are in accord with due process evidentiary requirements which necessitate that parties must have a right to cross-examine testimony, unless its reliability is established by corroboration.

Similarly, this Court in State v. Council, 335 S.C. 1 (1999), and State v. Jones, 273 S.C. 723 (S.C. 1979)(preceded by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), decided before the advent of formal Rules of Evidence), acknowledged reliability requirements for scientific or opinion evidence especially where, as here, the scientific evidence offered is not susceptible of cross-examination. Certainly, those requirements were later codified in the Rules of Evidence, particularly Rule 702. However, the due process requirements that underlie those rules are essential to fair hearings and persist even where formal Rules of Evidence do not apply, as has been acknowledged, if only implicitly, by this Court in Hamilton and the Court of Appeals in Gadson and Adams.

Here, the computer report offered by the Defendants supporting their contention that the Claimant was capable of performing light work was not susceptible of cross-examination. While Mr. Shadbolt, the FCE technician, was cross-examined as to the Claimant's physical restrictions, he testified that the vocational opinion that the Claimant could perform light work was the computer's, not his, (R. p. 45, line 10 - p. 46, line 11), and that he had no qualifications to give such vocational opinions. (R. p. 50, lines 9-15).

The Defendants offered no evidence to support the reliability of the computer generated vocational opinion, although it was their burden to do so. See Gadson at 270 (finding "the party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony.").

In fact, the computer's "opinion" that "Ms. Watson is capable of assuming a position in the light strength category.", (R. p. 232), was itself contradictory to the same report's finding that she did not meet the sitting tolerance requirement of her previous sedentary job. (R. pp. 230, noting "2. Ms. Watson sat for 3 minutes. Her sitting tolerance does not meet the demand minimum functional capacity requirement of sitting for 30 minutes continuously.").

The computer's opinion was also in conflict with the U.S. Department of Labor's Dictionary of Occupational Titles. The Claimant's vocational expert, J. Adger Brown, noted that the U.S. Department of Labor's Dictionary of Occupational Titles and the Code of Federal Regulations define the full range of sedentary work as "requiring the ability to sit for 6 out of 8 hours a day". (R. p. 86). Clearly, Ms. Watkins' restrictions of no sitting for more than 3 minutes continuously as set out by Mr. Shadbolt's measurements, (R. p. 230), would not meet the Department of Labor's definition of sedentary work. Claimant's attorney questioned Mr. Shadbolt regarding this fact and he indicated:

> Q. Ok. Would you agree with me, then, that the Dictionary of Occupational Titles lists sedentary work as including the requirement that the worker be able to sit for six out of eight hours?
>
> A. I would not be – I would have to look at the book. I would not be familiar with that.

Q. Ok. So your answer is, I don't know?

A. I don't know.
(R. p. 52, lines 3-10).

As such, the computer's opinion that the Claimant was capable of light work should have been excluded from evidence.

Furthermore, the trend in Workers' Compensation common law and statutory law has been to require higher standards of evidence, as demonstrated by the legislature's amendments to the Act in 2007.

Those amendments include additional evidentiary requirements in repetitive trauma cases, (§42-1-172); in cases where an aggravation of a pre-existing condition is alleged, (§42-9-35); and in medically complex cases, (§42-1-160). In each case, the legislative amendments required expert opinions stated to a reasonable degree of medical certainty.

In the recent case of Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (S.C. 2012), this Court excluded the report of the Defendants' physician expert because that opinion was not stated to a reasonable degree of medical certainty. While Michau dealt with a repetitive trauma case under §42-1-172, the statutory language is the same there, as in medically complex cases, such as those involving spinal injury, see McLeod v. Piggly Wiggly, 280 S.C. 46, 313 S.E.2d 38 (S.C. 1984), under §42-1-160.

Thus, this ruling, if left unaltered, would result in the incongruous result that the computer's opinion here would be admissible, but that the same opinion as to impairment as a result of a workers' compensation injury offered by an orthopaedic surgeon would be excluded if not stated to a reasonable degree of medical certainty.

In sum, formal rules of evidence notwithstanding, due process and the common law require that expert and scientific evidence, especially that which, as here, is not susceptible to cross-examination, must be excluded from evidence unless the party offering such evidence meets the standards of reliability set out in Jones and Council. Defendants did not meet that standard and the opinion generated by Defendants' computer should have been excluded.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S DENIAL OF TOTAL AND PERMANENT DISABILITY PURSUANT TO S.C. CODE §42-9-30(21).

The Commission found that Claimant suffered a fifty (50%) percent permanent loss of use to her spine pursuant to S.C. Code §42-9-30(21). (R. p. 14, ¶11).

S.C. Code §42-9-30(21) provides:

> (21) for the loss of use of the back in cases where the loss of use is forty-nine percent or less, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks. In cases where there is fifty percent or more loss of use of the back, sixty-six and two-thirds percent the average weekly wages during five hundred weeks. The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases **where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under Section 42-9-10(B). The presumption set forth in this item is rebuttable**. (emphasis added).

A presumption in the Worker's Compensation Act will be applied where it meets the requirements. Davis v. Bypass Auto Parts, 304 S.C. 75, 403 S.E.2d 133 (1991). To rebut the presumption requires direct, substantial evidence that it does not apply. Floyd v. W.O.

Green Plumbing & Heating Company, 255 S.C. 352, 179 S.E.2d 28 (1971); Suburban Propane Gas Company v. DesChamps, 298 S.C. 230, 379 S.E.2d 301 (Ct. App. 1989); Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 459 (Ct. App. 1999). No such evidence was submitted herein.

In fact, in their Order, the Commission found:

> ... She testified that she would be willing to try to work, and given the sedentary nature of her job before this accident, when coupled with her restrictions, it is debatable whether or not she could actually return to work.
> (R. p. 14, ¶11)(emphasis added).

A divided Court of Appeals affirmed.

The majority relied on the testimony of Dr. Chokshi that "As long as the work is within that particular restrictions, I believe it is reasonable for her to continue working.", as well as Ms. Watson's extensive experience and training in an occupation of a sedentary nature.

As the dissent points out, however, the standard of total disability, the presumption of which the Defendants must overcome in this case, is not whether the Claimant could do sedentary work if jobs were available within her significant restrictions, but instead whether there are in fact jobs available within those restrictions in the competitive marketplace.

That is, the standard for determining total disability under S.C. Code §42-9-10 is the ability 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. Wynn v. Peoples Natural Gas Company, 238 S.C. 1, 118 S.E.2d 812 (1961). "[t]he ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total

disability." Simmons v. City of Charleston, 349 S.C. 64, 73-74, 562 S.E.2d 476, 480-81(Ct. App. 2002)(emphasis added).

As the dissent points out:

> The following facts are undisputed: (1) in a workplace setting, Watson now can sit continuously for no longer than three minutes; (2) in a workplace setting, Watson now can stand continuously for no longer than twelve minutes and can walk no farther than 0.10 mile; (3) Adger Brown, the vocational analyst who reviewed Watson's restrictions, found these job factor restrictions rendered Watson permanently and totally disabled; and (4) when claimant returned to her job, which is classified as sedentary, her employer sent her home, stating there was no work available that could accommodate Watson's job restrictions.
> Watson v. Xtra Mile, Op. No. 5013 (S.C. 2012).

Notwithstanding the fact that Dr. Chokshi testified the Claimant could work if there were jobs available within her restrictions, the Defendants produced, and the Commission and the majority cited, no evidence indicating that there are jobs that the Claimant can perform within her restrictions.

Therefore, the Defendants failed to meet their burden of direct and substantial evidence necessary to overcome the presumption of total and permanent disability and the Claimant respectfully requests this Court review the Court of Appeals' decision to affirm the Commission's denial of an award of total and permanent disability.

CONCLUSION

In conclusion, your Petitioner requests that the Court consider the novel question before this Court of whether in a Workers' Compensation claim, the absence of formal rules of evidence notwithstanding, due process and the common law require that expert and

scientific evidence, especially that which, as here, is not susceptible to cross-examination, must be excluded, unless the party offering such evidence meets the standards of reliability set out in Jones and Council.

Further, your Petitioner requests that the Court consider whether the presumption of total disability under §42-9-30(21) was overcome where the Claimant could do sedentary work if jobs were available within her significant restrictions; or whether, as the dissent and your Petitioner argue, the standard to overcome the presumption of total disability is whether there are, in fact, jobs available within the Claimant's restrictions in the competitive marketplace.

Respectfully submitted,

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BY: _____
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PO BOX 13057
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Florence, South Carolina

October 17th, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM APPELLATE PANEL OF THE
SC WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2010-174006

Geneva Watson ..... Petitioner,

Xtra Mile Driver Training, Inc. and
Hartford Underwriters Insurance Co., ... Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix Index by depositing a copy of each in the United States Mail, postage prepaid, on October 17, 2012, addressed to their attorney of record, Kathryn R. Fiehrer, at her office at PO Box 20550, Charleston, South Carolina, 29413.

October 17, 2012

WUKELA LAW FIRM

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October 17, 2012

Honorable Daniel Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia SC 29201

Re: Geneva Watson vs. Xtra Mile Driver Training, Inc.
and Hartford Underwriters Insurance Co.
Appellate Case No. 2010-174006

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of a Petition for Writ of Certiorari, along with my office check in the sum of One Hundred ($100.00) Dollars. I have also enclosed two (2) copies of an Appendix, one bound and one unbound, with attachments:

1. Record on Appeal;
2. Final Brief of Appellant dated January 26, 2011;
3. Final Brief of Respondents dated February 2, 2011;
4. Decision of the Court of Appeals, Opinion No. 5013 filed August 1, 2012;
5. Petition for Rehearing dated August 14, 2012;
6. Order of the Court of Appeals denying Petition for Rehearing filed on September 20, 2012.

By copy of this letter, I am providing the Court of Appeals with a copy of the Petition for Writ of Certiorari and I am serving counsel for Respondent with a copy of the Petition for Writ of Certiorari, along with a copy of the Appendix Index.

With kind regards, I am

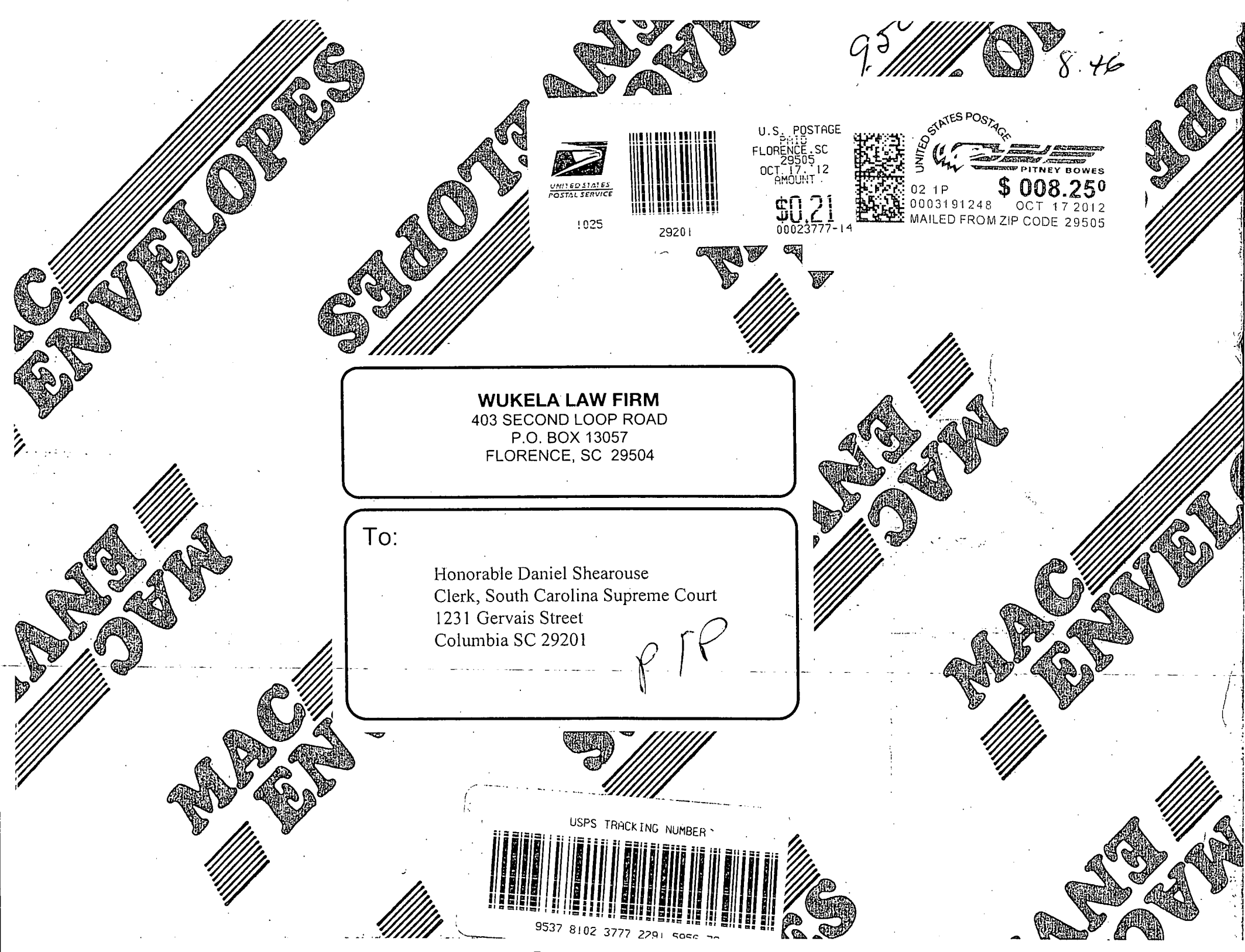
Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb
Enclosures
cc: Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

Ms. Kathryn R. Fiehrer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The Supreme Court of South Carolina

Steve Wukela

10/18/2012

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