THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case Number: 2019-000886

Freddie Tarver, Claimant, ...Appellant,

v.

Beech Island Rural Community, Employer, and
Auto-Owners Insurance Company, Carrier, ...Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in affirming the Hearing Commissioner's denial of permanent and total disability under S.C. Code Ann. § 42-9-10 when the uncontroverted medical, vocational, and lay evidence compelled the conclusion that the Appellant was entitled to an award of total general disability based on multiple causally-related permanent injuries (to the back, the pelvis, the hip, and two teeth) and his resulting vocationally documented inability to continue to perform the heavy physical labor he had performed during his entire lifetime including during his 28 years of employment with the Employer or any other meaningful full-time labor.

2. Whether, in the alternative, the Appellate Panel erred in upholding the Hearing Commissioner's denial of permanent partial disability under S.C. Code Ann. § 42-9-20 when all medical and vocational records and opinions, including those of the Respondents' own IME physician and vocational expert, and the uncontroverted testimony at the hearing uniformly ruled out full-time heavy labor employment which was the only type of work the Appellant had ever been able to perform.

3. Whether the Appellate Panel erred in upholding the Hearing Commissioner's failure to make an award for the lower extremities when the uncontroverted evidence verifies that the Appellant sustained a 5% permanent disability to each lower extremity as a result of the accident-related injuries.

4. Whether the Appellate Panel erred in upholding the Hearing Commissioner's calculation of the Appellant's average weekly wage based on the Respondents' Form 20 alone, when fairness pursuant to S.C. Code Ann. § 42-1-40 would have been best achieved by incorporating the Appellant's verified outside income duly documented by the Appellant's 2013 tax filing (R. pp. 366-67) in order to avoid an unfair result.

STATEMENT OF THE CASE

Freddie Tarver, the Appellant, was injured on the job on April 15, 2014, while performing his duties arising out of and in the course and scope of his employment with Beech Island Rural Community (the Employer). On December 31, 2015, he filed a Form 50 (R. p. 51) seeking an award for total and permanent disability under S.C. Code § 42-9-10 or in the alternative permanent partial disability under S.C. Code § 42-9-20 along with additional medical care as a result of a fracture in the lumbar spine, multiple fractures to his pelvis, fractures of the sacrum from S1 to S4, hematomas in the pelvis and both legs, a hemorrhage in the bladder, an acute aortic abdominal injury, damaged teeth, and numerous soft tissue injuries. The Respondents filed a Form 51 (R. p. 52) on January 7, 2016, admitting that the Appellant sustained certain compensable injuries but contesting the extent of the disabilities and denying total and permanent disability under S.C. Code Ann. § 42-9-10 or permanent partial disability under S.C. Code Ann. § 42-9-20.

A hearing on the merits was held on September 27, 2016, before The Honorable Avery B. Wilkerson, Jr., who issued a Decision and Order dated December 5, 2016, finding that the Appellant sustained an injury to his back and pelvis and awarded compensation under § 42-9-30 for a single body part, specifically, a 25% permanent partial disability to the back; denied the Appellant either permanent and total disability or in the alternative permanent partial disability; denied his request for additional medical care; found MMI was reached on the approximate date of his return to work (i.e., July 10, 2014); denied compensability for the Claimant's two damaged teeth (both eventually lost); and denied compensability for any other body parts claimed by the Appellant. On December 19, 2016, the Appellant filed a Form 30 appeal to the full commission. The Appellate Panel, by

order of January 22, 2018, reversed the Hearing Commissioner on his denial of compensation for the loss of the two teeth and ordered that "the balance of the Findings of the Single Commissioner shall be remanded to the Hearing Commissioner to analyze the impact of the [Panel's] ruling on the S.C. Code Section 42-9-10 claim and analysis of wage loss under S.C. Code Section 42-9-20 to include findings of fact and conclusions of law." (R. pp. 25-26). With no additional proceedings below the Hearing Commissioner issued a revised Decision and Order dated June 4, 2018, in which he found that the Appellant sustained compensable injuries to his back, pelvis, hip, and two teeth; awarded 25% permanent disability to the back, 2% to the hip, and two weeks for the loss of each tooth but nonetheless concluded "that S.C. Code Sections 42-9-10 and 42-9-20 do not apply."

The Appellant filed an appeal to the Full Commission per his Form 30 dated June 19, 2018, alleging numerous errors as set forth hereafter. The appeal was heard on October 22, 2018, and the second Appellate Panel filed its Order of the Full Commission on April 26, 2019, stating the following: "IT IS, HEREBY, ORDERED that the Findings of Fact and Conclusions of Law contained in the Single Commissioner's order of June 5, 2018, are affirmed in their entirety and adopted as the findings of this panel." (R. p. 14). The Appellant filed a Notice of Appeal in this Court on May 24, 2019.

STATEMENT OF THE FACTS

The Appellant, aged 58 at the time of the accident, suffered numerous serious and permanent injuries when he attempted to stop the company truck from rolling away and was dragged face-down for a distance of 20 to 30 feet. He was taken by ambulance in excruciating pain to Georgia Regents Medical Center, where he received emergency care and was then transferred to University Hospital in Augusta, Georgia, for specialized inpatient care. The diagnosed injuries were as follows:

Bilateral superior and inferior pubic rami fractures (with note that "the left superior pubic ramus fracture extends to the anterior most aspect of the left acetabulum"); a nondisplaced fracture of the posterior superior aspect of the S1 vertebral body with non-displaced fractures within the posterior elements of the sacrum from S1 to S4; an L5 lumbar transverse process fracture with minimal displacement; bilateral, right greater than left, extraperitoneal pelvic hematoma with small volume hematoma within the prevesical space; a hematoma of the right lower extremity; an extravescial extraperitoneal hemorrhage with compression of the bladder; an acute traumatic abdominal aortic injury; a pulmonary contusion; and a "hollow organ" injury. Several weeks thereafter the Appellant was diagnosed by his dentist as having sustained causally-related damage to two front teeth, which diagnosis was later independently confirmed by an endodontist selected and engaged by the Carrier.

The Appellant received physical therapy for two months following discharge from the hospital and then returned to his full regular duties. The first follow-up assessment of his condition was performed on December 10, 2014, by the Respondents' IME physician, Dr. W. Daniel Westerkam, who recommended restrictions which ruled out the heavy labor duties of the Appellant's 28 years of employment with the Employer as well as any other similar heavy labor in the job market. Specifically, those restrictions, "that he not lift more than 50 pounds and that he not do repetitive squatting," were derived from an examination a full eight (8) months after the accident and well into his resumption of work, and three months prior to his resignation. In his IME report Dr. Westerkam noted that the Appellant had had "scrapes and bruises on his chest and face and he sustained several fractures," and he explicitly described numerous serious symptoms that were conspicuous during the exam:

> "He states it is difficult to do some of the activities, particularly the squatting type activities which hurt his hips, pelvic and back area. He also has trouble lifting heavy objects and digging holes. He is taking Celebrex and naproxen on a regular basis as well as Zanaflex. He takes Percocet and Dilaudid as needed, about two times a week, when he has severe pain. ... He has some mild mid-back pain and has pain in both hips. He states he is very stiff in the morning and has to loosen up. ... There is some tenderness along the lumbar spine to palpation. Mild tenderness along the right and left greater trochanteric bursa area. ... The patient does have some pain with forward flexion and back extension, minimal pain

to lateral flexion. ... The patient is able to ambulate without difficulty, although he has a slightly antalgic gait. He is able to squat with some effort but must use the table to get back up. ... This would yield a 10% spine impairment, or a 13% lumbar regional spine impairment." (R. pp. 315-16).

On April 23, 2015, one month after his work ended, the Appellant underwent a Functional Capacity Evaluation at Columbia Rehabilitation Clinic. The Appellant was assessed as having put forth a consistent effort and was determined to qualify for limited light work only. (R. pp. 339-40).

On December 29, 2015, the Appellant was evaluated by Dr. Justin K. Hutcheson, a pain specialist with Carolinas Center for Advanced Management of Pain. Dr. Hutcheson diagnosed work-related injuries to the Appellant's lumbar spine and pelvis causing pain in the low back and hips radiating to the right upper thigh. He noted "very limited flexion and internal/external rotation both hips." He assigned an impairment rating of 14% to the whole person consisting of 16% to the lumber spine and 5% lower extremity rating "due to limited hip flexion range of motion." (R. p. 313).

Dr. John R. Velky of University Medical Group, Family Physicians of North August, who had been the Appellant's personal physician 10 years, became the authorized treating physician after his release from the hospital. Initially that care consisted primarily of prescribing and monitoring the several medications earlier prescribed at the hospital, which medications were initially authorized and paid for by the Carrier but later denied without notice or explanation to the Appellant a couple of months before his deposition on March 17, 2015. (R. p. 260, lines 2-25; p. 261, lines 1-14). The Appellant continued to suffer from pain, especially in his back, and continued to take all prescribed medication but through his own health coverage and at his own expense. A typical snapshot of his difficulties is contained in Dr. Velky's progress notes for the visit of 5/27/16:

> "This is a chronic problem. The current episode started more than a year ago. The pain is at a severity of 8/10. The pain is severe. The pain is the same all the time. Stiffness is present all day." (R. p. 308).

Dr. Velky's record also contained the following notes:

> "Musculoskeltal:
> Right hip: He exhibits decreased range of motion and tenderness.
> Left hip: He exhibits decreased range of motion and tenderness. (R. p. 307).

Dr. Velky, the Appellant's physician for 10 years and the authorized treating physician for this accident, analyzed the Appellant's health history, the changes thereto resulting from the accident, the resulting work disability, and the need for further treatment. He verified that there were no pre-existing musculoskeletal problems (also verified, *inter alia*, by the Georgia Regents Hospital records, (R. p. 363). In his summary letter of September 12, 2016, he gave the following overall assessment that "to a reasonable degree of medical certainty Mr. Tarver is most probably totally and permanently disabled from any full-time gainful employment." (R. p. 310).

The Appellant also sustained damaged teeth. Shortly after the accident he developed pain and abscesses to two front teeth. His regular dentist, Dr. Ron Bryant, explaining why such injuries may not show up immediately, opined that the injuries resulted from the accident:

> "The amount of injuries Mr. Tarver suffered from his accident may not have manifested orally until later. Trauma that causes the mouth to close with force can break, chip or put fracture lines in teeth and may not show up until later. Both front teeth #8 and #9 need to be extracted and implants, custom abutments and crowns put on them to properly restore. He will need a temporary flipper to wear while the implants integrate with the bone for 3-4 months. Because of the other injuries sustained in the accident there had to be oral injuries." (R. p. 342).

The Respondents sent the Appellant to an endodontist for a second opinion. That IME was performed by Thomas E. Day of Augusta Associates of Endodontics, who concurred with the

opinion of Dr. Bryant that the dental injuries were accident causally-related, as follows (with abbreviated words expanded):

> "Patient had accident on 4/15/2014 involving work truck in which he got caught by the door and was dragged [by] the truck on his stomach. He injured his back and fractured his pelvis. December 2014 he saw Dr. Bryant with pain to 8, 9. Tooth # 8 is fractured at the gum line and Dr. Bryant made patient a temporary flipper to wear to replace tooth # 8. Tooth # 9 is sore and there is a space along the margin of the crown where we feel this tooth may [be] fractured as well. We concur with Dr. Bryant['s] diagnosis that these teeth received trauma during the accident and we agree with Dr. Bryant['s] recommendation that these two teeth need RCT and buildup on both teeth." (R. p. 346).

A vocational assessment of the Appellant was performed by Glen K. Adams, MRC, CRC, CEES. After extensive testing and review of all of the Appellant's pertinent medical records, employment history, and educational records Mr. Adams rendered the opinion that, "He has incurred a total loss of access to the competitive labor market. He is classified as **totally vocationally disabled** as a result of injuries sustained on April 15, 2014, while working for Beech Island Rural Community." (emphasis original). (R. p. 326).

The Respondents obtained a vocational assessment by Jan Westmoreland of The Directions Group, Inc. Ms. Westmoreland opined, "After review of medical reports and my clinical interview, Mr. Tarver's physical capacity range appears to fall within the sedentary to light physical demand work capacity." (R. p. 335).

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 the appellate 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 in the record as a whole. Fishburne v. ATI Sys. Int'l., 384 S.C. 76, 84, 681 S.E.2d 595, 599-600 (Ct. App. 2009); S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011). As stated in Shealy v. Aiken County., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000), "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Furthermore, as stated in Hutson v. S.C. State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012), "[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support a different conclusion. Potter v. Spartanburg School District 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of a single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E2d 200 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages." Hutson at 399 S.C. 389-90, 732 S.E.2d 504.

ARGUMENTS

The Appellate Panel erred in upholding the Hearing Commissioner's conclusion that the Appellant was limited to the four awarded scheduled benefits when in fact the uncontroverted evidence supports total and permanent disability under S.C. Code Ann. § 42-9-10 or at the very least permanent partial disability under S.C. Code Ann. § 42-9-20 (encompassing ISSUES ON APPEAL numbered 1 and 2).

The Appellant sustained numerous fractures and other serious injuries to multiple body parts in attempting to stop the company truck from rolling away and was dragged face-down for a distance of 20 to 30 feet. He was taken by ambulance in excruciating pain to Georgia Regents Medical Center, where he received emergency care, and was then transferred to University Hospital in Augusta, Georgia, for specialized inpatient care. The diagnosed injuries were as follows:

> Bilateral superior and inferior pubic rami fractures (with note that "the left superior pubic ramus fracture extends to the anterior most aspect of the left acetabulum"); a nondisplaced fracture of the posterior superior aspect of the S1 vertebral body with non-displaced fractures within the posterior elements of the sacrum from S1 to S4; an L5 lumbar transverse process fracture with minimal displacement; bilateral, right greater than left, extraperitoneal pelvic hematoma with small volume hematoma within the prevesical space; a hematoma of the right lower extremity; an extravescial extraperitoneal hemorrhage with compression of the bladder; an acute traumatic abdominal aortic injury; a pulmonary contusion; and a "hollow organ" injury. (R. pp. 342, 356-60, 362-65).

The Appellant received physical therapy for two months following his discharge from the hospital and then returned to his full regular duties. Several months after the accident, while the Appellant was still working for the Employer, the first follow-up assessment of his residual condition was performed by the Respondents' IME physician, Dr. W. Daniel Westerkam, *who recommended restrictions which ipso facto ruled out the heavy duty undertakings of the Appellant's 28 years of employment with the Employer as well as any other similar heavy labor in the job market.* The Appellant's regular heavy manual labor duties included operating a jack hammer, operating a

backhoe, lifting pipes and water meters weighing 100 pounds and as much as 200 pounds, digging ditches, lifting heavy objects upward onto trucks or front loaders, cutting concrete and asphalt, maneuvering and using pumps to evacuate water, using picks to break up the ground or hard surfaces, installing pipes, picking up trash, and cutting grass. These duties routinely required heavy lifting, pulling, pushing, bending, climbing, stooping, and twisting (R. p. 141, lines 21-25; pp. 142-43, p. 144, lines1-2), all of which Dr. Westerkam's IME as well as all subsequent medical opinions ruled out because of the causally-related residuals. Thus, from a medical standpoint, Dr. Westerkam's IME opinions alone, without reference to the other medical opinions in the record, should have taken the Appellant out of his heavy labor job of 28 years' duration. Specifically, the restrictions "that he not lift more than 50 pounds and that he not do repetitive squatting," derived from an examination on December 10, 2014, a full eight (8) months after the accident and well into the Appellant's return to work, should have ended his employment with Beech Island. That is especially true since Dr. Westerkam explicitly described numerous telltale symptoms that were conspicuous during the exam:

> "He states it is difficult to do some of the activities, particularly the squatting type activities which hurt his hips, pelvic and back area. He also has trouble lifting heavy objects and digging holes. He is taking Celebrex and naproxen on a regular basis as well as Zanaflex. He takes Percocet and Dilaudid as needed, about two times a week, when he has severe pain. ... He has some mild mid-back pain and has pain in both hips. He states he is very stiff in the morning and has to loosen up. ... There is some tenderness along the lumbar spine to palpation. Mild tenderness along the right and left greater trochanteric bursa area. ... The patient does have some pain with forward flexion and back extension, minimal pain to lateral flexion. ... The patient is able to ambulate without difficulty, although he has a slightly antalgic gait. He is able to squat with some effort but must use the table to get back up. ... This would yield a 10% spine impairment, or a 13% lumbar regional spine impairment." (R. pp. 315-16).

This assessment, which establishes a permanent back disability (later corroborated by Dr. Justin K. Hutcheson and not contested by the Respondents), also validated the continuously problematic bilateral hip deficits and impairments, which are independently and voluminously verified in each treatment or evaluation record. Representative examples are the following:

> Dr. Westerkam IME: "tenderness along the right and left greater trochanteric bursa area"; "patient...has a slightly antalgic gait"; "able to squat with some effort but must use the table to get back up" (R. p. 316); University Hospital: "**Bilateral hip pain**" (R. p. 355) (emphasis original); Georgia Regents Medical Center: "C/O bilateral hip pain" (R. p. 361); University Hospital: "complaining of pain in his left hip and right hip" (R. p. 354); Dr. John Velky, the authorized treating physician: "Right hip: He exhibits decreased range of motion and tenderness" (R. p. 307); Tracy Hill FCE: "lumbar and bilateral hip range of motion are limited", "qualifies for a lower extremity impairment rating of 5% for each hip due to limited bilateral hip flexion range of motion" (R. p. 340); Dr. Justin K. Hutcheson IME: "pain in the low back to both hips that can radiate to right upper thigh"; "5% lower extremity impairment rating each hip due to limited hip flexion range of motion" (R. p. 313); and the recent pain therapy records of Dr. Mark J. Stewart: "Hip flexor weakness" (R. p. 352); "Left upper leg: He exhibits tenderness. Left lower leg: He exhibits tenderness" (R. p. 351); "He reports at least two falls recently with his left leg giving out on him." (R. p. 353).

Curiously, the assessment by Dr. Westerkam contained no recommendations for further care that might have lessened the observed symptoms as is almost universally done by pain doctors confronted with such symptoms. Also of note, neither Dr. Westerkam nor the Respondents provided or even sought an FCE in order to determine the Appellant's physical capabilities and deficits, which is routinely done if for no other reason than to insure that the worker does not get further injured. All of that notwithstanding, Dr. Westerkam's IME explicitly negates not only the ability of the Appellant to continue in his heavy labor job (restrictions given and impairment rated) but also negates the several premises advanced by the Respondents which yielded the bedrock findings of the Hearing Commissioner and adopted by the Panel, namely, that the Appellant was able to return to full duty after two months, that he did not complain to anybody about pain during his work, that

the problems of which he complained at the hearing developed after his employment ended, and that his retirement had nothing to do with his injuries and residuals. In point of fact, eight months after the accident the written and unassailable evidence to the contrary was placed in the Respondents' hands while the Appellant, whose life's habit was to work hard and never complain, was forcing himself through the full range of heavy duties. In so doing, he suffered during the work day but even more after work and during the night despite his ongoing regimen of pain medications and muscle relaxers initially prescribed by the hospital physician and thereafter carried forward by the authorized treating physician, Dr. John Velky. (R. p. 129, lines 4-25; R. p. 130, lines 1-2; R. p. 131, lines 18-25; R. pp. 132-36). He let his supervisor know that he was hurting but just did his job anyway and asked for no special consideration from his supervisor of 15 years, David Scott, who verified that, "He's always been a good worker ...." (R. p. 297, lines 20-25; R. p. 298, lines 1-6). On several occasions he fell as a result of his difficulties with balance. (R. p. 246, lines 17-21). There was no question about the Appellant's credibility in any of these matters: when Supervisor Scott was asked about the Appellant's veracity, he testified, "He's always been an honest person. I have no reason to doubt him. If he says he's hurting, he's hurting." (R. p. 299, lines 9-15). Three months after the Westerkam assessment, with constant pain, stiffness, chronic insomnia, unstable balance and consequent falls, regular use of a cane, numerous prescription medications including some narcotic pain killers, among other impediments, the Appellant accepted the inevitable and relinquished the heavy duty job he had loved and faithfully discharged for 28 years. As to why he did not quit earlier, he responded, "Well, I trusted the doctor when ... he had told me I could go back to work." (R. p. 144, lines 2-7). In any event, the fact that the Appellant managed, under the most difficult of circumstances and for an abbreviated period of time, to perform his prior work duties before yielding

to his limitations in no way forms the basis for a denial of benefits under § 42-9-10 or § 42-9-20. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996); Eaddy v. Smurfit-Stone Container Corporation, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003), Clemmons v. Lowe's Home Center, et. al., 420 S.C. 282, 803 S.E.2 268 (2017).

On April 23, 2015, just one month after his work ended and approximately four months after the Westerkam examination, the Appellant underwent an FCE at Columbia Rehabilitation Clinic. This uncontroverted evaluation, the only one in the record, took into account, among other factors, his recurrent pain in the lumbar spine region, the pelvis, the buttock, and both anterior thighs; difficulty with prolonged sitting and standing; limited range of motion in the hips and lumbar region; no toleration of squatting or twisting; and only occasional walking, stairclimbing, kneeling, bending, and reaching. The pain level during the evaluation reached 6 out of 10. The Appellant, judged by the therapist to have put forth a consistent effort, was deemed to qualify for limited light work only. (R. pp. 339-41). The Hearing Commissioner and the Panel failed to take this critical evidence into account or even address it.

On December 29, 2015, the Appellant was evaluated by Dr. Justin K. Hutcheson, a pain specialist with Carolinas Center for Advanced Management of Pain. Dr. Hutcheson diagnosed work-related injuries to the Appellant's lumbar spine and pelvis causing pain in the low back and hips radiating to the right upper thigh. He noted "very limited flexion and internal/external rotation both hips." He assigned an impairment rating of 14% to the whole person consisting of 16% to the lumber spine and 5% to each lower extremity "due to limited hip flexion range of motion." (R. p. 313). He provided the following prognosis:

"Given the level of fractures to lumber spine, pelvis, multiple hematomas/contusions he is likely to have ongoing pain the remainder of his life. Given age, education level and history of pelvis and lumber fractures, I think he will have a real problem maintaining pace and perseverance in a competitive work environment at 40 hours/week." (R. p. 313).

Dr. Hutcheson offered the following recommendations "designed to lesson the period of disability from his work-related injuries":

"Right now he is stable with home exercise and pain medications. I recommend he continue these going forward. He will need urine testing 3-6 times/year while on controlled substances to stay compliant with state and federal pain medication guidelines. An alternative treatment plan would include MRI of the lumber spine and pelvis to evaluate for soft tissue injuries, stenosis, disc herniations which are often seen after injuries of this caliber. Injections and DME could be considered based on that testing. These statements are made to a reasonable degree of medical certainty...." (R. p. 313).

Dr. John R. Velky of University Medical Group, Family Physicians of North August, was the authorized treating physician (R. pp. 137-38; p. 139, lines1-2) after the Appellant was released from inpatient hospitalization. Dr. Velky has also been the Appellant's personal physician for 10 years. Initially his follow-up care consisted primarily of prescribing and monitoring the numerous medications earlier prescribed at the hospital, which medications were initially authorized and paid for by the Carrier but later denied, without notice or explanation to the Appellant, a short time before his deposition on March 17, 2015. (R. p. 260, lines 2-25; p. 67, lines 1-14). The Appellant continued to suffer from pain in the affected body parts and continued to take all prescribed medication but was forced to do so through his own health coverage and at his own expense. A typical snapshot of his difficulties is contained in Dr. Velky's progress notes for the visit of 5/27/15:

"This is a chronic problem. The current episode started more than a year ago. The pain is at a severity of 8/10. The pain is severe. The pain is the same all the time. Stiffness is present all day." (R. p. 308).

Dr. Velky's record of that visit also contained the following notes:

"Musculoskeltal:
Right hip: He exhibits decreased range of motion and tenderness.
Left hip: He exhibits decreased range of motion and tenderness. (R. p. 307).

After ordering an MRI of the lumbar spine Dr. Velky recorded the result, as follows:

"CLINICAL INDICATIONS: lumbar back pain .... Reason for Exam: lumbar back pain Comparison: CT scan 4/15/14 Findings: Conus is at the superior endplate of L1. Slight levoscoliosis is seen. Anterior osteophyte formation is seen at L1-L2. Broad-based noncompressive disc bulge is present at the L1-L2. At the L2-L3 broad-based disc bulge is seen with a small right paracentral *annular rent* and disc protrusion best seen on the axial T 2-weighted images/ Broad-based noncompressive disc bulge at the L3-L4. Central noncompressive disc bulge at the L4-L5. Decreased disc at L5-S1 with broad-based disc bulge extending into both neural foramina with subtle indentation of the exiting nerve roots bilaterally. Diffuse hypertrophic changes of the articulating facets are seen however no spinal cord stenosis. Impression: Diffuse degenerative disc disease with osteoarthritic changes of the articulating facet more prominent at the L5-S1." (emphasis added) (R. p. 309).

With the advantage of hindsight of over 10 years as the Appellant's physician, Dr. Velky, the *authorized treating physician* (R. p. 137, lines 8-25; p. 138, lines 1-16), was in the best position to assess the Appellant's health history, the changes thereto caused by the accident, the resulting work disability, and the need for further treatment. He verified that there were no pre-existing musculoskeletal problems (also verified, *inter alia*, by the Georgia Regents Hospital records). (R. p. 363). His summary letter of September 12, 2016, is succinct and definitive:

"I have been Freddie Tarver's primary care physician for about 10 years. During this time frame he was healthy and active, working a full time labor job and a part time plumbing job. He had problems with hypertension and elevated cholesterol.

After the accident of April 15, 2014, I noticed significant changes in his overall health. In addition, I've noticed significant residual issues particularly with ongoing complaints of low back pain. Prior to the accident, I do not recall any medical complaints or treatments related to his back.

Some of these issues are residual. I had to refer him to pain management with Dr. Stewart as I am no longer able to write prescription pain medications. Furthermore, I've noticed deterioration and (sic.) Mr. Tarver's overall health since the accident of April 15, 2014. To

a reasonable degree of medical certainty Mr. Tarver is most probably totally and permanently disabled from any full-time gainful employment." (R. p. 310).

On January 26, 2016, a vocational assessment of the Appellant was performed by Glen K. Adams, MRC, CRC, CEES. After extensive testing and review of all of the Appellant's pertinent medical records, employment history, and educational records Mr. Adams, in his evaluation dated February 8, 2016, (R. pp. 317-26), arrived at the following salient conclusions: that the Appellant could not complete mainstream education beyond the sixth grade, that he has a 1.5 grade spelling ability and a 2.7 grade math ability, that "Mr. Tarver is unable to engage in employment that requires reading comprehension and math," "that Mr. Tarver is essentially functionally illiterate," and "that he elected to retire rather than face the prospect of not being able to perform his required work duties and the expected consequences." He went on the observe, "It is evident that Mr. Tarver's work ethic was a source of self-esteem and that he took pride in being able to contribute financially to his family in spite of his significant academic weaknesses." (R. p. 326). The sum total of Mr. Tarver's unfortunate residual condition is contained in Mr. Adams's final summary:

> "Based on the work statement provided by Dr. Westerkam, Mr. Tarver is unable to resume his employment as a water maintenance worker. Taking into consideration the subsequent FCE and clinical evaluation by Dr. Hutcheson, Mr. Tarver's work capacity is classified as 'limited light'. He is unable to engage in a full range of 'light' work. A transferrable skills analysis was conducted utilizing OASYS to determine the presence of transferrable occupations based on Mr. Tarver's vocational profile. No relevant occupations were identified through this analysis. Therefore, Mr. Tarver's residual labor market consists of any remaining employment classified as 'unskilled'. Mr. Tarver does not possess the skills, knowledge or abilities to engage in any employment similar to his past work. Given his significant vocational weaknesses, combined with his functional limitations, he is unable to engage in any employment within the Office, Sales or Production industries. No residual labor market remains for jobs within the Building and Grounds Cleaning and Maintenance industry, as these jobs require physical abilities that Mr. Tarver does not possess. No residual 'unskilled' occupations were identified for which Mr. Tarver qualifies. He has incurred a total loss of access to the competitive labor market. He is classified as **totally**

vocationally disabled as a result of injuries sustained on April 15, 2014 while working for Beech Island Rural Community." (emphasis original). (R. p. 326).

The Respondents obtained their own vocational assessment by Jan Westmoreland of The Directions Group, Inc., whose report dated March 16, 2016, differs almost imperceptibly from that of Glenn Adams. Specifically, Ms. Westmoreland's testing found that Mr. Tarver had a BETA IQ of 70 (R. p. 333), that his Word Reading score was a 2.8 Grade Equivalent, that his Sentence Comprehension score was a 3.2 Grade Equivalent, and that his Math Computation score was a 2.2 Grade Equivalent. She concluded that, "His test results indicate an IQ representing 'borderline' intelligence." When calculated to include "Standard Error of Measurement" she concluded that Mr. Tarver's IQ range was "61 through 79 (extremely low to borderline)." (R. p. 334). As to his physical abilities, Ms. Westmoreland stated, "After review of medical reports and *my clinical interview*, Mr. Tarver's physical capacity range appears to fall within the *sedentary to light physical demand work capacity*." (emphasis added) (R. p. 335). The only slight deviation by Ms. Westmoreland from Mr. Adams's assessment that Mr. Tarver is completely unemployable is that Ms. Westmoreland purports to carve out a small niche for Mr. Tarver for menial either part-time employment or full-time employment, but she failed to define which were which in her survey of available jobs in the local area although the nature of the jobs (movie theater ticket taker, e.g.) sounded suspiciously like part-time jobs. But in any case, she opined that he could "anticipate earning from $7.25/hour to $8.00/hour (R. p. 338), which rate, it should be noted, would represent a huge diminution in income from the $25.37 he was earning per hour based on 40 hours per week (per Respondents' Form 20 calculation of an average weekly wage of $1,037.49). *Her opinion notwithstanding, the overwhelming preponderance of the evidence compels the conclusion that Mr. Tarver does not have*

the physical endurance even for the jobs she cited, nor were those jobs found to exist when the Appellant and his wife sought access to them.

Under the law of South Carolina a claimant is entitled to elect benefits under the wage loss model, rather a scheduled benefit, where more than one body part has been *affected* by his accidental injuries. Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960); Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002). Further, it is well settled that the Workers' Compensation Act is to be liberally construed in favor of the injured claimant unless otherwise prohibited. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). As has been held in a long succession of cases from both of our appellate courts, employees who because of a work injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled, even notwithstanding some nominal earning capacity. The term "disability" means 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. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996); McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (1989) ("Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial." 300 S.C. 107, 386 S.E.2d at 474). See also Eaddy v. Smurfit-Stone Container Corporation, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003). Disability in workers' compensation cases is to be measured by loss of earning capacity. Total disability does not require a finding of complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for other employment. Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43 (1965). Here, the Appellant is of advanced age (58 at the time of the accident, 60 at the time of the first

hearing), reached only the sixth grade before being diverted to vocational education and has only a second grade equivalent education level as determined by both vocational experts, is "functionally illiterate" according to vocational expert Glen Adams, has no job experience other than heavy manual labor including during his 28 years with the Employer, has serious permanent impairments to multiple body parts that prevent him from performing heavy labor, has no transferrable skills or the ability to gain any, and has had no success with applications to even those employers who were alleged to be offering menial work in his geographic area. With the totality of these negative employment factors he is in fact totally and permanently disabled under § 42-9-10. If for any reason the Court should conclude he is not totally and permanently disabled, then by virtue of all medical opinions in the record the Appellant should be deemed permanently partially disabled under § 42-9-20, as even Dr. Westerkam, the Respondents' IME doctor and their sole informant, found that he could not perform the heavy labor that had been required for virtually all of his duties. In sum, the record contains no evidence that challenges the conclusions of the Appellant's doctors concerning his permanent disability resulting from his multiple accident-related injuries and therefore provides no support for the findings of the Commission denying permanent partial or total general disability.

The Appellate Panel erred in upholding the Hearing Commissioner's failure to make an award for the lower extremities when the uncontroverted evidence verifies that the Appellant sustained a 5% permanent disability to each lower extremity as a result of the accident-related injuries. (encompassing ISSUES ON APPEAL numbered 3.)

As detailed above, the FCE performed on April 23, 2015, just one month after the Appellant resigned, the Appellant underwent an FCE at Columbia Rehabilitation Clinic. This evaluation took into account the many causally-related deficits he was experiencing in his lumbar spine, pelvis, buttock, hips, and both anterior thighs, specifically including limited range of motion in the hips and

lumbar region, symptoms also verified by Dr. Westerkam. The net result was a 5% permanent impairment rating for each lower extremity. (R. p. 339-41). Thereafter, on December 29, 2015, Dr. Justin K. Hutcheson diagnosed work-related injuries resulting in pain in the low back and hips radiating to the right upper thigh. He noted "very limited flexion and internal/external rotation both hips." He assigned an impairment rating of 5% to each lower extremity "due to limited hip flexion range of motion." (R. p. 313). These uncontroverted findings were also documented by Dr. Velky, the authorized treating physician, as excerpted above. Thus, the Panel erred as a matter of law in failing to make an award for the lower extremities.

The Commission's calculation of the Appellant's average weekly wage should have carried out the overiding goal of compensating injured workers on the fairest possible basis under S.C. Code Ann. § 42-1-40 by allowing his outside income to be included. (Encompassing ISSUES ON APPEAL numbered 4.)

The Appellant earned a comparatively small amount of income outside his regular employment with the Employer. For tax year 2013, the year immediately preceding the year of his accident, he duly filed his tax return and paid his taxes on that income. The Respondents were provided that tax return for the purpose of including that income in the calculation of the Appellant's average weekly wage and compensation rate and never raised an objection that it had to be presented to them on a Form 20. While the Appellant concedes that Regulation 67-1603 (H) does include that procedural requirement, it is respectfully submitted that § 42-1-40 has always been interpreted as providing "an elasticity or flexibility with a view to always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." Forest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007); Stephenson v. Rice Services, Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). As stated in Pugh v. Piedmont Mechanical, 396 S.C. 31, 39, ,719 S.E.2d

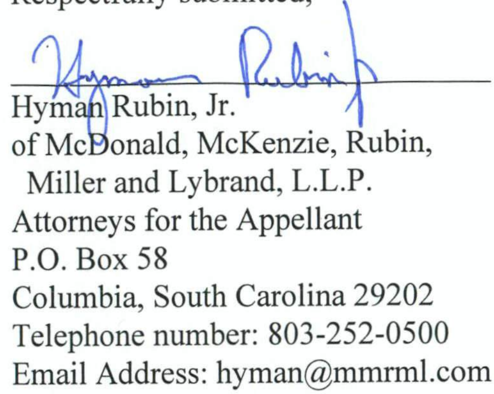
676, 681, (Ct. App. 2011), "The prevailing goal and policy of section 42–1–40 is to use the method that will fairly compensate the employee 'for reductions in their earning power caused by work-related injuries.' " The two alternatives here are to completely exclude the outside wages or to include them on the basis that it would fairer to all concerned to include earnings that were in fact reported and taxed, as well as provided to the other parties well in advance of the hearing. The reasoning of the Court of Appeals in Lewis v. L.B. Dynasty, 2015 WL 4137999 (reversed on unrelated grounds), suggests that in a case such as this there should be a distinction as against those cases where no reliable, documented evidence has been produced. Specifically, the court noted that if a tax return had been submitted, as was done in Steele v. Self Serve, Inc., 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999), the court might be inclined to overlook the administrative shortcoming in favor of fundamental fairness under the Act. It is respectfully submitted that pursuant to S.C. Code Ann. § 42-1-40 fairness and justice would best be achieved by incorporating the Appellant's verified outside income, duly documented by his 2013 tax filing (R. p. 366-67) in order to avoid a harsh result.

CONCLUSION

For the reasons stated hereinabove and under the applicable statutory and case law it is respectfully submitted that the Order of the Hearing Panel, upholding in full the Decision and Order of the Hearing Commissioner, wrongfully denied the Appellant general disability benefits under S.C. Code Ann. § 42-9-10 or § 42-9-20. The Appellant's numerous serious injuries have left him with multiple body parts that are permanently impaired and/or permanently adversely affected by those injuries, and he is totally and permanently disabled under the former statute or alternatively

permanently partially disabled under the latter based on the uncontroverted lay, medical, and vocational evidence.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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JAN 23 2020
SC Court of Appeals

Appellate Case No.: 2019-000886

Freddie Tarver, Claimant, ... Appellant,

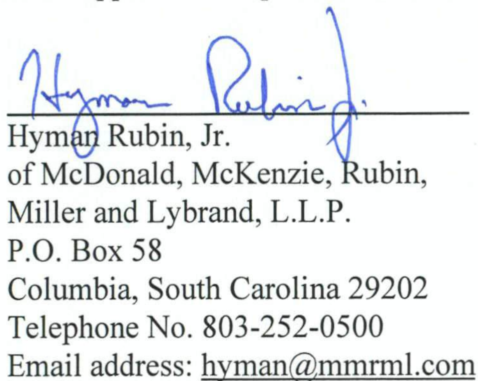
v.

Beech Island Rural Community, Employer, and

Auto-Owners Insurance Company, Carrier, ...Respondents.

CERTIFICATE OF COUNSEL

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



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