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.

REPLY BRIEF

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1. 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 and medically 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.

The Respondents assert that "no physician prior to Tarver's retirement ever viewed his post-injury limitations to be so significant as to render him permanently and totally disabled." (Respondents' Brief at page 5). The argument is based on two incorrect premises: that such an opinion relating to employability must come solely from a doctor, and that the pertinent medical analysis must be of record *prior* to the last day of employment. Not only are the premises incorrect under the law but in addition the Respondents, in so contending, have disregarded the critical fact of Dr. W. Daniel Westerkam's evaluation that the Appellant, by virtue of his impairments and restrictions, could no longer carry out the undisputed heavy labor requirements of his job. That assessment, made by the Respondents' hand-picked physician, was in fact rendered *three months before* the Appellant's work ended. To add insult to injury, the Respondents, who were in sole possession of Dr. Westerkam's report of impairments and limitations, never shared that information with the Appellant and even now in effect assert that there was no such medical opinion. In their Brief at page 6 they state, "Tarver acknowledged that at the point he made the decision to retire, he did not have any kind of note or excuse from a doctor indicating that he was no longer able to do the

work."

Also directly apropos of the Respondents' temporal argument, the uncontroverted Functional Capacity Evaluation of Tracy Hill was rendered *less than one month after the Appellant's last day at work*, which is hardly a meaningful gap in time. And, Dr. John Velky, who was both the authorized treating physician and the Appellant's personal physician for more than ten years and was the only medical provider who knew of and opined on the totality of the injuries and their aftermath, stated in his note of May 27, 2015, *exactly two months after the Appellant's last date of employment*:

> "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. Stiffness is present all day." (emphasis added) (R. p. 308).

Nor was Dr. Justin K. Hutcheson's uncontroverted assessment (R. p. 313) temporally suspect simply because it came several months after the end of the Appellant's job inasmuch as his evaluation relied upon and adopted the very timely FCE cited above, *and* there is no probative evidence anywhere in the record to support any change of condition in those few ensuing months.

In their Brief at pages 6 and 10 the Respondents attempt to establish a post-retirement worsening of condition derived solely from pure speculation extrapolated from the following question and answer (R. p. 175, lines 21-25):

> Q. [D]o you think that the activities you were engaged in at work may have helped you to avoid that type of situation [deteriorated condition] and that sitting at home in your retirement maybe aggravated it?
>
> A. *Could be.* (emphasis added)

The Respondents' rank speculation, based on a question posed as a possibility ("may have") and answered with a possibility ("could be") yields no probative evidence and in fact flies in the face

of all of the medical and lay evidence in the record, which evidence *is* probative on the issue of what his condition really was during the last months of his employment.

The Respondents argue at page 8 of their Brief that "despite his having retired from his job at Beech Island, Tarver continued to run his own plumbing business and continued his ministry work through his church." However, his tax return for tax year 2013, the year next preceding his year of injury, reveals that he sustained a **loss** in the amount of $177 from his plumbing business and income from his ministry in the amount of only $950, the latter having ended by the time of the hearing (R. p. 177, lines 13-16). At the time of his accident he was earning from Beech Island, at a minimum, $60,000 a year. By the Respondents' own reckoning, as cited in their Brief at page 9 from Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003), "Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their normal earning capacity." It is unclear how reference to those earnings support a "normal earning capacity"and negate the Appellant's entitlement to total and permanent disability. Also of interest is that while the Respondents argue for the inclusion of those sideline wages to demonstrate residual earning capacity they vigorous oppose their inclusion to arrive at a fair average weekly wage.

At page 10 of their Brief the Respondents urge that the issue of disability based on the wage loss model was not substantially argued by the Appellant in his Brief and was therefore abandoned. Not only was that issue explicitly set forth (at page 18) ("Under the law of South Carolina a claimant is entitled to elect benefits under the wage loss model, rather than a scheduled benefit, where more than one body part has been *affected* by his accidental injuries,"), but it was also extensively argued and voluminously documented with facts and law. The case advanced by the Respondents,

Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991), is wholly inapposite. There, the Plaintiff both failed to raise an exception and failed to argue the issue in question but instead simply mentioned it in a single sentence without argument or supporting authority. In Williams v. Leventis, et al, 290 S.C. 386, 350 S.E.2d 520 (Ct. App. 1986), cited with approval in Matthews, this Court noted that the Plaintiff had effectively abandoned an issue where he had offered only a single sentence in the formal conclusion of his brief "not supported by any authority whatsoever." 290 S.C. at 390, 350 S.E.2d at 523. That is distinctly not the case here. The wage loss claim has been continuously asserted at every level of the proceedings starting with the Form 50, then before the hearing before the single commissioner, then before two appellate panels, and now in this Court as cited above.

2. The Appellate Panel erred as a matter of law 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 meaningful full-time employment.

If for any reason the Court should conclude the Appellant 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. On December 10, 2014, while the Appellant was still working for the Employer, the uncontroverted 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 heavy labor in the job market.* The Appellant's routine heavy manual labor duties included operating a jack hammer, operating a backhoe, lifting

pipes and water meters weighing between 100 pounds and 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 regularly required heavy lifting, pulling, pushing, bending, climbing, stooping, and twisting–all of which Dr. Westerkam's IME as well as all subsequent medical opinions ruled out because of the causally-related residuals. (R. p. 141, lines 21-25; p. 142-43; p. 144, lines 1-2). 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 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." (Resp. APA #2, pp 6-7, R. p. 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, Dr. Westerkam did not recommend nor did the Respondents seek 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's limitations do not cause him to be further injured or cause injury to co-workers. 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, 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 decision to end his employment 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

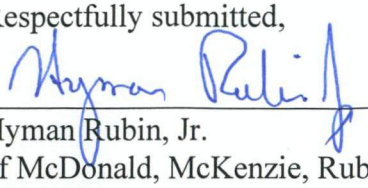
Respondents' hands while the Appellant, whose life's habit was to work hard and never complain, was forcing himself through the full range of heavy duties. In so doing, he suffered during the work day but even more after work and during the night despite his ongoing regimen of pain medication and muscle relaxers initially prescribed by the hospital physician and thereafter carried forward by the authorized treating physician. (R. p. 129, lines 4-25; R. p. 130, lines 1-2; R. p. 131, lines 18-25; R. pp. 132-36). 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 § 42-9-20. See Stephenson v. Rice Services, Inc., 323 S.C 113, 473 S.E.2d 699 (1996); Clemmons v. Lowe's Home Center, et. al., South Carolina Supreme Court, 420 S.C. 282, 803 S.E.2 268 (2017).

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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CERTIFICATE OF COUNSEL

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

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