THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Case No.: 2012-213610

Norge L. Gonzalez-Torres.....Appellant,

v.

World Fiber Technologies, Inc. and The Standard Fire Insurance Company, c/o Travelers.....Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

The Appellant, Norge L. Gonzalez-Torres ("Gonzalez") writes this Reply Brief to address Argument III from the Respondent's Brief. The Respondent argued that "[t]he Workers' Compensation Commission correctly determined that Appellant sustained 12% permanent partial disability to the back in accordance with the substantial evidence on record." (Respondent's Br., p. 10). Gonzalez presents this Reply Brief to further address this issue, and argues that the Commission erred in granting Gonzalez a 12% permanent partial disability award when the Commission mechanically translated Dr. Scharf's 12% impairment rating into a 12% disability award, while improperly disregarding other available evidence regarding the character of Gonzalez's injury.

In South Carolina, Workers' Compensation claimants are entitled to a monetary award if they suffer a permanent disability. The Workers' Compensation Act defines disability as "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." S.C. Code Ann. § 42-1-120 (2013). In this case, the Commission issued its award under § 42-9-30, which allows compensation for scheduled members. S.C. Code Ann. § 42-9-30 (2013). "Loss of earnings is not required for recovery under this section; compensation is based on the character of the injury." *Bateman v. Town & Country Furniture Co.,* 287 S.C. 158, 160, 336 S.E.2d 890, 891 (Ct. App. 1985) (citing *G.E. Moore Company v. Walker,* 232 S.C. 320, 102 S.E.2d 106 (1958)).

South Carolina courts have further set forth the standard for computing a permanent partial disability pursuant to § 42-9-30:

> Unless the question of the extent of partial loss of use under Code § 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. The extent of loss of use need not be shown with mathematical precision. Nevertheless, the award may not

> rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis.

Linen v. Ruscon Constr. Co., 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) (citing *Bundrick v. Powell's Garage,* 248 S.C. 496, 151 S.E.2d 437 (1966)). In its brief, the Respondent argued that reliance on *Linen* was improper because a better case existed for the determination of permanent partial disability to the back, *McLeod v. Piggly Wiggly,* 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984).

In that case, a complicated series of facts led to the Commission awarding a 25% permanent partial disability to the back; the employer/carrier appealed this award. *McLeod v. Piggly Wiggly,* 280 S.C. 466, 471, 313 S.E.2d 38, 40 (1984). The claimant was born with a birth defect in his back, injured his back twice in two separate car wrecks before his work injury, and had already brought a Workers' Compensation claim against a previous employer for a back injury. *Id.* at 469, 313 S.E.2d at 39. The only evidence presented regarding the claimant's disability was lay testimony from the claimant himself and a non-expert opinion from a general practitioner. *Id.* at 471, 313 S.E.2d at 40-41. Considering the "area of the body, the congenital defect and the type of injury sustained," the Court ruled that the determination of disability required "a higher degree of expertise than was presented to determine the degree of partial loss of use." *Id.* at 471, 313 S.E.2d at 41 (the Court determined that the type of injury was "was one of disc degeneration reflecting the cumulative effect of successive injuries," *Id.* at 470, 313 S.E.2d at 40).

The Respondent argued that *McLeod* "clearly demonstrates that the back is a more complicated area of the body, and therefore, calculation of permanent partial loss of use to the back requires medical expert testimony and cannot be based on lay testimony alone, especially when that testimony contradicts the only available expert medical

evidence in the record." (Respondent Br., p. 11). Gonzalez submits that *McLeod* does not stand for that proposition, but rather stands for the proposition that when complicating factors are present in a case, like the presence of cumulative degenerative injuries and congenital birth defects, something other than the opinion of a general practitioner is needed to precisely determine disability. The Respondent is able to cite no direct authority for the proposition that the back requires an additional level of expert testimony, and the back is included in the list of scheduled injuries with the same burden of proof as any other injury. S.C. Code Ann. § 42-9-30 (2013).

In making the argument that the back is a technically complicated area on which factors other than an impairment rating should not be considered, the Respondent has constructed a straw man argument to make it seem as if Gonzalez has pitted his own lay testimony against the expert medical opinion of Dr. Scharf. Gonzalez never made such an argument, and believes that Dr. Scharf's medical opinion is crucial to the determination of this case. The problem with Dr. Scharf's opinion is that it is based on the AMA Guides, which provide at best an incomplete picture of Gonzalez's disability. At worst, the AMA Guides are wholly inadequate for the purposes of determining work-related disability.

The Respondent has further argued that because the "Appellant testified that he even never [sic] tried to return to work after being released by his doctor (Hr. Tr. p. 20, lines 16-19), and therefore he failed to satisfy the burden set forth in *Shealy.*" (Respondent Br., p. 11). *Shealy* involved a claimant who sustained a work-related injury and was fired ten days later, despite not missing any time from work after the injury. *Shealy v. Algernon Blair, Inc.,* 250 S.C. 106, 109, 156 S.E.2d 646, 647 (1967). The

Commission ordered "the employer to pay compensation at the maximum weekly rate for total disability . . . ." *Id.* at 109, 156 S.E.2d at 648. However, the court noted, the Commission "did not declare the extent of his Incapacity, if any, to earn such wages after the injury. Nor did it determine the average weekly wages which claimant was Able to earn after his injury." *Id.* The Court held that these facts were "essential findings" for the purpose of determining whether the claimant suffered a "compensable disability." *Id.* at 109-10, 156 S.E.2d at 648. Without any evidence of these facts in the record, the claimant was not entitled to a finding of disability. *Id.* at 113, S.E.2d at 649-50.

As the Respondent noted, the Court did determine that "[t]he burden of proving causation rested upon claimant. This burden could be met only by evidence that claimant had made reasonable efforts to obtain employment and had failed because of an injury produced handicap." *Id.* at 113, 156 S.E.2d at 649. However, the sentence before that passage reflects that the Court's inquiry concerned whether or not the claimant was entitled to a compensable disability, not the extent of that disability: "[The claimant] is not entitled to compensation unless his periods of unemployment were attributable to an injury produced limitation on, or impairment of, his capacity to work." *Id.*

Essentially, *Shealy* turned on the issue of whether the claimant had met the threshold for any disability award to be issued after his termination, not the *degree* of that disability. In this case, Gonzalez suffered from an admitted injury; the Respondent long ago conceded the right to contest whether the Gonzalez had suffered from a compensable disability, only reserving the right to contest the extent of that disability. Furthermore, Gonzalez has already been issued a disability award by the Commission, and that finding was unappealed by the Respondent. That finding is now final, and Gonzalez's threshold

entitlement to a disability award of some kind is not at issue on this appeal; rather the degree of that disability is the inquiry at hand.

The Respondent's contention that Gonzalez has failed to seek meaningful work is irrelevant, because the Commission is required to examine the "character of the injury," not whether Gonzalez sought work or suffered from a loss of earnings. *Bateman* at 160, 336 S.E.2d at 891. Precisely how *Shealy* guides this Court in determining the degree of Gonzalez's disability in this case is not clear from the Respondent's brief, and the Respondent has failed to link the essential holding of *Shealy* to the facts of this case.

Instead, this case concerns the troublesome practice of the Commission in allowing Dr. Scharf's 12% impairment rating to stand in for an award of disability. Rather than conduct additional fact-finding into the character of Gonzalez's injury, based on the evidence in the record, the Commission mechanically translated the impairment rating into a disability award. This legal conclusion is problematic for several reasons.

Because of his injury, Gonzalez was found to function at a light duty work capacity despite previously working a heavy duty job (APA Submission, p. 26), suffers from a severe loss of range of motion (Gonzalez Deposition, p. 19-20; Hearing Transcript, p. 18), received an expert medical finding that he had lost *50% of the use of his spine* (APA Submission, p. 19), and is unable to perform activities involving bending or manipulation of the spine (Gonzalez Deposition, p. 19-26; Hearing Transcript, p. 14-18). While these factors are significant in determining the character of Gonzalez's injury (and thus his disability), they are not included in his 12% impairment rating, which is based on either a Diagnosis-Related Estimates method or a Range of Motion method. American Medical Association, Guides to the Evaluation of Permanent Impairment 381-

384, 398-404 (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2000) (hereinafter AMA Guides). Dr. Scharf did not state which method he used in determining Gonzalez's impairment rating. (APA Submission, p. 19).

Gonzalez would urge this Court to see the 12% disability award for what it truly is: Dr. Scharf has been granted the authority, via the Commission's rubber stamp, to determine Gonzalez's disability, which became final as soon as Dr. Scharf issued his report. In its Order, the Commission gave virtually no consideration as to how the impairment rating plays into a better understanding of the character of the injury. Gonzalez cited extensively to the AMA Guides in his Appellant Brief, and the Respondent ultimately conceded that an impairment rating and a finding of disability are two very different things. (Respondent Brief, p. 11). The Respondent is not the only one to have noted the discrepancy; both the AMA Guides itself and legal commentators go to great lengths to point out the differences between the two.

As noted in Gonzalez's Appellant Brief, the AMA Guides take pains to note that they should not be used for a determination as to a patient's ability to work:

> [Impairment ratings] reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL),** *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work,* as listed in Table 1-2.
>
> AMA Guides 4 (emphasis in original).

The authors of the AMA Guides give further reasoning for their decision not to equate impairment with disability:

> Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involved many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age education and prior work experience to determine the extent of work disability. . . . As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

AMA Guides 5.

The AMA Guides are used so extensively in Workers' Compensation claims because they allow Workers' Compensation Commissions "to ground workers' compensation in objective health status, scientifically determined by experts, with the mushy sociolegal factors peeled away." Martha T. McCluskey, *How the Biological/Social Divide Limits Disability and Equality,* 33 Wash. U. J. L. & Pol'y 109, 131 (2010) (hereinafter *Divide*). These so-called 'mushy' factors still remain a part of our state's Workers' Compensation law, because the Commission is required to examine the character of the injury, essentially the impact of the injury on the claimant's ability to work. However, "the AMA Guides continues to reinforce and privilege the idea of a core objective biological status measurable apart from these subjective and tangential social actions (activities and participation)." *Id.* at 132. Therefore, in addition to contention of the AMA Guides authors that impairment ratings should not stand in for disability determinations, the AMA Guides appear woefully inadequate to do so.

In this case, the Commission has allowed an impairment rating to stand in for a determination of disability, without considering the additional factors, precisely because it is both easy and simpler. "With disability . . . the biological or scientific core status has

meaning only in relation to functioning in a particular social, economic, and political context. Indeed, the concept of 'medical impairment' seems primarily useful as a strategy for removing contested judgments about disability from political, social, and legal scrutiny." *Id.* at 134.

Despite the perception that impairment ratings simplify the determination of disability in Workers' Compensation cases, the AMA Guides are actually inadequate for this purpose:

> By presenting a highly technical and seemingly scientific numerical rating of biological status, the AMA Guides' ratings serve to skew disability determinations even if those determinations supplement the ratings with socioeconomic evidence. The thing most understandable about "impairment" is that it is supposed to be "more objective" than claims of work disability. The AMA Guides' impairment ratings mainly function to prove that work disability is a suspect status produced by subjective attitudes and behavior that must be sharply limited and only grudgingly rewarded.
>
> *Divide* at 142.

The AMA Guides is also problematic for determining disability because it is unable to account for the factors that are so important in determining an employee's ability to perform work:

> In short, 'impairment ratings' are largely ratings of non-work disability that then become presented as an 'objective' basis for evaluating work disability. In effect, the impairment ratings assume a standard of 'normal functioning' based on a person who *does not normally include wage work among their daily activities*--or a normal person for whom work activities make no significant bodily demands beyond those encountered in nonwork activities.

Divide at 139-40 (emphasis added). An example can better illustrate this problem:

> In the classic (though atypical) example, direct use of the *AMA Guides* to determine disability benefits means that the bank president who loses a finger but has no resulting lost income would receive the same benefits as the pianist whose lost finger renders her permanently and totally disabled--

> because both would receive the same percentage whole-person impairment rating.

Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 Rutgers L. Rev. 657, 833 (1998) (hereinafter *Illusion*). In short, the AMA Guides simply have no mechanism to capture the deep and rich understanding of an injury's impact on a claimant's ability to work. Instead, they attempt to solve this complicated problem with expediency at the expense of accuracy by setting forth a hard and fast set of rules that its own authors admit are flawed when determining disability.

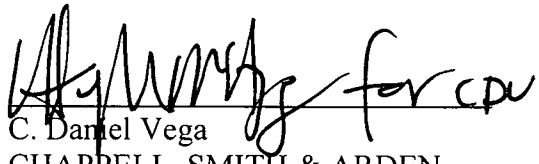
Ultimately, the problems in this case are clear. First, the Commission has allowed Dr. Scharf's impairment rating to stand in as a disability determination, by mechanically translating the impairment rating into a disability award. Second, in doing so, the Commission failed to evaluate or account for the character of the Gonzalez's injury, in the form of determining how the loss of the use of his back has affected his ability to work. And finally, despite the numerous medical and sociological flaws within the AMA Guides when it comes to determining disability, the Commission has relied heavily on the AMA Guides in doing just the thing that its authors warn against and commentators have shown to be faulty.

Gonzalez preys that this Court carefully consider the applicable legal standards as well as the evidence from the record, both of which indicate that Gonzalez is entitled to a disability award in excess of the 12% permanent partial disability award granted by the Commission. Furthermore, Gonzalez preys that this Court issue an Order requiring the Commission, in all cases of permanent partial disability, to account for all of the facts in the record and their effect on the Gonzalez's disability, especially when the Commission has granted a disability award equal to an impairment rating issued by a Doctor. The

practice of translating impairment ratings into disability awards is deeply flawed, because the AMA Guides are inadequate to determine disability and more importantly because South Carolina's legal standards require more than just an impairment rating in determining disability.

Respectfully submitted,

April 24, 2013



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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant on Defendants/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2012, addressed to their attorney of record, LeAnne McCormick, 4500 Ft. Jackson Blvd., Columbia, SC 29209.

April 24, 2013

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