THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-000090

Randall Dalton, Employee,..……..……..... Appellant,

v.

The Muffin Mam, Employer,
and Amerisure Mutual Insurance Company, Inc., Carrier,…….....Respondents.

REPLY BRIEF OF APPELLANT

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I. RESPONDENTS' ARGUMENTS CONFIRM THE EXISTENCE OF SHELTERED EMPLOYMENT UNDER SOUTH CAROLINA LAW

A. Respondents' recitation of North Carolina law is misplaced

Appellant has never argued that South Carolina should adopt North Carolina workers' compensation law's methodology of determining whether an employee who is receiving wages is totally disabled. In the single paragraph acknowledgement of North Carolina's recognition of the doctrine of sheltered employment in Appellant's brief, Appellant merely notes that South Carolina workers' compensation law germinated in North Carolina Workers Compensation soil, and North Carolina's workers' compensation law recognized that a claimant who is receiving wages can nevertheless be totally disabled, *i.e.,* receipt of wages is not dispositive of whether a claimant is totally disabled. South Carolina's definition of economic-based disability, a definition that Respondents entirely fail to analyze, is derived, as it must be, from the total disability statute, S.C. Code Ann. § 42-9-10 (2007).

South Carolina's definition of total disability based on the economic model has always held that a claimant is statutorily disabled when the services that he can offer are "so limited in quality, dependability, or quantity that a ***reasonably stable market*** for them does not exist." *Wynn v. Peoples Natural Gas Co.*, 238 SC 1, 118 SE2d 812 (1961) (emphasis added). *Wynn* cited *Lee v. Minneapolis St Ry. Co*., 41 N.W.2d 433 (Minn. 1950), a Minnesota case that elucidates that the basis of economic disability is generally the ability of an injured employee to compete in the marketplace for wages. The *Lee* Court held that:

> although an injured person may be able to perform some parts of his occupation, he may be held to be totally disabled if he is unable to perform the substantial and material parts of some gainful work or occupation with reasonable continuity. This rule *can only mean that the injured employe [sic] must be in such condition that* ***prospective employers*** *will normally and reasonably be willing to hire him despite his handicaps*.

Id. at 316, 434 (emphasis added). As the *Lee* Court highlights, therefore, total disability does not focus on present receipt of wages but on "prospective" employment potential.

The absence of any analysis of South Carolina's statutory definition of "disability" in Respondents' arguments is telling. Instead of looking at South Carolina's definition, Respondents focus their analysis on *Peoples v. Cone Mills Corp.*, 316 NC. 426, 342 SE2d 798 (NC 1986) and allege that it stands for the proposition that an employer's providing wages creates a "rebuttable presumption" of a claimant's capacity to earn wages. The Appellate Panel's Order did hold that Appellant had failed to establish disability under *Peoples*, an analysis that is not identical to whether Appellant can establish disability under the pertinent standard found at S.C. Code Ann. § 42-9-10 and as analyzed in Appellant's Brief.

Nevertheless, assuming, *arguendo*, that South Carolina were to adopt the methodology found in *Peoples*, it should be noted that the case at bar is less distinguishable from *Peoples* than is alleged by Respondents, and the substantial evidence in the record would require a finding that Appellant met the *Peoples* standard. As Respondents note, the employer in *Peoples* "modified an existing [. . .] position." 316 NC at 428, 342 SE 2d at 801. The North Carolina Supreme Court specifically held that this modified version of an existing position was one that the claimant "*was capable of performing*," but that such "tendered employment, as a matter of law, is no indication of [claimant's] ability to earn wages. Disability is defined by the Act as impairment of one's earning capacity rather than physical disablement." *Id*. at 434, 801. The *Peoples* Court went on to explain why "post-injury earnings of an employee may under some conditions not accurately reflect the employee's earning capacity" by asking questions including "*How long will employer continue to employ claimant if his condition remains unchanged? What would become of claimant if employer should not continue his business? Must claimant continue to be employed by the same*

employer against his will in order to receive payment of compensation . . .?" *Id*. at 436, 805 (quoting *Branham v. Panel Co*., 223 N.C.233, 25 S.E.2d 865 (N.C. 1943) (italics in original). *Larson's Workers' Compensation Law*, in fact, explicitly recognizes that total disability may exist even when post-injury wages exceed pre-injury wages, as in the instant case: "[i]t is ***uniformly held***, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling ***or exceeding those received before the accident***." *Larson's Workers' Compensation Law* § 81.01[3] (2021) (emphasis added).

The *Peoples* Court favorably cited *Allen v. Industrial Comm*, 87 Ariz. 56, 347 P.2d 710 (1959). In *Allen*, an Arizona case, the claimant's job consisted "primarily of making scheduled calls on commercial accounts to sell tires, other equipment and services, and, at times, to change tires on automobiles or trucks belonging to customers." *Allen* at 58, 711. In *Allen*, the claimant was 36 years old and had permanent restrictions with the result that "his grip was weaker and more limited (it was estimated that the grip of his right hand was 35 to 40 pounds less than before the accident); his fingers were deformed and snapped when in use; and the dexterity of his fingers was reduced as the result of limitation of motion in his finger and knuckle joints." *Id.* at 58, 712. The claimant's doctor testified that the claimant "*could do the same work but not as well, as easily, as quickly or to the same degree as before the accident*." *Id*. at 59, 712. (emphasis added). The claimant's employer testified that the claimant would "have little or no chance to be employed by other similar companies" and that "his own company would in fact not hire a man in the condition of petitioner." *Id*. at 59, 711. The *Allen* Court outlined that the commission was required to look at "the employee's previous disability, his occupational history, the nature and extent of his physical disability, the type of work he is able to perform, wages received for work performed

subsequent to the injury, and his age at the time of the injury." *Id*. at 60, 713. The *Allen* Court concluded that the claimant's "wages may reflect not the employee's earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or to secure equivalent employment." *Id*. at 68, 718.

The *Peoples* Court did not hold that post-injury employment created a "presumption" of disability. Instead, it held that when an employer offers a job within the restrictions of an injured worked, "*[i]f the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive*, evidence of the employee's earning capacity." *Peoples* at 440, 807 (emphasis added). Accordingly, a job provided to a claimant with work-restrictions is not a presumption under *Peoples*; instead, it is merely "strong, if not conclusive" evidence. Most importantly, the evidence is only strong "if" that "proffered job is generally available *in the market*." That is, if the job a claimant is performing can only be performed with accommodations that are not generally allowed by the market, its existence does not create "strong" evidence of work capacity.

In the case at bar, Ronald Williams testified that a supervisor like Appellant would be "required physically to do all the same duties that a regular maintenance tech would do." (APA p. 326, ln 14-17). Mr. Williams thereafter testified, in an exchange with Appellant's counsel, as follows:

> Q. Okay. What about a person who could not – who had a restriction of never exerting more than 30 pounds of force? Would you hire that sort of person off the street?
>
> A. Probably not.

> Q. Okay. So, if he couldn't lift 30 pounds of weight, you don't think that person would be able to do the physical grind required for a maintenance tech. Is that what you're saying?
>
> A. If he couldn't do that with both arms, yeah. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do.
>
> Q. Okay.
>
> A. It depends on the individual.

APA p. 328-29, Williams. Dep. p. 13, ln 25 to p. 14, ln 13.

Although this employer representative makes the self-serving statement that he would hire any employee "who could do what he needed to do," he specifically concedes that he a person who applied for the job who could not lift 30 pounds with both arms would not be able to compete for a job with Respondent Employer. Respondents' 30(b)(6) designee, *in testimony that binds Respondents*, testified "I don't know if there's actually a lot of heavy lifting." The official position, to which Respondents are bound, therefore, is that they do not know how much lifting is required for any position in Appellant's department, and they produced no evidence of any position that existed within the company that would be available to a person who could not lift 30 pounds (Jermon Dep. p. 6, ln 19-23; APA p. 295; APA pp. 307- 315 Jermon Dep. Ex. 1 and 2). Instead, Respondents produced evidence that can only be interpreted to conclusively establish that Appellant was able to maintain employment only because he had accommodations that included a helper to assist him with physical activities that all similarly situated employees were required to perform as a condition of employment. As Respondents' Rule 30(b)(6) designee also testified, "When he started having his restrictions, we dialed that down, what he was able to lift." (APA p. 300; Jermon Dep. p 11, ln 22-23). The designee, when asked if a person off the street would be hired with respondent's restrictions, testified "I don't know that I can answer that questions as far as if he had just walked off the street." (APA p. 302, Jermon Dep. p. 13, ln 15-17). She thereafter

testified, "If there's anything that he can't do, as I said, somebody else has been able to take over for him." (APA p. 302-303, Jermon Dep. p. 13, ln 25 to p. 14, ln 1-2).

In the case at bar, the Rule 30(b)(6) deponent, *who bound Respondents with her testimony*, testified that Respondent Employer modified Appellant's job duties and allowed him to have assistance to perform the duties that all similarly situated employees were required to perform on their own. Accordingly, there literally exists *no relevant evidence, at all,* in the record that an individual of Appellant's age, education, past work experience, and physical restrictions would be employable with Respondent Employer or any other employer without accommodations. Based on the criteria outlined by both the *Peoples* Court in North Carolina and the *Allen* Court in Arizona, in order for any fact finder to conclude that a claimant retained the capacity to work, the record must contain an answer to what is ultimately the only relevant question in this case: ***What is the title of any job, as it actually exists in the labor market without accommodations, that a person of Appellant's age, education, past work experience, and post-injury physical abilities could perform?*** There is, literally and unequivocally, absolutely no evidence in the record that provides any answer to this question.

B. Testimony about Appellant's "value" to Respondent Employer is not a substitute for relevant evidence about Appellant's ability to compete for wages, *i.e.*, his "market value."

In a workers' compensation proceeding, the Commission's findings must be supported by "*competent evidence*." See, e.g., *Robinson v. City of Cayce*, 265 S.C. 441, 219 S.E.2d 835 (1975) (emphasis added). Competent evidence has been defined to encompass both admissible evidence and relevant evidence. See *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. Evidence is relevant under South Carolina law when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." South Carolina Rule of Civil Procedure 401. Apodictically, a statement may be a fact but not be competent evidence. Every case has a pile of factual materials that must be used to build a bridge across gulf between what is alleged and what must be proved. Only relevant evidence can act as a plank that forms part of the bridge. The size of the pile of factual material is irrelevant. In the case at bar, Respondents attempt to substitute volume for relevance. *In lieu* of engaging in an analysis of Appellant's ability to compete for wages in the marketplace, Respondents heap mounds of facts regarding Appellant's "value" to the Respondent Employer on the day of the Single Commissioner Hearing, and they place particular emphasis on Appellant's own lay testimony regarding his "value" to Respondent Employer. The Commission's findings also focus on the fact that Appellant is a "valued employee" because, although he has "major lifetime restrictions" he is "the only person who understands and knows the old equipment, and nobody else can do his job at the Muffin Mam." (Appellate Panel Order Finding of Fact #2). Even if Respondents could establish that, on the day of his Single Commissioner Hearing, Appellant was the most "valuable" employee in the history of the company, that fact would not be relevant evidence that could assist in determining the relevant issue in the case. The question at issue in the case is whether the Claimant could compete for wages in the marketplace if he lost the job he had on the day of the hearing. How valuable lay witnesses, including Appellant himself, thought he was in the context of his employment with a single employer at a single point in time cannot help to answer that relevant question. Claimant's value to Respondent Employer on the day of his hearing is not the relevant question; the relevant question is what his "market value" is, or, as South Carolina workers' compensation law denominates it—his "work capacity."

South Carolina law makes it abundantly clear that lay testimony about market value or work capacity does not rise to the level of being competent evidence and, by extension, cannot constitute substantial evidence. The Supreme Court of South Carolina stated in *Hutson v. South Carolina State Ports Authority*, 399 SC 381, 732 SE 2d 500 (2012), that such an analysis must be based on:

> two principles which form the lens through which we view this case. First is the guiding principle undergirding our workers' compensation system 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. Instead, an Award must be founded on evidence of sufficient substance to afford a reasonable basis for it.

Hutson at 387, 503. In *Hutson*, it was "undisputed that the claimant's admitted injury prevents him from continuing in his life's occupation as a crane operator. The sole question before us, therefore, is whether his injury will also prevent him from earning the same wages in another job." The Court then outlined the evidence in the case upon which the Commission's decision rested. The "evidence" in favor of the Commission's holding that the claimant could engage in other employment was his own testimony that he could open a restaurant because he was a good cook. *Id*. at 503, 388. The information in the record that the Court held constituted relevant and competent evidence, on the other hand, was an "employability evaluation report" from a vocational expert that stated that the claimant could not earn the same wages as he could before the accident. *Id*. at 384, 501. The Court went on to explain that testimony, even if it came from a claimant, must be set against expert opinion from a vocational expert when the issue in question was work capacity. *Id.* at 389, 504.

Thus, the test for disability based upon the general disability, or "economic," model found at S.C. Code Ann. § 42-9-10 and § 42-9-20 has always been a two-part test that looks first at the claimant's occupation and, second, at what his wages would be if he could no longer perform in

his occupation. Although Respondents do not concede in the case at bar that Appellant cannot maintain his current occupation as a maintenance mechanic, their witnesses concede, as noted above, that his restrictions would not allow him to perform the job functions required of all other maintenance mechanics without accommodations being made for him; accordingly, the relevant test in the case at bar, as in *Hutson*, is what other work Appellant could perform outside of the field of being a maintenance mechanic.

As the *Peoples* and *Allen* Courts both outlined, as summarized above, when a disability system looks at work *capacity* as the determinative factor, the analysis must focus *prospectively* on what would happen in the event the claimant lost the job he was provided. In *Allen*, the 36-year-old claimant maintained *the same job* and performed *the same duties*, but, because he did the job less effectually than prior to his injury, the *Allen* Court looked to the economic loss he sustained by analyzing the wages he had the capacity to make before and after the accident. The *Allen* Court made the determination by looking at the claimant's age, work history/experience, and post-injury disability and determined the market value the claimant would provide based on those criteria using the expert testimony of his physician and the statement from his employer that no job would likely be available within his abilities outside of his work for the employer. The claimant clearly provided value to his employer, as he was performing the *identical functions he had before his injury*—but the court employed the economic model of disability analysis because he could not compete in the marketplace for work with another employer at the same rate of pay.

"Value" to one particular employer at one point in time has never been relevant evidence for a determination of work capacity. It cannot be. The last stagecoach driver on earth, who had been a stagecoach driver for 50 years and was unlicensed to operate motor vehicles, on the last day any stagecoach ever operated, would probably be the most valuable employee in the history

of his stagecoach employer, and, as such, may have commanded excellent wages. On the day the stagecoach was replaced by a bus, however, his "market value" or "work capacity" would be either diminished or eradicated. The extent of his lost market value would require, as outlined in *Hutson*, the analysis of a vocational expert. In the case at bar, the record contains only one vocational analysis. That analysis, although it recites the *fact* that Appellant continued his employment with Respondents on the day of the evaluation, makes only one *relevant evidentiary* statement about Appellant's market value or work capacity, namely that Appellant would be "incapable of returning to work with a new employer as a maintenance mechanic" and therefore would be "unhireable in any other capacity" if he were to lose his job with Respondent for any reason. (APA p. 184).

II. RESPONDENTS ACKNOWLEDGE THE NEED FOR VOCATIONAL EXPERT EVIDENCE AND OPINION IN THEIR ATTEMPT TO CONTRIVE IT

The only conceivable analysis of relevant evidence that any factfinder could use to determine whether an individual could obtain employment in the marketplace is the opinion of a vocational expert who is qualified to make that assessment. In *Peoples*, the Court determined that the claimant was not disabled because the "bare statement that he is unable to work is insufficient, in our opinion, to afford reasonable basis for the conclusion that he is totally disabled." *Peoples* at 13, 818. The *Peoples* Court continued that the "question of the extent and probable duration of respondent's disability, if any, was not a simple one for the solution of which the Commission would be justified in accepting [the claimant's] testimony against that of the medical experts." *Id.* The Court concluded, quoting *Larson*, that the

> increasing tendency to accept Awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but the simple and routine cases [. . .] The principal thus

> stated concerning testimony as to causation is **equally applicable to testimony *as to extent of disablement*** in cases such as the one at bar.

Id. quoting Larson's Workers' Compensation Law, Section 79.54.

Indeed, Respondents tacitly acknowledge the evidentiary void in their arguments and attempt to fill it with opinions from counsel, which, as they acknowledge in their memorandum, "counsel is not an expert in this case and his explication carries no evidentiary weight. Argument of counsel is not evidence." (Resp. Br. at 6, FN1 *citing Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127 (Ct. App. 1991)). Respondents' Counsel thereafter argues that the only vocational report in the record is deficient by suggesting that it did not adequately inquire into Claimant's work history prior to his position with Respondent Employer and that it "indicates [Mr. Brown] was unaware of the two certificates Claimant earned while working for GE." (Resp. Br. at 14, FN 6). The record is devoid of evidence that Brown did not inquire into Appellant's prior work history and that he was "unaware" of any certificates Appellant received. The report was created nearly a year before the hearing. Brown was never deposed to simply ask him if he had reviewed the purportedly relevant information or to ask him if what information should be analyzed by a competent vocational expert in similar circumstances. It would require expert testimony to opine about what information should be relied upon in a vocational report. Assuming, for the sake of argument, that he did not review what counsel believes he should have, there is no evidence it would change the results of his analysis—apart from the suggestions of Respondents' counsel. Respondents' argument that Brown's report is deficient amounts to a red herring, intended to distract this Court from the absence of any competent evidence that claimant could perform any job that would be available in the marketplace.

The vocational report confirmed that Appellant had been employed for about 17 years with Respondent-Employer at the time the vocational evaluation was performed. (APA. p. 181). Under

standard vocational analysis, as acknowledged by the Social Security Disability Guidelines, for example, "[p]ast *relevant work* is work that you have done *within the past 15 years*, that was substantial gainful activity, and that lasted long enough for you to learn to do it." 20 C.F.R § 404.1560 (b)(1) (emphasis added). Accordingly, under standard and legally cognizable vocational analysis, any work before Appellant's employment with Respondent Employer would not have been relevant. In order to establish some reason why such information could be relevant, Respondents would have needed to proffer it through the report or testimony of another expert, or they could have deposed Appellant's expert for clarification. They did neither, and they now seek to substitute the assertions of counsel for the evidence they tacitly admit would be required for a finding that Appellant is not totally disabled.

It is true, as Respondents argue, that South Carolina has not expressly held that only vocational expertise can analyze whether a claimant is totally disabled under the economic model. Because it is the "economic" model, it requires an analysis of what careers are available in the economy and what prerequisites are required by the job applicant to obtain the jobs that are available. No method of economic disability analysis other than vocational expertise is conceivable. Even if no South Carolina court has expressly held that a vocational expert statement is required, a long jurisprudential history has demonstrated the outcome-determinative result of its absence.

III. APPELLANT HAS NOT ABANDONED HIS ARGUMENTS REGARDING THE INSUFFICIENCY OF THE APPELLATE PANEL AWARD

Appellant has not abandoned his arguments regarding the insufficiency of his scheduled member award. Economic model disability is greater than scheduled member disability by definition. By arguing that his disability meets the standards of total economic disability,

Appellant necessarily argued that his scheduled member disability award was insufficient for every reason that he argued supports a total disability award.

CONCLUSION

Appellant is permanently and totally disabled based on all competent evidence in the record. For the reasons stated, this Court should determine Appellant is permanently and totally disabled.

Respectfully Submitted,

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