In the
COURT OF CIVIL APPEALS OF ALABAMA
2020158

STEELCASE, INC.,

Appellant,

v.

JOHNNY W. RICHARDSON,

Appellee.

On Appeal from the
Circuit Court of Limestone County, Alabama

BRIEF OF THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

While the appellee, Johnny Richardson, stands ready, willing and able to provide oral argument in this case, the appellee respectfully contends that oral argument would not materially aid the resolution of this case. The legal issues on appeal are simple and straightforward.

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STATEMENT OF JURISDICTION

The undersigned agrees that this Court has jurisdiction over this appeal of a trial court decision awarding workers' compensation benefits following an *ore tenus* trial.

TABLE OF AUTHORITIES

Cases:

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STATEMENT OF THE CASE

This is a workers' compensation case. The plaintiff, Johnny Richardson ("Richardson"), filed suit against his employer, Steelcase, Inc. ("Steelcase"), on July 8, 1994. (Def.'s Exh. 1-A). In that complaint, Richardson sought workers' compensation benefits for two work-related accidents, the first on November 15, 1991, and the second on August 20, 1992. (Def.'s Exh. 1-A).

On February 27, 1996, Richardson and Steelcase reached an agreement to settle the aforementioned workers' compensation claims. (Def.'s Exh. 1-B). The claims for the 1991 work-related accident were fully settled and resolved under the Alabama Workers' Compensation Act as it existed prior to the 1992 amendments. (Def.'s Exh. 1-B).

In settling the claims for the August 20, 1992, accident and injury, both Richardson and Steelcase expressly agreed that "on August 20, 1992, plaintiff, while employed by the defendant, sustained a second back injury which arose out of and in the course of his employment." (Def.'s Exh. 1-B). However, since Steelcase had returned Richardson to work following this injury despite his

inability to even attend work with any regularity, the parties resolved the claim for compensation based upon Richardson's permanent physical impairment rating only. (Def.'s Exh. 1-B). In addition, the parties expressly agreed that Richardson should retain all rights under *Ala.Code* §25-5-57(a)(3)i.(1992 Repl. Vol.), to re-petition the Court for consideration of any vocational evidence should Richardson lose his job within three hundred (300) weeks of his injury. (Def.'s Exh. 1-B).

Richardson lost his employment on May 12, 1998, within three hundred (300) weeks of his August 20, 1992, work-related accident and injury. (R.60). Thereafter, on October 4, 1999, Richardson filed the present petition for workers' compensation benefits against Steelcase. (C.6-8). The present petition sought a consideration of vocational evidence under *Ala.Code* §25-5-57(a)(3)i. as well as a demand for certain medical benefits under the Act. (C.6-8). On November 3, 1999, Steelcase filed an answer to Richardson's present complaint for benefits. (C.19-22). On May 15, 2002, Steelcase served an amended answer to Richardson's complaint. (C.53-55).

Richardson's claim proceeded to an *ore tenus* trial before the Honorable George T. Craig on August 12, 2002. (R.1). Both Richardson and Steelcase submitted extensive trial briefs discussing the evidence before the trial court. (C.60-111). During the trial, the trial court heard testimony from multiple witnesses concerning the extent of Richardson's vocational disability. These witnesses included Richardson, Steelcase's representative, and vocational experts retained by each party.

On October 7, 2002, following the *ore tenus* trial, the trial court entered a judgment under *Ala.Code* §25-5-57(a)(3)i., finding Richardson one hundred percent (100%) vocationally disabled and awarded benefits accordingly. (C.112-117). The trial court, in its final decree, also considered and decided the separate issue of medical benefits claimed by Richardson. (C.112-117). On November 14, 2002, Steelcase filed its notice of appeal in this case. (C.119). Steelcase does not contend on appeal that the trial court's decision concerning medical benefits was erroneous. (C.122).

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING STEELCASE'S AFFIRMATIVE DEFENSE UNDER ALA.CODE §25-5-57(a)(3)i(ii) (1992 Repl. Vol.) WHERE RICHARDSON'S LOSS OF EMPLOYMENT WAS DUE TO A GOOD CAUSE CONNECTED TO HIS WORK, NAMELY HIS PHYSICAL INABILITY TO CONTINUE HIS EMPLOYMENT AS A RESULT OF HIS WORK-RELATED ACCIDENT AND INJURY

II. WHETHER THE TRIAL COURT WAS CORRECT IN COMPLYING WITH *ALA.CODE* §25-5-57(a)(3)i. (1992 Repl. Vol.) WHERE IT CONSIDERED ANY AND ALL VOCATIONAL EVIDENCE AS EXPRESSLY DIRECTED BY THE STATUTE

III. WHETHER THE TRIAL COURT WAS CORRECT IN AWARDING RICHARDSON BENEFITS WHERE THE OVERWHELMING EVIDENCE REVEALED RICHARDSON WAS PHYSICALLY INCAPABLE OF GAINFUL EMPLOYMENT

IV. WHETHER THE TRIAL COURT WAS CORRECT IN CALCULATING THE BENEFITS DUE RICHARDSON BASED ON THE EVIDENCE ADMITTED AT TRIAL

STATEMENT OF FACTS

Johnny Richardson was 46 years old at the time of trial. (R.44). Richardson did not complete high school. (R.44). He did, however, later obtain a GED. (R.44). He possesses no further education. (R.44). According to testing conducted on Richardson, he reads, spells, and performs arithmetic at an elementary to middle school level only. (R.165-166). Testing also reveals that he has a learning disability. (R.165-166).

Richardson's employment history has consisted of very strenuous, physical work. He first worked at 72 Marine Center in Athens, Alabama. (R.45). Johnny Richardson began working at 72 Marine Center in a part-time capacity while still in high school. (R.45). After quitting high school early, he began working this position in a full-time capacity. (R.45).

At 72 Marine Center, Richardson worked as an outboard motor mechanic and salesman. (R.45). The position required strenuous physical activities, including duties falling in the heavy exertional range. (Pl.'s Exh. 9). Richardson held this employment for approximately 13 to 14

years. (R.45). He left this job only upon obtaining employment at Steelcase. (R.46).

In November, 1984, Johnny Richardson began working for Steelcase in Athens, Alabama. (R.46). Richardson's first position at Steelcase was as an Assembler, placing bags on panels as they came down the production line. (R.46). This job required very strenuous physical activities, including constant standing for a nine-hour shift, bending, stooping, and lifting up to 100 pounds. (R.46-47).

Between 1984 and his first injury in November, 1991, Johnny Richardson worked a variety of positions at Steelcase. (R.47). These positions included jobs placing bags on panels, boxing parts, building panels, working as an expediter, serving in the repair bay, painting, and functioning as a back-up supervisor. (R.47). All of these positions required strenuous physical activities, including bending, stooping, and standing constantly throughout a nine-hour shift. (R.48).

On November 15, 1991, Johnny Richardson suffered an accident and injury to his lower back while performing his work at Steelcase. (R.48). This accident occurred as

Richardson stretched fabric on a panel. (R.48). As he stretched the fabric, a clamp holding it to the panel slipped, causing him to bend over a work bench and injure his lower back. (R.48). Richardson reported the accident to his supervisor the same day it occurred. (R.48).

Prior to his November, 1991, work-related injury, Richardson had seen Dr. Kenneth Eldred, a chiropractic physician, on approximately 5 occasions for chiropractic adjustments to his lower back. (Pl.'s Exh. 1 to Dep. Dr. Eldred). Following the November 15, 1991, work-related accident, Dr. Eldred treated Richardson on two additional occasions in 1991 and one occasion in 1992. *Id.*

On November 18, 1991, 3 days after the work-related accident, Richardson saw Dr. John Bacon, an orthopedic surgeon. (Pl.'s Exh. 2 to Dep. Dr. Bacon). At that time, Richardson reported pain which radiated down his leg. (Dep. Dr. Bacon, p.7). Dr. Bacon prescribed medication to Richardson and saw him again on December 6 and 27, 1991. (Dep. Dr. Bacon, p.8). Dr. Bacon then recommended a CT scan to determine whether Richardson suffered from a ruptured lumbar disc. (Dep. Dr. Bacon, p.8).

At that time, Dr. Cauthen, a local physician, referred Richardson to Dr. Frank Haws. (Def.'s Exh. 2). Dr. Haws, a neurosurgeon, first examined Richardson on January 6, 1992. (Dep. Dr. Haws, p.4). Dr. Haws diagnosed Richardson with a ruptured lumbar disc as a result of his injury. (Dep. Dr. Haws, p.5). On January 8, 1992, Dr. Haws performed surgery on Richardson to remove the ruptured disc. (Dep. Dr. Haws, p.5).

On February 26, 1992, Dr. Haws again saw Richardson in follow-up from his surgery. (Dep. Dr. Haws, p.5). According to Dr. Haws, Richardson was "recovering nicely" from his injury and surgery. (Dep. Dr. Haws, p.5). Dr. Haws did not place any permanent restrictions on Richardson as a result of the November, 1991, accident and injury. (Dep. Dr. Haws).

Following his November, 1991, injury and surgery, Richardson returned back to work at Steelcase. (R.49). He then fully resumed and performed all the regular duties of his employment with no physical problems or limitations. (R.49). At trial, Steelcase's corporate representative, Rayburn Hughes ("Hughes"), agreed that Richardson could

fully perform all his normal job duties at Steelcase after returning to work from the November, 1991, injury and subsequent surgery. (R.372). Likewise, Dr. Eldred testified that Richardson fully recovered from this first injury. (Dep. Dr. Eldred, pp.11-12).

On August 20, 1992, Richardson suffered a second accident and injury at Steelcase while performing his regular job duties. (R.49-51). Specifically, Richardson was again stretching fabric over a panel, when the clamp holding it in place slipped. (R.50-51). When the clamp gave, it forced Richardson over his work bench injuring his lower back. (R.50-51). Richardson then immediately dropped to his knees in pain. (R.50-51). Richardson promptly reported the accident and injury to his supervisor the same day it occurred. (R.50-51). Steelcase then completed a written accident report. (Pl.'s Exh. 1).

In August, 1992, following this work-related accident and injury, Richardson returned to Dr. Haws for treatment. (Dep. Dr. Haws, p.5). Dr. Haws initially treated Richardson conservatively and returned him to work. (Dep. Dr. Haws, p.5).

When Richardson did not improve, he again began seeing Dr. Eldred. (Pl.'s Exh. 1 to Dep. Dr. Eldred). Steelcase then authorized Dr. Eldred to treat Richardson and began paying the appropriate charges for this treatment. (Dep. Dr. Eldred, p.9). Dr. Eldred treated Richardson for his severe lower back pain on approximately 16 occasions from January, 1993, through September 1, 1993. (Pl.'s Exhibit 1 to Dep. Dr. Eldred).

In September, 1993, Richardson again returned to Dr. Haws. (Dep. Dr. Haws, p.6). Dr. Haws admitted Richardson to the hospital and prescribed a lumbar myelogram. (Dep. Dr. Haws, p.6). The myelogram revealed a defect at L5-S1 compatible with nerve root compression and possible re-rupture of the disc. (Dep. Dr. Haws, p.6). On October 13, 1993, Dr. Haws performed surgery on Richardson including a lysine of adhesions and a laminectomy to remove the herniated lumbar disc. (Pl's. Exh. 9, p.2).

Following the surgery, Richardson continued to seek treatment with Dr. Haws on several follow-up visits. (Dep. Dr. Haws, p.6). Then, in January, 1994, Richardson asked Dr. Haws to return him to work. (Dep. Dr. Haws, p.6). Dr.

Haws complied with this request, and Richardson returned to work at Steelcase in January, 1994. (R.56-57; Dep. Dr. Haws, p.6).

Although Richardson returned to work at Steelcase in January, 1994, he was never again able to perform his regular pre-injury job duties. (R.372-375). At trial, Steelcase's representative agreed that Richardson never again could perform his normal job duties. (R.372-375).

After returning to work in January, 1994, Richardson did not see Dr. Haws again until July, 1998. (Dep. Dr. Haws, p.7;Pl.'s Exh.1 to Dep. Dr. Eldred). However, Richardson did continue to receive significant amounts of treatment from other physicians during this period of time.

Dr. Eldred continued to treat Richardson for his severe and chronic back and leg pain, providing treatment on 11 separate occasions in 1994, 14 occasions in 1996, 45 occasions in 1997, and 32 occasions within just the first few months of 1998 before Steelcase unilaterally revoked his authorization to provide this necessary care. (Dep. Dr. Eldred, p.117). In early 1998, Steelcase unilaterally notified Dr. Eldred that he was no longer authorized to

treat Richardson and that his bills would no longer be paid. (Dep. Dr. Eldred, pp.9-10). Steelcase then revoked Dr. Eldred's authorization to treat Richardson after many years of necessary medical treatment and despite Richardson's desire to continue with this treatment. (Dep. Dr. Eldred, p.10).

In 1994, Steelcase also sent Richardson to Dr. Martin Jones, an orthopedic surgeon in Birmingham, for further treatment. (Dep. Dr. Jones, pp.6-7,55).[1] Dr. Jones testified that Richardson presented with chronic back pain upon his initial visit in 1994. (Dep. Dr. Jones, pp.54-55). Dr. Jones then began providing medical care to Richardson, treating him on multiple occasions between 1994 and 1998, when Richardson last worked at Steelcase. In its brief, Steelcase erroneously contends that its company doctor, Dr. Jones, concluded Richardson could work without problems. However, quite the opposite is true. According to Dr. Jones, Richardson presented with problems performing work on multiple occasions throughout the course of

[1] Dr. Jones was deposed in 1994 and again in 2002, shortly before trial. All references in Richardson's brief, unless otherwise indicated, are to the more current deposition.

treatment. (Dep. Dr. Jones, p.41). Dr. Jones further testified that Richardson had a long-standing problem with absences from work due to his chronic pain. (Dep. Dr. Jones p.42). In March, 1998, Dr. Jones even noted his concern that Richardson would not be able to continue in his job. (Dep. Dr. Jones, p.42). As for chiropractic care, Dr. Jones testified that he even recommended that Richardson continue his chiropractic therapy with Dr. Eldred. (Dep. Dr. Jones, p.40).

On July 8, 1994, Richardson filed suit against Steelcase seeking workers' compensation benefits as a result of his work-related injuries. (Def.'s Exh. 1-A). However, despite his chronic back pain and limitations, Richardson had returned to the worksite at Steelcase. Thus, on February 27, 1996, Richardson and Steelcase reached a settlement of his claim and sought the Court's approval of that settlement. (Def.'s Exh. 1-B). Both parties stipulated in their settlement petition that Richardson had suffered a work-related accident and injury on August 20, 1992, which arose out of and in the course of his employment with Steelcase. (Def.'s Exh. 1-B). The

trial court never considered any vocational evidence as Richardson had returned to the worksite. The trial court approved the parties' petition settling Richardson's workers' compensation claim for benefits based solely on his physical impairment rating. However, the court's decree expressly protected Richardson's rights under *Ala.Code* §25-5-57(a)(3)i, to re-open his claim for a full consideration of all vocational evidence in the event he lost his employment within 300 weeks of his injury. (Pl's. Exh. 2).

As stated previously, Richardson returned to work in January, 1994. Although back at work, it is undisputed that he was never again able to perform his normal job duties. When he first returned to work, Steelcase placed Richardson in the maintenance department. (R.56-57). This position was not in his regular department at Steelcase. (R.56). Instead, it was a position possessing no set responsibilities and requiring no real physical exertion. (R.56-57). In this position, Richardson was allowed to do anything he needed to get comfortable and lessen his chronic pain. (R.56-57). Richardson might try to type

some purchase orders, take the company truck to pick up parts on occasion, or process some time cards. (R.56-57). Basically, he would perform small errands, when able, for the company. (R.57). Even then, he was unable to attend work regularly due to his chronic back pain. (R.57). While in this position, Steelcase continued to charge Richardson's time not to the maintenance department, but rather, back to the trim department where he had worked prior to his injury. (R.374-375).[2]

After approximately a year and a half in the special duty position in maintenance, Steelcase attempted to move Richardson back to the trim department where he worked prior to his 1992 injury. (R.374-375). However, Hughes admitted at trial that Richardson was unable to perform his job in the trim department. (R.374-375).

Steelcase then assigned Richardson duties bagging parts. (R.58).[3] This position normally required the employee to lift an approximately forty-pound box onto a

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[2] Richardson contends that this position was not a real job, but simply created to return him to work.

[3] Again, this is not a real position. Steelcase policy requires the opportunity for employees to bid on any open jobs. (R.387). Hughes is in charge of the bidding process but cannot recall ever placing this position up for bids after Richardson quit working at Steelcase. (R.387).

table, then remove screws from the box and place them in bags. (R.58). However, Richardson was unable to perform this job. He could not even lift the box onto the table as required. (R.58). If another Steelcase employee was available, Richardson would ask that individual to lift the boxes for him. (R.58). If no other employee was available to do the work for him, he would simply walk idly around the plant. (R.58). Due to his pain, he would often even have to lie on the floor at the plant. (R.59).

Richardson continued to miss substantial amounts of time from work at Steelcase. (R.58). He often could not come to work at all. (R.59). Due to his back, he had great difficulty just getting up in the morning. (R.59). Thus, even when able to come to work, he was frequently late. (R.59). Often, he would hurt so badly at work that he would leave in the middle of the day without even punching out on the time clock. (R.59, 133). When at work, he spent most of his time walking around the plant or lying on the plant floor. (R.59). Over time, his pain and absences continued to increase. (R.56,59). Steelcase's policy requires that all employees be prepared for work

each and every day. (R.377-378). At trial, Hughes testified that Steelcase has disciplined, and even terminated, employees who violated this policy. (R.377-378). However, Richardson was unable to attend work with any regularity. According to attendance records, Richardson only presented at Steelcase 50% of the time or less in the last 3 months of his employment alone. (Pl.'s Exh. 13). When one considers the additional fact that Richardson often left work in the middle of the day without even punching out on the time clock, his attendance becomes even more infrequent. At trial, Hughes agreed that Steelcase would not hire someone who had a bad attendance record over time. (R.386). According to Richardson, Steelcase did not care whether he presented to work or not. (R.95). When present at work, he spent his time doing whatever necessary just to get comfortable, including sitting, standing, or walking around the plant. (R.97).

Finally, Richardson's pain and limitations reached the point where he could no longer even appear at the jobsite at all. (R.60). On May 12, 1998, within 300 weeks of his work-related accident and injury, Richardson quit his

employment with Steelcase. (R.60).[4]

Richardson has not performed any employment since leaving Steelcase. (R.60). He applied for, and received, Social Security disability benefits. (R.60). He also now possesses a handicapped car tag. (R.60-61).

Richardson presently suffers chronic pain on a daily basis. (R.54). His chronic pain has only worsened over time. (R.54). In addition to chronic pain, both of his legs are numb. (R.54-55).

Due to his chronic pain, Richardson cannot sleep well. (R.55). At most, he sleeps 3 hours a night (R.55). Even then, he can only sleep lying on the floor, not in a bed. (R.55). During the day, he hurts so badly that he cannot concentrate or get comfortable in any position. (R.55-56).

Richardson cannot get out of bed consistently in the morning. (R.61). When able to get out of bed, he must first take a hot shower just to move. (R.61). He then spends the remainder of the day lying down, sitting, or walking around the house, trying to get comfortable.

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[4] Richardson testified both on direct and cross-examination that he specifically quit working at Steelcase on May 12, 1998. (R.60,91-93). Although he attempted to change his testimony at trial, Steelcase's

(R.61-62).

Richardson is even unable to perform simple tasks of daily living. He cannot put on socks, put on regular shoes, or tie his shoes. (R.64). He is unable to help with cooking or house cleaning. (R.64). He is unable to perform any lifting. (R.62). He has attempted to ride his riding lawn mower in his yard but can only do this sedentary activity for 15 to 20 minutes before going back into the house to rest. (R.62).

Before his work-related accident and injury in August, 1992, Richardson enjoyed working on outboard motors, working with wood, and cutting grass. (R.64-65). In fact, Richardson even previously mowed grass to earn extra income. (R.86-88). However, he is unable to perform any of these activities now. (R.64-65). At trial, Richardson related how he tried to stain a cedar chest for his wife but that he hurt so badly it took over 3 months just to complete this very small project. (R.132).[5] Furthermore,

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representative Hughes testified in deposition that May 12, 1998, was Richardson's last day of work at Steelcase. (Dep. Hughes, pp.90-91).

[5] Steelcase asserted in its brief that Richardson could perform a variety of activities such as riding motorcycles, woodworking, cutting grass, weedeating, using a pressure washer to clean his house, and lifting objects. Steelcase's assertions are simply untrue. Counsel invites the court to

his chronic pain increases when he attempts to perform any activities. (R.66).

Dawn Parrish ("Parrish") also testified at trial. (R.323-348). Parrish became a neighbor of Richardson in 1989. (R.323). In 1997, Richardson and Parrish began dating and subsequently married. (R.323-324). According to Parrish, Richardson was very active when they first became neighbors and had several hobbies such as working with wood, cars, and boats, as well as in his yard. (R.326-327). Parrish observed that Richardson initially curtailed some of his activities after his first injury in 1991 but soon recovered and was again performing all the activities he enjoyed. (R.327-328). However, Parrish noted that after the August, 1992, accident and injury, Richardson never recovered. (R.328). After the 1992 injury, he tried to perform activities but could not do them. (R.328). After she began dating Richardson in 1997, Parrish observed that he could not help clean the house.

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carefully examine Richardson's testimony. This testimony clearly reveals that he is not physically able to perform any physical activities. In fact, Richardson specifically testified on the pages cited by Steelcase, that he is not completely able to cut even his own yard, has not used a pressure washer to clean his house, cannot perform mechanical work anymore, and cannot ride his motorcycle any further than around the block. (R. 112-113, 365).

(R.329). Parrish now does all the cooking and house cleaning. (R.335). Richardson's son, James, or Parrish now perform all the yardwork. Parrish even has to help Richardson dress each morning. (R.332-333). Because Richardson can only drive short distances, Parrish also does most of the driving. (R.335-336). According to Parrish, Richardson cannot lift anything around the house. (R. 337).

Parrish has observed Richardson experiencing muscle spasms. (R.329-330). Some of these spasms are so severe that they appear to be seizures and cause Richardson to drop to his knees, frozen with pain. (R.329-330).

At trial, Parrish described her observations of Richardson at the time he quit working at Steelcase. (R.336-337). She described how he frequently was not even able to get out of bed in the morning. (R.336). She would frequently call Steelcase and relate that he would be absent. (R.336). When he did go to work, he always was in pain. (R.336). Parrish works regular hours at a job in Huntsville. (R.337). Upon arriving home in the afternoon after work, she would often find Richardson in pain, lying

in the bed, on the couch, or on the floor. (R.336-337).

At trial, Steelcase's counsel attempted to refute Richardson's disability by arguing that he ran a business named J & J Sweeping, which provided services cleaning parking lots. However, the evidence does not support Steelcase's assertion. Parrish started J & J Sweeping in December, 1997. (R.344). Parrish, not Richardson, owned and operated the business. (R.338). Both Richardson and Parrish testified at trial that Parrish ran this business. (R.67,338). Richardson played no role in operating the business. (R.338).

Parrish performed all the sales calls aimed at generating customers for J & J Sweeping. (R.338-339). Parrish negotiated all the contracts with customers of the business. (R.338-339).

The business possessed two sweeper trucks which were used to clean parking lots. (R.344). One of these trucks would be used each night to clean certain lots. (R.345). Parrish performed all the parking lot cleaning each night after her regular job in Huntsville. (R.339). If she needed a break, she would hire Richardson's son, James, or

James' friends, to perform the cleaning work for her. (R.339). The only cleaning contract that involved additional lawn maintenance was with a local Wal-Mart store. (R.346). Parrish hired James and his friends to do this work as well. (R.347).[6]

Parrish explained that she did not have adequate credit to purchase the initial sweeper truck when she began her business. (R.338). Thus, she used Richardson's name to finance the truck and start the business. (R.338). This is precisely why the financing documents and business license are in his name. (R.342).

Richardson's involvement in J & J Sweeping was extremely limited. If one of the sweeper trucks needed servicing, he would drive it to Steelcase that day instead of his normal vehicle and then take it to the mechanic after work. (R.339). He did this as a favor to Parrish because she worked during the day in Huntsville. (R.339). Likewise, he would occasionally ride solely as a passenger

[6] At trial, Steelcase's representative falsely testified that he saw someone he believed to be Johnny Richardson cutting grass at a business. (R.365). This is completely contrary to his prior deposition where he admitted that he did not know if he had seen Richardson since Richardson left Steelcase. (R.370).

with his wife in a truck to keep her company. (R.154).[7] He never performed any of the landscape work. (R.84-87). At most, he may have shown an employee how to operate a piece of landscape equipment. (R.85-86).[8]

As stated previously, Richardson's severe, chronic pain necessitated frequent visits to Dr. Eldred for medical treatment after his return to work in 1994. He also sought treatment for his chronic pain from Dr. Jones, Steelcase's physician in Birmingham. Although Dr. Jones saw Richardson for his chronic pain, he did not recommend surgery. (Dep. Dr. Jones, p.45). Thus, in May, 1998, Richardson returned to Dr. Bacon, an orthopedic surgeon in Athens, who had treated him several years previously. (Dep. Dr. Bacon, pp.8). In May, 1998, Dr. Bacon prescribed for Richardson

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[7] In its Statement of Facts, Steelcase falsely states that Richardson drove the sweeper trucks at night. (Steelcase brief, p. 18). However, Richardson actually testified that he rode as a passenger with his wife on occasion at night but never drove the trucks himself at night to clean lots. (R. 83-85; 154-155).

[8] In its Statement of Facts, Steelcase falsely asserts that Richardson performed a portion of the lawn cutting activities for J&J Sweeping and also did lawn maintenance for private individuals at the time he quit his employment with Steelcase. (Steelcase brief, p. 18). However, Richardson clearly testified that his only involvement in J&J Sweeping's lawn cutting activities was to explain to his wife's employees how to operate a piece of equipment. (R.85-86). As far as conducting lawn care for private individuals, Richardson did not perform this activity at the time he last worked for Steelcase. In fact, the evidence, including tax returns, clearly reveals that Richardson performed this activity only prior to his injury at Steelcase. (R. 89-90).

"no work permanently - failed back syndrome." (Pl.'s Exh. 2 to Dep. Dr. Bacon).

Dr. Bacon testified by deposition in this case. In his deposition, Dr. Bacon testified as follows concerning Richardson's condition:

> Q. (By Mr. Blackwell): What are the restrictions that you placed Mr. Richardson under?
> A. No bending, no lifting more than ten pounds, no standing or walking for more than two hours a day, no sitting for more than two hours a work day. He could not sit for more than fifteen minutes at a time without standing or moving around. He should not twist or bend from the waist. He could not ride in a car for long distances.
> Q. Are those restrictions permanent?
> A. Yes.
> Q. Okay, and are they related to his back condition?
> A. They are.
> . . .
> Q. Does he suffer from what you would term chronic back pain?
> Mr. Gibson: Object to the form.
> A. Yes, he does.
> Q. Doctor, if you would, assume for me that the evidence in this case will reveal that Mr. Richardson sustained a work-related injury on November 15, 1991, for which he sought medical treatment and, eventually, back surgery. He then, following the treatment and surgery, was able to return to his employment performing the duties of his regular job. After returning to work, he suffered a second work-related injury to his back on August 20, 1992, for which he sought medical treatment and additional back surgery. Since that time he has experienced back pain and his problems

have worsened to the point which I have described to you today as his painful medical condition. Based upon those facts and a reasonable degree of medical probability, did the August 20, 1992, work-related injury cause or contribute to cause the back condition for which you treated Mr. Richardson and the restrictions you have placed on him?
Mr. Gibson: Object to the form.

A. Given the scenario, it would seem that the second injury contributed to his back problems.

(Dep. Dr. Brown, pp. 14-16).[9]

Dr. Eldred also testified by deposition at trial. Dr. Eldred testified that Richardson fully recovered from his earlier 1991 injury. (Dep. Dr. Eldred, pp.11-12). He then specifically testified that the August 20, 1992, accident and injury at Steelcase had rendered Richardson totally disabled. (Dep. Dr. Eldred, p.121). In 1998, Dr. Eldred sent Richardson for another surgical consultation with Dr. Haws, the surgeon who had performed both of his prior surgeries. (Dep. Dr. Eldred, pp.18-19). After evaluating Richardson, Dr. Haws specifically reached the same opinion that all of Richardson's present problems result from his

[9] At trial, Steelcase contended that Richardson's present condition is due to degenerative changes. However, Dr. Bacon testified that, "I think the degenerative changes I have seen in his back are the result of surgery on the discs." (Dep. Dr. Bacon, p. 47).

August 20, 1992, accident and injury at Steelcase. (Correspondence contained in Pl.'s Exh. 1 to Dep. Dr. Eldred). As for the specific extent of Richardson's disability, Dr. Eldred testified as follows:

Q. Did Mr. Richardson or does Mr. Richardson have the type of back condition from his injury that was progressively worsening?
A. Yes, sir, it will, in my opinion, it will definitely get progressively worse.
Q. You mentioned that on your first visit and then on your last visit again he was in pain. Is Mr. Richardson in chronic pain?
Mr. Bailey: Object to the form.
A. Severe chronic pain.
Q. What effects does that pain have on his capabilities?
Mr. Bailey: Object to the form.
A. Well, a man in that kind of pain, he can't hold a job, he can't work. Life is just miserable because he can't have any activities, physical activities he normally had.
Q. Do you have an opinion as to whether Mr. Richardson's condition is permanent?
A. Yes, sir, it would be permanent.
Mr. Bailey: Object to the form.
Q. Do you have an opinion as to whether any permanent restrictions would be placed upon Mr. Richardson's activities?
Mr. Bailey: Object to the form.
A. Yes, sir.
Q. And what is your opinion in that regard?
Mr. Bailey: Object to the form.
A. Well, I remember telling Mr. Richardson that a weight restriction of ten pounds, and two hours at the most. And that if it got severe to let his pain be the guide when he first started.

(Dep. Dr. Eldred, pp. 14-15)

Steelcase artfully ignores almost all of the medical evidence, including the opinions of 3 separate physicians, Dr. Haws, Dr. Eldred, and Dr. Bacon. All 3 of these physicians specifically conclude that Richardson's present condition is directly attributable to his August 20, 1992, accident and injury at Steelcase. Instead, Steelcase cites Dr. Jones and claims that Richardson's present condition is simply due to unrelated disc degeneration. Counsel invites the court to examine closely Dr. Jones' testimony. Dr. Jones testified that he did not treat Richardson at the initial time of his accident and injury. Rather, he specifically testified that, since he began treating Richardson long after the injury and surgery, it was more difficult for him to comment on causation. (Dep. Dr. Jones, p.37). However, he concluded that Richardson suffered post-laminectomy syndrome, surgically related changes, scar tissue from surgeries, and disc degeneration. (Dep. Dr. Jones, pp.35-39). Dr. Jones then related that the degeneration had occurred at the site of the work-related injury and surgery, explaining that back injuries

and subsequent surgical repairs can create such degeneration. (Dep. Dr. Jones, p.35). Finally, Dr. Jones testified as follows concerning Richardson's accident and resulting condition:

> Q. The injuries and condition that you observed in Mr. Richardson and the history you gathered of his - - the course of his condition, is that consistent with the injuries and the surgeries he described to you?
> A. I would say probably so.

(Dep. Dr. Jones, p.36).

Steelcase contends that Richardson could perform physically within the guidelines of certain functional capacity evaluations (FCE's). However, Drs. Bacon and Eldred both disagreed, placing much greater restrictions on Richardson. Furthermore, Richardson began hurting so badly during the most recent FCE that he could complete only half of the FCE before stopping, consuming pain pills, and returning home for 2 days of bed rest. (R.66-67).

Patsy Bramlett ("Bramlett"), a vocational counselor, interviewed Richardson on several different occasions and testified at trial. Bramlett possesses a master's degree in rehabilitation counseling. (R.156-157). Bramlett worked for the State of Alabama for many years helping

individuals with disabilities find gainful employment and has served on a panel of vocational experts frequently employed by the Social Security Administration to render vocational opinions concerning claimants. (R.156-157).

Bramlett testified that from his August 20, 1992, accident forward, Richardson has experienced increased difficulty due to his back injury. (R.161-162). Based on his current restrictions, Richardson is not even capable of full time work at any exertional level. (R.164). Likewise, he does not possess any transferable skills in his present condition. (R.169-173). Bramlett concluded that Richardson was 100% vocationally disabled, testifying as follows:

> Q. And can you relay those opinions to the Court?
> A. Yes. It was my opinion that Mr. Richardson would have a vocational disability rating of one hundred percent and I felt that his likelihood or probability that he would be a candidate for vocational rehabilitation was not a feasible goal, but he's not a candidate for vocational rehabilitation. . .

(R.167).

Bramlett clearly testified that Richardson was <u>not</u> a candidate for vocational rehabilitation. Contrary to

Steelcase's assertion, Bramlett never conceded that Richardson was a candidate for vocational rehabilitation in his present condition. Steelcase asserts throughout its brief that Dr. Boone recommended vocational rehabilitation. However, when directly asked in deposition whether he believed Richardson was a candidate for vocational rehabilitation, Dr. Boone actually responded by stating "[n]o, because I would not have adequate information to make that determination." (Dep. Dr. Boone, pp.25-26).

The trial court heard the evidence *ore tenus* before reaching its decision that Richardson suffered a work-related injury on August 20, 1992, that had rendered him permanently and totally disabled. The trial court's decision in this case is well supported by the evidence.

STATEMENT OF STANDARD OF REVIEW

This appeal comes from a decree rendered in favor of the employee after an *ore tenus* trial in a workers' compensation case. The trial court, hearing the case *ore tenus*, is uniquely able to judge the credibility and demeanor of the witnesses and render a fair and just decision. As such, under the appropriate standard of review, the facts must be reviewed in the light most favorable to the findings of the trial court.

The "Statement of Facts" contained in the appellant's brief, however, ignores the appropriate standard of review. Instead, appellant carefully picked and chose from the evidence to present a one-sided, distorted view of the facts. As a result, Appellee therefore respectfully presented an additional statement of facts in the preceding section of this brief.

SUMMARY OF ARGUMENT

Johnny Richardson suffered a work-related injury in August, 1992, while employed by Steelcase. This injury left him severely disabled and in chronic pain. It is undisputed that his resulting disability prevented a return to any normal or regular employment.

Richardson filed a workers' compensation claim based on his 1992 accident and injury. However, Steelcase created a series of minimal positions in an effort to return him to employment. As a result, the Workers' Compensation Act precluded a consideration of his true vocational disability.

According to the overwhelming evidence, Richardson could not even perform the minimal positions created by Steelcase. He frequently missed work. When present at work, he would often lie on the plant floor in pain and required assistance from co-employees to perform any tasks. As a result, he could not physically continue his employment with Steelcase.

Richardson left his employment with Steelcase within

300 weeks of his injury. He then petitioned the trial court to reconsider his compensation benefits based on his true vocational disability as specifically endorsed by Alabama's Workers' Compensation Act.

Richardson's petition proceeded to an *ore tenus* trial before the Honorable George T. Craig. The trial court carefully considered all the evidence, including any vocational evidence, and then issued a final decree in accordance with the plain language of the Act. The trial court's decision is well-supported by the facts and in accordance with Alabama law. Thus, the trial court's decision should be affirmed upon appeal.

ARGUMENT

I. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING STEELCASE'S AFFIRMATIVE DEFENSE UNDER *ALA.CODE* §25-5-57(a)(3)i(ii) (1992 Repl. Vol.) WHERE RICHARDSON'S LOSS OF EMPLOYMENT WAS DUE TO A GOOD CAUSE CONNECTED TO HIS WORK, NAMELY HIS PHYSICAL INABILITY TO CONTINUE HIS EMPLOYMENT AS A RESULT OF HIS WORK-RELATED ACCIDENT AND INJURY

The case at bar involves a claim for benefits pursuant to *Ala.Code* §25-5-57(a)(3)i. (1992 Repl. Vol.). That section of the Act states that the trial court shall not consider any evidence of vocational disability when an employee returns to work after reaching maximum medical improvement at a wage equal to, or greater than, his pre-injury wage. *Id.* The section makes no distinction concerning the quality or type of work performed after the employee's injury. *Id.* Rather, the only statutory consideration concerns the amount of wages paid for the particular employment. Where those wages equal or exceed pre-injury wages, the court can only award compensation based on the injured employee's physical impairment. An injured individual might have a very small partial physical impairment, but based on his age, education, and the nature

of his permanent restrictions, could be considered totally disabled vocationally in the open market.

Although the section prohibits the consideration of vocational evidence upon a return to employment at a wage at least equal to pre-injury wages, it does contain an important safety valve for the injured employee. If the injured employee loses his employment within 300 weeks of the injury, he may petition the trial court for a reconsideration of his benefits. Upon such a reconsideration, the statute expressly provides that the trial court may consider any evidence of vocational disability.

Although *Ala.Code* §25-5-57(a)(3)i. generally allows for the consideration by the trial court of any vocational evidence, it does contain 5 narrow exceptions where such a consideration is not allowed. In the present case, Steelcase affirmatively raised only 1 of those 5 narrow exceptions as a defense. The exception raised by Steelcase as a defense is as follows:

> (ii) The loss of employment is voluntary, without good cause connected with such work.

Ala.Code §25-5-57(a)(3)i(ii). The statute requires that Steelcase prove its affirmative defense by clear and convincing evidence. *Wal-Mart Stores, Inc. v. Hepp*, 797 So. 2d 475 (Ala.Civ.App. 2000).

In the case at bar, this exception is clearly inapplicable. At trial, the court carefully considered all of the evidence surrounding Richardson's loss of employment. In its Final Decree, the trial court specifically held:

> In this case, the defendant contended that the specific exception in the statute, which prohibits the assessment of the workers' true vocational disability in the event the loss of employment was voluntary without good cause connected to the work, was applicable. *See Ala.Code* §25-5-57(a)(3)i(ii). However, under the Act, it is the defendant's burden to prove, by clear and convincing evidence, that the plaintiff's loss of employment was due to the enumerated exception. The Court has carefully weighed the evidence on this issue and concludes the defendant has failed to meet its burden on this issue. Rather, the evidence at trial revealed that the loss of employment was for a good cause connected to said work, i.e., the plaintiff's physical inability to attend the jobsite or continue his employment with the defendant.

(C.115). The trial court correctly denied Steelcase's affirmative defense based on the overwhelming evidence at

trial.

A. RICHARDSON'S LOSS OF EMPLOYMENT WAS FOR GOOD CAUSE

Richardson's loss of employment was clearly for good cause, i.e., his inability to function physically on a daily basis. In its brief, Steelcase cites *Gibbons v. Shaddix Pulpwood Co.*, 699 So. 2d 225 (Ala. Civ. App. 1997), for the proposition that when an employee voluntarily leaves his employment due to a claimed physical incapacity, the decision must be objectively reasonable. In the present case, the overwhelming evidence clearly justifies Richardson's loss of employment.

At trial, the evidence revealed that Richardson suffered chronic, debilitating pain. His condition necessitated almost constant therapy and medical treatment just to function on a daily basis. According to his physicians, he suffered great difficulty attending work long before his employment ended. Attendance records for the months before his employment ended reveal that Richardson could only attend work a few hours each week.

Steelcase's own corporate representative admitted at trial that Richardson never returned to his normal work

after the August, 1992, injury. (R.372-373). Although Steelcase returned him to the workplace, he could not attend work on a daily basis. When at Steelcase, Richardson frequently hurt so badly he would simply lie on the plant floor. (R.59). He often left work in pain in the middle of the day to go home. (R.59-133). He finally reached the point where he could not even make it to work at all. (R.60).

In his condition, Richardson is unable to care of himself. He cannot sleep at night due to his pain. (R.55). He cannot even bend to tie his own shoes. (R.64). His wife performs all the household chores. (R.335).

Certainly, Steelcase cannot contend that Richardson's loss of employment was unreasonable or due to unsubstantiated physical problems. At trial, the court carefully listened to Richardson's testimony. In addition, his wife described how she must care for him on a daily basis.

Finally, the parties presented much medical evidence to the court. Although conspicuously absent from Steelcase's brief, both Dr. Bacon and Dr. Eldred testified by

deposition. In May, 1998, Dr. Bacon prescribed no work permanently for Richardson due to his back problems. (Pl's. Exh. 2 to Dep. Dr. Bacon). Dr. Eldred, who treated Richardson longer than any other physician, specifically testified that Richardson is disabled and unable to function on a daily basis. (Dep. Dr. Eldred, p.121). Even Dr. Jones, Steelcase's company physician, admitted in deposition that, for at least a year prior to the loss of employment, Richardson had been experiencing significant difficulties maintaining his job. (Dep. Dr. Jones, pp.41-42).

Steelcase contends that the "parts bag job" held by Richardson when he last worked, was suitable employment.[10] Richardson agrees that the so-called "parts bag job" was a physically easy job when compared to other positions at Steelcase. Apparently, Steelcase contends that it created suitable employment by requiring absolutely nothing of Richardson. At trial, it was undisputed that Richardson spent most of his time when present at Steelcase simply sitting or walking around.

[10] At trial, the evidence revealed that the "parts bag job" was not a real or

Although the parts bag job contained very minimal requirements, Richardson was still unable to perform the job. According to the undisputed testimony, other employees had to perform the minimal tasks of this created position for Richardson. (R.58). When other employees were not available, Richardson simply did nothing. (R.58).

Despite the light physical requirements, Richardson rarely attended work due to his chronic pain and limitations. Finally, Richardson reached the point where he was simply physically unable to attend work at all or even function on a daily basis. It is simply illogical for Steelcase to contend Richardson possessed "suitable employment" when he was no longer even physically able to attend the jobsite.

In order to justify its erroneous contention, Steelcase must (and does in its brief) disregard the actual testimony of Richardson's wife as well as almost all of the medical evidence. Steelcase cites medical testimony from only Dr. Jones in support of its misguided position. Even then, Steelcase omits Dr. Jones' testimony that Richardson

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regular position at the plant.

experienced problems physically maintaining his employment for an extended period of time.

Steelcase completely omits the testimony from Drs. Bacon and Eldred that Richardson was totally disabled. Instead, Steelcase cites a March, 1998, FCE but fails to relate that Richardson was so debilitated that he could not even complete the examination. Afterwards, he spent 2 days bedridden and in pain. (R.66-67). Neither Dr. Bacon nor Dr. Eldred accepted this examination as a valid representation of Richardson's capabilities.

In the alternative to its argument that Richardson's last position at Steelcase was "suitable employment," Steelcase argues that "suitable accommodations" existed. However, Steelcase never offered any accommodations to Richardson despite the fact that he obviously could not perform his assigned position and instead, either walked around or laid on the plant floor in pain while at work. Additionally, the existence of suitable accommodations presupposes that Richardson is even capable of attending the jobsite. Quite the opposite is true in this case.

Finally, when faced with a complete lack of evidence in

support of its affirmative defense, Steelcase asserts that Richardson "doctor shopped" and performed activities consistent with employment in May, 1998. It is very ironic that Steelcase would assert that Richardson is guilty of "doctor shopping." One must remember that Dr. Eldred was Richardson's authorized treating physician for many years. Both Dr. Haws and Dr. Eldred treated Richardson following his 1992 work-related injury. However, after his surgery, Steelcase simply transferred his care to Dr. Jones in Birmingham. Thereafter, Steelcase unilaterally revoked Dr. Eldred's authorization to provide treatment.

Richardson certainly did not "doctor shop." When Dr. Jones would do nothing to alleviate his chronic pain, he sought treatment with Dr. Bacon, who had also treated him previously. In its brief, Steelcase attempts to mislead this Court by implying that Richardson traveled to Tennessee for treatment with Dr. Bacon. Perhaps this implication is made to bolster Steelcase's false claim of "doctor shopping." However, at the time of his treatment, Dr. Bacon still practiced in Athens, Alabama. In fact, Steelcase's counsel attended his deposition at his office

in Athens. (Dep. Dr. Bacon).

Steelcase further attempts to bolster its false argument that Richardson was not disabled, could be rehabilitated, and was "doctor shopping" by distorting Dr. Boone's deposition testimony. Dr. Max Boone was Richardson's family physician. (Dep. Dr. Boone). Dr. Boone is not a back specialist. According to Dr. Boone, he never treated Richardson for his severe back injury because Richardson was already receiving treatment for the injury through other physicians. (Dep. Dr. Boone, p.29). Contrary to Steelcase's assertion, Dr. Boone did not testify that Richardson was a good candidate for vocational rehabilitation. When directly questioned by Steelcase's counsel, Dr. Boone testified on this issue as follows:

> Q. Would it be a fair statement to say that you were of the opinion that Mr. Richardson was a good candidate for vocational rehabilitation?
> A. Not necessarily, because I don't do disability evaluations. I wasn't really in a place to tell him one way or the other that he was disabled. . .

(Dep. Dr. Boone, p.16). Only by ignoring the overwhelming evidence, including the testimony of Richardson, Richardson's wife, Dr. Eldred, Dr. Bacon, and Patsy

Bramlett, as well as distorting the testimony of both Dr. Jones and Dr. Boone, can Steelcase assert that Richardson unjustifiably left his employment at Steelcase. Instead, the overwhelming evidence reveals an employee who is not working for the simple reason that he is so physically disabled he cannot function on even a daily basis.

Steelcase's assertion that Richardson was performing physical activities consistent with work in May, 1998, is equally erroneous. Many of the very facts alleged by Steelcase in support of this contention in its brief are not even contained in the evidence or are completely contrary to the evidence. Steelcase makes the same false assertions in its statement of facts and subsequent argument on this issue. Counsel would direct the court back to the preceding Statement of Facts in this brief which details Richardson's physical capabilities as actually contained in the evidence.

B. RICHARDSON'S LOSS OF EMPLOYMENT WAS DIRECTLY CONNECTED TO A DISABILITY ARISING OUT OF HIS EMPLOYMENT AT STEELCASE

Steelcase asserts that the loss of employment must be

connected with a disability arising out of that employment. Present counsel questions such a narrow interpretation as is currently proffered by Steelcase. Based upon a plain reading of the statutory exception, it is conceivable that "good cause connected with such work" could encompass other reasons for leaving one's employment. However, it is unnecessary to discuss such possible reasons further since Richardson's cessation of employment was directly connected to the disability he suffered as a result of his August 20, 1992, accident and injury.

In an effort to distort the issue of causation, Steelcase erroneously argues that Richardson must prove medical causation by clear and convincing evidence. Richardson certainly established medical causation with a level of evidence far exceeding the clear and convincing standard. In its brief, Steelcase artfully ignored the express opinions of 3 separate physicians who all concur that Richardson's current condition results directly from his August 20, 1992, accident and injury at Steelcase.

Dr. Kenneth Eldred is the physician with the greatest knowledge, over the years, of Richardson's physical

condition. Dr. Eldred has treated Richardson from the time of his injury up to the present. In his deposition, Dr. Eldred specifically testified that Richardson was totally disabled as a direct result of his August, 1992, accident and injury at Steelcase. (Dep. Dr. Eldred, pp.11-17).

Dr. Haws, a neurosurgeon, operated on Richardson following both his prior 1991 injury at Steelcase and the subsequent August, 1992, accident and injury made the basis of this case. (Dep. Dr. Haws). Dr. Haws examined Richardson again in 1998 shortly after he left Steelcase's employment, for further surgical consultation. Dr. Haws then reached the express opinion that "I feel this is related to an injury in August, 1992." (Exh. 1 to Dep. Dr. Eldred).

Dr. Bacon, an orthopedic surgeon, treated Richardson in the early 1990's and again in 1998 as a surgical consultation. After examining Richardson in 1998, Dr. Bacon also reached the medical conclusion that the August, 1992, injury at least contributed to his current disability. (Dep. Dr. Bacon, pp.15-16).

In fact, Dr. Bacon even further explained the

degeneration in Richardson's back which Steelcase now mentions. According to Dr. Bacon, this degeneration is the result of Richardson's surgery from his injury and the scar tissue left by that surgery. (Dep. Dr. Bacon, p.47).

In an effort to deny causation, Steelcase omits the medical opinions from 3 separate treating physicians and distorts the opinion of its own physician, Dr. Jones. Dr. Jones did not deny that the August 20, 1992, accident caused Richardson's current condition as urged by Steelcase. Rather, Dr. Jones specifically testified that he did not begin to treat Richardson until long after that injury. Furthermore, causation was never a concern of his. (Dep. Dr. Jones, pp.54-55). According to Dr. Jones, he was simply assigned by Steelcase to treat Richardson's chronic pain. (Dep. Dr. Jones, p.55). As a result, he did not want to form an opinion concerning causation. Yet, he did testify that degeneration can result from prior injuries and surgeries and that the degeneration in Richardson's back was in the location of his prior surgery. (Dep. Dr. Jones, p.35). He further testified that Richardson's present condition was consistent with the history of his

accident and injury at Steelcase. (Dep. Dr. Jones, p.36). Quite clearly, Richardson presented clear and convincing evidence concerning the causation of his condition.

Although the evidence of medical causation clearly surpasses the level of clear and convincing, such a level does not constitute the appropriate standard of proof in this case. In *Ex parte Trinity Industries, Inc.*, 680 So. 2d 262 (Ala. 1996), our Supreme Court analyzed the types of injuries which may be suffered by an employee during the course of his employment. In conducting this analysis, the Supreme Court noted that determining whether a causal relationship exists is difficult when the injury does not result from a sudden and traumatic external event. *Id.* at 266. In such "non-accidental" injury cases, our Courts have applied a standard of persuasion which requires clear and convincing evidence. *Id.* However, this standard is inapplicable in claims involving accidental injuries, i.e., injuries from sudden and traumatic external events such as the one Richardson suffered when a clamp suddenly gave way forcing him over a workbench and injuring his back. In *Ex parte Trinity Industries, Inc.*, the Alabama Supreme Court

clearly noted that:

> An employee claiming to have been injured by a sudden and traumatic external event (an "accident" in the colloquial sense, e.g., being struck by a falling hammer on a construction site or slipping off a ladder) need only produce substantial evidence tending to show that the alleged "accident" occurred and tending to establish "medical causation," by demonstrating that the "accident" was a contributing cause of the complained-of injuries and complications.

Id. at 266. (Footnote No. 3).

This case involves a specific accident which occurred on August 20, 1992, and plaintiff's injuries, condition, and complications from that accident. Thus, the appropriate standard is one of substantial evidence. In that regard, it is undisputed that the accident occurred as claimed by Richardson. Additionally, 3 separate physicians testified that Richardson's current condition is directly attributable to that injury. Thus, Richardson clearly satisfies the burden of persuasion concerning medical causation in this case.

Presumably, Steelcase argues that the non-accidental standard applies if an employee's condition does not remain static without change from the date of injury. Such an argument, if accepted, would have the practical effect of

creating one standard, clear and convincing evidence, for all claimed disabilities since almost every person's condition changes from the date of injury. Second, such a position would defeat the liberal purposes of our workers' compensation laws where absolutely no difficulty exists in tracing the condition to a specific accident as in the present case.

In the case at bar, the trial court properly denied Steelcase's affirmative defense. The evidence at trial clearly revealed that Johnny Richardson left his employment for a good cause connected to that employment, i.e., his disability as a result of the August 20, 1992, work-related injury he suffered at Steelcase.

II. WHETHER THE TRIAL COURT WAS CORRECT IN COMPLYING WITH *ALA.CODE* §25-5-57(a)(3)i. (1992 Repl. Vol.) WHERE IT CONSIDERED ANY AND ALL VOCATIONAL EVIDENCE AS EXPRESSLY DIRECTED BY THE STATUTE

Steelcase contends that the trial court's actions are contrary to both *Ala.Code* §25-5-57(a)(3)i. and §25-5-57(a)(4)d. However, the trial court properly fulfilled its duties under the Act and awarded Richardson benefits based on the overwhelming evidence at trial.

A. THE TRIAL COURT CORRECTLY CONSIDERED ANY AND ALL VOCATIONAL EVIDENCE IN RENDERING ITS DECISION UNDER *ALA.CODE* §25-5-57(a)(3)i.

Steelcase contends that the trial court exceeded the statutory authority granted it by *Ala.Code* §25-5-57(a)(3)i. However, the trial court properly followed the Act and considered any and all evidence of vocational disability as a result of Richardson's inability to continue in the employment of Steelcase.

In its brief, Steelcase raises an issue of statutory construction.

> One of the fundamental rules of statutory construction is that a court is to determine and give effect to the Legislature's intent in enacting a statute. *Norfolk S. Ry. Co. v. Johnson*, 740 So. 2d 392 (Ala. 1994).

Bleier v. Wellington Sears Company, 757 So. 2d 1163, 1168 (Ala. 2000). Additionally,

> As in all cases of statutory construction, we are bound to give effect to the plain language of the statute. *McNair v. Dothan Marine, Inc.*, 656 So. 2d 1217 (Ala. Civ. App. 1995); *USX Corp. v. Mabry*, 607 So. 2d 249 (Ala. Civ. App. 1992). Further we construe the Workers' Compensation Act liberally to effect its beneficient purpose, and we resolve reasonable doubts in favor of the employee. *Riley v. Perkins*, 282 Ala. 629, 213 So. 2d 796 (1968); *City of Guntersville v. Bishop*, ____ So. 2d _____ (Ala. Civ. App. 1997).

Gilliam v. Akzo Nobel Industrial Fibers, Inc., 710 So. 2d 445, 448 (Ala. Civ. App. 1997), *cert. denied* (1998).

What is the plain language of *Ala.Code* §25-5-57(a)(3)i? The statute itself unambiguously states that if an injured worker returns to work on or after reaching maximum medical improvement (MMI) at a wage equal to or exceeding his pre-injury wage, then the court shall not consider any evidence of vocational disability. The statute makes no distinction concerning the type of post-injury work performed. Rather, it plainly limits compensation to only the injured worker's physical impairment upon such a return to work. The limitation to compensation based upon physical impairment only is an important distinction in the statute. An injured individual might have a very small partial physical impairment but, based on his age, education, and the nature of his permanent restrictions, could be considered totally disabled vocationally if left to compete for work on the open market.

In the case at bar, Richardson suffered a disabling back injury. It is undisputed that following that injury, he never again returned to normal employment. When one

considers that Richardson's post-injury capabilities precluded him from any work activities that did not allow him to sit or walk around whenever he wanted, to lift almost nothing, to come and go as he pleased, to miss work whenever he wanted, and to lie on the floor at work in pain, it is extremely likely that he would have been adjudicated as totally disabled in the absence of his return to the work site at Steelcase. However, since Steelcase did return him to work, albeit in created positions, the statute expressly limited him to a recovery based solely on his physical impairment.

Because of the plain statutory language in the Act, the parties settled Richardson's earlier compensation claim based solely on his physical impairment. Since the earlier case resulted in a settlement, the trial court did not adjudicate any other issues. As discussed previously, Richardson lost his employment with Steelcase on May 12, 1998, within 300 weeks of his accident and injury. Quite simply, Richardson could no longer even physically get himself to the work site at all. In such situations, the statute is again unambiguous. Since Richardson left his

employment within 300 weeks of his injury, he could petition the court to reconsider the earlier permanent partial disability rating based only on physical impairment when he settled his claims previously.

What is the scope of the trial court's reconsideration? The statute expressly provides that, upon reconsideration, the trial court may consider any earnings the employee is able to earn, any permanent restrictions, as well as "any" evidence of vocational disability. *Id.*

The statute itself expressly allows the trial court to consider "any" evidence of vocational disability. Yet, Steelcase urges a construction of the statute which would limit the trial court's consideration of vocational evidence. The construction urged by Steelcase is clearly contrary to the plain and unambiguous language of the statute which allows the trial court to consider "any" evidence of vocational disability. Nothing in the Section limits the trial court's consideration of the vocational evidence. Likewise, nothing in the Section precludes the trial court from finding the worker 100% vocationally disabled if supported by the vocational evidence.

Steelcase's present contention would also deny the trial court the authority to consider all of the evidence concerning the employee's earnings ability or permanent restrictions. Again, such a construction is clearly counter to the plain meaning of the statute.

In disregard to the plain language of the statute, Steelcase argues that the determination of whether an employee is permanently partially or permanently totally disabled must "conclusively" be made by a trial court at the time of the employee's initial claim. In support of its argument, Steelcase erroneously relies on *Keen v. Showell Farms, Inc.*, 668 So. 2d 783 (Ala. Civ. App. 1995). However, in *Keen*, this Court never stated that a "conclusive" determination must be made at the time an initial workers' compensation claim was filed. In *Keen*, this Court held only that the trial court had authority to find the worker permanently and totally disabled despite her return to the workplace. *Id.* at 785. In reaching that conclusion, *Keen* cites almost exclusively to cases pre-dating the 1992 amendment now at issue.

Indeed, the trial court often makes no finding of

disability in disputed cases which are resolved by settlement. Often, the parties to a claim dispute whether the injured worker is partially or totally disabled and settle for some specific sum of benefits between 99% and 100% disability. In Richardson's case, the parties reached a settlement of his initial claim for benefits. The trial court, in its decree approving that settlement, made no specific findings concerning the extent of his disability.

Quite clearly, the statutory construction urged by Steelcase would deny the trial court the authority expressly given it by the legislature in considering a worker's disability. Not only would Steelcase's contention, if accepted, be contrary to the plain language of the statute, it would also defeat important purposes of our workers' compensation laws. The Workers' Compensation Act serves the valuable purposes of compensating workers with a disability while promoting a return to work if at all possible. The particular section at issue is important in effectuating the primary purposes of our workers' compensation laws by encouraging employers to return workers to some type of employment while also protecting

workers from unscrupulous employers who would simply pay them wages until the statute of limitations expired. The section also provides the dedicated employee an opportunity to attempt work without losing important benefits in the event he truly is vocationally disabled.

In a recent concurrence in *Lanthrie v. Wal-Mart Stores, Inc.*, 2002 WL 31133373 (Ala. Civ. App. Sept. 27, 2002) (NOT YET RELEASED FOR PUBLICATION), Judge Murdock discussed the important purposes of *Ala.Code* §25-5-57(a)(3)i., the difficulties in dealing with post-injury wages, and the presumptions which existed prior to the 1992 statutory amendments. In analyzing this particular section, Judge Murdock noted:

> The legislative solution adopted in 1992 was a compromise that limited the amount of benefits available to employees who return to work making wages equal to or higher than those they made before their injury. With the adoption of §25-5-57(a)(3)i., such employees are entitled to benefits based only on their degree of physical impairment; evidence of vocational impairment may not be introduced. To protect the employee, however, the statute allows a right of action beyond the general statute of limitations if the employee is subsequently terminated under certain circumstances. In reading §25-5-57(a)(3)i., I see a straightforward rule that is not couched in terms of a presumption such as that which was employed by the courts prior to that statute's

> adoption; nor do I see any language allowing an employee to *rebut* any such presumption. While it is true that the Workers' Compensation Act is to be construed so as to effect its beneficient purposes, we may not give the Act a construction not fairly and reasonably supported by its language. *Ex parte Beaver Valley Corp.*, 477 So. 2d 408 (Ala. 1985).

Id. at *7.

The section at issue presents a straightforward rule. Where an employee is returned to work at a wage equal to or greater than his pre-injury wage, regardless of his true vocational disability, he is limited to compensation based only on his physical impairment. However, if the employee subsequently loses this employment under the allowed circumstances, the trial court can then consider any evidence of vocational disability. In the case at bar, the trial court certainly complied with the unambiguous language of the statute and rendered a fair and just decision. As a result, Steelcase's contention on this issue must fail.

B. THE TRIAL COURT'S AWARD OF PERMANENT TOTAL DISABILITY BENEFITS DID NOT VIOLATE *ALA.CODE* §25-5-57(a)(4)d.

Ala.Code §25-5-57(a)(4)d. states as follows:

> Any employee whose disability results from an injury or impairment and who shall have refused to undergo physical or vocational rehabilitation or to accept accommodation shall not be permanently and totally disabled.

(underline added). Under this section, it is the refusal by the claimant of offered rehabilitation or accommodation which precludes an award of total disability.

The cited section presupposes that the employer has actually offered rehabilitation or accommodation to the injured employee. However, in the case at bar, the record is devoid of any evidence that Steelcase ever offered any rehabilitation to Richardson.

The record is equally devoid of any offer of accommodation to Richardson when he last worked at Steelcase. The evidence actually reveals that Richardson is so disabled that he would be unable to work regardless of proposed accommodations. However, no offer was ever made when Richardson left his employment in May, 1998, or at any time thereafter.

According to the evidence, Richardson left his employment with Steelcase on May 12, 1998. At no time in May, 1998, or later, did Steelcase ever propose any job

modifications. After quitting Steelcase, Richardson had at least two conversations with management employees at Steelcase. However, in none of these conversations did Steelcase ever propose a modification in an effort to return him to work.

Because Steelcase never made any offers of rehabilitation or accommodation when Richardson left his employment, it cannot now seek to deny Richardson benefits. However, assuming *arguendo* and contrary to all the evidence, that such an offer was made, the trial court still correctly denied Steelcase's effort to preclude an award of the appropriate compensation benefits.

This Court has previously held that "[t]he question whether an employee can be rehabilitated is a question of fact, and the weight of the evidence before the court is not within this court's purview." *Asplundh Tree Expert Company, Inc. v. Latham,* 656 So. 2d 839, 841 (Ala.Civ.App. 1995). At trial, the court carefully considered extensive evidence concerning the work provided by Steelcase, Richardson's reasons for leaving his employment, and Richardson's vocational disability. The evidence revealed

that Richardson can barely function on a daily basis. He is often totally incapacitated. Even before he left Steelcase's employment, he was barely attending work. When at work, he would even lie on the plant floor in pain on occasions. Certainly, the trial court was justified in finding Richardson totally disabled when the evidence clearly revealed that no accommodations would have enabled him to continue working.

Steelcase's arguments, in its brief concerning vocational rehabilitation, are disturbing. In its brief, Steelcase claims that Richardson's own vocational expert, as well as several physicians, recommended vocational rehabilitation. Steelcase then boldly claims that rehabilitation was refused. However, these arguments are clearly contrary to the evidence.

Patsy Bramlett testified at trial as a vocational expert for Richardson. At trial, Bramlett specifically testified that Richardson was <u>not</u> a candidate for vocational rehabilitation in his present condition. Likewise, Dr. Boone, who is now cited by Steelcase as a proponent of rehabilitation, when directly asked whether

Richardson was a good candidate for vocational rehabilitation, specifically answered by stating "not necessarily." (Dep. Dr. Boone, p.16).

In the case at bar, the trial court properly considered the evidence. That evidence is overwhelming that Richardson was never offered any rehabilitation or other accommodation when he left his employment at Steelcase. The evidence is equally overwhelming that Richardson is too disabled to be a candidate for rehabilitation or work with any accommodation. Thus, the trial court's decision awarding benefits was proper and just.

III. WHETHER THE TRIAL COURT WAS CORRECT IN AWARDING RICHARDSON BENEFITS WHERE THE OVERWHELMING EVIDENCE REVEALED RICHARDSON WAS PHYSICALLY INCAPABLE OF GAINFUL EMPLOYMENT

Under *Ala.Code* §25-5-57(a)(3)e., a trial court shall deny workers' compensation benefits to an employee who refuses suitable employment without justification. In short, the statute requires an offer of employment, that the offered employment be suitable to the worker's physical condition, that the worker refuse the employment, and that the refusal be unjustified. The analysis of these elements

involves multiple questions of fact for the trial court.

In the case at bar, Steelcase boldly asserts that Richardson refused suitable employment. However, the evidence reveals quite the opposite.

At the time Richardson left his employment with Steelcase, he could barely function on a daily basis. Often, he hurt so badly he could not even arrive at the jobsite. When he did attend the jobsite, he was frequently late and frequently left early. When at Steelcase, he could not do any physical work. Due to his chronic pain and limitations, he spent his time at Steelcase either walking around or lying on the plant floor. Without question, Richardson's physical condition precluded gainful employment.

Steelcase asserts that it had a light duty "parts bagger" job which was suitable for Richardson. In light of the preceding paragraph, it is quite clear Richardson was unable to attend any type of work. In addition to the above, Richardson specifically testified that he could not lift the boxes of parts, one of the necessary aspects of this position. In fact, the undisputed evidence reveals

that Richardson required help from co-workers to perform this task of the "parts bagger" position. When no co-worker was available, he did nothing. Contrary to Steelcase's assertion, the undisputed evidence reveals that Richardson could not perform his employment with Steelcase.

In order to justify its position, Steelcase asserts that the job requirements were consistent with a prior functional capacity evaluation. However, Steelcase neglects to note that Richardson could physically only complete half of that evaluation, that Richardson spent the next 2 days after the evaluation bedridden due to chronic pain, and that multiple treating physicians refused to accept the results of that evaluation.

In *Avondale Mills, Inc. v. Weldon*, 680 So. 2d 364 (Ala. Civ. App. 1996), this Court examined *Ala.Code* §25-5-57(a)(3)e. (1975). In that case, this court held that:

> There was conflicting evidence presented as to whether the offered jobs were 'suitable' to Weldon's capacity. Due to this conflict, we are unwilling to find the trial court in error.

Id. at 367.

The evidence in this case overwhelmingly supports the position that there is no suitable employment for

Richardson in his present condition. The trial court carefully listened to this overwhelming evidence, including the testimony of Richardson, Richardson's wife, Dr. Bacon, Dr. Eldred, and Patsy Bramlett. In addition, the trial court carefully observed Richardson throughout the trial.

Based on all of the evidence, Richardson believes that any objective person would reach the conclusion that he is not physically capable of any employment. Certainly, substantial evidence exists to support the trial court's decision in this case. As a result, *Ala.Code* §25-5-57(a)(3)e. (1975), does not preclude the provision of workers' compensation benefits to Johnny Richardson.

IV. WHETHER THE TRIAL COURT WAS CORRECT IN CALCULATING THE BENEFITS DUE RICHARDSON BASED ON THE EVIDENCE ADMITTED AT TRIAL

In its brief, Steelcase generally assails the average weekly wage and mortality statistics used by the trial court to calculate Richardson's benefits. However, the trial court correctly calculated the benefits due Richardson based on the evidence.

The evidence introduced at trial revealed that

Richardson earned an average weekly wage, including the value of fringe benefits, of $740.96 at the time of his August 20, 1992, accident and injury. (Exhs. 3 & 4 to Dep. Hughes). Based on the correct average weekly wage, Richardson should have been entitled to benefits at a compensation rate of $493.97 each week. However, the maximum rate payable under the Act at the time of his injury was $400.00 per week. Thus, the trial court properly based his compensation on a rate of $400.00 per week.

Instead of the rate established by the undisputed evidence at trial, Steelcase argues that the trial court should impose a lower rate which the parties presumably used to calculate Richardson's impairment rating when the case was previously settled. However, Steelcase neglects to point out that the actual issue of average weekly wages was never fully litigated in the earlier case because the parties reached a settlement. The decree entered by the trial court as part of that earlier settlement contains no finding concerning the average weekly wage. Thus, this issue was properly before the trial court at the current

trial of this case.

Second, Steelcase contends that the trial court erred in utilizing the United States Government's official vital statistics in calculating Richardson's life expectancy. Specifically, Steelcase contends that the trial court must utilize the mortality table authorized by Alabama's statute. Presumably, Steelcase refers to the mortality table promulgated pursuant to *Ala.Code* §35-16-1, et. seq. Under *Ala.Code* §35-6-2, all courts in Alabama are authorized to accept this mortality table into evidence. However, the Section also states that nothing shall affect the admissibility of other competent evidence. *Id.* Furthermore, *Ala.Code* §35-16-4(b) specifically states:

> The provisions of section 35-16-3 and subsection (a) of this section are cumulative and shall not prevent any court from taking judicial knowledge of mortality tables, as provided by law, nor affect the admissibility of such tables in evidence when offered in any other lawful and proper manner.

At the trial of this case, Richardson's counsel offered into evidence the table of vital statistics established by the United States Government. (Pl's Exh. 12). Steelcase did not object to the mortality table offered by Richardson

on any grounds other than the alleged ground that the trial court could accept no table other than the one issued pursuant to *Ala.Code* §35-16-1, et seq. As detailed above, Steelcase's position on this issue is incorrect. Thus, the trial court properly admitted into evidence the mortality table offered by Richardson.

CONCLUSION

Based on all the foregoing, the Appellee Johnny Richardson respectfully requests that The Alabama Court of Civil Appeals affirm the trial court's decision based on clear Alabama law and the overwhelming evidence presented at an *ore tenus* trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the following counsel of record by placing a copy of same in the United States mail, postage prepaid, on this the 18th day of February, 2003, addressed as follows:

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