[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-7072

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN DOHERTY,

Appellant,

v.

TURNER BROADCASTING SYSTEMS, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF OF APPELLANT DOHERTY

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GLOSSARY

DC WCA…..District of Columbia Workers Compensation Act

IRS……...…Internal Revenue Service

JA ……..….Joint Appendix

U.S.C……United States Code

STD……Short Term Disability

WC…….Workers Compensation

SUMMARY OF THE ARGUMENTS

As an initial matter Doherty fully concurs with the arguments made in the Amicus Curiae brief. Appellant will leave well enough alone as the Amicus Brief is solid, well thought out, and supported by record evidence compared to anything Doherty is capable of arguing. On that note Doherty will concentrate on the misleading fixations, mischaracterized testimony, and good ole plain known falsehoods put forth by Turner that are procedurally deficient and unsupported by record evidence.

ARGUMENTS

TURNER'S ARGUMENT THAT THEY DIDN'T KNOW APPELLANTS WORK INJURY WAS COVERED UNDER THE DC WCA STARTING ON 12/30/2012

One fixation is Turner's assertion that disability payments under the DC WCA may or not may be non-taxable. Appellee Br. 11. There is no debate on this. 29 U.S.C. § 104(a)(1) exempts amounts received "under workmen's compensation acts" from taxable gross income….period. Turner next attempts to obfuscate the issue by for the first time bringing up "the workers compensation determinations ." Appellee Br. 21. These "determinations"[1] is where Turner states:

> The workers' compensation determinations made no mention of the taxability of the compensation Mr. Dougherty received as advance payments, and

[1] Turner does not provide a reference to what these "determinations" are but for purposes of Doherty's argument they would be JA 463-468.

the DC WCA and I.R.C. are silent as to the taxability of payments made to an employee before a workers' compensation determination. Appellee Br. 33.

Firstly, this is a red herring. Compensability of an injury claim under the DC WCA rest on the Claimant's initial claim which Doherty made, *see* JA461. Turner could have filed a Notice of Controversion[2] on the claim challenging it and denying it, but they did not. There is no record evidence that Turner did not know about this initial WC claim. Their argument that they did not know the work injury was covered under the DC WCA and that they were not required to amend his W 2's until these "determinations" came out is just an outright falsehood. These "determinations" *see* JA 463-468 actually are all against Turner for various subsequent violations of the DC WCA from Doherty's date of injury of 12/30/2012. They have nothing to do with the compensability of Doherty's original claim, as discussed supra. Turner has no record evidence that they challenged the original claim and as a matter of fact they paid indemnity and medical benefits[3] since that date of injury, 12/30/2012. In fact, the Office of Workers Compensation issued a memorandum stating, "it is concluded that the employer/carrier does not dispute that a work-related injury did occur on 12/30/2012 and has paid benefits to

[2] https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/OWC%20Form%20No.%2011.pdf

[3] *See* JA 465. "It is concluded that the employer/carrier does not dispute that a work-related injury did occur on 12/30/2012 and has paid benefits to the claimant as well as allowed continued medical treatment for said injury."

the claimant as well as allowed continued medical treatment for said injury." *see* JA465.

A second clear obfuscation is in this Turner statement:

> The workers' compensation determinations made no mention of the taxability of the compensation Mr. Dougherty received as advance payments, and the DC WCA and I.R.C. are silent as to the taxability of payments made to an employee before a workers' compensation determination. Further, Mr. Dougherty's emails merely state his personal opinion that the compensation should not be taxed, which is in contravention of the tax treatment of all other Turner employees under the STD plan. (JA374 at ¶ 8). *see* Appellee Br. 33.

Turner references these supposed emails yet does not provide a reference to where they are in the record evidence. As to Doherty merely stating his opinion it is hard to reply as Turner provides no record evidence of these alleged emails. There is however record evidence from Turner's own Manager of Risk Management at the time, Paul Miller, who stated to Doherty that Workers Compensation is non-taxable. *see* JA458.

Turner further states that Doherty's opinion, which they provide no record evidence of, "is in contravention of the tax treatment of all other Turner employees under the STD plan. (JA374 at ¶ 8)." The simple answer to that is Turner may have misclassified the employees on WC, but being paid taxable STD, because as they readily admit they take a business tax deduction[4] for all STD payments company wide. Turner also doesn't list how many of those employees are covered or have a

[4] *See* ECF No. 59, at 8 n.6

claim under their respective locations Worker Compensation laws. As Turner's parent company at the time was Time Warner the exponentiality of the tax deductions Turner took could be enormous and a motivation to ignore 29 U.S.C. § 104(a)(1).

TURNER CLAIMS THAT THE INTERNAL REVENUE SERVICE CONFIRMED THAT DOHERTY'S 2015 W 2 WAS CORRECT

This statement is not based on any record evidence. The IRS letter (*see* JA470) does not confirm that the IRS in fact confirmed anything. The IRS inquiry merely asked Turner if the W 2 was correct. They did not investigate or audit the request or issuance of the W 2. How it works for a W 2 inquiry to the IRS is this.[5] Doherty called 800-829-1040 to initiate a W 2 complaint where he stated that Turner would not provide a corrected W 2. Doherty filed a Form 4852,[6] Substitute for a W 2, as instructed to do by the IRS.

This Form 4852 had the proper amount that should have not been taxed and taxed for his income from Turner for 2015[7]. The proper amounts are listed in JA518 in an email exchange on May 23, 2016, with Tom Calender who was Senior Counsel for Turner where Doherty also expressed that he had initiated the W 2

[5] https://www.irs.gov/faqs/irs-procedures/w-2-additional-incorrect-lost-non-receipt-omitted/w-2-additional-incorrect-lost-non-receipt-omitted

[6] https://www.irs.gov/forms-pubs/about-form-4852

[7] For Doherty's 2015 income from Turner, taxable wages were 44401.84 and non-taxable WC disability benefits were 46161.16. *see* JA 518, 494-495.

complaint with the IRS. The IRS then sends a letter to employer requesting that they furnish a corrected W 2 within 10 days. This letter that was sent to Turner was not produced in discovery as they claimed it was a "paper" letter and they could not find it. Regardless Turner has admitted having had the letter and responding to it by telling the IRS that Doherty's 2015 W 2 was correct. This is borne out in the letter with Turner's tax department address on the top of the IRS letter. *see* JA 470. So, the IRS in no way shape or form confirmed the W 2 as correct, they merely accepted Turner's statement. The next step for Doherty was to file a civil complaint which he gave Turner notice of. *see* JA518. Turner's next argument, which doesn't' deserve analysis, is that Doherty could go to the IRS and attempt to recoup his losses due to Turner's violation of 29 U.S.C. § 104(a)(1). *see* footnotes Appellee Br. 26-27. That would only serve to circle around to the fraudulent 2015 W 2 Tuner issued which the IRS said is what they base Doherty's income on. So indeed, the IRS did not "confirm" anything other than to accept Turner's false explanation. The remedy for Doherty then becomes filing suit under I.R.C. § 7434.

TURNER'S CLAIM THAT THE DC WCA AND THE I.R.S. ARE SILENT AS TO THE TAXABILITY OF PAYMENTS MADE TO AN EMPLOYEE BEFORE A WORKER'S COMPENSATION "DETERMINATION"

As discussed supra Turner provides no definition or explanation as to what a "worker's compensation determination" is. *see* Appellee Br. 33. If they are referring to whether or not Doherty's WC claim was accepted they missed the boat

on that. In fact, the record evidence shows that he filed a claim (*see* JA461) and it was accepted by Turner as there is no record evidence of them having opposed it. As to the silence of the taxability by the IRS it seems Turner has not factored in 29 U.S.C. § 104(a)(1). The applicability of this statute has been argued through this case and most elegantly in the Amicus Briefs. As far as the DC WCA and federal law, U.S.C. § 104(a)(1), has supremacy and Doherty in a DC WC Hearing with Administrative Law Judge Douglas Seymour was told by the ALJ that "I can grant you disability benefits and medical expenses." *see* JA127. In other words, the ALJ for the Administrative Hearings Division cannot rule on a federal question. They are limited to granting indemnity benefits and medical expenses per the DC WCA.

TURNER'S CLAIM THAT APPELLANTS ISSUES III THROUGH VII WERE NOT PRESERVED FOR APPEAL. APPELLEE BR. 36-40

Turner's insistence that U.S.C. § 104(a)(1) and the DC WCA only applies to them when it's to their advantage, or when non-existent "determinations" are made goes against everything the Act was intended to do. At the risk of lecturing, it is helpful to see what the system really is.

The purpose of the Act is to `assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers.

To achieve this objective, the DC WCA strikes a bargain between workers and employers based on `a mutual renunciation of common law rights and defenses by employers and employees alike. The injured worker receives compensation quickly, without having to endure the rigors of litigation or prove fault on behalf of the employer. In exchange, the employer is assured that the injured worker will be limited to compensation under the Act and may not pursue the unpredictable damages, except that Turner now claims Doherty was not covered under the DC WCA until the so called "determinations," discussed supra, were made.

Workers' compensation is a form of insurance that provides wages and medical support to employees injured on the job in exchange for that employee's relinquishment of his or her right to sue the employer for tort negligence. In Turner's assertion that the "determinations" *see* Appellee Br. 33 legally determined when Doherty was covered under the DC WCA would mean that Doherty had the right to sue Turner for personal injury while Turner was compensating him through their Short-Term Disability program and did not recognize him as being covered under the DC WCA. This assertion by Turner

is a deprivation of property[8] and Doherty, under Turner's scheme, could have had the opportunity to sue for personal injury.

Next Turner in Appellee Br. 38 states that the District Court never denied Doherty due process. This is for this court to decide and not Turner's team of lawyers. Throughout Appellee Br. 35 – 40 Turner does not address Appellants arguments with any substance except to say none of the issues were preserved and they do not counter any arguments Doherty made in issues III through VII in his brief filed under seal. As such it is hard to counter their arguments as there are no direct ones.

For preservation purposes Doherty did bring up the fact that the District Court had failed to rule on his Motion for a Revised Scheduling Order. *see* Appellants Br. 15-17. The District Court only gave a "Okay. All right" answer in the colloquy in JA 793 Lines 10-25 and JA 794 Line 1. In fact, this can be a constitutional due process issue. Extended discovery would have given Appellant the opportunity to bolster his case. In the case at bar, there is no dispute that the disability benefits plaintiffs seek under the DC WCA are protected property

[8] See Matthews v. Dist. of Columbia, 675 F. Supp. 2d 180, 186 (D.D.C. 2009); Fonville v. Dist. of Columbia, 448 F. Supp. 2d 21, 26 (D.D.C. 2006). Disability payments are considered property.

interests. See Matthews v. Dist. of Columbia, 675 F. Supp. 2d 180, 186 (D.D.C. 2009); Fonville v. Dist. of Columbia, 448 F. Supp. 2d 21, 26 (D.D.C. 2006).

Turner did not address Doherty's arguments that were made under seal, specifically Appellants Br. 12 – 21 and as such Doherty cannot respond to their silence on the specific issues. What they did manage to argue was perfunctory and undeveloped. Therefore, as a matter of law Turner's opposition should be denied for failure to actually argue any of their sparse points, cite case law or legal precedent.

See McFarland v. George Washington University, 935 A.2d 337, 351 (D.C. 2007) quoting "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." Enders v. D. C., 4 A.3d 457, 471 n. 21 (D.C. 2010); see also Bardoff v. U.S., 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived). *See* also, Phrasavang v. Deutsche Bank, 656 F. Supp. 2d 196, 201 (D.D.C. 2009) where it was held that where a party fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded. With that Doherty's arguments stand as argued in his brief.

TURNERS ASSERTIONS THAT DOHERTY TESTIFIED IN DEPOSITION THAT HIS W 2'S WERE "ACCURATE"

Turner went to great lengths to cherry pick and whittle down Doherty's deposition testimony to suit their false and misplaced theories. To simplify, if someone owed Doherty 100 dollars and today they paid him fifty they would

still owe him. If one were to ask Doherty tomorrow "how much did they pay you yesterday" the answer to the exact question would be 50 dollars. That does not mean they don't owe another 50 dollars. In Turner's world this would mean that they accurately paid him back 50 dollars. Semantics and linguistics can be molded to represent a lot of things and when certain word clusters are picked out of deposition testimony the same is true.

As noted in Appellee Br. 19 Turner spills a lot of ink once again that Doherty admitted that his W 2's were accurate in his deposition. What Doherty really admitted in his deposition was the following:

JA350

Q. In 2015 did you have a workplace injury?
A. In 20 -- no, it wasn't an injury. It was still a continuation of the injury from 2012. I went out to get surgical intervention in 2015.

Q. And were you paid for the days you missed due to your surgery in 2015?

A. Well, I wasn't -- I wasn't paid according to the District of Columbia Workers' Compensation Act. Did I -- did Turner pay me, yeah, but it wasn't in accordance with the statutory requirements.

JA349-50

Q. In 2014 do you recall how you received -- meaning did you go through -- did your checks, I guess your income replacement, did that come from ESIS or Turner?

A. Well, I don't believe it was income replacement. They're referred to -- it's supposed to be wage-loss benefits. And I recall at the time it came through -- it came through Turner. But it wasn't in accordance with the statutes for the Workers' Comp Act for the and I still haven't -- to this day

have gotten paid for that -- that period of time.

JA355

Q. Do you know anybody at Turner who would willfully file fraudulent information? Do you know who the person may have been?

A. I believe I asked those questions and they have not been answered yet in my discovery, and also the -- my request for documents that I haven't received, that I gave you over -- well, I think -- this now is day 31. So I can't answer that question yet.

JA 359

A. Well, I think I just told you that it's because I was out for about nine months or so. That was -- you know that was a good -- that's what -- you know, my income was not what it was supposed to be. It wasn't the average

weekly wage underneath -- pursuant to the Act
because Turner never fulfilled their part of the
bargain under the Act.

JA 365

Q. So are you not going to answer why you
believe Turner allegedly provided or fraudulently
provided false information to the IRS in 2014?

A. Okay. As I said twice already, I've
not completed discovery. So I can't answer that
in detail.

The point being made here is that Doherty's deposition testimony repeatedly referenced that he was being taxed on his non-taxable WC wage loss benefits and that discovery was not yet completed. Turner's parroting of Doherty saying his W 2's were accurate can be juxtaposed next to what he also actually said. Doherty can only hope and invite the court to read JA 346 – 371 in its entirety for clarification.

TURNERS REPEATED REFERENCES TO CALENDAR YEARS OTHER THAN THE YEAR 2015

Finally, Turner repeatedly references the years 2014 and 2016 and even back to 2009 and how Appellant was compensated for wage loss disability benefits. The fact is Doherty filed this lawsuit for the year 2015 and that's where the arguments rest. If this case is remanded back to District Court there may be a precedent that develops for violations of I.R.C. § 7434 that may permit Doherty

to seek relief separately for other years where Turner has perpetrated the same violations that they did in 2015.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment and remand.

Respectfully Submitted, /s/ Martin Doherty February 7, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3269 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Martin Doherty certify that on February 7, 2023 I electronically filed the foregoing Opening Brief via this Court's CM/ECF system, which will send notice of such filing to counsel of record and Appellees Turner Broadcasting Systems Inc., in the above-captioned case.

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