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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No. 2023-000909
(Court of Appeals Opinion No. 2023-UP-164
Filed April 26, 2023)

Randall G. Dalton, Employee, ... Petitioner,

v.

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

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents The Muffin Mam ("Employer") and Amerisure Mutual Insurance Company, Inc. (jointly "Respondents") hereby oppose Petitioner Randall G. Dalton's Petition for Writ of Certiorari ("Petition") for review of the Court of Appeals' Opinion No. 2023-UP-164, filed April 26, 2023. Petitioner, Claimant below, has not raised any novel question of law or identified any prior decisions of this Court with which the Court of Appeals' Opinion conflicts, or any other issue that warrants this Court's review. Consequently, the Petition should be denied.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COMMISSION AND THE COURT OF APPEALS CORRECTLY FOUND THAT CLAIMANT FAILED TO MEET HIS BURDEN OF PROVING HE IS ENTITLED TO PERMANENT AND TOTAL DISABILITY?

II. WHETHER CLAIMANT FAILED TO PRESERVE ANY OTHER ISSUE FOR APPELLATE REVIEW?

STATEMENT OF THE CASE

The dispute in this case centers on the extent of permanent disability proven by Claimant following an admitted work-related injury that occurred on June 25, 2017. Claimant filed a Form 50 with the South Carolina Workers' Compensation Commission on September 3, 2020, alleging compensable injuries to his neck, right shoulder, back, both hands, groin, right lower extremity, left lower extremity, and right hip, and seeking an award of permanent and total disability. (R. pp. 31-32). Respondents filed a Form 51, admitting injury to Claimant's cervical spine, lumbar spine and right shoulder, but denying the other alleged body parts as well as the nature and extent of injury and any resulting disability. (R. pp. 35-36).

The Single Commissioner found, among other things, that Claimant was not permanently and totally disabled, and awarded him 15% disability to his right shoulder and a combined rating for cervical and lumbar spine of 15% to his back. The Single Commissioner found Claimant failed to show a compensable injury to the remaining alleged body parts. (R. pp. 1-16).

Claimant appealed to the Full Commission, which issued its Decision and Order on January 7, 2022. The Full Commission affirmed in part and modified in part the Single Commissioner's Findings of Fact, confirming that "the Rulings of Law are correct." (R pp. 17-29). The Commission concluded as a matter of law that Claimant failed to meet his burden of proving he is permanently and totally disabled under either S.C. Code Ann. §§ 42-9-10 or 42-9-30. (R. p. 26). In addition, the Commission found that "Claimant has not met his burden of proof required to establish sheltered employment and entitlement to an award for permanent disability under Peoples v. Cone Mills Corporation 342 S.E.2d 798 (N.C. 1986) and other cited case law. We find the facts of this claim to be significantly different with the facts at issue in Peoples, and therefore the case law is inapplicable." (R. pp. 26-27). The Commission awarded Claimant permanent partial disability of 25% to the right shoulder and 25% to the spine, totaling $105,723.00 to be paid in a lump sum. (R. pp. 12, 27).

Claimant timely appealed to the Court of Appeals, which affirmed the Commission under the applicable standard of review. Claimant now seeks a writ of certiorari from this Court but, as is discussed below, presents no issue or argument warranting further review.

BACKGROUND FACTS

A. Relevant Lay Testimony.

Claimant suffered work related injuries to his cervical and lumbar spine and right shoulder on June 25, 2017. (R. pp. 31-32).[1] At the time of the Single Commissioner hearing, Claimant was 61 years old. (R. p. 484, lines 20-25). Claimant testified that, after obtaining a high school degree, he took some technical college courses in auto mechanics and industrial electronics, but did not obtain any certificate. (R. p. 485, lines 1-8). He has no problem reading

[1] Respondents include only an abbreviated version of the relevant facts here, and refer the Court to the more detailed account contained in their Brief to the Court of Appeals, pp. 4-15.

or writing and uses a computer program called CAMS for work for preventive maintenance tasks. (R. p. 485, lines 9-11; p. 486, lines 6-25). Claimant also took some accounting at Limestone College but he did not think he received a certificate. (R. p. 531, lines 18-24). He acknowledged that, "as far as a certificate, I may have got one when I worked at GE but that was through my work when they sent me to switch gear school." He explained that, prior to working for GE, he did not know how to do switch gear work but was able to learn it. (R. p. 532, line 1 – p. 533, line 7). Claimant is certified to drive a forklift. (R. p. 536, lines 3-6).

Claimant testified that, as of the time of the hearing, he had worked for Employer for almost 19 years. (R. p. 488, lines 19-24). His current position is Maintenance Supervisor, a position he had held for about a year. (R. p. 488, line 25 – p. 489, line 3). Previously, Claimant had worked for Employer as a Maintenance Tech. (R. p. 489, line 19 – p. 490, line 4). As Maintenance Supervisor, Claimant's job entails, "[b]asically, being over the people, I mean, making sure that they're doing what they're supposed to be doing but I still do a lot of the same stuff I was doing before as far as, you know, looking at a—the equipment or something," working on the floor and "fixing stuff." (R. p. 490, lines 5-17; p. 491, line 1 – p. 492, line 2). He explained that typically his work did not involve "lift[ing] any weight" but did involve a "good bit" of pushing the equipment, which is on wheels. (R. p. 492, lines 14-23; p. 493, lines 5-21).

Claimant explained that he does not "do a lot [of] overhead work," but that "[m]aybe sometimes" he would have to "torque nuts or something like that," which requires more than 10 pounds of pressure. If something was too heavy or he was not comfortable doing something, "then I'll get somebody to do that." (R. p. 493, line 22 – p. 494, line 21). He also testified that he works on equipment that is low on the floor, "and that's pretty strenuous." (R. p. 496, lines 8-15).

Claimant testified that Employer was accommodating his lifting restrictions: "Well, they—like if I need help and stuff like that. I try not to lift anything heavy or anything like that …. But I do a lot more walking now since we—since they shut down the other facility. So, I don't really get to—to sit down like I did before." (R. p. 501, line 16 – p. 502, line 7). Claimant explained that he will "get the guys to do anything heavy" and that "I usually do stuff like trouble shooting; if—if a piece of equipment is not running correctly or whatever then I'll go help out with that because I know a lot of the equipment that's in there, especially the old stuff, because none of the other people in there know how to do that." (R. p. 516, lines 1-14). He acknowledged that he does some of the physical work himself, within his restrictions, which Employer has "been pretty good about doing that." (R. p. 518, lines 9-22). Claimant does not "do anything over ten (10) pounds over my head at all with" his right shoulder, "[a]nd I try not to lift anything on this side. I've become a lot stronger on my left side because I favor my left side." (R. p. 507, lines 12-19).

Claimant testified that he felt like he "deserve[d]" his salary of $72,000 and that "I probably deserve more than that …. I bring a lot of value, in my own opinion." He agreed that he is able to contribute to the work. (R. p. 531, lines 3-17). Claimant testified that, when Employer shut down one facility, they moved him to the new facility. (R. p. 538, lines 1-7).

Prior to working for Employer, Claimant held a maintenance position at another bakery, Goglanian Bakery, for three years which involved similar tasks but different machinery. He had to "relearn how to work on the equipment from that job to the Muffin Mam job." (R. p. 496, line 23 – p. 497, line 16). Prior to that, he worked wiring control panels for Sew Simple, which made equipment for the textile industry. Claimant testified that he did not believe he could do that position again, not because of his physical limitations, but because he "couldn't remember how

to do that, I mean, I was trained doing that." (R. p. 498, lines 1-23). Prior to that, he worked at a GE Service Center, which "work was very heavy and strenuous," heavier duty than his maintenance job. (R. p. 500, line 19 – p. 501, line 12).

Terri Jermon was deposed as Employer's Rule 30(b)(6) representative. (R. p. 363, lines 8-9; p. 364, line 8 – p. 365, line 1). When Claimant's counsel queried Ms. Jermon as to the lifting requirements for a maintenance technician, she responded: "I don't know if there's actually a lot of heavy lifting. If there's going to be something substantial to lift, more than one person would do it. That's a policy we have with anything—anything here. But normally I don't think anybody would be expected to pick up more than, you know, 30 pounds by themselves. When [Claimant] started having his restrictions, we dialed that down, what he was able to lift. And as far as I know, there's never been any problem with that." (R. p. 367, lines 11-24). When asked about Claimant's restrictions, Ms. Jermon testified that, "if it was something that was beyond his restrictions, either someone else would be assigned to that duty or someone else would assist him …. We've been able to accommodate his restrictions. I don't think there's ever been any problem with that." (R. p. 368, lines 5-19). When Claimant's counsel asked Ms. Jermon whether Claimant would be hired as a maintenance technician with his current restrictions, she responded, "I don't believe that there's ever been any real issue. I don't know that I can answer that question as far as if he had just walked off the street. But with his qualifications that he's had for a long time, I think he probably would have been hired …. He's been able to handle pretty much anything that's needed to be done." (R. p. 369, lines 3-24). Ms. Jermon referred counsel to Claimant's current supervisor, Ronnie Williams, who "could probably answer those same questions." (R. p. 370, lines 17-19).

Mr. Williams testified that he was hired by Employer as engineering manager but at the time of his deposition was the director of engineering. (R. p. 389, lines 5-12). Mr. Williams testified that, while Claimant would have to reach over his head to perform tasks, he would not need to exert more than 30 pounds of force when working on equipment and would not need to move anything weighing more than "15 maybe 25 pounds. Anything heavier than that, they'll use a lift or a forklift." (R. p. 393, lines 1-16). Mr. Williams testified that Claimant was "kind of holding two [job titles]. He's doing maintenance supervisory work, taking care of paperwork and what have you. Maintenance schedule, and he's also my lead fabricator for—he helps do project work, building conveyors and machinery, welding, such as that." Claimant's time is split "[p]robably 50/50" between the two roles. Mr. Williams agreed that Claimant "is … required physically to do all of the same duties that a regular maintenance tech would do." (R. p. 394, lines 6-22; p. 397, lines 20-24; p. 395, lines 7-17).

When asked whether they would hire a maintenance technician who could not do any overhead work, Mr. Williams first explained that in the job Claimant currently performs, in "the fabricating position yes, because there's really no overhead work involved in it. You know, it's all waist level of constructing them and doing the fitting …. There is really nothing here where he has to lift anything other than his hands over his head." Mr. Williams clarified that a maintenance technician has "to be able to put their hands above their head. Not necessarily lift anything, but they got to be able to reach up." He agreed that he would hire someone who "was fully able to lift their hands above their head," even where "[t]heir restriction was just they could not lift more than 10 pounds above their head." (R. p. 398, line 13 – p. 399, line 3; p. 396, lines 1-24).

Claimant's counsel asked Mr. Williams whether he would hire a person "who had a restriction of never exerting more than 30 pounds of force." Mr. Williams first responded, "[p]robably not," but then went on to explain, "[i]f he couldn't do that with both arms, yea. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do." (R. p. 396, line 25 – p. 397, line 11).

A. Relevant Medical and Expert Evidence.

Following his injury, Claimant received treatment for his right shoulder from Dr. Hoenig. Dr. Hoenig determined that Claimant reached maximum medical improvement ("MMI") on June 18, 2018, assigning him permanent restrictions of "no lifting more than 10 pounds up overhead," and an 8% impairment rating to the right shoulder. (R. pp. 161-162, 164).

Claimant returned to Dr. Hoenig on December 26, 2018 for a follow up on the right shoulder. Dr. Hoenig noted that "[w]hile doing an FCE as ordered by Dr. Lim he had an increase of pain in his right shoulder. This FCE was done on 11/14/2018." (R, pp. 181-184). When Claimant returned to Dr. Hoenig on January 16, 2019, he was again released at MMI with "[n]o change to his previous restrictions of 14B otherwise." (R. pp. 185-187).

Dr. Lim initially treated Claimant's spine and then referred him to Dr. Behr. (R. p. 504, line 21 – p. 505, line 11). Dr. Behr released Claimant at MMI for both the cervical and lumbar spine on November 7, 2018, with a recommendation for pain management for at least two years. (R. pp. 175-179). On November 20, 2018, Dr. Behr completed a Form 14B assigning permanent lifting restrictions of nothing over 30 pounds, and assigning impairment ratings of 4% to the cervical spine and 8% to the lumbar spine. (R. p. 180).

Claimant underwent another FCE on December 16, 2020. The general results of the Physical Abilities Assessment in that FCE are as follows: **Material Handling:** Floor to Waist –

20 lbs; Lift—Waist to Shoulder – 10 lbs; Lift—12-inch to Waist – 20 lbs; Lift—Shoulder to Overhead – 7 lbs; Carry—Bimanual – 20 lbs; Push (static) – 60 lbs; and, Pull (static) – 35 lbs. (R. pp. 207-209). With regard to the noted limitations of lifting from floor to waist and from 12 inches to waist being only 20 pounds, the FCE indicates that "Client attempted to lift 25 lbs, but was unable to lift to waist height. His R. knee buckled during lift." (R. p. 214).

J. Adger Brown, Jr. interviewed Claimant via telephone for a vocational evaluation. Mr. Brown issued his report on April 19, 2020. Among other things, Mr. Brown concluded that "[f]rom a vocational standpoint, it is my opinion that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (R. p. 236). Mr. Brown also concluded that Claimant "is a reasonably literate individual who would not have any problems in a job requiring routine reading and writing." (R. p. 234).

Without inquiring into Claimant's work history beyond his position with Employer, and only taking into account Claimant's high school and technical college courses,[2] Mr. Brown also concluded that, should Claimant lose his job for any reason "he would find himself unemployed and, more likely than not, totally disabled from any and all forms of work." Specifically, Mr.

[2] Specifically, Mr. Brown's report indicates he was unaware of the two certificates Claimant earned while working for GE, the accounting classes Claimant took, or of any of his prior employment history. Mr. Brown also appears to base his opinion as to future employment prospects on Claimant's "self-report," despite noting that Claimant had "difficulty providing concise" or "clear" answers regarding his job duties and how they have changed since the injury. (R. pp. 234-236).

Brown concluded that Claimant "would be unable to work as a supervisor without the ability to perform the full range of work of a maintenance mechanic, and would, more likely than not, be unemployable in any other capacity due to his age, restrictions, and functional limitations." Mr. Brown concluded that "any and all reasonable efforts [should] be extended to maintain Mr. Dalton in his present position, as he appears to be performing valuable work for his employer." (R. p. 237).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2016). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder. [citation omitted] The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Factual determinations by the Commission must be upheld on review unless unsupported by substantial evidence." *Curiel v. Env't Mgmt. Servs.*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

ARGUMENT

I. The Court of Appeals correctly upheld the Commission's determination that Claimant failed to meet his burden of proving he is entitled to permanent and total disability under S.C. Code Ann. § 42-9-10.

At the outset, Claimant appears unable to decide whether this case presents a novel legal issue which this Court can decide *de novo*, or whether his position is aligned with and supported by existing South Carolina legal precedent. On one hand, he suggests that this case presents a "novel question[] of law," (Pet. p. 4); on the other hand, he argues South Carolina law "already parallels the sheltered work model." (Pet. pp. 8, 9).[3] Regardless of whether consideration of the "sheltered work model" presents a novel legal issue in South Carolina Worker's Compensation cases, the facts of this case simply do not present a "sheltered employment," "make work" or "nominal employment" issue. There is no evidence that Claimant's position with Employer constitutes "make work" or "sheltered employment" but, instead, the exact opposite. Both Claimant himself and his vocational expert recognized this fact. (R. p. 531, lines 3-17; p. 236). The arguments set forth in Claimant's Petition constitute little more than an unsuccessful attempt to obfuscate the fact that he failed to meet his evidentiary burden of proving total disability. The Commission Decision is supported by substantial evidence and fully conforms to this Court's precedent evaluating and applying the definition of disability in S.C. Code Ann. § 42-9-10.[4]

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[3] Paradoxically, having urged the Commission and the Court of Appeals to adopt the "sheltered work" doctrine as set forth in *Peoples*, Claimant now criticizes the Court of Appeals and Respondents for analyzing this case pursuant to *Peoples*. (Pet. p. 10 (complaining that the Commission held that Claimant "failed to establish disability under Peoples, an analysis that is not identical to whether Appellant can establish disability under the pertinent standard found at S.C. Code Ann. 421-9-10").

[4] In addition, a number of the arguments raised in Claimant's Petition were never presented below, including his argument based on the maximum benefits a claimant can receive "when reduced to present value as required by the Act." (Pet. p. 4-6). This and other unpreserved arguments are not properly before this Court and should be summarily dismissed. *Hoffman v.*

A. Even if this Court were to adopt the sheltered employment doctrine set out in *Peoples v. Cone Mills*, this case does not involve "sheltered employment" or "make work."

Tellingly, the two cases cited the most in the Petition—*Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (N.C. 1986), and *Allen v. Indus. Comm'n*, 87 Ariz 56, 347 P.2d 710 (Ariz. 1959)—are not even South Carolina cases but, instead, are from North Carolina and Arizona, respectively. Although Claimant would have this Court look—uncritically it seems—to North Carolina courts' adoption and application of the so-called "sheltered employment" doctrine, no South Carolina appellate court has done so thus far. And, despite the fact that *Peoples* was decided over 35 years ago, no South Carolina appellate court has ever adopted the ruling in or even cited to *Peoples*,[5] let alone *Allen*, an Arizona case decided under a substantially dissimilar worker's compensation statute. Even if South Carolina jurisprudence were inclined to adopt the so-called "sheltered employment" doctrine, however, this would not be the case in which to do so.

Regardless of whether South Carolina recognizes the "sheltered employment" doctrine, however, the outcome would be the same because this case does not involved "sheltered" or "make" work. As the Commission correctly found, "the facts of this claim [are] significantly different with the facts at issue in Peoples." (R. pp. 26-27). In *Peoples*, the injured employee, who had only a 5th grade education, "was continually exposed to cotton dust and lint" in his job with Cone Mills. After the employee was diagnosed with chronic obstructive pulmonary disease with a byssinosis component, Cone Mills transferred him to the supply room. However, that

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Powell, 298 S.C. 338, 380 S.E.2d 821 (1989) (an appellate court will not consider a claim or argument not raised to the lower tribunal).

[5] As the Supreme Court explained in *Wigfall v. Tideland Utils.*, 354 S.C. 100, 114-115, 580 S.E.2d 100, 107 (2003), South Carolina courts are not bound to and do not always follow North Carolina workers' compensation precedent.

position required "bending, lifting, reaching and walking," and still exposed him to dust from the facility. The employer then "modified an existing third shift supply room position and offered it" to the employee, although that position "never existed before" with the employer. In this specially-created role, the employee was not required to "lift *any* object," but instead, the person coming to the supply room would retrieve the requested part. The employee did "not have to engage in any physical activity of which he does not feel capable. He will work only the number of hours he desires and will not be required to work if he does not feel like doing so." 316 N.C. at 429-430, 342 S.E.2d at 801; *see also id.* at 438-439, 342 S.E.2d at 806 (noting that the "defendant is willing to pay him the same salary in the supply room job that he was earning as a supervisor without regard for whether he comes to work, how long he stays, and how much he does while he is there")).

Here, in stark contrast, Claimant has a high school diploma, (R. p. 485, lines 24-25), has taken courses at the community college level and uses a computer program called CAMS for work. (R. p. 486, lines 1-11). He also took some accounting classes at Limestone and obtained certificates in balancing and switch gear work when he worked for GE. (R. p. 531, line 18 – p. 533, line 7). Claimant is certified to drive a forklift. (R. p. 536, lines 3-6). He has been promoted to a supervisory position in which he plans and oversees preventive and other maintenance work. In addition, he does a lot of the physical maintenance work himself. (R. p. 518, lines 9-11; *see also* R. p. 490, lines 5-17 (Claimant testifying "I still do a lot of the same stuff I was doing before as far as, you know, looking at a—the equipment or something," working on the floor and "fixing stuff")). Claimant testified that he "deserve[d]" his salary of $72,000 and that "I probably deserve more than that …. I bring a lot of value, in my own opinion." He agreed that he is able to contribute to the work. (R. p. 531, lines 3-17). He testified that he works nine-hour shifts. (R. p.

502, lines 19-24). Ms. Jermon testified that Claimant has "been able to handle pretty much anything that's needed to be done." (R. p. 369, lines 23-24). Mr. Williams testified that, as far as he could tell, Claimant has "done everything on his own. There's no—been no really any restrictions put on him as far as I know. He performs his functions just as well as anyone else here." (R. p. 395, lines 12-17; *see also* R. p. 394, lines 14-17 (Mr. Williams testifying that Claimant "is … required physically to do all of the same duties that a regular maintenance tech would do")). Even Claimant's vocational expert opined that "an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (R. p. 236). Mr. Brown concluded that Claimant "appears to be performing valuable work for his employer." (R. p. 237).

In *Peoples*, the testimony uniformly showed that there was no "job on the market today similar to that job with the same pay scale" but, instead, it was "a tailored, engineered type of job," that had been "designed specifically for" the employee. 316 N.C. at 431-432, 342 S.E.2d at 802. Moreover, Cone Mills' personnel manager testified that, not only was the position created "especially for" the employee, but "no person other than [the employee] would be hired to work in the supply room at the wages he was offered, and there was "no position at Cone other than the modified supply room job which" the employee could fill. 316 N.C. at 429-430, 342 S.E.2d at 801. Here, in contrast, and despite Claimant's attempts to distort his testimony, Mr. Williams said he would hire someone as a maintenance technician who had restrictions of lifting no more

than 10 pounds overhead and lifting no more than 30 pounds waist high with one hand, so long as he could do the work. (R. p. 396, lines 1 – p. 397, line 11; R. p. 398, line 13 – p. 399, line 3).[6]

The North Carolina Supreme Court discussed prior cases that "explained why post-injury earnings of an employee *may under some conditions* not accurately reflect the employee's earning capacity." *Peoples*, 316 N.C. at 435-436, 342 S.E.2d at 804-805 (emphasis added). While the Court recognized that "post-accident earnings are not the *conclusive* measure of earning capacity," 316 N.C. at 436, 342 S.E.2d at 805 (emphasis added), the fact that a position has been modified somewhat in order to accommodate a valued employee's restrictions does not discount those earnings entirely either. Citing Professor Larson, and based on the facts before it, the North Carolina Court explained that earning capacity cannot be determined "by the largess of a particular employer," and that:

> Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper, or if the work for which claimant is paid is ' make work' or 'sheltered work.'

316 N.C. at 438, 342 S.E.2d at 806, *quoting* 2 A. Larson, *The Law of Workmen's Compensation* § 57.34 (1983). Claimant relies on this passage from Larson as well, claiming, erroneously, that

[6] In this respect, this case is even more factually distinguishable from *Allen*, where the employer testified that the claimant's injuries, which included the loss of one eye and a fractured right hand that left his hand deformed and weaker, "affected his future with the company with respect to raises or promotions and that but for the accident," the claimant would have been earning substantially more per week. The employer also testified that it was his opinion that the claimant had "little or no chance to be employed by other similar companies, that his own company would in fact not hire a man" in the claimant's condition, but that it was "the company's policy to keep disabled workers on the job at the same pay." 87 Ariz. at 59, 347 P.2d at 712. Here, in contrast, Ms. Jermon and Mr. Williams indicated they would hire someone with Claimant's restrictions. (R. p. 369, lines 3-24; p. 396, line 1 – p. 397, line 11; p. 398, line 13 – p. 399, line 3).

"the hallmark of the 'sheltered work' or 'make work' doctrine is that disability must be analyzed without reference to income …" (Pet. p. 7-8).

That is not what Professor Larson provides. Claimant's reliance on Larson's discussion of the sheltered work doctrine is misplaced and is based on an incomplete analysis of Professor Larson's treatment of the concept of earning capacity. The section of Larson that discusses post-injury earning capacity begins with a general discussion of that concept, explaining that "actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity." 2 Larson's Workers' Compensation Law § 81.01[4] (2021). In particular, "[i]f the employee, as often happens, returns to his or her former work for the same employer after the injury, or is offered it, at a wage at least as high as before, there is a presumption against loss of earning capacity. The presumption may be overcome." 2 Larson's Workers' Compensation Law § 81.02[3]. The discussion of "sheltered employment" adopted by North Carolina currently can be found in 2 Larson's Workers' Compensation Law § 81.06, entitled "Discounting Employer's Sympathy," and refers to one of the ways in which the presumption "that actual post-injury earnings" reflect post-injury earning capacity can be rebutted. Showing that an injured worker is retained solely out of sympathy or out of the employer's "largess," or demonstrating that a position is "make work" or "sheltered employment," as in *Peoples* or *Allen*, is simply one way of rebutting this presumption.

Here, however, Claimant failed to rebut the presumption that his post-injury wages are proof that he is not permanently and totally disabled. This is because substantial evidence supports the Commission's finding that, "[b]y all accounts, including his own testimony, Claimant is a valued employee" and that he "is the only person who understands and knows the

old equipment, and nobody else can do his job at Muffin Mam," that he "is performing legitimate work of value to his employer," and "is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light." (*See* R. p. 490, lines 5-17; p. 516, lines 1-14; p. 518, lines 9-11; p. 531, lines 3-17; R. pp. 236, 237; R. p. 394, lines 6-22; p. 397, lines 20-24).[7] This evidence, in turn, supports the Commission's conclusion that it did "not find sheltered environment employment," (Commission Decision, R. pp. 24-25), which should be affirmed. Claimant's arguments regarding sheltered employment, even if this Court were to adopt that doctrine, fail and the Commission Decision should be affirmed.

Because Claimant's position with Employer is not "sheltered employment," or "make work," his argument that he lacks any earning capacity because he might not be able to find other employment, "if he lost the job he had on the day of the Single Commissioner Hearing," fails, as does his "last stagecoach driver on earth" analogy. (Pet. pp. 19, 21-22). As Professor Larson explained, "[i]f the claimant's earnings in post-injury employment are sufficiently regular and continuous to establish true earning capacity," which here they are, "the claimant cannot assert disability based on the uncertainty of future continuance of employment opportunities in that field. The claimant must take his or her chances on economic unemployment like anyone else." 2 Larson's Workers' Compensation Law § 81.07.

Searching for a hook on which to hang his Petition, Claimant incorrectly accuses the Commission of denying his claim for total and permanent disability based *solely* on the fact that he was earning wages at the time of the Single Commissioner hearing, which Claimant paints as a "ruse" to simply get past the sixty-day period in which an employer's request to terminate temporary total disability payments, pursuant to S.C. Code Ann. § 42-9-260, must be heard.

[7] Contrary to Claimant's incorrect assertions to this Court, there is substantial, probative evidence in this Record supporting the Commission Decision.

Instead, the Commission's Finding of Fact Nos. 2 and 3, read together, establish that "Claimant is a valued employee" who is "the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Man." Given his value to Employer, Claimant was transferred to the new production facility and Employer has accommodated his lifting restrictions. Consequently, the Commission did "not find sheltered environment employment," noting instead that Claimant was "making more money now than before the accident." (R. p. 24). The Commission also noted Mr. Brown's opinion that "an excellent rehabilitation outcome" had been achieved in that Claimant was continuing to work for Employer "in a modified position where he is performing legitimate work of value to his employer." Even within his restrictions, Claimant "is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light," having been promoted to a salaried position as a supervisor. (R. pp. 24-25).

This case does not rely on speculation or conjecture, as was the case in *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 732 S.E.2d 500 (2012), where the claimant only believed he could run a restaurant, even though he had never worked in that industry previously. Here, Claimant's estimation of his worth to Employer is confirmed by Ms. Jermon, Mr. Williams and even Claimant's expert, Mr. Brown.

Nor is this case comparable to *Stephenson v Rice Servs.*, 323 S.C. 113, 473 S.E.2d 699 (1996), where, although the claimant worked for the employer as an army mess hall supervisor, and also held a second job pumping gas and sweeping at a local gas station, his employment was sporadic, with periods of employment interspersed with periods of hospitalizations for PTSD. In rejecting the Court of Appeals' conclusion that, because the claimant "was actually earning money before his injury, he clearly couldn't have been totally disabled prior to his injury," this

Court noted "the unusual facts" of the case. 323 S.C. at 115, 473 S.E.2d at 700. While it is true that "the mere fact of employment is not *always* indicative of earning capacity," 323 S.C. at 119, 473 S.E.2d at 702 (emphasis added), as noted by Professor Larson, that fact creates a rebuttable presumption of earning capacity. 2 Larson's Workers' Compensation Law § 81.01[4]. In *Stephenson*, the employer successfully rebutted the presumption by demonstrating that the claimant was "basically unemployable" prior to his workplace accident by producing substantial evidence that he "could function only within certain civilian jobs in a military setting," that he "was incapable of holding jobs for any length of time," and had only worked for the employer for a few months. 323 S.C. at 121, 473 S.E.2d at 703. Here, in contrast, Claimant has not rebutted the presumption but, at best, presented some conflicting evidence. As this Court reiterated in *Wynn v. Peoples Natural Gas Co.*, however, appellate courts are not "the triers of the facts," and "[r]egardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive." 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).[8]

Contrary to Claimant's assertions otherwise, his position with Employer at the time of the Single Commissioner hearing was not "nominal employment" or "make work." Despite

[8] South Carolina precedent relied on by Claimant does not support his position. For example, *Wynn* involved an employee who suffered a work-related heart attack. After he recuperated, the claimant was only able to work an hour and a half a day for a couple of months, and not exerting himself at all, after which he testified he was advised by his doctors to resign and not work anymore. This Court reversed the Commission's award of permanent and total disability, explaining that, the assertion that, following his injury "he has not been able to do any work is belied by the agreed statement in the transcript that he 'began a limited return to his work … on an ever-increasing basis,'" and statements by his physicians that he was "able to work if he will avoid undue physical or mental strain." 238 S.C. at 12-13, 118 S.E.2d at 818. Here, substantial evidence demonstrates that, not only has Claimant consistently worked nine-hour shifts, contributing substantially and meaningfully to the work of Employer, he continued to do so at a salary reflecting his promotion to a supervisory position.

Claimant's attempts to focus this Court's attention on more limited restrictions than those imposed by his authorized treating physicians, (Pet. p. 13), substantial evidence supports the Commission's conclusion that Claimant is able to perform his job with modifications and his work, even as thus modified, provides significant value to Employer.

Claimant's proposed "two-part test," (Pet p. 20), does not accurately reflect the law of this State.[9] Under Claimant's proposed analysis, the Commission is to look at an injured worker's occupation, and then at what his wages would be "if he could no longer perform in his occupation." (Pet. p. 20). Unsurprisingly, he can point to no South Carolina case adopting or applying his two-part test. Instead, "an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury." *Wynn*, 238 S.C. at 11, 118 S.E.2d at 817-818; *see also Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 629, 142 S.E.2d 43, 44 (1965) (same, and noting that the burden of proof of total disability is on the claimant).

Furthermore, Claimant's argument that there is no evidence that he could compete for any other job because Employer responded to his document subpoena for the Rule 30(b)(6) deposition with only three pages of documents is, at best, highly misleading. His litigation-style tactic of asking Employer to produce documents reflecting job opportunities "in the State of South Carolina" that are open to applicants with Claimant's specific lifting requirements is nothing more than an attempt to "flip" his burden of proving he is permanently and totally disabled onto the Employer, requiring Employer to "disprove" his claim. Instead, it is Claimant

[9] It is noteworthy that the "two-part test" presented in his Petition is vastly different from the two-step analysis argued in his Brief to the Court of Appeals. (App. Br. pp. 10-15). Neither correctly states the law in South Carolina.

who bears the burden of coming forward with substantial evidence that he is permanently and totally disabled. *E.g.*, *Coleman*, 245 S.C. at 630, 142 S.E.2d 45.

Claimant distorts testimony from both Ms. Jermon and Mr. Williams in an attempt to "create" facts favorable to his theory of the case. Claimant suggests (incorrectly) that, as Employer's Rule 30(b)(6) witness, Ms. Jermon's inability to answer the question of whether Employer would hire someone as a maintenance technician with Claimant's current restrictions is conclusive proof that he would be unemployable. However, her testimony is proof of no such thing. Ms. Jermon stated that she was not sure she could answer that question, as she is not in the maintenance department. (R. p. 369, lines 3-24). Nonetheless, Ms. Jermon referred Claimant's counsel to Claimant's current supervisor, Mr. Williams, who "could probably answer those same questions." (R. p. 370, lines 17-19).

Claimant then misleadingly quotes only part of Mr. Williams' response to the question of whether he would hire someone off the street "who had a restriction of never exerting more than 30 pounds of force." Mr. Williams first responded, "[p]robably not," but then went on to explain, "[i]f he couldn't do that with both arms, yea. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do." (R. p. 396, line 25 – p. 397, line 11). In other words, so long as a worker could exert 30 pounds of force, whether with one arm or using both arms, he would be hired. In addition, there is no evidence that Claimant's lifting restriction of no more than 10 pounds overhead affects his job in any significant manner. While Mr. Williams testified that he would not hire someone who could not lift his hands over his head at all, he also explained that "[t]here is really nothing here where he has to lift anything other than his hands over his head." (R. p. 396, lines 1-24). Mr. Williams also agreed that he would hire someone

who "was fully able to lift their hands above their head," even where "[t]heir restriction was just they could not lift more than 10 pounds above their head." (R. p. 398, line 13 – p. 399, line 3).

Thus, neither Ms. Jermon nor Mr. Williams testified that Claimant's restrictions "would not allow him to perform the job functions," of a maintenance supervisor, his current job, as is suggested by Claimant. (Pet. p. 20). In short, the only way Claimant can conclude that the record does not contain "even a scintilla of evidence," that Claimant retains capacity and/or can perform work that is available in the marketplace, (Pet. pp. 14-23), is by narrowly focusing on isolated extracts of testimony and evidence, and misconstruing or ignoring any evidence that is not favorable to his theory of the case. That is the very opposite of substantial evidence. *E.g.*, *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618 (substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action). In fact, Claimant's own vocational expert opined that he provided value to Employer and, in addition, that Claimant "is a reasonably literate individual who would not have any problems in a job requiring routine reading and writing." (R pp. 230-234).

B. Claimant's assertion that expert vocational evidence is required in every case to determine whether an injured worker is permanently and totally disabled is incorrect and unsupported by any authority.

Claimant incorrectly asserts that *Clark v. Phillips Electronics/Shakespeare*, 433 S.C. 186, 857 S.E.2d 378 (Ct. App. 2021), requires expert vocational reports in order to prove (or, in this case, given his improper attempt to flip the burden of proof, disprove) that an injured worker is permanently and totally disabled, while at the same time acknowledging that no South Carolina

case has "expressly" required a vocational report.[10] (Pet. pp. 17-18, 22). In *Clark*, the Commission concluded as a matter of law that the claimant was not permanently and totally disabled, which conclusion was not supported by any findings of fact. Thus, it was that unsupported conclusion that the Court of Appeals held "floats on air, unsupported by any visible explanation or evidence." 433 S.C. at 194, 857 S.E.2d at 382. Here, in contrast, the Commission explained in its findings of fact why it concluded as a matter of law that Claimant failed to prove he was permanently and totally disabled. The factual findings that support the Commission's legal conclusion that Claimant failed to meet his burden of proving permanent and total disability under S.C. Code Ann. § 42-9-10 include the finding that, "[b]y all accounts, including his own testimony, Claimant is a valued employee. Claimant is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam. Claimant was transferred from a former location to the new location in Laurens, South Carolina. Claimant has major lifetime restrictions of no lifting more than 10 pounds overhead, yet the employer has accommodated these restrictions over the past 3 years." Consequently, the Commission did "not find sheltered environment employment," or that "Claimant is permanently and totally disabled," but simply noted that "Claimant is making more money now than before [the] accident."

In addition, the Commission found Claimant's vocational expert's report stated "that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others,

[10] Essentially, Claimant's position appears to be that he has met his burden of proving he is permanently and totally disabled, regardless of compelling evidence otherwise, so long as he produces a report by a vocational expert, even where that report is, at best, equivocal. That is not the law in South Carolina.

and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (R. p. 24). Thus, Claimant is simply wrong that the fact that he was making more money was the sole basis for the Commission's determination that he failed to meet his burden of proving total disability. Furthermore, these findings are completely in line with this Court's resolution of *Wynn*, 238 S.C. at 12-13, 118 S.E.2d at 81 (reversing award of total disability where the claimant was able to perform at least some limited work).

While Claimant is correct that the only vocational expert report in the record is the one produced by Mr. Brown, even that report fails to meet the standard Claimant alleges is necessary. For example, Claimant posits that the analysis under "the 'economic' model … requires an analysis of what careers are available in the economy and what prerequisites are required for the job applicant to obtain the jobs that are available." (Pet. pp. 22-23). Mr. Brown's report does none of this but, instead, merely recites Claimant's medical history (some of which, like the hernia repair, is entirely irrelevant to his worker's compensation claim), and then discusses only his employment with Employer. (R pp. 230-234). Curiously, and importantly, Mr. Brown notes that Claimant "is a reasonably literate individual who would not have any problems in a job requiring routine reading and writing," (R. p. 234), which indicates Claimant could perform jobs outside of the occupational field of maintenance. Thus, Mr. Brown's conclusion that Claimant would be "totally disabled from any and all forms of work," should he lose his job with Employer, is based on nothing more than conjecture and speculation. In short, Mr. Brown's report is entirely devoid of any evidence that the services Claimant can offer are "so limited in quality, dependability, or quantity that a ***reasonably stable market*** for them dos not exist." *Wynn*, 283 at 12, 118 S.E.2d at 818 (emphasis added).

Moreover, the Commission clearly took Mr. Brown's report into account in concluding that Claimant was not permanently and totally disabled. While it is true that Mr. Brown's expert opinion provides some support for both the Commission Decision as well as Claimant's position, as noted above, where there is a conflict in the evidence, either between two witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. *Wynn*, 238 S.C. at 12, 118 S.E.2d at 818. In short, the fact that Claimant submitted a vocational expert report and Employer did not does not mean somehow that he automatically met his burden of proof. This is particularly true where, as is the case here, the vocational report provides support for both sides' positions.

Claimant suggests that all the facts that support the Commission Decision are somehow not competent evidence, advancing a perplexing "volume for relevance" proposition. (Pet. pp. 18-19). The point of demonstrating that Claimant's work for Employer was valued and valuable was to counter his arguments on appeal that his supervisor job was "sheltered employment" or "make work." However, it is uncontroverted that Claimant was performing both supervisory tasks and routine maintenance, as well as welding/fabrication. (R. p. 366, lines 3-16; p. 394, lines 6-22; p. 397, lines 20-24). Not only did Claimant testify that he "bring[s] a lot of value" to Employer and "contribute[s] to the work," (R. p. 531, lines 7-17), Ms. Jermon and Mr. Williams agreed. (R. p. 366, lines 3-16; p. 369, lines 3-24; p. 394, lines 6-22; p. 397, lines 20-24). Even Claimant's expert, Mr. Brown, concluded that Claimant "is performing legitimate work of value to his employer," and that he was "performing valuable work for his employer." (R. pp. 236-237).[11]

[11] Clearly, Claimant would rather focus on his convoluted, and often incorrect, formulations of the test for permanent and total disability, and divert this Court's attention away from the substantial evidence that supports the Commission Decision.

In sum, the Commission's determination that Claimant failed to meet his burden of proving permanent and total disability under S.C. Code Ann. § 42-9-10 is supported by substantial evidence and is consistent with this Court's precedent. Claimant has presented no novel issue of law or precedent with which the Court of Appeals' Opinion is in conflict. As a result, there is no need for further appellate review and this Court should deny the Petition.

II. Claimant presents no other issues that warrant this Court's review.

Although Claimant makes a passing argument that "the [C]ourt of [A]ppeals' Opinion conflicts with all South Carolina precedent existing to date," in his two-sentence argument on Issue No. 3, he has not identified a single opinion from this Court that is in conflict with the Court of Appeals' Opinion. In addition, Section III of the Petition, consisting of two sentences and no citations whatsoever, should be deemed abandoned and unpreserved for review. *See, e.g.*, *Transportation Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010).

CONCLUSION

For the reasons stated herein, this Court should deny Claimant's Petition in its entirety.

Respectfully submitted,

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