APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE # 1402961

Bryan McHowell,	)
Employee/Claimant	)
Vs.	)
Star Food Products/ Mrs. Stratton's Salads, Inc.,	) **ORDER**
Employer	)
and	)
Great American Alliance Ins.	)
Carrier	)

Appellate Panel Review held in Columbia, South Carolina on February 22, 2016 after timely and proper service was perfected upon all parties of interest.

Appellate Panel Decision and Order filed: April 20, 2016.

Appearances: **Respondent/Claimant represented by Brent P. Stewart, Esquire of Stewart Law Offices, L.L.C. of Columbia, South Carolina.**

Appellates/Defendants represented by Shelby H. Hapeshis, Esquire of Huff and Hapeshis of Irmo, South Carolina.

RECEIVED

MAY 19 2016

SC Court of Appeals

CASE HISTORY

This appeal arises from a denied repetitive trauma claim. On February 27, 2014 Claimant was definitively diagnosed with a work related repetitive trauma injury. On March 27, 2014, within ninety days of the date of diagnosis, Claimant, through his attorney, filed a Form 50 placing the defendants on notice of repetitive trauma injuries to the left arm and left shoulder.

The Claimant previously alleged injuries to his left shoulder, neck, left hand and finger following a March 6, 2012 work related motor vehicle accident. The defendants denied that claim and on July 9, 2013 both parties presented to a hearing in front of Commissioner Susan S. Bard. On October 25, 2013 Commissioner Barden issued an Order denying the claim finding that Mr. McHowell returned to baseline within a few days of the injury. The Claimant did not go out of work due to the March 6, 2012, motor vehicle accident. As a result, the repetitive trauma giving rise to the injury continued up until September 2013. In September of 2013, the Claimant went out of work due to being unable to do the work required by the Employer and due to inheriting money to allow him to seek the treatment he so desperately needed. The Claimant worked the repetitive job for approximately 18 months after the March 6, 2012 automobile accident and being found to be back to baseline by Commissioner Barden.

On January 9, 2015 Claimant, through his attorney, filed a Form 50 requesting a hearing on the February 27, 2014 repetitive trauma injury. The Defendants maintained their denial of the claim and a hearing was set for April 8, 2015 before the Honorable Aisha Taylor.

At the call of the hearing Claimant contended that he was at maximum medical improvement based on the medical report of Dr. William Lehman, one of his treating physicians, and Dr. Matthew Schwartz. Claimant requested a finding of compensability, payment of all causally related medical treatment, a finding of permanent and total disability pursuant to Section

42-9-10 of the South Carolina Code, lifetime causally related medical treatment, and all other benefits pursuant to the Act.

Dr. William Lehman, with knowledge of the March 6, 2012 car accident, stated that in his medical opinion, to a reasonable degree of medical certainty:

1. The Claimant suffered a work related repetitive trauma injury to his arm and shoulder.
2. There is a direct casual relationship between the condition under which the Claimant's work was performed and his injuries to the left shoulder.
3. The injury to the shoulder was new.
4. The Claimant's job duties at Star Food Products, Inc. increased his risk for present injury.
5. The injury demanded surgery.
6. The Claimant went back to work after the automobile accident and due to repetitive motion continued to aggravate the shoulder.
7. The records of Carolina Orthopedics specifically set out sprains and strains of the shoulder and upper arm.
8. That the Claimant was released following surgery with restrictions of no lifting waist to above head, no repetitive use of the shoulder, no overhead lifting, no lifting over 10 pounds overhead and that he was limited to doing light or possibly medium work.
9. That the Claimant may need in the future surgery, physical therapy, steroid injections, over the counter medications and prescription medication.
10. That the Claimant suffered 5 percent impairment to the left shoulder and 3 percent impairment to the upper extremity.
11. The repetitive trauma injury affects the arm.

Dr. Matthew Schwartz, also a treating physician of the Claimant, stated in a questionnaire that he concurred with the above as set out by Dr. Lehman.

Other medical records document an injury to the arm and shoulder. Metrolina Medical's Dr. Howard Mandel, a neurologist, in a report dated September 17, 2014, stated, "He says he is continuing to experience pain in the left shoulder region. He also has some pain radiating down the arm and he has numbness in the whole arm at times particularly if he is doing anything repetitive with the arm or if he has it up even watching television sometimes." Dr. Gisele Girault, a pain doctor, states in her records, "Patient is considering a total shoulder replacement."

An expert as to ergonomics opined in a report that based on what he reviewed the Claimant's work tasks at Star Foods elevated his risks for the development of musculoskeletal disorders (cumulative trauma disorders) to the shoulders. The elevated risks are related to repetition, force and shoulder posture. The expert stated he would like to view the job, but the attorney for Star Foods did not respond to requests to view the job sent out on February 24, 2015, February 13, 2014 and March 6, 2015.

Ashley Johnson, a vocational expert held the Claimant to be totally and permanently disabled. An expert hired by the Defendant the week of the hearing stated at trial that she had not had time to complete her vocational evaluation. Her testimony greatly limited the work that the Claimant could perform. In fact, she was unable to state definitively any job the Claimant could perform.

Stephan Laney of Star Foods testified that:

1. The Claimant's job was repetitive in nature.
2. That the repetitive nature of the job entailed lifting 300 boxes to unload his truck
3. That the repetitive nature of the job entailed moving 300 cases of product regularly.

4. That there was actually about 1200 repetitive motions required to do the Claimant's job.
5. That he knew that Mr. McHowell went out of work due to his shoulder issues.

The only witness called by the Defense was one that was supposed to state the Claimant was seen working. However, this witness denied that she had seen the Claimant working in spite of numerous proddings from her testimony. The Defendant offered no medical testimony, no ergonomic testimony or evidence of any prejudice in regards to their claim of lack of notice within 90 days.

The claim was found compensable and Mr. McHowell found totally disabled by the single commissioner.

STATEMENT OF THE CASE

Claimant, Bryan McHowell, has a pre-existing left shoulder condition. In June of 2011, Mr. McHowell underwent a left shoulder surgery (including a distal clavicle excision, acromioplasty, and the implementation of hardware). Following shoulder surgery, he underwent post-surgical physical therapy. In January of 2012, he underwent a left shoulder steroid injection.

On March 6, 2012, Mr. McHowell was involved in a work-related motor vehicle accident. Mr. McHowell filed a Form 50 alleging the March 6, 2012 motor vehicle accident aggravated a pre-existing condition in his left shoulder. The defendants filed a Form 51 denying the claim.

A hearing on Claimant's Form 50 and Defendants' Form 51 took place in front of Commissioner Susan Barden on July 9, 2013. On October 25, 2013 Commissioner Barden issued an order denying the claim and finding, "If Claimant injured/aggravated his left shoulder in the accident, I find that his condition returned to baseline...." Commissioner Barden, in her

order, found the Claimant not to credible. However, co-workers specifically stated that they found the Claimant to be an honest individual.

Mr. McHowell continued to work for Star Food Products until August of 2013 when he inherited money and left work in order to undergo left shoulder surgery. On October 31, 2013, Mr. McHowell underwent left shoulder surgery.

On February 27, 2014, Mr. McHowell was diagnosed with a repetitive trauma work-related injury. On March 27, 2014 claimant, through his attorney, filed a Form 50 placing the defendants on notice of the claim. The Claimant filed a Form 50 requesting a hearing on January 9, 2015. Claimant respectfully requested the following benefits pursuant to the Act: a) that the February 27, 2014 work-related injury be found compensable; b) a finding of permanent and total disability; c) payment of all causally related medical treatment to date: d) lifetime medical treatment; and e) Utica Mohawk language.

On February 5, 2015 the Employer/Carrier filed a Form 51 denying the claim pending an investigation. The case was heard by the Honorable Aisha Taylor on April 22, 2015 in Rock Hill, South Carolina.

The Hearing began with a long list of objections and a Motion in Limine filed by the Claimant in regards to the Defendant/Employer's attempts to include numerous unauthenticated, duplicative and prejudicial exhibits which were not relevant to the case through their Form 58 brief. The Single Commissioner denied the Claimant's Motion in Limine. The Defendant/Employer then attempted to exclude the ergonomics report of Glen Adams stating he was not an expert in ergonomics. The Single Commissioner stated that, "I think it's been the Commission's general practice that he is one of the few ergonomics experts in the state for purposes of workers' compensation, and so I'll just limit it to that." Employer/Carrier offered no

12. Stephen Laney of Star Foods likewise testified to the repetitive nature of the job stating that 300 cases of product were regularly moved by the Claimant.

13. Stephen Laney, Star Foods employee, stated that the Claimant repetitively lifts boxes up to 300 times a week to load his truck and up to 300 boxes to unload his truck.

14. Stephen Laney, Star Food witness, stated that actually, there are about 1200 repetitive motions required to do the Claimant's job.

15. Stephen Laney, Star Food witness, knew Mr. McHowell went out of work due to his shoulder issues.

16. That the Claimant was entitled to a finding of compensability, payment of all medicals, lifetime medicals, Utica Mohawk language and Dodge medicals.

The Employer/Carrier contended that:

1. That there was no new injury.
2. There was no repetitive trauma.
3. Notice was not timely provided to the Employer.
4. There was only one body part involved, if there was actually an injury.
5. This injury is barred by res judicata and collateral estoppel.

On November 9, 2015 Commission Taylor issued the following Findings of Facts, Conclusions of Law and Order.

FINDINGS OF FACT

1. I find that Mr. McHowell was involved in a work related motor vehicle accident on March 6, 2012.

2. I find that Mr. McHowell alleged that he injured his left shoulder in the March 6, 2012 motor vehicle accident. I find that Mr. McHowell has a pre-existing left shoulder condition.

3. I find, in accordance with the prior Decision and Order of Commissioner Barden, Claimant had returned to baseline following his March 6, 2012 motor vehicle accident and thus, his current medical condition is unrelated to his prior injury.

4. I find that the employer's representative, Steve Laney, testified Claimant's job was repetitive.

5. I find that Mr. McHowell's job at Star Food Products was both repetitive and heavy. This finding is based on the deposition testimony of Stephen Laney, a representative of the employer, and the ergonomics report completed by Glenn Adams.

6. I find that on October 3, 2013 Mr. McHowell presented to Dr. Lehman with left shoulder pain following the March 5, 2012 motor vehicle accident.

7. I find that on October 31, 2013, the Claimant underwent the following surgical procedures to the left shoulder: a) arthroscopy with major debridement of the labrum and rotator cuff; b) mini\open repair of a supraspinatus tendon tear; c) anterior acromioplasty and CA ligament resection; and d) open acromioclavicular joint arthroplasty. I find that postoperatively Dr. Lehman diagnosed chronic complete rotator cuff tear, labral degenerative tear, subacromial impingement, and acromioclavicular joint arthritis.

8. I find that on February 27, 2014 Mr. McHowell was diagnosed with a work related repetitive trauma injury.

9. I find that Defendants were provided timely notice of the February 27, 2014 repetitive trauma injury as Claimant has a complex history with regard to the shoulder and he

reported the injury within ninety days of the date he discovered, or could have discovered, that his condition was compensable. Additionally, I find that the Defendants have not been prejudiced by any perceived lack of notice.

10. I find that Mr. McHowell provided Dr. Lehman with a job description that outlined the physical requirements of his job at Star Foods.

11. I find that on February 27, 2014 Dr. Lehman stated, to a reasonable degree of medical certainty that: a) There is a causal connection between Mr. McHowell's repetitive use of his left shoulder on the job and the injury that he sought treatment for; b) There is a direct causal relationship between the condition under which Mr. McHowell's work is performed and the injuries to the left shoulder; c) Mr. McHowell's left shoulder injury is new; and d) Mr. McHowell's job duties at Star Food Products increased his risk for the present injury.

12. I find that on August 22, 2014 Dr. Lehman opined, "Mr. McHowell's job activities at Star Foods place a substantial physical demand on the left shoulder, which would meet the criteria for repetitive trauma, and such activities would place the left shoulder at a substantially higher risk of injury, given the pre-existing rotator cuff and labral abnormalities at the shoulder, most probably leading to the progression of the partial rotator cuff tear diagnosed in 2011, progressing to a complete tear with intraarticular abnormalities and recurrent impingement, culminating in the need for surgery on the left shoulder on 10/31/13."

13. I find that on November 26, 2014 Dr. Schwartz opined, most probably and to a reasonable degree of medical certainty, "I have had an opportunity to review the July 6, 2015 questionnaire and August 22, 2011 report of Dr. William Lehman. Upon review, I

concur with Dr. Lehman's diagnosis and assessment of Mr. McHowell's injuries and future medical needs."

14. I find that Section 42-1-172 of the South Carolina Code defines a repetitive trauma injury.

15. I find, by a preponderance of the evidence, that there is a causal connection established by medical evidence between the repetitive activities that occurred while Mr. McHowell was engaged in the regular duties of his employment at Star Food and his left shoulder and left arm injuries.

16. I find that there is a direct causal relationship, established by medical evidence, between the conditions under which Mr. McHowell worked and his left arm and left shoulder injuries.

17. I find Claimant sustained compensable repetitive trauma injuries to his left arm and left shoulder within the course and scope of his employment at Star Foods.

18. I find that on July 6, 2014 Dr. Lehman restricted Mr. McHowell from engaging in the following activities: a) lifting waist to overhead; b) repetitive use of the left shoulder; c) over-head lifting; and d) lifting over 10 pounds overhead. Dr. Lehman placed Mr. McHowell in a light to medium work category.

19. I find that on July 6, 2014 Dr. Lehman recommended future medical treatment in the form of surgery, physical therapy, steroid injections, and medications both over the counter and prescription.

20. I find that on July 6, 2014 Dr. Lehman provided a 3% rating to the left upper extremity and a 5% rating to the left shoulder due to the February 27, 2014 work related repetitive trauma injury.

21. I find that the amount Mr. McHowell can lift overhead and the amounts he can lift with the left shoulder are both limited.

22. I find that Mr. McHowell's left shoulder and arm injury affects his ability to complete chores, yard work, laundry, and cleaning.

23. I find that on January 10, 2015 Dr. Lehman opined, "It is my opinion, that Mr. McHowell's repetitive left shoulder injury of February 27th, 2014 affects his left arm."

24. I find that Mr. McHowell's February 27, 2014 injury affects the function of his left arm and left shoulder.

25. I find that the present condition of Mr. McHowell's left shoulder and left arm prevents him from returning to work with Star Foods. Additionally, I find that Mr. McHowell has applied for six other jobs and as of the date of hearing, had been unable to find employment.

26. I find that Mr. McHowell keeps a check book and is able to regularly manage his own funds. I find that Mr. McHowell requested a lump sum payment of benefits in order to catch up on bills and other items since he has been out of work.

27. I find that Mr. McHowell has not worked since August of 2013.

28. I find that Mr. McHowell has sustained permanent impairment to the left shoulder and left arm.

29. I find that Ashley H. Johnson, a vocational expert out of Vargas Vocational Consulting, opined, "It is my opinion that Mr. McHowell is totally disabled from a vocational perspective."

30. I find that the labor market survey completed by Jan Westmoreland was tentative as she did not have the opportunity to contact potential employers and see if they would be able

39. I find that no hearing costs are assessed.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in 42-1-10 S.C. Code of Laws, et. seq., that:

1. Pursuant to South Carolina Code Ann. §42-15-10 and §42-17-20, jurisdiction and venue are proper.
2. Pursuant to South Carolina Workers' Compensation Commission Rules and Regulations, Rule 67-210(B) and Rule 67-213(C), the parties were properly served with Notice of the Hearing.
3. South Carolina Code Ann. § 42-15-20(C) addresses notice in repetitive trauma claims. I find the Claimant provided the Defendants with notice within ninety days of the date he discovered, or could have discovered, that his condition was compensable.
4. South Carolina Code Ann. § 42-1-172 addresses repetitive trauma injuries. I find the Clamant sustained compensable repetitive trauma injuries to his left arm and left shoulder within the course and scope of his employment at Star Foods.
5. In accordance with the prior Decision and Oder of Commissioner Barden, the Claimant had returned to baseline following his prior motor vehicle accident and thus, his current medical condition is unrelated to his prior injury.
6. South Carolina Code Ann. § 42-9-10 addresses permanent and total disability. I find Claimant is permanently and totally disabled pursuant to S.C. Code Ann. Section 42-9-10. I base this finding on the greater weight of the evidence as a whole including but not limited to, the medical opinions of the treating physicians and the vocational assessment provided by Glen Adams.

7. I find Claimant entitled to lifetime medicals pursuant to the S.C. Code of Laws, Ann. (1976, as amended).
8. I find that the settlement proceeds of $299,911.20 shall be allocated as follows: $196,991.64 in compromise settlement of disputed future wage loss at the rate of $170.11 per week for a period of 1,158.04 weeks, representing the remainder of the Claimant's life, pursuant to South Carolina Code of Laws, Ann. (1976, as amended) §19-1-150 and the South Carolina Supreme Court decision of Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 SE2d 59 and pursuant to the Sciarotta v. Bowen, 837 F2d 135 (3rd Cir. 1988) decision; $99,870.43 as attorney's fees and $4,049.13 as expenses incurred in bringing this action, pursuant to a written agreement between the Claimant and his attorney.

ORDER

IT IS HEREBY ORDERED that this claim is found compensable as a repetitive trauma injury both the left arm and left shoulder.

IT IS FURTHER ORDERED that the Claimant is found to be totally and permanently injured.

IT IS FURTHER ORDERED that the Defendants are responsible for payment of all causally related medical treatment received to date;

IT IS FURTHER ORDERED that the Claimant is given lifetime medicals under the SC Code.

IT IS FURTHER ORDERED that the award of $299,911.20 shall be allocated as follows: $196,991.64 in compromise settlement of disputed future wage loss at the rate of $170.11 per week for a period of 1,158.04 weeks, representing the remainder of the Claimant's life, pursuant to South Carolina Code of Laws, Ann. (1976, as amended) §19-1-150 and the

South Carolina Supreme Court decision of Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 SE2d 59 and pursuant to the Sciarotta v. Bowen, 837 F2d 135 (3rd Cir. 1988) decision; $99,870.43 as attorney's fees and $4,049.13 as expenses incurred in bringing this action, pursuant to a written agreement between the Claimant and his attorney.

AND IT IS SO ORDERED.

Within the statutory period, Defendants, by and through their attorney, filed a Request for Commission Review, setting forth their reasons for appeal, copies of which were furnished to all interested parties prior to oral argument, which took place before the Appellate Panel on February 22, 2016.

By way of appeal, Defendants/Appellant asserts:

1) The Single Commissioner erred in finding and ordering that the claimant is permanently and totally disabled pursuant to 42-9-10, the error being that the claimant sustained an injury to one body part is an error of law and not supported by a preponderance of the evidence.
2) The Single Commissioner erred in finding as fact and ordering that the claimant's current medical condition is unrelated to his prior injury, the error being that this is not supported by the preponderance of the evidence and is an error of law.
3) The Single Commissioner erred in finding as fact and concluding as law that this claim was not barred by the doctrine of tea (res) judicata and collateral estoppels, the error being that this is not supported by the preponderance of the evidence and is an error of law.
4) The Single Commissioner erred in determining that the claimant gave adequate notice of the injury and the Defendants were not prejudiced by the lack of notice, the error

being that this finding is not supported by the preponderance of the evidence and is an error of law.

5) The Single Commissioner erred in finding as fact and concluding as a matter of law that the claimant's injury was causally related to his job duties at Star Foods, the error being that this finding is not supported by the preponderance of the evidence and is an error of law.

6) The Single Commissioner erred in finding as fact and determining as a matter of law that the claimant sustained a repetitive trauma to his left arm and shoulder, the error being that this is not supported by the preponderance of evidence and is an error of law.

7) The Single Commissioner erred in determining that the claimant suffered a 3% rating to his left upper extremity and a 5% rating to his left shoulder due to this alleged injury, the error being that this finding is not supported by any medical evidence, is a misstatement of fact, and is an error of law.

8) The Single Commissioner erred in finding as fact and determining as a matter of law and ordering that the claimants injury prevents him from returning to work, the error being that this is not supported by the preponderance of the evidence and is an error of law.

9) The Single Commissioner erred in determining that the claimant is entitled to a lump sum payment. the error being that this payment is not supported by the preponderance of the evidence and is an error of law.

10) The Single Commissioner erred in determining that defendants are liable for all previously incurred causally related medical treatment and expenses, the error being that this is not supported by the evidence and is an error of law.

A review was held in Columbia, South Carolina on February 22, 2016, where arguments by both parties of interest were made before the Appellate Panel. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellant Panel and has since been under study and consideration.

Pursuant to §42-17-50, we, the Appellate Panel, have weighed the evidence presented at the initial hearing and have reviewed the Hearing Commissioner's Decision and Order. We have considered all issues raised in the briefs and as presented through oral arguments by Appellants and Respondent.

After careful review and consideration of all the evidence in the case, the Appellate Panel agrees with the Hearing Commissioner's Decision and Order in its entirety and adopts the Decision and Order, including her Findings of Fact and Conclusions of Law, in total.

FINDINGS OF FACT

Accordingly, we the Full Panel of the Workers' Compensation Commission make the followings findings of fact:

1. We find that Mr. McHowell was involved in a work related motor vehicle accident on March 6, 2012.

2. We find that Mr. McHowell alleged that he injured his left shoulder in the March 6, 2012 motor vehicle accident. We find that Mr. McHowell has a pre-existing left shoulder condition.
3. We find, in accordance with the prior Decision and Order of Commissioner Barden, Claimant had returned to baseline following his March 6, 2012 motor vehicle accident and thus, his current medical condition is unrelated to his prior injury.
4. We find that the employer's representative, Steve Laney, testified Claimant's job was repetitive.
5. We find that Mr. McHowell's job at Star Food Products was both repetitive and heavy. This finding is based on the deposition testimony of Stephen Laney, a representative of the employer, and the ergonomics report completed by Glenn Adams.
6. We find that on October 3, 2013 Mr. McHowell presented to Dr. Lehman with left shoulder pain following the March 5, 2012 motor vehicle accident.
7. We find that on October 31, 2013, the Claimant underwent the following surgical procedures to the left shoulder: a) arthroscopy with major debridement of the labrum and rotator cuff; b) mini open repair of a supraspinatus tendon tear; c) anterior acromioplasty and CA ligament resection; and d) open acromioclavicular joint arthroplasty. We find that postoperatively Dr. Lehman diagnosed chronic complete rotator cuff tear, labral degenerative tear, subacromial impingement, and acromioclavicular joint arthritis.
8. We find that on February 27, 2014 Mr. McHowell was diagnosed with a work related repetitive trauma injury.
9. We find that Defendants were provided timely notice of the February 27, 2014 repetitive trauma injury as Claimant has a complex history with regard to the shoulder and he

reported the injury within ninety days of the date he discovered, or could have discovered, that his condition was compensable. Additionally, we find that the Defendants have not been prejudiced by any perceived lack of notice.

10. We find that Mr. McHowell provided Dr. Lehman with a job description that outlined the physical requirements of his job at Star Foods.

11. We find that on February 27, 2014 Dr. Lehman stated, to a reasonable degree of medical certainty that: a) There is a causal connection between Mr. McHowell's repetitive use of his left shoulder on the job and the injury that he sought treatment for; b) There is a direct causal relationship between the condition under which Mr. McHowell's work is performed and the injuries to the left shoulder; c) Mr. McHowell's left shoulder injury is new; and d) Mr. McHowell's job duties at Star Food Products increased his risk for the present injury.

12. We find that on August 22, 2014 Dr. Lehman opined, "Mr. McHowell's job activities at Star Foods place a substantial physical demand on the left shoulder, which would meet the criteria for repetitive trauma, and such activities would place the left shoulder at a substantially higher risk of injury, given the pre-existing rotator cuff and labral abnormalities at the shoulder, most probably leading to the progressing to a complete tear with intraarticular abnormalities and recurrent impingement, culminating in the need for surgery on the left shoulder on 10/31/13."

13. We find that on November 26, 2014 Dr. Schwartz opined, most probably and to a reasonable degree of medical certainty, "I have had an opportunity to review the July 6, 2015 questionnaire and August 22, 2011 report of Dr. William Lehman. Upon review, I

concur with Dr. Lehman's diagnosis and assessment of Mr. McHowell's injuries and future medical needs."

14. We find that Section 42-1-172 of the South Carolina Code defines a repetitive trauma injury.

15. We find, by a preponderance of the evidence, that there is a causal connection established by medical evidence between the repetitive activities that occurred while Mr. McHowell was engaged in the regular duties of his employment at Star Food and his left shoulder and left arm injuries.

16. We find that there is a direct causal relationship, established by medical evidence, between the conditions under which Mr. McHowell worked and his left arm and left shoulder injuries.

17. We find Claimant sustained compensable repetitive trauma injuries to his left arm and left shoulder within the course and scope of his employment at Star Foods.

18. We find that on July 6, 2014 Dr. Lehman restricted Mr. McHowell from engaging in the following activities: a) lifting waist to overhead; b) repetitive use of the left shoulder; c) over-head lifting; and d) lifting over 10 pounds overhead. Dr. Lehman placed Mr. McHowell in a light to medium work category.

19. We find that on July 6, 2014 Dr. Lehman recommended future medical treatment in the form of surgery, physical therapy, steroid injections, and medications both over the counter and prescription.

20. We find that on July 6, 2014 Dr. Lehman provided a 3% rating to the left upper extremity and a 5% rating to the left shoulder due to the February 27, 2014 work related repetitive trauma injury.

21. We find that the amount Mr. McHowell can lift overhead and the amounts he can lift with the left shoulder are both limited.

22. We find that Mr. McHowell's left shoulder and arm injury affects his ability to complete chores, yard work, laundry and cleaning.

23. We find that on January 10, 2015 Dr. Lehman opined, "It is my opinion that Mr. McHowell's repetitive left shoulder injury of February 27th, 2014 affects his left arm."

24. We find that Mr. McHowell's February 27, 2014 injury affects the function of his left arm and left shoulder.

25. We find that the present condition of Mr. McHowell's left shoulder and left arm prevents him from returning to work with Star Foods. Additionally, we find that Mr. McHowell has applied for six other jobs and as of the date of the hearing, had been unable to find employment.

26. We find that Mr. McHowell keeps a check book and is able to regularly manage his own funds. We find that Mr. McHowell requested a lump sum payment of benefits in order to catch up on bills and other items since he has been out of work.

27. We find that Mr. McHowell has not worked since August of 2013.

28. We find that Mr. McHowell has sustained a permanent impairment to the left shoulder and left arm.

29. We find that Ashley H. Johnson, a vocational expert out of Vargas Vocational Consulting, opined, "It is my opinion that Mr. McHowell is totally disabled from a vocational perspective."

30. We find that the labor market survey completed by Jan Westmoreland was tentative as she did not have the opportunity to contact potential employers and see if they would be

able to accommodate Mr. McHowell's work restrictions. Additionally, Ms. Westmoreland did not have the opportunity to interview Mr. McHowell or sit in on his testimony.

31. We find Claimant is permanently and totally disabled pursuant to S.C. Code Ann. Section 42-9-10. We base this finding on the greater weight of the evidence as a whole including, but not limited to, the medical opinions of the treating physicians and the vocational assessment provided by Ashley Johnson. We did review and consider the vocational assessment provided by Jan Westmoreland; however, we gave the Vargas Vocational report greater weight.

32. The testimony of Defendant's rebuttal witness, Ms. Riggins, was very damaging to Defendants' case as Defendants could not prove Claimant was currently working in another capacity.

33. We find Claimant is entitled to lifetime causally-related medical treatment for his work injuries at the direction of Defendants pursuant to Section 42-15-60.

34. We find Claimant is entitled to a lump-sum payment subject to the commuted value tables.

35. We find Claimant is entitled to James v. Anne's SSA apportionment language.

36. We find Defendants' are liable for any and all previously incurred related medical treatment to be paid pursuant to the SC Fee Schedule.

37. We find Claimant is entitled to reimbursement for all causally-related out-of-pocket expenses including mileage reimbursement, if any.

38. We find that this claim is neither barred by res judicata nor collateral estoppels as a preponderance of the evidence indicates that Mr. McHowell brought two separate and

distinct causes of action, the On March 6, 2012 work related motor vehicle accident and the February 27, 2014 work related repetitive trauma injury by accident.

39. We find that no hearing costs are assessed.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in 42-1-10 S.C. Code of Laws, et. seq., that:

1. Pursuant to the South Carolina Code Ann. §42-15-10 and §42-17-20, jurisdiction and venue are proper.
2. Pursuant to South Carolina Workers' Compensation Commission Rules and Regulations, Rule 67-210(B) and Rule 67-213(C), the parties were properly served with Notice of the Hearing.
3. South Carolina Code Ann. §42-15-20(C) addresses notice in repetitive trauma claims. We find that the Claimant provided the Defendants with notice within ninety days of the date he discovered, or could have discovered, that his condition was compensable.
4. South Carolina Code Ann. §42-1-172 addresses repetitive trauma injuries. We find the Claimant sustained compensable repetitive trauma injuries to his left arm and left shoulder within the course and scope of his employment at Star Foods.
5. In accordance with the prior Decision and Order of Commissioner Barden, the Claimant had returned to baseline following his prior motor vehicle accident and thus, his current medical condition is unrelated to his prior injury.
6. South Carolina Code Ann. §42-9-10 addresses permanent and total disability. We find Claimant is permanently and totally disabled pursuant to S.C. Code Ann. Section 42-9-10. We base this finding on the greater weight of the evidence as a whole

including but not limited to, the medical opinions of the treating physicians and the vocational assessment provided by Glen Adams.

7. We find Claimant entitled to lifetime medicals pursuant to the S.C. Code of Laws, Ann. (1976, as amended).

8. We find that the settlement proceeds of $299,911.20 shall be allocated as follows: $196,991.64 in compromise settlement of disputed future wage loss at the rate of $170.11 per week for a period of 1,158.04 weeks, representing the remainder of the Claimant's life, pursuant to South Carolina Code of Laws, Ann. (1976, as amended) §19-1-150 and the South Carolina Supreme Court decision of Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 SE2d 59 and pursuant to the Sciarotta v. Bowen, 837 F2d 135 (3rd Cir. 1988) decision; $99,870.43 as attorney's fees and $4,049.13 as expenses incurred in bringing this action, pursuant to a written agreement between the Claimant and his attorney.

ORDER

IT IS HEREBY ORDERED that this claim is found compensable as a repetitive trauma injury to both the left arm and left shoulder.

IT IS FURTHER ORDERED that the Claimant is found to be totally and permanently injured.

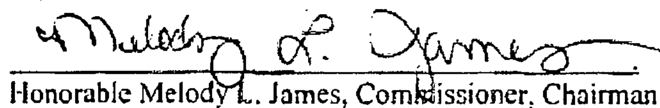
IT IS FURTHER ORDERED that the Defendants are responsible for payment of all causally related medical treatment received to date;

IT IS FURTHER ORDERED that the Claimant is given lifetime medicals under the SC Code.

IT IS FURTHER ORDERED that the award of $299,911.20 shall be allocated as follows: $196,991.64 in compromise settlement of disputed future wage loss at the rate of $170.11 per week for a period of 1,158.04 weeks, representing the remainder of the Claimant's life, pursuant to South Carolina Code of Laws, Ann. (1976, as amended) §19-1-150 and the South Carolina Supreme Court decision of Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 SE2d 59 and pursuant to the Sciarotta v. Bowen, 837 F2d 135 (3rd Cir. 1988) decision; $99,870.43 as attorney's fees and $4,049.13 as expenses incurred in bringing this action, pursuant to a written agreement between the Claimant and his attorney.

AND IT IS SO ORDERED.

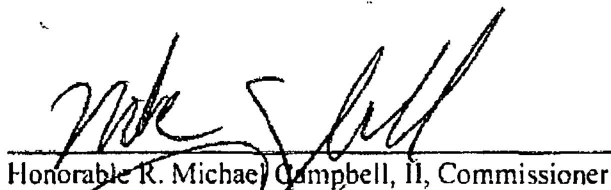
South Carolina Workers' Compensation Commission



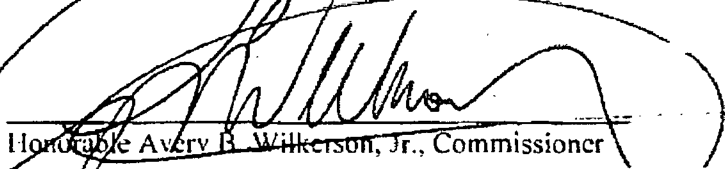
Honorable Melody L. James, Commissioner, Chairman

FULL AFFIRMATION

CONCUR:



Honorable R. Michael Campbell, II, Commissioner



Honorable Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on April 20, 2016