

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

WCC File No. 1402961  
Appellate Case No. 2016-001072

**RECEIVED**  
JAN 03 2017  
SC Court of Appeals

Bryan McHowell, Employee/Claimant ..... Respondent,

v.

Star Food Products/Mrs. Stratton's  
Salads, Inc., Employer, and  
Great American Alliance Ins., Carrier, ..... Appellants.

**SUPPLEMENTAL RECORD ON APPEAL**

E. Ros Huff, Jr.  
Shelby G. Hapeshis  
HUFF & HAPESHIS, LLC  
P.O. Box 1935  
Irmo, SC 29063

Blake A. Hewitt  
John S. Nichols  
BLUESTEIN NICHOLS  
THOMPSON & DELGADO  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599

Brent P. Stewart  
STEWART LAW OFFICES  
P.O. Box 670  
Rock Hill, SC 29731  
(803) 328-5600

Attorneys for Appellants

Attorneys for Respondent

INDEX

Claimant's Form 58 and Attachment  
(Pre-Hearing Brief to the Single Commissioner) ..... 1

Employer's Form 58  
(Pre-Hearing Brief to the Single Commissioner) ..... 4a

Transcript of February 22, 2016  
(Appellate Panel Hearing) ..... 5

Certificate of Counsel ..... 30



Claimant's Name: <u>Bryan McHowell</u>		Employer's Name: <u>Star Food Products Inc.</u>	
Address:		Address: <u>2050-A Willow Springs Lane</u>	
City: <u>Lancaster</u>	State: <u>SC</u>	City: <u>Burlington</u>	State: <u>NC</u>
Zip: _____	Zip: _____	Zip: <u>27215</u>	Zip: _____
Home Phone: _____	Work Phone: _____	Carrier: <u>Strategic Comp Services</u>	
Preparer's Name: <u>Brent P. Stewart</u>		Preparer's Phone #: <u>803-328-5600</u>	

**A claim for workers' compensation benefits is made based on the following grounds:**

X Injury  Illness  Repetitive Trauma

1. Compensation Rate: \$\$TBD      2. AWW: \$\$TBD      Date of Injury: 2/27/2014
3. Type of injury and body part(s): Repetitive trauma to left shoulder and left arm
4. Facts in controversy: See attachment
5. Legal issues involved: See number 4
6. Unusual aspects: \_\_\_\_\_
7. Witnesses (designate if expert):\* Bryan McHowell; William L. Lehman, Jr., MD\*; Matthew A. Schwartz, MD\*; Allan S. Ryder-Cook, MD\*; Gisele Girault, MD\*; James Goodson, NP\*; Glen K. Adams, MRC, CRC, CEES; Ashley H. Johnson, MS, CRC, CLCP\* and other lay witnesses to be named in rebuttal to evidence or testimony presented by the Defendant live and/or by way of deposition.
8. Exhibits: Please refer to the Administrative Procedures Act Submittal; claimant reserves the right to amend APA Submissions, Form 58 & witnesses.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance): Please refer to exhibits listed in the Administrative Procedures Act Submittal; claimant reserves the right to amend medical evidence.
10. Name, address, and specialty, if any, of the treating physician: Carolina Orthopaedic Surgery Associates, 134 Professional Park Drive, Rock Hill, SC 29732; Metrolina Neurological Associates, 200 S. Herlong Avenue, Ste. H, Rock Hill, SC 29732; The Pain Center, 115 Blarney Drive, Suite 111, Columbia, SC 29223.
11. Impairment rating(s); body part(s); physician and date of opinion: TBD
12. I am amending my Form 50/51 in the following manner: \_\_\_\_\_

**Mediation**

- a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- b. Mediation is required pursuant to Reg. 67-1802.
- c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to [mediation@wcc.sc.gov](mailto:mediation@wcc.sc.gov).

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to E. Ros Huff, Jr., Huff Law Firm, LLC, PO Box 1935, Irmo, SC 29063 on the 27 day of March, 2015 by:  first class postage  certified mail  personal service.

Signature: \_\_\_\_\_ Email: brent@stewartlawoffices.net  
 Date of hearing: April 8, 2015 Time needed for hearing: 60 minutes

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. \* Commissioners reserve the right to admit expert witnesses at hearings.



## ATTACHMENT

Bryan McHowell was injured on March 6, 2012, in an on the job automobile wreck. Commissioner Barden found in her order regarding that wreck that if Mr. McHowell had injured or aggravated his left shoulder in the work related accident he had returned to baseline in late March/early April 2012, the date of his next orthopaedic visit. The Order of Commissioner Barden is attached to this Form 58. Mr. McHowell continued to work following his March 6, 2012 work related accident until August 2013, when he went out of work due to shoulder related pain, which resulted in surgery on October 31, 2013. On February 27, 2014, he was diagnosed as suffering from a repetitive trauma injury to his left shoulder. Specifically Dr. Lehman stated there was a **causal connection between the condition under which Mr. McHowell's work is performed and the injuries to his left shoulder, that Mr. McHowell's injuries were new in nature, that Mr. McHowell's job duties at Star Food Product's increased his risk for his present injury and that he was limited from doing lifting, overhead lifting and pushing or pulling.** Dr. Lehman had specific knowledge of the work related wreck dated March 6, 2012. Dr. Lehman went on to state that the following specific restrictions would apply to Mr. McHowell:

1. No lifting waist to above head.
2. Repetitive use of the left shoulder.
3. Over-head lifting.
4. Lifting 10 pounds overhead
5. Was limited to doing light or possibly medium work.

Further, Dr. Lehman stated that Mr. McHowell may need in the future to lesson periods of disability the following items:

1. Surgery
2. Physical Therapy
3. Steroid injections
4. Over the counter medications
5. Prescription Medication

It is important to note that Dr. Lehman rated both the shoulder and the arm in regards to this repetitive work injury.

Dr. Matthew Schwartz also opined that Mr. McHowell suffered a repetitive injury on November 26, 2014. Dr. Schwartz likewise knew of the work related wreck mentioned above dated March 6, 2012.

While two medical providers clearly show that Mr. McHowell suffered a repetitive injury on the job Glen Adams at Adams and Wilkinson Associates was retained to evaluate the job. Mr. Adams opined that, "The data provided in the 'Ergonomics Research' section above indicates that Mr. McHowell's work tasks at Star Foods

elevated his risks for development of musculoskeletal disorders (cumulative trauma disorders) to the shoulder. The elevated risks are related to repetition, force and shoulder posture. " Mr. Adams stated that he would like to actually view the job and the Claimant requested an on-site assessment or video on the following dates February 24, 2015, February 13, 2015 and March 6, 2015. However, the Defense did not respond to any of these requests.

Lastly, a vocational report was completed on Mr. McHowell which resulted in a determination that he was totally and permanently disabled.

Claimant is informed and believes he is entitled to the following benefits pursuant to the Act: a) a formal finding of compensability with regard to the left arm and left shoulder; b) payment of all causally related medical treatment received to date and mileage; c) lifetime medical treatment under §42-15-60 and Dodge; d) payment of temporary compensation in accordance with the Act; e) 500 weeks of compensation pursuant to the act; and f) all other benefits pursuant to the Act.



Claimant's Name: Bryan McHowell Employer's Name: Mrs. Stratton's Salads, Inc.  
Address: \_\_\_\_\_ Address: 2050 Willow Spring Lane,  
City: Lancaster State: SC Zip: \_\_\_\_\_ City: Burlington State: NC Zip: 27215  
Home Phone: \_\_\_\_\_ Work Phone: ( ) - \_\_\_\_\_ Carrier: Great American Alliance Insurance Company  
Preparer's Name: Shelby H. Kellahan Preparer's Phone #: (803) 262-2232

**A claim for workers' compensation benefits is made based on the following grounds:**

Injury  Illness  Repetitive Trauma

1. Compensation Rate: 639.47 2. AWW: \$959.16 Date of Injury: 2/27/14  
3. Type of injury and body part(s): L shoulder  
4. Facts in controversy: Whether the claimant suffered a repetitive trauma to his left shoulder, thus entitling him to WC benefits; and if so did the claimant give adequate notice;

5. Legal issues involved: See No. 4; §42-15-60 (Medical Benefits); 42-9-10 (Temporary Total Disability); 42-9-30 (Permanent Partial Disability); 42-1-160 (Injury defined); 42-15-60 (Notice); 42-1-172 (Repetitive Trauma) estoppel and res judicata, last Injurious exposure rule, election of remedies, Geathers v. 3V

6. Unusual aspects: Motion to Postpone to be submitted.

7. Witnesses (designate if expert):\* A Representative(s) of the Employer/Carrier; The Claimant; Any witness listed by the Claimant, Bridget Hollis, Debbie Vaughn, Steve Laney, Steve Tilley, Norman Mabry,

The Defendants reserve the right to cross examine any expert submitted by the claimant pursuant to 1-23-330(3). The Defendants reserve the right to amend their Pre-hearing brief upon receipt of additional information

8. Exhibits: CI's personell file; Hearing Transcript; Order; clincher agreement; Forms 50 and Form 51; claimant's deposition for impeachment purposes; the deposition of Norman Mabry; the deposition of Steve Tilley; SLED report; driving record; MVA reports; Chubb Insurance WC claim DOI 5/4/93; Zurich American Insurance WC claim DOI 2/12/09; Allstate Insurance MVA 2/2/11; Boral/Liberty Mutual Insurance claim 3/27/06; Fed Ex Application;

9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):  
Carolina Hand Center; Carolina Orthopaedic Surgery Associates; Lancaster Rehab Center; Center for Orthopaedic Surgery; Mackey Family Practice; Metrolina Neurological Associates; Lancaster Orthopaedics & Sports Medicine; Springs Memorial Hospital; Palmetto Rehab Specialists

10. Name, address, and specialty, if any, of the treating physician: \_\_\_\_\_

11. Impairment rating(s); body part(s); physician and date of opinion: \_\_\_\_\_

12. I am amending my Form 50/51 in the following manner: \_\_\_\_\_

**Mediation**

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Questions regarding mediation may be submitted to [mediation@wcc.sc.gov](mailto:mediation@wcc.sc.gov).

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Stewart Law Offices, LLC

Address PO Box 670, Rock Hill, SC 29731-6670 on the 27<sup>th</sup> day of March 2015 by:  first class postage  certified mail  personal service.

Signature: [Signature] Email: skellahan@colalaw.com  
Date of hearing: April 8, 2015 Time needed for hearing: 1 hour

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.\* Commissioners reserve the right to admit expert witnesses at hearings.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #1402961

BRYAN MCHOWELL	)	
	)	
CLAIMANT,	)	
	)	SC WORKERS' COMPENSATION COMMISSION
VS.	)	
	)	HEARING OF
STAR FOOD PRODUCTS	)	
	)	BRYAN MCHOWELL
EMPLOYER,	)	
AND	)	VS
	)	
GREAT AMERICAN	)	STAR FOOD PRODUCTS
ALLIANCE	)	
CARRIER.	)	

This is the Transcript of the South Carolina Workers' Compensation Full Board Hearing of Bryan McHowell versus Star Food Products, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:37 P.M., Monday, February 22, 2016, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

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BY

GLORIA DAVIS

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## APPEARANCES

FOR THE APPELLANT:  
Shelby H. Hapeshis, Esquire  
Huff Law Firm, LLC  
7244 Woodrow Street  
P.O. Box 1935  
Irmo, SC 29063

FOR THE RESPONDENT:  
Brent P. Stewart, Esquire  
Stewart Law Office  
1242 Ebenezer Road  
Rock Hill, SC 29731

## COMMISSIONERS PRESENT:

Melody James, Chair

Mike Campbell

Avery Wilkerson

\*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

\*\*This is an Official Transcript governed by 25A S.C. Code ANN. Regs 67-615 D (Supp. 2000). The unauthorized copying of this document is deemed to be conversion of an asset belonging to the Court Reporter.

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I N D E X

	Page
Argument for the Appellant by Ms. Hapeshis	5:11
Argument for the Respondent by Mr. Stewart	14:4
Reply for the Appellant by Ms. Hapeshis	22:13
Certificate	26



1 -- that's fine. I just wanted to get that  
2 straight for the record. Yes.

3 Court Reporter: Thank you.

4 Commissioner Wilkerson: Okay. No, you  
5 -- you don't have that in front of you; it  
6 was a typo.

7 Court Reporter: Thank you, very much.

8 Commissioner Wilkerson: Sure. Thanks.

9 Commissioner James: Ms. Hapeshis?

10 ARGUMENT FOR THE APPELLANT

11 By Ms. Hapeshis:

12 Commissioners, briefly, if I can, I'm going to go  
13 for a quick timeline of how we got here because if this  
14 is so convoluted that if I don't do that to begin with  
15 it ends up being a mess in my perspective as well as  
16 probably anyone listening to this right now. I just  
17 want start by -- this claim starts or actually the  
18 problem started when Mr. McHowell's left shoulder -- in  
19 June of 2011, that was eight (8) months prior to his  
20 hire date with the Defendants, Star Foods. At that  
21 time he underwent surgery for his left shoulder. On  
22 January the 5th of 2012, which was one (1) month prior  
23 to the hire with our Employer, the Claimant sees Dr.  
24 O'Malley, who is his personal Orthopedist, and the  
25 client -- the Claimant is having problem with overhead

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1           lifting, he reports neck and back pain and he describes  
2           himself as disabled. On February the 2nd of 2012, one  
3           prior to the date -- start with our Employer, the  
4           Claimant returns to his personal Orthopedist and  
5           reports that injections only lasted several days that  
6           he had before. Orthopedist contemplates an MRI and  
7           possible surgery. On February the 3rd of 2012, the  
8           Claimant begins working with the Defendant, Star Foods.  
9           On March the 5th of 2012, the Claimant has a motor  
10          vehicle accident while working on the job; a Form 50 is  
11          filed for that claim. On March the 19th of 2013, the  
12          Claimant's Attorney, Brent Stewart, sends a  
13          questionnaire to Dr. Lehman, who relates the need for  
14          surgery to the Claimant's motor vehicle accident of  
15          2012. On July the 9th of 2013, our Workers' Comp  
16          number 1207730 takes place before Commissioner Barden  
17          and then the very next month the Claimant stops working  
18          for the Defendants. On October the 25th of 2013, the  
19          claim for the shoulder injury, for the left shoulder,  
20          is rendered non-compensable by Commissioner Barden.  
21          Six (6) days later, the Claimant has shoulder surgery  
22          for his left shoulder and Dr. Lehman relates it to the  
23          motor vehicle accident of 2012. On 11 -- on November  
24          the 4th of 2013, the Claimant appeals and then on  
25          December the 23rd of 2013, the Claimant is doing well

1 from the surgery and Dr. Lehman, again, relates it to  
2 the motor vehicle accident of 2012. On February the  
3 19th, 2014, which is Workers' Comp file number 1207730,  
4 a hearing is supposed to take place; the parties  
5 verbally settled the matter and we do not walk into the  
6 hearing room. On February the 20th, 2014, Claimant's  
7 counsels -- counsel sends a questionnaire to Dr. Lehman  
8 with job descriptions asking him to relate the surgery  
9 that the Claimant had in October to a repetitive trauma  
10 injury and includes a job description with the  
11 questionnaire. On February the 21st, the doctor  
12 relates it. On March the 2nd, 2014, Claimant's  
13 attorney and Defense counsel enter into a clincher  
14 agreement for the 2012 motor vehicle accident for the  
15 same shoulder that surgery had already been completed  
16 and the Claimant's -- the Claimant's counsel requested  
17 that Defense strike a provision in the settlement  
18 agreement saying that there are no other claims,  
19 reported or unreported. On March the 17th, the  
20 clincher document is approved; one (1) week later a  
21 Form 50 is filed for this repetitive trauma claim. And  
22 we're here today -- the sequence of events puts us to  
23 where we are today. After our -- our hearing with  
24 Commissioner Taylor, she found the repetitive trauma  
25 claim compensable to the same body part, with the same

1 Employer that the Claimant was not even working with at  
2 the time. Our first argument would be that the  
3 Commissioner erred in finding the Claimant permanently  
4 and totally disabled because the rating was a five  
5 percent (5%) rating to the Claimant's shoulder only.  
6 The medical records are indisputable. Dr. Lehman, in  
7 both his questionnaire and his medical reports, say  
8 it's a five percent (5%) rating and equates it to a  
9 three percent (3%) upper extremity rating. And we  
10 would say in Colonna versus Marlboro Park Hospital that  
11 the Claimant can not even proceed under 42-9-10 because  
12 it is a one (1) body part question and the Colonna  
13 decision was very -- the Colonna decision was very  
14 specific in saying that there has to be evidence that  
15 the other body part was impaired or injured and I don't  
16 think that it can be proven on either one in this  
17 matter as the rating was just to the shoulder.

18 Commissioner James: And I see that, and  
19 it says equates to the shoulder and the -- we  
20 all know the Guide says that the upper  
21 extremity, the shoulder is sixty percent  
22 (60%). So, the division, the math works out  
23 --

24 Ms. Hapeshis: Okay.

25 Commissioner James: -- three percent

1 (3%) to five percent (5%). What about the  
2 opinion of Dr. Lehman that says, it is my  
3 opinion that Mr. McHowell's repetitive left  
4 shoulder injury affects his left arm?

5 Ms. Hapeshis: I would say in the  
6 Colonna decision that affects is defined as  
7 impaired or injured and there was no  
8 impairment rating to the arm and there was no  
9 injury to the arm; the injury was to the  
10 shoulder and it was a shoulder surgery from  
11 -- shoulder surgery --

12 Commissioner James: Right.

13 Ms. Hapeshis: -- for impingement  
14 syndrome.

15 Commissioner James: I think the record  
16 is clear there is no injury. So, it's a  
17 question of whether it affects his left arm  
18 or not. So, all we have is a medical  
19 statement with nothing behind it but a doctor  
20 does say -- even though he doesn't explain  
21 how --

22 Ms. Hapeshis: Okay.

23 Commissioner James: -- the doctor says  
24 affects.

25 Ms. Hapeshis: Affects. Yes.

1 Commissioner James: Yes.

2 Ms. Hapeshis: And we would say the

3 affects would be different than impaired or injured

4 under the Colonna decision. If -- if you do have to

5 get to the vocational reports in saying it was a

6 permanent and total case, we would just say that Ashley

7 Vargas would be the report that the Claimant's attorney

8 relied upon and it was -- the Claimant's attorney told

9 her that he could only do heavy work. If you see Dr.

10 Lehman's restrictions, its modified duty, no overhead

11 lifting. No overhead lifting was the same restrictions

12 he had in 2011, before he even started working with our

13 Employer. We would also contend that the guy applied

14 for a FedEx job even after his surgery while he -- or

15 even after his motor vehicle accident, even when he was

16 still working with the Employer. Even if it was found

17 that the guy has a repetitive injury, we would say it's

18 not from our injury or our employment. He was already

19 having problems, he was having injections and surgery

20 was already contemplated as well as MMI -- as well as

21 an MRI. The Claimant's attorney contends that

22 Commissioner Barden's reference that the Claimant had

23 returned to baseline is evidence, in fact, that the

24 Claimant did return to base -- return to baseline and I

25 -- the order is clear that she says, if I find that the

1 Claimant did suffer an aggravation or an injury, then I  
2 find the Claimant returned to baseline. So, we would  
3 say that she wasn't trying to make a medical opinion;  
4 she didn't believe the guy and it's pretty clear when  
5 you go through her order that that was her finding.

6 Commissioner Wilkerson: But this wasn't  
7 Commissioner Barden's order; this is  
8 Commissioner Taylor's order.

9 Ms. Hapeshis: Right, it is.

10 Commissioner Wilkerson: Okay.

11 Ms. Hapeshis: As far as a repetitive  
12 trauma injury, under 42-1-172, and -- and the onset and  
13 cumulative effects, the Claimant already had the injury  
14 and surgery was even contemplated before coming to work  
15 with the Employer. The Claimant never complains to his  
16 supervisor that there are problems with the repetitive  
17 nature of his job; that's Steve Laney's deposition,  
18 pages 8 through 12. And the Vocational Expert, Glen  
19 Adams, states that he can't reach a definitive  
20 conclusion regarding an ergonomics risk to the left  
21 shoulder, and that's on Claimant's APA, page 71. The  
22 Claimant also described himself as disabled before he  
23 even begins working with our Employer. And then we  
24 would say as far as the medical evidence goes, you have  
25 Dr. Lehman, who relates the injury to a motor vehicle

1 accident, and then -- that's on March the 19th of 2013,  
2 and that's on Defendant's APA, 115. And then, on  
3 February the 20th of 2014, he relates it by the -- to  
4 the repetitive trauma by questionnaire. And then,  
5 again, on September the 30th of 2014, he states that  
6 the shoulder problems are coming from a motor vehicle  
7 accident of 2012, and that's in Claimant's APA, page  
8 38. Dr. Schwartz initially fills out an opinion  
9 relating -- agreeing with Dr. Lehman, but in the very  
10 next month, on December 22nd, 2014, he states that  
11 there is no evidence that he is an appropriate surgical  
12 candidate and he also references the motor vehicle  
13 accident in that report. Dr. Girault can not relate  
14 the -- Dr. Girault says that he has nothing more to  
15 offer the Claimant as the Claimant is already receiving  
16 injections. Also, the Claimant, himself, tells Dr.  
17 Ryder-Coop -- Ryder-Cook that he is retired and that  
18 was his reason for going out of work. And he tells  
19 Steve Laney that the reason he quit work was that he  
20 was inheriting money from a relative, and that's in  
21 direct contradiction to his testimony before  
22 Commissioner Taylor that he quit work because of the  
23 pain complaints he was having with his shoulder. We --  
24 even if a repetitive trauma applies that Caper would  
25 exist because the guy knew that lifting overhead would

1 cause problems; he knew that before he started working  
2 with our Employer, he knew it before the -- any injury  
3 occurred. Finally, under overhead repetitive trauma,  
4 we would argue that we were prejudiced by lack of  
5 notice. We would say first of all, that there is no  
6 way the Claimant could not have discovered by  
7 exercising reasonable diligence that he had a  
8 repetitive trauma claim. The Claimant has had -- the  
9 Claimant and client's attorney has had their job duties  
10 -- and as well as Dr. Lehman -- since 2012. The  
11 Claimant's attorney pursued this case under an injury  
12 by accident and did not pursue it under repetitive  
13 trauma. The -- Dr. Lehman, who did say he suffered  
14 from repetitive trauma was prevented -- was provided  
15 with written -- hand written job descriptions by the  
16 Claimant but also the same job descriptions were sent  
17 to him back in 2012, and that's under Defendant's APAs,  
18 page 136. It's just the fact that the Claimant's  
19 attorney suggested that the statement from the clincher  
20 be stricken prior to bringing this claim is also  
21 knowledge that they were going to bring this claim and  
22 we'd say there was prejudice thereby. And that's, I  
23 guess, all for right now.

24 Commissioner James: All right. And --  
25 and you'll get three (3) minutes in reply.

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1 All right, Mr. -- Mr. Stewart.

2 Mr. Stewart: Yes, ma'am.

3 ARGUMENT FOR THE RESPONDENT

4 By Mr. Stewart:

5 I want to start out by just dealing with -- I'm  
6 kind of going to go in the order of what she did, but  
7 the body part question. APA 38, Claimant's, on that  
8 medical record of the Orthopedist, it says that the  
9 client suffers a glenoid labrum tear, the sprains and  
10 strains of other specified sites of the shoulder and  
11 upper arm; it's a medical that shows there is a strain,  
12 sprain tear --

13 Commissioner James: That -- that's the  
14 injury. So, in order to, you know, what --  
15 what we're looking at right now, if it's not  
16 an original -- you're saying it's originally  
17 an injured body part?

18 Mr. Stewart: -- I'm saying this --

19 Commissioner James: Because the doctor  
20 says affects.

21 Mr. Stewart: -- I'm saying the body --  
22 I'm saying according to this record, and this  
23 is Dr. Schwartz, not Dr. Lehman, he comes out  
24 and notes that there is a labrum tear, a  
25 sprain and strain of other specified sites

1 and he says the shoulder and upper arm and I  
2 believe that's from the repetitive nature of  
3 the injury and that's APA, 38. All right?

4 Commissioner James: All right. Now,  
5 repetitive there is that gate keeping  
6 statute. I -- I want to go to the issue of  
7 affect as opposed to originally injured.  
8 There -- there -- it is obvious, even though  
9 I think it was argued otherwise, that the  
10 three percent (3%) is really the -- is the  
11 equivalent of the five percent (5%); I think  
12 that statement is very clear or it's very  
13 clear to me that that's exactly what --  
14 that's exactly what that is. But there is a  
15 statement in finding of fact number 23,  
16 Commissioner Taylor says, that the doctor  
17 says there is an affect to the upper  
18 extremity; is that the record you're  
19 referring to or are you referring to a  
20 another record?

21 Mr. Stewart: I'm referring to --

22 Commissioner James: She did not --

23 Mr. Stewart: -- a different record --

24 Commissioner Wilkerson: It's a  
25 different record, yes.

1                   Mr. Stewart: -- but there is a  
2                   questionnaire, and that's APA 48 --

3                   Commissioner James: -- okay.

4                   Mr. Stewart: -- where the doctor  
5                   straight out says, it's my opinion that Mr.  
6                   McHowell's repetitive left shoulder injury,  
7                   February 27th, affects his left arm.

8                   Commissioner James: Which is  
9                   uncontradicted?

10                  Mr. Stewart: And -- well, and it's also  
11                  supported by Metrolina Neurological that says, he is  
12                  continuing to experience pain in the left shoulder  
13                  region. He also has some pain radiating down the arm  
14                  and has numbness in the whole left arm, particularly if  
15                  he is doing anything repetitive with the arm or if he  
16                  even has it up watching television sometimes; that's  
17                  APA, 0049. There is another medical record that  
18                  addresses the arm and says that he may need shoulder  
19                  surgery or -- or shoulder replacement, and that's when  
20                  Dr. Girault, 0054, and I believe that on 0051, starts  
21                  out also addressing the fact that the arm is affected  
22                  and that's the evidence that I believe supports the two  
23                  (2) body parts. The next issue is the vocational  
24                  reports. The only completed vocational report was  
25                  Ashley Johnson. They hired a Vocational the Friday

1 before the hearing; if you look at the brief they  
2 submitted, they didn't even list that person as a  
3 witness. They were permitted to call two (2) witnesses  
4 to this case: Wanda Riggins and the Vocational person.  
5 Their Vocational said, we didn't have time to even  
6 complete our report. Ashley Johnson's completed report  
7 finds him totally and permanently disabled and that's  
8 the evidence of this case, along with the fact that he  
9 tried to get work and couldn't. The other witness is  
10 Wanda Riggins, and Wanda Riggins is why this case is  
11 where it is. They brought in a witness named Wanda  
12 Riggins and Wanda Riggins was supposed to testify that  
13 she saw Mr. McHowell working this whole point when he  
14 was out. Well, Wanda Riggins got up there and said, I  
15 -- that's not him; that's not the person. That's why  
16 these depositions -- depositions were set and canceled  
17 but when they thought they had this guy working they  
18 didn't. So, when they didn't do that, they didn't do  
19 anything to counter balance any of the evidence of the  
20 case. This is a clear medical case. How do we show  
21 the repetitive nature of the job? She is right, Steven  
22 Laney, in his deposition, he comes out and says that  
23 there are twenty-four hundred (2,400) repetitive  
24 motions a week on this job. He says -- I say, so, you  
25 really move about twelve hundred (1,200) repetitive

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1 moves for the stuff in the freezer section, three  
2 hundred (300) on, three hundred (300) off, three  
3 hundred (300) take it off during a week's span; he  
4 says, yes. He goes on to say, nobody likes to hear the  
5 truth because you only get paid for touching it once  
6 but you're really paid -- one touch it locks and then  
7 you have to touch it five (5) or six (6) more times  
8 over the period of the time. He says there are at  
9 least twelve hundred (1,200) repetitive motions in the  
10 job; that's the deposition of Steve Laney. Steve Laney  
11 also says in there that the client went to him and  
12 said, my shoulder is hurting and he said, he didn't  
13 know -- he didn't -- wasn't mentioning anything about  
14 the repetitive nature of the job but he said that he  
15 would have to go talk to the supervisor about the job  
16 and he would deal with that issue, and that's in the  
17 deposition of Steve Laney. Incidentally, Steve Laney  
18 also, in a previous deposition, stated that he believed  
19 Bryan McHowell was a very honest man and a good worker.  
20 Another issue with Adams and Wilkinson, so, we've given  
21 you the doctors all, clearly, saying repetitive trauma.  
22 We're giving you testimony from the supervisor of the  
23 employee of the repetitive nature of the job and then  
24 we have -- we do the -- a vocational with Glen Adams,  
25 who they objected to saying he wasn't an expert in

1 regards to repetitive trauma. And Commissioner Taylor  
2 said, well, I think it's really one of the ones that we  
3 actually accept as being an expert. So, we got a  
4 report done and we sent the report out right away; we  
5 sent it out, once we got it, to them and the reason we  
6 sent it to them was, the report said we believe the  
7 repetitive nature of the job causes stress and in order  
8 for me to do a final report, you need to -- we need to  
9 come view the job. So, at that point we start sending  
10 letters, and these are in the brief, too. We send  
11 three (3) letters to Ros Huff saying, this expert wants  
12 to see the job. If you let him see the job he might  
13 say the repetitive nature -- as it is, his opinion is  
14 the repetitive nature of the job caused the injury but  
15 he could change his mind if you let us see the job and  
16 view it; one (1), two (2), three (3) letters, all  
17 ignored. I knew if I went off of what I was supposed  
18 to say and started following what she did I'd mess up  
19 but I'll try to pull back. Prejudice, because you  
20 settle a prior claim doesn't have anything to do with  
21 prejudice in this hearing. The record is void of any  
22 prejudice or any argument of prejudice or even in the  
23 mention of prejudice in the hearing; there was nothing  
24 in any of the records that shows how they were  
25 prejudiced. In fact, when we told them to cross out

1 any other report, then they should have known that  
2 there was going to be another claim coming. The fact  
3 that the doctors -- and I -- they said that we should  
4 have known and I should have known as a lawyer -- the  
5 doctors weren't aware of the repetitive nature of the  
6 job back when she said back in 2012, because the APA  
7 that she referred to -- and I'd ask you to look at her  
8 APAs, she cites them -- and read what she says the APA  
9 says to what it actually says. But APA, 136, is a --  
10 2014, is the -- when I sent the job duty out in 2014,  
11 but it does not go back to 2012. There is a huge ball  
12 of stuff here, most of it self-serving hearsay, not  
13 even admissible. Commissioner Taylor, over my motion  
14 in limine, let every bit of this in. She looked at  
15 every bit of it and from ever bit of it she went to  
16 what the relevant evident was -- evidence was, and she  
17 decided the case. APA 26, clearly the medical record  
18 here says, he was temporary better until the motor  
19 vehicle accident, which is caused the RCT to rupture  
20 again; we don't disagree with that. He went back to  
21 work and due to repetitive motion continued to  
22 aggravate the shoulder; this resulted in a second  
23 shoulder arthroscopy performed by Dr. Lehman in 2013.  
24 That is not a questionnaire; that is a medical record  
25 of Dr. Schwartz. APAs, 30, 31, Dr. Lehman explains how

1 the procedure went. We're trying to complicate  
2 everything about this first claim, the second claim;  
3 that doesn't matter. He had a car wreck in March of  
4 2012. He continued to work fifteen (15) more months  
5 without his surgery or any treatment, whatsoever, until  
6 he couldn't take it anymore from lifting twelve hundred  
7 (1,200) -- twenty-four hundred (2,400) times a week  
8 over and over and over. This APA from Dr. Lehman, on  
9 30 and 31, states what happened with the car wreck.  
10 Every doctor knew about his pre-existing condition  
11 before 2011, they knew about his surgery in 2011, they  
12 knew about his car wreck in 2013, and they still found  
13 this competitive -- as competitive trauma. So, in  
14 their brief they keep arguing that it's my burden of  
15 proof to -- my burden of proof. I can't give you any  
16 more than four (4) doctors that tie it together, four  
17 (4) doctors saying the arm is affected, an expert for  
18 repetitive trauma and a Vocational Expert. At that  
19 point, I satisfy my burden and what their brief doesn't  
20 plan on is that the burden has to shift at some point  
21 and if they don't like the evidence, they have to do  
22 something to counter balance it; my argument to you is  
23 they didn't because they thought they had this guy on a  
24 camera, they thought they were going to run Wanda  
25 Riggins in, because of that they decided not to do

1 anything else with their case and that's the reason  
2 that the only evidence we have is the evidence we have.  
3 There was no issue with notice. It was diagnosed in  
4 February; the Form 50 was filed within thirty (30)  
5 days. We have ninety (90) days from a definitive  
6 diagnosis to file the claim. It was filed when he  
7 wasn't working there but that doesn't matter; the  
8 Statute doesn't start running until the definitive  
9 diagnosis.

10 Commissioner James: Thank you, sir.

11 Ms. Hapeshis.

12 REPLY FROM THE APPELLANT

13 By Ms. Hapeshis:

14 Just to follow up, briefly, his -- his assertions  
15 that he has multiple doctors relating this claim to a  
16 repetitive trauma claim, look at Dr. Schwartz's record  
17 of December the 22nd of 2014, after he already agreed  
18 with Dr. Lehman saying it was a repetitive trauma he  
19 says, I do not think this is an appropriate surgical  
20 candidate at the present time for a shoulder  
21 replacement surgery and I see no evidence that would  
22 require a shoulder arthroscopy; Dr. Schwartz didn't  
23 even think he needed surgery. Then you've got -- you  
24 go down to, let's see, the next doctor that saw him,  
25 Dr. Girault with pain, he couldn't relate it. So, we

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1 would say, no, there weren't multiple doctors relating  
2 this injury. We would say the only one was Dr. Lehman  
3 who said that the shoulder -- and did the shoulder to  
4 arm conversion rating. And I think that they all --  
5 there's no -- it's uncontested they all say affect but  
6 there is no injury to and there is no impairment to the  
7 arm. As far as notice goes, we would say that notice  
8 was not -- not adequate and we were prejudiced by it.  
9 I don't know of any attorney in the State would sign a  
10 clincher for a shoulder claim knowing that the  
11 Claimant's attorney had already sent a questionnaire  
12 bringing a repetitive trauma claim. I -- I mean, I --  
13 I think that would just be common sense to not sign a  
14 clincher knowing that there is something out there  
15 already in the works bringing a repetitive trauma  
16 injury. And we would just say that, you know, with  
17 notice -- and he never complained about it. There is  
18 tons of testimony he never complained about it. Even  
19 after they bring this repetitive trauma claim, he's  
20 still relating it to the 2012 motor vehicle accident,  
21 which is inconsistent with his testimony. So, we would  
22 say there wasn't proper notice and we were prejudiced  
23 thereby. Finally, we did argue that there was a  
24 problem with res judicata and collateral estoppel as we  
25 did think that there were both essentially the same

1 claims that were being brought. But to get back to the  
2 -- the Vocational Experts, as far as Jane Westmoreland  
3 goes, doctor -- I mean, Commissioner Taylor even says  
4 in her hearing transcript she knows that she was under  
5 time constraints, which is why I had to bring her to  
6 the hearing; I was given two (2) weeks. And she  
7 testified that the guy could work. Now, he says that  
8 her report is incomplete; well, so is Glen Adams'. I  
9 mean, his report is incomplete; he even says his report  
10 is incomplete. So, I mean, if that's going to be an  
11 issue, then I don't think either one of them should be  
12 given any weight. As far as the Vocational Expert with  
13 -- with Jane Westmoreland versus Ashley Vargas, Ashley  
14 Vargas was not given his full history of what he could  
15 do. He was a Sales Manager, this guy has got a GED,  
16 he's got some technical college training, he did some  
17 driving, truck driving, at Wall Timber and didn't have  
18 to do any lifting and he incorporated a business after  
19 the surgery to haul trucks and this was when he was  
20 supposedly so hurt that he quit work with the Employer.  
21 So, we would just say the evidence does not support a  
22 finding that there was a repetitive trauma injury with  
23 our claim. Thank you.

24 Commissioner James: Thank you all.

25 Commissioner Campbell: Thank you all.

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1                   You all have a good afternoon.  
2                   Commissioner Wilkerson: Thank you all.  
3                   Commissioner James: This concludes the  
4                   hearing.

5                   (THERE BEING NO FURTHER ARGUMENTS, THE FULL BOARD HEARING  
6                   CONCLUDED AT 3:02 P.M.)

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

WCC File No. 1402961  
Appellate Case No. 2016-001072

Bryan McHowell, Employee/Claimant. . . . . Respondent,

v.

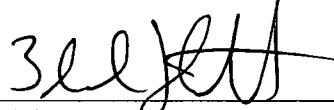
Star Food Products/Mrs. Stratton's  
Salads, Inc., Employer, and  
Great American Alliance Ins., Carrier,. . . . . Appellants.

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that this Supplemental Record on Appeal contains  
all material proposed to be included by any of the parties and not any other material.

December 30, 2016

Respectfully submitted,



Blake A. Hewitt, # 73674  
John S. Nichols, # 4210  
BLUESTEIN NICHOLS  
THOMPSON & DELGADO  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599

Attorneys for Respondent