THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

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

v.

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

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes and Other Authorities**

## COUNTER-STATEMENT OF ISSUES ON APPEAL

A. Whether the Workers' Compensation Commission's finding that Bryan McHowell's shoulder injury affects his arm must be upheld when it is amply supported by lay and expert testimony.

B. Whether the finding that Mr. McHowell is permanently and totally disabled must be upheld when it is supported by testimony from Mr. McHowell's doctor as well as by an additional expert's report.

C. Whether the finding of a "repetitive trauma" injury must be upheld when it is supported by expert testimony as well as by the employer's admission that Mr. McHowell's job involved repetitive activity.

D. Whether the decision allowing Mr. McHowell to receive his award in a lump-sum must be affirmed when nobody argued to the commission that a lump-sum payment was inappropriate.

## STATEMENT OF THE CASE

In truth there is only one issue in this appeal: Whether the Workers' Compensation Commission's decision is clearly erroneous in view of the substantial evidence in the record. The commission found Bryan McHowell injured his left shoulder through repetitive activities at work, that this injury affects Mr. McHowell's left arm, and that Mr. McHowell is permanently and totally disabled. The question on appeal is whether these findings meet the standard of appellate review. They do.

Bryan McHowell worked for Star Food Products for a year and a half, from February of 2012 to August of 2013. (R.p.433); (R.pp.93-94). He left Star Foods to have surgery on his left shoulder, surgery he paid for with money he inherited from his brother. (R.pp.94-95). He had this surgery in October of 2013. (R.p.137).

In March of 2014, while he was still out of work after surgery, Mr. McHowell brought a workers' compensation claim alleging a repetitive trauma injury to his left

shoulder. (R.p.63). The following January, Mr. McHowell gave notice he would be alleging the left shoulder injury also affected his arm. (R.p.65).

The central dispute at trial was whether Mr. McHowell had truly been injured on the job or whether his shoulder issues were merely the result of continuing shoulder problems he began experiencing in 2011, before he started at Star Foods. Mr. McHowell admitted his pre-existing shoulder problems: He said his work at Star Foods aggravated them to the point he needed surgery and that he ultimately suffered significant physical restrictions. (R.pp.31-32). He presented evidence to support these assertions. See, e.g. (R.pp.159-160).

Star Foods claimed Mr. McHowell's shoulder was not affected by his work and that he was merely seeking to have some else pay for his pre-existing issues. (R.pp.32-33).

The parties also disputed whether a prior workers' compensation claim was relevant, a claim arising out of a 2012 car wreck, shortly after Mr. McHowell began work. The commission denied that claim, specifically finding *if* Mr. McHowell *had* injured his left shoulder in the wreck, his condition returned to "baseline" shortly afterwards. (R.p.609, ¶18). The claim settled on appeal. (R.pp.617-620).

Star Foods believed the repetitive trauma claim was a "do-over" of the wreck claim. (R.p.85). Mr. McHowell argued the claims were unrelated. He explained regardless of the wreck claim, two doctors believed the repetitive tasks of Mr. McHowell's job caused Mr. McHowell to develop a complete rotator cuff tear, creating the need for Mr. McHowell's surgery and leaving Mr. McHowell with a permanent disability. (Supp.R.pp.3-4).

A single commissioner heard the claim in April of 2015 and issued a detailed order in Mr. McHowell's favor that November. (R.pp.27-57).

Star Foods asked the commission to review the single commissioner's decision, and after an appellate panel heard argument in February of 2016, the panel issued an order affirming the single commissioner. (R.pp.1-26). The panel issued its decision in April of 2016. *Id.* The decision was unanimous. *Id.*

## ARGUMENT

The commission found Mr. McHowell injured his left shoulder through repetitive activities at work. (R.p.21, ¶¶14-17). It also found this injury affects Mr. McHowell's left arm and that Mr. McHowell is permanently and totally disabled. (R.p.22, ¶24; p.23, ¶31).

A party bears a heavy burden to successfully challenge these findings. *Lark v. Bi-Lo* held the Administrative Procedures Act governs review of the commission's decisions. 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the APA, the commission's findings should be affirmed unless they are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. S.C. Code Ann. § 1-23-380 (5)(e) (Supp. 2016).

The evidence in the record satisfies this standard. This Court should affirm.

A. The commission's finding that Mr. McHowell's shoulder injury affects his arm must be upheld because it is amply supported by lay and expert testimony.

The single commissioner made a specific finding that Mr. McHowell's injury affects the function of his left arm and left shoulder. (R.p.53, ¶24). The appellate panel made the same finding. (R.p.22, ¶24).

These findings are relevant because of the rule that certain injuries must "affect" multiple body parts in order for an injured worker to pursue a total disability award. This is sometimes known as the "exclusivity rule" or the "single member defense."

The seminal case on this issue is *Singleton v. Young Lumber Co.*, which held that an injured worker with an ankle injury was limited to an award based on the loss of the use of his leg. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). *Singleton* explains that when someone injures a part of the body listed in the "scheduled recovery" statute—S.C. Code Ann. § 42-9-30 (2015)—the injured worker is limited to the compensation set forth in that statute unless "some other part of [the] body is affected." 236 S.C. at 471, 114 S.E.2d at 845.

There is ample precedent describing the correct application of this rule.

This Court's decision in *Bass v. Kenco Group* noted the scheduled recovery statute was not the exclusive remedy for a shoulder injury that caused the injured worker to suffer mental problems. 366 S.C. 450, 464, 622 S.E.2d 577, 584 (Ct. App. 2005). This Court's decision in *Simmons v. City of Charleston* similarly held an injured worker was not limited to the schedule when the injury to one leg (a spider bite) caused pain and swelling in the other leg. 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002).

The rationale of this principle, as this Court stated in *Brown v. Owens Steele*, is that when a scheduled injury"nevertheless affects other parts of the body," the injured worker is entitled to "the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994).

There is ample evidence Mr. McHowell's shoulder injury affects his left arm. First, there is Mr. McHowell's own testimony. (R.p.96, lines 3-4). Then, there are records from medical doctors describing symptoms "radiating into the left arm," (R.p.163), and periods of numbness in the arm as well as radiating pain. (R.p.178). Mr. McHowell's primary

treating physician completed a questionnaire in which he opined Mr. McHowell's shoulder injury affected his left arm. (R.p.177). A neurologist concluded the majority of Mr. McHowell's symptoms were related to his shoulder problem. (R.p.180). All of this testimony supports the decision that Mr. McHowell's injury is not "isolated" to his shoulder. Instead, the shoulder injury is interfering with other parts of Mr. McHowell's body.

There is more evidence of the same nature. As is common in workers' compensation cases, Mr. McHowell underwent a vocational assessment to judge his suitability for returning to work. This assessment noted Mr. McHowell's complaints that certain activities either cause his arm to go sleep or to get sore. (R.p.193). This evidence does not describe an injury with symptoms "confined" to the shoulder. Mr. McHowell's shoulder injury causes him to experience pain and numbness radiating down his arm, which makes it different than an injury whose symptoms are confined to the shoulder.

Symptoms like radiating pain and numbness make the difference. This is why the injured worker in *Hutson v. State Ports Authority* was not limited to the scheduled recovery statute. 390 S.C. 108, 117, 700 S.E.2d 462, 467 (Ct. App. 2010). A different part of *Hutson* was overruled, but in the claimant's favor and the instructive point remains valid. 399 S.C. 381, 732 S.E.2d 500 (2012). Having symptoms in multiple body parts satisfies the threshold.

A lack of these symptoms is precisely why the injured worker in *Colonna v. Marlboro Park Hospital* was limited to an award for the leg. The leg injury in *Colonna* required implanting a spinal cord stimulator in the injured worker's back. This Court correctly held that inserting a device for treatment did not count as another part of the body being "affected" by the injury. 404 S.C. 537, 546, 745 S.E.2d 128, 133 (Ct. App. 2013).

Mr. McHowell's case is materially different. Doctors did not insert a device in his arm to treat his shoulder or in his shoulder to treat his arm. Mr. McHowell's shoulder injury causes him to have pain in his arm as well as numbness. These symptoms naturally affect Mr. McHowell's ability to use his arm in activities of daily living and in doing work.

There is ample evidence supporting the commission's finding that Mr. McHowell's left shoulder injury affects his left arm. The commission's decision is not clearly erroneous.

B. The finding that Mr. McHowell is permanently and totally disabled must be upheld because it is supported by testimony from Mr. McHowell's doctor as well as by an additional expert's report.

The Supreme Court has explained total disability does not require complete helplessness. *Wynn v. Peoples Nat. Gas Co.*, 238 S.C. 1, 11, 118 S.E.2d 812, 817 (1961). The test, in general terms, is whether the injured worker is unable to perform services other than those services that are "so limited in quality, dependability, or quantity'" that a reasonably stable market for those services does not exist. *Id.* at 11-12, 118 S.E.2d at 817.

The commission found Mr. McHowell was permanently and totally disabled, specifically noting evidence from two doctors as well as a vocational consultant. (R.p.23, ¶31). The record supports the commission's finding. It is not clearly erroneous.

Mr. McHowell has significant limitations. His principal doctor has said he may not lift anything over his head that weighs more than 10 pounds. (R.p.152). This is an improvement from February of 2014, when this same doctor told Mr. McHowell he could not do *any* overhead lifting, (R.p.150), but it means Mr. McHowell cannot return to Star Foods, where his job involved frequently loading and unloading 200 to 300 cases of food products, each ranging from 5 pounds to 75 pounds, stacked above his head. (R.p.252).

Then, there is the vocational evaluation. It describes Mr. McHowell's job at Star Foods and it explains truck driving jobs are often "heavy" duty jobs when they involve loading and unloading. (R.pp.193-194). The evaluation concluded Mr. McHowell—at that time 56 years old and with a work history of medium to heavy occupations—had no skills to transfer to lighter work and was likely precluded from all gainful employment due to his age, education, experience, and limitations. (R.pp.194-195). It also noted future surgeries would further limit Mr. McHowell's opportunities. *Id.*

Star Foods argues for reversal based on its own vocational expert—an expert who never even met Mr. McHowell, (R.p.125, lines 21-25)—and suggests that because Mr. McHowell has five years of work experience in sales, Mr. McHowell can "clearly" work in sales, notwithstanding his restrictions.

Mr. McHowell's five years in sales consisted of selling industrial piping and valves in the late 1970s. (R.p.93, lines 6-16). Even if this experience was not horribly outdated, and it assuredly *is* outdated, sales jobs commonly involve lifting equipment, lifting products, and demonstrations. Star Foods presented no evidence that Mr. McHowell is capable of a sales position. This looks like speculation, and the commission rejected it.

There is ample evidence supporting the finding Mr. McHowell is permanently and totally disabled. The commission's decision is not clearly erroneous.

C. The finding of a "repetitive trauma" injury must be upheld because it is supported by expert testimony as well as by the employer's admission that Mr. McHowell's job involved repetitive activity.

A "repetitive trauma" is a specific type of on-the-job injury. It was first recognized as compensable in *Pee v. AVM*, 352 S.C. 167, 573 S.E.2d 785 (2002).

When the Workers' Compensation Act was revised in 2007, the legislature codified the definition of repetitive trauma the Supreme Court articulated in *Pee*. See Act No. 111, sec. 7, 2007 S.C. Acts 599, 612. The statute repeats, as *Pee* explained, that a repetitive trauma is not the result of a discreet incident like a trip-and-fall, but has a gradual onset and is caused by the cumulative effect of repeated events. S.C. Code Ann. § 42-1-172(A) (2015).

Precedent contains several examples of repetitive traumas. *Pee* involved carpal tunnel syndrome that resulted from repetitive use of the injured worker's hands. 352 S.C. at 167, 573 S.E.2d at 785. *Schulknight v. City of North Charleston* involved a firefighter who suffered hearing loss as a resulting of more than twenty years of exposure to the siren on fire engines. 352 S.C. 175, 574 S.E.2d 194 (2002). This Court has several decisions including the cases of an air conditioning technician whose back gave out after repeatedly lifting heavy equipment, a factory worker who suffered shoulder and neck injuries from repeatedly hammering saw blades, and a nurse assistant injured from repeatedly lifting patients. *Rhame v. Charleston County Sch. Dist.*, 415 S.C. 162, 781 S.E.2d 151 (Ct. App. 2015); *King v. Int'l Knife*, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011); *White v. MUSC*, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003).

Multiple pieces of evidence support the commission's four specific findings addressing Mr. McHowell's repetitive trauma. (R.p.21, ¶¶14-17). Mr. McHowell's principal doctor opined there was a direct connection between Mr. McHowell's repetitive use of his left shoulder and the injury for which this doctor provided treatment. (R.p.150, ¶1). He also opined Mr. McHowell's job duties at Star Foods increased Mr. McHowell's risk of this injury. (R.p.150, ¶5).

This same physician explained, in a letter, that Mr. McHowell's job worked in combination with Mr. McHowell's preexisting shoulder problems and caused a partial rotator cuff tear diagnosed in 2011 to progress into a complete rotator cuff tear, with additional complications, culminating in the need for surgery in 2013. (R. p.159). A second physician read this letter and concurred with the diagnosis and assessment of Mr. McHowell's injuries and future medical care. (R.p.176, ¶2).

Then, there is the testimony of the ergonomics expert, who authored a report stating Mr. McHowell's work tasks at Star Foods elevated his risks for developing "cumulative trauma disorders" to the shoulders because of repetition, force, and shoulder posture of the movements the job required. (R.p.201). The expert wrote this was a preliminary conclusion and that he would like to observe the job in person, but multiple observation requests to Star Foods went unanswered. (R.pp.202-204). "Cumulative trauma disorders" is eerily reminiscent of the repetitive trauma statute's language discussing a gradual injury "caused by the cumulative effects of repetitive traumatic events." Section 42-1-172(A).

Star Foods criticizes this evidence, but that approach is foreclosed by the standard of review. The commission could have viewed the medical records as containing inconsistencies, but it chose not to take that view, and nothing suggests the commission's decision was clearly erroneous. In a recent decision that hinged on proper application of the standard of review, the Supreme Court explained "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual findings[.]" *Hartzell v. Palmetto Collision*, 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016). The same is true for Mr. McHowell's case.

The hearing commissioner noted testimony from Stephen Laney, a Star Foods employee, that Mr. McHowell engaged in 1,200 repetitive movements between loading, unloading, and other activities. (R.pp.49-50). The appellate panel noted this in its decision. (R.p.19, ¶4). There is ample evidence supporting the finding Mr. McHowell suffered a repetitive trauma. The commission's decision is not clearly erroneous.

D. The lump-sum award must be affirmed because nobody argued to the commission that a lump-sum payment was inappropriate.

In the normal case, the decision to award a lump-sum payment is reviewed under the abuse of discretion standard.[1] In this case, however, the issue is not subject to any appellate review because it was not raised to the commission.

*I'On v. Town of Mt. Pleasant* explains that the losing party in the lower court "must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). In practice, this means "the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.* at 422, 526 S.E.2d at 724. A party may not argue an issue on appeal that was not raised and argued below.

Star Foods objected to the lump-sum award on its Form 30, (R.p.60, ¶8), but Star Foods never presented any argument on the issue to the commission, written or otherwise. Star Foods' principal brief to the commission included lump-sum as one of the nine

[1]Lump sum awards are allowed by Section 42-9-301 of the Code (2015). *Ashley v. Ware Shoals Manufacturing Co.* explains an appellate court will review a lump-sum award for abuse of discretion. 210 S.C. 273, 287, 42 S.E.2d 390, 396 (1947).

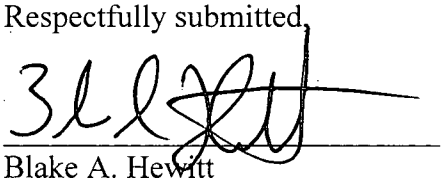
questions presented, (R.p.831), but the brief's argument section only addressed three issues: the exclusivity rule, repetitive trauma, and res judicata. (R.pp.831-839). The reply brief never mentioned the lump-sum issue, (R.pp.841-852), and there was no discussion of a lump-sum during oral argument. (Supp.R.pp.5-29). Nobody argued this issue to the commission. Ever.

Now, Star Foods says it did not get adequate notice of a lump-sum request. That argument was never presented below. For that reason, it is barred.

## CONCLUSION

This Court should affirm because the evidence in the record satisfies the standard of review.

Respectfully submitted,



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