THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Melody L. James, Commissioner
R. Michael Campbell, II, Commissioner
Avery B. Wilkerson, Commissioner

WCC File No. 1402961

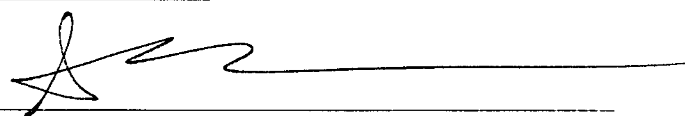
Appellate Case No. 2016-001072
Bryan McHowell, Employee/Claimant, Respondent,

v.

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

FINAL BRIEF OF APPELLANTS

December 29, 2016



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STATEMENT OF ISSUES ON APPEAL

A. **Did the hearing commissioner and the appellate panel of the South Carolina Workers Compensation Commission err as a matter of law in determining that the claimant was permanently and totally disabled under 42-9-10, when the claimant only suffered an injury to one body part? (shoulder)?**

B. **Did the hearing commissioner and the appellate panel of the South Carolina Workers Compensation Commission err as a matter of law in determining that the claimant was permanently and totally disabled, when the evidence does not support such a finding?**

C. **Did the hearing commissioner err and the appellate panel of the South Carolina Workers Compensation Commission err in determining that the claimant suffered from a repetitive trauma injury thus entitling him to workers compensation benefits when the evidence does not support such a finding?**

D. **Did the hearing commissioner and the appellate panel of the South Carolina Workers Compensation Commission err in determining that the claimant was entitled to a lump sum payment of benefits?**

STATEMENT OF THE CASE

The claimant, Brian McHowell (hereinafter "claimant"), has an extensive medical history with regard to his left shoulder, which is the subject of the current litigation. In June 2011, eight months prior to the claimant's date of hire with Star Foods (Employer), Claimant underwent left shoulder surgery and physical therapy).

One month prior to his date of hire with the employer, Claimant returned to his personal orthopedist in January 2012 with complaints of "increasing shoulder pain" and underwent an injection (R. Vol. I pp. 316-318).

On February 2, 2012, only one day before working with the Employer the claimant reported that the injection had only lasted "several days." Claimant's orthopedist recommended another injection and possible MRI (R. Vol. I p. 319).

The claimant began working for the employer on February 3, 2012 as a route sales person. The claimant's left shoulder injury was already litigated in a prior claim filed by the claimant after he began working for the employer in 2012. On March 6, 2012, Claimant alleged that he injured his left shoulder and neck in a work-related motor vehicle accident. (hereinafter "MVA claim"). The claimant's attorney filed a Form 50 on June 25, 2012 for the MVA claim. (R. Vol. II p. 536). Defendants responded by Form 51 stating that the claimant did not suffer an injury by accident, as he was still actively treating for a shoulder problem before beginning work with Employer (R. Vol. II. 552).

A hearing Commissioner heard the matter on the MVA claim and determined that the claim for injuries to the left shoulder was not compensable and the claimant appealed. ((R. Vol. II p. 602). An Appeal Hearing was set before the Appellate Panel for February 19, 2014. Minutes prior to the hearing being held, defense counsel and the claimant's attorney verbally settled the matter on a clincher basis for $9,000.00 and notified the Commissioners that they would not be giving oral arguments. On the very next day, February 20, 2014, and without knowledge to defense counsel, the claimant's attorney sent a questionnaire to Dr. Lehman with a Job description asking him to find that the claimant sustained a repetitive trauma injury to the same shoulder (R. Vol. I. p. 151). Defense counsel forwarded a proposed clincher agreement to the claimant to memorialize the verbal MVA claim settlement from February 19, 2014. The clincher agreement for the MVA claim was signed by the claimant's attorney on March 7, 2014 (R. Vol. II pp. 617-620). However, the claimant's attorney, with knowledge that he was bringing the current litigation for the left shoulder, requested that Defendants strike out a provision in the clincher agreement which stated that "claimant states there are no other workers compensation claims reported or unreported at any other time prior to this agreement." (R. Vol. II p. 617)

Since the claimant had not been employed by Star Foods for eight months, had already received surgery for his left shoulder, and since defense counsel had no knowledge of the questionnaire that was sent to Dr. Lehman one day after settlement negotiations, Defense counsel struck through the provision in the clincher document as well and signed it on March 13, 2014. (R. Vol. II p. 618). Thus, this clincher agreement closed the non-compensable left shoulder MVA claim.

The claimant's attorney again litigated the injuries to the claimant's left shoulder by a Form 50 filed on March 27, 2014. This time, the claimant's attorney states that the claimant's left shoulder injury is the result of a repetitive trauma which occurred on February 27, 2014 rather than the MVA accident. Thus, he was permitted to re-litigate the left shoulder injury to the Commission. The claimant clearly states in his Form 50 that the injury is to the claimant's left shoulder and the body part affected is the left shoulder. He based his new form 50 on a questionnaire he obtained from Dr. Lehman on February 27, 2014. In this questionnaire, Dr. Lehman changes his opinion that the shoulder problem was the result of the MVA but now states that the shoulder problems were from a repetitive trauma. (R. Vol. I pp. 150-151). After no further activity was done by the Claimant's attorney on the claim, the Employer filed a Form 19 closing out the claim on July 31, 2014.

On January 9, 2015, Claimant again filed a Form 50 request for a hearing. In this Form 50, the claimant's attorney does not state what body part is injured." (R. Vol. I p. 65). While the claimant's attorney raises an injury to the claimant's left shoulder and arm in his Form 58, he does not amend his Form 50 for the same. (R. Vol. I. p. 130).

On February 5, 2015 the Employer/Carrier filed a Form 51 denying the claim pending an investigation. (R. Vol. I p. 66). The case was heard on April 22, 2015 before the Single

Commissioner. At the hearing, the defendants argued among many other things that the claimant cannot be permanently and totally disabled because he injured only one body part (his shoulder) and that this current claim was barred under the doctrines of res judicata and collateral estoppel. Further, defendants argued that that claimant did not suffer from a repetitive trauma and if he did, defendants had no notice of the same. (R. Vol. I. pp. 85-87). An order was not issued in this matter until November 9, 2015, almost eight months after the hearing. In the order, the Commissioner found that the claimant suffered from a repetitive trauma and ruled that the claimant was permanently and totally disabled pursuant to SC Code Ann. Section 42-9-10 and was entitled to a lump sum award. (R. Vol. I. p. 27). The Employer appealed by Form 30 filed on November 20, 2015 on all issues raised including a lump sum award. (R. Vol. I p. 59). A hearing was held before the Appellate panel on February 22, 2016. The Appellate Panel of the South Carolina Workers Compensation Commission affirmed the order in its entirety by Order dated April 20, 2016. (R. Vol. I. p. 1). Employer filed a Motion to Reconsider its decision and/or have the case heard by a six member panel on April 26, 2016. The Commission denied that Motion by Order dated May 16, 2016. Employer filed a Notice of Appeal with this court on May 19, 2016.

ARGUMENTS

ARGUMENT I

THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW AND RULED IN DIRECT CONTRADICTION TO COLONNA V. MARLBORO PARK IN DETERMINING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED UNDER 42-9-10 WHEN THE CLAIMANT ONLY INJURED ONE BODY PART.

The law in this state is unequivocally clear and beyond a reasonable doubt that two body parts must be injured or impaired in order for a claimant to proceed for total disability benefits pursuant to S.C. Code Ann. Section 42-9-10. There are NOT two body parts involved in this

matter. The claimant received shoulder surgery. (R. Vol. I p. 137). There was no impairment rating to the claimant's arm and no anatomical injury or impairment to the claimant's arm. (R. Vol. I p. 152, 160). The Commissioner's determination and the Appellate Panel's affirmation of her finding of fact that two body parts were impaired is clear error.

In finding of fact #3, the commissioner found 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." (R. Vol. I p. 11). This finding is clearly erroneous in light of the record. A cursory glance of this questionnaire, which is the only impairment rating given as a result of this injury would show that the Commission committed clear error in stating that Dr. Lehman gave a rating to both the claimant's shoulder AND arm. (R. Vol. I p. 152).

Dr. Lehman states in his questionnaire that "based upon the preliminary findings of impingement syndrome, created by repetitive use, 3% UE (upper extremity/arm) impairment exists, **equivalent** (equal to) to 5% impairment to the shoulder. (emphasis added) (R. Vol. I p. 152). Dr. Lehman never gave a rating to both the shoulder and the arm. He simply illustrated the conversion of an upper extremity (arm) rating to the shoulder rating. Dr. Lehman again reiterates that the claimant has impairment to his shoulder only in his medical record of August 22, 2014. In that record, Dr. Lehman states:

> In terms of impairment, I have previously stated in the questionnaire that a 5% impairment would apply simply to the diagnosis of persistent impingement syndrome created by repetitive use, but the impairment would be substantially greater if a recurrent rotator cuff tear or rotator cuff insufficiency, potentially requiring surgery, were discovered as a result of the MRI/Arthograpm of the **shoulder**. (R. Vol. I p. 160).

Again, Dr. Lehman mentions only the shoulder, the shoulder rating of 5% and the surgery given to the shoulder. His mention of the arm in his questionnaire was a conversion for the

shoulder rating only. Because no impairment was ever given for a separate injury to the arm, the Commission committed error of law in finding contrary to the evidence before it. There is no doubt that there was no traumatic injury to the arm. In fact, the claimant's attorney does not state that the arm is injured in any of his Form 50 pleadings. (R. Vol. I p. 63, 65).

While it is true that the Commission found as fact #22 that Dr. Lehman stated the arm was affected, this is still not evidence that the arm was injured or impaired in order to proceed for total disability. Dr. Lehman simply stated that "it is my opinion, that Mr. McHowell's repetitive **left shoulder injury** of February 27th, 2014 **affects** his left arm." (R. Vol. I p. 177). The claimant's attorney's argument that the "affect" language used in this medical report is evidence of impairment or disability to the arm is also erroneous because it is in direct contradiction of the law in this state. It is common sense that an injury to the shoulder will affect the arm. See Singleton v. Young Lumber Co., 114 SE 2d 837, 236 SC 454 (SC 1960) stating that it is a "common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Larson's Workers' Compensation Law, 87.05 at 87-8; see, e.g., Cunnyngham v. Donovan, 271 F. Supp. 508 (E.D. La. 1967); Williams v. Industrial Comm'n, 237 P.2d 471 (Ariz. 1951).

The shoulder moves the arm, so of course it would affect the movement of the arm as this court in Singleton recognized long ago. However, the medical record/evidence is devoid of any injury, impairment or disability to the claimant's left arm. It is true that in Singleton, this court stated that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional **injuries** beyond a lone scheduled injury. Singleton at 471. However, the claimant is this case is limited to recovery pursuant to 42-9-30 because the evidence is devoid of any additional injury or impairment to the arm as a result of the February 2014 alleged incident.

Therefore, the Commission erred as a matter of law in finding the claimant permanently and totally disabled pursuant to SC Code Ann. 42-9-10. Pursuant to law interpreted by this court and the language of SC Code Ann. 42-9-10 and 42-9-30, the "affects" language in Dr. Lehman's report is not enough to show that two body parts were injured or impaired. This court recently addressed this issue of the two body part requirement and interpretation of the word "affect" in its recent 2013 decision of Colonna v. Marlboro Park Hospital, 745 S.E.2d 128,404 S.C. 537 (2013).In the Collona decision, a hospital employee sought workers' compensation benefits for a compensable injury to her ankle/foot. To address the pain in the claimant's right foot and ankle, a spinal cord stimulator was implanted in the claimant's back. The court ruled against her proceeding under 42-9-10. They reasoned that "a claimant must prove **not only that another body part was affected** by the insertion of the treatment device, **but that another body part was impaired or injured** for section 42-9-10 to apply." See Colonna at 546.

This court, in the Colonna Decision, described what the term "affected" meant with regard to a second body part. In Colonna, the court plainly and unambiguously stated that "Colonna's ability to recover under section 42-9-10 is premised on her ability to establish an **additional injury or impairment** to a second body part. (emphasis added). Colonna at 547. This interpretation is consistent with numerous prior decisions of this court. See;. Wigfall v. Tideland Utilities, 354 S.C. at 106, 580 S.E.2d at 103 (finding the Singleton court intended for "impairment" to encompass a **physical deficiency** and concluding a claimant is not limited to scheduled benefits under section 42-9-30 if he or she can show "**additional injuries"** beyond a lone scheduled injury"); Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (analyzing whether the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual **disability** as a result" of the compensable injury (emphasis added).

The hearing commissioner and the appellate panel specifically ruled that the claimant was permanently and totally disabled and based this ruling upon the misapprehension that the claimant suffered a 3% rating to his left upper extremity and a 5% rating to his left shoulder. This finding is erroneous and not supported at all by the medical evidence. It is clear from the medical questionnaire of Dr. Lehman, that the doctor was not rating both the shoulder and the arm, but rather he was converting the upper extremity rating to a shoulder rating. (R. Vol. I p. 152). The claimant had shoulder surgery. (R. Vol. I p. 137). Dr. Lehman stated in his medical report that only the shoulder was injured and that as a result of that injury, the arm was affected. Pursuant to South Carolina law, this language was not enough to allow the claimant to proceed under the permanent and total disability statute and the Commission committed clear error. Because there is only one body part at issue, the claimant is not permanently and totally disabled pursuant to SC Code Ann, 42-9-10 and must proceed for disability pursuant to SC Code Ann. Section 42-9-30.

ARGUMENT II

THE HEARING COMMISSIONER AND APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION ERRED IN DETERMINING THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED WHEN THE EVIDENCE DOES NOT SUPPORT SUCH A FINDING.

Assuming arguendo that this court were to find that the claimant met his burden of proving injury to two body parts and the claimant could proceed under SC Code Ann. Section 42-9-10, the Commission still erred in finding the claimant permanently and totally disabled under that statute.

The claimant's attorney submitted evidence in the form of a Vocational Assessment by Ashley Vargas to support that the claimant was permanently and totally disabled. The defendants presented rebuttal evidence in the form of live testimony by Vocational Expert Jan

Westmoreland to rebut Ms. Vargas' report. The Commissioner and the appellate panel placed greater weight upon Ms. Vargas' opinion.

The claimant's expert, Ms. Vargas, found the claimant permanently and totally disabled because "it was highly unlikely that the Claimant would be able to get employment given his past work history and age." (R. Vol. I pp. 112-115). However, the claimant's work history as reported to Ms. Vargas was that he only did heavy work. This is erroneous. The claimant is a high school graduate with some technical training as well. (R. Vol. I p. 93) The claimant applied for employment with Fedex as a DELIVERY DRIVER on November 9, 2012. (R. Vol. II p. 788). This was while he was still working with our employer and during the time in which his alleged repetitive trauma took place (R. Vol. II. p. 788). According to the claimant's own testimony at the hearing in 2015, he received on the job sales training for approximately five years for industrial piping and valves (R. Vol. I p. 93, lines 6-19). Sales is clearly something that the claimant would be able to do with his restrictions.

Moreover, the claimant has already worked or attempted to work since his shoulder surgery of 2013. The claimant testified at the hearing he incorporated a business in October of 2013, which was after he left work with the employer and during his time he had surgery. The business was incorporated as Big Bubba's Inc., and the business was to perform trucking and loading. (R. Vol. I p. 98, lines 24-25; p. 99, lines 1-16). When Mr. McHowell filed for the incorporation of that business, he was certainly aware of any physical limitation that he might have had. He also testified at the hearing that he has done yard work including mulching since this accident. (R. Vol. I p. 100, lines 1-4).

Even if Mr. McHowell was allowed to proceed under SC Code Ann. 42-9-10, he cannot meet his burden of proving that he is permanently and totally disabled. Moreover, his disability

can't be related to his employment with star foods as he already considered himself "disabled" before even working for the employer. He also applied for social security disability benefits prior to the date of this order which is now on appeal. The claimant did not leave his job with Star Foods because he couldn't perform the work. Stephen Laney, the claimant's supervisor testified that the repetitive trauma problems were not the reason that he was going out of work. His reason for quitting was that he was inheriting money from a relative. (R. Vol. II p. 806).

Assuming arguendo that the claimant is allowed to proceed under 42-9-10, which the appellants vehemently argue that he is not entitled to as he has not injured two body parts, the claimant did not meet his burden of proving that he is totally disabled and the Commissioner's determination is erroneous.

ARGUMENT III.

THE COMMISSION ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CLAIMANT SUSTAINED A REPETITIVE TRAUMA THUS ENTITLING HIM TO BENEFITS, THE ERROR BEING THIS FINDING IS NOT SUPPORTED BY ANY EVIDENCE AND IS AN ERROR OF LAW.

Not only does the substantial evidence not support the appellate panel's finding that the claimant is entitled to workers compensation benefits for a repetitive trauma injury, Appellants would also argue that no evidence was presented to support the finding. Therefore, the Appellate Panel erred as a matter of law in finding that the claimant suffered from a repetitive trauma injury. See Lorrick v. S.C. Electric and Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965).

Under § 42-1-172 (A): "Repetitive trauma injury" means an **injury which is gradual in onset and caused by the cumulative effects** of repetitive traumatic events." The claimant already had an injury requiring surgery before he even came to work with the employer. Because the claimant's shoulder pain was so bad that a doctor was already contemplating an MRI and

surgery, before he even started working with this employer, the evidence does not support the finding that his problems and surgery performed in October of 2013 were the result of a repetitive trauma on the job. (R. Vol I. p. 319).

The first time that the repetitive nature of the claimant's job was ever brought into question was when the claimant's attorney brought this 2014 claim. All documents reviewed and testimony given before Commissioner Barden in the mva claim say nothing about his job being repetitive. (R. Vol. II pp. 547-600). Even the claimant's own testimony during the first hearing fails to state any repetitive nature of his job. (R. Vol. II pp 547-600).

The claimant's attorney tries to argue that since his shoulder claim from the motor vehicle claim was non-compensable, he can now proceed as the claimant suffered from a repetitive trauma to his left shoulder because Commissioner Barden in finding of fact 18 of her MVA claim order found that claimant returned to baseline. This is not only a misstatement of fact, but an error of law. Commissioner Barden did not make a medical determination that the claimant was at baseline. The Commissioner's finding is as follows:

> **If** Claimant injured/aggravated his left shoulder in the accident, I find that his condition returned to baseline: (a) when Claimant returned to his personal orthopedist for his **previously scheduled** 8-week follow-up visit, Claimant never mentioned the work accident as a factor in his ongoing pain; nor did Claimant report an aggravation. (R. Vol. II p. 609).

The claimant also relies on the questionnaire of Dr. Lehman to support his repetitive trauma claim. This is also erroneous because the questionnaire is in direct contradiction to the medical evidence. It is clear that Dr. Lehman has no clue as to how the claimant injured himself. Dr. Lehman does not even mention a repetitive trauma until after he answers the questionnaire and reviews the job requirements months after surgery. Then, Dr. Lehman states in report dated

after the questionnaire stating that the injury was from repetitive trauma that the problems were from the motor vehicle accident of 2012. (R. Vol. I p. 163). The claimant tells his own doctor, Dr. Ryder Cook, on September 17, 2014, which was after the date he allegedly had notice of the repetitive trauma claim, that he injured his shoulder in a motor vehicle accident and makes NO mention of a repetitive trauma. (R. Vol. I p. 178). Dr. Lehman's report of September 30, 2014, also dated after his questionnaire, states that the claimant's injury was the result of a motor vehicle accident (R. Vol. I p. 163)

A cursory glance of Dr. Lehman's medical records show that he unequivocally believed that that claimant's problems were the result of the motor vehicle accident. Moreover, there is no mention of the claimant's job duties or complaints by the claimant to Dr. Lehman about a repetitive injury until after this questionnaire of February 2014. The record does not support that the claimant had a repetitive trauma but rather the claimant is attempting to litigate the same injury that has already been adjudicated. The Employer would assert that his claim is barred by the doctrines of Res Judicata and Collateral Estoppel. See Johnson v. Greenwood Mills Inc., 452 S.E.2d 832 (SC 1994).

Even if the Commissioner properly found that the claimant suffered from a repetitive trauma, it was error for the Commissioner to determine that the defendants had adequate notice. The claimant's first received notice of this claim by claimant's Form 50 filed on March 27, 2014

Under SC Code Ann. Section 42-1-172:

> notice of the injury or condition **must** be given by the employee **within 90 days of the date** the employee discovered, **or could have discovered by exercising reasonable diligence**, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Claimant could have recognized a repetitive trauma by exercising due diligence. Not only has the claimant been represented by counsel for his shoulder problems for years, he has been a patient of Dr. Lehman's for years. However, he expects the Commission to believe that he did not have notice of a repetitive trauma injury until Dr. Lehman filled out his medical questionnaire in February of 2014? The claimant's attorney has had the claimant's job duties since the beginning of the litigation for the MVA claim. He should have been aware of any repetitive nature of the claimant's job. Moreover, the appellants suffered significant detriment in signing the clincher documents for the claimants MVA claim without notice that the claimant would be bringing a repetitive trauma claim for the same injured body part. When he lost that claim, he took a second bite of the apple under the guise of an alleged repetitive trauma. How would the claimant's attorney even know to ask the doctor's opinion about a repetitive trauma unless he was already contemplating bringing the same injury under a repetitive trauma claim? It is obvious that the claimant's attorney knew at the time that he requested a change in the clincher document as well as when he sent the questionnaire to the claimant's physician, yet, he failed to notify defense counsel of this claim when he enticed her to change the clincher agreement for the sole purpose of bringing this action. The defendants were severely prejudiced by not having notice of the repetitive trauma claim as defense counsel would not have entered into the clincher agreement with claimant's counsel during the first mva Claim. The Commissioner's determination that defendants were not unduly prejudiced by lack of notice is clearly erroneous.

The first notice that Defendants received of this claim was by virtue of claimant's Form 50 filed on March 27, 2014. The claimant stopped working for the employer in august of 2013. He had surgery on October of 2013. Taking into consideration, the contradictions in the doctor's reports, the changes made in the clincher documents, as well as the timeframe of the claimant's left shoulder problems which even pre-dated his work with the employer, the commissioner's

finding that he suffered from a repetitive trauma and that Defendants had adequate notice, is erroneous.

ARGUMENT IV

THE HEARING COMMISSIONER AND THE APPELLATE PANEL ERRED IN DETERMINING THAT THE CLAIMANT WAS ENTITLED TO A LUMP SUM AWARD

The hearing commissioner held and the Appellate Panel affirmed that the claimant was entitled to a lump sum award. However, the claimant's attorney did not ask for the same in his Form 50 pleadings. (R. Vol. I pp. 63,65). Under Green v. City of Columbia, 427 S.E.2d 685 (1993), the Employer was entitled to thirty days' notice of all issues to be litigated. While the claimant's attorney did raise the issue in his opening statement during the hearing, he failed to present evidence necessary to justify the lump sum payment. Under Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (SC 1947). Therefore, it was error for the Commissioner to award lump sum payment of benefits.

CONCLUSION

Based on the above cited arguments, the Claimant would respectfully request that the Order of the Single Commissioner and Appellate Panel be reversed in its entirety.

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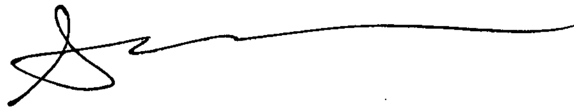
CERTIFICATE OF COUNSEL

In compliance with Rule 211, the Appellant's Final Brief is identical to the brief previously served under Rule 208 with the exception that it now contains references to the record.



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