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THE STATE OF SOUTH CAROLINA
In The 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 REPLY BRIEF

December 29, 2016

E. Ros Huff, Jr., Esquire #2767
Shelby G. Hapeshis, Esquire #74731
HUFF AND HAPESHIS, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Appellants Star Food Products/Ms. Stratton's Salads, Inc. and Great American Insurance Company

Other Counsel of Record:
Brent P. Stewart, Esquire
Stewart Law Offices
PO Box 670
Rock Hill, SC 29731-6670

Blake Hewitt, Esquire
John S. Nichols, Esquire
Bluestein Nicols Thompson & Delgado
PO Box 7965
Columbia, SC 29202

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IN REPLY TO RESPONDENT/CLAIMANT'S BRIEF, DEFENDANTS EMPLOYER/CARRIER RESPOND WITH THE FOLLOWING:

A. THE COMMISSIONER'S DETERMINATION THAT THE CLAIMANT IS DISABLED UNDER SC LAW WHEN HE INJURED ONLY ONE BODY PART, IS A CLEAR ERROR OF LAW (S.C. CODE ANN. SECTION 42-9-30)

The claimant injured one body part, the shoulder. The claimant's attorney does not state that the arm is injured in any Form 50 pleadings. (R. Vol. I pp. 63,65). Only the shoulder received an impairment rating, and no other body parts were injured or impaired. As such, he is prohibited from receiving permanent and total disability under the South Carolina Workers Compensation Act.

The claimant's attorney contends that the following statement by Dr. Lehman is enough to meet the two body part requirement under South Carolina Law to proceed under the total disability statute of 42-9-10 rather than the general disability statute of 42-9-30: "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). It is clear that this statement does not meet the two part requirement as Dr. Lehman does not state that the claimant injured his arm and he didn't assign an impairment rating to his arm. It is undisputed that the claimant never injured his arm. As such, the Commissioner allowing the claimant to proceed under the total disability statute of 42-9-10, was erroneous. The shoulder joint provides motion to the upper arm and therefore "effects" its use of the arm itself, however, there was no ANATOMICAL INJURY to the arm. Perhaps the best illustration of the courts application of disability when another body part is affected is the case of Lail v. Georgia Pacific Corporation, 328 SE 2d 911, 285 SC 234 (1985).

In Lail, the Commission awarded the claimant 50% loss of use to the hand when the claimant's thumb was severed from his hand by a machine." The claimant underwent a series of

operations where his thumb was reattached to his hand and a nerve was taken from his leg and grafted to his thumb. However, his thumb still lacked sensation. A third operation was performed in which skin with a nerve and artery was transferred from his ring finger to his thumb. Skin from the right elbow was removed to cover the defect on the ring finger. The surgéon, rated the thumb at 60% impaired and the ring finger at 20%. He referred to the AMA Guide and concluded that the hand was 26% impaired. Dr. Brilliant, the physician later retained by the claimant, found a total loss of use of the thumb and a 5% loss of use of the ring finger. He concluded that a 52% loss of use of the hand had resulted. Both the hearing commissioner and the appellate Panel found that the claimant sustained a 50% loss of use to his hand rather than his thumb or finger. The appellant contended and the SC Court of Appeals agreed that the award should be for loss of use of the thumb and finger because they were the actual **impaired** body parts rather than the hand. As the court in Laile stated:

> When a thumb is severed from the hand and surgically reattached with limited sensory and motor functions, the use of the hand is necessarily **affected.** However, here, the medical testimony established that the claimant suffered **no functional impairment to any part of his hand** other than the thumb and finger. We hold that the award of compensation for the hand contravenes the legislative plan providing scheduled amounts for loss of use of thumbs and fingers. S.C. Code Ann. § 42-9-30(1)-(7) (1976).

The court in Lail remanded the matter for factual findings regarding the percentage of loss of use of the thumb and third finger. Lail v. Georgia Pacific Corporation, 328 SE 2d 911, 285 SC 234 (1985). Likewise in our case, when the shoulder is injured it affects the arm. However, if there is no ANATOMICAL injury or functional impairment to the arm, the claimant must proceed under the general disability statute of 42-9-30 for the injured body part (shoulder).

The claimant's attorney interprets the Singleton decision to stand for the proposition that if another body part is simply "affected," the person can proceed under the permanent and total

disability statute. In Singleton v. Young Lumber Co., 114 SE 2d 837, 236 SC 454 (SC 1960), 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. There was no injury to any body part other than the shoulder in the claimant's instance. Just because the claimant's arm was affected is not enough to take disability out of 42-9-30. Therefore, under the Singleton decision, the claimant is limited to recovery under 42-9-30.

The claimant's attorney next relies on the case of Bass v. Kenco Group to support its contention that a second body part need only be "affected" in order to proceed under the permanent and total disability statute. However, in Bass v. Kenco Group 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005), there were two separate "injuries." The claimant had both a mental injury and an injury to his left shoulder. The court in Bass unequivocally stated that "because Bass incurred two **injuries**...the award under section 42-9-20 was appropriate." The Bass decision does not support the claimant's case as the claimant did not suffer from an "injury" to his arm. He only suffered from one anatomical injury to his shoulder. As such, the Commissioner's determination was in error and in contradiction to South Carolina Law.

Next, the claimant's attorney, in his brief, erroneously argues that Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002) supports his argument with regard to the "affect" language. In Simmons, the claimant suffered an amputation of his left leg which led to an assignment of 100 percent impairment of that leg. Testimony was adduced during the hearing showing the right leg, which was a leg **bitten** by the spider, also continued to suffer injury. This testimony led the Commissioner to find that Simmons suffered swelling and impairment in his right leg. Simmons at 76. In the Simmons case there was an actual **injury** AND **impairment** to the second body part (i.e. right leg) from the spider bite. The claimant in this case suffered no injury or impairment to any body part other than the shoulder. No doctor

has ever assigned an impairment rating to the arm. Further, it is undisputed that the claimant suffered no injury to his arm. Therefore, the Simmons case is once again proof that the Commission committed an error of law in this matter.

The claimant argues in his brief that the Hutson v. State Ports Authority, 390 S.C. 381, 732 S.E.2d 500 (2012) case, is instructive because the claimant in that decision had symptoms like radiating pain and numbness. The Hutson decision was reversed and remanded and should not be relied upon. Moreover, the court in Hutson stated that the Commission should have taken into consideration the radicular symptoms to the legs **for disability** to the legs and not the back under **42-9-30**, not under the permanent and total disability statute of 42-9-10. The Hutson case actually supports the defendants position in this matter and even if it did support he claimant's case, the Hutson decision was issued before this Court's recent application of the permanent and total disability statute in Colonna.

The claimant's attorney erroneously argues that "having symptoms" in another body party is the threshold to proceed under the total disability statute. This is not supported by South Carolina Law as stated above or in the recent Colonna decision. He attempts to distinguish this court's Colonna v. Marlboro Park Hospital, 745 S.E.2d 128,404 S.C. 537 (2013) decision to the current situation by stating that lack of symptoms is why the claimant in Colonna was limited to an award under 42-9-30. This is untrue. In Colonna, this court explicitly held 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 (emphasis added). The claimant's interpretation of Colonna as illustrated in his brief is a misstatement of law and the Commission's determination of permanent and total disability is in direct contradiction to the Colonna case as well as a voluminous history of South Carolina case law on the subject.

B. EVEN IF THE CLAIMANT COULD PROCEED UNDER THE PERMANENT AND TOTAL DISABILITY STATUTE, HE DID NOT PROVE AN INCAPACITY TO EARN WAGES AND THE COMMISSIONER'S DETERMINATION WAS AN ERROR OF LAW

Defendants contend that the claimant should not be allowed under South Carolina Law to proceed under the permanent and total disability statute (42-9-10). Assuming arguendo that he could proceed under the permanent and total disability statute, the evidence does not support a finding that the claimant has an incapacity to earn wages, which is the definition of disability in this state. See Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965) holding that disability in compensation cases is to be measured by loss of earning capacity.

First, the claimant's attorney contends that the claimant cannot return to his job at Star Foods because of his job restrictions and therefore he has the "incapacity to earn wages." This is untrue. The claimant left Star Foods because his uncle passed away, not because he was unable to do the job. (R. Vol. II pp. 806-809). He continued to work and perform job duties up until the time that he left Star Foods. As such, his restrictions had no bearing on this employability with Star Foods and even if they did, he still did not provide evidence of the incapacity to earn wages in other jobs.

The claimant's attorney relies on his expert, Ashley Vargas' (Johnson), opinion that the claimant is permanently and totally disabled because of his restrictions and his past work history. The Defendants would first assert that a vocational expert opinion is not even relevant as the claimant should have been limited to recovery under the general disability statute (42-9-30). Moreover, Ms. Johnson's assessment erroneously relies on the claimant's description of his past work history as being "heavy labor." (R. Vol. I p. 194). The claimant's description to Ms. Johnson with regard to his past work history was untruthful as shown by the claimant's own testimony and actions. The claimant is a high school graduate with some technical training as

well. (R. Vol. I p. 93; lns. 3-16). 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 the employer and during the time in which his alleged repetitive trauma took place (R. Vol. II p. 788). The claimant himself even knew that he could do heavy labor if needed as he was the one that applied for such a job with Fedex. Moreover, the claimant has sales experience. 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, lns. 3-16). While the claimant's attorney contends that the claimant can no longer work in sales for piping and valving as such sales are highly outdated, this argument is irrelevant as he has experience generally in sales. Because the claimant himself has sales experience; believed that he could be a delivery driver for Fedex when he applied for work there; and has an educational background, Johnson's determination that he is unemployable is not supported by the evidence. Further, even the claimant himself testified that he has done heavy labor in the form of yard work since his alleged injury to include wood chipping. (R. Vol. I p. 100 lns. 1-4).

Ms. Westmoreland's hearing testimony should be given greater weight in this matter as she took into consideration the claimant's **actual** work history. (R. Vol. I pp. 114-118). Ms. Westmoreland reviewed his records and accurate work history and determined that he is employable based on his education, work history, restrictions and limitation. She believed from her search of jobs in the area that he's capable of being a shuttle operator, concession operator; event attendant, customer service representative, and dispatcher. In her expert opinion, the claimant suffered an injury to his shoulder only and his is employable. (R. Vol. I pp. 114-118).

A finding that the claimant is permanently and totally disabled is clearly erroneous. The claimant's impairment rating was a mere 5% rating to his shoulder---one body part--yet the Commissioner determined that he had the incapacity to earn any wages. While the Defendants

contend that none of these problems arose from the repetitive nature of the job but rather the car accident from 2012, there are other reasons why even the one impaired body part (shoulder) resulting in disability, is not related to his employment with Star Foods. For instance, the claimant already considered himself "disabled" because of his shoulder problems before even started working for the employer. (R. Vol. II p. 493). He also applied for social security disability benefits prior to the date of this order from the Hearing Commissioner. Further, the claimant has already worked or attempted to work since his shoulder surgery of 2013 both with Fedex and with incorporating his own business. 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 lns. 24-25; p. 99, lns. 1-16). Mr. McHowell has the ability to earn wages in numerous capacities and the Commission's determination that he is permanently and totally disabled is erroneous.

C. THE COMMISSIONER'S DETERMINATION THAT THE CLAIMANT SUSTAINED A REPETITIVE TRAUMA INJURY IS AN ERROR OF LAW

The evidence does not support that the claimant suffered from a repetitive trauma injury and the Claimant did not meet the notice requirement of such an injury. 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's attorney did not meet his burden of proving a repetitive trauma injury. The claimant's injury to his shoulder was neither gradual in onset nor caused by the cumulative effects of traumatic events because he already had problems with his shoulder before he began working at Star Foods. Further, the trauma was not an injury by accident because the injury (i.e. shoulder problems) were already present and the claimant could have expected the results from lifting items with an already torn rotator cuff. (R. Vol. I p. 319). See Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (S.C. 2002) holding that a

repetitive trauma injury meets the definition of "injury by accident" in that it is an **unforeseen injury** caused by trauma. (emphasis added). The claimant's attorney did not meet his burden of proving repetitive trauma as the claimant's injuries were neither gradual in onset nor unforeseen.

The claimant's attorney contends that the Commissioner's determination is supported by the evidence because Dr. Lehman opined there was a direct connection that the claimant's job duties increased his risk of injury. Dr. Lehman is not an ergonomics expert and not qualified to make such a determination. Secondly, Dr. Lehman's own statement is contradicted throughout his medical records as he attributed the claimant's problems with his shoulder to the car accident of 2012 on multiple occasions including the time that he performed the shoulder surgery. He did not relate the problems to a repetitive trauma claim until months after the surgery when the claimant was no longer working for the employer. Most importantly, the job descriptions that Dr. Lehman reviewed did not discuss the physical demands of the job. The claimant did not meet his burden of proof through Dr. Lehman's reports for the reasons stated above. Further, Dr. Lehman's report are evidence that if the claimant did sustain a repetitive trauma, that the injury was not unforeseen as the claimant was already treating for his shoulder when he began working at Star Foods. (R. Vol. II. Pp. 503-512).

No ergonomics expert states that the claimant's work tasks elevated the risks of a repetitive trauma. The claimant' attorney relies on the ergonomics expert report of Glen Adams. However, Glen Adams stated that his report was **preliminary** because he did not get to see the claimant's work site. (R. Vol. I p. 201). Further, Mr. Adams could only state that from what he saw from the job duties that work tasks elevated his risks for developing cumulative trauma disorders. (R. Vol. I p. 201). A cumulative trauma disorder is not a repetitive trauma as even admitted by the claimant's attorney in his brief. The ergonomics report is not evidence of a repetitive trauma claim as it was not complete and it didn't even state that the claimant's risk of

developing a repetitive trauma claim was elevated. Therefore, the claimant did not meet his burden of proof and the Commissioner's determination was in error.

Finally, the claimant's attorney contends that the Defendants are precluded from bringing these arguments with regard to repetitive trauma under the standard of review because it is not an error of law. They rely on the case of Hartszell v. Palmetto Collision, 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016), wherein the court stated that "while 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." The defendants are not asking for this court to make fact findings opposite to those of the Commission, but rather state that the Commission made a clear error of law upon review of the record because there was no evidence to support its determination.

The medical reports do not show a repetitive trauma injury related to his job duties. Dr. Lehman states in a letter dated September 17, 2014, **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. 167). 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 pp. 178-180). 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. 165). The medical reports simply do not support a repetitive trauma injury. Further, the mere fact that this same body part with the same employer was already litigated as an injury by accident is proof that there was no repetitive trauma as this issue and injury were already litigated. The claimant did not meet his burden of proof with the ergonomics expert report either. As such, the Commissioner's determination was an error of law.

D. THE LUMP SUM AWARD WAS NOT ARGUED BY THE CLAIMANT'S ATTORNEY AND THE COMMISIONER'S DETERMINATION OF ENTITLEMENT TO THE AWARD WAS ERRONEOUS AND AN ABUSE OF DISCRETION

The Claimant's attorney, by his own admission in his brief, did not argue the issue of lump sum award, yet contends that the defendants are in error because they did not argue that the lump sum award was inappropriate. The Defendants did not present rebuttal evidence because Lump Sum was never raised in the pleadings.

The hearing commissioner held and the Appellate Panel affirmed that the claimant was entitled to a lump sum award. This was an abuse of discretion. See Ashley v. Ware Shoals Manufacturing Co., 210 S.C. 273,287, 42.S.E.2d 390,396 (1947) stating that an appellate court will review a lump sum award for abuse of discretion. The claimant's attorney did not ask for a lump sum award in his Form 50 pleadings. (R. Vol. I pp. 63,65). Neither did he argue lump sum benefits because by his statement in his brief, "no one" argued lump sum benefits. (Respondents brief page 10). 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 at the hearing, he failed to present evidence necessary to justify the lump sum payment. Further, the lack of notice of the lump sum issue in his Form 50 pleadings deprived the defendants of their opportunity to prepare and defend on that issue. The claimant's attorney also failed to present evidence to support allocation of his fees and costs and they were awarded by the Commissioner. Because of the lack of evidence and failure of the claimant to plead lump sum, any entitlement to lump sum benefits was based on surmise conjecture and speculation and was an abuse of discretion.

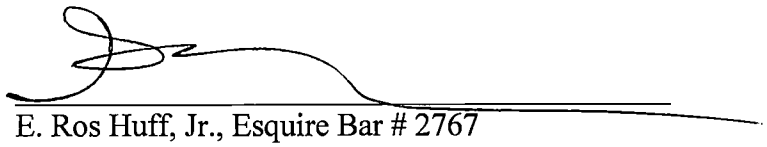
The claimant's attorney attempts to shift the burden with regard to the lump sum issue by stating that the Defendants did not adequately raise the issue of the lump sum award being

inappropriate to the commission. It is not the defendant's obligation to raise this issue. Also, the claimant's statement is untrue as the Defendants raised the issue of lump sum in their Form 30 appeal of the order and in their brief. (R. Vol. I p. 60; R. Vol II p. 831) Defendants raised the lump sum issue at the proper time that it could have been raised, which was after any award was made.

Further, Defendants contend that they never even had the obligation to raise issues with regard to a lump sum award as lump sum payment was not ordered by the Commission. Both orders award money pursuant to Utica Mohawk language. The commission allocated $196,991.64 in compromise settlement of disputed future wage loss at the rate of $11 per week for a period of 1.158.04 weeks representing the remainder of the Claimant's Life pursuant to 19-1-150 and Utica Mohawk language. (R. Vol. I p. 26; R. Vol. I p. 57). As far as the rulings in both orders are concerned, the claimant's only entitlement by order of any court is not a lump sum amount, but rather $11 a week for the remainder of his life. Further, the award gives $99,870.43 in attorney's fees and $4,049.13 as expenses pursuant to a written agreement between the Claimant and his attorney. However, no evidence of such agreement was provided to the court. (HT Commissioner Taylor). Because a Lump Sum Payment was not awarded by the Commission Defendants contend that the claimant is not entitled to such payment. Further, if the court were to find that the Claimant entitled to a lump sum payment, the issue was raised in the Defendant's Form 30 and brief. (R. Vol. II pp. 831-832). Moreover, the issue was adequately argued as the defendants vehemently argued that the claimant was entitled to NO AWARD from the Commission much less, a lump sum award. (R. Vol. I p. 831).

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.



E. Ros Huff, Jr., Esquire Bar # 2767
Shelby G. Hapeshis, Esquire Bar # 74731
HUFF AND HAPESHIS, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Appellants Star Food Products/ Mrs. Stratton's Salads, Inc., Employer and Great American Alliance Ins., Carrier, Appellants.

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CERTIFICATE OF COUNSEL

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

December 29, 2016

E. Ros Huff, Jr., Esquire Bar No. 2767
Shelby G. Hapeshis, Esquire Bar No. 74731
HUFF AND HAPESHIS, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Appellants Alice Manufacturing Company, Inc. and Great American Alliance Insurance Company

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief by depositing a copy of the same in the United States Mail, postage prepaid, on December 29, 2016 to the following parties, and or their representatives:

Brent P. Stewart, Esquire
Stewart Law Offices
PO Box 670
Rock Hill, SC 29731-6670

Blake Hewitt, Esquire
John S. Nichols, Esquire
Bluestein Nicols Thompson & Delgado
PO Box 7965
Columbia, SC 29202

E. Ros Huff, Jr., Esquire Bar # 2767
Shelby G. Hapeshis, Esquire Bar # 74731
HUFF AND HAPESHIS, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Appellants Star Food Products/ Mrs. Stratton's Salads, Inc., Employer and Great American Alliance Ins., Carrier, Appellants.