THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

Case Number 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. The Panel erred when it found Nicholas' work was not repetitive (Finding #25).

a. "Repetitive trauma" does not mean "constant trauma," nor is it limited to trauma caused by repeating a single, identical task.

The just resolution of this claim begins with rejecting efforts to distort the definition of "repetitive trauma." For the sake of denying benefits, Respondents would have the Court ignore plain English, disregard statutory and caselaw references to "repetitive trauma," and forget the fundamental purpose of workers compensation. They essentially argue that a Bluffton firefighter is not entitled to compensation for repetitive trauma injury unless the firefighter proves the impossible: either that he was engaged in *constantly* traumatic activity, or that the trauma by which he was injured involved the endless repetition of one specific task.

Repetitive does not mean *constant*; those are different words with different meanings. Respondents admit that the plain, Meriam-Webster definition of "repetitive" refers simply to an "act or instance of repeating or being repeated." Respondent's Initial Brief (hereafter, "RB"), p.14. Accordingly, "repetitive trauma" is trauma that is repeated. Nothing about that definition requires the trauma to be constant. In fact, Respondents effectively acknowledge that *repetitive* does not mean *constant*. Referring to the job description, for example, Respondents more than once claim that none of the required activities are performed "on a constant *or* repetitive basis." (emphasis added) RB, p. 15, p.19. Obviously, Respondents know "repetitive" and "constant" are not the same thing. It is beside the point, therefore, to note that firefighters are expected to eat and allowed to sleep during their shifts, and misleading to claim that proves no repetitive trauma is involved in their job duties.

Repetitive trauma also does not require repetition of *one single, identical task.* Arguing that the only compensable repetitive trauma injuries are those caused by a single activity repeated over and over is contrary to South Carolina law. *White v. MUSC,* 586 S.E.2d 157, 158

(2003), rehearing denied 2003 S.C. App. LEXIS 156 (S.C. Ct.App., Sept 17, 2003). Anthony White's back injury was attributed to repetitive trauma from a *variety* of work activities for MUSC – removing trash bins, lifting patients, moving equipment, and transporting patients from room to room. *Id.* There was absolutely no claim that White's injury resulted from repetition of just one activity, yet this Court easily treated White's injury as a repetitive trauma injury. *Id.* Not surprisingly, Respondents choose to completely ignore *White,* apparently conceding that point. When the Legislature legislated certain changes in workers compensation in 2007, including changes regarding repetitive trauma injuries,[1] it did *not* undo *White's* implicit holding that multiple different activities may together cause repetitive trauma.

Furthermore, the statute itself does not require that a specific task or single activity be the sole source of trauma before an injured worker can be compensated for repetitive trauma injury. S.C. Code Ann. §42-1-172. Section 42-1-172, ostensibly defining "repetitive trauma injury," does not say that a causal connection must be established between the injury and a repetitive *activity.* On the contrary, it says the required causal connection is between "the injury" and "the repetitive *activities* that occurred while the employee was engaged in the regular duties of his employment."(emphasis added) Respondents cannot expect this Court to change the law by insisting on proof that the injury arose from repetition of a single, specific task. Furthermore, considering the underlying purpose of workers compensation, suggesting an arbitrary distinction that would allow compensation when repetitive trauma results from repeating a single identical task but deny it when repetitive trauma results from various job duties would be illogical and contrary to public policy. When a firefighter is repeatedly traumatized by lifting, it is not only

[1] The legislation provided that the required 90-day notice in repetitive trauma injury cases begins to run when the worker knew or should have known his condition was compensable (not simply on the date of disability, as earlier provided by caselaw such as *White* and *Johnson v. Cooper,* 2006 S.C. App. Unpub. LEXIS 7).

contrary to statutory and caselaw, but an absurd contradiction of public policy to suggest the resulting trauma is not "repetitive" because one day the firefighter was lifting heavy equipment, another day a heavy patient, and a third day a heavy tree trunk felled by a hurricane.

b. Finding that Nicholas' work not repetitive work was unsupported by substantial evidence.

It is blatantly false when Respondents claim there is "no evidence in the record whatsoever which supports Appellant's argument that his job as a firefighter involves repetitive activities."

First, the job description itself provided evidence that Nicholas' work was repetitive, and that description is consistent with common knowledge about the work of firefighters and EMTs. Surely no one could be surprised that Nicholas' job description required him to be able to carry 75-pound ladders, carry fire hoses and other heavy equipment, carry firehoses full of water, hold flowing hoses for long periods of time, and drag or carry human beings. (Claimant's Ex. J, page 1) It cannot be surprising that his "essential duties" while acting as an EMT required him to lift and carry patients for considerable distances, walk with weight, lift crash victims from motor vehicles, and complete functions and tasks "that are very physically demanding without breaks." Id. The only thing that could be surprising is that Respondents seriously contend none of those activities were expected to be repeated with any frequency. And if there seriously *could* be any doubt about that, the job description itself says the job requires the worker to "withstand the effects of repeated exposure to traumatic situations." Id.

Second, uncontroverted testimony also established that Nicholas' job activities were repeated, and with considerable frequency. No evidence contradicted Nicholas' testimony that he started virtually every workday by spending the first ninety minutes making sure trucks and the equipment on them was in working order, and that doing so required him to pick up,

manipulate, and inspect equipment with a total weight of about 8,000 pounds (HT p. 20 – p. 21) No one contracted his testimony when he said that every workday he handled those 75-pound ladders the job description required him to carry, or that daily he lifted 100-lb. hydraulic power units and hooks that weighed 90 pounds. (HT p. 21, ll. 5-15) Respondents also did not deny that, in addition to the daily routine, Nicholas spent 60 to 80 hours a month using heavy equipment in training. (HT p. 23, ll. 7-10) No one disagreed with his testimony that at least once each shift, he had to pick up another human (HT p. 32, ll. 13-16) or with his testimony that over the course of his career he had lifted hundreds of patients off the ground, beds, or toilets. (HT p. 24, ll. 6-8)

Third, Dr. Lindley provided evidence that, at least as relevant to a back injury specialist considering the etiology of his patient's condition, Nicholas' job duties as a firefighter and EMT were repetitive. Dr. Lindley's written opinion characterized the duties of lifting, holding hoses, and maneuvering heavy equipment, tools, and patients as "repetitive tasks." (Claimant's APA #3, p.15) He explains that the repetitive nature of the tasks is the repeated "bending and lifting and pushing and pulling...." (JL Dep. P. 18)

Respondents complain that Dr. Lindley's "opinion regarding whether Appellant's job is repetitive or not is based upon a layman's definition of 'repetitive'" (RB p. 17), a complaint that is ironic in at least two respects. First, the question of causation fundamentally is a question about the etiology of injury, so Dr. Lindley may the only person who is *not* a "layman" with respect to that point. Second, Dr. Lindley understands what "repetitive activities" are for purposes of repetitive trauma injury far better than the sole witness on whom Respondents rely to deny that Bluffton firefighters and EMTs perform repetitive work.

Respondents rely entirely on the self-serving conclusion by Respondent Fire District's personnel officer, who opined that he does not consider firefighters' duties to be repetitive.

There are at least two things wrong with that position. First, we know the personnel officer was operating under a badly mistaken impression of what comprise repetitive job duties, as he did not consider any activity "repetitive" unless it was a single identical activity repeated constantly during the workday[2] – a definition of "repetitive" *contrary* to South Carolina law. Second, if a repetitive trauma injury claim can be defeated just by an employer insisting in the face of clear evidence to the contrary that an employee's work was not repetitive, there may never be another workers compensation award in South Carolina worker for a repetitive trauma injury; clearly, the conclusory opinions of an employer cannot be allowed to control.

2. The Panel erred when it found Nicholas failed to prove a direct causal relationship between his work and his repetitive trauma injury.

a. The Commission applied incorrect legal standards concerning proof of the direct causal relationship between Nicholas' work and his injury.

Respondents assert that Nicholas Thompson was never required to prove causation with absolute certainty, yet they cannot deny that both the single Commissioner and the Panel based their conclusions on a factual finding that Dr. Lindley was "not sure" of the causal relationship. (Finding of Fact No. 19, in both cases). After reviewing Dr. Lindley's written statement and his deposition testimony, *the very first observation* set out in the Findings is that Dr. Lindley was "not sure." Of what significance is it that a medical witness is "not sure"? None; once Dr. Lindley confirmed that he held his opinions with "reasonable medical certainty," the standard of prove was preponderance of the evidence. It seems, however, that being "sure" *was* required in

[2] Reid disclosed his mistaken understanding of South Carolina workers compensation law when he testified: "repetitive would be using a pair of scissors over and over again for a 12 hour shift is what I would define as repetitive." (HT p. 103, ll. 19-21) Reid correctly believes such activity would be repetitive; however, he is *in*correct in suggesting that *only* such constant repetition of a single activity qualifies as "repetitive."

this case, as the Lindley's unrefuted opinions of causation were considered inadequate because Dr. Lindley admitted uncertainty about *non*essential details.

The Commissioner and Panel further erred when they subjected Nicholas Thompson's proof to the arbitrary requirement of establishing that his ultimate condition was caused *either* by the frequent, more ordinary repetitive trauma of his daily work *or* by specific, more memorable individual events, and Respondents would have this Court repeat that error. That approach clearly prejudices workers injured by repetitive trauma by treating *examples* of particularly demanding repetitive activities *as if* they were each independent episodes of a workplace injury. Nicholas consistently testified that at no time during or after any specific incident at work did he believe he was injured, and at no time following any of those incidents did he require medical treatment, time off work, or work restrictions. The clear nature of repetitive trauma injuries is that they arise from a *series* of separate events, each of which alone does not cause injury, but which together cumulatively produce injury.

Statute defines a repetitive trauma injury as one "gradual in onset and caused by *cumulative* effects...." S.C. Code Ann. §42-1-172(A) (emphasis added) Yet, Respondents continue to characterize each example of repetitive trauma as if it were a separate occasion of injury. Requiring a claimant to separate out various events or "mini accidents" from a series of events, and prove which of those events caused injury, contradicts the very nature of repetitive trauma injuries.

b. The conclusion that Nicholas' injury *was not* caused by repetitive trauma is unsupported by substantial evidence.

Dr. Lindley testified without qualification that Nicholas' need for surgery is "related to the work-related events." (JL Dep. p. 33, l. 19 – p. 34, l.3) Dr. Lindley testified that Nicholas' back condition was "most likely exacerbated" by his work-related activities. (JL Dep. p. 32, ll. 6-

10; p. 33, ll. 8-13) He conceded the possibility that Nicholas may have had a pre-existing back injury, but there was no equivocation, nor any contrary evidence offered by anyone, that at the very least, repetitive trauma from Nicholas' work had caused both (a) aggravation of any prior back injury; and (b) the ultimate need for surgery. (JL Dep. p. 32, ll. 6-10; p. 33, ll. 8-13; p. 33, l. 19 – p. 34, l.3) Nevertheless, the Commissioner and Panel entered the inexplicable conclusion that Nicholas had "failed to establish by a preponderance of the evidence that he sustained an aggravation of a pre-existing condition." (Conclusion of Law No. 4)

No one expects Respondents to *dis*prove compensability. However, a qualified expert – not a hired consultant, but a treating spine surgeon to whom the injured worker was referred in the course of his care *suggested by his employer* – testified to a reasonable degree of medical certainty that the worker's inability to continue working and his need for surgery were caused by repetitive job activities. The injured worker is 30 years old and has no family history of such problems. The employer's personnel officer has acknowledged his is a "physically demanding job" that "does take a toll," and has noted that "you don't see many 50-year-old men on fire engines." No other cause of injury is even suggested. Under those circumstances, the lack of any explanation other than work does provide corroborative evidence of causation.

3. The Panel erred when it found Nicholas failed to give his employer proper notice of his claim for repetitive trauma injury.

Respondents admit that Nicholas provided written notice of his claim for a repetitive trauma injury to his back on April 19, 2017. RB, p.22. That back injury was diagnosed for the first time on February 10, 2017, less than 90 days earlier. The notice was well within the time required by statute, which requires only that the employee give notice within 90 days of the date when the employee knew or should have known that his injury is *compensable*. S.C. Code Ann.

§42-15-20(C). The Commissioner and the Panel's conclusion that Nicholas "failed to provide the Employer with proper notice of ...repetitive trauma injury," clearly was in error.

Prior to February of 2017, there was nothing of which Nicholas was obliged to give his employer notice because there was no reason to believe he was entitled to any compensation. He was not requiring medical care, so he had no claim for medical benefits. He was still able to work *and was working without limitation*, so he had no claim for wage loss. He had not been diagnosed with any injury, much less any permanent disability, so he clearly could not have expected his employer to pay him for some permanent disability.

What was he supposed to notify his employer *of*? That he had pain in his back? That back in 2015, he had a back sprain for which he saw an orthopedist on a single occasion?[3] That his family doctor had concluded at that time that he had "no injuries of consequence," but had noticed a congenital fusing of his lowest vertebra, which could have been a source of his pain?

Sifting through Nicholas' very minimal medical and chiropractic records prior to 2017, Respondents insists that on several occasions, Nicholas should have known he had a repetitive trauma injury entitling him to compensation – even though not a single one of his caregivers knew that, and even though there is no evidence that the cumulative effects of his work had even caused the repetitive trauma injury by then. Respondents continue to suggest that as soon as Nicholas believed his *pain* was work-related, he had duty to give notice of a workers compensation claim – even though pain alone is not compensable and even though *King v. International Knife* tells us that suspecting for years that pain may be work-related does <u>not</u>

[3] Possibly Nicholas *could have* made a claim for the expense of that one clinic visit back in 2015; we can only guess whether his employer would have honored the claim or insisted that the sprain was not caused by work. In any case, the fact that Nicholas chose to not make a workers compensation claim for a single medical bill occasioned by an isolated back sprain surely does not waive his right to claim compensation later for a more serious and lasting injury to the same body part.

trigger the time for giving notice. 395 S.C. 437, 718 S.E.2d 227 (2011) When King had missed no work because of his condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury, he did not yet have a compensable injury. *Id.* at 229

Criticism of this young firefighter for not knowing earlier that he had a compensable repetitive trauma injury is especially unfair not only because of the absence of any such diagnosis by a physician before 2017, *but especially* when considering what the employer's own responses were when it learned he was having ongoing pain that was making it hard to work. On January 10, 2017, when Nicholas told his Battalion Chief that his back pain was starting to affect his job, the Battalion Chief's response was to *not worry about it* and go see the personnel officer about taking time off under FMLA. (HT p. 48, ll.12 – p. 49, l.4) The Battalion Chief – surely familiar with the grueling demands of firefighting and the fact that few firefighters last to the age of 50 – did not suggest that he may have had a repetitive trauma injury and might consider a workers compensation claim. Likewise, the personnel officer himself shared no such insight or wisdom when Nicholas consulted him. (HT p. 49, ll.11-20) Even when Nicholas returned to the personnel officer after he had been diagnosed with a serious injury, the personnel officer didn't suggest the possibility of injury as a result of the cumulative effects of repetitive trauma, and instead challenged Nicholas to come up with a particular date of injury.

Finally, Respondents would have this injured worker penalized because of the lack of clarity on his various Form 50s about the date or dates of his injury. Admittedly, those forms do reveal confusion and lack of clarity about the onset of the injury. However, that clearly does not defeat Nicholas' claim. The Supreme Court itself has clearly stated that "it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." *Schurlknight v. City of N. Charleston,* 352 S.C. 175, 574 S.E.2d 194, 195.

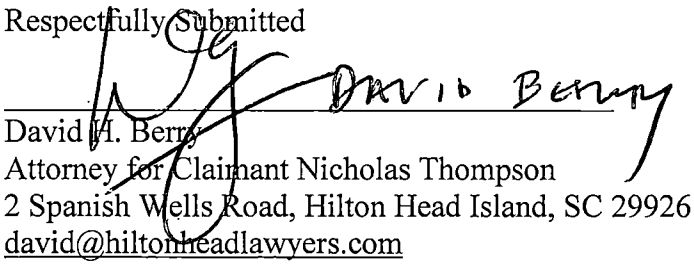
Considering that inherent characteristic of repetitive trauma injuries, there is no basis for finding inadequate notice, much less any prejudice to the employer, in this case.

Summary and Conclusion

Nicholas established that during his four years as a firefighter, he endured repetitive trauma, he proved without dispute that he has a repetitive trauma injury, and he proved by a preponderance of the evidence that the ultimate injury and required surgical care was directly caused by the repetitive trauma of his job. He gave prompt notice of his resulting claim for compensation as soon as his injury was diagnosed, and within days of the last day on which he was able to do his job without limitation. No greater notice than that could be required of him.

This Court should remand the case to the Commission for entry of an order finding Nicholas Thompson's condition compensable and scheduling a hearing to address the extent of workers compensation benefits owed him.

Respectfully Submitted



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July 22, 2019

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

Case Number 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Appellant's Reply Brief* has been served upon the Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents by mailing one copy by United States Mail, addressed as shown this ____ day of _____ , 2019.

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Case Number 2019-000597

Greetings:

I am enclosing Appellant's Reply Brief and Proof of Service.

With Kind Regards,

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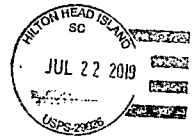

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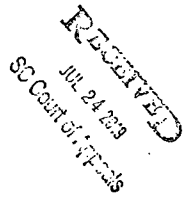

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