

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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Case Number 2019-000597

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Nicholas B. Thompson, Employee, Appellant,

v.

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

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INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Is a firefighter with a back condition aggravated by cumulative effects of repetitive trauma on the job entitled to workers compensation benefits when he provides notice of his claim only after he is no longer able to work, is diagnosed with injury, and requires medical treatment?

## STATEMENT OF THE CASE

Firefighter Nicholas Thompson claims WC benefits from his former employer, Bluffton Township Fire District, which denied his claim. The single Hearing Commissioner denied Thompson's request for benefits, concluding that Thompson failed to prove that his work involved repetitive trauma, failed to prove a direct causal relationship between his work and his injury, and failed to provide proper notice of his claim. The Panel affirmed, adopting the single Commissioner's findings and conclusions essentially verbatim.

## FACTS

### 1. Nicholas Thompson, firefighter and EMT

Nicholas Thompson trains to become a firefighter at the South Carolina Fire Academy and earns his academy certification in 2013. (Hearing Transcript, Record on Appeal ("HT, ROA") p. 93, l. 19 – p. 94, l. 1) He is 26 years old.<sup>1</sup> In April of 2013 Nicholas goes to work for the Bluffton Township Fire District as a Firefighter II. (HT, ROA p. 94, ll. 2-9, ll. 20-21)

A Bluffton firefighter must be fit and strong, able to do a job the department's Personnel Officer describes as "a very physical job, very demanding, very tough." (HT, ROA p. 186, ll. 11-12) The job description for a Firefighter II requires that firefighters:

- Carry ladders weighing approximately 75 pounds;
- Carry fire hoses and other heavy equipment up and down ladders;
- Carry firehoses full of water while standing or crawling;
- Hold flowing hoses for long periods of time;

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<sup>1</sup> Multiple medical records confirm that Thompson was born in 1986; his birth date has been redacted from the records, but there is no dispute about his age.

- Drag or carry other human beings;
- Operate power saws in awkward positions;
- Force entry into buildings; and
- Tear down building walls and ceilings. (Job description, ROA p. 544-545)

Firefighters also are required to respond to medical emergencies. (HT, ROA p. 99, ll. 13-20).

Nicholas is certified as an Emergency Medical Technician (EMT). (HT, ROA p. 99, l. 13) As a Firefighter II, his “essential duties” as an EMT include things like:

- Lift and carry patients over rough or uneven terrain for considerable distances;
- Bend, strain, stretch, contort, push, pull, twist, carry, walk with weight, and lift to remove victims from motor vehicles; and
- Complete emergency rescue functions and tasks that are very physically demanding without breaks, recovering quickly when given a short break. (Job description, ROA p. 544)

Ultimately, as the job description says, the job requires the worker to “withstand the effects of repeated exposure to traumatic situations.” (ROA, page 545)

Nicholas loves his job. (HT, ROA p. 167, l. 13) His shift starts at 8:00, but he shows up at 7:30. (HT, ROA p. 94, ll. 19-20) He starts pretty much every single workday the same way: he spends the first hour and a half making sure trucks and the equipment on them is in working order. (HT, ROA p. 94, l. 21 – p. 95, l. 8) Every morning, he picks up, manipulates, and inspects about 8,000 pounds of equipment. (HT, ROA p. 95, ll. 5-8) The daily routine has him handling 75-pound ladders, hundred-pound hydraulic power units, and a hydraulic hook that alone weighs about 90 pounds. (HT, ROA p. 95, ll. 10-15) Just to check the power unit, he has to reach over the truck’s back bumper, grab the hundred-pound unit, pull it out, put it on the ground, start it up, and then lift it up and put it back. (HT, ROA p. 95, ll.12-14)

Besides daily inspection and maintenance, Nicholas and his fellow firefighters are often handling that equipment for training. Every month, Nicholas spends 60 to 80 hours training – not sitting at a computer or talking in a classroom, but physically using the heavy equipment. (HT, ROA p. 97, ll. 7-10) He puts on gear that weighs 100 pounds, runs the hydraulic pump, and drags

hoses full of hundreds of pounds of highly pressurized water, not to mention crawls, climbs, and twists while using heavy equipment. (HT, ROA p. 97, ll. 10-15) Regularly, but less frequently, he helps inspect and maintain the district's thousands of fire hydrants – bending over and wrenching open each fire hydrant to be sure it will operate when needed. (HT, ROA p. 96, ll. 8-16)

Much of Nicholas' job is medical. (HT, ROA p. 99, l. 13) He answers calls to nursing homes to help lift patients and he answers a lot of calls to car wrecks. (HT, ROA p. 99, ll. 13-14, ll.19-20) At least once every shift, he picks someone up off a floor, off the ground, or out of a car. (HT, ROA p. 107, ll. 13-16) Before his career is over, he will pick up hundreds of patients off the ground, off beds, or off toilets. (HT, ROA p. 98, ll. 6-8)

## **2. Back pain**

In the fall of 2014, a local chiropractor offers Bluffton firefighters services at his clinic and Nicholas is among those who go in. (HT, ROA p. 102, ll. 16-20) Nicholas reports shoulder and back pain that comes and goes and is worse with twisting and bending, better with stretching. (Hall records, ROA p. 210, 211, 214) Nicholas feels he is still adapting to his job (HT, ROA p. 102, ll. 20-22), but the occasional pain is not interfering with his ability to do the job. (HT, ROA p. 102, l. 24 to p.103, l. 1) The chiropractor does not diagnose any injury, nor recommend any medical treatment. He does suggest chiropractic care, but Nicholas returns on only one occasion, at which he reports that he already has improved. (Hall records, ROA p. 211)

Late in 2014, Nicholas consults a different chiropractor about “discomfort” in his right sacroiliac area that is of “unknown origin” and “relieved by rest,” accompanied by cramping and pain in his legs and feet. (Bluffton Chiro records, ROA p.216) The chiropractor notes various symptoms, but diagnoses no injury nor recommends any medical referral. (Bluffton Chiro

records, ROA p. 216-220) Nicholas sees the chiropractor two more times. (Bluffton Chiro records, ROA p. 221-224) His symptoms are not interfering with his job. (HT, ROA p. 102, l. 25 – p. 103, l.1)

A year later, 29-year old Nicholas sees his regular physician, David Dorsner, MD, and reports recurring pain in his lower back. (Dorsner records, ROA p. 226) Dr. Dorsner notes that Nicholas has no numbness, weakness, or tingling and has had “no injuries of consequence.” (Dorsner records, ROA p. 226) Dr. Dorsner’s notes seem to indicate the pain is related to work.<sup>2</sup> Dr. Dorsner notes that Nicholas’ pain is improving and has changed from a sharp pain to a dull ache (Dorsner records, ROA p. 230). Dr. Dorsner diagnoses no injury and issues no work restrictions. Dr. Dorsner explains to Nicholas the results of an X-ray, which reveals a congenital fusing of Nicholas’ L5 vertebra with his sacrum, which according to the reporting radiologist “can be a source of pain.” (X-ray report, ROA p. 233)

On Dr. Dorsner’s recommendation, in December 2015 Nicholas consults an expert in back pain, John Batson, MD at Low Country Spine and Sport. (Batson records, ROA p. 236) Nicholas still is not missing any work, nor is his back pain interfering with him doing his job. The only injury Dr. Batson diagnoses is a lower back sprain. (Batson records, ROA p. 238) Dr. Batson neither takes Nicholas off work nor imposes any work restrictions. (Batson records, ROA p. 236-238)

A few months later, in March or April 2016, Nicholas is involved as an EMT in a lifting incident that is “nothing major” at the time but will turn out to be notable enough to recall later. (HT, ROA p.107, ll. 12-13, HT, ROA p.110, ll. 2-3) He is part of a response team called to help

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<sup>2</sup> Dr. Dorsner’s history includes, “LBP to the lower back, which resulted Work [sic]....” And Dr. Dorsner notes, “Pt is a fireman and uses his back frequently at work.” (Dorsner records, ROA p. 226-227)

a woman weighing 400 lbs. or more get up off her floor. (HT, ROA p. 107, ll. 16-24) At some point during their efforts, he feels a shot of pain from his lower back into his right leg (HT, ROA p. 109, ll. 8-11) and as he later walks away from the scene, he feels a “little pinch of pain” in his lower back and right buttock (HT, ROA p. 111, ll.2-5), so he does some stretching motions as he walks away. (HT, ROA p. 111, ll. 7-8) He comments about what a “big girl” she was and says his back is “jacked up,” but by the time he is back at the station, he is not thinking much of it because it is only lingering “a little.” (HT, ROA p. 111, ll. 10-11; p. 112, ll. 18-20) If he is injured, he doesn’t realize it. (HT, ROA p. 113, ll. 9-10) He expects it will go away, so he just stretches, takes some ibuprofen, and rests, which always seems to help. (HT, ROA p. 113, ll. 13-15) He continues doing his job, without restrictions, without missing any work, and without requiring any medical care.

Throughout the entire year of 2016, Nicholas requires no medical treatment, misses no work, and continues to be able to do his job without restrictions.

The recurring demands continue, of course, with some days more demanding than others. For example, on July 9, 2016, the department is called to the Belfair Plantation to fight a blazing fire engulfing much of a very large house. (HT, ROA p. 113, ll. 18-24) Nicholas puts on his hundred pounds of gear, grabs a hose, and drags about 150 pounds of hose into the driveway to start attacking the fire. (HT, ROA p. 113, l. 25 – p. 114, l.8) Water starts flowing at a rate of about 4000 pounds a minute, and for about 20 minutes, Nicholas crouches in the driveway and pushes down on the nozzle to keep the flow of water directed at the blaze. (HT, ROA p. 114, l. 13-23; p. 115, ll. 5-8) After a break, he resumes that work for another 15 minutes, until another break. (HT, ROA p. 115, ll. 14-18). At that point, his heart rate and blood pressure are too high to continue that particular task (HT, ROA p. 115, l. 22 – p. 116, l.1) and his back hurts a lot, but

he is able to keep working the rest of the night, filling and replacing air cylinders for other firefighters' air packs. (HT, ROA p. 116, ll. 9-22) When the fire is finally put out, Nicholas is still there doing his job and as he helps clean up, he picks up four 150 pound rolls of hose before leaving the scene. (HT, ROA p. 117, ll. 2-10) Back at the station, he says his back is "killing him" (HT, ROA p. 118, ll. 14-16), but if he has injured his back, he doesn't know it. (HT, ROA p. 155, ll. 23-24) As he says, "it's a tough job, you feel pain, you take some Ibuprofen or something, and you move on." (HT, ROA p. 154, ll. 16-18) So Nicholas goes inside, takes a shower, and pops an Ibuprofen." (HT, ROA p. 118, ll. 20-22)

Still, Nicholas requires no medical treatment, misses no work, and continues to do his job without restriction. Still, the only injury ever mentioned is the "sprain" Dr. Baston diagnosed in 2015. No doctor has ever told him he has any serious or lasting injury. Meanwhile, the work continues.

The fire department knows that the cumulative effects of the "physically demanding job," add up to a point that it "does take a toll." (HT, ROA p. 186, ll. 13-17) As the Personnel Officer notes, "you don't see many 50-year-old men on fire engines." (HT, ROA p. 186, ll. 15-16) The next memorable event that contributes to the cumulative effects of the job on Nicholas Thompson is Hurricane Matthew, which arrives in South Carolina in October 2016.

For days, Bluffton firefighters make what the district's Personnel Officer calls a "yoeman's effort" to clear streets of trees and heavy debris. (HT, ROA p. 177, ll. 17-18) Trees are down everywhere. The firefighters grab saws and chains and do whatever they can to get them off roadways. (HT, ROA p. 119, l. 22 – p. 120, l. 4) One tree is so huge that when its stump falls into the road, they have to put a chain around it and use an engine to move it (HT, ROA p. 120, l. 1-5), but most of the trees are cut up and carried away by hand. (HT, ROA p.

120, ll. 6-12) Firefighters no sooner finish getting one tree off the road when they get to the next tree 20 feet down the road and have to do the same thing again. (HT, ROA p. 121, ll. 10-14) Before the effort is finished, Nicholas helps cut, drag, or carry 100 to 200 trees off the road. (HT, ROA p. 120, ll. 12-17) At first, he is sore and his back is starting to hurt a little bit. (HT, ROA p. 121, ll. 3-5) By the end, he says his back is “killing” him and, presumably like most all the workers, he doesn’t know how much more he can keep doing. (HT, ROA p. 121, ll. 16-18) But, as always, rest and Ibuprofen keep him going, and Nicholas requires no medical treatment, misses no work, and continues to do his job without restriction.

Late in 2016, Nicholas’ back pain is starting to appear a little more often, and even when he is just doing his morning repetition of inspection and testing chores on the heavy equipment or his required daily physical training, the pain is starting to irritate him. (HT, ROA p. 122, l. 23 – p. 123, l. 2) He manages it by doing various stretches, taking Ibuprofen, and lying down, but still misses no work and requires neither work restrictions nor medical treatment to keep working. The pain does not prevent Nicholas from performing his job. (HT, ROA p. 151, ll. 5-12)

Finally, in January of 2017, Nicholas feels the pain is starting to affect his job and he knows he’s got to “find out what’s going on,” so on January 10, 2017, he talks to his Battalion Chief. (HT, ROA p. 123, ll. 12-20) The Battalion Chief tells him not to worry about it and sends him to the Personnel Officer to consider options including FMLA leave. (HT, ROA p. 124, ll. 1-4) Nicholas tells the Personnel Officer he does not know exactly what is wrong with his back, but he is having major back pain. (HT, ROA p. 124, ll. 11-14)

The Personnel Officer suggests Nicholas talk with Deputy Chief Cramer, whose wife is a pain management specialist. (HT, ROA p. 124, ll. 17-19) Nicholas thinks that is a great idea, as

he wants to figure out what he should do to address his pain, so he leaves the office without any FMLA paperwork. (HT, ROA p. 124, ll. 19-25) Nicholas talks to Deputy Chief Cramer and they agree he should look for pain management options. Nicholas calls Susan Cramer, MD the next morning and goes through the referral process to see her, securing an appointment for February 10, 2017. (HT, ROA p. 125, ll. 12-20)

For the next month, as he waits to see Dr. Cramer, Nicholas still works without restriction, without interruption, and without medical treatment. (HT, ROA p. 126, ll. 11-15) No one thinks it is “really anything” at the time, so he just continues doing his job for the entire month. (HT, ROA p. 126, ll.12-14) He is still able to do his work. (HT, ROA p. 167, ll. 3-9)

### **3. Back injury revealed**

On February 10, 2017, injury to Nicholas Thompson’s 30-year-old back is diagnosed for the first time.<sup>3</sup> Nicholas reports to Dr. Cramer on that date that he is having severe low back pain, which by then is constant. (Cramer intake records, ROA p. 240) Dr. Cramer suspects he has an “HNP” – herniation of the nucleus pulposus (the inner core of the vertebral disc) – in his lumbar spine and sends him for an MRI. (Cramer records, ROA p. 462) Nicholas receives a prescription for medication. (Cramer records, ROA p. 462)

The MRI reveals that Nicholas has vertebral disc injuries at two levels. The disc between his L4 and L5 vertebrae is bulging diffusely and disc material is extruding from the disc, and the disc between his L5 and S1 vertebrae is protruding enough to displace a nerve root in his lumbar spine. (MRI report, ROA p. 471) There is also severe narrowing at L4-L5 of the doorway to Nicholas’ spinal canal through which his L5 traversing nerve roots must pass, causing “probable...nerve root impingement.” (MRI report, ROA p. 471)

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<sup>3</sup> Other than the lumbar sprain diagnosed by Dr. Batson in 2015. Nicholas Thompson is not making, and never has made, any claim for workers compensation benefits for that injury.

For the first time since Nicholas became a firefighter four years earlier, Nicholas' work duties are restricted by a doctor. Dr. Cramer issues an "Excuse Form" that says Nicholas may return to work February 13, 2017 on "Light/Sedentary Duty Only." (Cramer records, ROA, p. 463) For the first time in his life, Nicholas receives an epidural steroid injection in his back, administered on February 15, 2017 by Dr. Cramer in an effort to treat his pain. (Cramer records, ROA, p. 464-465) She also refers him to neurosurgeon James Lindley, MD at The Neurological Institute of Savannah & Center for Spine.

The fire department has no light/sedentary duty to offer Nicholas, so he is placed on paid FMLA leave. (FMLA letter, ROA p. 528-530) Nicholas is pulled "off the line" at the fire house on February 12, 2017 while he is still working his shift. (HT, ROA p. 129, ll. 9-10) That turns out to be Nicholas Thompson's last day as a firefighter.

The next day Nicholas sees Dr. Lindley, who recommends surgery. Dr. Lindley explains that the disc damage at L4-5 is a "broad-based disc protrusion...that is really circumferential" around the entire disc space, creating mild to moderate narrowing of the spinal canal at that level. Dr. Lindley recommends disc replacement. (Lindley records, ROA p. 475) Later, Dr. Lindley will change his specific recommendation, but will still say Nicholas needs surgery at both L4-5 and L5-S1 levels. (Lindley records, ROA p.478)

By now, Nicholas is pretty sure his condition is related to his job. He is well aware of the lifting, twisting, carrying, and bending he performs repeatedly each workday. He knows his family has no history of similar problems. (Cramer records, ROA p. 242) At least by the time Nicholas sees Dr. Cramer, he suspects he has been injured at work, but he doesn't want to "jump to any conclusions." (HT, ROA p. 161, ll. 8-14) He has been told that claiming workers compensation will delay his medical treatment, so he tries to avoid that and rely on personal

health insurance instead. (HT, ROA p. 161, ll. 14-17) He fears not getting treatment, but also fears losing a job he loves. (HT, ROA p. 167, ll. 13, 17-20)

Nicholas' mother urges him to admit the relationship between his work and his back injury. (HT, ROA p. 174, ll. 4-7) On February 22, 2017, Nicholas acknowledges that his condition is work-related, and tells the Personnel Officer that he wants to report a claim, but his fears about not being able to get treatment through workers compensation are realized. (HT, ROA p. 162, ll. 17-23) Meanwhile, he is still hoping his health insurance will pay for his recommended surgery, but on March 7 he is notified it will not. (HT, ROA p. 168, ll. 11-18)

#### **4. Cause of injury, aggravation, and required surgery**

On July 11, 2017, Dr. Lindley issues a written opinion that Nicholas' duties including lifting, holding hoses, maneuvering heavy equipment, tools and patients are "repetitive tasks" that, in conjunction with three specific traumatic events Nicholas has described (lifting the 400 lb. woman, fighting the Belfair fire, and cleaning up after Hurricane Matthew), have "caused and/or aggravated his low back injury with radicular symptoms." (Lindley report, ROA p. 476) Later, the department's Personnel Officer will agree that the cumulative effect of the firefighter's job requirements can lead to injury. (HT, ROA p. 187, ll. 11-14) No doctor will ever claim Nicholas' work was *not* the cause of his back injury. Nicholas cannot identify any activities outside of work that would have caused his injury. As he says, "I don't pick up 400 pound people at home." (HT, ROA p. 150, ll. 20-24)

Dr. Lindley later explains that what he refers to as the repetitive nature of Nicholas' job is the repeated "bending and lifting and pushing and pulling...." (Lindley Deposition, ROA p.564, ll.12-16) Noting Nicholas' history of back pain, Dr. Lindley explains that Nicholas "has a condition that is characterized by a degenerative process in his back and that occurred at some

point in time, ...we don't know exactly when...." (Lindley Deposition, ROA p. 578, l. 2-6) Dr. Lindley concedes it would be speculating to say with certainty exactly what was the first, "primary," reason for Nicholas' back problem, given "multiple factors where there was wear and tear over time." (Lindley Deposition, ROA p. 567, l. 23 – p. 568, l. 2) However, Dr. Lindley testifies that to a reasonable degree of medical certainty, Nicholas' back condition was "most likely exacerbated" by his work-related activities, including not just the repetitive daily demands, but also the three particularly demanding events described above. (Lindley Deposition, ROA p. 578, ll. 6-10; p. 579, ll. 8-13) Dr. Lindley also testifies that to a reasonable degree of medical certainty, Nicholas' symptoms were exacerbated by "work-related events" and that the need for surgery is "related to the work-related events." (Lindley Deposition, ROA p. 579, l. 19 – p. 580, l. 3)

### STANDARD OF REVIEW

The Court of Appeals' review is limited to deciding whether the decision of the Appellate Panel of the Workers' Compensation Commission is either unsupported by substantial evidence or reflects an error of law. Code 1976, §1-23-380(A)(6).

### ARGUMENT

1. **The Panel erred when it found Nicholas' work was not repetitive (Finding #25, ROA p. 36).**
  - a. **Finding that Nicholas' work did not involve repetitive trauma reflects an error of law regarding the definition of "repetitive trauma."**

The Commission appears to have made the erroneous assumption that "repetitive trauma" refers only to trauma resulting from work in which the employee constantly engages in identical activity throughout the workday. That is not the law in South Carolina. Rather, this Court has made it quite clear that it is the *trauma* that must be *repetitive*, not the specific *activity*. In *White*

*v. MUSC*, for example, this Court found repetitive trauma resulting from a variety of different tasks. 586 S.E. 2d 157 (2003) Mr. White’s job did *not* entail doing one single thing over and over each day. Rather, his job duties were quite varied and included “removing trash bins from the operating room, moving equipment, lifting patients, and transporting patients to and from other rooms.” *Id.* at 159. It was the physically traumatic demands of the employee’s various repeated activities that entitled Mr. White to compensation, not a claim that his injury arose from a single identical activity repeated over and over.

When the Legislature in 2007 expanded Title 42 to explicitly address repetitive trauma, it embraced certain concepts and rejected others from *White* and other repetitive injury cases, such as *Schurlknight v. City of N. Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002) and *Bass v. Isochem*, 365 S.C. 454 (Ct. App. 2005). For example, it rejected *Schurlknight’s* “last day of exposure” or “last day of work” holding regarding notice, in favor of a stated discovery rule. S.C. Code Ann. §42-15-20. Notably, however, the Legislature did not reject the *White* holding indicating that *various* activities through their repetition can be the cause of a repetitive trauma injury; the code does not state that employees injured by repetitive trauma can qualify for benefits only if the trauma resulted from repetitive activities that were *identical*.

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

Three separate sources of evidence established that Nicholas Thompson engaged in repetitive work: the employer’s own job description; Nicholas’ testimony about the tasks he repeated daily or otherwise; and Dr. Lindley’s testimony regarding the repeated physical functions of bending, lifting, pushing, pulling, etc. that Dr. Lindley found medically relevant to this firefighter’s ultimate back condition. None of the details of any of that evidence – all as laid out in FACTS above – was controverted. The employer offered no evidence that the job

description was inaccurate, that Nicholas Thompson did not do the work described above, or that the work did not involve repeated bending, lifting, pushing, and pulling.

The *only* “evidence” on which the Commission based its conclusion was not evidence at all, but rather the editorial comment of the employer’s Personnel Officer, Cpt. Reid, that he personally would not consider an activity “repetitive” unless it was a single identical activity repeated constantly during the workday. Reid explains, “...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, ROA p. 178, ll. 19-21) Both the single Commissioner and the Panel relied on Cpt. Reid’s opinion in finding a lack of repetitive work, though that opinion clearly was based on Reid’s mistakenly narrow understanding of what can be “repetitive” for purposes of repetitive trauma injury. Accordingly, the conclusion that Nicholas’ work was not repetitive is unsupported by substantial evidence.

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

"Repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. S.C. Code Ann. § 42-1-172(A)

The “causal connection [must be] established by medical evidence....” S.C. Ann. §42-1-172(B)

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

First, the Commission subjected Nicholas’ claim to the inappropriate standard of absolute certainty. The causation opinions Dr. Lindley provided, both in his written statement and in his sworn testimony, were expressly based on “a reasonable degree of medical certainty.” With that degree of certainty being the threshold for medical opinions, the law requires only that causation be proven by “a preponderance of the evidence.” S.C. Code Ann. § 42-1-172(B)

That proof was provided, both through the opinions of Dr. Lindley and through the complete absence of any proof of some *other* cause. However, 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) Dr. Lindley testified that to a reasonable degree of medical certainty, Nicholas’ back condition was “most likely exacerbated” by his work-related activities. (Lindley Deposition, ROA p. 578, ll. 6-10; p. 579, ll. 8-13) *Most likely* is enough; he did not need to be “sure.” Dr. Lindley also testified without qualification that, to a reasonable degree of medical certainty, Nicholas’ need for surgery is “related to the work-related events.” (Lindley Deposition, ROA p.579, l. 19 – p. 580, l. 3) Dr. Lindley conceded the possibility that Nicholas may have had a pre-existing back injury, given complaints of back pain in the years leading up to his diagnosis and considering the fact that Nicholas did not expressly blame his work when he first sought medical treatment in 2017. However, there was *no equivocation* by Dr. Lindley, *nor any contrary evidence offered by anyone*, that at the very least, repetitive trauma from Nicholas’ work had caused an aggravation of any prior back injury and the ultimate need for surgery.

Second, the Commission arbitrarily imposed a requirement with regard to causation that required Nicholas to prove his ultimate condition was caused *either* by the ordinary, repetitive demands of his work *or* by those particular events of repetitive trauma that were especially memorable (which the Commission labels “work accidents”) . The single Commissioner and the Panel both stated as relevant findings:

19. Dr. James Lindley testified that he is not sure if the repetitive nature of the Claimant’s job caused his back condition or if the work accidents caused the back condition. (ROA, p. 23; p. 35)

...

21. ...Dr. Lindley further testified to a reasonable degree of medical certainty that the Claimant's work duties, repetitive tasks as a part of his job duties, and the three events the Claimant conveyed to him had aggravated his lower back condition; however, he cannot say whether an exacerbation of the Claimant's back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (ROA, p. 23-24; p. 35-36)

This analysis arose from mistreatment of the three *examples* of particularly demanding repetitive activities *as if they were each independent episodes of a workplace injury*, rather than as "mini accidents" that are the part and parcel of repetitive trauma cases. That is as much of a mischaracterization as if any other episode among the hundreds of episodes of repetitive trauma sustained during four years of service to the fire department were subjected to scrutiny and required to be either proven or disproven as an independent source of injury. They were *incidents* of repetitive trauma, memorable because of the relatively intense trauma they involved, but there is no evidence that they were *injuries*. On the contrary, Nicholas Thompson consistently testified, over and over again, that at no time during or after those or other incidents at work did he believe he was *injured*. (e.g., HT, ROA p. 154, ll. 18-19; p. 155, ll. 23-24; p. 160, ll. 24-25) Furthermore, at no time did he require medical treatment, time off work, or work restrictions.

The nature of repetitive trauma injuries is that they arise from a *series* of separate events – each of which may not alone cause the injury, but which together accumulate to produce eventual injury. It is inherently contradictory in a repetitive trauma case to require a claimant to separate out various events or "mini accidents" from a long series of events and prove that some of those events did *not* cause the injury. As the Supreme Court noted in *Schurlknight*, "it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." 574 S.E.2d at 195. Rather, as the Court noted, such injuries are caused by repetitive events or "mini-accidents." *Id.* The statute itself defines a repetitive trauma injury

as one which is “gradual in onset and caused by *cumulative* effects....” S.C. Code Ann. §42-1-172(A) (emphasis added)

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

Dr. Lindley testified that to a reasonable degree of medical certainty, it is more likely than not – *i.e., most likely* – that the ultimate condition of Nicholas’ back as observed in February of 2017 was caused by his repetitive work activities. (Lindley Deposition, ROA p. 578, ll. 6-10; p. 579, ll. 8-13) Dr. Lindley testified without qualification that Nicholas’ need for surgery is related to his work. (Lindley Deposition, ROA p. 579, l. 19 – p. 580, l. 3) There was no contrary medical evidence offered. None of Nicholas’ medical records even suggest any other cause for injury. No evidence – expert or lay testimony – contradicted Dr. Lindley’s conclusions, suggested any earlier diagnosis of Nicholas’ current condition, or offered any explanation *other than the obvious explanation of his work* as a cause of his injury. The finding of no causation was unsupported.

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

An employee injured by repetitive trauma in the workplace is required to give notice within “ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable....” S.C. Code Ann. §42-15-20 “The provision for notice of a workplace injury to an employee should be liberally construed in favor of workers’ compensation claimants. *Nero v. South Carolina Department of Transportation*, (S.C. App. 2017) 420 S.C. 523.

The key distinction here is between *pain* and *injury*. Many people work at jobs so physically demanding they can cause discomfort or even pain. Obviously, however, an

employee is not expected to know he is *injured* just because he is experiencing pain, nor is he entitled – much less expected – to make a compensation claim simply because he is in pain. If the employee requires no medical treatment and misses no work, what benefits would he be entitled to in the first place? Furthermore, even if the employee not only is experiencing pain, but suspects the pain is related to his work, that *does not* mean the employee should know he is injured and therefore is required to give notice of a compensable injury.

In *King v. International Knife*, this Court reversed an Appellate Panel that denied benefits based on inadequate notice because the employee (who ultimately was found to have carpal tunnel syndrome caused by repetitive trauma) had suspected for years that his arm pain was connected to his work. 395 S.C. 437, 718 S.E.2d 227 (2011) Mr. 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. *Id.* at 229 This Court agreed that under those circumstances, Mr. King did not have a compensable injury. *Id.* Likewise, before February 2017, Nicholas Thomas had missed no work, had sought no treatment, and had not been diagnosed as having a repetitive trauma injury. It was January of 2017 before his pain became so bad that it was affecting his work and he required treatment, and February of 2017 before he actually obtained treatment and his injury was diagnosed. At that point, he gave timely notice; he cannot be expected to have known before then that he had a compensable injury.

The Commission misstated the record when it claims that Nicholas “believed that his back *injury* was work-related as of October 2016.” (Finding No. 7, ROA p. 32)) That was not the testimony. The testimony was that as of October 2016, Nicholas believed his *pain* was work-related – just as Mr. King had suspected two years before he made his claim that his *pain* was work-related. Nicholas did not know he *had* an injury, much less that it was work-related, as of

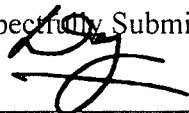
October 2016. Even the doctor to whom the department informally referred him – pain specialist Susan Cramer, MD – did not *know* he had an injury until she ordered an MRI to confirm her suspicions. Surely Nicholas was not required to know months before any doctor diagnosed him that he had an injury or what his injury was.

### SUMMARY AND CONCLUSION

Nicholas Thompson established that over the course of his four years as a firefighter, he endured repetitive trauma, proved without dispute that he has a repetitive trauma injury, and proved by a preponderance of the evidence that the ultimate injury – aggravation of his back condition to the point of disability and the need for major surgery – 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 to him.

Respectfully Submitted



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