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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-000090

Randall Dalton, Employee,..…….…..... Appellant,

v.

The Muffin Mam, Employer,
and Amerisure Mutual Insurance Company, Inc., Carrier,…….....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case presents the opportunity for this Court to confirm that South Carolina workers' compensation law recognizes that a person can be technically employed but still be totally and permanently disabled—the doctrine sometimes referred to as "sheltered employment," "sheltered work," or "made work." Procedurally, this case is an appeal by Randall G. Dalton ("Appellant") from the Appellate Panel's finding that Appellant was not permanently and totally disabled under the South Carolina Workers' Compensation Act.

Appellant sustained an admitted work injury to his spine and right shoulder on June 26, 2017, in the course and scope of his employment with the Muffin Mam ("Respondent Employer"). The case was originally heard by Single Commissioner Avery B. Wilkerson, Jr. in Greenville, South Carolina on April 13, 2021. The Single Commissioner issued an order on June 30, 2021 and found Appellant sustained permanent partial disability of 15% to his spine and 15% to his right shoulder. The Single Commissioner found Appellant was making more money at the time of the hearing than he was at the time of his injury; therefore, he was not permanently and totally disabled.

Thereafter, Appellant filed a Form 30 request for review with the Appellate Panel. The Appellate Panel held a review on November 23, 2021 and issued a Decision and Order on January 7, 2022. The Order increased Appellant's permanent partial disability ratings from 15% to the spine to 25% to the spine and from 15% to the right shoulder to 25% to the right shoulder and concluded that Appellant was not totally and permanently disabled because he was still working for the same employer and had been promoted to a salaried, supervisory position in which he made more money than he was making on the date of his injury. The Appellate Panel did not make

findings correlating Appellant's work capacity to his entitlement to disability benefits and instead relied solely upon the receipt of wages as the basis for finding he was not permanently and totally disabled. Appellant filed his Notice of Appeal to this Court on January 26, 2022.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard of review for Commission Decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135 276 S.E.2d 304, 306 (1981). "An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion." S.C. Code Ann. § 14-3-330 vests the Supreme Court of South Carolina with "appellate jurisdiction for correction of errors of law in law cases [. . .], and the Supreme Court has held an appellate court may decide novel questions of law with "no particular deference to the lower court." *Madison ex rel. Bryant v. Babcock Ctr., Inc*., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). S.C. Code Ann. §14–8–200(a) provides the Court of Appeals "shall apply the same scope of review that the Supreme Court would apply in a similar case."

With regard to the meaning of a statute, "[s]tatutory interpretation is a question of law subject to de novo review." *Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422 427, 699 S.E. 2d 687, 689 (2010). The Commission's factual findings must be based on substantial evidence, and "[s]ubstantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citations omitted).

ARGUMENT

I. SOUTH CAROLINA LAW RECOGNIZES THAT A WORKER CAN BE NOMINALLY EMPLOYED BUT STILL BE PERMANENTLY AND TOTALLY DISABLED (I.E., SHELTERED EMPLOYMENT), AND THE ANALYSIS OF PERMANENT AND TOTAL DISABILITY UNDER SOUTH CAROLINA LAW CENTERS ON THE CAPACITY TO COMPETE IN THE MARKETPLACE FOR WAGES

A. "Disability" is a multifarious term under South Carolina workers' compensation law, and its meaning must be derived from its context

"Disability" under the South Carolina Workers' Compensation Act can signify either temporary disability or permanent disability. Temporary disability begins on the eighth day a claimant "has been out of work due to a reported work-related injury." S.C. Code Ann. § 42-9-260 (2007). Temporary disability ends upon a finding of maximum medical improvement ("MMI"). *See*, *e.g.*, *Curiel v. Envtl. Mgmt. Servs.*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) ("[T]emporary total disability benefits are available from the date of injury through the date of maximum medical improvement [. . .]"). After a finding of maximum medical improvement, South Carolina Workers' Compensation law provides for permanent disability compensation under two distinct "disability" models—the economic model and the medical model.

The first, the "economic model," is the model statutorily found at S.C. Code Ann. § 42-9-10 (2007) and S.C. Code Ann. § 42-9-20 (2007). The "economic model [. . .] defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 104, 580 S.E. 2d 100, 102 (2003). A prerequisite to the application of the "economic model" of disability is that the claimant must have sustained injuries that extend beyond a single scheduled member (i.e., arm, leg, etc.). *See*, *e.g.*, *Singleton v. Young*

Lumbar Co., 236 S.C. 454, 471, 114 S.E. 2d 837, 845 (1960) (holding "[w]here the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity."). The second model is found at S.C. Code Ann. § 42-9-30 (2007). This "medical model" [. . .] provides awards for disability based upon degrees of medical impairment to specific body parts." *Id*.

In its broadest definition, found at S.C. Code Ann. § 42-1-120 (2007), "disability means *incapacity* because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (emphasis added). Significantly, this statutory definition of disability encompasses both temporary disability and permanent disability (i.e., both its "economic" and "medical" models). The temporary disability focus rests upon "the same [. . .] employment" component of the definition, as the claimant's employer can either accommodate his temporary work restrictions or initiate temporary disability payments pursuant to S.C. Code Ann. § 42-9-260. A claimant is not required to search for "other employment" when he is *temporarily* and totally disabled despite the statutory definition's inclusion of the "other employment" phrase. *See e.g.*, *Lee v. Bondex, Inc*., 406 S.C. 97, 103-04, 749 S.E. 2d 155, 157-58 (Ct. App. 2013). ("For temporary disability benefits, a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment [. . .]. [H]e is not required to prove he could not find employment with another employer in order to receive temporary disability benefits.").

The focus of the disability analysis for permanent benefits, however, is upon "any other employment." This broad, statutory definition for disability has been identical since at least 1952.[1] In analyzing the identical provision in 1954, the Supreme Court of South Carolina explained, in the context of a *permanent* disability analysis, that "disability is to be measured by the employee's *capacity or incapacity* to earn the wages which he was receiving at the time of his injury. *Loss of earning capacity* is the criterion." *Keeter v. Clifton Mfg. Co. et al*., 225 S.C. 389, 392, 82 S.E. 2d 520, 522 (1954) (emphasis added). The ability to earn wages "in the same or any other employment" has never allowed the permanent disability analysis to stop with the actual fact of ongoing receipt of wages from the employer in whose workplace a claimant was injured. Instead, by longstanding precedent, "[d]isability is a relative term and must be related to the occupation of the claimant." *Colvin v. E. I. Du Pont De Nemours Co*., 227 S.C. 465, 474, 88 S.E. 2d 581, 585 (1955). That is, "same employment" does not signify "same employer" but, instead, signifies the analysis of determining whether the employee's physical limitations will remove his capacity to earn wages in any *occupation* for which he is suited.

In *Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 118 S.E. 2d 812 (1961) the Supreme Court of South Carolina elaborated on the analysis that was required:

> Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. On the other hand, the rule in most states is that an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. The generally accepted test of total disability is inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

[1] *See* S.C. Code Ann. § 72-10 (1952), for example.

Id. at 11, 118 S.E. 2d at 817-18 (internal citations and quotations omitted). Therefore, the test for total disability under S.C. Code Ann. § 42-9-10 is not to calculate the amount of the check being given to the injured worker by his employer but to look at the "capacity" the injured worker has to "earn" wages after the injury. Many states have formally acknowledged that employment is "sheltered" employment" or "sheltered work" when the claimant receives payments from his employer but lacks the capacity to compete for similar work in the marketplace. One state that has formally acknowledged the doctrine is North Carolina.

B. Permanent and total disability historically and statutorily requires an analysis of a claimant's ability to compete for wages irrespective of his ongoing receipt of pay from his employer

1. North Carolina workers' compensation law, upon which South Carolina's workers' compensation law is based, explicitly recognizes sheltered employment doctrine

As South Carolina courts have articulated repeatedly, "[b]ecause South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases. *Spoone v. Newsome Chevrolet-Buick*, 309 S.C. 432, 434, 424 S.E.2d 489, 490 (1992). North Carolina law expressly recognizes "sheltered employment." In *Peoples v. Cone Mills Corp.*, the North Carolina Supreme Court ruled, "[a]n injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805-806 (N.C. 1986). Larson defines the doctrine as follows:

> Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, ***or if he manages to continue only by delegating his more onerous tasks to a helper***, or if the work for which claimant is paid is 'made work' or 'sheltered work.'

A. Larson, The Law of Workmen's Compensation §§ 57.21, 57.34 (1983) (emphasis added) (footnotes omitted). Therefore, the hallmark of the "sheltered work" or "make work" doctrine is that disability must be analyzed without reference to income but instead must be based on the claimant's ability to compete in the marketplace for consistently available jobs he can perform despite his injury-related work restrictions.

2. South Carolina's statutory "economic disability" model requires the Same analysis of disability as that required by North Carolina's sheltered work rule

The South Carolina definition of total disability based on the "economic" model from S.C. Code Ann. § 42-9-10 already parallels the sheltered work paradigm. Total economic disability exists under S.C. Code Ann. § 42-9-10 when the services that a claimant can offer are "so limited in quality, dependability, or quantity that a ***reasonably stable market*** for them does not exist." *Wynn v. Peoples Natural Gas Company*, 238 S.C. 1, 118 S.E. 2d 812 (1961) (emphasis added).

Accordingly, South Carolina law recognizes the same policy rationale as North Carolina's sheltered work rule, which has been articulated by North Carolina as follows:

> The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated. Termination of the employee would not necessarily signal a bad motive on the part of the employer. An employer facing a business decline reasonably could determine that continued retention of the employee was not feasible. The employee also could be dismissed for misconduct. The employer could, for reasons beyond its control, simply cease doing business.

Peoples, 316 N.C. at 438, 342 S.E.2d at 806. Therefore, even if South Carolina has never expressly stated that sheltered work doctrine exists under the Workers' Compensation Act, the proper analysis of what constitutes disability under South Carolina law has long been based on determining the "capacity" of a claimant to compete in the marketplace for wages without reference to actual pay he or she is receiving from a specific employer in specific circumstances. As the Supreme Court of South Carolina succinctly stated in *Stephenson v. Rice Svcs., Inc.*, 323 S.C. 113, 119, 473 S.E. 2d 699, 702 (1996), "***the mere fact of employment is not always indicative of earning capacity***." (emphasis added). Thus, regardless of the name attributed to it, South Carolina law has long recognized that the calculation of wages being provided to a claimant is not the measure of permanent and total disability under the "economic model" found in South Carolina Workers' Compensation Law. In failing to accurately apply the analysis of the economic model of permanent and total disability, the Appellate Panel committed an error of law.

II. APPELLANT IS PERMANENTLY AND TOTALLY DISABLED DESPITE HIS NOMINAL EMPLOYMENT AT THE TIME OF HIS SINGLE COMMISIONER HEARING

A. The first step in a disability analysis is determining what causally related work restrictions a claimant has, and the substantial evidence in the record demonstrates Appellant can lift only ten pounds above his waist and only twenty pounds at any level

Under any analysis, the first element of evaluating a claimant's vocational ability is to determine what injury-related limitations the worker has. The Appellate Panel is required to look at what "tasks" or "services" the employee is capable of performing despite his or her injury-related impairments. *See Stephenson*, 323 S.C. at 118, 473 S.E. 2d at 702.

According to Appellant's authorized treating physician for his back injury, Dr. James Behr, Appellant's permanent work restriction for his back is "no lifting over 30 pounds." This restriction was provided on November 20, 2018. (R. p. 180). Dr. Hoenig, Appellant's treating physician for the shoulder injury, limited him to not lifting more than 10 pounds overhead. He provided this restriction on June 26, 2018. (R. p. 164). On October 10, 2020 (after Dr. Hoenig's placement of restrictions) Appellant's family physician, Dr. James Fuson, after writing Appellant out of work for his back injury, allowed him to return to work but only with the "caveat to do no lifting greater than 10 lbs." (R. p. 198).

The Appellate Panel's Order tacitly determined that Appellant's physical restrictions substantially exceeded those imposed by his physicians. The Appellate Panel found, "Claimant exerted full effort during his [Function Capacity Evaluation], and the restrictions recommended in the FCE [. . .] are a reliable and accurate representation of Claimant's permanent restrictions." (R. p. 20, ¶ 6). In an FCE performed December 16, 2020, Appellant's maximum lifting from waist to shoulder level was ten pounds, and his maximum lifting above shoulder level was only seven pounds. (R. p. 209). Every piece of evidence in the record demonstrates that Appellant could not lift more than ten pounds overhead, and, although Dr. Behr opined that Appellant was capable of lifting as much as thirty pounds below shoulder level, Appellant's family physician limited Appellant's lifting to only ten pounds at all. The valid FCE notes that Appellant could lift a maximum of *twenty pounds* from floor level and was "unable to lift" when he attempted twenty-five pounds. (R. p. 214). Accordingly, based upon the Appellate Panel's findings, Appellant's actual physical restrictions, as derived from the FCE and adopted by the Appellate Panel, are substantially more vocationally limiting than those imposed by his physicians prior to

administration of the FCE, which did not take place until December 16, 2020 (R. p. 207). Therefore, substantial evidence in the record indicates Appellant can only lift ten pounds above his waist and only twenty pounds at any level.

B. The second step in a disability analysis is to determine what jobs a claimant could compete for in the marketplace, and the substantial evidence in the record supports that Appellant cannot perform the full range of duties for any position with Respondent Employer

Under longstanding precedent, a corporation is bound by the statements of its agent designated pursuant to South Carolina Rule of Civil Procedure 30(b)(6). *See, e.g.*, *Covol Fuels No. 4, LLC v. Pinnacle Min. Co., LLC*, 785 F.3d 104, fn 13 (4th Cir. 2015). ("The organization is permitted to designate a person to testify on its behalf, and the organization is bound by that testimony"). South Carolina Rule of Evidence 801 allows any statement made by a person "authorized by the party to make a statement concerning the subject" to be admitted in spite of a general prohibition against hearsay, and SCRCP 32(a)(2) specifically outlines that "a person designated under Rule 30(b)(6) [. . .] to testify on behalf of a public or private corporation [. . .] which is a party may be used by an adverse party for any purpose."

Appellant noticed a Rule 30(b)(6) deposition of an employee designated by Respondents. The topics of the deposition were the following:

1. [Appellant]'s job title and job duties from the date of his hiring to the present, including the physical requirements necessary for any person who wishes to apply to obtain such positions.

2. All employment positions at [Respondent Employer] in the State of South Carolina that are open to applications from a person with no more than a high school education and the physical restriction of being unable to lift more than 10 pounds overhead and no lifting more than 30 pounds; the training required to perform such a job; and the rate of pay of such a job.

3. What accommodations are being made since [Appellants]'s injury to enable him to undertake his job duties.

4. Knowledge of the provenance of the job descriptions and job postings for any employment position that falls within topics 1-3 (above) and requested pursuant to the Form 27 subpoena served concurrently with this Notice.

5. Whether any person with restricted use of one arm as well as lifting restrictions of no more than 10 pounds overhead and no more than 30 pounds lifting, has been hired for any position falling into the categories in questions 1-4 (above) and how long such person(s) remained in such position(s) from the date of [Appellant]'s hiring to the present.

(R. p. 378). Respondents produced only one witness, Terri Jermon, to testify regarding all of these topics, and her 30 (b)(6) deposition occurred June 9, 2020. (R. p. 357). In conjunction with the deposition notice, Appellant served a subpoena that requested all documents in Respondents' possession that were responsive to the topics outlined in the notice. (R. p. 375). Respondents produced three pages of documents. (R. p. 380-382). The witness confirmed that the three pages of documents produced were the only existing documents that corresponded with the topics outlined above during her deposition testimony. (R. p. 362). Ms. Jermon testified that she did not know the physical requirements for Appellant's current or past position, or for any position in his department. She stated, "I can't answer that question because I'm not in that department." (R. p. 370). Again, in response to Appellant's subpoena for any evidence of any jobs for a person with only a high school education who was unable to life more than ten pounds overhead and no more than thirty pounds total (Appellant's maximum work abilities according to his authorized physicians at the time of the 30 (b)(6) deposition), Respondents produced evidence of no position at all. When asked about his ability to perform his current job, Ms. Jermon testified, "If there's anything that he can't do [. . .] *somebody else has been able to take over for him*." (R. pp. 369-370) (Emphasis added). She further testified that, because she could not answer with specificity,

"Ronnie Williams [. . .] could probably answer those same questions as well." (R. p. 370). In sum, Respondents' official and binding position *based on the testimony of their chosen representative* as to whether a job existed within Appellant's work capabilities, is "I can't answer that […]" (R. p. 370).

Thereafter, Appellant took the deposition of Ronnie Williams, who was asked if he would hire a person off the street who could not exert up to thirty pounds, and Mr. Williams testified, "[p]robably not." (R. p. 397). When asked to clarify, "if he couldn't lift 30 pounds of weight, you don't think the person would be able to do the physical grind required [. . .]," Mr. Williams responded, "[i]f he couldn't do that with both arms, yeah." (R. p. 397). Therefore, *assuming the maximum physical ability existing anywhere in the record*, there is no evidence that Appellant can perform any work at Respondent Employer apart from having someone more physically capable assist him, the very definition of "sheltered work." *See A. Larson, The Law of Workmen's Compensation* §§ 57.21, 57.34 (1983) (emphasis added). Significantly, as noted above, the restrictions that the Respondents' representatives testified would prohibit Appellant's employment were the least restrictive physical limitations provided by his treating physicians, restrictions that exceeded his actual physical limitations as determined by the FCE that the Appellate Panel adopted, *in toto*, as his true restrictions.

Therefore, the person to whom Respondents' Rule 30(b)(6) designee deferred testified that a person with Appellant's maximum physical ability existing in the record (lifting a maximum of 30 pounds) would "probably not" be hired by Respondent Employer (R. p. 397), and Respondents' official testimony pursuant to Rule 30 (b)(6) regarding whether a person with Appellant's physical limitations could be employed with Respondent Employer was that it did not know. As noted

above, Appellant's work restrictions pursuant to the FCE fully adopted by the Appellate Panel included no lifting above twenty pounds. (R. p. 20). Accordingly, the record literally does not contain a piece of relevant evidence that could be reasonably construed to conclude that Appellant retains the capacity to hold employment with Respondent Employer.

C. There is no evidence Appellant can perform any other work apart from his sheltered employment with Respondent Employer

In order to determine to what extent a claimant's earning capacity outside of his contemporaneous actual employment remains "intact," it is necessary to use expert vocational evidence. *See Clark v. Phillips Electronics/Shakespeare*, 433 S.C. 186, 857 S.E.2d 378 (Ct. App. 2021). In *Clark*, the claimant and defendants each procured a vocational evaluation. The Appellate Panel's findings of fact did not discuss either vocational report in the record, and, therefore, the Court of Appeals had "no way of knowing what the Panel used to find [the claimant's] earning capacity was intact;" therefore, the holding that the claimant had the ability to earn wages merely "float[ed] on air." *Id.* at 194, 857 S.E.2d at 382. In the case at bar, the only expert vocational opinion in the record is from Adger Brown, who opines that Appellant is capable of engaging only in "modified work" and that he would be "incapable of returning to work with a new employer as a maintenance mechanic." Therefore, Appellant would be "unhireable in any other capacity" if he were to lose his job with Respondent Employer for any reason. (R. p. 237). Not only does the Appellate Panel's Order fail to account for Brown's unequivocal statement that Appellant's earning capacity was destroyed, but, unlike in *Clark* where another report at least existed and made the (uncorroborated) statement that the claimant could obtain other employment, the record in the present matter contains literally no statement from any relevant source that Appellant could compete for work in the marketplace. Indeed, the only reference in the Appellate

Panel's Order is a quotation from Brown's report that "an excellent rehabilitation outcome has been achieved in that [Appellant] is continuing to work with his same employer of about seventeen years [. . .]". (R. p. 236). This statement is indeed a factual recitation from Brown's report, but it is merely Brown's acknowledgement that he was aware that Appellant was employed by Respondent Employer and receiving a salary that exceeded his pre-injury earnings. The Appellate Panel Order completely disregards the actual vocational analysis articulated by Brown:

> That having been said [. . .] within a reasonable degree of vocational certainty [. . .] should [Appellant] lose his job for any reason, whether it be through reinjury, termination, downsizing, layoff, sale of the company, or any other reason, he would find himself unemployed and, more likely than not, totally disabled from any and all forms of work [. . .] [Appellant] would be incapable of returning to work with a new employer as a maintenance mechanic, would be unable to work as a supervisor without the ability to perform the full range of work of a maintenance mechanic, and would, more likely than not, be unhireable in any other capacity due to his age, restrictions, and functional limitations.

(R. p. 237).

Appellant's vocational value on the day of his hearing was entirely based upon his tenure with this specific employer working on a specific configuration of equipment. Ronnie Williams testified that he (Williams) performed the same physical work as every other person on the "floor" at the facility. (R. p. 394). He testified that Appellant's role also required Appellant to perform all the physical duties of any other employee on the floor. (R. p. 394 at ln. 17). The only specific evidence in the record about Appellant's value to Respondent Employer is Appellant's own testimony. He testified about what service he provided Respondent Employer in his supervisory role. He stated:

> [M]ost of the time I get the guys to do anything heavy, like if they had to ---they had to anchor racks and stuff the other day [. . .]. I usually do stuff like trouble shooting; if – if a piece of equipment is not running correctly or whatever then I'll go help out with that

> because I know a lot of the equipment that's in there, *especially the older stuff, because none of the other people in there know how to do that*.

(R. pp. 516) (emphasis added).

When asked whether his supervisors were also ignorant about the older equipment, he responded, "[y]es" and that his new supervisor had "been there about a year" and that Ronnie Williams had left the company after two or three years. (R. pp. 516-517). He continued that with regard to "the older equipment" that "I'm the only one that knows, really, how to work on that." When asked how he knew, he responded "[i]t's just eighteen (18), nineteen (19) years" of experience. (R. pp. 517). The sole reasonable inference based on the only evidence contained within the record about Appellant's value to Respondent Employer is that it hinged on his institutional knowledge of archaic machinery gained by his long tenure with the Employer.

The picture of what happened in Appellant's place of employment is clear. He was employed by a manufacturing/baking facility whose footprint was contracting, as one of its facilities had closed already. *Id*. at 502. Respondent Employer experienced demonstrably high turnover with the effect that its employees did not remain with the facility long enough to learn how to keep the old equipment running. Respondents' Rule 30(b)(6) deponent testified Appellant's direct supervisor was "on furlough" at the time of her deposition on June 9, 2020. (R. p. 368). Ronnie Williams testified that Respondent Employer had to "let [Appellant's assistant] go because of cutbacks." (R. p. 397). Appellant, after nearly two decades of experience massaging the machines into compliance, knew what no other employee there did, but this knowledge had no application outside of the continually narrowing confines of this specific employer. The fact that he provided a service that was valuable in this one narrow context does not mean that he has the "capacity" to provide vocational services outside of the walls of this employer. The record

contains literally no competent evidence that this experience with Respondent Employer can be transferred to any other employer any more than his earlier experience working in a textile mill that went out of business is transferrable to any textile mill in South Carolina—because the textile industry in South Carolina has ceased to exist. (R. p. 498). Vocationally, Appellant existed on the day of his Single Commissioner hearing as an interesting relic that necessarily must cease to have any vocational value once the old equipment he nursed no longer required the palliative care only he could provide.

Because Respondents did not present any vocational opinion, the only possible position that they could assert Appellant is able to hold based on evidence existing in the record is the position he was holding with Respondent Employer on the day of the Single Commissioner hearing, and neither the binding Rule 30(b)(6) testimony of Respondents' designated representative nor the testimony of Appellant's supervisor supports the contention that Appellant was capable of obtaining employment with Respondent Employer or, once obtained, maintaining it apart from assistance from other employees. Not only does no substantial evidence exist in the record to support the position asserted by Respondents, no evidence, *at all*, exists within the record that would allow a reasonable mind to conclude anything other than that Appellant is permanently and totally disabled under the economic model of S.C. Code Ann. § 42-9-10. Therefore, the Appellate Panel's determination is not supported by substantial evidence and is clearly erroneous in light of the only evidence in the record.

III. EVEN APART FROM THE SECTION 42-9-10 ECONOMIC MODEL OF TOTAL DISABILITY, SUBSTANTIAL EVIDENCE AT LEAST REQUIRES A FINDING THAT APPELLANT HAS SUSTAINED GREATER DISABILITY THAN FOUND BY THE APPELLATE PANEL

In light of the substantial evidence of severe vocational limitation, the disability to Appellant's spine exceeds 50%, and therefore Appellant should be found totally disabled under S.C. Code Ann. § 42-9-30 (21). At the very least, in the alternative, Appellant's scheduled member injuries clearly exceed the disability ratings found by the Appellate Panel, and, therefore, his scheduled member disability award to both his back and shoulder should be increased substantially above the Appellate Panel's permanent disability 25% award to each member pursuant to § 42-9-30. As brief reiteration, the least restrictive limits within the record would prohibit Appellant from lifting more than ten pounds overhead and more than thirty pounds *at all*. The permanent disability assigned by the Appellate Panel is inadequate to account for Appellant's actual disability.

CONCLUSION

As a matter of law, the Appellate Panel erred in not holding Appellant is permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10 and the applicable analysis under South Carolina law. Appellant is limited to work restrictions, at a maximum, that restrict him from exerting/lifting thirty pounds at all and ten pounds overhead. Based on the valid FCE performed and fully adopted by the Appellate Panel, Appellant can lift only ten pounds from waist level and only twenty pounds at any level. (R. p. 209). His only relevant work history is physically performing mechanical repairs predominately with Respondent Employer. The only vocational evidence in the record establishes that he would be unemployable at any place other than the place he was employed on the day of his Single Commissioner hearing, where a helper performed all activities he is now physically incapable of performing — the exact definition of "sheltered work" or, even without adopting the term, the definition of disability under S.C. Code Ann. § 42-9-10.

Accordingly, as a matter of law, Appellant is permanently and totally disabled based on all of the evidence in the record. In the alternative, he should be found totally disabled under S.C. Code Ann. § 42-9-30 (21) or, at a minimum, have his scheduled member disability ratings increased.

Respectfully Submitted,

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May 2, 2022

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-000090

Randall Dalton, Employee,……..…….....Appellant,

v.

The Muffin Mam, Employer,
and Amerisure Mutual Insurance Company, Inc., Carrier,…….....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,

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