THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No.: 2022-000090

Randall G. Dalton, Employee, ...Appellant,

v.

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

BRIEF OF RESPONDENTS

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II. WHETHER CLAIMANT IS NOT ENTITLED TO EITHER PERMANENT AND TOTAL DISABILITY OR AN INCREASED DISABILITY AWARD UNDER S.C. CODE § 42-9-30(21)?

STATEMENT OF THE CASE

The dispute in this case centers on the extent of permanent disability proven by Claimant Randall Dalton following an admitted work-related injury that occurred on June 25, 2017. Claimant filed a Form 50 with the South Carolina Workers' Compensation Commission on September 3, 2020, alleging compensable injuries to his neck, right shoulder, back, both hands, groin, right lower extremity, left lower extremity, and right hip, and seeking an award of permanent and total disability. (R. pp. 31-32). Respondents The Muffin Mam, Inc. ("Employer") and Amerisure Insurance Company filed a Form 51, admitting injury to Claimant's cervical spine, lumbar spine and right shoulder, but denying the other alleged body parts as well as the nature and extent of injury and any resulting disability. (R. pp. 35-36).

The parties filed Form 58 Pre-Hearing Briefs as well as APA submissions. Claimant filed multiple Form 58s, on March 29, 2021, March 30, 2021, and again on April 9, 2021. (R. pp. 225-227, 349-351, 401-410). Defendants filed their Form 58 and APA submissions on March 29, 2021. (R. pp. 39-42).

The Single Commissioner hearing took place on April 13, 2021.[1] The Single Commissioner found, among other things, that Claimant was not permanently and totally disabled, and awarded him 15% disability to his right shoulder and a combined rating for cervical and lumbar spine of 15% to his back. (Decision and Order, filed June 30, 2021, R. pp. 1-16).

Claimant appealed to the Full Commission, raising five separate issues. An Appellate Panel of the Full Commission heard argument on November 23, 2021 and issued its Decision

[1] At the hearing, there was some confusion as to whether Defendants had filed a Form 21; however, the parties agreed that the hearing was pursuant to both Appellant's Form 50 and Respondents' Form 21.

and Order on January 7, 2022. The Full Commission affirmed in part and modified in part the Single Commissioner's Findings of Fact, confirming that "the Rulings of Law are correct." (Appellate Panel Decision and Order, filed January 7, 2022, R p. 23). In particular, the Full Commission found that, at the time of his injury, Claimant had been making $54,963.36 a year; whereas, at the time of the hearing, he was being paid a salary of $72,000 a year. (Finding of Fact No. 1, R. p. 24). In addition, the Commission found that, "[b]y all accounts, including his own testimony, Claimant is a valued employee. Claimant is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam. Claimant was transferred from a former location to the new location in Laurens, South Carolina. Claimant has major lifetime restrictions of no lifting more than 10 pounds overhead, yet the employer has accommodated these restrictions over the past 3 years." (Finding of Fact No. 2, R. p. 24). Consequently, the Commission did "not find sheltered environment employment," or that "Claimant is permanently and totally disabled. Claimant is making more money now than before [the] accident." (Finding of Fact No. 3, R. p. 24).

The Commission evaluated Claimant's vocational expert's report which stated "that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (Finding of Fact No. 4, R. p. 24).

The Commission found that the restrictions recommended in Claimant's functional capacity exam ("FCE") were "reliable and an accurate representation of Claimant's permanent restrictions," (Finding of Fact No. 7, R. p. 25); however, the Commission did not adopt those as Claimant's permanent restrictions over those imposed by his treating physicians. In fact, the Commission specifically gave "greater weight to the two authorized treating physicians at Carolina Ortho and Neurosurgical Associates, Dr. Hoenig and Dr. Behr." (Finding of Fact No. 11, R. pp. 25-26). Dr. Hoenig assigned Claimant an 8% impairment to the right shoulder, and Dr. Behr assigned an impairment rating of 4% to the cervical spine and 8% to the lumbar spine. (Finding of Fact Nos. 8, 9, R. p. 26). Consequently, the Commission found that Claimant had sustained a 25% disability to his right shoulder and "a combined rating for cervical and lumbar spine of 25% to his back." (Finding of Fact No. 12, R. p. 26).

The Commission concluded as a matter of law that Claimant failed to meet his burden of proving he is permanently and totally disabled under either S.C. Code Ann. §§ 42-9-10 or 42-9-30. (Conclusions of Law Nos. 9, 10, R. p. 26). In addition, the Commission found that "Claimant has not met his burden of proof required to establish sheltered employment and entitlement to an award for permanent disability under Peoples v. Cone Mills Corporation 342 S.E.2d 798 (N.C. 1986) and other cited case law. We find the facts of this claim to be significantly different with the facts at issue in Peoples, and therefore the case law is inapplicable." (Conclusion of Law No. 11, R. pp. 26-27). The Commission awarded Claimant permanent partial disability of 25% to the right shoulder and 25% to the spine, (Conclusion of Law No. 15, R. p. 27), totaling $105,723.00 to be paid in a lump sum. (Commission Decision p. 12, R. p. 27).

Claimant timely appealed to this Court.

BACKGROUND FACTS

A. Relevant Lay Testimony.

Claimant suffered work related injuries to his cervical and lumbar spine and right shoulder on June 25, 2017. (R. pp. 31-32). Claimant testified that he slipped on some steps and landed on his right side, injuring his right shoulder and spine. (R. p. 503, line 18 – p. 504, line 20).

Following the injury, he received treatment for his right shoulder and his back. Specifically, Dr. Hoenig treated his right shoulder and Dr. Lim initially treated his spine and then referred him to Dr. Behr. (R. p. 504, line 21 – p. 505, line 11).

Claimant testified that, at the time of the hearing, he was 61 years old. (R. p. 484, lines 20-25). He testified that he had finished the 12th grade and had taken some technical college courses in auto mechanics and industrial electronics, but had not obtained a certificate. (R. p. 485, lines 1-8). He has no problem reading or writing and uses a computer program called CAMS for work for preventive maintenance tasks. (R. p. 485, lines 9-11; p. 486, lines 6-25). On cross-examination, Claimant testified that he also took some accounting at Limestone College but he did not think he received a certificate. (R. p. 531, lines 18-24). He also acknowledged that, "as far as a certificate, I may have got one when I worked at GE but that was through my work when they sent me to switch gear school …. And I went and taken balancing for them …. That's the only two (2) certificates I remember but that was through work, that wasn't through a—through education or anything." He explained that, prior to working for GE, he did not know how to do switch gear work but was able to learn it. (R. p. 532, line 1 – p. 533, line 7). Claimant also is certified to drive a forklift. (R. p. 536, lines 3-6).

Claimant testified that he had worked for Employer for almost 19 years. (R. p. 488, lines 19-24). His current position is Maintenance Supervisor, a position he had held for about a year at the time of the hearing. (R. p. 488, line 25 – p. 489, line 3). Previously, Claimant had worked for Employer as a Maintenance Tech. (R. p. 489, line 19 – p. 490, line 4). As Maintenance Supervisor, Claimant testified that his job entails, "[b]asically, being over the people, I mean, making sure that they're doing what they're supposed to be doing but I still do a lot of the same stuff I was doing before as far as, you know, looking at a—the equipment or something," working on the floor and "fixing stuff." (R. p. 490, lines 5-17).

After describing the various pieces of equipment he is responsible for maintaining, (R. p. 491, line 1 – p. 492, line 2), Claimant was asked:

> Q: So, how much—how much weight do you have to lift to be able to work on these machines?
>
> A: Well, they're mostly—you don't have to lift any weight because they're on wheels or whatever.
>
> Q: Okay. How much pushing or pulling do you have to do?
>
> A: That's a pretty good bit, I mean, if you have to set the line up you have to push the stuff into—in the line like they conveyors or the depositors or the grease machine …"

(R. p. 492, lines 14-23). Claimant then explained that pushing this equipment required "a pretty good bit of pressure," and that "[m]ost of this stuff can be pushed with a couple of people," which is what is normally required. (R. p. 493, lines 5-21).

Claimant explained that he does not "do a lot [of] overhead work," but that "[m]aybe sometimes" he would have to "torque nuts or something like that," which requires more than 10 pounds of pressure.[2]

> Q: So, do you have people who do things—do the physical things—do any of these physical things for you?
>
> A: They do … If it's too heavy or something that I'm not comfortable doing or stuff like that, then I'll get somebody to do that."

(R. p. 493, line 22 – p. 494, line 21). He also testified that he works on equipment that is low on the floor, "and that's pretty strenuous." (R. p. 496, lines 8-15).

Claimant testified that Employer was accommodating his lifting restrictions: "Well, they—like if I need help and stuff like that. I try not to lift anything heavy or anything like that …. But I do a lot more walking now since we—since they shut down the other facility. So, I don't really get to—to sit down like I did before." (R. p. 501, line 16 – p. 502, line 7). Claimant testified that he works nine-hour shifts, "[b]ecause they put me on salary." (R. p. 502, lines 19-24). Claimant testified that he gets to work at 6:00 a.m., describing the basic duties of his supervisor role, checking with his staff and making "sure everything is set up" and planning what needs to be done that day. (R. p. 515, lines 2-25). Claimant explained that he will "get the guys to do anything heavy" and that "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 old stuff, because none of the other people in

[2] Although Claimant's counsel, upon questioning from Commissioner Wilkerson, represented that "the physician's restrictions are—technically say lifting but if you look in detail at the FCE it's—it's pressure that he—how much pressure he can exert is basically comparable to how much weight he can lift." (R. p. 495, lines 6-22). However, Claimant's counsel is not an expert in this case and his explication carries no evidentiary weight. Argument of counsel is not evidence. *See, e.g.*, *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

there know how to do that." (R. p. 516, lines 1-14). He acknowledged that he does have to do some of the physical work himself, within his restrictions, which Employer has "been pretty good about doing that." (R. p. 518, lines 9-22).

Claimant testified that he felt like he "deserve[d]" his salary of $72,000 and that "I probably deserve more than that …. I bring a lot of value, in my own opinion." He agreed that he is able to contribute to the work. (R. p. 531, lines 3-17). Claimant testified that, when Employer shut down one facility, they moved him to the new facility. (R. p. 538, lines 1-7).

Claimant testified that, currently, he does not "do anything over ten (10) pounds over my head at all with" his right shoulder, "[a]nd I try not to lift anything on this side. I've become a lot stronger on my left side because I favor my left side." (R. p. 507, lines 12-19).

With respect to his cervical spine, Claimant testified that his "neck gets seized up" sometimes. Because he needs a doctor's excuse to be out of work, his family doctor, Dr. Fuson, wrote him an out of work note. Claimant acknowledged that he has had no surgery on either his neck or his low back. (R. p. 509, lines 2-23; p. 513, lines 2-5).

Claimant testified that his lower back hurts him the most, with the worst being "probably getting on the floor, having to get down low and—and pushing the heavy equipment." (R. p. 512, lines 11-18). However, Claimant testified that he could mow his lawn if he chose to do so. (R. p. 539, lines 1-25). He also "vaccum[s] a little bit" although his wife does most of the housework. (R. p. 540, lines 6-9). The only non-work activity Claimant testified he could no longer perform was that he could not throw a baseball now. (R. p. 507, line 23 – p. 508, line 3).

Prior to working for Employer, Claimant held a maintenance position at another bakery, Goglanian Bakery, for three years which involved similar tasks but different machinery. He had to "relearn how to work on the equipment from that job to the Muffin Mam job." (R. p. 496, line

23 – p. 497, line 16). Prior to that, he worked wiring control panels for Sew Simple, which made equipment for the textile industry. He left that position before the company went out of business. Claimant testified that he did not believe he could do that position again, not because of physical limitations, but because he "couldn't remember how to do that, I mean, I was trained doing that." (R. p. 498, lines 1-23). Prior to that, he worked at a GE Service Center, which "work was very heavy and strenuous," heavier duty than his maintenance job. (R. p. 500, line 19 – p. 501, line 12).

On June 9, 2020, Terri Jermon was deposed as the Rule 30(b)(6) representative of Employer. She testified that she has been with Employer from 1998 to the present, and served as the workers' compensation coordinator until sometime in late 2019. (R. p. 363, lines 8-9; p. 364, line 8 – p. 365, line 1). Ms. Jermon explained that Employer is "a commercial bakery. We're a wholesale bakery." As for a maintenance technician, she explained that position involved, "[a]nything to do with mechanical operations here in the plant, whether it be repairing machinery, building new machinery in some cases, troubleshooting. I know he does a lot of the welding, or he used to do a lot of the welding work and things like that in the maintenance shop. Pretty much anything to do to keep the building running." (R. p. 366, lines 3-16).

When Claimant's counsel queried her as to the lifting requirements for a maintenance technician, Ms. Jermon responded: "I don't know if there's actually a lot of heavy lifting. If there's going to be something substantial to lift, more than one person would do it. That's a policy we have with anything—anything here. But normally I don't think anybody would be expected to pick up more than, you know, 30 pounds by themselves. When he started having his restrictions, we dialed that down, what he was able to lift. And as far as I know, there's never been any problem with that." (R. p. 367, lines 11-24). When asked about Claimant's

restrictions, Ms. Jermon testified that, "if it was something that was beyond his restrictions, either someone else would be assigned to that duty or someone else would assist him …. We've been able to accommodate his restrictions. I don't think there's ever been any problem with that." (R. p. 368, lines 5-19).[3] Claimant's counsel asked Ms. Jermon whether Claimant would be hired as a maintenance technician with his current restrictions. Although Ms. Jermon stated that she was not sure she could answer that question, as she is not in the maintenance department, she testified, "I don't believe that there's ever been any real issue. I don't know that I can answer that question as far as if he had just walked off the street. But with his qualifications that he's had for a long time, I think he probably would have been hired …. He's been able to handle pretty much anything that's needed to be done." (R. p. 369, lines 3-24). Ms. Jermon referred Claimant's counsel to Claimant's current supervisor, Ronnie Williams, who "could probably answer those same questions." (R. p. 370, lines 17-19).

Mr. Williams was deposed on October 6, 2020. He testified that he was hired by Employer as engineering manager but at the time of his deposition was the director of engineering. (R. p. 389, lines 5-12).[4] He was asked:

> Q: Okay. So in operating or working on those larger pieces of equipment, would the maintenance tech generally be required to do work that—reaching over his head to work on those pieces of equipment?

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[3] Ms. Jermon also noted that Mark Warner, Claimant's direct supervisor, was on furlough at the time of her deposition, (R. p. 368, lines 20 – p. 369, line 2), which Claimant asserts is evidence that Employer's "footprint was contracting." (App. Br. p. 17). However, furloughs were not unusual during the height of the first wave of Covid 19. https://www.cnbc.com/2020/04/03/what-happens-if-youre-furloughed-during-the-coronavirus-pandemic.html

[4] Prior to working for Employer, Mr. Williams worked for another bakery, Highland Baking Company. (R. p. 389, lines 16-21). Similar to Claimant, Mr. Williams has a high school diploma, earned through the GED program, and then work experience but no licenses or certifications specific to engineering. (R. p. 390, line 17 – p. 391, line 2).

A: Yes. That's highly possible, yes.

Q: And would the maintenance technician be required to exert more than 30 pounds of force when working on that equipment?

A: I wouldn't say so.

Q: Okay. So how heavy is the—are the pieces of equipment that the maintenance tech would generally be required to move?

A: Most of them be 5, 10, 15 maybe 25 pounds. Anything heavier than that, they'll use a lift or a forklift.

(R. p. 393, lines 1-16).

Mr. Williams testified that Claimant was "kind of holding two [job titles]. He's doing maintenance supervisory work, taking care of paperwork and what have you. Maintenance schedule, and he's also my lead fabricator for—he helps do project work, building conveyors and machinery, welding, such as that." Claimant's time is split "[p]robably 50/50" between the two roles. Mr. Williams agreed that Claimant "is … required physically to do all of the same duties that a regular maintenance tech would do." (R. p. 394, lines 6-22; p. 397, lines 20-24). Mr. Williams also testified that any restrictions put on Claimant would have been "before I got here. Since I have been here, he's done everything on his own. There's no—been no really any restrictions put on him as far as I know. He performs his functions just as well as anyone else here." (R. p. 395, lines 7-17).

When asked whether they would hire a maintenance technician who could not do any overhead work, Mr. Williams first explained that in the job Claimant currently performs, in "the fabricating position yes, because there's really no overhead work involved in it. You know, it's all waist level of constructing them and doing the fitting …. There is really nothing here where he has to lift anything other than his hands over his head."

Q: All right. So if the restriction was that he couldn't lift his hands over his head to tighten a bolt or something like that, then—

A: Right. Then I have—I would not hire that person, no.

Q: Okay.

A: If they couldn't use their hands above their head.

(R. p. 396, lines 1-24). Mr. Williams clarified that a maintenance technician has "to be able to put their hands above their head. Not necessarily lift anything, but they got to be able to reach up." However, he also agreed that he would hire someone who "was fully able to lift their hands above their head," even where "[t]heir restriction was just they could not lift more than 10 pounds above their head." (R. p. 398, line 13 – p. 399, line 3).

Claimant's counsel also asked Mr. Williams whether he would hire a person "who had a restriction of never exerting more than 30 pounds of force." Mr. Williams first responded, "[p]robably not," but then went on to explain, "[i]f he couldn't do that with both arms, yea. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do." (R. p. 396, line 25 – p. 397, line 11).

B. Relevant Medical and Expert Evidence.

Dr. Hoenig, who performed a right shoulder scope with biceps tenotomy, decompression, distal clavicle resection, and rotator cuff repair on Claimant's right shoulder on February 14, 2018, (R. pp. 72-73), determined that Claimant reached maximum medical improvement ("MMI") on June 18, 2018. Dr. Hoenig assigned Claimant permanent restrictions of "no lifting more than 10 pounds up overhead," and assigned an 8% impairment rating to the right shoulder. (R. pp. 161-162). On June 26, 2018, Dr. Hoenig completed a Form 14B stating the same restriction and impairment rating. (R. p. 164).

Claimant returned to Dr. Hoenig on December 26, 2018 for a follow up on the right shoulder. Dr. Hoenig noted that "[w]hile doing an FCE as ordered by Dr Lim he had an increase of pain in his right shoulder. This FCE was done on 11/14/2018." (R, pp. 181-184). When Claimant returned to Dr. Hoenig on January 16, 2019, he was again released at MMI with "[n]o change to his previous restrictions of 14B otherwise." (R. pp. 185-187).

Dr. Behr released Claimant at MMI for both the cervical and lumbar spine on November 7, 2018, with a recommendation for pain management for at least two years. (R. pp. 175-179). On November 20, 2018, Dr. Behr completed a Form 14B assigning permanent lifting restrictions of nothing over 30 pounds, and assigning impairment ratings of 4% to the cervical spine and 8% to the lumbar spine. (R. p. 180).

Claimant saw his family doctor, Dr. Fuson, on October 12, 2020, complaining of neck and back pain. The visit lasted 15 minutes. Dr. Fuson noted that Claimant was doing much better and was "[h]aving only mild pain and is ready to resume work. Thus he will return with caveat to do no lifting greater than 10 lbs. Will recheck in 1 month." (R. pp. 194-200).

Claimant underwent another FCE on December 16, 2020. He was "referred for FCE to determine 'general abilities.'" The general results of the Physical Abilities Assessment in that FCE are as follows:

Material Handling:

Floor to Waist	20lbs
Lift—Waist to Shld	10lbs
Lift—12-inch to Waist	20lbs
Lift—Shoulder to Overhead	7lbs
Carry—Bimanual	20lbs
Push (static)	60lbs
Pull (static)	35lbs

(R. pp. 207-209). With regard to the noted limitations of lifting from floor to waist and from 12 inches to waist being only 20 pounds, the FCE notes indicate that "Client attempted to lift 25 lbs, but was unable to lift to waist height. His R. knee buckled during lift." (R. p. 214).

Claimant was sent by his counsel to J. Adger Brown, Jr. for a vocational evaluation, which took place on April 13, 2020.[5] Mr. Brown issued his report on April 19, 2020. Mr. Brown noted that Claimant currently was "working as a maintenance mechanic supervisor with Muffin Mam; and the question has been posed as to Mr. Dalton's future should he, for some reason, be unable to continue in his present employment." (R. p. 230).[6] Mr. Brown noted that, following his work accident, Claimant was out of work for only a week, after which he began medical treatment and was "transitioned into doing more office work and occasionally some maintenance work on the factory floor following the shoulder surgery performed by Dr. Hoenig. At that point, he started ordering parts, checking parts in and out of storage, and performing other related paperwork. By April or May, 2019, Mr. Dalton states he was made a maintenance supervisor at the Simpsonville plant where he continued doing clerical work and some maintenance and repair on the floor including building conveyor systems." Claimant informed Mr. Brown that "his work in the office was fairly sedentary," and when he did "go on the floor," he was advising other employees "and performing minimal physical activities generally in the lifting and handling range of 10-20 pounds. He states that on a rare to occasional basis, he did more physically demanding work, including welding and assembling when there was no one else available to do the work, or in the case of welding, as no one else knew how to do the welding

[5] The interview took place via telephone, due to concerns over the corona virus, while Claimant was at work. (R. pp. 235-236).

[6] Mr. Brown noted that his report was based on various medical records and "a functional capacity evaluation completed November 15, 2018." (R. p. 230). There is no November 15, 2018 FCE in this record.

that was required." After he was promoted to Maintenance Supervisor, Claimant continued spending about 50% of his time in the office and 50% of his time on the floor, "most commonly at the light level of exertion, but occasionally performing more demanding physical duties on a short-term basis when other staff is not available." (R. pp. 234-235).

Among other things, Mr. Brown concluded that "[f]rom a vocational standpoint, it is my opinion that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (R. p. 236).

Without inquiring into Claimant's work history beyond his position with Employer, and only taking into account Claimant's high school and technical college courses,[7] Mr. Brown also concluded that, should Claimant lose his job for any reason "he would find himself unemployed and, more likely than not, totally disabled from any and all forms of work." Specifically, Mr. Brown concluded that Claimant "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." Mr. Brown concluded that "any and all reasonable efforts [should] be extended to maintain Mr.

[7] In particular, Mr. Brown's report indicates he was unaware of the two certificates Claimant earned while working for GE, the accounting classes Claimant took, or of any of his prior employment history. (R. pp. 234-235).

Dalton in his present position, as he appears to be performing valuable work for his employer." (R. p. 237).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2016). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder. [citation omitted] The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Factual determinations by the Commission must be upheld on review unless unsupported by substantial evidence." *Curiel v. Env't Mgmt. Servs.*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Prod., Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. *Anderson v. Baptist*

Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See Pack v. South Carolina Dept. of Transp.*, 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted").

This deferential standard of review is not discarded in cases of statutory interpretation. Rather, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Transportation Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010) [citation omitted].

ARGUMENT

I. The Commission correctly found that Claimant failed to meet his burden of proving he is entitled to permanent and total disability under S.C. Code Ann. § 42-9-10.

At the outset, Claimant appears unable to decide whether this case presents a novel legal issue which this Court can decide *de novo*, or whether his position is aligned with and supported by existing South Carolina legal precedent. On one hand, he suggests that this case presents a "novel question[] of law," (App. Br. p. 4), asserting that "[t]his 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 'make work.'" (App. Br. p. 2). On the other hand, he argues South Carolina law "already parallels the sheltered work paradigm," (App. Br. p. 9), arguing that "South Carolina law recognizes that a worker can be nominally employed but still be permanently and totally disabled (i.e., sheltered employment)."

(App. Br. p. 5, *see also* p. 9). Thus, Claimant vacillates between arguing this case should be governed by a novel concept, *i.e.*, the sheltered employment doctrine as applied by North Carolina courts, and arguing that South Carolina already recognizes and applies the sheltered employment doctrine.

Factually, this case simply does not present a "sheltered employment," "make work" or "nominal employment" issue. Claimant's discussion of the doctrine, and his overly-dramatic and flamboyant descriptions of Employer's machinery as "archaic," its employee turnover as "demonstrably high," the value of Claimant's knowledge having "no application outside of the continually narrowing confines of this specific employer," whose "footprint" was purportedly "contracting,"[8] and of Claimant as little more than "an interesting relic" whose value "necessarily must cease to have any vocational value once the old equipment he nursed no longer required the palliative care only he could provide," (App. Br. pp. 17-18), are little more than an attempt to distract this Court from the fact that the Commission Decision is supported by substantial evidence and fully in conformance with precedent evaluating and applying the definition of disability in S.C. Code Ann. §§ 42-1-120, 42-9-10 and 42-9-30(21).

A. Even if this Court were to follow the North Carolina case of *Peoples v. Cone Mills*, this case does not involve "sheltered employment" or a "make work" position.

Although Claimant would have this Court look—uncritically it seems—to North Carolina courts' adoption and application of the so-called "sheltered employment" doctrine, no South Carolina appellate court has done so thus far. And, despite the fact that *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (N.C. 1986) was decided over 35 years ago, no South

[8] Commercial bakeries, unlike the textile industry in South Carolina, do not appear to be "contracting," even though many employers found their usual markets disrupted during the Covid19 epidemic. *See* https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/

Carolina appellate court has ever adopted the ruling in or even cited to *Peoples*.[9] Even if South Carolina jurisprudence were inclined to adopt the so-called "sheltered employment" doctrine, however, this would not be the case in which to do so.

In *Peoples*, the injured employee, who had only a 5th grade education, "was continually exposed to cotton dust and lint" in his job with Cone Mills. After the employee was diagnosed with chronic obstructive pulmonary disease with a byssinosis component, Cone Mills first transferred him to the supply room. However, that position required "bending, lifting, reaching and walking," and still exposed him to dust from the facility. The employer "modified an existing third shift supply room position and offered it" to the employee, although the position offered the employee "has never existed before" with the employer. In the specially-created role, the employee was not required to "lift *any* object," but instead, the person coming to the supply room would retrieve the requested part. The employee did "not have to engage in any physical activity of which he does not feel capable. He will work only the number of hours he desires and will not be required to work if he does not feel like doing so." 316 N.C. at 429-430, 342 S.E.2d at 801; *see also id.* at 438-439, 342 S.E.2d at 806 (noting that the "defendant is willing to pay him the same salary in the supply room job that he was earning as a supervisor without regard for whether he comes to work, how long he stays, and how much he does while he is there")).

Here, in contrast, Claimant has a high school diploma, (R. p. 485, lines 24-25), and has taken courses at the community college level and uses a computer program called CAMS for work. (R. p. 486, lines 1-11). He also took some accounting classes at Limestone and obtained certificates in balancing and switch gear work when he worked for GE. (R. p. 531, line 18 – p.

[9] As the Supreme Court explained in *Wigfall v. Tideland Utils.*, 354 S.C. 100, 114-115, 580 S.E.2d 100, 107 (2003), South Carolina courts are not bound to and do not always follow North Carolina workers' compensation precedent.

533, line 7). Claimant also is certified to drive a forklift. (R. p. 536, lines 3-6). He has been promoted to a supervisory position in which he plans and oversees preventive and other maintenance work. In addition, he does some of the physical maintenance work himself. (R. p. 518, lines 9-11; *see also* R. p. 490, lines 5-17 (Claimant testifying "I still do a lot of the same stuff I was doing before as far as, you know, looking at a—the equipment or something," working on the floor and "fixing stuff")). Claimant testified that he "deserve[d]" his salary of $72,000 and that "I probably deserve more than that …. I bring a lot of value, in my own opinion." He agreed that he is able to contribute to the work. (R. p. 531, lines 3-17). He testified that he works nine-hour shifts. (R. p. 502, lines 19-24). Ms. Jermon testified that Claimant has "been able to handle pretty much anything that's needed to be done." (R. p. 369, lines 23-24). Mr. Williams testified that, as far as he could tell, Claimant has "done everything on his own. There's no—been no really any restrictions put on him as far as I know. He performs his functions just as well as anyone else here." (R. p. 395, lines 12-17; *see also* R. p. 394, lines 14-17 (Mr. Williams testifying that Claimant "is … required physically to do all of the same duties that a regular maintenance tech would do")). Even Claimant's vocational expert opined that "an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (R. p. 236). Mr. Brown concluded that Claimant "appears to be performing valuable work for his employer." (R. p. 237).

In *Peoples*, the testimony uniformly showed that there was no "job on the market today similar to that job with the same pay scale" but, instead, it was "a tailored, engineered type of job," that had been "designed specifically for" the employee. 316 N.C. at 431-432, 342 S.E.2d at 802. Moreover, Cone Mills' personnel manager testified that, not only was the position created "especially for" the employee, but "no person other than [the employee] would be hired to work in the supply room at the wages he was offered, and there was "no position at Cone other than the modified supply room job which" the employee could fill. 316 N.C. at 429-430, 342 S.E.2d at 801. Here, in contrast, and despite Claimant's attempts to distort his testimony, Mr. Williams said he would hire someone as a maintenance technician who had restrictions of lifting no more than 10 pounds overhead and lifting no more than 30 pounds waist high, so long as he could do the work. (R. p. 396, lines 1 – p. 397, line 11; R. p. 398, line 13 – p. 399, line 3).

The North Carolina Supreme Court discussed prior cases that "explained why post-injury earnings of an employee *may under some conditions* not accurately reflect the employee's earning capacity." *Peoples*, 316 N.C. at 435-436, 342 S.E.2d at 804-805 (emphasis added). And, while the Court recognized that "post-accident earnings are not the *conclusive* measure of earning capacity," 316 N.C. at 436, 342 S.E.2d at 805 (emphasis added), the fact that a position has been modified somewhat in order to accommodate a valued employee's restrictions does not discount those earnings entirely either. Citing Professor Larson, and based on the facts before it, the North Carolina Court explained that earning capacity cannot be determined "by the largess of a particular employer," and that:

> 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.'

316 N.C. at 438, 342 S.E.2d at 806, *quoting* 2 A. Larson, *The Law of Workmen's Compensation* § 57.34 (1983). Claimant relies on this passage from Larson as well, claiming, erroneously, that "the hallmark of the 'sheltered work' or 'make work' doctrine is that disability must be analyzed without reference to income …" (App. Br. p. 8-9).

Claimant's reliance on Larson's discussion of the sheltered work doctrine is misplaced and is based on an incomplete analysis of Professor Larson's treatment of the concept of earning capacity. The section of Larson that discusses post-injury earning capacity begins with a general discussion of that concept, explaining that "actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity." 2 Larson's Workers' Compensation Law § 81.01[4] (2021). In particular, "[i]f the employee, as often happens, returns to his or her former work for the same employer after the injury, or is offered it, at a wage at least as high as before, there is a presumption against loss of earning capacity. The presumption may be overcome." 2 Larson's Workers' Compensation Law § 81.02[3]. The discussion of "sheltered employment" adopted by North Carolina currently can be found in 2 Larson's Workers' Compensation Law § 81.06, entitled "Discounting Employer's Sympathy," and refers to one of the ways in which the presumption "that actual post-injury earnings" reflect post-injury earning capacity can be rebutted. Showing that an injured worker is retained solely out of sympathy or out of the employer's "largess," or demonstrating that a position is "made work" or "sheltered employment," is simply one way of rebutting this presumption.

Here, Claimant failed to rebut the presumption that his post-injury wages demonstrate that he is not permanently and totally disabled. This is because substantial evidence supports the Commission's finding that, "[b]y all accounts, including his own testimony, Claimant is a valued employee" and that he "is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam," that he "is performing legitimate work of value to his employer," and "is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light." (*See* R. p. 490, lines 5-17; p. 516, lines 1-14; p. 518, lines 9-11; p. 531, lines 3-17; R. pp. 236, 237; R. p. 394, lines 6-22; p. 397, lines 20-24). This evidence, in turn, supports the Commission's conclusion that it did "not find sheltered environment employment," (Commission Decision, R. pp. 24-25), which should be affirmed. Claimant's arguments regarding sheltered employment, even if this Court were to adopt that doctrine, fail and the Commission Decision should be affirmed.

Because Claimant's position with Employer is not "sheltered employment," or "made work," his argument that he lacks any earning capacity because he might not be able to find other employment, "if he were to lose his job with Respondent Employer for any reason," (App. Br. p. 15), fails. As Professor Larson explained, "[i]f the claimant's earnings in post-injury employment are sufficiently regular and continuous to establish true earning capacity, the claimant cannot assert disability based on the uncertainty of future continuance of employment opportunities in that field. The claimant must take his or her chances on economic unemployment like anyone else." 2 Larson's Workers' Compensation Law § 81.07.

B. South Carolina case law does not support Claimant's position.

South Carolina case law relied on by Claimant does not support his position that he has met his burden of proving that he is permanently and totally disabled. For example, *Wynn v.*

Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961), involved an employee who suffered a work-related heart attack. After he recuperated, he was only able to work an hour and a half a day, doing no work and not exerting himself at all for only a couple of months, after which he testified he was advised by his doctors to resign and not work anymore. The Commission found that the claimant was permanently and totally disabled. 238 S.C. at 7-8, 118 S.E.2d at 815-816. The Supreme Court disagreed, however, explaining that "the finding of total disability here cannot stand" because the claimant's argument that, following his injury "he has not been able to do any work is belied by the agreed statement in the transcript that he 'began a limited return to his work … on an ever-increasing basis,'" and statements by his physicians that he was "able to work if he will avoid undue physical or mental strain." 238 S.C. at 12-13, 118 S.E.2d at 818. Here, substantial evidence demonstrates that, not only has Claimant worked consistently and meaningfully for Employer, he continues to do so at a salary reflecting his promotion to a supervisory position.

In contrast, in *Stephenson v Rice Servs.*, 323 S.C. 113, 473 S.E.2d 699 (1996), although the claimant worked for the employer as an army mess hall supervisor, and also held a second job pumping gas and sweeping at a local gas station, his employment history showed sporadic periods of employment interspersed with periods of hospitalizations for PTSD. In rejecting this Court's conclusion that, because the claimant "was actually earning money before his injury, he clearly couldn't have been totally disabled prior to his injury," the Supreme Court based its decision on what it noted were "the unusual facts" of that case. 323 S.C. at 115, 473 S.E.2d at 700. While it is true that "the mere fact of employment is not always indicative of earning capacity," 323 S.C. at 119, 473 S.E.2d at 702, as noted by Professor Larson, that fact creates a rebuttable presumption of earning capacity. 2 Larson's Workers' Compensation Law § 81.01[4].

In *Stephenson*, the employer successfully rebutted the presumption by producing substantial evidence that the claimant was "basically unemployable" prior to his workplace accident, consisting of evidence that he "could function only within certain civilian jobs in a military setting," that he "was incapable of holding jobs for any length of time," and had only worked for the employer for a few months. 323 S.C. at 121, 473 S.E.2d at 703. Here, in contrast, Claimant has not rebutted the presumption but, at best, presented some conflicting evidence. As the Supreme Court reiterated in *Wynn*, however, appellate courts are not "the triers of the facts," and "[r]egardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive." 238 S.C. at 12, 118 S.E.2d at 818

Claimant also relies on *Colvin v. E.I. Du Pont De Nemours Co.*, 227 S.C. 465, 88 S.E.2d 581 (1955); however, the facts of that case are meaningfully distinguishable from this case. There, the claimant had limited education and was unskilled. He had only worked as a manual laborer such that his permanent restrictions of lifting no more than 15 pounds rendered him unemployable as a common laborer, "and he is not qualified by training or experience for any other." *Id.*

In addition, and contrary to Claimant's assertions otherwise, his position with Employer at the time of the Single Commissioner hearing is not "nominal employment" or "made work." Despite Claimant's attempts to fabricate more limited restrictions than those imposed by his treating physicians, substantial evidence supports the Commission's conclusion that Claimant is able to perform his job with modifications and his work, even as thus modified, provides significant value to Employer.

Claimant points to Dr. Fuson's October 12, 2020 note as evidence that his permanent lifting restriction is really 10 pounds, not 30 pounds. However, Dr. Fuson's note indicates

Claimant was doing much better and was "[h]aving only mild pain and is ready to resume work. Thus he will return with caveat to do no lifting greater than 10 lbs. *Will recheck in 1 month*." (R. pp. 194-200) (emphasis added). The fact that Dr. Fuson planned to see Claimant again for a recheck in one month indicates that the 10 pound lifting restriction was never intended to be a permanent restriction. Even if that were not the case, Dr. Fuson's restriction conflicts with that of Dr. Behr and it is the Commission's role to resolve conflicts in the evidence. *Anderson*, 343 S.C. at 492-93, 541 S.E.2d at 528; *Wynn*, 238 S.C. at 12, 118 S.E.2d at 818.

Claimant also points to the FCE in his argument that he cannot even lift 30 pounds. However, while the FCE notes that "Client attempted to lift 25 lbs, but was unable to lift to waist height," it also explains that "[h]is R. knee buckled during lift." (R. p. 214). Thus, the buckling of Claimant's right knee, which is not a compensable body part, is what limited his lifting, not either of his compensable injuries. Further, although the Commission expressed its opinion that the FCE was "reliable and an accurate *representation* of Claimant's permanent restrictions," (Finding of Fact No. 7, R. p. 25) (emphasis added), as noted above, the Commission did not adopt those as Claimant's permanent restrictions over the restrictions imposed by his treating physicians. Regardless, the Commission's conclusions regarding Claimant's ability to perform his job in a way that is of value to Employer is uncontroverted by any evidence in the record. (R. p. 531, lines 3-17; R. p. 236, 237). The only reasonable conclusion that can be drawn from this evidence is that Claimant's position with Employer is not "nominal" or "sheltered" employment, nor is it "made work."

Furthermore, there is no evidence that Claimant's lifting restriction of no more than 10 pounds overhead affects his job in any significant manner. While Mr. Williams testified that he would not hire someone who could not lift his hands over his head at all, he also explained that

"[t]here is really nothing here where he has to lift anything other than his hands over his head." (R. p. 396, lines 1-24). Mr. Williams also agreed that he would hire someone who "was fully able to lift their hands above their head," even where "[t]heir restriction was just they could not lift more than 10 pounds above their head." (R. p. 398, line 13 – p. 399, line 3).

C. Claimant's purported two-part analysis is not the law in South Carolina.

Claimant proposes a two-step analysis that he insists must be applied to determine whether he is permanently and totally disabled, to the exclusion of all other evidence to the contrary. Under Claimant's proposed analysis, the Commission is to look at an injured worker's permanent restrictions and then determine what jobs he or she could be hired to perform, without any regard for the fact that the worker continues to work for his employer in a skilled and highly valued position. (App. Br. pp. 10-15). Not surprisingly, he can point to no South Carolina case adopting or applying his two-part test.

Furthermore, Claimant's argument that there is no evidence that he could compete for any other job because Employer responded to his document subpoena for the Rule 30(b)(6) deposition with only two documents is, at best, highly misleading. His litigation-style tactic of asking Employer to produce documents reflecting job opportunities "in the State of South Carolina" that are open to applicants with Claimant's specific lifting requirements is nothing more than an attempt to play "gotcha." It should be surprising to no one that Employer did not have any documents responsive to Claimant's highly case-specific questions.

Claimant then cites isolated responses from both Ms. Jermon and Mr. Williams in an attempt to distort their actual answers. Claimant suggests that, as Employer's Rule 30(b)(6) witness, Ms. Jermon's inability to answer the question of whether Employer would hire someone as a maintenance technician with Claimant's current restrictions is proof that he would be

unemployable. Her testimony is proof of no such thing. Although Ms. Jermon stated that she was not sure she could answer that question, as she is not in the maintenance department, she testified, "I don't believe that there's ever been any real issue. I don't know that I can answer that question as far as if he had just walked off the street. But with his qualifications that he's had for a long time, I think he probably would have been hired …. He's been able to handle pretty much anything that's needed to be done." (R. p. 369, lines 3-24). Ms. Jermon referred Claimant's counsel to Claimant's current supervisor, Mr. Williams, who "could probably answer those same questions." (R. p. 370, lines 17-19).

Claimant then misleadingly quotes only part of Mr. Williams' response to the question of whether he would hire someone off the street "who had a restriction of never exerting more than 30 pounds of force." Mr. Williams first responded, "[p]robably not," but then went on to explain, "[i]f he couldn't do that with both arms, yea. Now, I wouldn't disqualify a guy with one arm as long as he could do what he needed to do." (R. p. 396, line 25 – p. 397, line 11). In other words, so long as a worker could exert 30 pounds of force, whether with one arm or using both arms, he would be hired. Moreover, as noted above, although Mr. Williams testified that he would not hire a maintenance technician who could not lift their hands over their head, he would hire someone with a 10 pound overhead lifting restriction. (R. p. 398, line 13 – p. 399, line 3). Thus, neither Ms. Jermon nor Mr. Williams testified that Claimant's restrictions "would prohibit [his] employment," as is suggested by Claimant. (App. Br. p. 14). In short, the only way Claimant can conclude that "the record literally does not contain a piece of relevant evidence that could be reasonably construed to conclude that [Claimant] retains the capacity to hold employment with Respondent Employer," (App. Br. p. 15), is by narrowly focusing on isolated extracts of testimony and evidence, and misconstruing or ignoring any evidence that is not

favorable to his theory of the case. That is the very opposite of substantial evidence. *E.g.*, *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618 (substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action).

D. Claimant's assertion that expert vocational evidence is required in every case to determine whether an injured worker is permanently and totally disabled is incorrect and unsupported by any authority.

Claimant incorrectly asserts that this Court's opinion in *Clark v. Phillips Electronics/Shakespeare*, 433 S.C. 186, 857 S.E.2d 378 (Ct. App. 2021), requires the submission of an expert vocational report in order to prove an injured worker is not permanently and totally disabled.[10] *Clark* holds no such thing. Instead, in *Clark*, the Commission concluded as a matter of law that the claimant was not permanently and totally disabled, which conclusion was not supported by any findings of fact. Thus, it was that "finding—which appears in the 'Conclusions of Law' section—[that] floats on air, unsupported by any visible explanation or evidence." 433 S.C. at 194, 857 S.E.2d at 382. Here, in contrast, the Commission explained in its findings of fact why it concluded as a matter of law that Claimant failed to prove he was permanently and totally disabled. The factual findings that support the Commission's legal conclusion that Claimant failed to meet his burden of proving permanent and total disability under S.C. Code Ann. § 42-9-10 include the finding that, "[b]y all accounts, including his own testimony, Claimant is a valued employee. Claimant is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam. Claimant was transferred from a

[10] Essentially, Claimant's position appears to be that he has met his burden of proving he is permanently and totally disabled, regardless of compelling evidence otherwise, so long as he produces a report by a vocational expert. That is not the law in South Carolina.

former location to the new location in Laurens, South Carolina. Claimant has major lifetime restrictions of no lifting more than 10 pounds overhead, yet the employer has accommodated these restrictions over the past 3 years." (Finding of Fact No. 2, R. p. 24). Consequently, the Commission did "not find sheltered environment employment," or that "Claimant is permanently and totally disabled. Claimant is making more money now than before [the] accident." (Finding of Fact No. 3, R. p. 24). In addition, the Commission found Claimant's vocational expert's report stated "that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor." (Finding of Fact No. 4, R. p. 24). The Commission also found that Claimant was "making more money now than before the accident," and was "now paid a salary of $72,000 a year," (Finding of Fact Nos. 1 & 3, R. p. 24); however, those were not the only bases for its determination that Claimant is not permanently and totally disabled, as Claimant wrongly argues.

While Claimant is correct that the only vocational expert report in the record is the one produced by Mr. Brown, the Commission clearly took Mr. Brown's report into account in concluding that Claimant was not permanently and totally disabled.[11] While it is true that Mr. Brown's expert opinion provides some support for both the Commission Decision as well as Claimant's position, as noted above, where there is a conflict in the evidence, either by different

[11] Having addressed Mr. Brown's report, the Commission was not required to explain or account for every statement or opinion in that report, as Claimant suggests. (App. Br. pp. 15-16).

witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. *Anderson*, 343 S.C. at 492-93, 541 S.E.2d at 528; *Wynn*, 238 S.C. at 12, 118 S.E.2d at 818. In short, the fact that Claimant submitted a vocational expert report and Employer did not does not mean somehow that he automatically met his burden of proof. This is particularly true where, as is the case here, the vocational report provides support for both sides' positions.

Claimant again misconstrues the evidence of his "vocational value" asserting it is "entirely based on his tenure with this specific employer working on a specific configuration of equipment." (App. Br. p. 16). As noted above, Claimant works 9-hour shifts, performing both supervisory tasks and routine maintenance, as well as welding/fabrication. (R. p. 366, lines 3-16; p. 394, lines 6-22; p. 397, lines 20-24). Claimant testified that he "bring[s] a lot of value" to Employer and "contribute[s] to the work." (R. p. 531, lines 7-17). Mr. Brown agreed that Claimant "is performing legitimate work of value to his employer," (R. p. 236), and that he was "performing valuable work for his employer." (R. p. 237).

In sum, the Commission's determination that Claimant failed to meet his burden of proving permanent and total disability under S.C. Code Ann. § 42-9-10 is supported by substantial evidence and is consistent with precedent. As such, this Court should affirm the Commission Decision.

II. Claimant is not entitled to either permanent and total disability or an increased disability award under S.C. Code § 42-9-30(21).

Claimant's argument that the evidence in this case requires a greater disability than found by the Commission fails for a number of reasons. At the outset, this argument is comprised of a single paragraph and contains no citation to authority beyond Section 42-9-30(21). As such, it should be deemed abandoned on appeal. A cursory and unsupported argument is deemed

abandoned on appeal. *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

Even if this Court considers Claimant's argument addressing the partial disability award to his back, however, it lacks merit. Despite the fact that the medical model of compensation as applied under Section 42-9-30 is based on physical impairment as opposed to vocational limitations, Claimant simply argues that "in light of the substantial evidence of severe vocational limitation the disability to [his] spine exceeds 50%, and therefore [he] should be found totally disabled under" Section 42-9-30(21).[12] Section 42-9-30 speaks in terms of loss of use, and the evidence in this case fully supports the Commission's award of 25% to Claimant's back.

First, Dr. Behr assigned impairment ratings of only 4% to the cervical spine and 8% to the lumbar spine. (R. p. 180). And, while Claimant also was assigned a permanent 30 pound lifting restriction to waist level, Claimant testified that he works full, nine-hour shifts and physically was able to perform many of his prior maintenance tech tasks. (R. p. 490, lines 5-17; p. 502, lines 19-24; p. 518, lines 9-22). Mr. Williams confirmed that Claimant "performs his functions just as well as anyone else here," (R. p. 395, lines 7-17), and that he "is … required physically to do all of the same duties that a regular maintenance tech would do." (R. p. 394, lines 14-17). In addition, Claimant testified that he could mow his lawn if he chose to do so. (R.

[12] Claimant limited his argument regarding the disability rating to his spine. Therefore, he is precluded from arguing in reply that the rating assigned to his shoulder also is incorrect. *Simmons v. SC Strong*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief").

p. 539, lines 1-25).[13] He also "vaccum[s] a little bit" although his wife does most of the housework. (R. p. 540, lines 6-9). The only non-work activity Claimant testified he could no longer perform was that he could not throw a baseball now. (R. p. 507, line 23 – p. 508, line 3). This evidence is insufficient to support, let alone *require* any increase of the 25% disability award to either the shoulder or the back, or to demonstrate a total loss of use of the back.

"The extent of an injured workman's disability is a question of fact for determination by the Appellate Panel and will not be reversed if it is supported by competent evidence." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009); *see also Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 292, 638 S.E.2d 66, 71 (Ct. App. 2006) (it is the Commission's role, not the appellate court's, "to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another" in reaching a disability determination). Of particular relevance to this case, "the extent of an injured workman's disability is a question of fact for determination by the Commission and will not be reversed if it is supported by competent evidence." *Colvin*, 227 S.C. at 473, 88 S.E.2d at 585. Here, the Commission considered the medical and lay evidence and increased the disability award to Claimant's back from the 15% awarded by the Single Commissioner to 25%. This finding is supported by substantial evidence and should be affirmed on appeal. Consequently, because there is no evidence that Claimant has lost 50% or greater of the use of his back, he is not entitled to the statutory presumption contained in S.C. Code Ann. § 42-9-30(21).

This Court should affirm the Commission's 25% disability award to Claimant's back as supported by substantial evidence.

[13] Claimant explained that he does not mow the lawn because his wife "won't even let me get on the lawnmower because she likes to cut the grass." (R. p. 539, lines 4-7).

CONCLUSION

For the reasons stated herein, this Court should affirm the Commission Decision in its entirety and dismiss Claimant's appeal with prejudice.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE

May 3, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No.: 2022-000090

Randall G. Dalton, Employee, ...Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents The Muffin Mam, Inc. and Amerisure Mutual Insurance Company, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

May 3, 2022

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