THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Thomas Contreras, Claimant, ... Appellant,

v.

St. John's Fire District Commission, Employer, and
State Accident Fund, Carrier, ... Respondents.

Appellate Case No. 2021-000683

Appeal From The Workers' Compensation Commission

Opinion No. 6052
Heard September 14, 2023 – Filed March 13, 2024

PETITION FOR REHEARING

Appellant, by and through his undersigned attorneys, hereby files this Petition for Rehearing. On March 13, 2024, this Court issued an opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Contreras v. St. John's Fire District Comm'n, Op. No. 6502 (S.C. Ct. App, filed March 13, 2024) (Howard Adv. Sh. No. 10 at 21).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence, law and arguments raised on the issues of: (1) whether the arm was injured or affected as a matter of law, such that Contreras is entitled to an award under

§ 42-9-20 as a matter of law; (2) whether there is a true conflict in the evidence when Dr. DeMarco's impairment rating specifically included the biceps and his opinion that the arm was injured/affected is uncontradicted such that there is no substantial evidence that Contreras's injury was limited to the shoulder.

ARGUMENT

1. As the evidence of impairment, injury and affect on the right biceps/arm is overwhelming and uncontradicted, the Court should have reversed the Appellate Panel for making a single member disability award to the right shoulder when the evidence showed the right upper extremity was also injured/or affected thus qualifying Contreras for a general disability award under § 42-9-20.

In its Opinion, the Court viewed this case through the prism of substantial evidence, as if the conflicting medical evidence. Respectfully, there is no true conflict in the evidence. Dr. DeMarco's opinions are consistent and unchallenged. In fairness to the Court, the Order on review is structured as if the remand instructed the Appellate Panel to reweigh conflicting evidence rather than make specific findings of fact regarding Contreras's right arm, right shoulder, and right clavicle;" and "to make specific findings of fact and conclusions of law regarding awarding TPD benefits to Contreras." Contreras v. St. John's Fire District Commission, Unpublished Opinion No. 2019-UP-040 (S.C. Ct. App. filed January 23, 2019). [R.P. 72-75]. Nonetheless, the manner in which the Commission structured its Order does not require the Court to assume there is such a conflict nor must it ignore the law.

Respectfully, this is not a substantial evidence case as. From a legal standpoint, the arm and the shoulder are separate and distinct body parts. The Legislature provided that "compensation paid . . . for the loss of an arm [is] two hundred twenty weeks," whereas "the loss of a shoulder [is] three

hundred weeks." S.C. Code Ann. § 42-9-30 (13); 42-9-30 (14)(2007).

This holds true from a medical standpoint as well, particularly as it refers to the biceps. The function of the biceps is to is to flex the forearm at the elbow.[1] If the elbow is weak and painful – as in this case – then the injury unquestionably affects the arm.

In its original opinion, the Court held: "Here, Contraras presented evidence that he injured his right arm and clavicle in addition to his right shoulder." [R.P. 73]. To examine why this legal conclusion should not be dispositive, one needs to do a detailed dive into the record and the Appellate Panel's Order. A fair look at the Panel's reasoning demonstrates that there is no conflict in the evidence regarding the right arm.

To begin with, no one disputes that the situs of the *original* injury was the right shoulder. The first two surgeries performed by Dr. Jaskwhich were strictly for the shoulder. As the Commission corrected observed "Claimant's second surgery (October 2009) was also labeled a "*right shoulder*" arthroscopy during which surgery the biceps tendon itself was examined again and found to be 'intact,' and the biceps was also 'intact with no evidence of tearing.'" [R.P. 89, Finding of Fact 8(f) (emphasis in original)].

However, Contreras's condition began to worsen after the second surgery with the problems starting to involve the biceps. The Commission's Order addressed this point in a detailed finding of fact discussing the October 11, 2010 operative note:

> During the 2010 shoulder surgery (Claimant's 3rd – the first one performed by Dr. DeMarco), Dr. DeMarco documented that "The biceps was pulled and the joint seemed to be completely normal." *Some scar tissue interfered with the* ***biceps*** *gliding in and out of the* ***bicipital groove****, but after "good debridement," he was*

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[1]Lippert, Lynn S. (2006). Clinical kinesiology and anatomy (4th ed.). Philadelphia: F. A. Davis Company. pp. 126–7.

> *"able to see that in full internal and eternal rotation there was no undue pulling on the biceps like it was at the beginning of the case prior to the resection."* []. Dr. DeMarco later wrote [] that during this 3rd surgery, he had "pulled in as much of the biceps into the joint, and this is typically what we do, and in that region it appeared normal and so I did not decide to look further or release anything." (See also page 98, wherein Dr. Hughes also noted that during this 3rd surgery, the intra-articular biceps tendon was found to be "intact." [R.P. 89-90, Finding of Fact 8 (h) (emphasis added)].

In this finding, the Commission recognized that scar tissue from the two previous shoulder surgeries "interfered with the biceps gliding in and out of the bicipetal groove" and that prior to the surgery "there was undue pulling on the biceps." Essentially, the Commission found that the 3rd surgery had been successful in resolving these problems. And if that were the end of it, then perhaps the Commission's Order should have been affirmed.

Unfortunately for Contreras, the 3rd surgery did not resolve the problem with the biceps. On the first post-op visit on November 10, 2010, Contreras was "doing well." [R.P. 241]. However, a month later on December 17, Dr. DeMarco recorded "He still has pain and discomfort along the long head of his **biceps** and lateral deltoid." Physical exam confirmed "tenderness over the long head of the **biceps**." [R.P. 240 (emphasis added)].

On January 11, 2011, Dr. DeMarco released Contreras at MMI. He assigned a 7% right upper extremity impairment which he converted to an 11% shoulder impairment rating.[2] [R. P. 238-239].

By May 31, 2011, Contreras had a "flare up of pain" and returned with some **bicipital tendinitis** and anterior shoulder stiffness." Dr. DeMarco gave him an injection of Depo-Medrol.

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[2]The AMA Guides provide a formula to convert between shoulder and arm impairments. Dr. DeMarco divided the 7% upper extremity rating by .60 to convert it to an 11% shoulder rating. See, Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.), Section 16.4i, page 474

[R.p. 236-247 (emphasis added)].

At the next visit of November 22, 2011, Dr. DeMarco wrote a detailed report explaining that he now needed to operate on the biceps itself, specifically "do a **biceps tenodesis** on him" The doctor added that "the 1 thing that he has been completely consistent with where his pain is, directly over the **bicipital groove.**" [R.P. 234].

The Commission gives this critically important record short shrift noting only "that Dr. DeMarco wrote that the 4th surgery (including the 'right shoulder biceps tenodesis') is 'absolutely the last thing that can be done *in the shoulder...*'" [R.P. 90, Finding of Fact 8 (i) (emphasis added by Commission)]. The Commission left out the statement that the third surgery "**did help with some of the other pain, but he is left with *biceps pain*, which now needs to be addressed. This is still considered as workers' comp injury as directly and causally related to his injury on 10/08/2008.**" [R.p. 234]. The omitted statement is critically important because Dr. DeMarco is opining that the biceps pain and the surgery on the biceps is directly and causally related to the injury – which is a necessary predicate "to get clearance from workers' comp." [R.;p. 234].

The point here is that this statement shows that Dr. DeMarco opined *sua sponte* that the biceps "is considered as workers' comp injury" in a treatment note. Dr. DeMarco did not change his opinion as to the biceps injury in the questionnaire; he merely repeated an opinion he had already given in a "clincal treatment visit." As such, the Commission's rejection of the "check-the-box" questionnaires is wholly arbitrary.

Perhaps the most obvious error in the Appellate Panel's Order is its discussion of the impairment ratings and its finding that "After Claimant's 4th shoulder surgery, his condition improved . . ." [R.P. 90, Finding of Fact 8(l)].

The impairment rating assigned in January 11, 2011 – when Contreras reached MMI after the 3rd surgery – was 7% right upper extremity and 11% right shoulder. [R. P. 90, Finding of Fact 8(j); p. 238-239]. The Commission then notes that Dr. DeMarco "assigned a second impairment rating, as stated on the Commission's Form 14B, as 11% to the "right shoulder" with no other body part listed as affected." [R. P. 90, Finding of Fact 8(k)(emphasis added by Commission)]. The Commission seems to have treated this 14B as a change in opinion as it does differ from the January 21, 2011 treatment note wherein Dr. DeMarco opined "He may need injections, anti-inflammatories or repeat physical therapy." [R.P. 239]. The more likely explanation is that someone other than Dr. DeMarco filled out since it is incomplete (lacking dates of service and treatment recommendations) and the handwriting, signature and date format differ from the questionnaires and the September 4, 2012 14B. [Compare R. P 220 with R.P. 221-222, 569]. Regardless of the authenticity of this14B (dated May 19, 2011, thus not coinciding with a treatment note), the significance of the rating following the third surgery is that the biceps was not deemed impaired by Dr. DeMarco *at that time.*

The Commission correctly found "In his narrative note of August 7, 2012 (after the last of Claimant's shoulder surgeries), Dr. DeMarco assigned a 9% impairment rating, of which rating Dr. DeMarco attributed 3% to **biceps atrophy**." [R.P. 91, Finding of Fact 8(m)(emphasis added)]. However, the Commission overlooked the fact that 1% was for "pain and muscle spasm." While the pain could arguably be limited to the shoulder, the spasming muscle is specifically the biceps. The other parts of the impairment rating (3% for loss of internal rotation, 2% for loss of forward flexion) unquestionably relate to the shoulder.[3]

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[3]See, Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.), Section 16.4i, pages 474-479].

The 3% impairment rating for *biceps* atrophy is the elephant in the room. Singleton states, "Where 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." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)(emphasis added). Here we have a 3% **impairment** rating to the arm specifically for atrophy of the biceps muscle. Both by its location (in the upper arm stretching between the elbow and the shoulder) and function (flexion of the elbow), the biceps is a major part of the arm. As the arm is a second scheduled member distinct from the shoulder, Contreras proved that his arm is affected within the meaning of Singleton.

This alone should be the end of the discussion. Even not including the rating for muscle spasm and pain as a rating to the arm, the additional 3% means that *fully one-third* of the final ratinig is for the biceps. This is not, as the Court described it, merely "*some* evidence that supports Contreras's argument that his right arm was affected . . ." . Contreras v. St. John's Fire District Comm'n, Op. No. 6502 (S.C. Ct. App, filed March 13, 2024) (Howard Adv. Sh. No. 10 at 35)(emphasis added). Nor is it "the extent of any incidental involvement regarding the arm" as the Commission would have it. A separate rating to a second body part encompassing a third or more of the total impairment is more than enough to satisfy the two-body part rule set out in Singleton. Yet despite this clear and obvious evidence, the Appellate Panel engages in an exercise of lengthy and tortuous sophistry to make it appear as if there is a conflict in the evidence, simply to avoid being reversed and justifying its original erroneous decision.

For example, the Commission found "We give great weight to the fact that Claimant has not returned for treatment with Dr. DeMarco since August 2012 for his right 'arm' or 'bicep.'" [R.P.

92, Finding of Fact 8(q)]. How is this fact worthy of great weight when Dr. DeMarco has already medically related the arm/biceps injury to the original accident, as opined in his records, in the questionnaire and in the 3% biceps atrophy impairment? How can Contreras be blamed for not returning to Dr. DeMarco when he has been released prn and being told the 4th surgery is the absolute last thing that can be done?

As noted in the briefs, it is illogical and inconsistent for the Appellate Panel to initially give great weight to the questionnaires only to reverse itself – in response to Appellant's argument in Contreras I. However, the real point of the "check-the-box" questionnaires is they are not inconsistent with Dr. DeMarco's prior opinions. He opined in a treatment note that the "biceps pain . . . is still considered as workers' comp injury as directly and causally related to his injury on 10/08/2008." [R.p. 234]. He assigned a 3% impairment rating for biceps atrophy. He opined in the questionnaire that "Mr. Contreras injuries to his right shoulder and right upper extremity, (right biceps) are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work." [R.P. 221]. This opinion is wholly consistent with the impairment rating and causation opinions Dr. DeMarco gave in his medical reports.

The Court stated "We acknowledge the record contains some evidence that supports Contreras's argument his right arm was affected, including his hearing testimony about pain in his biceps,[4] complaints of long head of the biceps tendinopathy, [and] Dr. DeMarco's assignment at one point of 3% impairment for biceps atrophy . . ." Contreras v. St. John's Fire District Comm'n, Op. No. 6502 (S.C. Ct. App, filed March 13, 2024) (Howard Adv. Sh. No. 10 at 35). The Opinion then

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[4]Contreras testified he has problems "Just with lifting when I go to lift or hold something up, my shoulder will hurt and the **bicep will spasm real bad.**" [R. P. 156, line 16-page 157, line 1]. The Commission failed to acknowledge this testimony.

goes on to say that "the Appellate Panel had the authority to weight all of the evidence in the record to determine the extent of Contreras's disability." Id. at 36.

Respectfully, Appellant believes the Court overlooked or misapprehended several points leading to an erroneous decision. The first is that there is no inconsistency in the opinions of Dr. DeMarco and Dr. Hodge to weigh. Nor is there an inconsistency in the lay evidence; Contreras consistently testified to injuring his arm and having problems with his biceps. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]"); Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)("evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision of the Industrial Commission."). Cf. Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965)("Expert testimony is not binding upon the fact-finding body ***if*** there is competent substantial evidence to the contrary, though in matters of such kind which are not of common knowledge, fact finding body must accept opinion of experts.")

Secondly, the Commission is required to defer to the medical evidence – unless there is compelling lay evidence. The Appellate Panel cannot substitute its own unqualified medical opinion for the opinions of the doctors. The opinion of Dr. DeMarco is uncontradicted. When the Commission rejected his opinion it committed an error of law. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding). As in Burnette, "The record contains [Contreras'] medical records and testimony, as well as written

opinions by [his] treating physicians and a vocational rehabilitation expert. We find no evidence that challenges the conclusions of [Contreras'] doctors concerning [his injuries]." Id. Burnette compels reversal in this case.

Thirdly, the Appellate Panel seems to have reached its decision by counting how many times the medical records say *shoulder* and how many times they say *biceps* and *arm/upper extremity*. As set forth earlier in this Petition, the timeline shows the development of the biceps injury from the initial development of scar tissue after the second surgery to the full blown need for biceps surgery after the third, culminating in weakness, muscle spasms and an additional 3% impairment for biceps atrophy following the fourth. The issue is not whether the biceps was immediately injured in the second accident; it is whether the biceps is impaired or affected at the time permanent disability is determined.

Fourth, the Court misapplies the Brown case. The injured worker in Brown did "not argue on appeal his back injury has affected other parts of his body or that it has contributed to an impairment beyond the scheduled member." Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). In the instant case, Contreras proved both the affect and impairment on the second body part.

The evidence further shows that Contreras has lost any prospect of employment as a fire fighter and, despite diligent efforts, has been suffered a significant loss of earnings capacity. [R.P. 206-213]. As an award under § 42-9-20 would be larger than the single member award made by the Commission, the Commission should have applied the code section which would result in the greatest possible disability award. S.C. Code Ann. § 42-9-20 (2007)(setting out requirements for loss of earnings capacity).

The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. "The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). This concept is practically identical to North Carolina's *Doctrine of Munificent Remedy*. It would defeat the purposes of the Act to deny a Claimant the opportunity to establish a greater disability than he would receive under the scheduled member statute.

Under the Doctrine, "where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable." Gupton v. Builders Transport, 357 S.E.2d 674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). In other words, where a claimant has established entitlement to a greater award under § 42-9-10 or 42-9-20 than he would receive under a scheduled member award, the Commission is required to make the most favorable award. See McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy).

If interpreted under the Brown framework, Contreras would be entitled to an award for loss earnings capaciy under § 42-9-20. The Commission erred by failing to consider an award under § 42-9-20.

Therefore, the Court should reconsider its Opinion and issue a new Opinion on rehearing and either enter an award for loss of earnings capacity as found by the Single Commissioner or remand

with instructions for the Full Commission to enter such an award.

2. The Court should hold that the Appellate Panel violated the remand instructions by reweighing the evidence in an arbitrary manner.

The Court held the Commission did not violate the instructions on remand when it reweighed the evidence in a wholly different manner than in its original Decision and Order. Respectfully, Appellant believes the Court may have misapprended the Commission's actions and requests the Court to reconsider.

The Court acknowledged that "[T]he Appellate Panel's first order indicated it 'g[a]ve more weight to the opinions' provided in Dr. DeMarco's October 2012 check-box forms instead of his 2011 Form 14B, regarding future medical treatment Contreras needed, because the check-box forms were closer in time to the hearing and thus, 'more accurately reflect[ed] [Contreras's] current condition.'" The Court then observed that the Appellate Panel on remand:

> noted the check-box forms Contreras sent to Dr. DeMarco 'were not part of or in response to' a clinical treatment visit. The Appellate Panel noted that although the check-box forms stated Contreras had an injury or aggravation to the right biceps, the forms qualified the statement by indicating 'the [e]ffect is radiating pain and tenderness 'into' the right biceps." The Appellate Panel found 'this check-off response inconsistent with [Contreras's] subjective complaint to his vocational expert, whose 2011 report states that [Contreras] reported that his pain radiates upwards." The Appellate Panel found the check-box forms were also inconsistent with Dr. DeMarco's Forms 14B, to which it gave great weight.

The Court resolved this by reasoning that the questionnaires were given greater weight because they were relied on to award future medical treatment rather than disability. As future medical treatment was no longer an issue on appeal, the Commission was free to reweigh the evidence.

Respectfully, this is not sustainable logically. The Commission found the questionnaires

"more accurately reflect[ed] [Contreras's] current condition." His condition includes the impairment, pain and muscle spasms in his biceps. One cannot separate these two by any reasonable exercise of logic.

Furthermore, the flaw in the Commission's reasoning is exposed by their reference to a purported inconsistency in the vocational report versus Contreras's testimony. The Commission misrepresents the contents of the report. The vocational export reported "Mr Conteres [sic] states that he continues to have pain in his right shoulder that he described as 'stabbing' with 'sharp' pain radiating up to the top of his shoulder." [R.P. 207]. Contreras is not discussing biceps pain at all; he is relating the pain at the top of his shouler.The fatal flaw here is that the vocational report was completed on October 2, 2011 – *five months before the 4th surgery on March 9, 2012.* The reports of radiating pain and muscle spasms in the arm occur after the vocational evaluation and most particularly after the 4th surgery. As is well documented in the medical records, the biceps pain, spasms and atrophy occurred progressively through the 3rd and 4th surgeries – worsening after each procedure.

There are no inconsistencies in Dr. DeMarco's records. The only inconsistencies are in the machinations the Commission took to reweigh the evidence so as to support an already unsupportable Order in anticipation of this appeal.

Therefore, the Court should reconsider its Opinion and issue a substituted opinion reversing the Appellate Panel.

3. The Court should reconsider its denial of the request to correct the Commission's scrivener's error on the average weekly wage.

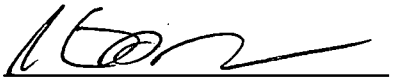
There is one area the Court needs to address. As Respondents pointed out, the 2021 Appellate Panel lowered the average weekly wage from $1,174.20 to $1,134.72. [R.P. 102, Finding of Fact 32]. The average weekly wage was not in dispute and not an issue for the Appellate Panel to address on remand. The finding changing the average weekly wage appears to be a scrivener's error – particularly since the finding is conclusory and does not purport to change the established average weekly wage. As this Court has plenary authority to correct a scrivener's error, Appellant asks that the Court correct the error and hold the average weekly wage is $1,174.20. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(court has authority to correct scrivener's errors at any time).

The Court denied the request because it was raised in the Reply Brief. As stated at oral argument, Counsel for Appellant did not notice the error until it was pointed out in Respondents' brief. However, our Supreme Court held in Trotter that a "request [to correct a scrivener's error] is not barred by principles of error preservation. Id. *citing* Rule 60(a), SCRCP (stating no explicit time limit for the correction of clerical errors).

CONCLUSION

For the foregoing reasons, the Court should reconsider its Opinion and reverse the Decision and Order of the Appellate Panel and reinstate the original Order and Award of the Single Commissioner or, in the alternative, remand to the Full Commission with explicit instructions to make for lost earning capacity under § 42-9-20. The Court should also correct the scrivener's error on the average weekly wage.

Respectfully Submitted,



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March 27, 2024
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2021-000683

Thomas Contreras, Employee, ... Appellant,

v.

St. Johns Fire District Commission, Employer, and
State Accident Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Wanda Powell, Paralegal to Stephen B. Samuels have caused the **Petition for Rehearing** to be served on the parties below, by placing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

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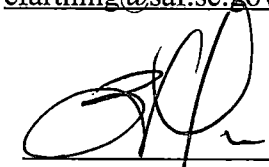

Wanda Powell, Paralegal

March 27, 2022

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March 27, 2024

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Thomas Contreras v. St. John's Fire District Commission
Appellate Case No.: 2021-000683

Dear Ms. Kitchings:

Enclosed for filing please find our **Petition for Rehearing** and **Proof of Service** in the above case. A check made payable to the SC Court of Appeals for the $50.00 filing fee will be hand delivered as indicated on the Certificate of Service.

Please have your staff file the **Petition for Rehearing** and **Proof of Service** and return to us a clocked copy. Please contact us with any questions or if further information is needed from our office.

Sincerely,

Wanda Powell
Paralegal for Stephen B. Samuels

/wp
Enclosure(s) as stated
cc w/encl.: Margaret Urbanic, Esq.
Erin Farthing, Esq.
Gary Christmas, Esq.