THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Case No.: 2021-00683

Thomas Contreras, Employee, ... Appellant,

v.

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

Appeal From the Workers' Compensation Commission

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

RETURN TO PETITION FOR REHEARING

Respondents, by and through their undersigned attorneys, hereby file this Return to the Petition for Rehearing.

Respondents allege and argue that the Court was correct in 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) and that the request for rehearing be denied.

The question on appeal was whether there is substantive evidence to support the findings of the 2021 Appellate Panel Order. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the

conclusion the Commission reached. " Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Id. Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996).

ARGUMENT

1. The Court was correct in upholding the Appellate Panel's finding that the Claimant suffered an injury to his right shoulder only and an award was proper under §42-9-30.

In 2019, the Court of Appeals issued Unpublished Opinion No. 2019-UP-040 (S.C. Ct. App. filed January 23, 2019) (hereinafter 2019 Order) remanding this matter back to Appellate Panel to provide specific findings of fact and a clear analysis and that is exactly what the Commission did in the 2021 Appellate Panel Order.

Petitioner argues that the 2019 Court of Appels decision makes a dispositive legal conclusion that the Petitioner injured his right arm and clavicle in addition to his right shoulder. (Petition p. 3). This is a selective reading of the 2019 Order. The 2019 Order found that the Appellate Panel findings of fact and conclusions of law are not sufficiently detained to allow the Court to determine whether the 2016 Appellate Panel decision was erroneous. The 2019 Order merely noted that the Petitioner presented evidence of an injury to his right arm, but this was not a dispositive finding that

Petitioner injured his right arm particularly when the 2019 Order remanded the case to the Appellate Panel for more detailed findings regarding their decision that the injury was limited to the Petitioner's right shoulder. As a result of the 2019 Order, the Appellate Panel issued an extensively detailed order regarding the Petitioner's treatment. (Order 2021, R. p. 76)

Throughout the Petition, Petitioner repeatedly tries to substitute his opinions and conclusions of the medical evidence in lieu of the actual medical evidence. Petitioner argues that although the first two surgeries were strictly for the shoulder, then third and fourth surgeries were to address issues with Petitioner's biceps. This is a change in position from Petitioner's Brief to the Court of Appeals when he "stated that the fourth and final surgery was specifically to address 'long head of the biceps pain'". (Appellant's Brief, p. 10). Petitioner is now arguing that the 3rd surgery was also to address alleged issues with his biceps. Although it is clear from a reading of the medical records, that all four surgeries were to and for the Petitioner's shoulder and Petitioner is mischaracterizing the medical records by lifting a select few words from the records to support his position. Just as the commission cannot substitute its own medical opinion for in place of medical evidence, the Petitioner also cannot do this. *See* Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012)

Similarly, on page 3 of the Petition, Petitioner notes that the function of the bicep is to flex the forearm at the elbow. There is no medical evidence in the record defining the function of the bicep thus this statement is outside the record on appeal. The Petition further states that "if the elbow is weak and painful *as in this case* the injury unquestionably affects the arm." Again, Petitioner is stating his opinion in absence of any supporting medical evidence. Furthermore, this case has been pending since

2008, this is the first mention in this case's fifteen-year history of the elbow being weak and painful.

Petitioner cites to Finding of Fact 8(h) of the 2021 Appellate Panel Order to argue that the wording of this finding means that the third shoulder surgery was specifically for the Petitioner's bicep. Finding of Fact 8 encompasses seven pages of the order and has twenty-one subparts and lays out the Appellate Panel's reasoning as to why the right arm is not a separately injured body part. The Appellate Panel notes that situs of the injury is to the shoulder. Despite having four surgeries, at no time over many years of treatment did any physician or medical provider ever order any specific or separate diagnostic testing to Petitioner's right arm. (FOF 8(b) R. p. 87). All of the diagnostic testing done was solely to the right shoulder. All four surgeries were documented in the medical records as being surgeries to the Petitioner's shoulder. In subpart (d), it was noted during the first right shoulder arthroscopy, the biceps tendon itself was intact. This subpart noted that both Dr. Jaskwhich and the anesthesiologist refer to this surgery as a shoulder surgery. Subpart (f) noted that Petitioner's second surgery was to the right shoulder. Petitioner then switched to Dr. DeMarco as his treating physician. Subpart (g) noted on the patient intake form that the Petitioner wrote that his injury was to his right shoulder and under description wrote shoulder pain, pressure and popping. Subpart (g) also noted that Petitioner failed to list his arm or biceps under "Other medical problems". Subpart(i) notes that the fourth and final surgery was as noted by Dr. DeMarco "the absolutely the last thing, that can be done in the *shoulder*...." (emphasis added). Subpart (k) finds that the in May of 2011, after the surgery discussed in subpart (h) Dr. DeMarco assigned an impairment rating to the **"right shoulder with no other body part was listed as affected"** (emphasis added).

Subpart (l) further finds that the "upper extremity was grossly neurologically and vascularly intact." Subpart (n) address the final treatment note of August 7, 2012 and noted that Dr. DeMarco only listed the right shoulder under "Body parts injured" and left it blank under "Body part(s) affected." Subpart (p) finds that all four surgeries that Claimant underwent were all pre and post operatively labeled shoulder surgeries.

On page 4 of the Petition, Petitioner pulls out select words from the May 31, 2011 treatment note to imply that the Petitioner was given an injection into his biceps. A more complete reading of the note finds that under history it lists: "Mr. Contreras returns today. He is having some anterior shoulder pain and discomfort that is worse after sleeping, as he sleeps with his arm elevated over his head." Under procedure it lists: "[a]fter discussing with the patient the benefits and risks of subacromial injection, the patient's right shoulder was prepped. Then 80 mg of Depo-Medrol and 4 cc of lidocaine were injected without difficulty." (Trp. 237). In other words, the injection was into the Petitioner's shoulder.

Page 4 of the Petition references a "detailed report" from November 22, 2011 arguing that this note shows that Dr. DeMarco performed the fourth surgery on the bicep. This is again a selective reading of a medical record. A complete reading of the note clearly indicates that the Claimant's last surgery was for his right shoulder.

> CHIEF COMPLAINT: Status post right shoulder SAD and excision of glenohumeral ligament from a previous SLAP repair and debridement: Date of surgery 10/11/2010, Worker's comp. Mr. Contreras returns today. He was a flare up of pain. I last saw him in May. He ran out of Celebrex, started hurting some more. Thera-Band exercises seemed to be hit or miss with him, can help or they can flare him up. **He did some yardwork this past weekend, and his shoulder has become somewhat painful.** He still has pain over the anterior aspect of the shoulder even when he just hangs it down or reaches behind him in extended position. It gets flared up by the simplest of procedure, whether it is lifting or doing light yardwork even if he comes off the Celebrex, he continues to have pain and discomfort.

> PLAN: At this point, Mr. Contreras continues to complain persistently of long head biceps and bicipital groove pain. There is approximately a 5 cm section of the long head of the biceps that we are unable to visualize arthroscopically on a routine arthroscopy; however, on selected patients with persistent pain in this area, we will go ahead take down the transverse ligament and the bursal sac in the area and visualize the long head of the biceps and certainly at this point do a biceps tenodesis on him. I would also do a coracoid decompression to take off the impingement that he is getting from his coracoid onto the anterior suscapularis and bicipital groove area. He has failed injections, it has been over a year, he continues having pain, and the 1 thing about him is that he has been completely consistent with where his pain is, directly over the bicipital groove. We looked at his biceps in the intraarticular position. I 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 release anything. We did remove his previous sutures from his previous repair and did a bursectomy and decompression, an AC joint resection. This did help with some of the other pain, but he is left with biceps pain which now needs to be addressed. This is still a worker's comp injury as directly and causally related to his injury on 10/08/2008. **This is absolutely the last thing that can be done in the shoulder, and after doing a tenodesis, a coracoid decompression, I told him whatever pain or discomfort is left in the shoulder he will have to live with.** We will need to get clearance from worker's comp, and his postoperative course would be similar with physical therapy a couple times a week starting around 4-5 weeks postoperatively and going for about 6 or 8 weeks. If we can get this done, I will see him in the end of December for surgery. (R. p. 234). (Emphasis added.)

Petition alleges that the November 22, 2011 record shows that Dr. DeMarco is opining that the Petitioner suffered an injury to his biceps and that it is subsequently compensable. This is a mischaracterization of the evidence. A reading of the complete treatment from November 22, 2011, unequivocally shows that the upcoming surgery was for the ongoing issues in the right shoulder.

On March 19, 2012, the parties entered in a Consent Order agreeing that Claimant had an injury to his right shoulder and that the Claimant is authorized to return to Dr. DeMarco for additional treatment and surgery. There is no reference to arm surgery. If the Petitioner believed in 2012 that the March 29, 2012 surgery was for the arm, it would only make sense that the Consent Order would reflected this or conversely

that the parties would not have entered into a consent order but would have gone forward with the hearing March 5, 2012 to litigate whether the arm and fourth surgery was compensable. Moreover, the actual surgery note from March 29, 2012 lists the pre operative and post operative diagnosis as right shoulder coracoid impingement; right shoulder intra-articular synovitis and adhesions, right shoulder subacromial impingement with adhesions and right shoulder long biceps tendinopathy. (R. pp. 258-259). A review of the physical therapy records following the Petitioner's fourth and final surgery show that physical therapy was for the shoulder. (R. pp. 343-346).

The record is full of actual treatment notes and records from Dr. DeMarco however the crux of Petitioner's argument relies on a check the box questionnaire prepared by Petitioner's attorneys. This questionnaire is the only time Dr. DeMarco mentions the right arm. However, the overwhelming substantial evidence does not support the statements made in questionnaire. As noted in Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011), the Commission can disregard medical evidence if other competent evidence in the record exists. Finding of Fact 8(r) in the Full Commission's order provides an explanation as to why the Full Commission did not accept these statements. (R. p. 93). In the actual treatment notes, none of the treatment notes categorize Petitioner's injury as an arm injury or reference any limitations on Petitioner's arm. The notes consistently categorize this injury as a shoulder injury with treatment to the shoulder.

There is not a separate rating to the biceps as suggested by Petitioner. Petitioner was last seen on August 7, 2012 by Dr. DeMarco. Dr. DeMarco examined the Petitioner's shoulder. DeMarco noted that the upper extremity was grossly neurologically and vascularly intact. (R. p. 223). Under assessment and treatment only

shoulder pain is listed there is no mention of arm pain or biceps pain. (R. p. 224). The rating from Dr. DeMarco states that Petitioner has a 9% impairment to the shoulder and that this rating **includes** 3% biceps atrophy, 3% loss of internal rotation, 2% for loss of forward flexion and 1% for pain and muscle spasm. The reference to the biceps is included as part of the shoulder in the rating assigned by Dr. DeMarco and it is not a separate rating.

Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E. 2d 837 (1960) stands for the proposition that in order for a claimant to obtain compensation in addition to a scheduled member, the claimant must show that some other part of his body is affected. In Simmons v. City of Charleston, 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002), this court held that if there is substantial evidence presented that shows that the claimant suffers additional complications to another part of the body, other than the scheduled member, the claimant is entitled to proceed under the general disability statute. However, as noted by the Simmons court, there still must be a showing of substantial evidence to demonstrate that additional body parts were affected. The substantial evidence in the record does not support a finding that more than one body part was affected. The overwhelming evidence in this case is that Petitioner only injured his right shoulder. More importantly, there is substantial evidence in the record to support the findings of the Commission's order and it should be affirmed. Substantial evidence should be more than a check the box questionnaire.

2. The Court of Appeals was correct in finding that the Appellate Panel did not reweigh the evidence in an arbitrary manner.

The Appellate Panel was instructed by the Court of Appeals to make specific findings regarding Petitioner's right arm, right shoulder and right clavicle. In a 31-page

order, the Appellate Panel made specific findings on each body parts. The 2021 order is not contradictory to the 2014 Appellate Panel Order as alleged by Petitioner. Specifically, Petitioner compares Finding of Fact #8(r) in the 2021 order to Finding of Fact 29 in the 2014 order. Finding of Fact 8 addresses whether the Petitioner's right arm is compensable, this Finding is seven pages long and has multiple subparts. Subpart (r) of this finding is addressing the check the box questionnaire completed by Dr. DeMarco that had multiple sub parts. Specifically, subpart (r) states:

> We considered Claimant's "check-the-box" questionnaires, sent by Claimant to the authorized treating physician, but note that these questionnaires were not part of or in response to or accompanied by any clinical treatment visit. We are mindful of the fact that these questionnaires do state that there was an injury and/or aggravation to the right biceps, but then qualify that statement by saying the affect is radiating pain and tenderness "into" the right biceps; the Appellate Panel finds this check-off response inconsistent with Claimant's subjective complaint to his vocational expert, whose 2011 report states that Claimant reported that his pain radiates upwards. The questionnaires are also inconsistent with Dr. DeMarco's 14B's to which we give great weight. (R. p. 93).

The Commission's findings are that that the references in the check the box questionnaire related to causation of the right biceps in inconsistent with the vocational report. This is the portion of the questionnaire that was specifically being discounted in the 2021 Order. The Appellate Panel is will within its review to weigh the evidence and discount parts of the reports as they believe was appropriate. [W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999).

Finding of Fact 29 from the 2014 order states:

> That, we find that authorized orthopedic surgeon, Dr. James DeMarco, opined on "check the box" forms dated October 8, 2012, and October 24, 2012, that Claimant is in need of future medical care and treatment in the form of mediations, pain management clinic, injections, tens unit, repeat diagnostic

> imaging, physical therapy and follow up office visits as a result of his August 8, 2008, accident at work. He further opined that said medical treatment would tend to lessen Claimant's period of disability. Dr. DeMarco, does not opine on his 14-B issued on May 16, 2011, that Claimant will need future medical care and treatment; however, he opines differently on his October 8, 2012 and October 24, 2012, check the box reports and we give more weight to the opinions given in said reports given that they were provided at a later date than the 14-B, were provided closer to Claimant's hearing date and more accurately reflect Claimant's current condition and need for future medical care and treatment. (R. p. 50).

These findings are not inconsistent and contradictory. The 2021 order provides for future medical care for the Claimant's shoulder which is what FOF 29 in the 2014 order does. Finding of Fact 29 of the 2014, Appellate Panel order purpose is to address the why the 14B's completed by Dr. DeMarco did not address future care. Thus, the 2021 Appellant Panel order did not upend the prior 2014 order as alleged by Petitioner's counsel. Both orders find the right shoulder compensable and reject that the clavicle, right arm or biceps as compensable body parts. Both orders find that the any award should be made under §42-9-30 and that an award under §42-9-20 is not appropriate. Both orders find that Petitioner is entitled to Dodge medical. (Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 547, 514 S.E.2d 593 (Ct. App. 1999).

Finding of Fact #10 in the 2021 Appellate Panel order states:

> As to both the right arm and right clavicle, we give the greatest weight to the treatment records accompanied by a clinical visit, rather than to check the box questionnaires sent by Claimant and for which there was no accompanying clinical visit and/or narrative treatment note. For instance, in the last narrative treatment note from Dr. DeMarco of August 7, 2012 (the date of maximum medical improvement), Dr. DeMarco's "Assessment" was "Shoulder pain" (under this particular heading), and the "Treatment" heading lists only "Shoulder Pain" as well. As part of the impairment rating to the right shoulder, Dr. DeMarco assigned 3% for biceps atrophy and **1% for pain/spams** [emphasis added]. This appears to the Appellate Panel to be the extent of any incidental involvement regarding the arm with nothing specifically regarding the clavicle. (Record, pages 103-104 and 404-405). (R. p. 95).

This finding is not inconsistent with Finding of Fact #29 from the 2014 order which orders future medical treatment. Finding of Fact #10 in the 2021 order is one of many findings that detail as to why the Appellate Panel correctly found that the only compensable body was the right shoulder.

The Court correctly noted that as the parties were no longer litigating the issue of whether the Petitioner needs future medical treatment, the 2021 Appellate Panel had no reason to reinstate this finding.[1]

Petitioner argues that the Appellate Panel has a fatal flaw in reasoning in Finding of Fact 8(o) by noting the difference in description of pain. The vocational report notes the pain in the right shoulder "radiating up to the top of his shoulder." (R. p. 207). Petitioner claims that this accurate statement from the vocational report is a fatal flaw. Petitioner then argues that the record is well documented with biceps pain, spams and atrophy and yet cites to no medical records. This statement also makes no sense in light of the void of any diagnostic testing, (MRI's, CT scans, EMG nerve conduction study, etc.) of the arm or bicep. As previously argued in this Response, the records support treatment to the right shoulder not the right arm.

Petitioner makes the conclusory statement in his brief that the Appellate Panel substituted its own medical opinion for the opinions of the doctors. In Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), the court found that prior orders were not supported by substantial evidence and reversed the Commission's findings. The Burnette court found that there was no evidence that the findings made by the commission originated from a medical provider and was forced to conclude that it

[1] Petitioner has not received any additional medical treatment since he last saw Dr. DeMarco on August 7, 2012.

was the medical opinion of the single commissioner. In the case at bar, the medical evidence clearly supports the findings of the Appellate Panel as discussed at length in prior sections of this Response. The Appellate Panel wrote a lengthy order and with detailed findings to support Furthermore, it appears that the Petitioner is substituting his opinion of that of the doctor's opinion by asserting that the fourth surgery was to alleviate arm pain. Petitioner also tries to argue that the Petitioner's opinion about the fourth surgery is medical evidence.

3. That the Court should not change the average weekly wage as 2021 Appellate Panel Finding of Fact #32 is correct.

Petitioner alleges that Finding of Fact # 32 is a scrivener's error with regards to the Petitioner's average weekly wage being lowered from $1,174.20 to $1,134.31. As noted by the Court the Respondents did not agree at oral arguments that this change was not an error but was actually purposeful and intentional by the Panel. Regardless, the first time that Petitioner raised this issue was in his reply brief as noted by the Court, an appellant may not use his reply brief to raises issues not argued in the initial brief. Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989).

CONCLUSION

For all of the foregoing reasons, the Court should deny the request for a hearing.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners Aisha G. Taylor, Susan S. Barden and T. Scott Beck

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Case No.: 2021-00683

Thomas Contreras, Employee, ... Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Return to the Petition for Rehearing upon the Appellant by emailing and mailing 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 address as follows:

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Margaret Urbanic

19 day of April, 2024

CS | LAW

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April 19, 2024

File No.: 2011805.000

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Thomas Contreras, Claimant, Appellant v. St. Johns Fire District Commission, Employer, and State Accident Fund, Carrier, Respondents
Case 2021-000683

Dear Ms. Kitchings:

Enclosed for filing please find our Return to Petition for Rehearing and Proof of Service in the above referenced case. Please have your staff file the Petition for Rehearing and Proof of Service and return a clocked copy. Please let me know if any further information is needed.

Very truly yours,

CLAWSON and STAUBES, LLC

Margaret M. Urbanic

MMU/
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