

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM 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)

Thomas Contreras, Claimant, Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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 1. As the evidence of impairment, injury and affect on the right biceps/arm is overwhelming and uncontradicted, the Court of Appeals 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.

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

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

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 13, 2024.. [App. p. 180].

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the Appellate Panel's Order reversing the Single Commissioner's § 42-9-20 disability award and limiting disability compensation to the shoulder under § 42-9-30, despite consistent uncontradicted evidence of injury to multiple scheduled body parts (shoulder, arm, and clavicle) and actual loss of earnings capacity.
2. Whether the Court of Appeals erred in affirming the 2021 Appellate Panel's Order where the Panel had been instructed to make additional specific and detailed findings but instead reweighed evidence differently and made new findings of fact wholly inconsistent from its previous order.
3. Whether this Court has authority to correct a scrivener's error made by the third Appellate Panel when it lowered the average weekly wage from \$1,174.20 to \$1,134.72.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries to the right arm, shoulder and clavicle sustained by the Petitioner, Thomas Contreras, on October 8, 2008 in his employment with the St. Johns Fire District (hereinafter "St. John's."). St. John's accepted Contreras's claim and began providing various benefits under Title 42, the Workers' Compensation Act.

Contreras received medical treatment primarily from Dr. David Jaskwich and Dr. James DeMarco. Contreras underwent 4 operations in and around the shoulder, with the last including surgery to the arm itself (the long head of the biceps muscle). [R.P. 258-259]. He reached MMI on August 7, 2012. The Appellate Panel held "Dr. DeMarco found that the Claimant had a 9%

permanent partial impairment to the shoulder and that **this included 3% biceps atrophy**, 3% for loss of internal rotation, 2% for loss of forward flexion and **1% for pain and muscle spasm**. There is no separate rating to the upper extremity.” [R.P. 47, Finding of Fact 7 (emphasis added)]. Thus, of the overall 9% impairment rating, nearly half of it is specifically based on muscle atrophy, pain and muscle spasm *in the arm*.

Dr. DeMarco definitively confirmed that both the shoulder and arm were injured and affected on October 24, 2012. Dr. DeMarco opined: “Most probably, and to a reasonable degree of medical certainty, 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.” He further opined: “Mr. Contreras’ injuries to his right shoulder affects his right upper extremity by way of radiating pain and tenderness into his right biceps as a result of his October 8, 2008 accident at work.” [R.P. 221]. Finally, when he did address the permanent impairment rating, he specifically assigned a 3% permanent impairment for “biceps atrophy.” [R.P. 224].

The second opinion doctor, Dr. Hughes, agreed. He opined similarly, stating: “Most probably and to a reasonable degree of medical certainty, Mr. Contreras’ injuries to his right shoulder, right upper extremity, right biceps and clavicle are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work.” [R.P. 214]. Dr. Hughes added the “injuries to his right shoulder affects his right upper extremity by way of pain and tenderness into his right biceps and clavicle as a result of his October 8, 2008 accident at work.” [R.P. 214].

As a result of these injuries, Contreras is unable to return to his previous employment as a firefighter and suffered a substantial loss in earnings capacity. Notwithstanding the aforementioned expert medical evidence that the right arm and clavicle were impaired and injured, the Appellate

Panel found that Contreras's injuries were limited to his right arm, thus disqualifying him for a disability award for loss of earning capacity under the economic model. The Appellate Panel awarded 35% permanent partial disability to the right shoulder.

On February 12, 2013, Contreras filed a Form 50 (Employee's Request for Hearing) seeking additional medical treatment and disability compensation. He specifically alleged he had suffered a permanent loss of earnings capacity as defined under S.C. Code Ann. § 42-9-20 (2007). [R.P. 118-119].

St. John's timely filed a Form 51 (Employer's Answer), admitting a "right shoulder injury only." [R.P. 120].

A hearing was held before Commissioner Gene McCaskill on May 14, 2013. Contreras testified on his own behalf. Evidence was presented regarding medical treatment, the extent of injuries and impairment, and vocational evidence establishing Contreras' injury related loss of earnings capacity.

Commissioner McCaskill issued a Decision and Order on August 27, 2013, making the following pertinent findings of fact:

That, I find, that on or about October 8, 2008, Claimant suffered injury by accident arising out of and in the course and scope of employment, wherein he injured his **right shoulder and right upper extremity**. [R.P. 22, Finding of Fact #3 (emphasis added)].

That, based on the record as a whole, I conclude the greater weight of the evidence, dictates that the Claimant has suffered permanent partial wage loss, pursuant to S.C. Code Ann. § 42-9-20. [R.P. 25, Finding of Fact #23].

Based on these findings, Commissioner McCaskill ordered St. John's to pay 340 weeks of permanent partial disability to Contreras, along with providing ongoing post-MMI medical treatment.

St. John's timely filed a Form 30 (Notice of Appeal) on September 3, 2013. [R.P. 121].

The Appellate Panel heard oral arguments on December 16, 2013. The Appellate Panel issued a Decision and Order on May 5, 2014. The Appellate Panel affirmed in part, reversed in part and remanded to the jurisdictional Commissioner for a determination of an award to the Claimant's right shoulder under 42-9-30. [R.P. 36-52].

Specifically, the Appellate Panel deleted the injury to the right upper extremity in Commissioner McCaskill's finding of fact #3, changing it to read: "Claimant suffered an injury to his right shoulder on October 8, 2008 in the course and scope of his employment." [R.P. 46, Finding of Fact 4]. Although still finding Contreras had proven an actual loss of earning capacity, the Appellate Panel reversed the award for lost earning capacity based on the injury being limited to the shoulder alone. As such, the Appellate Panel held the award should be made under the scheduled member statute, section 42-9-30, rather than under Section 42-9-20.

The Panel also added five other findings relevant to this appeal:

That Dr. DeMarco, the authorized treating orthopedic surgeon, issued a rating on August 7, 2012. Dr. DeMarco found that the Claimant had a 9% permanent partial impairment to the shoulder and that **this included 3% biceps atrophy**, 3% for loss of internal rotation, 2% for loss of forward flexion and 1% for pain and muscle spasm. There is no separate rating to the upper extremity. [R.P. 47, Finding of Fact 7 (emphasis added)].

Dr. Hughes, an orthopedist, performed an IME at the Claimant's request and issued a 14% permanent impairment rating to the Claimant's right shoulder and a 10% rating for the clavicle injury. [R.P. 47, Finding of Fact 8].

That the Single Commissioner did not find the clavicle compensable and that issue was not appealed. [R.P. 47, Finding of Fact 10].

That the Claimant's injury is limited to the right shoulder. [R.P. 50, Finding of Fact 32].

Claimant is entitled to an award under 42-9-30 for the right shoulder. [R.P. 50, Finding of Fact 33].

Additionally, the Appellate Panel held Petitioner “is entitled to a lump sum payment for any and all past due temporary partial disability benefits.” [R.P. 49, Finding of Fact 27]. However, the Panel eliminated a specific finding of fact supporting the award and made no findings of its own as to what the award should be.

On June 3, 2014, Contreras timely filed his Notice of Appeal to the Court of Appeals. The Court dismissed the appeal as interlocutory pursuant to Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). [R.P. 53-54].

The Appellate Panel then remanded to the original Single Commissioner, Commissioner McCaskill. The Single Commissioner issued a Decision and Order on October 22, 2015, wherein he found Contreras had suffered a 35% permanent partial disability to his right shoulder. [R.P. 62]. The Single Commissioner added he was limited by the remand instructions strictly to addressing permanent partial disability to the right shoulder. He therefore did not address the past due temporary partial disability benefits.

Contreras timely filed his Form 30 (Notice of Appeal) to the Full Commission on November 3, 2015. [R.P. 123-125].

The Appellate Panel issued its Decision and Order on May 26, 2016 fully affirming the Single Commissioner’s Order on remand – including the holding that temporary partial could not be addressed. [R.P. 63-71].

Contreras appealed to the Court of Appeals. In an unpublished opinion, the court vacated and remanded the Appellate Panel’s Orders. The court held “Without specific and definite findings

upon the evidence, we must remand because we cannot determine whether the Appellate Panel” findings are unsupported by substantial evidence or controlled by an error of law.” The court remanded with instructions “to the Commission to 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].

The third Appellate Panel issued a wholly new Full Commission Order on June 4, 2021. [R.P. 76-106]. The new Order disregarded the previous orders making different findings of fact. The Appellate Panel “awarded 35% permanency to the right shoulder [which] encompasses and includes any incidental effect on Claimant’s right clavicle, right bicep, and/or right bicep tendon. Claimant is not entitled to receive separate awards for either the right arm or right clavicle.” The Appellate Panel further ordered “that Claimant is additionally entitled to temporary partial disability benefits in the amount of \$29,824.18.” [R.P. 104].

Although not an issue in dispute on remand, the Appellate Panel reduced the average weekly wage from \$1,174.20 to \$1,134.72. [R.P. 102, Finding of Fact 32].

Petitioner timely appealed to the Court of Appeals. Oral argument was heard on September 14, 2023. The court issued its opinion on March 13, 2024. 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).

The Court of Appeals affirmed on three issues. The court rejected Petitioner’s argument “that upon remand from this court, ‘the Appellate Panel issued an *entirely* new [o]rder,’ ‘making new findings of fact *wholly contradictory* to its previous findings.’” Id. The court rejected this argument

holding:

In its first order, the Appellate Panel found the check-box forms deserved more weight because the time at which they were completed was closer in time to the hearing and thus, those forms more accurately reflected Contreras's condition at the time of the hearing. The third Appellate Panel order gave Dr. DeMarco's Forms 14B more weight in deciding if any of Contreras's body parts other than his shoulder were injured because they were completed as a part of Contreras's medical treatment accompanying doctor's visits, whereas the check-box forms were completed as a result of Contreras's attorneys sending the forms to the doctors to be completed for use in this litigation. We find the Appellate Panel's findings were not inconsistent because the Appellate Panel relied on different forms to make different decisions. The Appellate Panel explained why it relied on which forms for each decision. Accordingly, the Appellate Panel's third order was not inconsistent with its first order.

Id.

As to the second issue, the court held the Appellate Panel's finding that the injury was strictly limited to the right shoulder was supported by substantial evidence. The court rejected Petitioner's argument that this was a legal issue. The court:

acknowledge[d] that the record the record contains some evidence that supports Contreras's argument his right arm was affected, including his hearing testimony about pain in his biceps, complaints of long head of the biceps tendinopathy, Dr. DeMarco's assignment at one point of 3% impairment for biceps atrophy, and Dr. Hughes's IME opinion Contreras had a 14% impairment to the right shoulder and 10% to the right upper extremity. "However, when faced with conflicting testimony, we are constrained by our limited standard of review." Colonna, 404 S.C. at 547, 745 S.E.2d at 134. The record contains numerous references in Contreras's medical records to a shoulder injury with no mention of a bicep injury. Although Dr. DeMarco checked yes as to whether Contreras's right shoulder affected his right upper extremity on the check-box forms, the Appellate Panel had the authority to weigh all of the evidence in the record to determine the extent of Contreras's disability. Accordingly, the Appellate Panel did not err by limiting Contreras's disability award to his right shoulder under section 42-9-30.

Id.

The Court of Appeals also held in a footnote that it could not correct the scrivener's error on the average weekly wage because it was not raised until Petitioner's Reply Brief. At oral argument,

Petitioner confirmed that he had not noticed the scrivener's error until it was raised in Respondent's Brief to the Court of Appeals.

This Petition followed.

ARGUMENT

Petitioner, by and through his undersigned attorneys, hereby files this Petition for Writ of Certiorari. As grounds for granting his Petition, Petitioner would respectfully show this case presents important and novel issues addressing the adjudicative process at the Workers' Compensation Commission, as well as the level of scrutiny the appellate courts should apply when analyzing decisions from the Commission.

The primary issue is the duty of the Commission to apply the *Most Munificent Remedy Doctrine* by making the most favorable award to a disabled worker under the economic model rather than a lesser award under the medical model. Concomitant with this duty is the requirement that the Commission cannot reject consistent lay and medical evidence proving that, as in this case, that a second body part (the arm) was injured along with the admitted shoulder injury. Neither the Commission nor the Court of Appeals can disregard positive evidence nor can they create the illusion of conflicts in the evidence when there is no such inconsistency, particularly when the effect of this flawed decision making process is to deprive an injured worker of the remedy to which he is legally entitled.

The secondary issue concerns another part of the Commission's flawed process wherein a subsequent appellate panel given specific instructions to make a previous decision more specific instead issues a wholly new order that contradicts and rejects the original appellate panel's order.

These concerns warrant analysis and reversal by our State's highest Court. Therefore, the

Court should grant the Petition and issue the Writ of Certiorari.

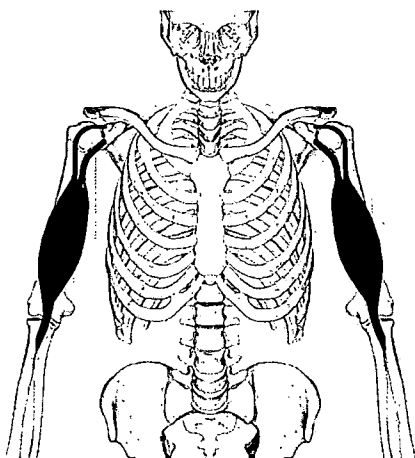
1. **As the evidence of impairment, injury and affect on the right biceps/arm is overwhelming and uncontradicted, the Court should have reversed the Appellate Panel for making a single member disability award to the right shoulder when the evidence showed the right upper extremity was also injured/or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

In its Opinion, the Court of Appeals viewed this case through the prism of substantial evidence, as if there were conflicting medical evidence. Yet, there is no true conflict in the evidence. Dr. DeMarco's opinions are consistent and unchallenged (and virtually identical to those of Dr. Hughes). 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." 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 appellate court to assume there is such a conflict nor must it ignore the law.

This is not a substantial evidence case. 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 issue matters because to recover benefits for economic loss under the medical model, there must be an affect on a second body part. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)("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.”). For Contreras and similarly situated injured workers, this amounts to an award of 340 weeks – considerably larger and fairer than the 105 weeks awarded by the Appellate Panel.

The distinction between the arm and the shoulder holds true from a medical standpoint as well, particularly as 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 here – then the injury unquestionably affects the arm. The location of the biceps in the arm is most obvious in an illustration:²



In its original opinion, the Court of Appeals held:

“Here, Contreras presented evidence that he injured his right arm and clavicle in addition to his right shoulder.” [R.P. 73].

Indeed, although Contreras undoubtedly suffered a serious injury to his shoulder, he also injured his right arm, specifically the biceps. The arm injury was serious enough to require a separate surgery, resulted in permanent impairment

ratings *specifically to the biceps and arm*, and left him with permanent pain, weakness, muscle atrophy and restrictions. Both Dr. DeMarco and Dr. Hughes explicitly opined Contreras suffered injuries to “right shoulder and right upper extremity, (right biceps) . . .” [R.P. 214, 221].

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

²"Biceps brachii muscle06" by Anatomography - en:Anatomography (setting page of this image). Licensed under CC BY-SA 2.1 jp via Wikimedia Commons - http://commons.wikimedia.org/wiki/File:Biceps_brachii_muscle06.png#mediaviewer/File:Biceps_brachii_muscle06.png

The Appellate Panel engaged in various machinations to disregard the overwhelming evidence that the biceps/arm had been injured, operated on, and impaired. The panel combed the medical records to cobble together numerous incidental – often trivial – findings to justify its ultimate conclusion. Any conclusions reached by the exercise of this *unusual finesse of reasoning* cannot survive meaningful appellate review. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel’s conclusion because “rank speculation” cannot outweigh competent evidence of disability). Cf. Therrell v. Jerry’s Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)(“Though the workers’ compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.”). This method of analysis – focusing on trivial minutiae to the exclusion of qualified expert opinions on the ultimate issue – is merely the Commission’s lay speculation about a medical diagnosis it refuses to accept. 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. The Appellate Panel repeated the error it made in Burnette when it substituted its own medical opinions for the opinions of the doctors.

The Appellate Panel was faced with two very specific pieces of evidence that definitively proved the arm, biceps and clavicle were injured. The first are the questionnaires completed by Dr. Hughes and Dr. DeMarco. The Appellate Panel inexplicably disregarded these opinions on the

ground that they contradict other statements by Dr. DeMarco. 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 Petitioner’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 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]. The questionnre is wholly consistent with the impairment rating and causation opinions Dr. DeMarco gave in his medical reports.

The other critical data point is the final impairment rating: 9% to the arm of which 3% is for biceps atrophy and 1% for “pain and muscle spasm” in the biceps. If 44% of the total impairment rating is specifically for the biceps muscle in the arm (combined with testimony that the pain and spasm is at the elbow), then the Commission cannot find as a matter of law that the arm is not injured and/or impaired.

This is not, as the Court of Appeals 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. This is consistent uncontradicted evidence mandating reversal.

Therefore, the Court should grant the Petition for Writ of Certioari.

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

The Court of Appeals 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. 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 reasoned the questionnaires were given greater weight because they were relied on to award future medical treatment rather than disability. The court added that as future medical treatment was no longer an issue on appeal, the Appellate Panel was free to reweigh the evidence.

While it is true that the Appellate Panel reached the same result as it did in 2014, the 2021 Panel was required to follow the same road. The panel was charged with making specific findings of fact based on the same evidence in the record; it was not permitted to make a u-turn once it realized that its ultimate finding was not sustainable.

The glaring error from the Appellate Panel on remand is the 180 degree reversal on the

weight given to the opinions from Dr. DeMarco. The 2014 Panel held “we give *more weight* to the opinions given in [the later] 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, Finding of Fact 29 (emphasis added)]. The 2021 Appellate Panel turned this finding on its head holding: “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.” [R.P. 95, Finding of Fact 10 (underline in original; italics added)].

Respondents contend this was not error because the “Commission’s findings are that the portions of the check the box questionnaire related to causation of the right biceps is inconsistent with the vocational report.” [Brief of Respondents, page 17]. Petitioner does not dispute that the Commission found the *medical evidence* to be inconsistent with the *vocational evidence* as to causation. However, this demonstrates another error. Medical evidence is used to prove causation; vocational evidence is used to prove disability. A vocational expert is not qualified to address medical causation. That issue is exclusively the province of a medical doctor such as Dr. DeMarco. For the Appellate Panel to find competent medical evidence is outweighed by incompetent vocation evidence on the issue of causation is patently erroneous. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel’s conclusion because “rank speculation” cannot outweigh competent expert testimony).

Furthermore, the flaw in the Appellate Panel’s reasoning is exposed by their reference to a purported inconsistency in the vocational report versus Contreras’s testimony. The second Pnel

misrepresents the contents of the report. The vocational expert reported “Mr Contreras [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 shoulder. 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.

The fact remains that the medical evidence on the shoulder, arm and clavicle *is* unrefuted. As the medical evidence on this issue is dispositive, this Court can and should reverse the Appellate Panel. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission’s denial of claim because the “only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe”); 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.”); 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.”).

Therefore, the Court should grant the Petition, issue the Writ, and reverse the Court of Appeals and Appellate Panel.

3. The Court should reverse the Court of Appeals' denial of Petitioner's request to correct the scrivener's error on the average weekly wage made by the third Appellate Panel.

There is one additional area the Court needs to address. As Respondents pointed out in their Brief to the Court of Appeals, 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 was 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, Petitioner asks 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).

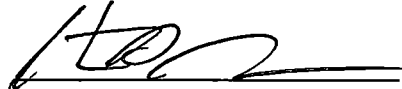
The Court of Appeals denied the request because it was raised in the Reply Brief. As stated at oral argument, Counsel for Petitioner did not notice the error in the third Appellate Panel's order until it was pointed out in Respondents' brief. However, this Court held in Trotter that a "request [to correct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

The average weekly wage was determined by the Single Commissioner following the hearing on May 14, 2013. Neither party appealed this determination at any point in the proceedings – even in a case which has been before the Appellate Panel three times and the Court of Appeals four times. It would be a miscarriage of justice for a scrivener's error made by a third appellate panel eight years after the trial to stand uncorrected. Contreras should not be punished for overlooking an incorrect numeral in a 29 page order. The Court should hear this case and correct the scrivener's error.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari on all issues.

Respectfully Submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Workers' Compensation Commission

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Appellate Case No. 2021-000683

Thomas Contreras, Employee, Petitioner,

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 Writ of Certiorari** and **Appendix** to be served on the parties below,
clearly marked on the date indicated below, addressed as follows:

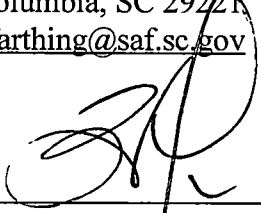
The Honorable Patricia A. Howard
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Via email: suptctfilings@sccourts.org

Margaret M. Urbanic, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Purbanic@clawsonandstaubes.com

Erin Farthing, Esquire
State Accident Fund
PO Box 102100
Columbia, SC 29221
efarthing@saf.sc.gov

June 12, 2024



Wanda Powell, Paralegal



STEPHEN B. SAMUELS
P. JASON REYNOLDS
C. DAVID BEALE, JR.
ATTORNEYS AT LAW

June 12, 2024

The Honorable Patricia A. Howard
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Thomas Contreras v. St. Johns Fire District Commission and State
Accident Fund
Appellate Case No.: 2021-000683

Dear Ms. Kitchings:

Enclosed for filing please find the original unbound copy of our **Petition for Writ of Certiorari, Appendix and Proof of Service** in the above case.

By copy of this letter, I am serving the Respondents with a copy of our **Petition for Writ of Certiorari and Appendix** as indicated by our Proof of Service.

Please have your staff file the **Petition for Writ of Certiorari, Appendix 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,

Stephen B. Samuels

SBS/wp
Enclosure(s) as stated

cc w/encl.: Margaret Urbanic, Esq.
Erin Farthing, Esq.
Gary Christmas, Esq.

RECEIVED
JUN 12 2024
S.C. SUPREME COURT

WE WORK FOR THE PEOPLE WHO WORK

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