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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Contreras, Employee, 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

AFFIRMED

Stephen Benjamin Samuels, of Samuels Reynolds Law Firm LLC, of Columbia, and Gary Christmas, of Christmas Injury Lawyers, LLC, of Mount Pleasant, for Appellant.

Margaret Mary Urbanic, of Clawson & Staubes, LLC, of Charleston, and Erin Farrell Farthing, of Lexington, for Respondents.

KONDUROS, J.: Thomas Contreras appeals an order from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) that awarded him permanent partial disability (PPD) compensation for a single member as a result of an injury to his right shoulder. On appeal, Contreras contends the Appellate Panel erred in making a single member disability award when the evidence showed his disability should have been awarded under the loss of

earnings capacity statute.[1] He argues the Appellate Panel erred in limiting compensation to injury for the shoulder, despite overwhelming evidence of injury to multiple scheduled body parts. Additionally, he asserts that on remand, the Appellate Panel erroneously substituted its judgment for the previous Appellate Panel. We affirm.

FACTS/PROCEDURAL HISTORY

St. John's Fire District Commission (St. John's) employed Contreras as a firefighter for over twenty-two years. On October 8, 2008, Contreras sustained an injury in the course and scope of his employment. The incident report indicated "Contreras felt something pull in his right shoulder" while lifting weights. He went to the emergency room, where his chief complaint was a soft tissue injury to the posterior right shoulder.

Following Contreras's injury, he made numerous doctors' visits, ultimately resulting in four separate surgeries. A December 12, 2008 MRI showed supraspinatus tendinitis, a probable superior labral tear, and moderate acromioclavicular (AC) joint arthrosis. Dr. David Jaskwhich diagnosed Contreras with right shoulder pain and a superior labral tear with bursitis. On January 29, 2009, Dr. Jaskwhich performed a "[r]ight shoulder arthroscopy with extensive debridement of bursa, synovium, labrum[,] and bone" and an "[a]rthroscopic repair of the superior labrum anterior-posterior (SLAP) tear." In August 2009, Contreras returned to Dr. Jaskwhich with continued pain. An MRI of his right shoulder revealed "mild tendinopathy of the supraspinatus and infraspinatus tendons" as well as "the intra-articular portion of the biceps tendons." After reviewing the MRI results, Dr. Jaskwhich noted Contreras had a "possible persistent labrum tear." Before performing a second surgery, Dr. Jaskwhich diagnosed Contreras with "[r]ight shoulder pain and impingement status post labral repair." Around October 1, 2009, Dr. Jaskwhich performed a second surgery: a "[r]ight shoulder arthroscopy with extensive debridement of suture, labrum, bursa[,] and bone." At a May 5, 2010 follow-up visit, Dr. Jaskwhich indicated Contreras continued to have pain in his right shoulder and "tenderness over the anterior biceps tendon" and treated him with injections along the biceps tendon. On July 14, 2010, Dr. Jaskwhich released Contreras at maximum medical improvement (MMI), assigning a 10% impairment rating to the right shoulder.

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[1] S.C. Code Ann. § 42-9-20 (2015).

On September 24, 2010, Contreras reported to Dr. James R. DeMarco, who indicated Contreras's chief complaints included "[r]ight shoulder loss of internal rotation," "[l]ong head of the biceps tendinopathy," and "[s]ignificant impingement syndrome." Dr. DeMarco performed Contreras's third surgery on October 11, 2010, completing a "[r]ight shoulder major debridement of a superior labrum anterior to posterior tear," a "[r]ight shoulder subacromial decompression and bursectomy," and a "[r]ight shoulder [AC] joint resection." Dr. DeMarco also performed "a distal clavicle resection" at that time.

On January 21, 2011, Dr. DeMarco stated in a medical report Contreras had a 7% permanent partial impairment of the right upper extremity, which converted to an 11% impairment of the right shoulder. In an addendum dated that same day, Dr. DeMarco opined Contreras had an 11% permanent impairment to the shoulder and a 7% impairment to the right upper extremity, which converted to a 4% impairment to the whole person. On May 16, 2011, Dr. DeMarco completed a Form 14B "Physician's Statement," indicating Contreras had an 11% impairment to the right shoulder, was unable to return to work, and would not need future medical care.

Dr. Charles H. Hughes Jr. conducted an independent medical evaluation (IME) of Contreras on October 6, 2011. Dr. Hughes completed a "check-box" form[2] that same day, checking "YES" to whether "Contreras'[s] injuries to his right shoulder, right upper extremity, right biceps[,] and clavicle [were] caused by and/or aggravated by the injuries he sustained in his" work accident. Dr. Hughes assigned a 14% permanent impairment rating to the right shoulder and 10% permanent impairment rating to the clavicle, writing in AC joint next to the word clavicle and upper extremity next to the rating.[3]

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[2] A few similar terms—such as "check-box" or "check-the-box" forms, reports, or questionnaires—are used throughout the record. These terms all refer to forms sent by Contreras's attorneys to doctors asking questions about his condition. The forms provided a place to check for yes or no and also several lines of space with the preface, "Explain, if necessary." One form also had a list of physical restrictions that could be checked. That form also included a question concerning Contreras's impairment rating that listed several body parts with corresponding blanks to be filled in with a percent sign next to each blank.

[3] The same question contained blanks to fill in for right upper extremity and right biceps but Dr. Hughes did not fill in those blanks.

Contreras also underwent a vocational assessment with Jean R. Hutchinson, a vocational consultant, in October 2011. Hutchinson reported that Contreras complained of right shoulder pain "with 'sharp' pain radiating up to the top of his shoulder." She opined Contreras was unable to perform the duties of his former position as a fire department chief, "would be in jeopardy with regard to locating suitable employment[,] and would incur a loss of future earning capacity." Hutchinson stated she anticipated Contreras earning minimum wage in the future.

In October 2011, Contreras filed a Form 50 asserting, "injuries to his right shoulder, right upper extremity, right glenohumeral ligament, right clavicle, right scapula, right lateral deltoid, right bicep[,] and right distal clavicle." St. John's and its workers' compensation insurance carrier, the State Accident Fund, (collectively, Respondents) filed a Form 51, admitting Contreras sustained an injury to his right shoulder only.

On November 22, 2011, Dr. DeMarco reported Contreras continued to feel pain along the "long head of the biceps and bicipital groove." Dr. DeMarco stated "the [one] thing about him is that he has been completely consistent with where his pain is, directly over the bicipital groove." Dr. DeMarco explained the previous surgeries helped Contreras with some pain but he was "left with biceps pain which now needs to be addressed." Dr. DeMarco recommended another surgery, stating that after completing "a tenodesis, a coracoid decompression," "[t]his [wa]s absolutely the last thing that can be done in the shoulder."

In March 2012, the parties entered into a consent order indicating Contreras sustained "an admitted injury to his right shoulder" and could return to Dr. DeMarco for additional treatment.

On March 29, 2012, Dr. DeMarco reported that Contreras's diagnoses prior to his fourth surgery included "[r]ight shoulder coracoid impingement," "[r]ight shoulder intra-articular synovitis and adhesions," "[r]ight shoulder subacromial impingement with adhesions," and "[r]ight shoulder long head of biceps tendinopathy." Dr. DeMarco performed Contreras's fourth and final surgery that day: a "[r]ight shoulder major debridement of the intra-articular synovitis with coracoid decompression," a "[r]ight shoulder subacromial decompression and bursectomy," and a "[r]ight shoulder long head of the biceps tenodesis." On June 26, 2012, Dr. DeMarco reported Contreras's pain at that time was minimal but he had been experiencing spasms around his biceps.

On August 7, 2012, Dr. DeMarco released Contreras at MMI, indicated he had restrictions of less than forty pounds for overhead lifting with both hands and no more than twenty pounds with his right arm, reported he could perform "a light to medium level job," and assigned a permanent partial impairment rating of 9%, specifying "3% for biceps atrophy, 3% for loss of internal rotation, 2% for loss of forward flexion[,] and 1% for pain and muscle spasm."

On September 4, 2012, Dr. DeMarco completed a Form 14B, opining Contreras had a 15% impairment to the right shoulder. He noted the impairment rating was a conversion from the right upper extremity to the right shoulder. On October 8 and 24, 2012, Dr. DeMarco completed "check-box" questionnaire forms. On both forms, Dr. DeMarco checked "YES" next to the statement: "Contreras'[s] injuries to his right shoulder and right upper extremity, (right biceps) are caused by and/or aggravated by the injuries he sustained in his" work accident. He also marked "YES" on both forms next to the statement that Contreras's right shoulder injuries affected "his right upper extremity by way of radiating pain and tenderness into his right biceps as a result of" the work accident.

In February 2013, Contreras filed a second Form 50, alleging the same injuries as his previous Form 50, which included his right shoulder, right upper extremity, right clavicle, right bicep, and right distal clavicle. By Form 51, Respondents again admitted injury to only the right shoulder. Respondents denied injury to "all other body parts."

In August 2013, following a hearing, the single commissioner found (1) Contreras injured his right shoulder and right upper extremity, (2) Contreras could not return to his job as a firefighter, and (3) Contreras suffered a permanent partial wage loss under section 42-9-20. Respondents appealed to the Appellate Panel, which affirmed in part, reversed in part, and remanded to the single commissioner. The Appellate Panel found Contreras's injury was "limited to the right shoulder" and remanded "for a determination of an award to [Contreras's] right shoulder under" section 42-9-30 of the South Carolina Code (2015). Contreras appealed the remand to this court, which dismissed the appeal as interlocutory and not immediately appealable, citing *Bone v. United States Food Service*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013).

On remand, the single commissioner determined Contreras sustained a 35% PPD to his right shoulder. Contreras appealed to the Appellate Panel, which affirmed the single commissioner's decision. Contreras appealed to this court, which found the Appellate Panel failed to make sufficiently detailed findings of fact and

conclusions of law in order for this court to determine whether the decision was erroneous.[4] *Contreras v. St. John's Fire Dist. Comm'n*, Op. No. 2019-UP-040 (S.C. Ct. App. filed Jan. 23, 2019). This court "vacate[d] the Appellate Panel's order and remand[ed] the case to the Commission to make specific findings of fact regarding Contreras's right arm, right shoulder, and right clavicle."[5] *Id.* at 3.

In the order after remand from this court, the Appellate Panel made additional findings of fact, awarded Contreras 35% PPD to the right shoulder, and found the "award encompasse[d] and include[d] any incidental effect on [his] right clavicle, right bicep, and/or right bicep tendon."[6] It stated Contreras was not entitled to a separate award for "the right arm or right clavicle." This appeal followed.

LAW/ANALYSIS

I. Alleged Inconsistency in Appellate Panel Orders

In this current appeal, Contreras argues 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." He asserts that in the new order, the Appellate Panel erroneously substituted its judgment for that of the 2014 Appellate Panel.[7] He contends the Appellate Panel erred "by completely reversing its own

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[4] This court found, "Although the Appellate Panel's order stated there was 'no separate impairment rating to the upper extremity,' its order failed to clearly set forth the underlying facts upon which it relied to support its conclusion that Contreras's injury was limited to the right shoulder." *Contreras*, Op. No. 2019-UP-040 at 2. This court determined, "Contreras presented evidence that he injured his right arm and right clavicle in addition to his right shoulder. This issue impacts the ultimate liability in the case and determines whether compensation falls under section 42-9-20 . . . or section 42-9-30 . . . ." *Id.*

[5] This court, in light of the insufficiency of the Appellate Panel's order, declined to "address whether Contreras should have received an award under section 42-9-20 rather than section 42-9-30." *Contreras*, Op. No. 2019-UP-040 at 3 n.1.

[6] It also found the issue of an injury to the right clavicle was unpreserved for review because Contreras had not appealed from the single commissioner's first order, which did not make an award for the clavicle. However, the Appellate Panel made substantive findings of fact as to the compensability of the right clavicle out of an abundance of caution.

[7] Throughout the proceedings of this case, the Appellate Panel has been composed of the same three commissioners. The first and third Appellate Panel had the same

previous findings." He maintains the Appellate Panel "did not have [the] authority to dispense with the original findings" and "could not reverse itself by" changing its view of the check-box forms. He posits this court instructed the Appellate Panel "to add to its previous findings to explain its reasoning," not to "ignore what it ha[d] already established." We disagree.

The 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." Specifically, the Appellate Panel stated:

> [A]uthorized orthopedic surgeon, Dr. James DeMarco, opined on "check the box" forms dated October 8, 2012, and October 24, 2012, that [Contreras] is in need of future medical care and treatment in the form of medications, 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 [Contreras's] period of disability. Dr. DeMarco, does not opine on his 14[]B issued on May 16, 2011, that [Contreras] 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 [Contreras's] hearing date[,] and more accurately reflect [Contreras's] current condition and need for future medical care and treatment.*

(emphasis added).

The Appellate Panel's third and final order, issued upon remand from this court, noted the check-box forms Contreras sent to Dr. DeMarco "were not part of or in

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commissioner designated as chair; a different commissioner was the chair for the second Appellate Panel.

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 Appellate Panel further provided:

> 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 [Contreras] 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 [MMI]), 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/spasm** [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 . . . .

The Appellate Panel further stated it considered Dr. Hughes's IME but noted it was created prior to Contreras's final surgery and evaluated the right shoulder. However, the Appellate Panel affirmed the single commissioner's prior order with regard to future medical care.

"The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence." *Parsons v. Georgetown Steel*, 318 S.C. 63, 66, 456 S.E.2d 366, 368 (1995). An appellate court must affirm the Commission's findings of fact if substantial evidence supports them. *Bartley v. Allendale Cnty. Sch. Dist.*, 392 S.C. 300, 306, 709 S.E.2d 619, 622 (2011). "A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced

because the administrative findings, inferences, conclusions[,] or decisions are affected by other error of law." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 282-83, 519 S.E.2d 583, 591 (Ct. App. 1999).

"The final determination of witness credibility and the weight assigned to the evidence is reserved to the [A]ppellate [P]anel." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008); *see also Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (noting the Appellate Panel is tasked with finding facts, evaluating the credibility of the witnesses, and assigning weight to the evidence). "In an appeal from the Commission, this [c]ourt may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact . . . ." *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002); *see also Etheredge v. Monsanto Co.*, 349 S.C. 451, 456, 562 S.E.2d 679, 681 (Ct. App. 2002) ("A court 'may not substitute its judgment for that of any 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 whole record.'" (quoting *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999))).

"The weight to be ascribed to particular testimony is for the commission to determine and not . . . [an appellate c]ourt." *Tobey v. L & P Constr. Co.*, 296 S.C. 122, 125, 370 S.E.2d 897, 899 (Ct. App. 1988). "The credibility and weight of the doctor's testimony is for the trier of fact." *Parsons*, 318 S.C. at 67, 456 S.E.2d at 368. "Regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive." *Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991). However, "[t]he commission may not . . . give artificial importance to a credibility determination when credibility is not a reasonable and meaningful basis on which to decide a question of fact." *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 639, 842 S.E.2d 349, 350 (2020).

In *Fragosa v. Kade Construction, LLC*, this court found "the Appellate Panel made inconsistent findings with regard to the existence of a physical brain injury." 407 S.C. 424, 430, 755 S.E.2d 462, 466 (Ct. App. 2013). This court "remand[ed] to the Appellate Panel for clarification" because of the inconsistency. *Id.* at 431, 755 S.E.2d at 466. This court also remanded for clarification in *Baker v. Hilton Hotels Corp.*, when the Appellate Panel had stated it agreed with a doctor's conclusion, but this court found the Appellate Panel's finding was inconsistent with the doctor's actual report. 406 S.C. 395, 402, 752 S.E.2d 279, 282-83 (Ct. App. 2013).

In this case, this court previously instructed the Appellate Panel "to make specific findings of fact regarding Contreras's right arm, right shoulder, and right clavicle." *Contreras*, Op. No. 2019-UP-040 at 3. The Appellate Panel did this.

The first order from the Appellate Panel did not find Dr. DeMarco's Forms 14B unreliable, but simply gave the check-box forms more weight because they were more recent.[8] The order did this in determining whether or not Contreras needed future medical care; the Appellate Panel found that he would. *See* S.C. Code Ann. § 42-15-60(A) (2015) (stating the commission can award future medical treatment when it believes the treatment "will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty"); *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583, 514 S.E.2d 593, 598 (Ct. App. 1999) ("[A]n employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached [MMI]."). That finding was the basis for determining Contreras would need future medical care and that determination is no longer disputed. Because the parties were no longer litigating that issue, the Appellate Panel had no reason to restate this finding in its third order.

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.

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[8] We note the Appellate Panel's first order initially references Dr. Marco's Forms 14B from both 2011 and 2012 in finding (5), but the finding Contreras alleges is inconsistent with the findings in the new order, finding (29), only mentions the Form 14B from 2011. The 2012 Form 14B was completed in September 2012, only one month before the check box forms. Both Forms 14B stated Contreras did not need future medical care.

II. Substantial Evidence

Contreras argues the Appellate Panel erred by "making a single member disability award" under section 42-9-30 "when the evidence showed his disability should have been awarded under the loss of earnings capacity statute," section 42-9-20. He contends the Appellate Panel erred when it denied compensation for the arm and clavicle, either as an award for lost earnings under section 42-9-20 or separate awards for loss of use under section 42-9-30. He asserts the Appellate Panel must apply the statute that provides the greatest benefits for a claimant. He argues he sustained injuries to his right shoulder and his right arm—specifically, the biceps. He contends his arm injury "require[d] a separate surgery, resulted in definable impairment ratings, and left him with permanent pain, weakness, muscle atrophy[,] and restrictions." Contreras asserts Dr. DeMarco gave him a 3% permanent impairment rating for "biceps atrophy." Contreras contends his own testimony was consistent with the medical evidence because he stated he had pain in the front and back of his biceps.[9] We disagree.

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). "This [c]ourt's review is limited to deciding whether the [Appellate Panel's] decision is unsupported by substantial evidence or is controlled by some error of law." *Id.* at 289, 599 S.E.2d at 610-11. "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 conclusion the administrative agency reached in order to justify its action." *Id.* at 289, 599 S.E.2d at 611. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007).

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[9] In his reply brief, Contreras requests for the first time that this court "correct a scrivener's error" that occurred when the Appellate Panel decreased his average weekly wage from $1,174.20 to $1,134.72. At oral arguments, Respondents disputed that this was an error. Because Contreras did not raise this until his reply brief, we cannot address this issue. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use . . . the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

"The burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture[,] or speculation." *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998). "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). "The final determination of witness credibility and the weight assigned to the evidence is reserved to the [A]ppellate [P]anel." *Houston*, 378 S.C. at 551, 663 S.E.2d at 89. "Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." *Hargrove*, 360 S.C. at 290, 599 S.E.2d at 611. "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). When conflicting medical evidence has been presented, "the findings of fact of the commission are conclusive." *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000).

In South Carolina workers' compensation proceedings, an injured employee has three ways to obtain compensation: (1) total disability under section 42-9-10 of the South Carolina Code (2015); (2) partial disability under section 42-9-20; and (3) scheduled disability under section 42-9-30. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). "The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity." *Id.* "[A] claimant with one scheduled injury is limited to the recovery under [section] 42-9-30 alone." *Id.* at 106, 580 S.E.2d at 103. "[A]n individual is not limited to scheduled benefits under [section] 42-9-30 if he can show additional injuries beyond a lone scheduled injury." *Id.* "Generally, an injured employee may proceed under either the general disability sections 42-9-10 and 42-9-20 or under the scheduled member section 42-9-30 in order to maximize recovery . . . ." *Lee v. Harborside Café*, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002). "Only where a scheduled loss is not accompanied by additional complications affecting another part of the body is the scheduled recovery exclusive." *Id.*

> The policy behind allowing a claimant to proceed under the general disability [section] 42-9-10 and [section] 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).

When an injury is confined to a scheduled member and the injury has not impaired any other part of the body, the employee can receive compensation only for the scheduled member under section 42-9-30. *Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 545, 745 S.E.2d 128, 132-33 (Ct. App. 2013). In order to receive compensation in addition to that scheduled for the injured member, the claimant must show the injury affects some other part of his body. *Id.* at 545, 745 S.E.2d at 133. "[A] claimant must prove not only that another body part was *affected* by an injury to a scheduled member, but that another body part was *impaired or injured* for section 42-9-10 to apply." *Dent v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 202, 813 S.E.2d 886, 890-91 (Ct. App. 2018).

In *Dent*, this court found the claimant "presented sufficient evidence to support his claims that his back injury has caused additional injury or impairment to his leg" as he "complained of persistent pain, numbness, and weakness in his . . . leg to his doctors, and" two doctors diagnosed him with lumbar radiculopathy. *Id.* at 202, 813 S.E.2d at 891. However, in that case the Appellate Panel found the claimant's back injury affected his leg. *Id.* This court found the evidence of the claimant's leg pain in the record was substantial evidence of an injury affecting his leg and thus, claimant could proceed under section 42-9-10. *Id.* at 202-03, 813 S.E.2d at 891.

Contreras argues the primary issue on appeal here is "virtually the same" as the one this court decided in *Hutson v. S.C. State Ports Authority*, when it found a claimant may have been entitled to additional compensation under section 42-9-30 because he suffered radicular symptoms from his back into his leg. 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010), *rev'd on other grounds*, 399 S.C. 381, 732 S.E.2d 500 (2012).

In *Hutson*, the claimant appealed the Appellate Panel's decision limiting his recovery to a 30% loss of use to his back. *Id.* at 110, 700 S.E.2d at 463. On appeal, the claimant pointed to the single commissioner's statements made both at the hearing as well as in the "order that he had intended to take into account his belief that [the claimant's] injury affected his right leg as well as his back and the combination of the two injuries would enable [the claimant] to recover under

section 42-9-20 as well as section 42-9-30." *Id.* at 116, 700 S.E.2d at 467. The single commissioner's order found the claimant "suffered radicular symptoms in his right leg that affected the functioning of the limb." *Id.* at 117, 700 S.E.2d at 467. The single commissioner "reiterated this finding when, in commenting on [the claimant's] assurances that he was capable of running a restaurant, he indicated that but for this testimony, he would have found claimant to be permanently and totally disabled 'with [e]ffects to the right leg.'" *Id.* Neither the employer nor the carrier appealed that finding. *Id.* Accordingly, this court held the claimant had "established at least a prima facie case for compensation for the injury to his leg pursuant to section 42-9-30 and remanded." *Id.* No party sought a writ of certiorari from the supreme court as to this court's determination regarding claimant's leg injuries. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 386 n.1, 732 S.E.2d 500, 502 n.1 (2012). The supreme court reversed this court's "decision that [the claimant] did not show a wage loss within the meaning of section 42-9-20" and remanded the matter. *Id.* at 390, 732 S.E.2d at 504.

Because the employer and carrier in *Hutson* did not appeal the single commissioner's finding regarding the claimant's leg, we disagree the case requires us to reverse the Appellate Panel.

Substantial evidence supports the Appellate Panel's determination that Contreras sustained an injury to his right shoulder only. The Appellate Panel concluded Contreras did not sustain an injury to his right clavicle, noting no medical diagnostics were completed on the clavicle, the treatment records referenced the clavicle only once, and Contreras did not complain of pain or injury to the clavicle in his deposition or at the hearing. The Appellate Panel also determined Contreras did not sustain an injury to his right arm. After the first two shoulder surgeries, Dr. Jaskwhich assigned a 10% impairment rating to the right shoulder in 2010. Contreras then reported to Dr. DeMarco, who indicated his chief complaints were "[r]ight shoulder loss of internal rotation," "[l]ong head of the biceps tendinopathy," and "[s]ignificant impingement syndrome." After Dr. DeMarco completed the third surgery, he completed a Form 14B, assigning Contreras an 11% impairment rating to the right shoulder in 2011. When Dr. DeMarco recommended a fourth surgery for Contreras, he provided "[t]his [wa]s absolutely the last thing that can be done in the shoulder." Finally, Dr. DeMarco completed another Form 14B, opining that Contreras had a 15% impairment to the right shoulder and that this was a conversion from the right upper extremity to the right shoulder. Furthermore, the Appellate Panel noted none of Contreras's doctors performed diagnostic testing on his right arm.

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, 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. *See, e.g.*, *Brown*, 316 S.C. at 280, 450 S.E.2d at 58 (holding the Appellate Panel properly required an employee to proceed under the scheduled member section when the employee failed to prove his back injury affected another body part or contributed to an impairment beyond a single scheduled member).

CONCLUSION

Based on the foregoing, the Appellate Panel's final order limiting Contreras's disability award to his shoulder is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

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

[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.

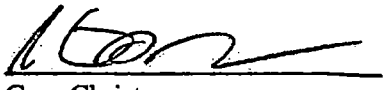
There is one area the Court needs to address. As Respondents pointed out, the 2021 Appellate Panel lowered the average weekly wage from $1,174.20 to $1,134.72. [R.P. 102, Finding of Fact 32]. The average weekly wage was not in dispute and not an issue for the Appellate Panel to address on remand. The 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

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

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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19 day of April, 2024

The South Carolina Court of Appeals

Thomas Contreras, Employee, Appellant,

v.

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

Appellate Case No. 2021-000683

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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FILED
May 13 2024

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