THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2021-000683

Thomas Contreras, Claimant, ... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. The Appellate Panel erred in 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 Reply to Respondents' Argument at pages 7-13].

Respondents seek to explain away the Appellate Panel's error by employing the same logical fallacy as did the panel on remand. Respondents simply disregard the medical opinions on the ultimate facts, blithely dismissing them as "check the box questionnaires prepared by Appellant's attorneys." [Brief of Respondents, page 11].

It is nonsensical and arbitrary for the Appellate Panel on remand to dismiss "check the box questionnaires" when the Commission's own Form 14B (Physician's Report) is itself a "check the box questionnaire." See. Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct.App. 2012)("The nature and timing of [employee's] visits do not discredit [the doctor's] medical opinion."). If the doctors disagreed with the questionnaires, they would not have completed them as they did.[1] See. Clark v. Philips Electronics/Shakespeare, 433 S.C. 186, 857 S.E.2d 378 (Ct.App. 2021)("[w]e are confident that if the doctors believed they were duped into their opinions they would have said so."). Indeed, when the first Appellate Panel reviewed the questionnaires before remand, the panel stated "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)]. For the second Appellate Panel to reverse the first

[1]For example, Dr. DeMarco disagreed with one of the questions about future medical treatment; explaining in his own hand writing that "Surgery not within a reasonable degree of medical certainty." [R. p. 221].

Appellate Panel and disregard the doctor's opinions is not only arbitrary; it is expressly prohibited under our jurisprudence. Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950)(one judge of the same court cannot overrule another).

The fact of the matter is Contreras's attorneys went to his doctors and asked for their expert medical opinions on the ultimate facts in the case. Dr. Hughes and Dr. DeMarco opined "Claimant's injuries to his right shoulder and upper extremity, (right bicep) are caused and/or aggravated by the injuries that he sustained in his October 8, 2008 accident at work." The two doctors 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." Dr. DeMarco assigned a 3% permanent impairment for "biceps atrophy." [R.P. 224]. There is nothing nefarious or unusual in this practice. As is usual in workers' compensation cases, the doctors provided their opinions by giving written answers to questionnaires.[2]

The first Appellate Panel logically considered the questionnaire responses to be authoritative and accurate because they were the final opinions of the doctors made closest to the hearing. The whole purpose of obtaining final opinions is because treatment records alone may not contain the evidence required for additional treatment or disability compensation under the rules of workers' compensation. See, e.g., Frampton v. S.C. Dep't of Natural Res., 432 S.C. 247, 851 S.E.2d 714 (Ct.

[2] See, e.g, Fragosa v. Kade Constr., LLC, 407 S.C. 424, 755 S.E.2d 462 (Ct.App. 2014)("In a March 2011 questionnaire from Fragosa's attorney, Dr. Sandoz checked 'Yes' in response to the question of whether Fragosa suffered physical brain damage rendering him totally and permanently disabled."); Baker v. Hilton Hotels Corp., 406 S.C. 395, 752 S.E.2d 279 (Ct. App. 2013)("Following Dr. Waid's evaluation and approximately one-and-a-half years after he last treated Baker, Dr. McCaffrey checked 'yes' in a medical questionnaire from Baker's attorney that he agreed with Dr. Waid that Baker sustained a permanent physical brain injury."); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct.App. 2013)(noting doctor "revised his medical opinion when he filled out a more detailed questionnaire for Burnette's counsel.").

App. 2020)(affirming appellate panel's denial of disability compensation because the employee "was required to prove, with expert medical evidence stated to a reasonable degree of medical certainty, that the alleged accident on September 4, 2010 aggravated his pre[ ]existing neck condition."); Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016)("Because more than ten weeks had elapsed since Hartzell's alleged injury and the Appellate Panel did not support its decision with expert medical evidence, we find it erred when it awarded medical benefits in contravention of subsection 42-15-60(A).").

If Respondents disagreed with the opinions of Dr. Hughes and Dr. DeMarco, they had the option of deposing the doctors or retaining their own experts. They did not. Respondents "could have offered contrary evidence; without any, the Panel had no basis to discount the objective medical evidence, and Crane tells us a vague nod to credibility cannot close the gap." Clark v. Philips Electronics/Shakespeare, 433 S.C. 186, 857 S.E.2d 378 (Ct.App. 2021).

Respondents focus on the portions of medical records that specifically use the word "shoulder" to the exclusion of records *from the same doctors* describing the additional injury to the arm (specifically the biceps). Respondents further argue:

> Additionally, there seems to be an assumption that because the word biceps is used that this automatically means that the arm is involved. No medical testimony was elicited by either side and there is no evidence that use of the term biceps refers to the arm.[3] [Respondents Brief, page 9].

Well . . . *yes*, an injury to the biceps is *by definition* an injury to the arm. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter

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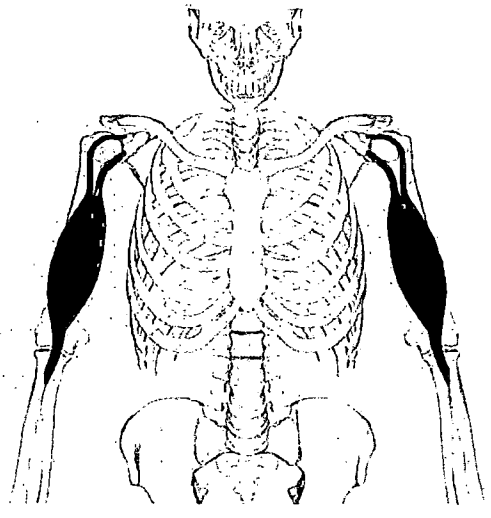
[3]The argument that there is "no evidence that use of the term biceps refers to the arm" is belied by the opinion of both surgeons, particularly Dr. DeMarco's explicit reference to the "right upper extremity, (right biceps)." [R.P. 221].

the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770.

The location of the biceps in the arm is most obvious in an illustration:[4]



The biceps is a two-headed muscle that lies on the upper arm between the shoulder and the elbow. Both heads arise on the scapula and join to form a single muscle belly which is attached to the upper forearm. While the biceps crosses both the shoulder and elbow joints, its main function is at the latter where it flexes the forearm at the elbow and supinates the forearm.[5]

The biceps is made up of two bundles of muscles - the long head and short head. The long head is shown in the outer darker area; the short head is on the inside. The fourth and final surgery was specifically to address "long head of the biceps pain." [R. p. 258].

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[4]"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

[5]Lippert, Lynn S. (2006). *Clinical kinesiology and anatomy* (4th ed.), pp. 126–7.

Respondents object to the use of the above illustration because "No doctor was ever shown this diagram to confirm or explain whether the diagram shown is relevant or depicts any of Appellant's four surgeries." [Brief of Respondents, page 9]. In fact, medical references are frequently consulted by our appellate courts to explain medical terms. See, e.g, Patton, v. Miller, 804 S.E.2d 252, 420 S.C. 471 (2017)(court cited *Blacks' Medical Dictionary* to state "Brachial means 'belonging to the upper arm.' The brachial plexus is the network of nerves that lies 'along the outer side of the armpit' and contains all the nerves to the arm."). If our supreme court can cite to a medical dictionary for the proposition that "Brachial means 'belonging to the upper arm'" then certainly this Court can refer to an illustration or dictionary defining the biceps as "the large flexor muscle of the front of the upper arm." *Merriam Webster's Collegiate Dictionary*, page 111 (10th Ed., 1993). The location of the biceps within the arm is not a matter in dispute. Nor is it susceptible to different interpretations.

As to whether any doctor was cross-examined on his opinions about the arm being affected or whether a surgery to the biceps is necessarily a surgery to the arm, Respondents elected not to depose the doctors. Not having done so, they are in no position to complain about the opinions stated by Dr. DeMarco and Dr. Hughes. A party is bound by its own tactical decisions. Cf. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(no prejudice in denying continuance to depose doctor where appellant cancelled first opportunity to depose doctor for tactical reasons).

Respondents seek to distinguish Hutson by arguing that:

> In Hutson, there was medical evidence presented to support that Hutson was having issues with his leg. In the case at hand, *Appellant has not presented any medical evidence to support his claim that his upper extremity was injured.* Hutson does not stand for the proposition that the mere testimony from the claimant that an injured body part crates pain or tenderness in other body part automatically creates a two-

> body part case. There must be actual objective medical evidence to support this contention. [Brief of Respondents, page 13 (emphasis added)].

The Act states "'medical evidence' means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code Ann. § 42-1-160(G)(2007). The questionnaires completed by Dr. Demarco and Dr. Hughes plainly meet this standard. Both doctors offered expert opinions stated to a reasonable degree of medical certainty that Contreras' injuries to his right shoulder, right upper extremity and right biceps were caused and/or aggravated by the October 8, 2008 work accident. [R.P. 214, 221]. As much as one hates to belabor the point, it is undeniable that there is "actual objective medical evidence to support this contention" that "his upper extremity was injured." See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("The record contains Burnette's medical records and testimony, as well as *written opinions by her treating physicians* and a vocational rehabilitation expert. We find no evidence that challenges the conclusions of Burnette's doctors. . . ")(emphasis added).

There is objective medical evidence from two orthopaedic surgeons that the fourth surgery was performed to address pain in the right arm, and that the surgery was to the biceps, which itself is part of the arm. The Appellate Panel on remand erred as a matter of law in two respects: (1) the panel reversed the findings of a previous Appellate Panel on the questionnaires thus exceeding the instructions on remand and violating the two-judge rule; and (2) by arbitrarily ignoring uncontradicted medical evidence that the right arm was injured/affected by the work accident. Therefore, the Court should reverse the findings of the Appellate Panel

2. The Appellate Panel erred in making a single member disability award to the right shoulder when the evidence showed the right clavicle was also injured thus qualifying Contreras for a general disability award under § 42-9-20 [In Reply to Respondents' Argument at pages 13-14].

Respondents argue that the issue of the clavicle injury was not preserved. Appellant disagrees as the issue was raised and ruled upon by the Appellate Panel on remand, albeit in Respondents' favor. [R.P. 81, Finding of Fact 7]. Strictly speaking, the Single Commissioner did not rule one way or the other on the "compensability" of the clavicle. Although a finding was requested, the order never reached the issue. As workers' compensation had no mechanism to address issues raised but not ruled upon by the single commissioner (at that time), there is no preservation issue here.[6] Rhame v. Charleston Cty. Sch. Dist., 412 S.C. 273, 772 S.E.2d 159 (2015)(petitions for rehearing permitted before appellate panel, but not before the single commissioner).

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers' compensation cases as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)("The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.") If the Court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386

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[6]The Commission amended its regulations in 2018 to permit both the single Commissioner and Full Commission to entertain motions for reconsideration. S.C.Code Reg. 67-215(B)(2018).

S.E.2d 793(Ct.App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct.App. 1988)("it is inferable from the record that [claimant] raised this issue before the single commissioner"). This Court has held issues are preserved where "it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order." Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct.App. 2003). In fact, this Court has ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct.App. 1994)("On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990."). Accordingly, to the extent there is a question of issue preservation here, the Court should follow its precedent and find the issue preserved.

The Appellate Panel's error as to the clavicle is virtually a reprise of its error concerning the right upper extremity. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion . . . Commission," is not evidence and cannot form the basis of a finding). Dr. Hughes explicitly opined that the right clavicle was injured in the work accident. [R.P. 94]. The Appellate Panel summarily disregarded his opinion based on giving greater weight to Dr. DeMarco's opinion. [R.P. 86, Finding of Fact 7(m)].

Admittedly, Dr. DeMarco did not provide the same causation opinion on the clavicle as he did on the right upper extremity (right biceps). [R.P. 221-222]. In his opinion regarding future medical treatment, Dr. DeMarco opined: "Most probably, and to a reasonable degree of medical

certainty, Mr. Contreras will need continued medical care and treatment to his . . . clavicle . . ." [R. p. 222]. If the doctor opines the patient needs continued medical care to a particular body part, then *ipso facto* that body part must necessarily have been injured or affected.

The definitive evidence of permanent injury to the clavicle is the third surgical report from October 11, 2010. Dr. DeMarco's surgical report states "we did a **distal clavicle resection** taking out about 10-12 mm distal clavicle . . ." [R.P. 261(emphasis added)]. Removing roughly half an inch from the clavicle may not be a dramatic or catastrophic procedure – nonetheless, it undoubtedly is a permanent injury to the clavicle. Indeed, the AMA Guides call for a 10% impairment of the upper extremity for this specific procedure – which is exactly what Dr. Hughes assigned.[7] [R.P. 215] See, Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.), Table 16-27, page 506.

Should the Court reverse on the right upper extremity/biceps issue, a second ruling on the clavicle would no longer be necessary. Nonetheless, there is medical proof of a permanent injury to the clavicle. Therefore, the Appellate Panel's finding on remand as to the clavicle should be reversed.

3. Under the two-body part rule, Contreras qualifies for a general disability award under § 42-9-20 [In Reply to Respondents' Argument at pages 14-16].

Respondents argue that "[t]he Appellate Panel was correct in finding that the injury is limited to the right shoulder and thus any award for disability should be made pursuant to S.C. Code § 42-9-

[7]In his own handwriting, Dr. Hughes noted the 10% permanent impairment for the clavicle was to the "upper extremity." [R.P. 215]. Dr. Hughes gave this opinion before Contreras underwent the surgery to his biceps. It can therefore also be inferred that the Single Commissioner considered the clavicle resection to have an affect on the right upper extremity.

30." The essence of the argument is that "the surgical reports . . . indicate that all four surgeries were to the shoulder." [Brief of Respondents, page 15].

This point was previously refuted at length, *supra* pages 1-6, in this Reply Brief. Doctor DeMarco was clear that the right arm was injured and that the fourth surgery was to alleviate "biceps pain." [R.P. 234, 258-259].

Respondents are essentially making a reverse Colonna argument. While this analysis is somewhat superfluous given Dr. DeMarco's opinion that the right arm was injured, Colonna demonstrates why the Commission got it wrong in the instant case.

Colonna affirmed the general principle applicable here, to wit: "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Colonna v. Marlboro Park Hospital, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013), *quoting*, Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003). The essential point made in Colonna is "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." Id. (emphasis in original).

In Colonna, the claimant suffered from a foot and ankle injury, which ultimately required surgical implantation of a spinal cord stimulator to treat severe intractable felt in the foot due to the complication of Reflex Sympathetic Dystrophy (RSD). The Commission made a partial disability award to the leg under S.C. Code Ann.§ 42-9-30. Colonna appealed, contending that the surgical implantation of the spinal cord stimulator in her back necessarily resulted affected her back – thus enabling her to seek a permanent and total disability award under S.C. Code Ann.§ 42-9-10.

The issue framed by the Court was whether the successful implantation of a medical device (without additional injuries from surgical complications) constituted an affected body part within the meaning of Wigfall and Singleton. This Court found "Colonna's argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment." Colonna.

Here we have the opposite situation. While the surgery itself took place at the situs of the primary injury (the shoulder), the surgery was to treat an injury to the situs of the secondary injury: the arm, specifically the biceps. The fourth surgery reattached the biceps to the shoulder. The key distinguishing factor from Colonna is the fact that Contreras's impairment rating includes **3% for biceps atrophy.** [R.P. 224 (emphasis added)]. Muscle atrophy is objective medical evidence that Contreras suffered impairment to the arm itself. As the arm was undeniably affected, Contreras satisfies the requirement in Wigfall for a second body part to be affected. Therefore, the Appellate Panel must be reversed.

4. The Appellate Panel on Remand exceeded its authority by reversing the findings of the previous Appellate Panel when its instructions were to "make specific findings of fact regarding Contreras' right arm, right shoulder, and right clavicle." [In Reply to Respondents' Argument at pages 16-19].

Respondents argue that the Appellate Panel on remand did not exceed the instruction to "make specific findings of fact regarding Contreras' right arm, right shoulder, and right clavicle." [Brief of Respondents, page 17]. They then argue that the new findings do not contradict the previous Appellate Panel's findings. 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]. Appellant 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).

Respondents then argue that "Appellant also tries to argue that the Appellant's opinion about the fourth surgery is medical evidence." [Brief of Respondents, page 19]. Appellant is doing no such thing. As this Court observed in Contreras I, "Contreras presented evidence that he injured his right arm and right clavicle in addition to his right shoulder." Contreras v. St. John's Fire District Commission, Unpublished Opinion No. 2019-UP-040 (S.C. Ct. App. filed January 23, 2019). That evidence was not the argument of counsel; it was the medical evidence from Dr. DeMarco referenced throughout Appellant's briefs.

Respondents also argue: "Appellant's statement that the medical evidence is unrefuted in part because there was no cross examination of doctors is shifting the burden of proof to the defense which is not appropriate." [Brief of Respondents, page 19]. Respondents misunderstand how the burden of proof works at trial. Contreras met his burden of proof when he "presented evidence that he injured his right arm and right clavicle in addition to his right shoulder." Contreras I. Respondents than had a decision to make. They could gamble that the Commission might overlook or misapprehend the evidence. Or, they could be proactive and attempt to challenge the medical evidence. They could have cross-examined the doctors hoping to change their opinions. They could have obtained their own medical expert who might have opined differently. They chose tactically to sit on their hands and hope the commissioners got it wrong. Although the Single Commissioner got it right, their gamble succeeded with the Appellate Panel.

The fact remains that the medical evidence on the shoulder 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.").

5. The evidence supports the Single Commissioner's findings on wage loss [In Reply to Respondents' Argument at pages 19-20].

Respondents argue the Single Commissioner's findings on wage loss are unsupported by the evidence, such that the case should be remanded for a recalculation of an award. [Brief of Respondents, page 20]. Appellant believes that a second remand of this case would result in unwarranted delays and violate the stated public policy of "swift and sure" compensation. See Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019)(commission has responsibility to "promptly decide this case without protracted litigation" frustrated the goals of workers' compensation by keeping the parties "trapped in a cycle of remands for years . . ."). This case began on October 8, 2008. It was tried in 2013. It has been more than long enough.

As with the medical evidence, Respondents sat on their hands as to vocational evidence. The vocational opinion of Jean Hutcheson is and remains the only competent evidence of Mr. Contreras's loss of earnings capacity. Respondents seek to argue about her conclusions, but they have no evidence. State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997)("to suggest that counsel's theoretical (and improper); argument substitutes for evidence is contrary to both common sense and

the law, since it is well-settled that argument of counsel is not evidence."). The Single Commissioner's Findings as to Contreras's loss of earnings capacity are fully supported by the evidence such that no remand is necessary. Therefore, the Court should reinstate the award of the Single Commissioner.

There is one area the Court needs to address. As Respondents point 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).

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel and reinstate the original Order and Award of the Single Commissioner. The Court should hold Contreras should receive compensation for lost earning capacity under § 42-9-20.

Respectfully Submitted,

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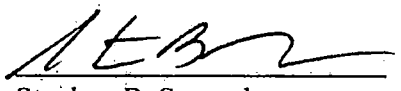
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,



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