

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

S.C. SUPREME COURT

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

Appeal From the Workers' Compensation Commission

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- 1. The Appellate Panel was correct in finding the that the right arm is not a separate compensable body part.**
- 2. The 2021 Appellate Panel is not inconsistent with the 2014 Appellate Panel order.**
- 3. That the Court should not change the average weekly wage as 2021 Appellate Panel Finding of Fact #32 is correct.**

## STATEMENT OF THE CASE

This matter arises out of a workers' compensation case. Petitioner injured his right shoulder in the course and scope of his employment as a firefighter on October 8, 2008. Petitioner filed a Form 50 in 2011 alleging an injury to his right shoulder, right upper extremity, right glenohumeral ligament, right clavicle, right scapula, right lateral deltoid, right bicep and right distal clavicle. (R. pp. 108-9). Respondents admitted an injury to the right shoulder only and denied all other body parts. (R. p. 115). In March of 2012, the parties entered into a consent order that the Claimant suffered an admitted injury to his right shoulder. (R. pp.1-2). In February of 2013, Petitioner filed another Form 50 alleging an injury to his right shoulder, right upper extremity, right glenohumeral ligament, right clavicle, right scapula, right lateral deltoid, right bicep and right distal clavicle. (R. pp. 118-119). Respondents timely filed a Form 51 admitting an injury to the right shoulder only. (R. p. 120). A hearing was held in 2013 and as a result of that hearing, the Single Commissioner found that Claimant injured his right shoulder and right upper extremity. The Single Commissioner also found that Claimant could not return to work as a firefighter. Additionally, the Single Commissioner also found that Claimant suffered a wage loss under §42-9-20. (R. pp. 3-35).

Respondents filed a Form 30 appealing the order of the Single Commissioner to the Full Commission. (R. pp. 121-2). The Full Commission reversed the order of the Full Commission and remanding the case back to the Single Commissioner for a determination under §42-9-30 to the right shoulder only. (R. pp. 36-52).

Petitioner appealed the Full Commission's order the Court of Appeals. This appeal was dismissed as interlocutory. (R. p. 53). The case was then remanded back to the Single Commissioner. The Single Commissioner found that the Claimant suffered a 35% permanent partial disability (PPD) to his right shoulder. Furthermore, the Single Commissioner noted that the Commission was limited to only determining an award of permanency to the Claimant's right shoulder. (R. pp. 55-62). Petitioner appealed to the Full Commission. (R. pp. 123-135). The Full Commission affirmed this award. (R. pp. 63-71). Petitioner then appealed to the Court of Appeals. In 2019, the Court of Appeals remanded the case back to the Full Commission to make specific findings of fact regarding Petitioner's right arm, right shoulder, and right clavicle. (R. pp. 72-5).

On April 27, 2021, the Full Commission issued an order awarding 35 % permanent partial disability benefits to the right shoulder and found that this award encompasses and includes any incidental effect on Claimant's right clavicle, right bicep, and/or right bicep tendon. The Full Commission specifically found that Petitioner was not entitled to receive a separate award for his right arm or clavicle. Respondents' Motion to Reconsider was then filed to address the award of temporary partial disability and on June 4, 2021, the Full Commission issued a modified award regarding the temporary partial disability award but did not modify the award for PPD. (R. pp. 76-104). On March 13, 2024, the Court of Appeals affirmed the Full Commission's order.

Petitioner ultimately underwent four (4) shoulder surgeries during the course of his treatment. In 2009, Dr. Jaskwhich performed Petitioner's first surgery which was a right shoulder arthroscopic repair of superior labrum anterior-posterior (SLAP) tear on January 29, 2009. (R. pp. 264-5). On September 2, 2009, a second right shoulder arthroscopic surgery to address ongoing popping and discomfort in Petitioner's shoulder was done by Dr. Jaskwhich. (R. pp. 262-263). The postoperative diagnosis of his second surgery was right shoulder arthroscopy with extensive debridement of suture, labrum, bursa and bone. (R. p. 262). On July 14, 2010, Dr. Jaskwhich noted that Petitioner had right shoulder pain and assigned lifting restrictions but found that the Petitioner was at MMI and assigned a 10% impairment rating to the right shoulder. (R. p. 282).

Petitioner's care was then transferred to Dr. DeMarco. On the new patient information form, Petitioner stated that he was there for treatment to his right shoulder. (R. p. 254). Dr. DeMarco first saw the Petitioner on August 6, 2010. The chief complaint listed was right shoulder injury. On October 11, 2010, Petitioner underwent surgery for right shoulder thickening of middle glenohumeral ligament and superior coracohumeral ligament, right shoulder intra-articular synovitis, right shoulder type 1 superior labrum anterior to posterior tear, right shoulder subacromial impingement syndrome and bursitis and right shoulder acromioclavicular joint osteoarthritis. (R. pp. 260-1).

Petitioner's fourth and last surgery was on March 29, 2012. Petitioner incorrectly contends that this specifically was intended to alleviate arm pain. Prior to the surgery on March 19, 2012, the parties agreed to a consent order that Petitioner had an admitted injury to his right shoulder and was to return to Dr. DeMarco for more surgery. The consent order does not mention the arm, bicep or clavicle or any other body part aside from the right shoulder. (R. pp. 1-2). It stands to reason that had the Petitioner felt that

this surgery was really intended for his arm as opposed to his shoulder that the consent order entered into mere weeks before surgery would address the arm and any other body part the Claimant felt was related to his workers' compensation claim. The preoperative diagnosis for the March 2012 surgery was right shoulder coracoid impingement, right shoulder intra-articular synovitis and adhesions, right shoulder subacromial impingement with adhesions and right shoulder long head of biceps tendinopathy. The post operative diagnosis was right shoulder coracoid impingement, right shoulder intra-articular synovitis and adhesions, right shoulder subacromial impingement with adhesions and right shoulder long head of biceps tendinopathy. (R. p. 258).

Dr. DeMarco's notes after the March 2012 surgery show that the follow up care was for the right shoulder. (R. pp. 227-230). Petitioner returned to Dr. DeMarco for post-surgical follow up on June 26, 2012. Dr. DeMarco noted that the visit was in follow up to his shoulder and examined the Petitioner's shoulder. The assessment and treatment were for Petitioner's shoulder. (R. p. 225-226).

Petitioner was last seen by Dr. DeMarco on August 7, 2012. This visit reflects that Claimant's shoulder was examined and the assessment and treatment were again noted for shoulder pain. Dr. DeMarco also stated that:

At this point the patient is at MMI and has permanent partial restrictions of less than 40 pounds no overhead lifting with both hands and no more than 20 pounds with his right arm overhead. Less than 50 pounds of two handed carrying and pushing and pulling. He can do a medium level job. He has a permanent partial impairment of 9%. 3% for biceps atrophy, 3% for loss of internal rotation, 2% for loss of forward flexion and 1% for pain muscles spasms. I do not predict any further surgical intervention in the next year however if he regresses with his pain he may need repeat corticosteroid injections, anti-inflammatories and/or physical therapy.

(R. pp. 223-224). Dr. DeMarco completed two 14B's during the tenure of his treatment of the Petitioner. On the May 16, 2011 Form 14B, Dr. DeMarco indicated that Claimant

injured his right shoulder. (R. p. 220). On the second 14B completed by Dr. DeMarco on September 4, 2012, he again indicated that Claimant injured his right shoulder. On the September 4, 2012, the 14B stated that Claimant had a 9% impairment rating to the right upper extremity which converted to a 15% impairment rating to shoulder, but the 14B does not have two separate ratings for two different body parts. (R. p. 569). There is no treatment in the record after August 7, 2012.

## **ARGUMENTS**

This Petition for Certiorari does not demonstrate any novel issues that the Supreme Court should consider, in fact the contrary is true despite the sixteen year history of this claim. This is simply a substantial evidence case. The Court of Appeals properly reviewed whether there is substantial 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).

The only novel factor in this case is that the Petitioner's attorney repeatedly interjects his own medical opinions and conclusions. On page 12 of the Petition for Certiorari, Petitioner includes a chart and diagram of the biceps and references documents and sources that were never part of the record or evidentiary presentation of evidence at the Commission. This however is clearly the Petitioner's own unusual finesse of reasoning that should not survive meaningful appellate review.

**1. The Appellate Panel was correct in finding the that the right arm is not a separate compensable body part.**

In reviewing all of the medical records as opposed to picking out select passages and words, the medical evidence is clear that injury sustained by the Petitioner and all of the subsequent four (4) surgeries were to his shoulder. Petitioner relies heavily on a check the box questionnaire prepared by his attorneys. This questionnaire is the only time Dr. DeMarco mentions the right arm. The overwhelming substantial evidence does not support the statements made in the questionnaire. Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17; 23, 716 S.E.2d 123, 126 (Ct. App. 2011). As noted in the Potter case, 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.

Dr. DeMarco's records when read in their entirety confirms that the fourth and final surgery was for the shoulder. As opposed to just lifting a few carefully chosen words, the record must be reviewed in full. At the November 22, 2011 appointment, Dr. DeMarco confirmed that this visit and surgery recommendation was for the Claimant's shoulder. As noted under chief complaint, the reason for the Claimant's appointment with Dr. DeMarco was for shoulder pain that flared up after doing yardwork. Under plan, Dr. DeMarco noted that the surgical recommendation was "absolutely the last thing that can be done in the shoulder, 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." (R. p. 234). Surgery was done on March 29, 2012. Both the pre operative and post operative diagnoses were to the right shoulder. (R. p. 54). Furthermore, under procedure's performed all of the procedures listed are to the right shoulder. There is no treatment or surgery to the arm. The operative note from March 29, 2012, gives a lengthy description of the procedure references the bicep tendon as it attaches to the shoulder joint not as separate injury. (R. pp. 258-9). Furthermore, as noted in the November 22, 2011 note, the pain and treatment were for the Petitioner's shoulder. (R. p. 234).

As noted by the Full Commission, there are no diagnostics anywhere in the record of the right arm. However, there are several MRIs to the right shoulder along with MRIs to the hip, left foot, and lumbar spine and CT scan of the sinuses. (R. pp. 274-280). It would seem logical that if any medical treatment was provided for the Petitioner's arm there would be some sort of diagnostic testing whether an x ray, CT scan, nerve conduction study or MRI of the arm but yet there is none in the record. In this case, the absence of evidence is in fact evidence.

Petitioner also points to Dr. Hughes' opinion to support his claim of an injury to the right arm. Dr. Hughes saw the Petitioner once for an IME for the right shoulder on October 6, 2011. (R. p. 217). The Full Commission order of 2021 did not find Dr. Hughes' opinion persuasive. (Finding of Fact 11; R. p. 95). Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. Potter at 126. Dr. Hughes only saw the Petitioner once and proved no actual treatment. In fact, Dr. Hughes' prediction about what treatment would be needed was incorrect as on October 6, 2011, Dr. Hughes opined that Petitioner would not have another surgery in the foreseeable surgery. In November of 2011, Petitioner's fourth surgery was recommended and later performed in March of 2012. Petitioner's reliance on this report is clearly misplaced.

The Full Commission gave more weight to the medical reports than the check the box questionnaire completed by Dr. DeMarco. Finding of Fact 8(r) in the Full Commission's order provides an explanation as to why the Full Commission did not accept these questionnaires. (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.

The Full Commission was correct in finding that the right shoulder was the situs of the injury. (FOF 8(a); R. p.87). Petitioner initially went to the emergency room for this incident on October 8, 2008 and where an x-ray to his right shoulder was done. Petitioner was then referred to Atlantic Occupational Health where he was diagnosed with shoulder strain. Petitioner was seen by Dr. Spearman on December 3, 2008 for right shoulder pain

from lifting weights. (R. p. 297). Dr. Spearman recommended an MRI to his right shoulder. Dr. Jaskwhich then treated Petitioner after the MRI. Dr. Jaskwhich noted that the MRI showed a superior labral tear with no evidence of a rotator cuff tear. (R. p. 295). A right shoulder arthroscopy, debridement and possible repair of the labrum was scheduled. (R. p. 295). On June 1, 2009, it was noted that he was back for follow up to his right shoulder and was released to full duty. (R. p. 291). On June 26, 2009, Petitioner returned with a "hot spot" in his shoulder and his shoulder had popped. (R. p. 291). On August 5, 2009, it was noted that Petitioner has daily pain in his shoulder and a second surgery was recommended to ensure that labrum is fully repaired. (R. p. 290). A second MRI of the shoulder was done. (R. p. 266). Surgery was done on January 29, 2009, by Dr. Jaskwhich. (R. pp. 264-265). On October 1, 2009, another surgery was done by Dr. Jaskwhich. (R. p. 262-3). On February 24, 2010, Petitioner was released to full duty. (R. p. 284). On May 5, 2010, Petitioner returned with ongoing pain in his right shoulder. Under treatment plan, it was noted that they "talked a little bit about what may be going with this shoulder." (R. p. 284). On July 14, 2010, Dr. Jaskwhich placed Petitioner at MMI and assigned a 10% impairment rating to the right shoulder. (R. p. 282). As discussed earlier in this brief all of the Dr. DeMarco's surgeries were to the Petitioner's shoulder including the fourth and final surgery in March of 2012.

Petitioner relies on Hutson v State Ports Auth., 390 S.C.108, 700 S.E.2d 500 (Ct. App. 2010) *reversed* 399 S.C. 381, 732 S.E. 2d 500 (2012), to support his claim that his right arm should be found compensable. In Hutson, the claimant had an admitted injury to the back and *documented* radicular symptoms in his leg. Hutson, who was a crane operator, was adamant that he would be able to successfully run a restaurant. The Commission found that Hutson failed to establish his wage loss for a finding under § 42-

9-20 and made an award solely to the back under §42-9-30. The Commission also found that the claimant's leg was affected by his back injury. This issue in Hutson was not appealed. The real issue in Hutson was whether there was enough evidence to support a wage loss based on Hutson's testimony that he wanted to open a restaurant. However, there is a notable difference between Hutson and the case at bar, in Hutson, there was medical evidence presented to support that Hutson was having issues with his leg. In the case at hand, Petitioner 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 creates 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. On the final treatment of Dr. DeMarco, it was noted that the "the upper extremity was grossly neurologically and vascularly intact." (R. p. 223). Thus, there is no objective evidence to show that Claimant's right arm was injured.

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. The bicep attaches to the shoulder and arguable the term is being used as part of the shoulder. Petitioner's diagram in his brief highlighting the bicep muscle is misleading. Petitioner attempts to argue that the long head bicep tendinopathy is part of the arm. The diagram is completely outside of the record on appeal. No doctor was ever shown this diagram to confirm or explain whether the diagram shown is relevant or depicts any of Petitioner's four surgeries. Furthermore, the diagram was not part of the record below or presented at the Single Commissioner hearing and should not considered as evidence.

The inclusion of this picture in the record without any medical testimony to authenticate this diagram is misleading and should not be considered by the Court. Petitioner's argument should be limited to the record made at the lower levels.

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. Furthermore, despite assertion by Petitioner, there is nothing in the record to support Petitioner's claim that the 1% rating for pain muscle spasm is for arm. (Petition for Cert. p. 4).

Throughout the Petition, Petitioner references his clavicle as an injured body part. The Full Commission order found that the Petitioner that compensability of the clavicle was not preserved on appeal. Issues not raised on appeal are not preserved for review. Rodney v Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). Petitioner alleged the clavicle as an injured body part at Single Commissioner hearing in 2013. The order from the Single Commissioner found the right shoulder and arm compensable. Petitioner did not appeal the failure to address the clavicle. When asked about the clavicle at the Full Commission hearing in 2013, Petitioner's counsel agreed that the clavicle was no longer an issue in the case. (R. pp. 187-188). Thus, all arguments and references to the clavicle being an injured body part should be ignored.

**2. The 2021 Appellate Panel is not inconsistent with the 2014 Appellate Panel order.**

Petitioner is incorrect in their contention that the 2021 Appellate Panel oversteps the remand instructions from the Court of Appeals and that the Full Commission erred in

substituting its judgement for the 2014 Appellate Panel. Of the note the same three commissions served on both the 2014 Appellate Panel and the 2021 Appellate Panel.

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 order of the Full Commission 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 portions in of the check the box questionnaire related to causation of the right biceps is 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. Thus, the 2021 Petitioner 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.

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 was the medical opinion of the single commissioner. In the case at bar, the medical evidence clearly supports the findings of the Full Commission as discussed at length in prior sections of this brief. The Full Commission 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 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.

**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). As this issue was not raised in the Petitioner's initial brief to the Court of Appeals relevant issue to address this issue was left out of the record but these issues were pointed out to the Court of Appeals during oral arguments. The Full Commission brief that was filed on June 4, 2021 was a modification of the Full Commission Order dated April 27, 2021. Respondents filed a Motion to Reconsider with the Full Commission to address the dates regarding the award of temporary partial benefits in Finding of Fact #32. As a result of that Motion, the Full Commission ultimately rewrote Finding of Fact #32 changing the dates of temporary partial and recalculated the average weekly wage. This Finding details how the Commission calculates the average weekly wage, and it is clearly not a scrivener's error.

## CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Certiorari.

Respectfully submitted,



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