

**APPELLATE PANEL DECISION AND ORDER  
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

**WCC NUMBER 0822640**

**THOMAS CONTRERAS**

**V.**

**ST. JOHN'S FIRE DISTRICT, EMPLOYER**

**STATE ACCIDENT FUND, CARRIER**

**HEARING:**

**DECEMBER 16, 2013**

**APPEARANCES:**

**RESPONDENT-CLAIMANT WAS  
REPRESENTED BY GARY CHRISTMAS  
APPELLANT-CARRIER WAS REPRESENTED  
BY MARGARET M. URBANIC**

**RECEIVED**

JUN 05 2014

**SC Court of Appeals**

This case was originally heard back on May 14, 2013, on Forms 50/51. As a result of the hearing, the Single Commissioner made the following findings of fact:

1. That, Claimant, Thomas Contreras, and employer, St. Johns Fire District Commission (hereinafter "St. Johns"), were subject to the South Carolina Workers' Compensation Act, at the time of the accidental injury.
2. That, the relationship of employer/employee existed between Claimant, Thomas Contreras, and employer, St. Johns, at the time of Claimant's work-related accident.
3. That, I find, that on or about October 8, 2008, Claimant suffered injury by accident, arising out of in the course and scope of employment, wherein he injured his right shoulder and right upper extremity (Authorized treating orthopedic surgeon Dr. James DeMarco APA #3, pp. 16-17; Orthopedic surgeon Dr. Charles Hughes APA #2, p. 9).
4. That, Defendants have provided the Claimant medical care and treatment for his injuries, including four (4) right shoulder surgeries.
5. That, authorized treating orthopedic surgeon, Dr. James DeMarco, opines on his 14-B medical statements dated September 4, 2012, and May 16, 2011, that Claimant is unable to return to work at his past employment. (Defendants' APA #8, p. 00056 and APA #3, p.15).
6. That, at the time of Claimant's work accident, he was working for two (2) employers; (a) St. Johns; and (b) AMF Bowling Centers (hereinafter "AMF") (APA #11, 12, and 13; and Hearing Tr. p. 25, ll. 20-22).

7. That I find that Claimant's combined earnings from his dual employment with St. Johns and AMF equates to an average weekly wage of one-thousand one hundred seventy four dollars and twenty cents (\$1,174.20) and a corresponding compensation rate of six-hundred sixty one dollars and twenty nine cents (\$661.29) (the maximum compensation rate for 2008 which is the year in which Claimant was injured on the job) (APA 11, pp. 265-269 and APA #12, pp. 269.5-271).
8. That, Claimant's job at the St. Johns fire department, which he held for over twenty-two (22) years, is physical by description (APA #10, pp. 228-230).
9. That, Claimant's last day of work with employer St. Johns was on January 21, 2011, after he was approved for early retirement due to his final physician's report stating that he was unable to return to work as a firefighter (APA #10, p. 231).
10. That, all of Claimant's jobs, prior to his work with the fire department, were also physical in nature (Hearing Tr. p. 17, l. 18-p. 18, l. 23).
11. That, since being unable to return to work with employer St. Johns, Claimant has continued to work as a desk clerk at the AMF bowling alley for fourteen (14) hours per week (Hearing Tr. p. 27, ll. 1-5 and p. 35, ll. 13-15).
12. That, since being unable to return to work with employer St. Johns, Claimant has actively searched for other employment. Claimant applied for a management position at the AMF bowling alley where he works when it became available; however, despite Claimant having worked at the bowling alley for twelve (12) years, he did not get the job as manager of the bowling alley (Hearing Tr. p. 35, ll. 16-24 and p. 43, ll. 12-25).

13. That, Claimant also has looked for other employment, took a test at Wal-Mart and failed said test and that he applied at CarMax, but that he was not hired. Claimant also applied for “a couple” of Federal jobs, but that he has yet to get an answer from any of these job applications (Hearing Tr. p. 28, l. 14-p. 29, l. 11; p. 36, l. 3-p. 37, l. 11; p. 47, ll. 6-13; and p. 48, ll. 6-23).
14. That, Claimant also has a small vending machine route which he works once per month. Those machines are located in area fire houses. Claimant testified that he makes little or no income from this route (Hearing Tr. p. 27, l. 21-p. 28, l. 13 and p. 37, l. 18-p. 39, l. 1).
15. That, the Claimant was fifty-one (51) years old at the time of the hearing.
16. That, Claimant is a high school graduate (1979).
17. That, Claimant is married with two (2) children.
18. That, Claimant is a US Army veteran who was honorably discharged.
19. That, pursuant to the opinion of authorized treating orthopedic surgeon, Dr. James DeMarco, Claimant cannot return to his employment with the employer St. Johns (APA #3, p. 15 and defendants APA #8, p. 00056). Authorized treating surgeon DeMarco’s opinion that Claimant cannot return to his past employment is corroborated by the uncontroverted and only vocational assessment in the record provided by certified rehabilitation counselor, Jean R. Hutchinson (APA #1, pp. 7-8). Vocational expert, Hutchinson, is of the opinion that Claimant cannot return to his past employment and that Claimant will now only be able to earn at or near minimum wage (APA #1, pp. 7-8). Furthermore, orthopedic surgeon, Dr. Charles

Hughes, also opines that Claimant can return to his prior employment (APA #2, p. 14).

20. That, defendants did not choose to submit a vocational evaluation in this case.
21. That, based on the record as a whole, the greater weight of the evidence, leads to the conclusion that Claimant cannot return to his previous employment with employer, St. Johns. Additionally, I find that Claimant, as he is today, cannot and will not find similar employment with another fire department.
22. That, given the Claimant's present physical condition, past work experience, age, education and skill set (he has no computer skills), I find that Claimant can only expect to earn minimum wage at his employment going forward.
23. That, based on the record as a whole, I conclude that the greater weight of the evidence, dictates that the Claimant has suffered permanent partial wage loss, pursuant to S.C. Code Ann. §42-9-20. Accordingly, I further find that Claimant is entitled to the compensation computation as allowed pursuant to the statute.
24. That, prior to Claimant's work accident and injuries, he was able to earn and had an average weekly wage of one-thousand one hundred seventy four dollars and twenty one cents (\$1,174.21) per week. That, as a result of Claimant's work related injuries, I find that Claimant is now only able to earn minimum wage (\$7.25 x 40 hours per week) which equates to two-hundred and ninety dollars (\$290) per week.
25. That, I find that, given Claimant's pre-accident average weekly wage and earning capacity was one-thousand one hundred seventy four dollars and twenty one cents (\$1,174.21), and given that I find that Claimant's post work accident earning

capacity is only two-hundred and ninety (\$290.00) dollars per week, I find that Claimant has suffered and will continue to suffer wage loss in the amount of eight hundred eighty eight dollars and twenty one cents (\$884.21) per week (Claimant's Average Weekly Wage of \$1,174.21 minus his new post accident wages of \$290.00 per week).

26. Accordingly, pursuant to S.C. Code Ann. §42-9-20, Claimant is entitled to, and defendants shall pay, an award of permanent partial wage loss in the amount of sixty-six and two-thirds percent (66 2/3%) of Claimant's eight-hundred eighty four dollars and twenty one cents (\$884.21) loss of earning capacity per week which equates to five-hundred eighty nine dollars and forty seven cents (\$589.47) per week (which equates to a total amount of \$153,262.20). Furthermore, I find that Claimant is entitled to said five-hundred eighty nine dollars and forty seven cents (\$589.47) per week for a total of two-hundred and sixty (260) weeks (Pursuant to S.C. Code Ann. §42-9-20 Claimant can receive 340 weeks of compensation for wage loss). By a separate finding in this Order, Claimant is entitled to eighty (80) weeks of Temporary Partial Wage Loss. Accordingly, Claimant has two-hundred and sixty (260) weeks of partial wage loss available to him under the statute for permanent partial wage loss (340 weeks minus 80 weeks). Accordingly, Claimant is entitled to, and defendants shall pay Claimant one-hundred fifty three thousand two hundred sixty two dollars and twenty cents (\$153,262.20 [wage loss of \$589.47 times 260 weeks]) to Claimant for permanent total wage loss. Again, said benefits are not to be paid to Claimant in lump sum

and shall be paid to Claimant in the amount of five-hundred eighty nine dollars and forty seven cents (\$589.47) per week over a 260 week period.

27. That, Claimant is entitled to a lump sum payment for any and all past due temporary partial disability benefits due.

28. That, furthermore, Claimant is entitled to, and that Defendants shall pay Claimant, temporary partial wage loss in the amount of sixty-six and two-thirds percent (66 2/3%) of his average weekly wage of one-thousand one hundred seventy four dollars and twenty one cents (\$1,174.21) minus the actual amount of wages that he earned for each week worked as demonstrated by Claimant's Exhibit APA #13, p. 274-276 (average weekly wage minus actual earnings) for eighty (80) weeks for the period of January 21, 2011 through August 7, 2012. Based upon Claimant's pre-accident wages he should have earned ninety-three thousand nine hundred thirty six dollars and eighty cents (\$93,936.80) during said eighty (80) weeks; however, his actual earnings were only two-thousand seven hundred and one dollar and one cent (\$2,701.10) during said eighty (80) weeks. Accordingly, Claimant is entitled to, and defendants shall pay Claimant, sixty-thousand eight hundred twenty three dollars and eighty cents (\$60,823.80) for his past temporary partial wage loss over eighty (80) weeks ( $\$93,936.80$  minus  $\$2,701.10 = \$91,235.70$ ; two-thirds of  $\$91,235.70 = \$60,823.80$ ).

29. That, with regard to Claimant's permanent partial wage loss award, the Claimant is only entitled to a lump sum payment of said award as it applies to the payment of Claimant's attorney's fees and case costs and the remaining benefits shall be paid to him in weekly installments. Accordingly, subject to Commission approval

of Claimant's Form 61 and Form 61A, Claimant's attorney shall be entitled to \$71,362.00 in attorney's fees (this is based upon 1/3 of Claimant's total award in the amount of \$214,086.00 [Claimant's award of \$153,262.20, for future wage loss, divided by three = attorney's fees of \$51,087.40; plus Claimant's award of \$60,823.80, for permanent partial wage loss, divided by three = attorney's fees of \$20,274.60 = total attorney's fees of \$71,362.00]), and \$3,381.77, for case cost reimbursement.

30. That, Claimant shall be entitled, and Defendants shall pay, for Claimant's past causally related medical care and treatment. Medical payment shall be made by the Defendants to the medical provider, the Claimant, or his insurance carrier, or to Medicare/Medicaid, if those expenses have been previously paid by them.

31. That, I 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 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 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 I 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.

32. That Claimant is entitled to, and Defendants shall pay, for all causally related future medical care and treatment for Claimant pursuant to S.C. Code Ann. §42-15-60, Dodge vs. Bruccoli, Clark, Layman, Inc., 334 SC 574, 514 SE2d 593 (Ct. App. 1999) and any other authority under the Act as I find that said medical treatment will tend to lessen Claimant's period of disability.

33. That Claimant reached maximum medical improvement as of August 7, 2012.

34. That I find that Claimant is entitled to the following allocation of his benefits of \$214,086.00, pursuant to James vs. Anne's 390 S.C. 188, 701 S.E.2d 730 and Utica Mohawk Mills vs. Orr 227 S.C. 226, 87 S.E.2d 589 (Ct. App. 2006):

- a. \$78,518.43 in compromise of disputed future disability benefits at the rate of \$55.10 per week commencing May 14, 2013, for a period of 27.40 years; representing Claimant's life expectancy pursuant to Section 19-1-150 of the S.C. Code of Laws and pursuant to Section 42-9-10 and 42-9-20 of the S.C. Code of Laws as interpreted by the S.C. Supreme Court decision of James vs. Anne's 390 S.C. 188, 701 S.E.2d 730 and Utica Mohawk Mills vs. Orr 227 S.C. 226, 87 S.E.2d 589 (Ct. App. 2006).
- b. \$71,362.00 as attorney's fees per written agreement between Claimant and attorney.
- c. \$3,381.77 in cost advances and expenses.
- d. \$0.00 towards the payment of future medical benefits.
- e. \$60,823.80, for past temporary partial wage loss.

The Employer/Carrier timely filed a Form 30 raising the following issues:

Whether the Single Commissioner erred in Finding of Fact #9 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #19 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #21 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #22 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #23 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #24 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #25 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #26 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in Finding of Fact #28 as it is not supported by substantial evidence;

Whether the Single Commissioner erred in ordering that the Claimant suffered a permanent partial wage loss;

Whether the Single Commissioner erred in ordering the calculation of the permanent partial wage loss;

Whether the Single Commissioner erred in ordering temporary partial wage loss as a form 17 has been signed and filed with the Commission;

Whether the Single Commissioner erred in the calculation of temporary total wage loss

In an appellate review, the Panel shall, pursuant to 42-17-50, review the Decision and Order weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and Conclusions of Law consistent with or inconsistent with those of the Single Commissioner. After careful review of the case including the Commission's file and arguments and briefs of counsel, the Appellate panel by unanimous decision Affirms in part, Reverses in Part and Remands the Decision and Order of the Hearing Commissioner. The Appellate Panel makes the following Findings of Fact:

1. That the South Carolina Workers' Compensation Commission has jurisdiction over this matter.
2. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act and that jurisdiction and venue are proper.
3. That an employer/ employee relationship existed between the Claimant and employer, St. John's Fire District at the time of the accident.
4. Claimant suffered an injury to his right shoulder on October 8, 2008 in the course and scope of his employment.
5. That, authorized treating orthopedic, Dr. DeMarco opines on his 14-B medical statements dated September 4, 2012 and May 16, 2011, that Claimant is unable to return to work at his past employment.
6. That, the Defendants have provided the Claimant with medical care and treatment for his

injuries, including four right shoulder surgeries.

7. That Dr. DeMarco, the authorized treating orthopedic surgeon, issued a rating on August 7, 2012. Dr. DeMarco found that the Claimant had a 9% permanent partial impairment to the shoulder and that this included 3% biceps atrophy, 3% for loss of internal rotation, 2% for loss of forward flexion and 1% for pain and muscle spasm. There is no separate rating to the upper extremity.
8. Dr. Hughes, an orthopedist, performed an IME at the Claimant's request and issued a 14% permanent impairment rating to the Claimant's right shoulder and a 10% rating for the Claimant's clavicle injury.
9. That, Claimant's last day of work with the employer was January 21, 2011, after he was approved for early retirement due to his final physician's report stating that he was unable to return to work as a firefighter. (APA #10, p. 231).
10. That the Single Commissioner did not find the clavicle compensable and that issue was not appealed.
11. That, at the time of Claimant's work accident, he was working for two (2) employers; (a) St. Johns; and (b) AMF Bowling Centers (hereinafter "AMF") (APA #11, 12, and 13; and Hearing Tr. p. 25, ll. 20-22).
12. That we find that Claimant's combined earnings from his dual employment with St. Johns and AMF equates to an average weekly wage of one-thousand one hundred seventy four dollars and twenty cents (\$1,174.20) and a corresponding compensation rate of six-hundred sixty one dollars and twenty nine cents (\$661.29) (the maximum compensation rate for 2008 which is the year in which Claimant was injured on the job) (APA 11, pp. 265-269 and APA #12, pp. 269.5-271).

13. That, Claimant's job at the St. Johns fire department, which he held for over twenty-two (22) years, is physical by description (APA #10, pp. 228-230).
14. That, all of Claimant's jobs, prior to his work with the fire department, were also physical in nature (Hearing Tr. p. 17, l. 18-p. 18, l. 23).
15. That, since being unable to return to work with employer St. Johns, Claimant has continued to work as a desk clerk at the AMF bowling alley for fourteen (14) hours per week (Hearing Tr. p. 27, ll. 1-5 and p. 35, ll. 13-15).
16. That, since being unable to return to work with employer St. Johns, Claimant has actively searched for other employment. Claimant applied for a management position at the AMF bowling alley where he works when it became available; however, despite Claimant having worked at the bowling alley for twelve (12) years, he did not get the job as manager of the bowling alley (Hearing Tr. p. 35, ll. 16-24 and p. 43, ll. 12-25).
17. That, Claimant also has looked for other employment, took a test at Wal-Mart and failed said test and that he applied at CarMax, but that he was not hired. Claimant also applied for several Federal jobs, but that he has yet to get an answer from any of these job applications (Hearing Tr. p. 28, l. 14-p. 29, l. 11; p. 36, l. 3- p. 37, l. 11; p. 47, ll. 6-13; and p. 48, ll. 6-23).
18. That, Claimant also has a small vending machine route which he works once per month. Those machines are located in area fire houses. Claimant testified that he makes little or no income from this route (Hearing Tr. p. 27, l. 21-p. 28, l. 13 and p. 37, l. 18-p. 39, l. 1).
19. That, pursuant to the opinion of the authorized treating orthopedic surgeon, Dr. DeMarco, Claimant cannot return to his employment with the employer, St. John's. (APA #3, p. 15 and Defendants' APA #8, p. 56). Dr. DeMarco's opinion that Claimant cannot return to

his past employment is corroborated by the uncontroverted and only vocational assessment in the record provided by certified rehabilitation counselor, Jean Hutchinson. (APA #1, pp. 7-8). Vocational expert, Hutchinson, is of the opinion that Claimant cannot return to his past employment as a firefighter.

20. That, based on the record as a whole, the greater weight of the evidence, leads to the conclusion that Claimant cannot return to his previous employment with employer, St. John's Fire District. Additionally, Claimant cannot and will not find similar employment with another fire department.
21. That, the Claimant was fifty-one (51) years old at the time of the hearing.
22. That, Claimant is a high school graduate (1979).
23. That, Claimant is married with two (2) children.
24. That, Claimant is a US Army veteran who was honorably discharged.
25. That, the Claimant was paid temporary total benefits from October 18, 2010 through September 25, 2011. Temporary total benefits were suspended as a signed Form 17 was filed on September 30, 2011.
26. No credit was requested by the Defendants and that issue was not raised before the Single Commissioner.
27. Claimant is entitled to a lump sum payment for any and all past due temporary partial disability benefits due.
28. That, Claimant shall be entitled, and Defendants shall pay, for Claimant's past causally related medical care and treatment. Medical payment shall be made by the Defendants to the medical provider, the Claimant, or his insurance carrier, or to Medicare/Medicaid, if those expenses have been previously paid by them.

29. 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 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 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.
30. That Claimant is entitled to, and Defendants shall pay, for all causally related future medical care and treatment for Claimant pursuant to S.C. Code Ann. §42-15-60, Dodge vs. Bruccoli, Clark, Layman, Inc., 334 SC 574, 514 SE2d 593 (Ct. App. 1999) and any other authority under the Act as we find that said medical treatment will tend to lessen Claimant’s period of disability.
31. That Claimant reached maximum medical improvement as of August 7, 2012.
32. That the Claimant’s injury is limited to the right shoulder.
33. Claimant is entitled to an award under 42-9-30 for the right shoulder.
34. That Claimant is entitled to allocation language pursuant to James v. Anne’s, 390 S.C. 188, 701 S.E.2d 730 and Utica Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (Ct. App. 2006).

That the Appellate Panel makes the following Conclusions of Law:

S.C. Code Ann. Section 42-1-40 defines average weekly wage in this state and Section 42-1-50 defines for the preceding year.

S.C. Code Ann. Section 42-1-120 defines disability.

S.C. Code Ann. Section 42-1-130 defines Employee.

S.C. Code Ann. Section 42-1-140 defines Employer.

S.C. Code Ann. Section 42-1-150 defines Employment.

S.C. Code Ann. Section 42-1-160 defines an injury by accident arising out of and in the course and scope of employment.

S.C. Code Ann. Section 42-9-30 governs the amount of compensation paid for specific disability.

S.C. Code Ann. Section 42-15-20 governs timely notice to the Employer.

S.C. Code Ann. Section 42-9-10 determines benefits when the incapacity to work is total.

S.C. Code Ann. Section 42-15-60 defines medical treatment to be furnished including lifetime medical benefits for a prosthetic device.

S.C. Code Ann. Section 42-1-400 defines "work which is a part of the owner's trade, business or occupation."

### **ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

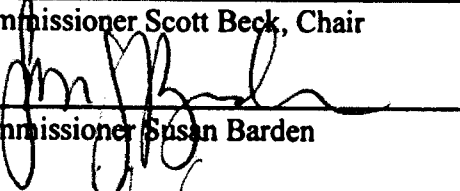
The order of the Single Commissioner is hereby affirmed in part, reversed in part and remanded by this Appellate Panel. This case shall be remanded to the Jurisdictional Commissioner for a determination of an award to the Claimant's right shoulder under 42-9-30.

IT IS SO ORDERED this 5<sup>th</sup> day of May, 2014, at Columbia, South Carolina.


SOUTH CAROLINA WORKER'S

By: 

Commissioner Scott Beck, Chair

By: 

Commissioner Susan Barden

By: 

Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Kim Falls on May 5, 2014***