THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1002925

Thomas Contreras, Employee/Claimant, ... Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

1. The Appellate Panel erred in reversing and remanding for a scheduled member disability award to the shoulder when the evidence showed disability should have been awarded under the loss of earnings capacity statute.

The essence of Respondents' argument is that the medical records are inconsistent – such that the Appellate Panel must be affirmed because it has authority to resolve the apparent inconsistency. In reality, there is no inconsistency in the medical records – there is certainly no inconsistency in the opinions of the doctors. Nor is there any question that Contreras underwent surgery to repair a torn biceps – resulting in a 3% impairment for atrophy of the biceps. The Appellate Panel even specifically quoted the biceps rating in its order – albeit as support for the erroneous conclusion that "There is no separate impairment rating to the upper extremity." [FC Order, page 12, Finding of Fact 7].

Respondents focus on 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. [Brief of Respondents, page 9].

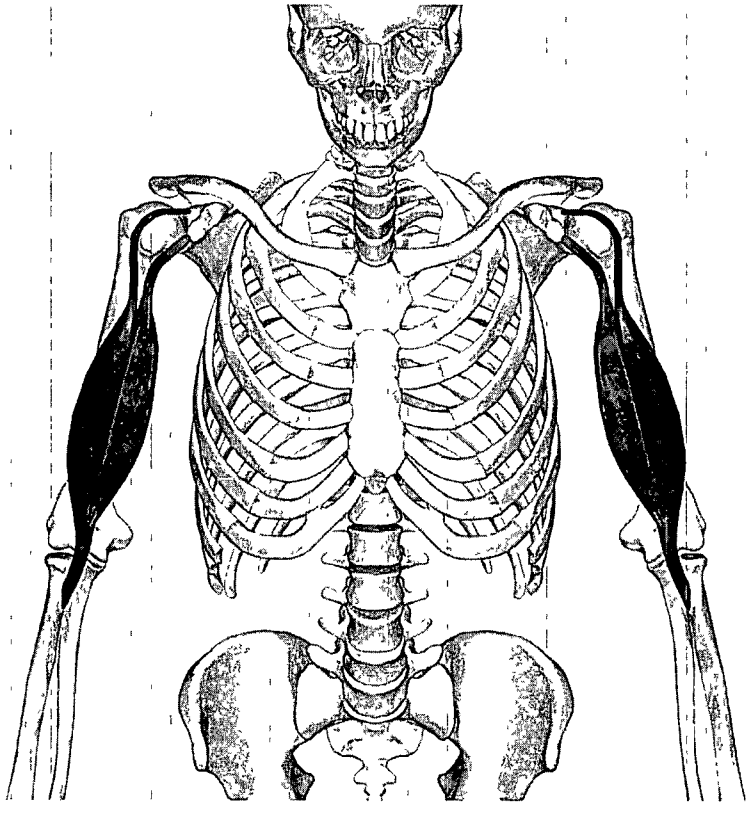
Well . . . *yes*, an injury to the biceps is *by definition* an injury to part of the arm. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770.

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.[1]

The biceps is made up of two bundles of muscles - the long head and short head. The fourth and final surgery was specifically to address "long head of the biceps pain." [APA 4, page 56].

The location of the biceps in the arm is most obvious in an illustration:[2]



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

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

The long head is shown in the outer darker area; the short head is on the inside.

Beyond the self-evident fact that the biceps is a major part of the arm, there is ample uncontested medical testimony that the arm was affected. Respondents summarily dismiss the medical opinions, characterizing them as "check the box questionnaires prepared by Claimant's attorney and presented to the doctors . . ." [Brief of Respondents, page 10].

Questionnaires are often used as evidence in workers' compensation cases. There is nothing nefarious or suspect about them. If a doctor disagreed with the questionnaire, he would not sign it.[3] Indeed, the Commission's own Form 14B is a questionnaire. The only requirement is that the opinion be stated to a reasonable degree of medical certainty – as was the case here. See Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)("opinion or testimony" obtained for litigation purposes in medically complex cases must be "stated to a reasonable degree of medical certainty.)"[4]

Furthermore, if Respondents disagreed with the opinions stated by the doctors in the questionnaires, they had the ability to depose the doctors and/or obtain a compulsory second opinion by a physician of their choosing. S.C. Code Ann. § 42-15-80 (2007)(employer has authority to compel employee to "submit himself to examination . . . by a qualified physician or surgeon designated and paid by the employer . . .). Not having done either, they are not in a position to

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[3]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." [APA p. 16].

[4]Michau involved a repetitive trauma injury where a medical "opinion or testimony" must be stated to a reasonable degree of medical certainty per the statute. S.C. Code Ann. § 42-1-172 (2007). Strictly speaking, the "reasonable degree of medical certainty" requirement would not extend to this case, unless the issue were deemed medically complex. See S.C. Code Ann. § 42-1-160 (E) (2007).

complain about the opinions stated by Dr. DeMarco and Dr. Hughes. A party is bound by his 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 showed no material information the doctor could have provided in a deposition that was not already included in the written record).

No one disagrees that, as a general proposition, it is for the Commission to resolve inconsistencies in the evidence. However, the Commission may only disregard medical evidence when there is 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). The point here is that there is no inconsistency – the medical opinions and lay testimony match up.

Respondents' argument that "Substantial evidence must be a higher standard than just having a doctor sign off on a 'check the box' questionnaire" is completely without merit or support in the law. In Burnette, this Court reversed the Commission for disregarding opinions stated by two doctors in questionnaires, holding "we are forced to conclude [finding of fact that claimant did not injure her lower back] is the medical opinion of the single commissioner, adopted by the Commission." The Court took particular notice that the single commissioner "ignored [the doctor's] contemporaneous determination of a 12% whole person impairment corresponding to the lumbar spine injury [instead finding] that 'if [Burnette] aggravated her low back condition in the accident in issue, the aggravation was temporary, and her condition returned to baseline or is the result of an intervening accident . . .'" Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012).

Burnette shows that ignoring unrefuted medical evidence stated in a questionnaire is grounds for reversal. Summarily disregarding the medical opinions of the two doctors is resorting to rank

speculation. See Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012)(reliance on speculation "in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it.").

The Appellate Panel's finding "That the Claimant's injury is limited to the right shoulder" is unsupported by substantial evidence. [FC Order, page 15, Finding of Fact 32].

Dr. DeMarco operated specifically on the biceps in an attempt to alleviate "biceps pain." [APA 3, page 30]. He opined: "Most probably, and to a reasonable degree of medical certainty, Mr. Contreras' injuries to his right shoulder and right upper extremity, (right biceps) are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work." He further confirmed: "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." [APA 3, page 16]. Finally, when he did address the permanent impairment rating, he specifically assigned a 3% permanent impairment for "biceps atrophy." [APA 3, page 20].

The second opinion doctor, Dr. Hughes, agreed. He signed a similar questionnaire, stating: "Most probably and to a reasonable degree of medical certainty, Mr. Contreras' injuries to his right shoulder, right upper extremity, right biceps and clavicle are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work." [APA 2, page 9]. Dr. Hughes added the "injuries to his right shoulder affects his right upper extremity by way of pain and tenderness into his right biceps and clavicle as a result of his October 8, 2008 accident at work." [APA 2, page 9].

Contreras himself testified: "The fourth surgery was the bicep where he cut it up right in here and moved it and screwed it to the bone." He further stated he still had pain and permanent problems in both his right shoulder and bicep. [Tr. Page 24, line 24-page 25, line 11].

This is the evidence of the case. *Nothing* contradicts the opinions of the doctors and the testimony of Mr. Contreras. The Appellate Panel simply got it wrong. The Panel's decision finding the injury was wholly limited to the shoulder is unsupported by substantial evidence and should be reversed.

2. The Appellate Panel erred in holding the Single Commissioner did not find the clavicle "compensable."

Respondents contend that the Commission properly found no compensable injury to the clavicle because "Dr. Hughes, who only saw the Appellant once, is the only doctor who found the clavicle was injured." [Brief of Respondents]. This is simply not accurate. Dr. DeMarco also addressed the clavicle – including performing surgery on the clavicle itself.

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 . . ." [APA page 16]. 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 . . ." [APA 4, page 56 (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.

This is undeniable medical proof of a permanent injury to a second scheduled body part. The Appellate Panel should be reversed on this issue.

3. The Appellate Panel's Decision and Order is immediately appealable because it finally determined the issue of whether Appellant can recover for general disability under § 42-9-20.

Respondents contend any order remanding a case for additional proceedings is not directly appealable. Appellant respectfully disagrees. In reversing the Single Commissioner, the Appellate Panel foreclosed any possibility that Contreras could recover for loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007). An order finally determining a part of the case is immediately appealable – indeed must be appealed else the ruling become the law of the case. See Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993)(holding failure to appeal commissioner's order requiring claimant to elect remedy between election of remedy § 42-9-20 and § 42-9-30 was law of the case). Moreover, the Appellate Panel is the final trier of fact. If the Panel was correct in holding the award must be made under § 42-9-30 on the existing record, then it must make that award itself – not remand back to a single commissioner.

Judicial review of the Commission's decisions is governed by the Administrative Procedures Act (APA). Pursuant to the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ." S.C. Code Ann. § 1-23-380 (Supp. 2013). "An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review." Bone v. U.S. Food Serv., 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013).

In the instant case, the Appellate Panel reversed an award for loss of earnings capacity made under S.C. Code Ann. 42-9-20 (2007). This decision decided the merits of the lost earning claim with finality – against Appellant. Moreover, even though the Appellate Panel remanded, the remand is limited to an award under § 42-9-30. It is therefore, immediately appealable because "A

preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

Bone is the key case establishing the basic principle underlying appealability from the Commission and other administrative agencies. It should be pointed out that workers' compensation cases are inherently different than other administrative decisions. A decision granting or denying a zoning permit, a liquor license, a power rate increase, a certificate of use for a medical device or even unemployment compensation is a one time decision deciding the single issue in a case. In workers' compensation, there can be multiple hearings over varying issues such as jurisdiction, compensability, temporary compensation, medical treatment and permanent disability. Even a decision awarding permanent disability does not end the case, for it may begin again on a change of condition or involve future disputes over medical treatment. The significance here is that final orders on these multitudinous issues are still being regularly decided by the appellate courts – even post Bone. See, e.g., Shatto v. Mcleod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)(order determining employment status was an appealable final order).

Appellant is aware of this Court's recent decisions in Rose v. JJS Trucking, LLC, Op. No. 5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 91) and Alvarez v. Quality HR Servs., Inc., Op. No. 5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 85). Both cases are distinguishable in that neither dealt with the merits of the case.

In Rose, the upstream employer sought to transfer liability to the South Carolina Uninsured Employer's Fund while the underlying claim was still ongoing. The commission refused to order the transfer, finding the issue of transfer was "not ripe for adjudication at this time." The employer argued the order was immediately appealable because a later appeal would deprive them of an

adequate remedy. The Court disagreed, noting "Appellants make no specific argument as to how the commission's refusal to address transfer at this time affects Appellants in any way other than to delay the payment of money."

The Court dismissed the appeal, holding: "Because the commission has not yet ruled on the merits of Samuel Rose's entire claim for benefits, however, the order is not a final decision, and thus not immediately appealable." Id. Rose differs from the instant case in that the Commission held the issue at bar was not ripe. As the Commission never addressed the merits, there was no final order from which to appeal.

In Alvarez, putative employers sought to appeal jurisdiction before the merits of the individual claims had been adjudicated. The Court vacated the decision below, holding:

> In this case, the commission ruled only on the coverage issue and did not decide the individual claimants' entitlement to benefits. Because the commission has yet to determine the substantive rights of the claimants, the commission's order is not a final decision.

Alvarez v. Quality HR Servs., Inc., Op. No. 5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 85).

Alvarez would have been appealable by the employers had the Commission ruled that the individual claimants were entitled to temporary compensation and medical treatment – even though permanent disability could not have yet been decided (since without provision of treatment, none of the claimants could have been placed at MMI).[5] Cf. Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014)(dismissing appeal because single commissioner's order was a denial

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[5]Alvarez illustrates the conundrum feared by the dissent in Bone. In Alvarez, the unfortunate decision of the Commission to bifurcate the coverage issues from the merits (and hear the coverage issues first), deprived the individual claimants of any relief at all. Indeed, whether they will be provided benefits even if their cases are awarded is uncertain, as payment of ordered benefits will be held up while the appeal of the putative employers makes its way back through the appellate courts.

of a motion to dismiss, thus not a final order reaching the merits of the claim).

In the instant case, the orders of the Single Commissioner and Appellate Panel directly addressed the merits. As to the Single Commissioner's award under § 42-9-20, that award was denied with finality by the Appellate Panel. The decision deprived Contreras of a remedy. It is, therefore, immediately appealable. The Court should deny Respondents' Motion to Dismiss.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel and reinstate the Order and Award of the Single Commissioner.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2014-001217

Thomas Contreras, Employee/Claimant, ... Appellant,

v.

St. Johns Fire Department, Employer, and
State Accident Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Appellant's Initial Reply Brief** and **Return to Respondents' Motion to Dismiss** to be served on the parties below, by placing 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, addressed as follows:

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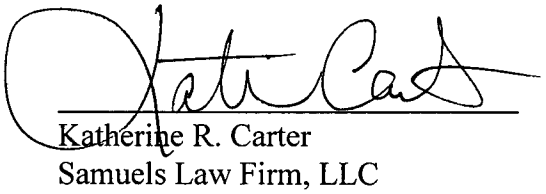

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February 27, 2015

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Thomas Contreras v. St. Johns Fire Department
Appellate Case No.: 2014-001217

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Appellant's Initial Reply Brief**, the original and seven (7) copies of the **Appellant's Return to Respondents' Motion to Dismiss** and a **Proof of Service,** in the above case.

Please have your staff clock in the Appellant's Initial Reply Brief, Return to Respondents' Motion to Dismiss, and Proof of Service and return a clocked copy in the enclosed self addressed stamped envelope.

Thank you for your assistance. Please contact us with any questions or if further information is needed from our office.

Sincerely,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc w/encl.: Margaret Urbanic, Esq.
Ellen Goodwin, Esq.
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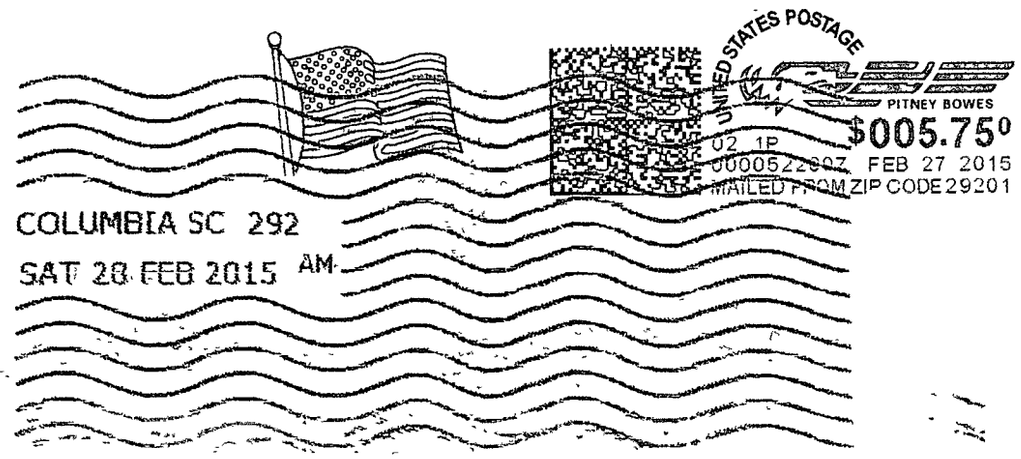

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