

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-001247

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SC Court of Appeals

Thomas Contreras, Claimant, Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

Gary Christmas
HOWELL & CHRISTMAS, LLC
P.O. Box 1896
Mt. Pleasant, SC 29465
(843) 849-2800

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in reversing the Single Commissioner § 42-9-20 disability award and finding the injury was limited to the shoulder, when Appellant suffered a permanent loss of earnings capacity from distinct injuries resulting in physical affect and impairment to multiple scheduled body parts (shoulder, arm, and clavicle).
2. Whether the Appellate Panel erred in finding “That the Single Commissioner did not find the clavicle compensable and that issue was not appealed,” when the issue was not specifically addressed nor decided with finality by the Single Commissioner decided with finality, nor required to be appealed by the prevailing party at trial.
3. Whether the Appellate Panel erred in finding Appellant was entitled to past temporary partial as previously ordered by the Single Commissioner, yet made no findings or award on the issue and prohibited Appellant from raising the issue after the remand, thus depriving Appellant of due process and a substantial vested benefit to which he was entitled under the Act.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries to the right arm, shoulder and clavicle sustained by the Appellant, Thomas Contreras, on October 8, 2008 in his employment with the St. Johns Fire District (hereinafter "St. John's."). St. John's accepted Contreras's claim and began providing various benefits under Title 42, the Workers' Compensation Act. Contreras received medical treatment primarily from Dr. James DeMarco. Dr. DeMarco ultimately performed four surgeries on Contreras – all for the shoulder, with the last including surgery to the arm itself (the long head of the biceps muscle). [APA #4, p. 54]. As a result of these injuries, Contreras is unable to return to his previous employment as a firefighter. He reached MMI on August 7, 2012.

On February 8, 2013, Contreras filed a Form 50 (Employee's Request for Hearing) seeking additional medical treatment and disability compensation. He specifically alleged he had suffered a permanent loss of earnings capacity as defined under S.C. Code Ann. § 42-9-20 (2007). [Form 50].

St. John's timely filed a Form 51 (Employer's Answer), admitting a "right shoulder injury only."

A hearing was held before Commissioner Gene McCaskill on May 14, 2013. Contreras testified on his own behalf. Evidence was presented regarding medical treatment, the extent of injuries and impairment, and vocational evidence establishing Contreras' injury related loss of earnings capacity.

Commissioner McCaskill issued a Decision and Order on August 27, 2013, making the following pertinent findings of fact:

That, I find, that on or about October 8, 2008, Claimant suffered injury by accident

arising out of and in the course and scope of employment, wherein he injured his **right shoulder and right upper extremity**. [SC Order, page 20, Finding of Fact #3 (emphasis added)].

That, based on the record as a whole, I conclude 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. [SC Order, page 23, Finding of Fact #23].

Based on these findings, Commissioner McCaskill ordered St. John's to pay 340 weeks of permanent partial disability to Contreras, along with providing ongoing post-MMI medical treatment.

St. John's timely filed a Form 30 (Notice of Appeal) on September 3, 2013. [Form 30].

The Appellate Panel heard oral arguments on December 16, 2013. The Appellate Panel issued a Decision and Order on May 5, 2014. The Appellate Panel affirmed in part, reversed in part and remanded to the jurisdictional Commissioner for a determination of an award to the Claimant's right shoulder under 42-9-30. [FC Order].

Specifically, the Appellate Panel deleted the injury to the right upper extremity in Commissioner McCaskill's finding of fact #3, changing it to read: "Claimant suffered an injury to his right shoulder on October 8, 2008 in the course and scope of his employment." [FC Order, page 11, Finding of Fact 4]. Although still finding Contreras had proven an actual loss of earning capacity, the Appellate Panel reversed the award for lost earning capacity based on the injury being limited to the shoulder alone. As such, the Appellate Panel held the award should be made under the scheduled member statute, section 42-9-30, rather than under Section 42-9-20.

The Panel also added five other findings relevant to this appeal:

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. [FC Order, page 12,

Finding of Fact 7 (emphasis added)].

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 clavicle injury. [FC Order, page 12, Finding of Fact 8].

That the Single Commissioner did not find the clavicle compensable and that issue was not appealed. [FC Order, page 12, Finding of Fact].

That the Claimant's injury is limited to the right shoulder. [FC Order, page 15, Finding of Fact 32].

Claimant is entitled to an award under 42-9-30 for the right shoulder. [FC Order, page 15, Finding of Fact 33].

Additionally, the Appellate Panel held Appellant "is entitled to a lump sum payment for any and all past due temporary partial disability benefits." [FC Order, Finding of Fact 27]. However, the Panel eliminated a specific finding of fact supporting the award and made no findings of its own as to what the award should be.

On June 3, 2014, Contreras timely filed his Notice of Appeal to the Court of Appeals. The Court dismissed the appeal as interlocutory pursuant to Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). [order dismissing appeal].

The Appellate Panel then remanded to the original Single Commissioner, Commissioner McCaskill. The Single Commissioner issued a Decision and Order on October 22, 2015, wherein he found Contreras had suffered a 35% permanent partial disability to his right shoulder. [Order, page 8]. The Single Commissioner added he was limited by the remand instructions strictly to addressing permanent partial disability to the right shoulder. He therefore did not address the past due temporary partial disability benefits.

Contreras timely filed his Form 30 (Notice of Appeal) to the Full Commission on November

3, 2105.

The Appellate Panel issued its Decision and Order on May 26, 2016 fully affirming the Single Commissioner's Order on remand – including the holding that temporary partial could not be addressed. [FC Order 2].

This appeal followed.

STATEMENT OF THE FACTS

Thomas Contreras was employed with the St. John's Fire District for twenty-two years, rising to the rank of Captain. He also worked part-time in a bowling alley and as a vending machine tender.

As being a firefighter requires great physical strength and stamina, St. John's requires its employees to engage in physical training. On October 8, 2008, Contreras injured his right shoulder and right bicep while lifting weights at the fire station. [Tr. Page 21, lines 3-2].

Following the injury, Contreras never returned to fighting fires. After undergoing 4 operations to his shoulder – including one specifically to the biceps in his right arm – Contreras was formally terminated from the Fire Department in January 21, 2011 due to his physical limitations. [Tr. Page 19, line 9-page 20, line 20; page 25, lines 12-18; APA 10, page 231].

Dr. DeMarco performed all 4 surgeries.¹ The fourth and final surgery was done on March 29, 2012. Dr. DeMarco described it as “arthroscopic major debridement of intra-articular synovitis with coracoid decompression, subacrominal decompression and bursectomy, and long head of biceps

¹Dr. DeMarco operated on January 29, 2009; October 1, 2009; October 11, 2010; and March 29, 2012. [APA 4, pages 56-73].

tenodesis.”² [APA 2, page 19]. The surgery involved implanting a “biceps tenodesis screw.” [APA 4, page 56]

Contreras described it in layperson’s terms: “The fourth surgery was the bicep where he cut it up right in here and moved it and screwed it to the bone.” Contreras stated he still had pain and permanent problems in both his right shoulder and bicep. [Tr. Page 24, line 24-page 25, line 11].

Dr. DeMarco’s records confirm that the fourth surgery was specifically intended - albeit unsuccessfully – to alleviate arm pain, specifically “biceps tendinopathy” [APA 4, pages 56-57]. Dr. DeMarco described the scenario at length on November 22, 2011:

At this point Mr. Contreras continues to complain persistently of **long head of the biceps** and bicipital groove pain. . . . He has failed injections, it has been over a year, he continues having pain, and the 1 thing about him is that he has been completely consistent with where his pain is, directly over the bicipital groove. [The previous surgeries] did help with some of the other pain, but he is left with **biceps pain** which now need to be addressed. This is still considered as workers’ comp injury as directly and causely [sic] related to his injury on 10/08/2008. [APA 3, page 30 (emphasis added)].

Dr. DeMarco definitively confirmed that both the shoulder and arm were injured and affected in a questionnaire response on October 24, 2012. Dr. DeMarco agreed: “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

²The biceps is a two-headed muscle that lies on the upper arm between the shoulder and the elbow. It is made up of two bundles of muscles - the long head and short head. The surgery was specifically to address “long head of the biceps pain.”[APA 4, page 56].

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].

Dr. Hughes examined Contreras on October 6, 2011 – before the third and fourth surgeries. He assigned impairment ratings of 14% to the arm and 10% to the upper extremity. Notably, he also opined Contreras was limited to 10 pounds lifting due to “Limited strength and endurance secondary to right arm impairment and [acromio-clavicular joint] resection.” [APA 2, pages 9-11]. Dr. Hughes assigned the impairment rating and restrictions to the right arm even before the unsuccessful biceps tenodesis.

Both doctors concurred that Contreras is unable to return to work as a fire fighter. Both doctors stated he would need additional post-MMI treatment.

After his medical termination from the fire department in 2011, Contreras continued working part time as a cashier at the bowling alley. He hoped to be offered a manager job, but none was forthcoming. He sought work with the Federal Government and elsewhere, with no success.

Contreras underwent an Employability Evaluation by a certified vocational consultant, Jean Hutchinson, on October 10, 2011. [APA 1, pages 1-8]. The vocational expert reviewed Contreras’ physical limitations, work history, education, and transferable skills. She opined:

I am of the opinion that Mr. Conteres [sic] is unable to perform the required job tasks

of his former work as a fire department chief, is unable to return to his past employment as a landscape laborer, and does not have transferable skills to perform other work that is within his residual restrictions. [APA 1, page 8].

Hutchinson further noted Contreras is earning \$8.00 per hour working approximately five hours per week in an accommodated position. She opined should his physical limitations resolve to the point where he has more function and stamina, [he] can expect to earn at or near minimum wage (\$7.25 - \$8.00 per hour) and would continue to experience a significant loss of earning capacity.” [APA 1, page 8].

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

“[T]he guiding principle undergirding our workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on “the medical opinion of the single commissioner, adopted by the Commission,” rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission “based on rank speculation . . . cannot now be used as the basis for denying [an injured worker’s] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

This appeal raises two sets of issues. The first set of issues goes to the interlocutory Order of the Appellate Panel filed on May 5, 2014. The second set of issues goes specifically to the Orders on Remand filed October 22, 2015 and May 27, 2016.

A. Issues regarding previous Appellate Panel Order reversing Single Commissioner Order and remanding to the Jurisdictional Commissioner.

The primary issue on appeal is a repeat of virtually the same error issue decided in Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995) (“as a matter of law the hip socket is part of the pelvis and not part of the leg for workers’ compensation purposes”).

In the instant case, although Contreras undoubtedly suffered a serious injury to his shoulder, he also injured his right arm, specifically the biceps. The arm injury was serious enough to require a separate surgery, resulted in definable permanent impairment ratings, and left him with permanent pain, weakness, muscle atrophy and restrictions. Both surgeons opined Contreras suffered injuries to “right shoulder and right upper extremity, (right biceps) . . .” [APA 3, page 16; APA 2, page 9].

The evidence shows Contreras’ injury is not limited to his shoulder. He therefore proved his right to proceed under the loss of earnings capacity statutes. S.C. Code Ann. § 42-9-20 (2007). As the undisputed evidence shows he suffered an actual loss of earnings capacity, the original disability award of the Single Commissioner should be reinstated.

- 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.**

Contreras has consistently argued that his injury was not limited to his shoulder – such that the disability award should have been made for loss of earnings capacity under S.C. Code Ann. § 42-

9-20 (2007). Contreras adduced proof that he injured a second body part – the biceps muscle in his upper extremity – and that his upper extremity injury had caused additional disability. Contreras also proved injury to his clavicle. This proof, combined with the definitive proof of an actual loss of earnings capacity, confirm that the Appellate Panel erred in reversing the Single Commissioner’s original disability award. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing denial of § 42-9-20 award where only evidence of residual earnings capacity was claimant’s unsupported speculation that he could open a restaurant, “thus, there is no evidence in the record supporting the commissioner’s order.”); Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995)(claimant is entitled to proceed under loss earnings statute because “as a matter of law the hip socket is part of the pelvis and not part of the leg for workers’ compensation purposes”).

A. Framework for Disability Compensation in Workers’ Compensation Cases.

The Workers’ Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C. Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)(“The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity

to establish a disability greater than the presumptive disability provided for under the scheduled member section.”).

In this case, the Single Commissioner made a § 42-9-20 disability award for partial loss of earning capacity under the economic model. The Appellate Panel reversed, remanding for a lesser § 42-9-30 award of specific disability to the shoulder under the medical model. See S.C. Code Ann. § 42-9-30 (14)(2007)(providing compensation for loss of use of the shoulder). Had Contreras not suffered the injury to his upper extremity, such that his injury was *entirely* limited to his shoulder, then he would be limited to significantly less compensation under the medical model – not withstanding the fact he suffered a significant loss of his pre-injury earning capacity.

The basic rule set out in Singleton states, “Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation.” Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). The principle espoused in Singleton recognizes “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.” Wigfall, 354 S.C. 100, 106-07, 580 S.E.2d at 103. This rule is colloquially referred to as the “two-body part rule.”

The part of Singleton relevant to this case states, “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.]. The point here is that if two or more scheduled members are injured, the claimant is entitled to proceed under general disability as a matter of law without further inquiry. However, if the actual injury is confined strictly to one body part, the claimant can still proceed under the general disability

statutes if he can “show that some other part of his body is affected.” Id. See, also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that affected other parts of body compensable as general disability). It is enough that the other body part be *affected*. There is no requirement that a separate impairment rating be given (although the Court should note Contreras was given a separate impairment rating for his biceps injury). “The Singleton Court intended ‘impairment’ to encompass a physical deficiency.” Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Cf. Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% to leg affirmed because ruptured Achilles tendon not limited to foot because pain traveled up into leg); Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)(for workers’ compensation purposes, there is no requirement that loss of use, or partial loss of use, of member of body requires evidence of direct injury to member itself).

B. Injuries to the Shoulder, Clavicle and Arm/Upper Extremity.

The Single Commissioner found as fact “that on or about October 8, 2008, Claimant suffered injury by accident arising out of and in the course and scope of employment, wherein he injured his **right shoulder and right upper extremity.**”³ [SC Order, page 20, Finding of Fact #3 (emphasis added)].

In a detailed order, the Commissioner described in detail the evidence on which he relied in reaching this finding. He recounted Dr. Hughes’ opinions on the injury to the right upper extremity itself, as well as the opinion that “Claimant’s injury to his right shoulder affects his right upper

³In his own handwriting, Dr. Hughes noted the 10% permanent impairment for the clavicle was to the “upper extremity.” [APA 2, page 10].

extremity by way of pain and tenderness into his right biceps and clavicle . . .” He noted Dr. Hughes’ descriptions of work restrictions specifically to the arm along with separate impairment ratings to the right shoulder (14%) and right upper extremity (10%). [SC Order, page 14-15].

The Commissioner then went into more description of the evaluations and treatment by Dr. DeMarco from August 6, 2010 through October 14, 2012. As with Dr. Hughes, 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 Single Commissioner then restated Dr. DeMarco’s opinion that: “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.” [SC Order, page 15-16; APA 3, page 16]. He noted the permanent impairment rating, particularly that Dr. DeMarco assigned a 3% permanent impairment for “biceps atrophy.” [SC Order, page 15-16; APA 3, page 20].

The Single Commissioner did not rely solely on the medical evidence. He also recounted Contreras’ testimony, to wit:

Claimant testified that prior to this work related accident he has never had any pain or symptoms to his right shoulder or bicep. Claimant testified that prior to his work accident, he had not problem with range of motion in his right shoulder, but that he does now because he cannot hold his shoulder in an upward position. Claimant testified that he has pain the front and back of his bicep and pointed to the bicep near the bend of his elbow. Claimant testified that prior to his work-related accident he did not have any problem with strength in his right shoulder but that he does now because if he lifts his shoulder up same causes pain and his right bicep will spasm. [SC Order, page 8].

This testimony is completely consistent with the medical evidence. Not only is the medical evidence and testimony of shoulder *and* arm pain unrefuted, Respondents’ counsel never even asked one single question about the above testimony on cross-examination. None of the doctors were cross-

examined.

This was the evidence at trial – recounted accurately by the Single Commissioner. Yet, despite this completely one-sided evidence, the Appellate Panel inexplicably reversed the key findings of fact supporting the Single Commissioner’s § 42-9-20 disability award. There is no analysis; no explanation; no reasoning – simply a slightly different set of factual findings with a vastly different result. Certainly there is no evidentiary basis for deleting the Single Commissioner’s findings that Contreras injured his right shoulder and right upper extremity.” [SC Order, page 20, Finding of Fact #3].

As in Burnette, “The record contains [Contreras’] medical records and testimony, as well as written opinions by [his] treating physicians and a vocational rehabilitation expert. We find no evidence that challenges the conclusions of [Contreras’] doctors concerning [his injuries].” Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). The Appellate Panel repeated the error it made in Burnette when it substituted its own medical opinions for the opinions of the doctors. Cf. Lail v. Georgia-Pacific Corp., 328 S.E.2d 911, 285 S.C. 234 (1985)(error to award disability to hand when medical testimony established functional impairment was to thumb and third finger).

The Appellate Panel should reconsider the decision in the interlocutory order and should reverse the finding that the injury is limited to the shoulder and reinstate the Order and Award of the Single Commissioner.

C. Evidence of Loss of Earnings Capacity.

The Single Commissioner made specific and detailed findings regarding Contreras’ actual loss of earning capacity. He specifically relied on the undisputed medical evidence that Contreras

was unable to return to his previous employment as a firefighter, along with limiting him from nearly any other employment. He also relied on the vocational expert, noting “defendants did not choose to submit a vocational evaluation in this case.” [SC Order page 23; Finding of Fact #20]. This was also noted by the Appellate Panel, who agreed Contreras was unable to return to his previous employment. [FC Order page 13-14, Finding of Fact #19].

After reviewing the evidence, the Single Commissioner made an award for a specific amount under § 42-9-20. This award is undisputedly supported by substantial evidence. The calculations are consistent with Contreras’ limited earnings at the time of the hearing – confirmed by the opinion of the vocational expert. See Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970)(“Loss of earning capacity alone is the criterion and medical opinion as to the extent of physical disability can have no probative value against actual earnings.”). Contreras proved the extent of his loss of earning capacity by both expert vocational evidence and by his own unsuccessful search for alternative employment. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(setting out three alternative methods of proof for lost earnings capacity: (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) “diligent efforts to secure employment.”).

The Appellate Panel gave no explanation for reversing the Single Commissioner’s disability award. Although never stated explicitly, it must be presumed that the Appellate Panel reversed based on its holding that the injury was limited to the shoulder only. Had the injury been strictly limited to the shoulder, with no injury or affect on the arm whatsoever, then Singleton would apply to limit the award to the shoulder under § 42-9-30.

There is no evidentiary basis for vacating the § 42-9-20 award. The evidence completely

supports the award, such that no other result is possible. Cf. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing denial of § 42-9-20 award where only evidence of residual earnings capacity was claimant’s unsupported speculation that he could open a restaurant, “thus, there is no evidence in the record supporting the commissioner’s order.”). As such, the Single Commissioner’s § 42-9-20 disability award should be reinstated.

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

The Appellate Panel added a finding “That the Single Commissioner did not find the clavicle compensable and that issue was not appealed.” [FC Order, page 12, Finding of Fact]. This finding is not necessarily critical to reinstating the Single Commissioner’s § 42-9-20 award, as the evidence showing the biceps injury and impairment satisfies the “two-body-part rule.”

The Single Commissioner found Contreras “injured his **right shoulder and right upper extremity.**”⁴ [SC Order, page 20, Finding of Fact #3 (emphasis added)]. 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. See Dozier v. American Red Cross, 411 S.C. 274, 68 S.E.2d 222 (Ct. App. 2015)(holding res judicata did not apply because even though issue was raised to Commission, it was “not addressed with finality.”). As workers’ compensation has no mechanism to address issues raised but not ruled upon by the single commissioner, there is no preservation issue here. 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

⁴In his own handwriting, Dr. Hughes noted the 10% permanent impairment for the clavicle was to the “upper extremity.” [APA 2, page 10]. 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.

the single commissioner).

Under the Single Commissioner's Order, it was not necessary to address the clavicle as a distinct and separate body part – his findings of injury to the right shoulder and right upper extremity are dispositive. Once Contreras proved an injury and affect on those two body parts, an additional finding on the clavicle was surplusage. See Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that affected other parts of body compensable as general disability). The rule is two body parts – not three or more.

The evidence does show the clavicle was both injured and impaired. Moreover, like the arm/upper extremity and like the shoulder, the clavicle is a separate scheduled member. 25A S.C. Code Reg. 67-1101 (2007)(setting maximum number of weeks for partial loss of use of the clavicle).

The October 11, 2010 surgery included a "Right shoulder acromioclavicular joint resection." [APA 4, page 56]. 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)]. Dr. Hughes noted this specific surgery when he assigned the 10% permanent impairment for the clavicle (with the handwritten addition that the impairment was to the "upper extremity."). [APA 2, page 10].

As the Single Commissioner did not explicitly address the clavicle with finality, there was no "error" to appeal – particularly since Contreras prevailed at trial. Therefore, to the extent the clavicle injury is relevant to the issues on appeal, the Appellate Panel's finding is erroneous and should be reversed.

B. Issues regarding Order from Single Commissioner on Remand.

1. Temporary Partial Disability.

In its original order remanding to the jurisdictional commissioner, the Appellate Panel found

“Claimant is entitled to a lump sum payment for any and all past due temporary partial disability benefits.” [FC Order, Finding of Fact 27]. The Appellate Panel eliminated the Single Commissioner’s specific finding on this issue (Finding of Fact 28) without explanation (perhaps inadvertently). It would have been within the remand instructions for the Single Commissioner to determine the amount due. Indeed, it would be necessary, as the Appellate Panel made no specific findings. Unfortunately, the Single Commissioner on remand determined that the remand instructions prohibited him from addressing any issue other than permanent partial disability. On the second appeal, the Appellate Panel repeated this ruling. The Panel specifically ruled:

It is important to note that the directive from the Full Commission Order of May 5, 2014 is very specific. We are to determine an award to the Claimant’s right shoulder pursuant to § 42-9-30.

While both parties made additional arguments in their briefs, this issue and this issue alone was before the Commission on this remand.

Appellant also raised issues from the prior Appellate Panel order dated May 5, 2014. We find that hte Appellant cannot challenge the order from the Full Commission dated May 5, 2104 and that the only issues from the order of October 22, 2015 are properly before this review panel.

[Order May 16, 2016, page 8, Findings of Fact 32, 33, 35].

These rulings by the Appellate Panel are erroneous in that the ruling barred Contreras from challenging an obvious error by the Commission. The Appellate Panel certainly intended to award temporary partial disability compensation, yet barred Contreras procedurally from correcting the error either before the Single Commissioner or the Appellate Panel on appeal from the remand.

Temporary total disability was stopped by consent when Contreras signed a Form 17 on January 20, 2011. He last worked for the Employer on June 21, 2011. He reached MMI on August 7, 2012. During this period, he was unable to work for the employer and only earned \$2,701.10 over

this 80 week period. [APA pages 274-276]. Accordingly, he would be entitled to 80 weeks of temporary partial compensation. S.C. Code Ann. § 42-9-20 (2007); Johnson v. Rent-A-Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(employee entitled to temporary compensation where employer never actually offered light duty work to employee).

In the original Order, the Single Commissioner found this amount would be \$60,823.80. [SC order 1, page 25, Finding of Fact 28]. This amount is supported by the evidence. Accordingly, the Court should reinstate this portion of the original Single Commissioner order.

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.

Respectfully Submitted,



Gary Christmas
HOWELL & CHRISTMAS, LLC
P.O. Box 1896
Mt. Pleasant, SC 29465
(843) 849-2800

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorneys for Appellant

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Columbia, South Carolina