THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-001247

Thomas Contreras, Claimant, ... Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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"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 2 n.2

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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 [In Reply to Respondents' Argument at pages 6-12]..

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].

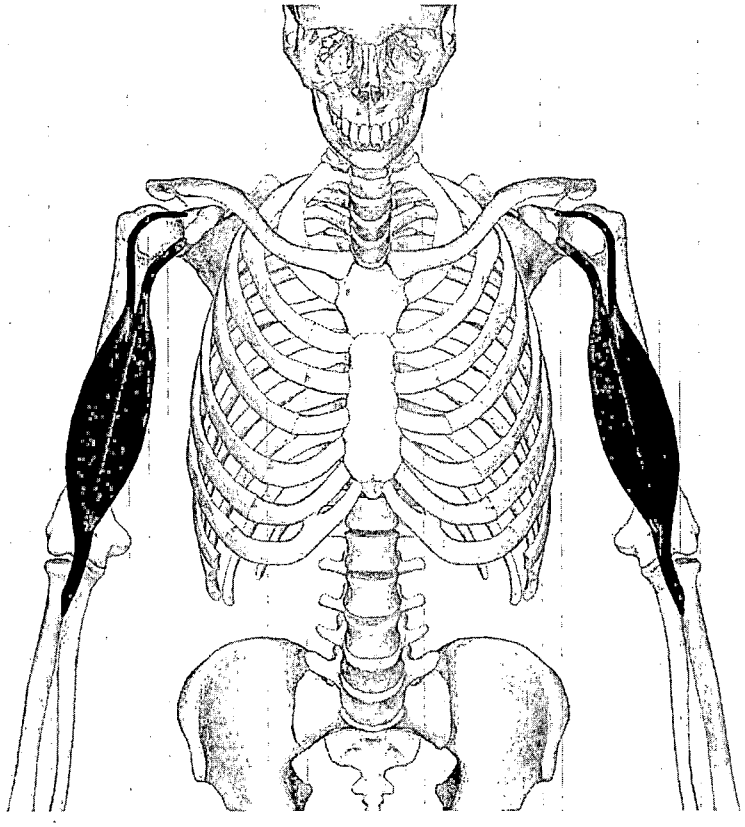
Well . . . *yes*, an injury to the biceps is *by definition* an injury to part of the arm. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers 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. Cf. Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)("[t]he nature and timing of [an employee's] visits do not discredit [a doctor's] medical opinion."). 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

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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).

designated and paid by the employer . . .). Not having done either, they are not in a position to 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].

Respondents contend the injury was to the biceps tendon – rather than the biceps itself. The website cited by Respondents, does have an entry describing a "biceps tendon tear;" even though this injury is to the long head biceps – resulting in biceps *muscle* atrophy (tendons do not atrophy).The entry actually supports an inference that the arm is affected, for it states "If you tear the biceps at the shoulder, you may lose some strength in your arm and have pain when you forcefully turn arm from palm down to palm up." See Htttp://orthoinfo.aaos.org/topic.cfm?topic=A00031. Indeed, the preoperative report quoted (and partially highlighted) by Respondents confirms that "he is still left with biceps pain which now needs to be addressed. This is still a worker's comp injury as directly and causally related to his injury on 10/08/2008." [Brief of Respondents at page 8, quoting APA page 30].

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"[In Reply to Respondents' Argument at pages 14-16].

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. Indeed, the AMA Guides call for a 10% impairment of the upper extremity for this specific procedure – which is exactly what Dr. Hughes assigned. See, Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.), Table 16-27, page 506. [APA 2, page 10]

This is undeniable medical proof of a permanent injury to a second scheduled body part. As previously argued in the Brief of Appellant, this issue is preserved for review by this Court. The Appellate Panel should be reversed on this issue.

3. Appellant preserved the issue regarding payment of temporary partial disability benefits [In Reply to Respondents' Argument at pages 16-18].

Respondents argue that the issue over payment of temporary partial disability compensation is not preserved. The essence of Respondents argument is that "Appellant raises issues from the Appellate Panel order filed May 5,2014, that were not previously raised on Appellant's first appeal to the Court of Appeals and the Appellate [sic] should be barred from arguing these issues on appeal." [Brief of Respondents at page 17]. This argument fails in two respects (1) the issue was not

decided by the Appellate Panel's May 5, 2014 Order and thus was not appealable; and (2) the first appeal is a nullity as it was dismissed on motion of Respondents as interlocutory.

In its May 5, 2014 Order, 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]. This finding could perhaps be sufficient, as the calculation is simple arithmetic. However, by deleting the Single Commissioner's specific finding on this issue (Finding of Fact 28), the Appellate Panel must have intended the Single Commissioner to reconsider his finding or, perhaps, simply made a scrivener's error and inadvertently deleted the specific finding while leaving the general finding intact.

The Appellate Panel remanded the case to the Single Commissioner. Seeking clarity, Appellant raised the issue in his Claimant's Brief to Single Commissioner on Remand. [trial brief]. He argued "it would be within the remand instructions (and necessary) for the Single Commissioner to determine the amount due. Indeed, it would be necessary, as the Appellate Panel made no specific findings." [Trial brief, page 7]. The Single Commissioner on remand ruled the remand instructions did not permit him to correct the error. [SC order 2].

The issue was then raised on the second appeal to the Appellate Panel. [FC appeal 2]. The Appellate Panel held it lacked jurisdiction to revisit the problem it had created. [FC order 2].

The point here is that the issue was not ripe for an appeal until the Single Commissioner ruled that he could not address the specific amount of temporary partial disability compensation to be paid. See Spivey v. Carolina Crawler, 367 S.C. 154, 624 S.E.2d 435 (Ct. App. 2006)(where commission hearing on issue is pending, issue is not ripe for appellate review).

The second reason the issue is preserved is because the first appeal was dismissed as

interlocutory. [order dismissing appeal]. "An order as to compensability, without addressing the claimant's current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment." Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). By the same token, once an appeal of an interlocutory is procedurally dismissed, it has no effect – it is a nullity. A party cannot be bound by a statement of issues in a brief when the underlying appeal never existed. Cf. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)("... dismissal leaves the situation as though no suit had ever been filed.").

Appellant raised the issue at his earliest opportunity – which was before the Single Commissioner on Remand. He has raised it at every opportunity since then. Moreover, the issue has been ruled upon by the Single Commissioner and Appellate Panel following the remand. As such, the issue is preserved.

This Court should reinstate the finding that in the original Order wherein the Single Commissioner found the past due temporary partial amount is $60,823.80. [SC order 1, page 25, Finding of Fact 28].

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,

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January 18, 2017

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. John's Fire District Commission and State Accident Fund
Appellate Case No.: 2016-001247

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Appellant's Initial Reply Brief, Supplemental Designation of Matter** and **Proof of Service,** in the above case.

Please have your staff clock in the Appellant's Initial Reply Brief, Supplemental Designation of Matter and Proof of Service and return a clocked copy in the enclosed self-addressed stamped envelope.

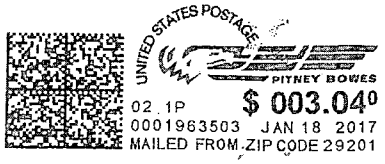
Thank you for your assistance. Please contact us with any questions or if further information is needed from our office.

Respectfully,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc: Margaret M. Urbanic, Esq.
Page P. Synder, Esq.
Gary Christmas, Esq.



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