

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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W.C.C. File No.: 1421162

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Karen M. Duncan, Employee, ..... Appellant,

v.

Eaton Corporation, Employer, and  
Old Republic Insurance Company, Carrier, ..... Respondents.

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**BRIEF OF RESPONDENTS**

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**STATEMENT OF ISSUE ON APPEAL**

- I. WHETHER THE COMMISSION PROPERLY AWARDED CLAIMANT A 10% PERMANENT LOSS OF USE TO HER SHOULDER BASED ON THE ENTIRETY OF THE EVIDENCE?

## STATEMENT OF THE CASE

Appellant Karen M. Duncan, Claimant below, suffered a work related injury on September 26, 2014. Respondents Eaton Corporation, her employer, and its workers' compensation carrier at the time of the accident accepted the claim and began providing medical treatment, which included arthroscopic shoulder surgery performed by Dr. Anthony R. Timms on March 17, 2015. Dr. Timms subsequently determined Claimant reached maximum medical improvement ("MMI") as of October 14, 2015, assigned her a 3% impairment rating to her left upper extremity, and released her to full duty. (R. pp. 190-192).

Respondents filed a Form 21 seeking a determination of permanent benefits, if any, due to Claimant as a result of her September 26, 2014 injury. (R. p. 267).

The parties filed Pre-Hearing Briefs. (R. pp. 269-270). Claimant submitted an independent medical examination ("IME") performed by Dr. William DeVault, as well as a Functional capacity evaluation ("FCE"). Respondents submitted Claimant's treatment and physical therapy records.

Single Commissioner Avery B. Wilkerson, Jr. heard the parties on August 30, 2016. At the hearing, Respondents submitted relevant pages of the AMA Guides, Fifth Ed., as a hearing Exhibit. (R. pp. 242-265).

The Single Commissioner issued his Decision and Order on December 1, 2016. (Decision and Order, filed Dec. 1, 2016, R. pp. 1-10) ("Single Commissioner Decision"). The Single Commissioner noted that the parties had stipulated that Dr. Timms' 3% impairment rating to the upper left extremity converted to a 5% impairment rating to the shoulder. After reciting the ratings provided by Dr. Timms and Dr. DeVault, the Single

Commissioner noted that Dr. DeVault's 53% impairment rating to the left shoulder did "not appropriately follow the AMA Guides," and was "based upon an erroneous combination of multiple medical conditions and erroneous calculations." The Single Commissioner accorded greater weight to Dr. Timms' medical opinion and awarded Claimant 10% permanent partial scheduled loss of use to her left shoulder pursuant to S.C. Code Ann. 42-9-30(14).

Claimant filed a Form 30 request for review alleging the Single Commissioner disregarded the medical evidence that she had provided, and assigned an incorrect permanent impairment rating. (R. pp. 275-276).

The parties filed appellate briefs with the Commission. (R. pp. 277-283) (R. pp. 284-289). An Appellate Panel of the Full Commission heard oral argument on March 21, 2017 and issued its Decision and Order on June 13, 2017, unanimously affirming the Single Commissioner Decision in its entirety. (Appellate Panel Decision and Order, filed June 13, 2017, R. pp. 11-16) ("Commission Decision").

Claimant timely appealed to this Court.

### **BACKGROUND FACTS**

Claimant, who is right-handed, (R. p. 107, lines 6-7), testified that she was 50 years old. (R. p. 77, lines 10-11). She has a high school diploma and has taken some college courses in business administration with an emphasis in medical billing encoding. (R. p. 77, line 22 – p. 78, line 4).

She began working for Eaton in 2008 in the Final Assembly Department and, at the time of her injury, was working as a Final Inspector. (R. p. 78, lines 14-22). She

sustained an admittedly compensable injury to her left shoulder on September 26, 2014. (R. p. 79, lines 12-15).

She began treating with Dr. Dennis Murphy, (R. pp. 161-163), and was referred to Dr. Timms at Lakelands Orthopedic & Sports Medicine Clinic. (R. p. 83, line 20 – p. 84, line 2). Dr. Timms diagnosed Claimant with a probable cuff tear or labral tear and ordered an MR arthrogram of her left shoulder. (R. p. 164). On March 17, 2015, Dr. Timms performed arthroscopic surgery to include a subacromial decompression, biceps tenotomy, rotator cuff debridement, labral debridement and distal clavicle excision. The surgery did not require any open procedure or emplacement of any bolts, screws or anchors. (R. pp. 193-195) (R. p. 84, lines 19 – p. 85, line 8; p. 102, lines 2-7).

On April 29, 2015, six weeks after the surgery, Dr. Timms noted that Claimant was guarding her shoulder and “just really would not let me loosen her up.” Her X-rays looked good, and Dr. Timms advised, “she needs to take the sling off and start using it more in the house .... I’m going to try to get physical therapy to be extremely aggressive with her,” as she was behind where she should have been at six weeks out “from a debridement as oppose[d] to a repair ...” Dr. Timms released her to go back to work at light duty. (R. pp. 177-178).

Under Dr. Timms’ direction, Claimant underwent physical therapy. (R. pp. 198-241). At the hearing, Claimant acknowledged that Dr. Timms would have had access to the records and measurements performed by the physical therapists because he had sent her to therapy. (R. p. 103, lines 16-22).

Claimant’s improvement continued to be unusually slow for not having had a cuff or labral repair, and Dr. Timms urged her to work harder in physical therapy. (R. p. 179).

She continued to see Dr. Timms and, on October 14, 2015, he noted that she complained of numbness in her left finger, some left shoulder soreness and “a lot of neck pain. She states her shoulder is probably the least of the problems that she is having now.” He noted that her range of motion for her shoulder was good, although she was experiencing “some general tenderness, but again it is mostly referred back to the elbow and the neck.” Dr. Timms noted her cubital tunnel issue but stated neither it nor her neck was related to her shoulder injury. He released her at MMI, gave her a 3% impairment rating to her upper left extremity and indicated she could return to full duty without any restrictions. (R. pp. 190-191) (R. p. 90, lines 10-13).

On November 2, 2015, Dr. Timms completed a Form 14B, again assigning a 3% medical impairment rating to Claimant’s left upper extremity, and releasing her to full duty without restrictions. He indicated she was not in need of further medical care for her work related injury. (R. p. 192).

On March 9, 2016, Claimant was sent by her counsel for a functional capacity evaluation (“FCE”), (R. pp. 133-140), and then to Dr. DeVault on May 14, 2016 for an independent medical examination (“IME”). (R. pp. 128-132). Dr. DeVault confirmed that Claimant was at MMI.

Although she saw Dr. DeVault over seven months after Dr. Timms provided his rating, Claimant testified that she had not sought any medical care or treatment for her shoulder during those intervening months. (R. p. 104, lines 1-25; p. 108, lines 7-20). She agreed that, during that time, she had experienced left elbow pain that had been diagnosed as due to a cubital tunnel and ulnar nerve condition. Her elbow pain was worse on the left and was unrelated to her September 26 work injury. (R. p. 105, lines 8-

25). In fact, she had sought medical treatment for her left elbow right before the FCE and the IME with Dr. DeVault. She ultimately underwent surgery on her left elbow. (R. p. 106, line 1 – p. 107, line 5).

Claimant testified that, although she was working full duty, “the guys that I work with, they’ll do the lifting and pulling out the drawers.” (R. p. 92, line 25 – p. 93, line 1). She testified that her supervisors were aware that she required assistance from her co-workers to do her job. (R. p. 94, lines 1-5). However, she testified that she was only taking over-the-counter medications for her shoulder pain and had not sought any medical treatment for it. (R. p. 95, lines 6-8; p. 104, lines 1-25; p. 108, lines 15-17). In addition, although she testified that she had missed some days from work due to her left shoulder and that her “supervisors [were] aware of this,” (R. p. 93, lines 12-25), she later admitted that she had taken them as vacation days or “call-in” days, and had not advised her employer that those days were for her shoulder. (R. p. 108, line 21 – p. 109, line 3).

#### **STANDARD OF REVIEW**

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act “mandates that the commission take the evidence, judge the credibility

and weight of that evidence, and from that judgment determine the facts of the case.” Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The Full Commission is the ultimate fact finder in workers’ compensation cases. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Fishburne v. ATI Sys. Int’l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, “[t]he weight to be accorded medical opinion testimony is a matter for the Commission.” Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 431, 450 S.E.2d 112, 116 (Ct. App. 1994).

### ARGUMENT

**I. The Commission properly awarded Claimant a 10% permanent loss of use to her shoulder based on the entirety of the evidence.**

First, Claimant’s Brief is virtually without legal support. Other than citing the Administrative Procedures Act and two cases addressing the standard of appellate review, Gray v. The Club Group, Ltd., 339.C. 173, 528 S.E.2d 435 (Ct. App. 2000) and Hopper v. Terry Hunt Constr., 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007), she cites no cases or statutory provisions in support of her substantive argument. A cursory and unsupported argument is deemed abandoned on appeal. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (mere allegations without argument and legal support are deemed abandoned).

In any event, Claimant’s appeal lacks merit. Claimant argues that the Commission’s decision to give greater weight to Dr. Timms’ opinion and less weight to

Dr. DeVault's IME is arbitrary and capricious.<sup>1</sup> This is, presumably, because Dr. Timms did not perform a complete FCE before providing an impairment rating. However, Dr. Timms was Claimant's treating physician and performed the arthroscopic surgery on her left shoulder. (R. pp. 164-197). He prescribed, tracked and had access to all of her physical therapy records. (R. pp. 198-241) (R. p. 103, lines 16-22). Furthermore, Claimant cites no authority, because there is none, for the proposition that a treating physician must perform a full FCE before providing an impairment rating.

Claimant also argues that Dr. Timms' impairment rating is incorrect because she requires help from co-workers to perform her job. However, at the time of the hearing before the Single Commissioner, Claimant had been working for almost a full year, during which time she had not sought any additional medical treatment for her left shoulder and only took over-the-counter pain medications. (R. p. 95, lines 6-8; p. 104 lines 4-25; p. 108, lines 7-20). Furthermore, during this time, she actively sought medical treatment for an unrelated left elbow condition, for which she ultimately had surgery. (R. p. 105, line 8 – p. 107, line 5). Thus, to the extent she was unable to perform her job without assistance, any such inability most likely was due to her elbow and/or neck problems, rather than to her left shoulder.

Claimant then takes issue with the Commission's finding that Dr. DeVault's impairment rating is erroneous. However, Claimant's counsel acknowledged twice at the Appellate Panel hearing that Dr. DeVault's 53% impairment rating "is a bit high." (R. p.

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<sup>1</sup> Although Claimant argues that the Commission totally disregarded Dr. DeVault's opinion, even a cursory reading of the Commission Decision reveals the Commission did not disregard Dr. DeVault's findings but, instead, noted the errors in his rating and then assigned his opinion the weight it warranted.

119, lines 5-20).<sup>2</sup> The Commission properly found that Dr. DeVault's rating is incorrect. The Commission, which has extensive experience in reviewing impairment ratings pursuant to the *AMA Guides*, correctly noted that Dr. DeVault's impairment rating is based upon an improper combination of multiple stacked medical conditions and erroneous calculations. Thus, the Commission clearly stated why Dr. DeVault's impairment rating was erroneous, *i.e.*, because it contains "an erroneous combination of multiple medical conditions and erroneous calculations." (Commission Decision, R. p. 14). Claimant understandably may disagree with the Commission's conclusion, but she is incorrect that the Commission failed to provide a sufficient basis for it.

Dr. DeVault's impairment rating does reflect, however, various measurements for Claimant's range of motion for flexion, extension, abduction, adduction, internal rotation and external rotation. As the Commission properly found, the appropriate calculation, assuming Dr. DeVault's medical findings are correct and credible, which Respondents do not concede, would reflect an impairment rating of 13% to the left shoulder. (R. pp. 242-265).

Next, Claimant argues that the Commission failed to explain how it reached the 13% "revised" impairment rating based on Dr. DeVault's findings. However, the Commission affirmed the Single Commission Decision in its entirety. (Commission Decision, R. p. 13). The Single Commissioner Decision, in turn, explained that "[a]n appropriate calculation, based upon findings reflected in Dr. DeVault's medical report,

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<sup>2</sup> And as noted above, Claimant acknowledged she was being treated for unrelated left elbow pain and problems at the time she underwent the FCE and when Dr. DeVault performed his IME, ultimately undergoing surgery on her left elbow. (R. p. 105, line 8 – p. 106, line 7). The pain she was experiencing in her left elbow had to have affected her ability to use her left arm, including her shoulder, and undoubtedly affected her functional and impairment ratings.

would reflect an impairment rating of 13% to the left shoulder. I base this finding upon the Claimant's APA pp. 1-4 and Defendants' Exhibit No. 1." (Single Commissioner Decision, R. p. 7). The first page of Defendants' Exhibit No. 1 contained a revised calculation under the AMA Guides using Dr. DeVault's specific findings. (R. pp. 242-265) (R. p. 122, lines 14-24). As a result, it is clear that the Commission reached its corrected 13% shoulder impairment rating based on Dr. DeVault's notes and Defendants' Exhibit No. 1.

Claimant appears to argue that the Commission erred by not awarding at least a 13% disability award based on the "revised" impairment rating from Dr. DeVault. (See App. Br. pp. 5-6). However, "[t]he extent of loss of use need not be proven with mathematical precision; it need only be shown by evidence giving a reasonable basis for the award." Harbin, 316 S.C. at 431, 450 S.E.2d at 117. Furthermore, "[t]he extent of an injured workman's disability is a question of fact for determination by the Appellate Panel and will not be reversed if it is supported by competent evidence." Fishburne, 384 S.C. at 86, 681 S.E.2d at 600; *see also* Lyles v. Quantum Chem. Co., 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993) ("[t]he commission may find a degree of disability different from that suggested by expert testimony").

Here, the Commission had impairment ratings from two different doctors. Claimant's treating physician, Dr. Timms, assigned her what the parties stipulated converts to a 5% impairment rating to her left shoulder, while Dr. DeVault's revised impairment rating was 13%. Taking all of the evidence into consideration,<sup>3</sup> the

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<sup>3</sup> The Commission Decision states that the Appellate Panel based its decision on the appellate briefs, oral argument, "the hearing transcript, review of submitted documentary

Commission found Claimant had sustained a 10% permanent loss of use of her left shoulder and awarded her benefits accordingly. (Commission Decision, R. p. 14). Given Dr. Timms' impairment rating and the fact that Claimant had returned to her prior position without restrictions and without seeking any additional medical treatment or prescription medications for her shoulder, the Commission's award is supported by substantial evidence and should be affirmed. *See Fishburne*, 384 S.C. at 88, 681 S.E.2d at 601 (affirming an award that fell between the impairment ratings provided by three different physicians).

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evidence of record, and review of the portions of the Workers' Compensation Commission's file admitted into the record ..." (Commission Decision, R. pp. 12-13).

**CONCLUSION**

For all the reasons stated herein, this Court should affirm the Commission Decision and dismiss Claimant's appeal with prejudice.

McANGUS GOUDELOCK & COURIE, LLC

February 5, 2018



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**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Brief of Respondents Eaton Corporation and Old Republic Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

February 5, 2018

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