

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
APPELLATE PANEL

Commissioner Susan S. Barden  
Commissioner Gene McCaskill  
Commissioner Melody L. James

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Appellate Case No.: 2017-001521

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Karen M. Duncan, Employee,

Appellant,

v.

Eaton Corporation, Employer  
and  
Old Republic Insurance  
Company, Carrier

Respondents.

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**FINAL BRIEF OF APPELLANT**

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Darren S. Haley (S.C. Bar # 14564)  
Willie J. Peters (S.C. Bar# 100974)  
The Haley Law Firm, LLC  
1007 Pendleton Street  
Greenville, SC 29601  
(864) 235-6638  
darren@darrenhaley.com  
*Attorneys for Appellant*

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The Haley Law Firm, LLC  
1007 Pendleton Street  
Greenville, SC 29601  
(864) 235-6638  
darren@darrenhaley.com  
*Attorneys for Appellant*

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## STATEMENT OF THE ISSUES ON APPEAL

1. Were the decisions of the Commissioner and the Appellate Panel to disregard Dr. William DeVault's findings arbitrary and capricious?

## STATEMENT OF THE CASE

This is an appeal from a decision of the South Carolina Workers' Compensation Commission Appellate Panel (hereinafter, the "Appellate Panel"), dated June 13, 2017. The Appellant, Karen M. Duncan (hereinafter, "Ms. Duncan" or "Appellant"), has been employed with the Respondent, Eaton Corporation (hereinafter, "Eaton"), since 2008. (R. p. 78, lines 14-15). On or about September 26, 2014, while working in the scope of her employment, Ms. Duncan sustained an injury to her left shoulder. (R. p. 79, line 16-p. 82, line 18). Ms. Duncan reported her injury to her supervisor, Amanda Nix, on Monday, September 29, 2014. (R. p. 82, line 23-p. 83, line 10). A claim was commenced with the South Carolina Workers' Compensation Commission on or about March 13, 2015.

Ms. Duncan began receiving medical treatment for her injuries, and Anthony R. Timms, M.D. (hereinafter, "Dr. Timms"), was Ms. Duncan's primary physician. (R. p. 73, lines 17-18). Per Dr. Timms' recommendation, Ms. Duncan underwent arthroscopic surgery on her left shoulder at Self Regional Healthcare on or about March 17, 2015. Dr. Timms was the attending surgeon. (R. p. 84, line 19-p. 85, line 1). Dr. Timms' pre-operative diagnoses were "left shoulder impingement; biceps tendon tear proximally; labral tear; partial versus full-thickness cuff tear," and his post-operative diagnosis was "left shoulder impingement; biceps tendon tear proximally; labral tear; partial versus full-thickness cuff tear; acromioclavicular (AC) joint arthritic changes were significant." (R. p. 147).

After the operation, Ms. Duncan was out of work until approximately April 29, 2015. (R. p. 86, lines 21-25). On or about April 30, 2015, Ms. Duncan returned to work, and was placed on light duty. (R. p. 87, line 9-p. 88, line 1). On or about November 2, 2015, Dr. Timms executed a Physician's Statement, finding that Ms. Duncan sustained a three percent (3%) medical impairment to the left upper extremity, and a zero percent (0%) medical impairment to the whole body. (R. p. 266). Furthermore, the aforementioned Physician's Statement provides that Ms. Duncan is able to return to work without restriction. (R. p. 266). Therefore, Ms. Duncan was placed on full work duty. Although Ms. Duncan has been placed on full duty, she still requires assistance from her co-workers with various tasks that required lifting, pushing, pulling, crawling, and other physical actions. Ms. Duncan's supervisors are aware of this. (R. p. 92, line 23-p. 93, line 9).

On or about March 9, 2016, Ms. Duncan underwent a functional capacity examination (hereinafter, the "FCE") at Align Networks. On or about May 14, 2016, Ms. Duncan had an appointment with William DeVault, M.D. (hereinafter, "Dr. DeVault") for the purposes of obtaining an independent medical examination and impairment rating. In his report, Dr. DeVault found that Ms. Duncan has 53% left shoulder permanent and partial impairment. (R. p. 91, line 17-p. 92, line 15; R. pp. 131-132).

On August 30, 2016, a hearing was held in Laurens County, South Carolina before The Honorable Avery B. Wilkerson, Jr. (hereinafter, the "Commissioner") to determine if compensation is due to Ms. Duncan, and if Eaton is entitled to credit for benefits paid in excess of award. On December 1, 2016, the Commissioner issued a Decision and Order assigning a 10% permanent impairment rating to Appellant's left shoulder. On December 13, 2016, Ms. Duncan, through counsel, filed a timely Request for Commission Review to the South Carolina

Workers' Compensation Commission Appellate Panel (hereinafter, the "Appellate Panel"), alleging that the Commissioner wrongfully disregarded Dr. DeVault's findings, and that the Commissioner erred by assigning a 10% impairment rating to Ms. Duncan's left shoulder. On March 21, 2017, a hearing was held before the Appellate Panel. On June 13, 2017, the Appellate Panel issued a Decision and Order affirming the Commissioner's ruling. On July 11, 2017, Ms. Duncan, through counsel, filed a timely notice of appeal to the South Carolina Court of Appeals.

## ARGUMENT

### **I. THE DECISIONS OF THE COMMISSIONER AND THE APPELLATE PANEL TO DISREGARD DR. DEVAULT'S FINDINGS WERE ARBITRARY AND CAPRICIOUS.**

The decisions of the Commissioner and the Appellate Panel to disregard Dr. DeVault's findings were arbitrary and capricious. The Administrative Procedures Act governs this Court's standard of review in appeals from the Appellate Panel. Hopper v. Terry Hunt Constr., 646 S.E.2d 162, 164, 373 S.C. 475, 479 (Ct.App.2007). An appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the administrative agency are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct.App.2000); See S.C. Code Ann. 1-23-380 (2017).

As stated above, Ms. Duncan underwent an FCE at Align Networks on or about March 9, 2016. (R. p. 134). Ms. Duncan's examiner was Jason Embler, PT, SCS (hereinafter, "Mr. Embler"). Mr. Embler found that Ms. Duncan performed with "determined consistent effort and demonstrated appropriate pain behaviors." (R. p. 134). Mr. Embler's report provides that Ms. Duncan is able to perform light work with occasional lifting below waist height of 10 pounds, 0

pounds at shoulder height and 0 pounds overhead. Mr. Embler's report further provides that Ms. Duncan could push 15 pounds and pull 21 pounds, and Ms. Duncan could occasionally reach at waist height, with no overhead reaching. (R. pp. 134-140).

On or about May 14, 2016, Ms. Duncan had an appointment with Dr. DeVault for the purposes of obtaining an independent medical examination and impairment rating. In his report, Dr. DeVault found that, "[b]ased on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, Ms. Duncan has 53% left shoulder permanent and partial impairment..." (R. pp. 131-132). Dr. DeVault also found that "in order to maintain her current level of function, Ms. Duncan will need four physician visits per year and sixteen physical therapy visits per year for treatment of acute exacerbations of her left shoulder conditions." (R. p. 132).

Although Dr. Timms was the Appellant's primary physician, upon information and belief, Dr. Timms did not perform a complete functional capacity evaluation when he assigned the three percent (3%) medical impairment to the upper extremity, and zero percent (0%) medical impairment to the whole body. It is undisputed that Dr. Timms' examination of the Appellant was very brief, lasting only approximately fifteen minutes. (R. p. 88, line 16-p. 89, line 25). Furthermore, it is undisputed that, although Appellant has been released to full work duty, she has always required help from co-workers to perform tasks involving heavy objects. (R. p. 92, line 16-p. 93, line 11). Prior to the injury in question, Ms. Duncan had never received any medical treatment to her left shoulder. (R. p. 94, lines 6-9). Furthermore, Ms. Duncan never re-injured her left shoulder after the injury in question. (R. p. 94, lines 10-12). Ms. Duncan is unable to lift her left arm above her head, and Ms. Duncan's supervisors are aware of this fact. The previously submitted medical records and reports, along with the undisputed testimony from

the hearing displaying Ms. Duncan's limitations do not support a finding of a 10% permanent impairment rating.

The Commissioner did not provide a sufficient basis for his finding that Dr. DeVault's impairment rating was erroneous. The Commissioner stated in its Decision that the impairment rating issued by Dr. DeVault was "based upon an erroneous combination of multiple medical conditions and erroneous calculations. An appropriate calculation, based upon findings reflected in Dr. DeVault's medical report, 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." (R. p. 7). However, the Commissioner did not specifically state why Dr. DeVault's findings were erroneous. In his decision, the Commissioner provided that the correct calculation, according to Dr. DeVault's findings, would reflect a 13% impairment rating to Appellant's left shoulder. (R. p. 7). However, the Commissioner did not provide his methods for reaching a 13% impairment rating. Furthermore, the Commissioner awarded a 10% impairment rating, despite finding that the correct calculations from Dr. DeVault's findings would yield a 13% impairment. In its Decision and Order, the Appellate Panel, while affirming in full the Commissioner's order, similarly found that Dr. DeVault's findings were erroneous, and the correct calculations, according to Dr. DeVault's findings, would reflect a 13% impairment to the left shoulder. (R. pp. 14-15). However, the Appellate Panel also failed to specify the reasoning behind their belief that Dr. DeVault's findings were erroneous and the reason for affirming the 10% impairment after finding that the correct calculations would reflect a 13% impairment. (R. pp. 14-15).

The medical records and reports submitted to the Commissioner, along with the undisputed testimony that Ms. Duncan still requires substantial assistance to perform daily work-related activities, shows that a 10% impairment rating is erroneous under these circumstances.

The decisions of the Commissioner and Appellate Panel to completely disregard Dr. DeVault's findings, without specifying the reason for doing so, shows that said decisions were arbitrary and capricious.

### CONCLUSION

For the aforementioned reasons, Appellant requests that this matter be reversed and remanded to the South Carolina Workers' Compensation Commission.

Respectfully submitted,



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Darren S/Haley (S.C. Bar No.: 14564)  
-Willie J. Peters (S.C. Bar No.: 100974)  
The Haley Law Firm, LLC  
1007 Pendleton Street  
Greenville, SC 29601  
(864) 235-6638 (Ph) (864) 370-1201 (Fax)  
darren@darrenhaley.com  
*Attorneys for Appellant*

Greenville, South Carolina  
February 8, 2018

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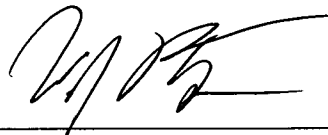
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



Willie J. Peters (S.C. Bar No.: 100974)  
The Haley Law Firm, LLC  
1007 Pendleton Street  
Greenville, SC 29601  
(864) 235-6638  
williepeters@darrenhaley.com  
*Attorney for Appellant*

February 8, 2018  
Greenville, South Carolina