

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

Appellate Case No.: 2016-001247

Thomas Contreras, i . . . Claimant, Appellant,

v.

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

RECORD ON APPEAL

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Case No.: 0822640

Thomas Contreras, Employee, Appellant

v.

St. Johns Fire District, Employer, and State Accident Fund, Carrier, Respondent

MOTION TO DISMISS APPEAL

Respondents hereby move before the Court to dismiss the appeal as the order being appealed is not a final order. The order of the Appellate Panel remands the case back to the Commission for further proceedings and to make a determination as to an award of permanent partial disability to the Claimant's shoulder. The courts have consistently held that an order remanding a case for additional proceedings is not directly appealable. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E. 2d 618 (1994). Therefore, this Appeal should be dismissed.

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SC Court of Appeals

Respectfully Submitted,



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January 19, 2015

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 0822640

Thomas Contreras,
Claimant,
v.
St. John's Fire District,
Employer,
and
SC State Accident Fund,
Carrier,
Defendants,

**CLAIMANT'S BRIEF TO SINGLE
COMMISSIONER ON REMAND**

STATEMENT OF THE CASE

This workers' compensation case 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.

Claimant appealed the Appellate Panel's Order to the Court of Appeals. On Motion from Defendants, the Court dismissed the appeal as interlocutory under Bone.

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 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

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

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].

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].

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].

ISSUE TO BE DETERMINED ON REMAND

1. Disability Award under § 42-9-30 (14)(2007).

The Appellate Panel's interlocutory Order remanded the case to the jurisdictional Commissioner. The Commissioner is bound by the instructions on remand. **As such, the award must be made for permanent partial disability to the shoulder under § 42-9-30 (14)(2007).**

Contreras underwent 4 surgeries to his left shoulder (including the arm and clavicle). His treating physician, Dr. DeMarco, assigned a 9% impairment rating to the shoulder.

The second opinion doctor, Dr. Hughes, assigned a 14% rating to the shoulder (plus 10% to the arm) *before* the unsuccessful 4th surgery. 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].

Both doctors agreed Contreras had permanent restrictions which prevent him from returning to his career of 22 years as a firefighter.

Claimant requests the Commissioner make an appropriate award under § 42-9-30, recognizing the extreme impact of the shoulder injury on Contreras’ ability to support himself and his family. From an occupational sense, Contreras has suffered a loss of use virtually equating to 100% of the shoulder. See S.C. Code Ann. § 42-9-30 (14) (2007)(“ . . . compensation paid for the injury . . . for the loss of a shoulder [is] sixty-six and thwo-thirds perc ent of the average weekly wages during three hundred weeks). Although the impairment ratings are not impressively high, the vocational effect on Contreras is dramatic.

2. Temporary Partial Disability.

The Appellate Panel found “Claimant is entitled to a lump sum payment for any and all past due temporary partial disability benefits due.” [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. However, 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.

Temporary total disability was stopped by consent when Contreras signed a Form 17 on January 20, 2011. He last worked on for Employer on June 21, 2011. He reached MMI on August 7, 2012. Accordingly, he would be entitled to 80 weeks of temporary partial compensation.

As previously found by the Single Commissioner, this amount would be \$60,823.80. Finding of Fact 28 should be included in the Order on Remand.

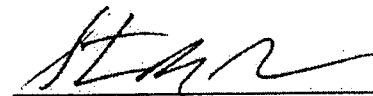
3. Procedure moving forward.

As the award is being made pursuant to a remand from the Full Commission, Claimant requests a provision in the Order allowing for immediate appeal to the Court of Appeals, bypassing briefing and oral argument before the Appellate Panel (should either party appeal). This would likely require a second order to be signed at judicial conference noting that the issues on appeal are the same previously raised before the Court of Appeals. An appeal on this basis would not be interlocutory as the Order on Remand would be a final order.

CONCLUSION

For the foregoing reasons, the Single Commissioner should (1) make an award recognizing the full disability to Claimant's shoulder; (2) reinstate the 80 weeks of TPD; and (3) recognize all issues previously decided are preserved for future appeal and that the appeal should be expedited for judicial economy purposes by bypassing briefing and oral argument at the Court of Appeals.

Respectfully Submitted,



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Attorneys for Claimant

July 21, 2015
Columbia, South Carolina



Claimant's Name: Thomas Contreras SSN: 117-58-7473 Employer's Name: St. Johns Fire District
Address: 363 Lantana Drive Address: Post Office Box 56
City: Charleston State: SC Zip: 29407 City: Johns Island State: SC Zip: 29457
Home Phone: () - Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Stephen B. Samuels Law Firm: Samuels Law Firm Preparer's Phone #: (803) 779-4000

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by Claimant Employer (check one) Date of Injury or Illness: 10/08/2008

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

Please see Attachment to Form 30.

(Check one) Oral argument is is not requested. Appellant's request for oral argument is waived if not indicated on this form.

Mediation
 Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Ellen Goodwin, Esq., PO Box 102100, Columbia, SC 29221 and Margaret M. Urbanic, Esq., 126 Seven Farms Dr., Ste. 200, Charleston, SC 29492-8144 on the 4th day of November 2015, by first class postage certified mail personal service.

[Signature] Attorney for Claimant Stephen@samuelslawfirm.net November 4, 2015
Preparer's Signature Title Email Date
 Check this box if you are not represented by an attorney

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

ATTACHMENT TO FORM 30

Thomas Contreras v. St. John's Fire District and State Accident Fund
WCC File No. 0822640

Grounds of Appeal:

- A. Issues regarding Order from Single Commissioner on Remand:**
- 1. Whether the Single Commissioner on remand erred as a matter of fact and law in finding that the instructions on remand limited his findings to a permanent partial disability award under § 42-9-30 when the vacating of the previous Order required additional findings to be made regarding temporary partial disability and temporary total disability?**
 - 2. Whether the Single Commissioner on remand erred as a matter of fact and law in failing to include, affirm or otherwise determine the amount of temporary partial disability compensation due?**
 - 3. Whether the Single Commissioner on remand erred as a matter of fact and law making a disability award which was unsupported by the evidence and failed to take into account Claimant's actual loss of earnings capacity?**
 - 4. Whether the Single Commissioner on remand erred as a matter of fact and law in determining Claimant reached MMI on September 4, 2012?**
 - 5. Whether the Single Commissioner on remand erred as a matter of fact and law in failing to make specific and detailed findings of fact sufficient for appellate review?**
- B. Issues regarding previous Appellate Panel Order reversing Single Commissioner Order and remanding to the Jurisdictional Commissioner:**
- 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 nor required to be appealed by the prevailing party at trial?
3. Whether the Appellate Panel erred in vacating various findings by the original Single Commissioner, yet failing to give instructions on remand allowing those necessary findings to be made, such findings including the average weekly wage and amount of temporary partial disability compensation due?
4. Whether the Appellate Panel erred by remanding to the jurisdictional commissioner and failing to make its own factual findings on all issues when the Appellate Panel bears the ultimate responsibility of making factual findings, such error also resulting in an interlocutory order?
5. Whether the Appellate Panel erred as a matter of fact and law in failing to make specific and detailed findings of fact sufficient for appellate review?
6. Whether the Appellate Panel erred as a matter of fact and law in failing to affirm the original Decision and Order of the Single Commissioner?

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 0822640

Thomas Contreras,
Claimant/Appellant,
v.
St. John's Fire District,
Employer,
and
SC State Accident Fund,
Carrier,
Defendants/Respondents.

**CLAIMANT'S BRIEF TO FULL
COMMISSION FOLLOWING REMAND**

STATEMENT OF ISSUES ON APPEAL

- A. Issues regarding Order from Single Commissioner on Remand:
1. Whether the Single Commissioner on remand erred as a matter of fact and law in finding that the instructions on remand limited his findings to a permanent partial disability award under § 42-9-30 when the vacating of the previous Order required additional findings to be made regarding temporary partial disability and temporary total disability?
 2. Whether the Single Commissioner on remand erred as a matter of fact and law in failing to include, affirm or otherwise determine the amount of temporary partial disability compensation due?
 3. Whether the Single Commissioner on remand erred as a matter of fact and law making a disability award which was unsupported by the evidence and failed to take into account Claimant's actual loss of earnings capacity?

4. Whether the Single Commissioner on remand erred as a matter of fact and law in determining Claimant reached MMI on September 4, 2012?
 5. Whether the Single Commissioner on remand erred as a matter of fact and law in failing to make specific and detailed findings of fact sufficient for appellate review?
- B. Issues regarding previous Appellate Panel Order reversing Single Commissioner Order and remanding to the Jurisdictional Commissioner:
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 nor required to be appealed by the prevailing party at trial?
 3. Whether the Appellate Panel erred in vacating various findings by the original Single Commissioner, yet failing to give instructions on remand allowing those necessary findings to be made, such findings including the average weekly wage and amount of temporary partial disability compensation due?
 4. Whether the Appellate Panel erred by remanding to the jurisdictional commissioner and failing to make its own factual findings on all issues, when the Appellate Panel bears the ultimate responsibility of making factual findings, such error also resulting in an interlocutory order?
 5. Whether the Appellate Panel erred as a matter of fact and law in failing to make specific and detailed findings of fact sufficient for appellate review?
 6. Whether the Appellate Panel erred as a matter of fact and law in failing to affirm the original Decision and Order of the Single Commissioner?

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' 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 80 weeks of temporary partial disability (from January 21, 2011 through his MMI date of August 7, 2012) and 260 weeks of permanent partial disability compensation 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].

On June 3, 2014, Contreras timely filed his Notice of Appeal to the Court of Appeals. On motion of Respondents, the Court of Appeals dismissed the appeal as interlocutory under Bone v. U.S. Food Serv., 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013).

On October 22, 2015, Commissioner McCaskill issued an Order on remand holding that (1) his authority on remand was strictly limited to making an award under § 42-9-20 (2007); and (2) holding "that the Claimant has suffered a 35% permanent partial disability to his right shoulder." [10/22/15 Order, page 8].

On November 4, 2015, Contreras timely filed his Form 30 (Notice of Appeal). [Form 30].

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 four operations to his shoulder – including one specifically to the biceps in his right arm – Contreras was formally terminated from the Fire Department on 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 four 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 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:

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

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].

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 needs 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 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].

ARGUMENT

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

It is unclear whether the Appellate Panel can revisit the issues decided in the May 5, 2014 order. These issues are raised to ensure they are preserved for further appellate review.

A. Issues regarding Order from Single Commissioner on Remand:

1. Disability Award under § 42-9-30 (14)(2007).

The Appellate Panel's interlocutory Order remanded the case to the jurisdictional Commissioner. The Commissioner is bound by the instructions on remand. **As such, the award must be made for permanent partial disability to the shoulder under § 42-9-30 (14)(2007).**

Contreras underwent four surgeries to his left shoulder (including the arm and clavicle). His treating physician, Dr. DeMarco, assigned a 9% impairment rating to the shoulder (including a 3% permanent impairment for "biceps atrophy.") [APA 3, page 20].

The second opinion doctor, Dr. Hughes, assigned a 14% rating to the shoulder (plus 10% to the arm) *before* the unsuccessful fourth surgery. He also opined Contreras was limited to 10 pounds lifting due to "Limited strength and endurance secondary to right arm impairment and [acromioclavicular joint] resection." [APA 2, pages 9-11].

Both doctors agreed Contreras had permanent restrictions which prevent him from returning to his career of twenty two years as a firefighter. The vocational evidence confirms that – from a vocational standpoint – Contreras has lost virtually all use of his shoulder and upper extremity.

The Appellate Panel should make an appropriate award under § 42-9-30, recognizing the extreme impact of the shoulder injury on Contreras' ability to support himself and his family. From an occupational sense, Contreras has suffered a *loss of use* virtually equating to 100% of the shoulder. See S.C. Code Ann. § 42-9-30 (14) (2007) (“... compensation paid for the injury ... for the loss of a shoulder [is] sixty-six and two-thirds percent of the average weekly wages during three hundred weeks). Although the impairment ratings are not impressively high, the nature of the injury is dramatic.

2. Temporary Partial Disability.

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. However, it would be 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.

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. Accordingly, he would be entitled to 80 weeks of temporary partial compensation. S.C. Code Ann. § 42-9-20 (2007).

In the original Order, the Single Commissioner found this amount would be \$60,823.80. This amount is supported by the evidence. Accordingly, the Appellate Panel should reinstate this portion of the original single commissioner order.

B. 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 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 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

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

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, Op. No. 5272 (S.C.Ct.App. Filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18)(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.

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.

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 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).

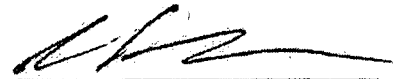
The October 11, 2010 surgery included a “Right shoulder acromioclavicular joint resection.” [APA 4, page 56]. Dr. DeMarco’s surgical report states “we did a **distal clavicle resection** taking out about 10-12 mm distal clavicle . . .” [APA 4, page 56 (emphasis added)]. Dr. Hughes noted this specific 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.

CONCLUSION

For the foregoing reasons, the Appellate Panel should reinstate the August 27, 2013, Order and Award of the Single Commissioner. If reinstatement is procedurally not possible at this level, then the Appellate Panel should clarify its Order to indicate that Claimant is entitled to temporary partial disability compensation at his compensation rate for 80 weeks.

Respectfully Submitted,



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January 27, 2016
Columbia, South Carolina

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0822640

Thomas Contreras,)
)
 Claimant,)
)
 vs.)
)
 St. Jones Fire District)
 Commission, Employer,)
)
 and)
)
 State Accident Fund, Carrier,)
)
 Defendants.)

TRANSCRIPT OF PROCEEDINGS

May 14, 2013

This hearing was held before Commissioner Gene McCaskill, reported by Kimberly T. Power, Court Reporter and Notary Public in and for the State of South Carolina; said proceedings were held at the South Carolina Workers' Compensation Commission, 500 North Main Street, County Services Building, Summerville, South Carolina, on Tuesday, May 14, 2013, commencing at 2:20 p.m.

1 APPEARANCES

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1 THE COURT: Today's date is May 14, 2013.

2 This is the case of Thomas Contreras vs. St. Johns Fire
3 District Commission. The carrier is the State Accident
4 Fund. The claimant is represented by James G.
5 Christmas, and the carrier/employer is represented by
6 Margaret M. Urbanic. The Workers' Compensation
7 Commission File Number is 0822640.

8 The date of the accident is October 8, 2008.
9 There are -- there are issues concerning average weekly
10 wage and comp rate which we discussed in the
11 pre-hearing conference, so that's yet to be determined.
12 This is an admitted claim?

13 MS. URBANIC: It's admitted to the right
14 shoulder.

15 THE COURT: Admitted to the right shoulder.
16 All right. Objections to APAs, jurisdiction, venue?

17 MR. CHRISTMAS: None from the claimant.

18 MS. URBANIC: Commissioner, I have an
19 objection to the claimant's Tab 14, which is Pages 274
20 to 299 of their APAs as I just received it yesterday,
21 so it's untimely. Payroll records from the bowling
22 alley and the bowling alley Form 20.

23 MR. CHRISTMAS: Commissioner, if I could just
24 speak to that. The Form 20 has been -- should have
25 been made a part of the Commission file and sent in

1 under a separate cover letter. These are the actual
2 wages from the bowling alley. We just got them. We
3 produced them as soon as we got them. It only goes to
4 the issue of temporary partial disability. And as we
5 discussed off the record, we have no objection to the
6 defendants having a day or two to review those numbers,
7 meet with us and try to get a consensus on that if
8 there is any good faith dispute to those. Whatever the
9 numbers are, they are and we don't see any prejudice
10 there. We just ask that they be moved into evidence,
11 please.

12 THE COURT: All right. Ms. Urbanic, we're
13 going to note your objection for the record. But as we
14 discussed in the pre-hearing conference, you do have
15 time to review these records. And if you have
16 concerns, we certainly can reconvene in some fashion
17 whether that be a conference call or actually reconvene
18 a hearing if we need to to address your concerns.

19 MS. URBANIC: Thank you.

20 THE COURT: Any other objections?

21 MR. CHRISTMAS: No, Your Honor.

22 MS. URBANIC: No.

23 THE COURT: All right. The Commission file
24 becomes a part of the record with the exception of
25 self-serving declarations and unstipulated medical.

1 reports.

2 All right. Mr. Christmas, if you could,
3 please, sir, put your client's position on the record.

4 MR. CHRISTMAS: Thank you, Your Honor. It's
5 claimant's position that he is permanently partially --
6 or suffered permanent partial wage loss as a result --
7 under Section 42-9-20 as a result of sustaining
8 injuries to his right shoulder, right upper extremity,
9 specifically the right bicep being the second body part
10 that's affected.

11 The analysis for the wage loss argument is
12 authorized treating orthopedic surgeon, Dr. Demarco,
13 has said that claimant is not able to return to his old
14 job, that is APA No. 3, Page 15, as a firefighter. The
15 two body parts are from authorized treating physician,
16 Dr. James Demarco. He mentions the right shoulder,
17 right upper extremity, and specifically the right
18 bicep. He says that the right shoulder affects the
19 right upper extremity as well. That is APA No. 3,
20 Pages 16, 17, and 18.

21 Also he in giving his global impairment which
22 included the shoulder and the upper extremity assigned
23 three percent specifically to the right bicep which is
24 APA No. 3, Page 20. And there's also notation
25 throughout the medical records with Demarco and

1 Jacowitz who is another authorized treating orthopedic
2 surgeon talking about the biceps. The fourth surgery
3 that the claimant had -- he's had four surgeries in
4 this case -- was also to repair the bicep. That's APA,
5 I think we mentioned it earlier, No. 4, Pages 54 and
6 55. And also there is an opinion from another
7 orthopedic surgeon, Dr. Charles Hughes, that also
8 states that the right shoulder affects the right upper
9 extremity, mentions the right shoulder, right upper
10 extremity, and right bicep, and that's APA No. 2, Page
11 9.

12 With regard to wage loss, there is also a
13 vocational report from Jean Hutchinson, it's APA No. 1,
14 Page 8, that finds the claimant has sustained permanent
15 partial wage loss. There also are his actual earnings
16 which are APA No. 13, Page 20 with the fire department
17 and also APA 13, Page 27 with regard to the bowling
18 alley.

19 He was duly employed. We need to talk about
20 that as well. He has a Form 20 that I don't believe is
21 disputed from the fire department that has an average
22 weekly wage of \$993.49, a compensation rate of \$662.36
23 which is the max -- which would reach the maximum
24 compensation rate for 2008 on its own. But given this
25 is a permanent partial wage loss case, we do need to

1 consider the second employment to determine that
2 correct average weekly wage. APA No. 12, Page 270 is
3 the Form 20 that should be part of the Commission file
4 and also has been submitted as an APA exhibit that has
5 the average weekly wage of being an additional \$180.72
6 with a new comp rate of \$120.49. When you combine the
7 work for the fire department with the work with the
8 bowling alley, the new combined average weekly wage is
9 \$1,174.21, and we would ask that that number be used in
10 determining his permanent partial wage loss under
11 42-9-20.

12 He's asking for, you know, past and future
13 medical care and treatment. Specifically authorized
14 treating physician Demarco at APA No. 3, Page 16 has
15 recommended medications, pain management, injections,
16 TENS unit, repeat diagnostics, physical therapy, and
17 office visits. We are also seeking a period of
18 temporary partial disability from January 21, 2011,
19 which is the date that the claimant was terminated by
20 the St. Johns Fire Department, up through May 16, 2011
21 for a total of 17 weeks. That's the date he reached
22 maximum medical improvement per authorized treating Dr.
23 James Demarco.

24 We are asking that he be paid his money in a
25 lump sum. And we are also asking that, just out of

1 abundance of caution, while he is working for the
2 bowling alley that we be allowed to have James vs. Anne
3 and Utica Mohawk language for apportionment in the
4 event that he is unable to work in the future.

5 Because of the pre-trial and the notes, I
6 went a little faster on that. If you need me to repeat
7 any of that, I'll be happy to do that.

8 THE COURT: All right. Ms. Urbanic.

9 MS. URBANIC: Commissioner, we've admitted
10 this claim to the right shoulder only. Gary referenced
11 the surgical record from surgery number four which is
12 on Pages 56 and 57 of the claimant's APA submissions.
13 You will note the pre-operative and post-operative
14 diagnosis is -- are regard to the right shoulder.
15 There is reference to the bicep, that the bicep
16 attaches to the right shoulder. And we would argue if
17 you look at the reports and records, you will see the
18 pain to the shoulder.

19 The most recent 14B which is from
20 Dr. Demarco, the most recent authorized treating
21 physician, which is on Page 56, Tab 8 of defendant's
22 APA submissions, references the 9 percent impairment
23 rating to the right upper extremity which converts to
24 15 percent radiating to the right shoulder. And just
25 because Dr. Demarco in his note from August of 2012

1 references the biceps as part of his radiating to the
2 right upper -- to the upper extremity, doesn't mean
3 it's a separate body part. It's just included because
4 that was attached to the right shoulder and part of the
5 surgery. So we think it should be limited to a 42-9-30
6 award to the right shoulder only.

7 With regards to the contention under 42-9-20
8 you should rely on Jean Hutchinson's report, we would
9 point out that report is from the fall of 2011. One,
10 it doesn't accurately reflect the amount of money
11 Mr. Contreras is currently earning from the bowling
12 alley. I believe he is earning a little over \$9 an
13 hour. And Mr. Contreras testified in his deposition
14 about some various jobs he's applied for and the type
15 of work he is capable of doing which I don't believe
16 it's appropriate to the vocational report of Jean
17 Hutchinson and we would argue that they fail to meet
18 their burden of proof with regards to that.

19 If for some reason you decide it shouldn't be
20 a 42-9-30 case with regard to the additional income
21 from the bowling alley and comp rate issue, you have
22 given me a few extra days to look at the documents that
23 Gary just sent over, so I would take the opportunity to
24 reply then just to go through the numbers and double
25 check ours to that.

1 As to the lump sum and allocation language,
2 Mr. Contreras is not on Social Security, he's not
3 applied for Social Security, and we don't think that's
4 appropriate for him to get that allocation language.

5 THE COURT: What's your position on the lump
6 sum?

7 MS. URBANIC: The lump sum, we would argue
8 that he has to show that he needs a lump sum. It's
9 always more appropriate for claimants to receive
10 benefits as a weekly check which is the State Accident
11 Fund's position in regards to that. I want to make
12 sure that's everything in there. And I believe that's
13 -- that covers everything.

14 MR. CHRISTMAS: Commissioner, I left one
15 thing out. Just in an the alternative to protect the
16 record, while we do believe this is a permanent partial
17 wage loss case under 42-9-20, in the alternative it
18 would be 42-9-30, Subsection 14, for the shoulder for
19 the 15 percent, also there's a rating of 10 percent to
20 the clavicle which we would be asking for disability on
21 under 67-11-01, Regulation 67-11-01, that's through
22 Dr. Hughes.

23 And also with regard to the evidence issue of
24 the Hutchinson report. There's nothing that has
25 physically changed in claimant's impairment or his

1 restrictions from any physician, authorized or
2 otherwise, since that report was created. There's
3 nothing in claimant's employment that has changed since
4 that report was created. The defendants have offered
5 absolutely no vocational evidence of any kind to
6 support their contention that he is employable at a
7 greater wage than he has actually earned.

8 In addition to that report, we don't have
9 speculative wage loss here. We have actual wage loss
10 that is demonstrated by loss of employment with the
11 fire department and demonstrated by his ability to only
12 work for 15 or 14 hours at the bowling alley.

13 MS. URBANIC: Just briefly in response.
14 Dr. Hughes is not an authorized treating physician.
15 He's an IME doctor that Mr. Christmas sent his client
16 to several years ago. The clavicle is not an accepted
17 body part. There would have to be a finding of
18 compensability in regards to that. We're not aware of
19 Dr. Demarco ever addressing that.

20 The one thing I forgot to mention was the
21 thing about ongoing medical treatment. We obviously
22 want that as related by the authorized treating
23 physician, Dr. Demarco, for causally-related medicals
24 and issues which I don't think is an issue.

25 THE COURT: Anything else, Mr. Christmas?

1 MR. CHRISTMAS: No, Your Honor.

2 THE COURT: All right. Ready to hear from
3 your witness?

4 MR. CHRISTMAS: Thank you.

5 (THOMAS CONTRERAS, JR., being duly sworn to
6 tell the whole truth, testified as follows:)

7 THE COURT: Please state and spell your full
8 name for the record.

9 THE WITNESS: Thomas Contreras, Jr. Thomas,
10 T-H-O-M-A-S, C-O-N-T-R-E-R-A-S.

11 THE COURT: Two requests for you. One, this
12 is a council chamber, not a hearing room. So it's a
13 little large for our purposes, but we're happy to have
14 it. I ask that you speak up. It's imperative that
15 young lady sitting right there who is making the record
16 hear you, but it's also equally important that the two
17 attorneys and I hear you. So if you -- the P.A. system
18 is not on, so you will need to speak up. Okay?

19 THE WITNESS: Yes.

20 THE COURT: The second is if you're asked a
21 yes or no question, please respond with yes or no. If
22 you shake or nod your head, she actually has to put
23 that in the record and sometimes that can be
24 misunderstood. An answer of yes or no is clearly
25 understood. So if it's a yes or no question, please

1 answer that way. All right?

2 THE WITNESS: Yes, sir.

3 THE COURT: Okay. Mr. Christmas.

4 MR. CHRISTMAS: Thank you.

5 DIRECT EXAMINATION

6 BY MR. CHRISTMAS:

7 Q Tommy, how old are you now?

8 A Fifty-one.

9 Q Okay. And how far did you go in school?

10 A High school, 12.

11 Q What year did you graduate?

12 A What year did I graduate?

13 Q Yes, sir.

14 A 1979.

15 Q Okay. And your current -- your past employment

16 with the fire department, how long had you been working with
17 them?

18 A Twenty-two years and seven months.

19 Q And is that the St. Johns Fire Department?

20 A Yes.

21 Q Is that the employer with which you were working
22 when you were injured?

23 A Yes.

24 Q Have you ever had any write-ups for dishonesty
25 with the St. Johns Fire Department or any other employer?

1 A No.

2 Q And, again, make sure you speak up for the court
3 reporter and for Ms. Urbanic. Do you have any criminal
4 record of any kind?

5 A No.

6 Q Do you have any history of drug or alcohol abuse
7 or treatment?

8 A No.

9 Q Do you have any military experience?

10 A Yes.

11 Q What branch were you in?

12 A Army.

13 Q And how many years were you in the service?

14 A Four years and three months.

15 Q Were you honorably discharged?

16 A Yes.

17 Q And when you were discharged, what was your final
18 rank there, your class?

19 A I was an E4.

20 Q All right. In terms of your work with the fire
21 department, I know you were there for over 22 years. In
22 that time, did you have any awards or anything given to you
23 by the department or by the community for your service?

24 A I was given most improved one year, and also I was
25 given a citizens award from Bank of America.

1 Q Ultimately did you rise to the level of being
2 captain of the department?

3 A Yes.

4 Q And before we get into that job description, I
5 want to ask you, are you married?

6 A Yes.

7 Q Okay. And how long have you been married?

8 A Twenty-eight years.

9 Q Do you have any kids?

10 A Two.

11 Q And what are their ages?

12 A Twenty-eight and 24.

13 Q Do you have any type of four year degree?

14 A No.

15 Q Any type of two year degree?

16 A No.

17 Q Do you have any type of technical college
18 certificates or training of any kind?

19 A No.

20 Q In terms of computer skills, I imagine almost
21 everybody can get on the internet and probably shoot an
22 e-mail. But do you have any computer training of any kind?

23 A No.

24 Q Have you ever been trained in QuickBooks?

25 A No.

1 Q Have you ever been trained in Excel?

2 A No.

3 Q Have you ever been trained in, you know,
4 PowerPoint or Adobe?

5 A No.

6 Q Have you ever worked in any type of office job in
7 the last 23, 25 years where you had any on-the-job training
8 for QuickBooks, Excel, Outlook, PowerPoint, anything like
9 that?

10 A No.

11 Q Okay. Now, before we get into your job
12 description with the fire department, what was your past
13 employment before working for the fire department? What
14 other types of jobs had you done?

15 A I worked for Domino's Pizza delivering pizza and
16 making pizza also. I worked at Home Depot. I've worked at
17 the bowling alley, and I did install fireplaces also.

18 Q And the jobs that you're talking about, past
19 employment before the fire department, were those physical
20 jobs?

21 A Yes.

22 Q Did they require to use both of your arms?

23 A Yes.

24 Q And how so?

25 A Well, the fireplace job, we had to carry the

1 fireplaces and we had to put them in the hole that they
2 made, you know, for the fireplace. We had to run pipes for
3 the chimney. So we had to hold the pipes and stick them
4 together.

5 Q How about with the pizza job with the delivering
6 and with making the pizzas?

7 A With the pizzas, I had to drive. I also had to
8 make boxes -- the boxes for the pizza. And if I was helping
9 make pizza, I had to grab the dough and flatten dough and
10 throw cheese on it.

11 Q Okay. And in terms of those jobs with the
12 injuries and the work restrictions you have now, do you
13 think you would be able to go and do that type of work now?

14 A No.

15 Q What would keep you from doing the -- putting in
16 the fireplaces work?

17 A The lifting and holding anything overhead.

18 Q How about with the pizza job, what would keep you
19 from doing that job?

20 A The pizza job, there's also some lifting. When
21 the truck comes in, you've got to pick stuff up. And with
22 moving around a lot, folding the boxes and stuff like that,
23 it will hurt afterwards.

24 Q Okay. In terms of your work restrictions, what's
25 your understanding of what your work restrictions are from

1 Dr. Demarco?

2 A As far as?

3 Q Let's say weight -- what weight can you lift
4 according to him?

5 A Fifteen, 20 pounds.

6 Q And what about do you have any restrictions with
7 the use of your right arm?

8 A My right arm? No overhead.

9 Q Okay. And I want to talk a little bit about your
10 job with the fire department. I know that you were a
11 captain. As a captain, did you also have to do the same
12 type of work that every other firefighter does?

13 A Yes.

14 Q Did you have to meet the same physical
15 requirements?

16 A Yes.

17 MR. CHRISTMAS: And in the APAs Page 228
18 through 230, Commissioner, we submitted a copy of the
19 job description.

20 BY MR. CHRISTMAS:

21 Q When it says you have to have the ability to meet
22 physical standard NFPA, what does that mean?

23 A Whatever the policy was for NFPA, which was as far
24 as it includes hearing, lifting, seeing.

25 Q What amounts of weight do you have to lift to meet

1 those physical requirements?

2 A The weights were up to at least a 165 pound dummy
3 that we had that we had to drag for the physical fitness
4 test.

5 Q Is that dummy supposed to simulate a human being
6 that you're saving from a fire?

7 A Yes.

8 Q In your job, would your job also require you to
9 have the ability to actually save a real person in a fire?

10 A Yes.

11 Q Whatever weight they happen to be?

12 A Whatever weight, yes.

13 Q Okay. It says that you also have to have the
14 ability to function, react quickly, calmly and so forth, and
15 that you also have to have the abilities for standard for
16 fire officer. Those physical requirements that are required
17 of you as a -- as a fire department firefighter, are you
18 physically able to do those now after this work accident and
19 your injuries?

20 A No.

21 Q Okay. What specifically can you not do as a
22 result of your work restrictions and your impairments?

23 A I can't lift ladders. I can't raise ladders.
24 When we had to carry the generator, I couldn't carry that.

25 Q Okay. I know this is an admitted accident, but I

1 want you to please tell the Commissioner briefly what
2 happened on October 8th of 2008.

3 A We went out -- at four o'clock we have to do
4 physical training. We usually run on the treadmill for a
5 little bit and then we would lift weights. I was lifting.
6 I was bench pressing. And when I went up, I heard something
7 pop, and my arm just dropped and I couldn't lift it back up.

8 Q Okay. As a result of this work accident, from
9 head to toe, if you could please describe to the
10 Commissioner what all was injured?

11 A My shoulder.

12 Q Which shoulder?

13 A My right shoulder and my bicep.

14 Q Which bicep?

15 A My right bicep.

16 Q If you could describe for me where it is in the
17 shoulder, what area are we talking about? Show the
18 Commissioner, please.

19 A It's right -- (Witness indicates.) I don't know
20 what you call it.

21 Q Just let the record reflect that you're pointing
22 to the top part of your shoulder in about the center?

23 A Yes.

24 Q Okay. On a pain scale of zero to ten, zero being
25 no pain and ten being the worse pain, what's it like in the

1 right shoulder?

2 A Seven.

3 Q Okay. What's it like on your worse days?

4 A On my worse days, seven.

5 Q What's it like on your best days?

6 A Five.

7 Q Okay. And in terms of the right bicep that you
8 were talking about, if you can show the Commissioner where
9 that hurts.

10 A The bicep hurts in the front and in the back.

11 (Witness indicates.)

12 Q Okay. And let the record reflect the claimant is
13 pointing to the front of his bicep near the bend of his
14 elbow and the front and the backside of his right arm.

15 And so in that area with the bicep, on that same
16 pain scale of zero to ten, zero being no pain and ten being
17 the worse pain, what does it feel like in your right bicep?

18 A About a seven.

19 Q And what's it like on your best days with that?

20 A Five.

21 Q Okay. In the bicep area what, if any, symptoms do
22 you have other than the pain?

23 A Spasms sometimes and sometimes it gets tight.

24 Q Okay. Is there ever a time where your right
25 shoulder injury is completely gone, you can't feel it?

1 A No.

2 Q Is it always there?

3 A Yes.

4 Q And in the right bicep, is there ever a time when
5 your right bicep injury is always gone and you can't feel
6 it?

7 A No.

8 Q Is it always there?

9 A Yes.

10 Q Okay. Now, with regard to your right shoulder and
11 your right bicep and right arm, have you ever had any prior
12 accidents at work or anywhere before this work accident
13 we're here for today?

14 A Yes.

15 Q On your right shoulder?

16 A Oh, not on my right shoulder, no.

17 Q Did you have one on your left shoulder?

18 A On my left shoulder.

19 Q So listen to my question again. On the right
20 shoulder, right arm, and right bicep, have you ever had any
21 prior work accidents or any other type of accident to the
22 right side before this work accident?

23 A No.

24 Q Okay. With regard to the one to the left
25 shoulder, how did that happen?

1 A Left shoulder was the same thing. I was lifting
2 weights and my shoulder popped.

3 Q Was that also when you were at work?

4 A Yes.

5 Q Okay. With regard to your medical treatment, I'm
6 going to let most of the medicals speak for themselves, but
7 did you have any injections in your shoulder and bicep?

8 A From the injury?

9 Q Yes.

10 A Yes.

11 Q How many injections do you think you had?

12 A Probably had about three.

13 Q After those injections, did you go on to have
14 surgeries?

15 A Yes.

16 Q How many surgeries did you have?

17 A Total four.

18 Q In terms of the four surgeries, and I know you
19 probably don't know the medical jargon, but do you know what
20 the surgeries were designed to do?

21 A I had -- well, up here he called it a tore labrum.
22 He just cut it and stitched it together.

23 Q What about your fourth surgery, your last surgery?

24 A The fourth surgery was the bicep where he cut it
25 up right in here and moved it and screwed it to the bone.

1 (Witness indicates.)

2 Q And let the record reflect the claimant is
3 pointing to the top of his bicep and talking about moving
4 the tendon over, you know, to try to repair the area.

5 So with regard to the four surgeries, did that
6 take away -- any of them take away all your pain in your
7 right shoulder and your right bicep?

8 A No.

9 Q Are you still having the permanent problem in your
10 right shoulder and right bicep?

11 A Yes.

12 Q Okay. Now, I know that you were terminated by the
13 fire department. What was the last date of work that you
14 did there?

15 A Dr. Demarco released me January 21st.

16 MR. CHRISTMAS: And, Commissioner, I just
17 point you to APA No. 10, Page 231 where he was
18 terminated on January 31st -- excuse me, 21st, 2011.

19 BY MR. CHRISTMAS:

20 Q At the time of your accident, were you working any
21 other jobs other than the St. Johns Fire Department?

22 A I was working at the bowling alley.

23 Q Okay. And I'm looking at APA No. 11, Page 2,
24 looks like 66. This was a Form 20 that was produced by the
25 St. Johns Fire Department. It has your four quarters of

1 what you earned and it has you having an average weekly wage
2 of \$993.49 and a compensation rate of \$662.36. Can you
3 review that and I'm just going to ask you a few questions.

4 In terms of the quarters and what you earned, does
5 that look about right to you as to what you earned in the
6 first, second, third, and fourth quarter in 2008 and 2007?

7 A Yes.

8 Q Okay. And this average weekly wage of \$993.49,
9 does that look accurate to you?

10 A Yes.

11 MR. CHRISTMAS: Commissioner, I'm looking at
12 APA No. 12, Page 270.

13 BY MR. CHRISTMAS:

14 Q And this was a Form 20 that was submitted by the
15 bowling alley that showed what you earned for your quarters
16 to determine your average weekly wage. Can you look at
17 those quarters and also the amounts and I'm going to ask you
18 a few questions when you're ready.

19 These quarters when it shows what you earned for
20 the first, second, third, and fourth quarters in 2008 and
21 2007, does that appear accurate to you?

22 A Yes.

23 Q And the average weekly wage of \$180.72, does that
24 appear accurate to you as well?

25 A Yes.

1 Q Okay. Now, in January of 2013, did your hours
2 increase at the bowling alley?

3 A Yes.

4 Q Okay. And what did they increase to at that time?

5 A It went from like 4 to 14, 17 hours.

6 Q Okay. Have you --

7 A Excuse me, 17 hours.

8 Q What do you typically get a week?

9 A Fourteen hours.

10 MR. CHRISTMAS: And so, Commissioner, I'm
11 looking at APA No. 13, Page 272.

12 BY MR. CHRISTMAS:

13 Q This is the reporting of what you earned at the
14 beginning of 2013, January through March, and it has you at
15 \$1,610.08. Is that accurate?

16 A Yes.

17 Q And in terms of the number of hours. I think you
18 testified it was 14, what are you earning per hour in that
19 job?

20 A It's \$9.18 an hour.

21 Q Now, with regard to that job, are you working any
22 other employment other than the bowling alley?

23 A I have a little snack route I take care of.

24 Q So tell the Commissioner about that. Do you earn
25 any money from that snack route?

1 A I don't make nothing off that snack route, really.

2 Q Where is the snack route? Where are the machines?

3 A At fire stations and I don't charge that much
4 money, so I put the money back -- back into it.

5 Q Did you also run that snack route back when you
6 were injured?

7 A Yes.

8 Q Okay. So you've had that both before and after
9 the accident?

10 A I've had it since '95.

11 Q And are you claiming any extra average weekly wage
12 from the snack route?

13 A No.

14 Q Okay. With regard to your attempts to find work,
15 I know that the -- you were terminated by the fire
16 department and you're working for the bowling alley. Have
17 you looked for work anywhere else?

18 A Yes.

19 Q Okay. What other types of places, if you can tell
20 the Commissioner, have you tried to find work?

21 A I've looked at Wal-Mart, Carmax. I've looked in
22 the federal job listing to try to find something in there.

23 Q Okay. Have you applied for jobs?

24 A Yes.

25 Q Okay. Has anyone hired you?

1 A No.

2 Q Okay. Is -- are you earning the same type of
3 money now that you were earning at the time of the accident
4 when employed by the fire department?

5 A No.

6 Q Okay. Are you earning less now?

7 A Yes.

8 Q Okay. Have you tried to find employment to become
9 fully employed and make the most money you can since being
10 let go by the fire department?

11 A Yes.

12 Q If you were physically able to return to work at
13 the fire department, would you have returned there?

14 A Yes.

15 Q Were you physically able to return there?

16 A No.

17 Q And why not?

18 A Because I couldn't -- I couldn't pass the physical
19 agility test. And the training that they had, I couldn't do
20 that training.

21 Q If Wal-Mart or these government jobs or any of the
22 places you've applied, any of them had hired you, would you
23 have tried your best to work in those jobs?

24 A Yes.

25 Q Have you done everything you know how to do to try

1 to become fully employed?

2 A Yes.

3 Q With those jobs like the ones at Wal-Mart and so
4 forth, do you know as you sit here now whether you would
5 really be able to do those jobs or not?

6 A I won't know unless I try.

7 Q Okay. If you were -- if there was some other job
8 that was made available to you that was within your
9 restrictions, would you be working at it now?

10 A Yes.

11 Q Has any job offer been made to you within your
12 work restrictions?

13 A No.

14 Q All right. I want to talk about your range of
15 motion. And what I mean by that is your ability -- first,
16 let's talk about being able to put your arm completely up
17 over your head. Prior to this work accident, did you have
18 any problems with your range of motion in your right
19 shoulder?

20 A No.

21 Q Do you have any problems with the range of motion
22 there now?

23 A Yes.

24 Q How so?

25 A I can't go straight up and hold it, but like -- or

1 swinging, like if I'm going to swing my arm up, I have to
2 swing it around.

3 Q Okay. Did you have those limitations before the
4 work accident?

5 A No.

6 Q And the limitations you have now, is that from
7 your injury from the work accident?

8 A Yes.

9 Q I want to talk about the strength in your right
10 shoulder and right arm. Did you have any problem with the
11 strength in it prior to the work accident?

12 A No.

13 Q And do you have any problems with the strength in
14 it now as a result of the work accident?

15 A Yes.

16 Q What kind of problems, if you could tell the
17 Commissioner, are you having with the strength?

18 A Just with lifting when I go to lift or hold
19 something up, my shoulder will hurt and the bicep will spasm
20 real bad.

21 Q Okay. Did you ever get spasms in the bicep before
22 this work accident?

23 A No.

24 Q And the spasms that you have in your right bicep,
25 does that come from the injury in the work accident?

1 A Yes.

2 Q Are you right or left hand dominant?

3 A Right hand.

4 Q And in terms of your ability to lift with the
5 right arm before this work accident, did you have any
6 restriction or limitation on your ability to lift before
7 this work accident?

8 A On my right arm?

9 Q Yes, sir.

10 A No.

11 Q Do you have restrictions on what you can lift with
12 your right arm now as a result of the work accident?

13 A Yes.

14 Q What's the most -- I know what the doctors think
15 you can lift. What's the most you'll attempt to lift?

16 A The most I'll attempt to lift is about 25 pounds
17 I'll try. But when I lift, I don't raise everything up
18 high.

19 Q Okay. Now, talking about -- moving to the area of
20 what you used to do around the home. Are there any
21 activities inside the home or outside the home that you used
22 to do that you are now limited in any way as a result of the
23 accident?

24 A I used to vacuum and dust and clean windows. I
25 don't do that no more.

1 Q Why not?

2 A My shoulder when raising up and the bicep just
3 hurts. I stop.

4 Q How about in terms of your ability to get dressed?
5 Do you have any problems dressing yourself?

6 A No.

7 Q How about driving, any problems driving?

8 A I drive left-handed now. I don't keep my right
9 hand on the steering wheel no more.

10 Q And why not?

11 A Moving it back and forth, it hurts.

12 Q Okay. Now, with regard to medical treatment,
13 Dr. Demarco has recommended a series of treatments including
14 medications, pain management, injections, TENS unit, repeat
15 diagnostics, physical therapy, office visits, and so forth.
16 Are you interested in continuing in having that medical
17 treatment going forward?

18 A Yes.

19 Q And with regard to the issue of lump sum, are you
20 in charge of your own bank account?

21 A Yes.

22 Q Do you handle your own financial affairs?

23 A Yes.

24 Q Do you make decisions for yourself on food,
25 clothing, shelter, things of that nature?

1 A Yes.

2 Q Could you use the money in this case in a lump sum
3 to help pay for food, clothing, shelter, debt, things of
4 that nature?

5 A Yes.

6 Q And have you ever been deemed by a court of
7 competent jurisdiction to be incompetent?

8 A No.

9 MR. CHRISTMAS: That's all I have,
10 Commissioner.

11 THE COURT: All right. Ms. Urbanic.

12 MS. URBANIC: Thank you. Commissioner, one
13 thing I failed to point out earlier was the last note
14 from August of 2012 from Dr. Demarco referenced some of
15 that ongoing medical care. But on the 14B from
16 September of 2012, which is Tab 8, Page 56 of the
17 defendant's APAs, he actually checked the box that he
18 would not need future medical care. So I just wanted
19 to point that out.

20 CROSS-EXAMINATION

21 BY MS. URBANIC:

22 Q Mr. Contreras, you mentioned briefly on direct
23 examination that you injured your left shoulder I think it
24 was back in 2006?

25 A Yes.

1 Q And it was the exact same thing lifting weights at
2 the fire station?

3 A Yes.

4 Q And you had a workers' compensation claim for that
5 as well?

6 A Yes.

7 Q And you actually received \$19,000 for the injury
8 to your left shoulder?

9 A Yes.

10 Q I understand you've worked at the bowling alley
11 for approximately 12 years?

12 A Yes.

13 Q You said in January your hours went up to about 14
14 hours a week?

15 A Yes.

16 Q And you had actually thought you were going to get
17 the manager position at the bowling alley; is that right?

18 A No. That was my goal when I retired as a fire
19 firefighter, to go right into management.

20 Q Okay. Well, didn't that position come up recently
21 at the bowling alley and it went to somebody else?

22 A They transferred a manager from a bowling alley
23 that closed to that one, so they never advertised or
24 anything.

25 Q You've been looking for work in the past couple of

1 months; is that right?

2 A Yes.

3 Q Okay. Because you mentioned the Wal-Mart job; is
4 that right?

5 A Yes.

6 Q And you didn't get that job because Wal-Mart makes
7 you take a test?

8 A I took a test and I didn't pass.

9 Q You didn't pass the test. Okay. And that was
10 about turning in employees if somebody was stealing a soda
11 kind of thing?

12 A Something like that, yeah.

13 Q I've never taken a test for Wal-Mart, so I don't
14 know firsthand. And you also applied at Carmax as a finance
15 clerk; is that right?

16 A Yes.

17 Q Okay. And you mentioned a couple of jobs with the
18 federal government; is that correct?

19 A Yes.

20 Q And one of them was immigration?

21 A I was looking into that, yes.

22 Q Because you're fluent in Spanish; is that right?

23 A Yes.

24 Q And the immigration job, what was the range of
25 salary in that position?

1 A I think it was from 58 to 90.

2 Q And the other job at the federal government was a
3 finance clerk position?

4 A Yes.

5 Q And what was that range?

6 A Forty-nine -- 30 or 49.

7 Q And you have not heard back with regards to either
8 one of those federal jobs?

9 A No. I didn't -- the finance clerk job was in
10 North Carolina, so -- but I was hoping to get one in
11 Charleston and never came through.

12 Q All right. But those would all be sitdown behind
13 a desk type position; is that right?

14 A Yes.

15 Q And you think you can do that type of sitdown
16 behind the desk type job?

17 A Yes.

18 Q And you mentioned briefly about your snack machine
19 business. Can you explain what exactly that entails?

20 A I have about six machines that I take care of. I
21 sell snacks out of them or soda and they're in the fire
22 stations.

23 Q So you deliver the snacks to the fire stations and
24 restock the machines?

25 A Yes.

1 Q You order the snacks?

2 A I go to Sam's or Cosco.

3 Q You go buy the snacks?

4 A Uh-huh.

5 Q Is that yes?

6 A Yes.

7 THE COURT: Do you own these machines?

8 THE WITNESS: Yes.

9 BY MS. URBANIC:

10 Q And you keep track of the books on these machines?

11 A Yes.

12 Q And I think you told me in your deposition that
13 because you're selling them at fire stations, you don't
14 charge a lot money for the snacks?

15 A I can't because they're not going to buy it. I
16 don't charge them for it.

17 Q All right. So you've never -- you've only broken
18 even on this business?

19 A They notice if I go up a nickel. Oh, you went up
20 a nickel on the Snickers.

21 Q And you've been doing that for how many years?

22 A Since '95.

23 Q And how many weeks do you devote to that business?

24 A How many weeks?

25 Q How many hours a week? Excuse me.

1. A Maybe three -- three hours.

2. Q And you work at the bowling alley about 14 hours a
3. week?

4. A Yes.

5. Q And I think you told me in your deposition you
6. have a two-year-old granddaughter you help take care?

7. A I help while my daughter is in school.

8. Q And is that on a daily basis?

9. A No, that's just -- you know, she'll call me and
10. tell me, Can you watch her tomorrow?

11. Q I think you also told me your mother lives with
12. you and you spend time driving her to appointments during
13. the day?

14. A Yes.

15. Q You haven't been back to Dr. Demarco since August
16. of 2012; is that correct?

17. A Yes.

18. Q You haven't been to a doctor for your shoulder
19. since then?

20. A No.

21. Q And you're not taking any -- currently taking any
22. pain medication for your right shoulder?

23. A No.

24. Q And you talked about some things you can and can't
25. do around the house on direct, but you're able to do some

1 yard work; is that right?

2 A Yes.

3 Q Rake leaves?

4 A Yes.

5 Q You mentioned trimming, cutting bushes?

6 A I tried that. I don't do that.

7 Q Are you able to wash your car?

8 A Yes.

9 Q Okay. Do dishes in the house for your wife?

10 A Sometimes, yeah.

11 Q I believe up until the time of your deposition,
12 you had been going to the gym; is that right?

13 A I signed up for the gym, but I haven't been in a
14 long time.

15 Q In your deposition you mentioned it had been about
16 three weeks since you had gone to the gym.

17 A The last time I went, yeah.

18 Q And you stopped going to the gym because you lose
19 weight when you go to the gym?

20 A Right -- no, I gain weight.

21 Q You gain weight when you go in the gym, but you
22 lose weight when you stop going, right?

23 A Yes.

24 Q We all want that diet.

25 THE COURT: I was going to say, I want that

1 diet.

2 BY MS. URBANIC:

3 Q And you used to run on the treadmill at the gym?

4 A Yes.

5 Q And when I asked you about whether or not you had
6 thought about going back to school in your deposition, you
7 mentioned about possibly going back to study human
8 resources?

9 A Yes.

10 Q Is that something you thought about?

11 A Something I like, yeah.

12 Q And the reason you haven't gone back is because it
13 cost money to go back to school?

14 A Yes.

15 Q But you think you can do that type of work if you
16 got training for it?

17 A Yes.

18 Q You've never applied for Social Security
19 disability?

20 A No.

21 Q And your plan for the future is to get a full-time
22 job; is that correct?

23 A Yes.

24 Q You only saw Dr. Hughes once; is that right? He
25 was the doctor I think up in Orangeburg.

1 A Orangeburg? I went to Mt. Pleasant.

2 Q Okay. Well, maybe he has an office in Mt.
3 Pleasant. And the voc report that was done by Jean
4 Hutchinson, you hadn't seen her since 2011; is that correct?

5 A Yes.

6 Q Since 2011 you actually had surgery number four on
7 your right shoulder. Does that sound right? Your surgery
8 was in March of 2012?

9 A I know it was in March.

10 Q 2012, though, right? Your last surgery was about
11 a year ago?

12 A Yes.

13 MS. URBANIC: Okay. I believe that's all the
14 questions I have for Mr. Contreras.

15 THE COURT: All right. Mr. Christmas.

16 MR. CHRISTMAS: Thank you. I'll be brief,
17 Commissioner.

18 REDIRECT EXAMINATION

19 BY MR. CHRISTMAS:

20 Q Okay. When you had the left shoulder -- not the
21 right shoulder we're here for today, but the left shoulder
22 injury back in 2005, were you able to return to duty full
23 duty?

24 A Yes.

25 Q With the fire department?

1 A Yes.

2 Q Full-time?

3 A Yes.

4 Q Without restrictions?

5 A Yes.

6 Q Able to do all the job requirements that they
7 required of you?

8 A Yes.

9 Q Okay. Are you able to do that with your right
10 shoulder?

11 A No.

12 Q Okay. With regard to the bowling alley, you were
13 asked about I know your goal maybe was to become manager
14 there. When the opportunity came up and they were looking
15 for a manager, did they hire you to do it?

16 A No.

17 Q What did they do?

18 A The took -- the bowling alley closed in Savannah
19 and they moved that manager to Charleston. He lived in
20 Charleston anyway.

21 Q Even though you had been there for all those
22 years?

23 A Yes.

24 Q How many years you been working there?

25 A Twelve.

1 Q Okay. If they would have tried to give you a
2 chance to do that, would you have tried to do that job?

3 A Yes.

4 Q Did they think you were ready for that job and
5 hired you to do it?

6 A No.

7 Q You were asked about Wal-Mart, Carmax, the
8 government jobs and so forth. Just to be clear, have any of
9 these potential employers offered you any employment of any
10 kind?

11 A No.

12 Q At any salary of any kind?

13 A No.

14 Q And you were asked about if you thought you could
15 do these type of jobs. Until you get there and do those
16 jobs, can you really know what you're capable of doing?

17 A No.

18 Q Now, with the snack machines that I think you said
19 you do about three hours a week, how long you been doing
20 that again?

21 A Since '95.

22 Q You making any money on these machines?

23 A No. I've actually lost money whatever I could
24 have made because I was out injured with the shoulder.

25 Q If you were able to turn that into a profitable

1 business any time between 1995 and today, would you have
2 done that?

3 A Not with the machines at the station -- fire
4 station.

5 Q My point is this: Is there any -- in your view,
6 is there any prospect of this turning into any type of real
7 income for you in the future?

8 A Yes, it could be.

9 Q It could be?

10 A It could be.

11 Q Okay. Has it been in the last, let me do my math,
12 13 years?

13 A No.

14 Q Or, excuse me, 18 years. Has it made you any
15 money in the last 18 years?

16 A No.

17 Q When you were asked about the yard work and doing
18 dishes and washing the car and doing things of that nature,
19 did you have any problems with pain or restrictions doing
20 those activities prior to this work injury?

21 A Yes. Yard work when I rake, it hurts and I just
22 stop for a while.

23 Q I'm asking before -- before this work accident,
24 did you have any problems doing those activities?

25 A No.

1 Q With the left shoulder or right shoulder, did you
2 have any problems doing the dishes, washing the car, yard
3 work before this work accident?

4 A No.

5 Q Do you have problems doing those activities now?

6 A Yes.

7 Q Are you able to do those activities pain-free?

8 A No.

9 Q Okay. Tell me about that.

10 A Just like with raking, when I'm raking and pulling
11 on the leaves, it's just -- just from moving back and forth,
12 my shoulder will get stiff and my bicep will start hurting.

13 Q Okay. And do you have to take breaks when you do
14 these activities?

15 A Yes, I take breaks.

16 Q How often you take breaks?

17 A Thirty, 40 minutes until it stops hurting.

18 Q Did you have to take breaks doing any of these
19 activities before this work accident?

20 A No.

21 Q Now, you were asked about school trying to go and
22 study human resources and I commend you on that goal. Do
23 you have the money or ability to pay to go get educated in
24 human resources?

25 A No.

1 Q Are you in school for human resources right now?

2 A No.

3 Q And, again, until you got in and tried that
4 program, do you even know if you would be capable of doing
5 that?

6 A No, I wouldn't know.

7 Q You testified that your plan was to try to find a
8 full-time job. Has that been your plan since the fire
9 department terminated you back in January of 2011?

10 A Yes.

11 Q Okay. And we're now over two years past that
12 point. Has anyone hired you to do full-time work?

13 A No.

14 Q You were asked about when you saw Jean Hutchinson.
15 Has your condition to your shoulder -- right shoulder or
16 right arm, has it improved in any way since you last saw
17 Ms. Hutchinson?

18 A No.

19 MR. CHRISTMAS: That's all I have. Thank
20 you, Commissioner.

21 MS. URBANIC: Just briefly, Commissioner.

22 RE-CROSS-EXAMINATION

23 BY MS. URBANIC:

24 Q Mr. Contreras, you mentioned when Gary was doing
25 redirect that you thought you could make money off the snack

1 machines at some point?

2 A If I bought more machines.

3 Q If you bought more machines. Okay. Have you
4 looked into that at all?

5 A Yes.

6 Q Is that something you're planning on doing?

7 A Am I planning on doing it? It's possible.

8 Q And the jobs we talked about you applied for,
9 Carmax, Wal-Mart, and the federal positions, that's all been
10 within the last two months roughly; is that correct?

11 A Yes.

12 Q That's when you started looking for work?

13 A I started looking for work, yeah. Yes.

14 MS. URBANIC: That's all the questions I
15 have.

16 THE COURT: Anything else, Mr. Christmas?

17 MR. CHRISTMAS: Just one.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. CHRISTMAS:

20 Q Had you been looking for other work other than
21 those specific jobs prior to that with the bowling alley and
22 other places?

23 A Yes.

24 Q Since you were released by the fire department in
25 January of 2011?

1 A Yes.

2 MR. CHRISTMAS: That's all I have.

3 THE COURT: Anything else?

4 MS. URBANIC: No, Commissioner.

5 THE COURT: All right. Thank you, sir. Any
6 other witnesses, Mr. Christmas?

7 MR. CHRISTMAS: No, Your Honor.

8 THE COURT: That's your case?

9 MR. CHRISTMAS: That's our case.

10 THE COURT: Any witnesses, Ms. Urbanic?

11 MS. URBANIC: No, Your Honor.

12 THE COURT: That's your case?

13 MS. URBANIC: Yes, Your Honor.

14 THE COURT: All right. Then that concludes
15 this hearing.

16 (The hearing concluded at 3:09 p.m.)

CERTIFICATE OF REPORTER

I, Kimberly T. Power, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing transcript of proceedings was taken before me on the date and at the time and location stated on Page 1 of this transcript; that the witness was duly sworn to testify to the truth; that the testimony of the witness and all objections made at the time of the proceeding were recorded stenographically by me and were thereafter transcribed; that the foregoing transcript of proceedings as typed is a true, accurate, and complete record of the proceedings made at the time to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 23rd day of July, 2013, Richland County, South Carolina.

Kimberly T. Power, Court Reporter
Notary Public for the State of South Carolina
My Commission Expires: 07/22/2015

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 0822640

Thomas Contreras,)
)
Employee/Claimant,)
)
v.)
)
St. John's Fire District)
Commission,)
)
Employer/Defendant,)
)
and)
)
State Accident Fund,)
)
Carrier/Defendants.)
-----)

COPY

FULL COMMISSION HEARING

Monday, December 16, 2013
3:00 p.m. - 3:30 p.m.

The Commission Hearing before Commissioner Susan S. Barden; Commissioner Aisha Taylor; and Commissioner T. Scott Beck, Chair, was taken at 1333 Main Street, Suite 500, Columbia, South Carolina on the 16th day of December, 2013 before Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina.



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EXHIBITS

(There were no exhibits marked during the hearing.)



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1 THE COURT REPORTER: Today is Monday, December 16th,
2 2013. This is South Carolina Workers'
3 Compensation case number 0822640. This is the
4 case of Thomas Contreras, Claimant versus St.
5 John's Fire District Commission, Employer and
6 State Accident Fund, Carrier. The Appellant is
7 the Defendant represented by Margaret Urbanic
8 and Respondent is represented by Gary
9 Christmas. Each side is allowed ten minutes
10 for oral arguments and the Appellant three
11 minutes in reply. You are requested to argue
12 the grounds of exception and stay within the
13 record.

14 COMMISSIONER BECK: Mr. Urbanic.

15 ARGUMENT BY MS. URBANIC:

16 MS. URBANIC: Thank you. We've appealed this claim
17 on several grounds. One of the first issues is
18 where the commission ordered some back TPD, and
19 let me give you a little background on the
20 hearing. This hearing was back in May. This
21 Claimant had two jobs. He worked as a fire
22 fighter for my employer, the fire district, and
23 he also had a second job at a bowling alley
24 working 12 to 14 hours a week there.

25 COMMISSIONER BECK: Let me stop you for just a



1 second. We do not, apparently, have a
2 transcript of this proceeding.

3 **MS. URBANIC:** Oh, I've got -- I think I have an
4 extra copy, and I don't think I wrote on this
5 one.

6 **COMMISSIONER BECK:** Thank you.

7 **COMMISSIONER BARDEN:** Thank you so much.

8 **MS. URBANIC:** So, the Claimant had two jobs, the
9 main job as the fire fighter, he's a captain at
10 the fire department. And he also had a second
11 job where he'd worked for many years, I think
12 actually he's still working there, at the
13 bowling alley. And the day before the hearing
14 I was sent over by Mr. Christmas' office the
15 information with regards to his wages from the
16 bowling alley, a Form 20, a printout of his
17 payroll records. At the hearing, at the pre-
18 hearing conference with the commissioner, I
19 objected to that information as not being
20 timely. The commission allowed that
21 information but let me have a couple of days to
22 take a look at it and respond to it in any way
23 I needed to respond to it. And Mr. Christmas'
24 office had emailed the commissioner's office,
25 Kelly, a case Hudson versus Ports Authority.



1 And I emailed, on May 21st, to Kelly, copied
2 Mr. Christmas, our position on the wages from
3 the bowling alley and the TPD issue with regard
4 to it asking, you know, pursuant to what the
5 commissioner told me, about giving me time to
6 respond and making it part of the record. And
7 at that time, because I wasn't aware until the
8 hearing that there was this issue of TPD from
9 the bowling alley and some back TT, and I
10 attached a Form 17 that had been filed and was
11 part of the commission's record. Although I
12 think it was signed by the Claimant before he
13 was represented by his attorney. Which on that
14 Form 17 indicated TT was paid from October 18th
15 of 2010 through September 4th of 2011. And
16 actually it continued until September 25th, I
17 believe, because of the date of filing of the
18 17. So one of the things that the commission
19 had ruled and ordered was a period of -- he
20 ordered back TPD from January 1st, 2011,
21 through August 7th, 2012. Well from January
22 21st, 2011, we had paid him TT. He was given
23 the max comp rate. He was the captain at the
24 fire department and made a very good wage. He
25 was at the max comp rate for the year of his



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1 injury, and we continued that until September
2 25th, 2011. So he's already got TT for that
3 time period for the max comp rate pursuant to
4 the 17 so we don't think it's appropriate for
5 that to be ordered. He signed a 17 and was
6 evidenced. And, as every single hearing we all
7 have ever been to, one of the things you all
8 say is the commission's file is then part of
9 the record. It was part of the record, he
10 signed it. Certainly the Claimant should've
11 been aware that he'd signed it and was put in
12 -- so there's never been a request since then
13 to start up TT. So therefore, we think that
14 should've been stopped during that time frame
15 or it should not have been awarded for that
16 time frame. I know it's a little bit confusing
17 with all the dates and the overlap and all
18 that. One of the things, and I know y'all just
19 got a copy of the transcript, was -- and I went
20 back and looked at the 58s and I didn't see
21 specific dates on his 58 for TT. But he
22 indicated on page eight at the hearing they
23 were seeking temporary partial from January
24 21st, 2011, through May 16th, 2011. Those are
25 the only dates I saw in the hearing, on the



1 transcript that were actually requested, and
2 again those were dates that were covered in the
3 Form 17 that were actually paid for temporary
4 total. And I went through it and I didn't see
5 any other dates requested but that's with
6 regards to the back. It's finding of fact
7 number 26, I believe, of the order that really
8 addresses all that in the order. We don't
9 believe we owe that time period back, temporary
10 partial as the max comp rate as paid for TT.
11 The bigger issue in this case is that the
12 Claimant suffered an injury to his right
13 shoulder. He did it while lifting weights at
14 the firehouse. All the firefighters workout
15 lot. Unfortunately, he had to have four
16 surgeries to his shoulder over the course of
17 several years. Three of them were by Dr.
18 Demarco who was the main treating physician.
19 Dr. Demarco rated him, actually, I believe,
20 more than once, most recently rated him on 2012
21 -- August 7th of 2012, where he gave him a nine
22 percent rating. And he said, in his rating --
23 he broke it out as to how he got to nine
24 percent, three percent for biceps, three
25 percent loss of internal rotation, two percent



1 loss of flexion and one percent for pain and
2 muscle spasm. However, the rating is nine
3 percent for his shoulder. We believe it's only
4 a shoulder injury. The last surgery that the
5 Claimant had it did involve his biceps tendon
6 and how they attached it to the shoulder. When
7 you look at the notes, all the treatment is to
8 his shoulder. Dr. Demarco, on the request of
9 the Claimant's attorney, did do a questionnaire
10 that was sent over. He checked a variety of
11 things off and he did check off in there that
12 the bicep was part of it. We would -- we would
13 argue that's all part of the right shoulder.
14 This is a check the box kind of questionnaire.
15 And the interesting thing is in the order there
16 was an issue with regards to something that was
17 in the 14B versus the check the box
18 questionnaire and the commissioner noted there
19 was a check the box questionnaire and relied on
20 the 14B. I know it's in here. So we point out
21 that the medical records are probably a little
22 bit more reflective of the actual injury. The
23 injury was in fact to the right shoulder. The
24 Claimant also claimed an injury to the
25 clavicle. Up here it's collarbone. The only



1 doctor to give an opinion with regards to the
2 clavicle was Dr. Hughes. He was a doctor
3 giving an independent medical examination as
4 requested by the Claimant's attorney. There
5 was no information from Dr. Demarco that that
6 was part of his injury. We believe Dr.
7 Demarco's opinion should be considered more
8 heavily than Dr. Hughes' opinion. Therefore,
9 we believe it's only an injury to the right
10 shoulder. It should be found under 42-930 with
11 regards to any disability. The Claimant's
12 attorney did have a vocational report done by
13 Gene Hutchinson. That report was done in 2011.
14 The Claimant, as I said, he was a captain at
15 the fire department, had been there a number of
16 years and obviously had done well to rise to
17 that high level of rank. He is also fluent in
18 Spanish and when I took his deposition he had
19 applied for various jobs with the federal
20 government, one of them being an interpreter
21 and some other jobs at Car Max and a few other
22 places. That was all within a few months prior
23 to the hearing. So it's not a situation where
24 even though he left the fire department in
25 2011, where he'd been looking for work for



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1 years and years and hadn't been successful in
2 finding work. He'd actually just started
3 looking for work and actually was looking for
4 some pretty decent paying jobs. There was a
5 federal government pay scale and had a good
6 salary range within it, and during this time
7 frame he continued working at the bowling
8 alley. In that job, he was earning \$9.18. The
9 lost wage analysis that was done uses minimum
10 wage, which is \$7.25. So the information we
11 have right now on the job he's been holding for
12 years and is still working at, he's actually
13 able to earn more than minimum wage. He hoped
14 to become a manager there but they closed
15 another alley and brought a manager in from the
16 old alley. So he didn't get the management
17 position there but it seemed very inconsistent
18 with us that the lost wage calculation wasn't
19 even using the earnings that he is currently
20 using.

21 **COMMISSIONER BARDEN:** What was his current earnings
22 at the bowling alley, what did you say?

23 **MS. URBANIC:** Nine dollars and 18 cents, and that is
24 what he testified at the time of the hearing.
25 The vocational report said he could earn



1 between 7.25 and \$8 an hour, although we did
2 not have a vocational report done. One because
3 we felt like it was a 42-930 case and two
4 because, even without it, we felt like, you
5 know, somebody who has been a captain at a fire
6 department may have more skills than just that
7 of somebody who could lift a person out of a
8 burning building. He's had an administrative
9 level job. He's had a management job and
10 supervised people. He's had to make, you know,
11 decisions very quickly in stressful situations
12 as a captain of the fire department. He's
13 admittedly fluent in Spanish. He has expressed
14 interest in going back to school and we felt
15 like his own testimony was very persuasive and
16 he was very persuasive in person as to what he
17 was capable of doing.

18 **COMMISSIONER BECK:** Okay. Mr. Christmas?

19 **COMMISSIONER BARDEN:** Mr. Christmas -- and I'm maybe
20 taking this, reading the 26 -- can you first
21 address the issue of the temporary partial, the
22 dates, the -- page eight of the transcript
23 versus the number ---

24 **MR. CHRISTMAS:** Yeah, I think whenever I was ---

25 **COMMISSIONER BARDEN:** I may have my wires crossed.



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1 MR. CHRISTMAS: In the pretrial, we had asked for
2 temporary partial as a general prayer -- I
3 mean, in the 58. And in the pretrial, I had
4 said the end date as the wrong end date. The
5 evidence was before the commissioner, we asked
6 them to rule upon, was in the record, and it
7 went to a period where the Claimant actually
8 reached maximum medical improvement which was a
9 few months later, in August.

10 COMMISSIONER BARDEN: Okay, in August.

11 MR. CHRISTMAS: Yes, ma'am.

12 COMMISSIONER BARDEN: Okay, thank you.

13 ARGUMENT BY MR. CHRISTMAS:

14 MR. CHRISTMAS: Just to address that briefly. With
15 regard to the issue of, you know, credit or
16 being paid temporary partial disability during
17 that period of time, the Defendant's didn't
18 bring it up in their form 58. They didn't
19 bring it up in the pretrial. They didn't bring
20 it up in the latter post trial with the
21 commissioner, and they didn't bring it up in
22 the Form 30. It was not raised. It was not
23 ruled upon and it would be improper to rule
24 upon, at this level, something that wasn't
25 raised and ruled upon at a level below. If



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1 there are questions on it, we'll be happy to
2 entertain them. Since my time is brief, I want
3 to get to the 42-920 argument. Specifically,
4 this is a fireman who worked there -- for the
5 Employer for 22 years. He has a high school
6 education, only. He has no computer skills,
7 he's 52 years old. Post working for the fire
8 department he has been working for a bowling
9 alley, 14 hours per week at 9.18 per hour.
10 That's all he's been able to find, he's been
11 looking for two and a half years. Despite the
12 contention that he just started working a few
13 months before the hearing, I quoted in the
14 brief and actually laid out the testimony in
15 the transcript where he says he has been
16 looking since he was let go by the fire
17 department.

18 **COMMISSIONER BECK:** Mr. Christmas, the first step is
19 getting out of 30.

20 **MR. CHRISTMAS:** Yeah. Let me address that.

21 **COMMISSIONER BECK:** The order only addressed right
22 shoulder and right upper extremity, that I see.
23 I don't see anything in here with regard to the
24 clavicle.

25 **MR. CHRISTMAS:** Yes, sir. Let me address that.



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1 **COMMISSIONER BECK:** Your argument that the clavicle,
2 as another body part, while it may be
3 dispositive at a hearing, it's sort of -- the
4 law of the case is not in here.

5 **MR. CHRISTMAS:** Sure.

6 **COMMISSIONER BECK:** Would you disagree with that?

7 **MR. CHRISTMAS:** I would not disagree with that.

8 **COMMISSIONER BECK:** So we've got right shoulder and
9 right upper extremity. And I assume, by the
10 right upper extremity, you're referring to the
11 bicep?

12 **MR. CHRISTMAS:** Yes, sir.

13 **COMMISSIONER BECK:** Was it a detached bicep tendon
14 that was reattached to the shoulder?

15 **MR. CHRISTMAS:** I believe the fourth surgery, the
16 one from March 29th, did address just the bicep
17 by itself. It was different from the previous
18 three shoulder surgeries.

19 **COMMISSIONER BECK:** What did they do in that
20 surgery?

21 **MR. CHRISTMAS:** Your Honor, I know there was a
22 surgery to the bicep, whether they reattached
23 it or whether they -- the specifics or the
24 detail of what they did in that I'm not sure
25 of.



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1 **COMMISSIONER BECK:** Okay. And that's something that
2 may be, I don't know about my colleagues, but
3 may be important to me ---

4 **MR. CHRISTMAS:** Sure.

5 **COMMISSIONER BECK:** --- in determining whether or
6 not it's outside of 30 or whether it stays
7 within 30. Because if it's all focused on the
8 shoulder, that's one thing. If there's a
9 separate and distinct injury to the bicep, it's
10 a whole different story.

11 **MR. CHRISTMAS:** Sure. If I could address it in
12 three ways.

13 **COMMISSIONER BECK:** Yes, sir.

14 **MR. CHRISTMAS:** First, the Claimant's testimony, when
15 he pointed out to the commissioner, was his
16 shoulder here (indicating) and the biceps at
17 the bend of the elbow. One of the four
18 surgeries was to the biceps and the authorized
19 treating physician's impairment rating was not
20 only to the shoulder -- I had attached it to
21 the brief that I ---

22 **COMMISSIONER BARDEN:** Separate rating to the arm.

23 **MR. CHRISTMAS:** Separate rating to the arm for the
24 biceps and then, also, the IME doctor also
25 found two separate ratings, one to the shoulder



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1 and one to the arm, based upon the bicep
2 injury. And so, you know, with the surgery
3 being the bicep, one of the four, with his
4 showing the commissioner two different places
5 where he's having the injury. Plus, also, Dr.
6 Demarco and Dr. Hughes also found that the
7 shoulder effects -- but not only found it,
8 there are different ratings to the second body
9 part. That's APA number one pages seven
10 through eight, APA number three page 15, APA
11 number eight and APA number two page 14.
12 Getting out of 30, then you go to whether or
13 not he is you know suffered wage loss. Since
14 the accident, he has looked for work, but just
15 like the court pointed out in Hudson, the
16 Defendants made the same argument, citing
17 Sellers v Pine Dale, that testimony of the
18 Claimant is going to show that he might be able
19 to earn more money. But the vocational report
20 I point out Defendants did not depose Dr.
21 Demarco to find out about the two different
22 impairments, did not depose Dr. Hughes to ask
23 about the two separate impairments, did not
24 depose Claimant's vocational expert to
25 challenge those opinions, did not offer a



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1 defense vocational report, did not offer a
2 defense EME to counter any of this evidence.
3 And so you know, respectfully, you know, the
4 wage loss was there. So the fact that he
5 applied for some jobs and then was not hired by
6 them -- Car Max, Wal-Mart, he gave a list of
7 them. The fact that he has applied, as the
8 court pointed out in Hudson, he shouldn't be
9 punished just for applying. He should, you
10 know, be speculative. Not only substantial
11 evidence but barely evidence of whether he
12 would even be able to do those jobs when he got
13 to them. He testified that he applied, was not
14 hired. Even if he was hired, he didn't know if
15 he would be able to do them. So, you know,
16 he's in a wage loss situation. He's in an
17 actual situation where he's only working 14
18 hours a week at 9.18 per hour. And so the
19 commissioner, I think, just did a balancing
20 test and said, based on the vocational opinion,
21 he's at or near minimum wage which is what that
22 is. And he found, based upon a 40 hour week,
23 if you actually did it on the -- he's only
24 working 14 hours a week. If you went to a 40
25 hour work week for the hours he's completely



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1 missing, it would actually go up. I think he
2 was trying to do balancing and kind of split
3 the baby on what the loss would be. So if it's
4 -- if it's not -- if that's not a fair balance
5 then go to what it actually is, which actually
6 is higher, which is, he's working 14 hours a
7 week at 9.18 per hour. He has tried to find
8 work. You know, the gentleman was in the
9 military, was a captain for the fire
10 department. He did work there for 22 years.
11 He has no write-ups for dishonesty. He has no
12 criminal record and his credibility is there.
13 So when he tells the commission that, you know,
14 he's got a problem here (indicating) and here
15 (indicating), in two separate places, and he
16 tells the commission I really did look for work
17 and this is the best I can do. You know, this
18 isn't a speculative situation. It's an actual
19 wage loss. He's actually experiencing it and
20 has been (experiencing it since he was let go by
21 the fire department.

22 **COMMISSIONER BECK:** tell me who did the surgery on
23 the biceps. Demarco do all of them?

24 **MR. CHRISTMAS:** I believe Demarco did all four, Your
25 Honor, and I believe the date on that -- let



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1 me find it, is -- it was on March 29th, and
2 it's APA number four page 54.

3 **COMMISSIONER BECK:** Thank you.

4 **MR. CHRISTMAS:** Yes, sir. So, to conclude, the
5 evidence as it exists under the current case
6 law Hudson and that was developed in the
7 record, you know, shows that he does have
8 partial wage loss and we respectfully ask this
9 finding of the hearing commissioner be upheld.

10 **COMMISSIONER BECK:** Mr. Christmas?

11 **MR. CHRISTMAS:** Yes, sir.

12 **COMMISSIONER BECK:** The APA you just cited me to,
13 looking at the preoperative diagnosis, the
14 postoperative diagnosis, everything shows right
15 shoulder.

16 **MR. CHRISTMAS:** Okay. The -- and I do not have the
17 brief with me. The ---

18 **COMMISSIONER BECK:** It addresses some bicep
19 tendinopathy but it's right shoulder, long head
20 of bicep tendinopathy.

21 **MR. CHRISTMAS:** Right. So long head of bicep
22 tendinopathy -- the bicep is a separate body
23 part from the shoulder which has the -- you
24 know, the other mechanisms of the shoulder.
25 And so if it goes into that area, it is a



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1 separate body part. It also is affected by the
2 shoulder injury itself and it also was
3 independently rated based upon the significance
4 of the injury.

5 **COMMISSIONER BECK:** Okay.

6 **MR. CHRISTMAS:** I guess if the standard is that he
7 has to have a surgery to the second body part,
8 I guess I would be ---

9 **COMMISSIONER BECK:** Well, it has to be impaired or
10 injured.

11 **MR. CHRISTMAS:** Right. and I think a three percent
12 impairment ---

13 **COMMISSIONER BECK:** And injured, I think.

14 **MR. CHRISTMAS:** Yes, Your Honor, and I would say
15 that a three percent impairment from the
16 authorized treating physician after four
17 surgeries recognizing the two separate injuries
18 should rise to the level of two body parts.

19 **COMMISSIONER BECK:** All righ.

20 **MR. CHRISTMAS:** Thank you, Your Honor.

21 **COMMISSIONER BECK:** Thank you. Ms. Urbanic?

22 **REPLY BY MS. URBANIC:**

23 **MS. URBANIC:** Thank you. A few things in response.
24 With regards to this issue of whether or not we
25 preserved the Form 17 and the requesting credit



1 for overpayment, as Mr. Christmas said,
2 initially on his 58, he said a generic
3 statement about TT. And it wasn't, as I said,
4 until we got the records the day before the
5 hearing, I objected to them and the
6 commissioner gave me additional time, were we
7 aware there was any real issue with regards to
8 temporary total benefits. And that's when the
9 commissioner graciously gave me a couple of
10 days to look at it and give him a response,
11 which I did by email to his assistant and a
12 copy to Mr. Christmas, on that, back on May
13 21st, 2013, bringing intent to the Form 17,
14 which is obviously part of y'all's record, the
15 workers' comp commission's record, and laid out
16 our position with regards to that. And on our
17 Form 30, it was raised. It was, though, on the
18 second page. I've had so many issues on appeal
19 we did, see attachment and it ended up on page
20 two. But we also, on the first page, raised an
21 objection to the finding of fact number 26,
22 which is the finding that dealt with all this
23 which showed it encompassed that as well. One
24 of the statements I also wanted to clarify was
25 on page 48 of the transcript ---



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1 **COMMISSIONER BARDEN:** Well, can you address the TPD
2 through the date of MMI versus May. Mr.
3 Christmas said he misspoke and he believes it's
4 August. Can you just address that?

5 **MS. URBANIC:** You know, I went back through it this
6 morning because I'm trying to line up the dates
7 with everything and unfortunately I couldn't
8 find my notes from the actual hearing. Because
9 I will admit, in my email that I sent back on
10 May 21, 2013, I actually had included -- sorry,
11 January 20 -- I think Gary just said until
12 August.

13 **COMMISSIONER BARDEN:** It was August, right. He says
14 that May was just a mistake.

15 **MS. URBANIC:** August of 2000?

16 **COMMISSIONER BARDEN:** Eleven.

17 **MS. URBANIC:** Eleven. And the date of our MMI was -
18 - I apologize. I'm getting myself confused
19 with all these dates and now I can't find my
20 58. We had a date of MMI from the 14B from Dr.
21 Demarco of September 14th, 2012. So, you know,
22 if Mr. Christmas' position is now it should've
23 been through August of 2011 that still would be
24 in the time -- and maybe I'm mixing up these
25 years and I apologize but that still would be



1 in the time period covered under the Form 17
2 because those benefits ran through September
3 25th of 2011. So I think that's where I'm
4 getting confused commissioner. I apologize.
5 I'm not trying to confuse y'all with it. One
6 other thing, one second. The rating that's on
7 page 12 of my APA's and I know it's also on his
8 APA submissions as well, but it's the final
9 rating from Dr. Demarco the authorized doctor.
10 He gives a nine percent and then he says what
11 it -- how he got to the nine percent. So it's
12 nine -- it's not nine percent plus three
13 percent for the biceps, three percent for the
14 loss of internal rotation. He is saying how he
15 got to the nine percent because the following
16 ratings add up to nine percent. And if you
17 read it the way it's written he has a permanent
18 partial impairment of nine percent, period.
19 Three percent for biceps, three percent for
20 loss of internal rotation, et cetera, et
21 cetera. So our contention is the nine percent
22 actually includes the biceps as commissioner
23 Beck noted. It wasn't a separate surgery for
24 the biceps. It wasn't detached. It was biceps
25 -- not tendinitis. Not tendinitis but close --



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1 a word close to that but I can't say it, was
2 part of the fourth surgery with regard to that
3 and really all the injury is that of the right
4 shoulder. Thank you.

5 **COMMISSIONER TAYLOR:** Thank you.

6 **COMMISSIONER BECK:** Thank you. This concludes the
7 proceeding.

8 (There being nothing further, the proceeding
9 concluded at 3:30 p.m.)
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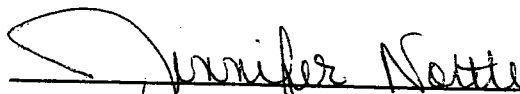
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CERTIFICATE

This is to certify that the within hearing consisting of twenty-four (24) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on June 25, 2014.



Jennifer Nottle
Court Reporter

Notary Public for South Carolina
My Commission Expires: 7/11/2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-001247


Thomas Contreras, Employee/Claimant, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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February 16, 2017
Columbia, South Carolina