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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKER'S COMPENSATION COMMISSION

Appellate Case No.: 2020-000351

Gene Grady, Employee, ... Respondent,

v.

The Shaw Group, Employer, and
Zurich American, Insurance Company,
Carrier, ... Appellants.

BRIEF OF THE RESPPONDENT

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STATEMENT OF THE CASE

Respondent sustained an admitted injury by accident on September 13, 2012. Appellants authorized continued medical treatment by Dr. Julie Barre when the Respondent moved back home to Florida after his admitted accident. (R., p. 1 - 2). Appellants paid attendant care after surgery. (R., p. 3 - 4).

Appellants filed a Form 21 request to stop payment of compensation on June 21, 2016 alleging Respondent reached maximum medical improvement (MMI) on May 25, 2016. (R., p. 103 - 110). Respondent filed a Form 22 on August 11, 2016 denying he had reached MMI and alleging he was permanently and totally disabled. (R., p. 111 - 113). A hearing scheduling for September 1, 2016 was continued to allow for mandatory mediation under WCC Reg. 67-1801. The hearing rescheduled for April 4, 2018 was resolved by Consent Order dated June 1, 2018 when it was agreed Respondent needed additional medical treatment. (R., p 7).

Respondent filed a Form 50 request for a hearing on January 29, 2018 alleging his injuries to his left shoulder and left arm entitled him to an award for total and permanent disability and future medical treatment under § 42-9-10, *S.C. Code Anno.*, 1976 as amended. (R., p. 114 - 116). Appellants filed a Form 51 on February 28, 2018 alleging the Respondent suffered an injury to his left shoulder and was, therefore, limited to a scheduled award under § 42-9-30(14), *S.C. Code Anno.*, 1976 as amended. (R., p. 117) – 119). Appellants filed a Form 21 request to stop payment of compensation on April 27, 2018 alleging the Respondent reached MMI on March 30,

2018. (R., p. 120 - 128). Respondent filed a Form 22 on May 4, 2018 alleging he was totally and permanently disabled. (R., p. 129 - 130).

A hearing on the Forms 50 and 51, 21 and 22 was held before Commissioner Gene McCaskill on September 27, 2018. Both parties submitted Form 58 Prehearing Briefs and Notice of Evidence submitted under the Administrative Procedures Act (APA). (R., p. 349 - 728; R., p. 757 - 760). The Commissioner issued a Decision and Order on June 11, 2019 finding and ruling the Respondent sustained injuries to his left shoulder and left arm, was permanently and totally disabled, and was entitled to future medical treatment including a total joint replacement of his left shoulder. (R., p. 7 - 41).

Appellants filed a Form 30 request for review on June 25, 2019. Appellants alleged the Hearing Commissioner's finding the Respondent suffered an injury to his left arm was not supported by the preponderance of the evidence. Appellants further alleged the ruling the Respondent was entitled to permanent and total disability under § 42-9-10, *S.C. Code Anno,* as amended 2007, was affected by an error of law because Respondent's injury was limited to his left shoulder. And, Appellant's further alleged the award of future medical treatment including a total joint replacement of the left shoulder was not supported by the preponderance of the evidence and was affected by an error of law because the medical testimony did not meet the required standard for admissibility.[1] (R., p. 138 - 141). The request for review was heard before

[1] Appellants' Form 30 also alleged the Hearing Commissioner's finding and ruling the Respondent was permanently and totally disabled were unsupported by the preponderance of the evidence but have abandoned that ground on appeal.

an Appellate Panel of the Commission on September 16, 2019. The unanimous Appellate Panel filed a Decision and Order on January 28, 2020 affirming the Commissioner. (R., p. 42 - 102).

Appellants filed a Notice of Appeal on February 24, 2020 and this appeal follows. (R., p. 180 - 184).

FACTS

On September 13, 2012 Respondent was treated for his admitted injury at Doctor's Hospital Center of Occupational Medicine and diagnosed with a left shoulder strain. (R., p. 381 - 382). He was referred for follow-up treatment to Dr. Duffin. Dr. Duffin's note on September 17, 2012 reported the Respondent's left shoulder and biceps were tender and diagnosed the Respondent as having a left shoulder strain and left bicipital tendonitis. (R., p. 378 - 379). Dr. Duffin's note on September 26, 2012 reported soreness of the front and back of the Respondent's left arm, diagnosed the Respondent as having a left shoulder strain, left bicipital tendonitis, and left lateral epicondylitis (tennis elbow), ordered a left shoulder MRI, and referred the Respondent for physical therapy. (R., p. 376 - 377). The physical therapist's note on November 28, 2012 reported the Respondent had pain and stiffness in the left shoulder and behind his left elbow. (R., po. 490). The MRI performed on December 4, 2012 revealed a rotator cuff tear. (R., p. 363). Dr. Duffin's note on December 7, 2012 reported "tenderness at the musculotendinous junction medially on the biceps but not up at the shoulder." (R., p. 356 - 357). The physical therapist's note on March 7, 2013 reported the Respondent was unable to perform any activity with his left arm due to

pain in his biceps and elbow. (R., p. 136 - 138). Dr. Duffin's note on May 15, 2013 reported the Respondent "still has some pain now kind of in the biceps area and some around the elbow with activities such as lifting something heavy." (R., p. 360 - 361).

The Respondent moved back home to Florida and continued orthopedic treatment by Dr. Julie Barre was authorized. Dr. Barre's note on February 17, 2014 reported the Respondent had left rotator cuff tendinopathy and a partial thickness tear related to his admitted injury. (R., p. 379). Dr. Barre performed left shoulder arthroscopic biceps tenodesis surgery on May 29, 2014. (R., p. 774 - 776). Dr. Barre referred the Respondent to Dr. Rehman for pain management on April 2, 2015. (R., p. 100 - 102). Dr. Barre performed left should arthoscopic surgery to debride the Respondent's torn rotator cuff on August 24, 2015. (R. p. 406 - 408). Dr. Barre's note on October 17, 2015 reported radicular pain down the left arm past elbow to his hand and Dr. Barre ordered an EMG nerve conduction test. (R., p. 417 - 419). An EMG nerve conduction test performed on February 5, 2016 was reported as normal. (R., p. 423). Dr. Barre referred the Respondent for a Functional Capacities Evaluation (FCE) and impairment rating On April 12, 2016. (R., p. 427 – 429; 430 - 431). The FCE performed on April 28, 2016 that determined the Respondent was unable to return to his job as an industrial electrician. (R., p. 432 – 433; 548 - 554). Although Dr. Barre believed the Respondent was at MMI, she recommended continued pain management. (R., p. 434 - 437). In a letter dated July 26, 2016 Dr. Barre wrote, "Based upon a reasonable degree of medical certainty, the [Respondent's] left shoulder and

left arm are both directly and causally related to is admitted accident of September 13, 2012." (R., p. 438).

Dr. Barre's deposition was taken on March 13, 2017. She testified when she first saw the Respondent she "diagnosed him with shoulder bursitis and symptoms of biceps tendonitis." (R., p. 203, lines 9 - 11). She testified when she last saw the Respondent on May 25, 2016 he was "complaining of pain in the proximal biceps and some in the distal biceps... So the whole kind of arm." (R., p[. 205, line 14 to p. 206, line 4). But Dr. Barre testified:

> Q.: And based on your postoperative diagnosis of left shoulder partial rotator cuff tear and superior labral anterior-to-posterior tear slash biceps tendinosis, is it your opinion within a reasonable degree of medical certainty that his injury you treated him for that first surgery, at least, was limited to his left shoulder?
>
> A.: Yes.

(R., p. 208, lines 16 – 17). She explained the reason she did not think the elbow was related to the Respondent's admitted injury on September 13, 2012 was because she did not have evidence of complaints of elbow pain at that time. (R., p. 226, lines 13 – 17). Dr. Barre admitted, however, it is not "uncommon" for patients with injuries like the Respondent's to have pain radiating down into their arm. (R., p. 230, lines 19 – 24). On cross-examination, Dr. Barre further admitted:

> Q.: And does the injury to his shoulder affect the functioning of his left arm?
>
> A.: Yes.
>
> Q.: Does it make the left arm weaker?
>
> A. I would say so because of the limitation secondary to the pain.

(R., p. 249, lines 12 – 17).

Respondent continued to receive pain management including opiate medications, analgesic gels, physical therapy, a brace, and a TENS unit. (R., p. 510 512; 517 - 520). Dr. Rehman's note on March 20, 2017 reported muscle contractures and pain down the Respondent's left arm with numbness and tingling in his fingers. (R., p. 595 - 598). Dr. Rehman's note on August 21, 2017 reviewed a repeat EMG nerve conduction study performed on August 3, 2017 which revealed chronic C7 radiculopathy. (R., p. 615 - 618). Dr. Rehman's note of December 18, 2017 reported Morphine had been added to the Respondent's pain medications. (R., p. 615 - 618).

Dr. Barre left her practice and the Respondent was referred to Dr. Bruce Steinberg. Dr. Steinberg's note on March 12, 2018 reported pain and weakness in the Respondent's shoulder and "exquisite palpable tenderness over the medial aspect of his left elbow." Dr. Steinberg diagnosed left shoulder pain, left partial chronic rotator cuff tear, left elbow joint pain, and left elbow medial epicondylitis. Dr. Steinberg did not recommend further surgery at that time but indicated, "in the future [the Respondent] may require a reverse head total joint arthrosis." (R., p. 666 – 669). An MRI of the Respondent's elbow performed on March 14, 2018 revealed an interstitial tear of the common extensor tendon. (R., p. 673 - 675). Dr. Steinberg wrote on May 25, 2018:

> I have been asked to clarify my opinion set forth in my March 12, 2018 office note in which I indicated Mr. Grady's need for a reverse head total joint arthrosis of the left shoulder. Based upon my review of is medical records, and my clinical evaluation, it is my opinion, based upon a reasonable degree of medical certainty, that Mr. Grady will most probably require a reverse head total joint arthrosis in the future directly caused by his left shoulder

> injury sustained during his on-the-job accident of September 12, 2012.

(R., p. 678).

On March 23, 2018 the Respondent was evaluated by Dr. Bright McConnell. Dr. McConnell's evaluation reported pain in Respondent's left elbow which Dr. McConnell correlated with a lesion shown on the elbow MRI performed on March 14, 2018. Dr. McConnell diagnosed probable mild-residual medial epicondylitis of the left elbow. (R., p. 679 - 685).

STANDARD OF REVIEW

Judicial review of Workers' Compensation Commission decisions is provided under § 42-17-60, *S.C. Code Anno.*, as amended 2007, of the Workers' Compensation Act:

> The award of the commission ... is conclusive and binding as to all questions of fact. However, either party to the dispute ... may appeal from the decision of the commission ... for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.

Judicial review of the Commission's decisions is also provided under § 1-23-380(5), *S.C. Code Anno.*, as amended 2008, of the Administrative Procedures Act:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;

(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

Appellate Courts may reverse a decision by the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the whole record. *Id.*; *Sturkie v. Ballenger*, 268 S.C. 536, 235 S.E.2d 120 (1977). The substantial evidence required to support a factual finding by the Commission is not evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Etheredge v. Monsanto Co.*, 349 S.C. 452, 652 S.E.2d 679 (2002).

ARGUMENT

I. The Commission's finding of fact the Respondent sustained a compensable injury to his left shoulder that impaired the use of his left arm by pain, muscle contractures, and numbness is supported by substantial evidence.

In its first finding of fact, the unanimous Appellate Panel found:

> On September 13, 2012 [the Respondent] sustained a compensable injury to his left shoulder, affecting his left arm... The [Respondent] experienced immediate pain in his left shoulder. The pain progressed into his left arm and elbow. The medical record is replete with references to [Respondent's] left elbow symptoms and that they relate to his admitted accident of September 13, 2012 to his left shoulder.

(R., p76). This finding of fact is supported by substantial evidence.

The medical records supporting this finding began within days of Respondent's admitted injury and were reviewed by the Appellate Panel in findings fact second through fifth. Within four days of Respondent's admitted accident the pain in his left shoulder had spread into his left biceps. (R., p. 784 - 785). Within two weeks his pain had spread to his elbow. (R., p. 782 - 783). On December 7 2012 the Respondent's treating orthopedist, Dr. Duffin, reported the Respondent had pain at the musculotendinous junction medially on the biceps not up at the shoulder. (R., p. 356). On March 7, 2013 the Respondent's physical therapist's reported the Respondent was unable to perform any activity with his left arm due to pain in his biceps and elbow. (R., p. 902). The medical records from the first six months of the Respondent's treatment following his admitted injury supports the finding the Respondent pain quickly spread from his left shoulder, down his left arm, to his elbow.

Appellants skip Respondent's initial treatment and ask this Court not only to assume the Commission's fact finding role but to give controlling weight to the opinion of Dr. Barre. Unfortunately for the Appellants, the determination of witness credibility and the weight to be assigned to the evidence is reserved to the Commission. *Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85 (S.C. App. 2008). When Dr. Barre's opinions are examined conflicts appear. In a letter dated July 26, 2016 Dr. Barre wrote, "Based upon a reasonable degree of medical certainty, the [Respondent's] left shoulder and left arm are both directly and causally related to is admitted accident of September 13, 2012." (R,, p. 438). But, in her deposition testimony, Dr. Barre testified on direct examination:

> Q.: And based on your postoperative diagnosis of left shoulder partial rotator cuff tear and superior labral anterior-to-posterior tear slash biceps tendinosis, is it your opinion within a reasonable degree of medical certainty that his injury you treated him for that first surgery, at least, was limited to his left shoulder?
>
> A.: Yes.

(R., p. 208, lines 16 – 17). But, then on cross-examination, she testified:

> Q.: And does the injury to his shoulder affect the functioning of his left arm?
>
> A.: Yes.
>
> Q.: Does it make the left arm weaker?
>
> A.: I would say so because of the limitation secondary to the pain.

(R., p. 249, lines 12 – 17). Again, unfortunately for Appellants, where there is a conflict in the evidence either of different witnesses or of the same witness, the findings of fact by the Commission are conclusive. *Walsh v. U.S. Rubber Co.*, 238 S.C. 411, 120 S.E.2d 685 (1961). Substantial evidence supporting the finding can be found from Dr. Barres conflicting opinions. Unfortunately for Appellants, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. *Tiller v. Nat' Health Care Ctr. Of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999).

The Appellate Panel's finding of fact is also supported by the substantial evidence from Respondent's treatment after Dr. Barre which Appellants ignore, or summarily dismiss as based on surmise, conjecture, or speculation, just as they did for the treatment before Dr. Barre. This medical evidence was reviewed by the Appellate Panel in its findings of fact twelfth through thirty-second. Respondent's pain management physician, Dr. Rehman, reported muscle contractures and pain

down the Respondent's left arm with numbness and tingling in his fingers on March 20,2017. (R., p. 595 - 598). A repeat EMG nerve conduction study on August 17, 2017 revealed chronic to moderate C7 radiculopathy. (R., p. 615 - 618). Dr. Steinberg, the orthopedist who took over after Dr. Barr, reported the Respondent had "exquisite palpable tenderness over the medial aspect of his left elbow" and diagnosed left shoulder pain, left partial chronic rotator cuff tear, left elbow joint pain, and left elbow medial epicondylitis. The left elbow MRI performed on March 14, 2018 revealed an interstitial tear of the common extensor tendon. (R., p. 673 - 675). Dr. Bright McConnell evaluation on March 23, 2018 correlated Respondent's left elbow pain with lesion shown on the MRI and diagnosed probable mild-residual medial epicondylitis of the left elbow. (R., p. 679 - 685). This medical evidence provides substantial evidence supporting the Appellate Panels finding of fact the Respondent sustained a compensable injury to his left shoulder that affected his left arm by pain, muscle contracture, and numbness is supported by substantial evidence.

II. The Commission's ruling the Respondent sustained injuries to his left shoulder and left arm is in accord with the Workers' Compensation statute and prior Court decision.

In its eighth ruling of law the unanimous Appellate Panel found, "As a result of the [Respondent's] compensable accident, he sustained injuries to his left shoulder and left arm." (R., p. 99). This ruling of law is in accord with the Workers' Compensation statute and prior Court decisions.

South Carolina provides three methods to obtain disability compensation under the Workers' Compensation Act: 1) total disability under § 42-9-10; 2) partial

disability under § 42-9-20; and scheduled disability under *S.C. Code Anno.* § 42-9-30. The first two are premised on the economic model, in most instances, while the third method relies conclusively upon the medical model. *Wigfall v. Tideland Utilities*, 354 S.C. 100, 580 S.E.2d 100 (2003). A claimant who sustains an injury limited to a scheduled body part may not recovery for total disability under § 42-9-10. If, however, the injuries or impairments affect multiple body parts, a claimant is not limited to the scheduled award. *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960); *McCollum v. Singer Co.*, 300 S.C. 103, 386 S.E.2d 471 (S.C. App. 1989) (claimant found totally disabled due to combined impairments to the back, stomach, and leg).

The arm and the shoulder are separate body parts under the Worker's Compensation statute. The Supreme Court held the shoulder was not part of the arm scheduled under § 42-9-30(13) in the case of *Therrell v. Jerry's Inc.*, 370 S.C. 22, 633 S.E.2d 893 (2006). In response to the Court's decision, the South Carolina Legislature amended § 42-9-30 of the Workers' Compensation statute to add subsection (14) listing the shoulder as a separate scheduled member. The arm and the shoulder remain separate body parts under the statute.

The Court of Appeals explained that a separate body part must be impaired or injured in order to be entitled to compensation under § 42-9-10. *Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 745 S.E.2d 128 (S.C. App. 2013). In *Colona* the claimant sustained an injury to her foot that required the implantation of a spinal cord stimulator in her back to help control pain. The claimant did not offer any evidence

the stimulator caused pain or impaired the use of her back and her claim under § 42-9-10 was denied. Unlike the claimant in *Colona*, there is ample evidence the Respondent's shoulder injury impaired the use of his left arm by pain, muscle contractures, and numbness. Another body part can be impaired or injured by pain, numbness, and weakness. *Dent v. E. Richland Cty Pub Serv. Dist.*, 423 S.C. 193, 813 S.E.2d 886 (S.C. App. 2018). The Appellate Panel's ruling of law the Respondent suffered injuries to his left shoulder and left arm is supported by substantial evidence he suffers severe debilitating pain, weakness, and numbness impairing the use of his left arm in addition to the injury and impairment to his left shoulder. The ruling of law the Respondent is entitled to compensation under § 42-9-30 because he suffered injuries to more than one body part is not affected by an error of law.

III. The Respondent's award of future medical including a total joint replacement of his left shoulder is not affected by an error of law.

Since the Respondent is entitled to total and permanent disability under § 42-9-10, he is statutorily entitled to lifetime medicals under § 42-15-60(C), *S.C. Code Anno.*, as amended 2007, and the Court does not need to decide Question II presented by the Appellants. The Appellate Panel, however, awarded the Respondent future medical under § 42-15-60(B)(2) and, therefore, therefore, Respondent will respond to Appellants' argument the award was not supported by competent substantial evidence. (R., p. 101).

Appellants point to Dr. Steinberg's office note from March 12, 2018 stating only "it is possible the Respondent may require left shoulder replacement surgery in the future" and his Form 14B dated June 24, 2018 stating no future medical treatment

is needed as failing to support the award or meet the required standard for admissibility of medical opinion evidence. Appellants forget Dr. Steinberg also stated in his letter dated May 25, 2018:

> I have been asked to clarify my opinion set forth in my March 12, 2018 office note in which I indicated Mr. Grady's need for a reverse head total joint arthrosis of the left shoulder. Based upon my review of is medical records, and my clinical evaluation, it is my opinion, based upon a reasonable degree of medical certainty, that Mr. Grady will most probably require a reverse head total joint arthrosis in the future directly caused by his left shoulder injury sustained during his on-the-job accident of September 12, 2012.

(R., p. 678). Again, unfortunately for Appellants, where there is a conflict in the evidence either of different witnesses or of the same witness, the findings of fact by the Commission are conclusive. *Walsh v. U.S. Rubber Co.*, *supra.* Dr. Steinberg's letter provides substantial, competent evidence to support the Commission's award of future medical treatment including total left shoulder replacement surgery.

CONCLUSION

For the foregoing reasons, the Court should rule the Commission's finding of fact the Respondent sustained a compensable injury to his left shoulder that impaired the use of his left arm because of debilitating pain, muscle contractures, and numbness is supported by substantial evidence. The Court should further rule that the Commission's ruling of law the Respondent is entitled to compensation for total and permanent disability under § 42-9-10 because he suffered injuries to his left shoulder and left arm is not affected by an error of law. And, the Court should rule the Commission's award of future medical treatment including left should

replacement surgery is supported by substantial, competent evidence. The Court should affirm the Decision and Order of the Appellate Panel dated January 28, 2020.

Respectfully submitted,

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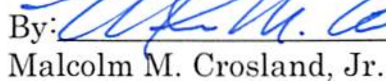

By:________________________
Malcolm M. Crosland, Jr.

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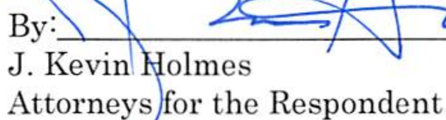

By:________________________
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Attorneys for the Respondent

Charleston, South Carolina
9th of September, 2020.