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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' 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 APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITY

STATEMENT OF ISSUES ON APPEAL

I. Whether the Appellate Panel erred in allowing Respondent to proceed under section 42-9-10 of the South Carolina Code (2015) when Respondent failed to prove an injury or impairment to his left elbow as a result of the work accident on September 13, 2012?

II. Whether the Appellate Panel erred in awarding Respondent lifetime causally related medical care under subsection 42-15-60(C) of the South Carolina Code (2015) including a future reverse head total joint arthrosis of the shoulder?

STATEMENT OF THE CASE[1]

A. Overall Summary

This case involves whether a claimant with an admitted injury to the left shoulder only can circumvent the mandate of *Singleton v. Young Lumber Co.,* 236 S.C. 454, 114 S.E.2d 837 (1960) and proceed under section 42-9-10 of the South Carolina Code (2015) by alleging an additional injury to the left elbow where the authorized treating physician who treated Respondent for over three years after the accident and performed two shoulder surgeries opined the left elbow complaints were not causally related to the work accident.

Gene Grady (Respondent) was 60 years old at the time of the hearing before the single commissioner. (R. p. 279, lines 18-20). He is a right-hand-dominant male. (R. p. 302, lines 7-8). His pertinent medical history includes two pre-accident surgeries on his left shoulder. (R. p. 308, lines 22-25; p. 309, lines 1-3). The first surgery was on September 23, 2002 and was a "repair of a detached superior labral tear." (R. p. 769). The second surgery ("arthroscopic debridement and decompression with a Mumford procedure") was performed on March 31, 2003. *Id.* These surgeries resulted in permanent light duty work restrictions as well as permanent impairment to his left shoulder. (R. p. 309, lines 4-12; pp. 769-772).

Respondent had one prior work-related accident to his left shoulder in 2002 that kept him out of work from 2002 until 2005. (R. p. 17, lines 14-23; p. 310, lines 3-13). Respondent returned to work in approximately 2005 and worked in "AutoCAD." (R. p. 310, lines 14-18). Respondent explained that "CAD" stands for computer assisted design. (R. p. 280, lines 13-18). Respondent

[1] At the outset, it is important to note that this is a workers' compensation claim from September 13, 2012. There are several hundred pages of medical records and hearing/deposition transcripts. For purposes of brevity, I have chosen to focus only on those facts that are pertinent to the issues on appeal.

worked in the computer design field for about two years. (R. p. 280, lines 13-18; p. 281, lines 1-2).

Respondent worked as a commercial electrician for Appellants. On September 13, 2012, he suffered an admitted injury to his left shoulder when he was moving a piece of steel and felt a pop in his left shoulder. (R. pp. 786-87). Respondent denied having pain anywhere else other than the front of his left shoulder at the time the accident occurred. (R. p. 311, lines 23-25; p. 312, lines 1-3). There is no dispute over the compensability of the left shoulder injury. (R. p. 136). Appellants admitted the injury and provided him with medical treatment including two additional surgeries and have also continuously paid Respondent weekly benefits for this claim since May 29, 2014. (R. p. 127).

After the accident, Respondent initially treated at Doctor's Hospital on September 13, 2012 where he was diagnosed with a left shoulder strain. (R. pp. 786-787). After treating with another orthopedist, he was ultimately referred to Dr. Julie Barre beginning on December 2, 2013. (R. pp. 374-77). Dr. Barre was Respondent's authorized treating physician between December 2, 2013 and December 21, 2016. (R. pp. 207, 215). In May of 2014, she performed left shoulder surgery—specifically "left shoulder arthroscopic, biceps tenodesis, and extensive debridement of a partial rotator cuff tear and debridement of a labral tear." (R. p. 201, lines 5-8). Due to continued complaints of pain, Dr. Barre performed a second surgery (left shoulder rotator cuff repair) on August 25, 2015. (R. pp. 202, 208).

Later, a dispute arose as to whether Respondent suffered an additional injury to the left elbow as a result of the September 13, 2012 accident. In March of 2017, Dr. Barre was deposed extensively regarding this issue and we encourage you to review her deposition transcript as it addresses the main issue on appeal. (R. pp. 189-263). Dr. Barre testified, after repeated

questioning, that Respondent did not suffer an injury to his left elbow on September 13, 2012 and that Respondent's left elbow complaints were not causally related to the work accident of September 13, 2012. (R. pp. 206-208). Dr. Barre testified that there was not a distinct injury to Respondent's left arm. (R. p. 256, lines 20-23). She further testified that any shoulder injury would affect the use of an individual's arm. (R. p. 256, lines 16-19). Dr. Barre did recommend an MRI of Respondent's left elbow, but she testified that said MRI was not causally related to the work accident Respondent suffered on September 13, 2012. (R. p. 260, lines 13-17). Regardless, Respondent later underwent an MRI of his left elbow on March 30, 2018, which was "negative for [a] ligamentous injury." (R. p. 673).

Dr. Barre testified Respondent reached maximum medical improvement (MMI) for his left shoulder on May 25, 2016 and he remained at MMI for his shoulder injury as of the date of her deposition. (R. p. 214, lines 20-23; p. 215, lines 6-12). Before her deposition, she opined that Respondent had a 5% permanent impairment rating to the left upper extremity as a result of his left shoulder injury. (R. p. 437). However, during her deposition, she ultimately deferred to a South Carolina physician for purposes of assigning a permanent impairment rating to Respondent's left shoulder. (R. p. 231, lines 17-23).

Respondent has seen several doctors since late 2016 when Dr. Barre left her practice. None of them have offered an opinion to a reasonable degree of medical certainty that Respondent has suffered an injury or impairment to his left elbow as a result of the September 13, 2012 work accident. Dr. Bruce Steinberg has been the authorized treating physician since he first saw Respondent on March 12, 2018. (R. p. 666). Dr. Steinberg's diagnoses include left shoulder pain, left partial chronic rotator cuff tear, left elbow pain, and left elbow medial epicondylitis ("but no findings on MRI March 30, 2018"). (R. pp. 673-674). He has not offered an opinion to a

reasonable degree of medical certainty that Respondent's left elbow complaints are causally related to the work accident. He has opined that Respondent reached MMI on March 30, 2018. (R. pp. 674, 677, 985). On June 24, 2018, Dr. Steinberg indicated on a Form 14B that Respondent had a 5% permanent impairment rating to the "left shoulder/elbow." (R. p. 985). That form identifies the injured body part as the "left shoulder" and an affected body part as the "left elbow." (R. p. 985).

Dr. Steinberg has offered inconsistent opinions regarding Respondent's need for future medical treatment that is casually related to the work accident. On March 12, 2018, Dr. Steinberg stated he did not recommend further arthroscopic surgery; however, "in the future it is possible [Respondent] may require a reverse head total joint arthrosis." (R. p. 668). On March 30, 2018, he opined that he "really ha[d] no further recommendations for [Respondent]." (R. p. 674). On May 25, 2018, he responded to a questionnaire from Respondent's attorney and indicated Respondent more likely than not would require future reverse head total joint arthrosis. (R. p. 678). His most recent opinion as to Respondent's future medical needs came via a South Carolina Form 14B completed on June 24, 2018 where he again opined that Respondent did not require future medical treatment as a result of the work accident. (R. p. 985).

Respondent saw Dr. Bright McConnell at the behest of his attorney for an independent medical examination on one occasion over five years after the work accident. (R. pp. 679-685). Dr. McConnell did not offer an opinion to a reasonable degree of medical certainty that Respondent has an injury or impairment to the left elbow as a result of the work accident. (R. pp. 679-685). Dr. McConnell opined that Respondent has a 26% permanent impairment rating to the arm, which converted to a 43% permanent impairment rating for the shoulder. (R. p. 685). He diagnosed "probable mild residual medial epicondylitis left elbow" and recommended additional treatment

for same, but, again, he did not opine whether this condition was causally related to the work accident. (R. pp. 684-685).

Respondent has also received pain management treatment with Sunshine Spine and Pain. (R. pp. 448-537). A discussion of those records has been omitted as it is not pertinent to the issues raised in this appeal. Respondent has also received a vocational evaluation, which is not relevant to the issues raised in this appeal. (R. pp. 556-578).

Respondent filed a Form 50, Request for Hearing, with the South Carolina Workers' Compensation Commission on June 12, 2018 alleging injuries to the "left shoulder, left arm." (R. pp. 131-132). He sought permanent and total disability benefits under section 42-9-10 due to his injury. (R. p. 132). Appellants filed a Form 51 responsive pleading admitting the injury to the left shoulder only and denying all other alleged body parts. (R. p. 136). Appellants additionally filed a Form 21, Request for Hearing, alleging Respondent had reached maximum medical improvement (MMI) for his admitted left shoulder injury and seeking to pay him permanent partial disability (PPD) benefits under section 42-9-30 of the South Carolina Code (2015). (R. p. 120).

B. Summary of the Relevant Arguments

On September 27, 2018, a hearing was held before Commissioner Gene McCaskill of the South Carolina Workers' Compensation Commission (the single commissioner). (R. p. 266). At the hearing, Respondent contended that "as a result of the injury he sustained on September 13, 2012, he's been rendered permanently and totally disabled." (R. p. 271, lines 5-7). Specifically, he contended he suffered "a biceps tendon tenodesis, a rotator cuff tear full thickness and . . . medial epicondylitis of his left elbow . . . ." (R. p. 271, lines 8-10).

Appellants argued that Respondent suffered an admitted injury to the left shoulder only, he had reached MMI, and he was entitled to an award of PPD under section 42-9-30. (R. p. 274, lines

8-25; p. 275, lines 1-5). Appellants specifically contended that under *Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013), *cert dismissed as improvidently granted* (April 8, 2015), in order to proceed under section 42-9-10, a second body part must not only have been affected, it must also have been injured or impaired as a result of the accident. (R. p. 275, lines 22-25; p. 276, lines 1-9). Appellants further relied on the deposition testimony of Dr. Barre, who testified that the left elbow complaints were not causally related to the work accident on September 13, 2012. (R. p. 276, lines 4-6).

C. Summary of the Relevant Rulings Below

On June 11, 2019, the single commissioner issued an order finding Respondent (1) sustained a compensable injury to his left shoulder affecting his left arm; (2) was entitled to permanent and total disability benefits under S.C. Code Ann. § 42-9-10; and (3) was entitled to "all future causally-related medical care and treatment as deemed necessary by [his] authorized treating physicians . . . [including a] reverse head total joint arthrosis of the left shoulder." (R. pp. 7, 29-35).

Appellants appealed the single commissioner's order to the Appellate Panel of the South Carolina Workers Compensation Commission. (R. pp. 138-141). The Appellate Panel heard the case on September 16, 2019 and issued an order on January 28, 2020. (R. p. 42). Appellants candidly—but respectfully—assert that a large majority of the Appellate Panel's order is irrelevant to the issues raised in this appeal as it addresses vocational evidence that is not relevant when analyzing a case under section 42-9-30 of the South Carolina Code. The Appellate Panel's analysis pertinent to the issues raised on appeal appears on pages 55, 58, 59, 60, and 61 of its order. (R. pp. 96, 99-102). The order recites the single commissioner's findings of fact and conclusions of law and affirms the single commission's ruling regarding Respondent's entitlement to benefits.

(R. pp. 46-73, 100). In one part, the order notes that Respondent suffered injuries to the left shoulder and left arm on September 13, 2012. (R. p. 96). In another part, the Appellate Panel found that Respondent sustained "compensable injuries to his left shoulder and [a] separate injury to his arm/elbow." (R. p. 99). The Appellate Panel also found:

> As a result of [Respondent]'s compensable accident, he sustained compensable injuries to his left shoulder and left arm. . . .
>
> ….
>
> As a result of [Respondent]'s compensable injuries, he has sustained a total destruction of his earning capacity and, as of the date he achieved maximum medical improvement (March 30, 2018), he has been permanently and totally disabled as a result of his compensable injuries to his left shoulder and his separate injury to his left arm/elbow. Even if [Respondent] had not sustained a separate injury to his left elbow, his left shoulder injury profoundly and seriously affects the functioning of his left arm and impairs the use of his left arm, in keeping with the Supreme Court's [sic] ruling of *Colonna*[.]"

(R. pp. 99-100).

Thus, the Appellate Panel concluded Respondent could proceed under section 42-9-10 and awarded him permanent and total disability benefits pursuant to section 42-9-10 as well as lifetime causally related medical treatment under subsection 42-15-60(B) of the South Carolina Code (2015). (R. pp. 100-102). On February 24, 2020, Appellants timely appealed the Appellate Panel's order to this Court. (R. pp. 180-184).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2019). An appellate court's review is limited to the determination of whether the Appellate Panel's decision is supported by substantial evidence or is controlled by an error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). "An appellate court may reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence." *Harrison v. Owen Steel Co.*, 422 S.C. 132, 137, 810 S.E.2d 433, 435 (Ct. App. 2018).

"While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence." *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017). "'Substantial evidence' is not a mere scintilla of evidence nor the 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 that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)).

ARGUMENT

I. The substantial evidence establishes that by permitting Respondent to proceed under Section 42-9-10 of the South Carolina Code (2015), the Appellate Panel's Findings of Fact and Conclusions of Law were clearly erroneous as Respondent did not prove an injury or impairment to his left arm/elbow as a result of the work accident on September 13, 2012.

South Carolina provides three methods to receive disability compensation: (1) total disability under section 42-9-10 (2015); (2) partial disability under section 42-9-20 (2015); and (3) scheduled disability under section 42-9-30 (2015). *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). The first two methods are based on the economic model in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. *Id.*

A claimant with one scheduled injury is limited to recovery of permanent disability benefits under section 42-9-30 and cannot proceed under section 42-9-10, "the general disability statute." *Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 545, 745 S.E.2d 128, 133 (Ct. App. 2013), *cert dismissed as improvidently granted* (April 8, 2015). In order for a claimant to proceed under section 42-9-10, he must prove not only that another body part was affected but that another body part was "impaired or injured for section 42-9-10 to apply." *Id.* at 546, 745 S.E.2d at 133. "The burden is on the claimant to prove that an injury is compensable within the act." *Therrell v. Jerry's, Inc.*, 370 S.C. 22, 30, 633 S.E.2d 893, 897 (2006). Likewise, "[t]he burden is on the employee to prove he or she is totally disabled under section 42-9-10." *Dent v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 201, 813 S.E.2d 886, 890 (Ct. App. 2018), *cert. denied* (Sept. 21, 2018).

A. South Carolina jurisprudence and Legislative intent hold that the injury at issue here—rotator cuff tear—is only compensable under section 42-9-30.

In *Therrell v. Jerry's Incorporated*, the Supreme Court of South Carolina addressed the issue of "whether compensation for a torn rotator cuff is limited to the scheduled recovery for the loss of use of an arm, or whether the injury is instead an unscheduled injury under § 42-9-30(20)." 370 S.C. at 26, 633 S.E.2d at 895. At that time, the "shoulder" was not a scheduled member under section 42-9-30. The Supreme Court held that a rotator cuff injury was not properly compensable

under the loss of use of the arm schedule of section 42-9-30. *Id.* at 28, 633 S.E.2d at 897. Additionally, the Supreme Court adopted the "situs of the injury" approach to determining how an injury is properly compensated. *Id.* at 28, 633 S.E.2d at 896.

The Legislature responded to the Supreme Court's decision in *Therrell* and enacted subsection 42-9-30(14) of the South Carolina Code which created an award for the loss of use of the "shoulder." *See* 2007 Act No. 111 (S.B. 332) (effective July 1, 2007). Subsection 42-9-30(14) currently provides for a maximum of 300 weeks of permanent partial disability benefits for the loss of use of the shoulder.

Appellants assert that the *Therrell* decision and subsequent enactment of subsection 42-9-30(14) indicate the Legislature intended for rotator cuff injuries, such as the one at issue here, to be compensable under section 42-9-30 rather than 42-9-10. It is clear that the Legislature contemplated the fact that shoulder injuries will inherently affect the arm, which is why they created a maximum award of 300 weeks rather than the 220-week limit for injuries affecting the arm. *See* S.C. Code Ann. § 42-9-30(13) (2015). What is equally clear is that by enacting subsection 42-9-30(14), the Legislature did not intend to allow a claimant to circumvent that subsection and proceed under section 42-9-10 by bootstrapping the arm and/or elbow to an injury involving the "shoulder." In other words, the logical conclusion is that by enacting a statutory subsection addressing the loss of use of the "shoulder," the Legislature intended that subsection to replace—not supplement—injuries affecting the "shoulder."

B. The substantial evidence of the Record establishes that Respondent suffered an admitted work-related injury to his left shoulder only.

Initially, Appellants want to make it clear that Respondent suffered an admitted work-related injury to his left shoulder. Appellants admitted the claim and provided Respondent with

substantial benefits including medical treatment and temporary total disability (TTD) benefits. Appellants have paid Respondent weekly TTD benefits since May 29, 2014. (R. p. 127). Furthermore, Appellants readily concede that Respondent is entitled to permanent partial disability (PPD) benefits under section 42-9-30 for his shoulder injury. Nevertheless, we respectfully assert the Appellate Panel erred in finding this was a "two-body-part" case and therefore outside of *Singleton*, thus allowing Respondent to proceed under section 42-9-10.

1. Dr. Barre was the most qualified medical expert because she treated Respondent for over three years and performed two left shoulder surgeries.

Dr. Julie Barre was Respondent's initial authorized treating surgeon. She treated Respondent for over three years and performed two surgeries in this case between December 2, 2013 and December 21, 2016. (R. pp. 207, 215). In May 2014, she performed left shoulder surgery—specifically "left shoulder arthroscopic, biceps tenodesis, and extensive debridement of a partial rotator cuff tear and debridement of a labral tear." (R. p. 201, lines 5-8). Due to continued complaints of pain, Dr. Barre performed a second surgery on August 25, 2015. (R. pp. 202, 208). Dr. Barre testified that at the time of both the first and second surgeries, Respondent's injury was limited to the shoulder. (R. p. 208, lines 10-17; p. 209, line 17-21).

Dr. Barre was the most qualified expert to render medical opinions in the case. She treated Respondent for the longest time and performed two surgeries on his left shoulder. Appellants respectfully assert that no one is more qualified to render an opinion as to the function of Respondent's injury than the surgeon who operated on the shoulder—twice—and treated Respondent for over three years after the accident. Her opinions in this case should have been the final word on medical causation, however, that did not occur.

On March 13, 2017, Dr. Barre was deposed regarding her treatment of Respondent and her testimony is particularly instructive in this matter. (R. pp. 189-264). Dr. Barre testified extensively concerning Respondent's left shoulder injury and medical treatment, as well as the lack of a left elbow injury. Specifically, she was asked:

> Q: "Do you think [Respondent] injured his elbow in the original work accident in this case back in 2013 (sic)?"
>
> A: I don't think so. I don't have any complaints on the elbow at that time."

(R. p. 226, lines 13-17). This testimony is particularly important because Claimant told Dr. Steinberg—the current authorized treating physician—he had persistent left elbow pain since the time of the injury. (R. p. 669). Dr. Barre further testified that a left elbow MRI she previously recommended was not causally related to the work accident. (R. p. 226, lines 18-20).

Dr. Barre likewise testified regarding the original situs of Respondent's injury. She explained that Respondent's injury was to the proximal biceps tendon.[2] (R. p. 206, lines 18-24). When asked whether Respondent suffered "a distinct injury to [his] left arm versus his shoulder," Dr. Barre replied in the negative. (R. p. 256, lines 20-23).

Dr. Barre continued when explaining the left elbow MRI:

> A: I mean we would be complete if we got the MRI of the elbow. They can do something like an ultrasound of the elbow, which is

[2] The "proximal biceps tendons" are tendons that connect the biceps muscle to the shoulder joint. *Picture of Biceps: Human Anatomy*, https://www.webmd.com/fitness-exercise/picture-of-the-biceps#1 (last visited May 29, 2020). In contrast, the "distal bicep tendon" is the tendon that attaches the biceps muscle to the forearm. *Id.*

less expensive. That might be able to show if there's any injury to the distal biceps tendon.

Q: As far as that distal biceps tendon is concerned, how would [Respondent] have injured that?

A: The mechanism of injury to that is usually more of a holding a load and then dropping it (indicating) extrinsically. So I don't - -

Q: So if you're pushing or pulling and feel a pop, as you described earlier, I think you said it was anterior to the left shoulder, that would not be consistent with having --

A: Not consistent with injuring that left shoulder at the initial injury, so . . .

Q: So then as far as – if that's the standard mechanism of injury for a distal biceps tendon injury, <u>are you in anyway saying that that potential distal biceps tendon injury is causally related to the work injury in this case?</u>

<u>A: I don't believe so</u>.

(R. p. 261, lines 2-25) (emphasis added).

Dr. Barre later testified that any shoulder injury necessarily affects the arm; however, when asked whether Respondent suffered "a distinct injury to [his] left arm versus his left shoulder," she replied, "No." (R. p. 256, lines 16-23).

Therefore, the former authorized treating physician, who treated Respondent for over three years and performed two surgeries on his left shoulder did not believe that Respondent's left elbow complaints were causally related to the accident. The basis for her opinion was that the description

and type of injury were inconsistent with the manner in which he originally injured his shoulder. Respondent's alleged injury to the *distal* biceps tendon would not be consistent with injuring his left shoulder at the initial injury because that was a *proximal* biceps tendon injury. (R. p. 261, lines 7-24).

Respondent will point to Dr. Barre's responses to questionnaires from him dated July 26, 2016 and August 17, 2016, respectively, wherein she opined that both the left shoulder and left arm were causally related to the work accident and that the work accident would cause chronic impaired functioning of the arm. (R. pp. 438-439). However, those opinions were given prior to her deposition where, again, she explained with specificity and after repeated cross-examination that she did not believe Respondent injured his left elbow in the work accident and she also did not believe that the left elbow complaints were causally-related to the work accident. (R. pp. 438-439). Moreover, Dr. Barre admitted at her deposition that she did not realize that South Carolina treated the shoulder and the arm as different body parts for purposes of workers' compensation benefits. (R. p. 231, lines 12-16). Thus, when she was subject to cross-examination about the opinions she gave in response to the questionnaires from Respondent's attorney, her opinion was clear that Respondent did not suffer a left elbow injury as a result of the work accident of September 13, 2012.

2. Any medical evidence that purports to support the Appellate Panel's finding that Respondent suffered an injury or impairment to the left elbow as a result of the work accident is based on surmise, conjecture, or speculation and not the substantial evidence of the Record.

It is axiomatic that a workers' compensation award cannot be based on surmise, conjecture, or speculation. *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); *see also*

Bundrick v. Powell's Garage, 248 S.C. 496, 503, 151 S.E.2d 437, 441 (1966) (holding an award of permanent disability benefits must be founded on evidence of sufficient substance and may not rest on surmise, conjecture, or speculation). However, that is exactly what occurred here when the Appellate Panel found the left elbow condition compensable and allowed Respondent to recover benefits under section 42-9-10.

In the Appellate Panel's Order, it summarily found that Respondent "sustained a compensable injury to his left shoulder, *affecting his left arm* while working at a rolling table fabricating steel pipe bars… the Claimant experienced immediate pain in his left shoulder. The pain progressed into his left arm and elbow. The medical record is replete with references to Claimant's left elbow symptoms and that they relate to his admitted accident of September 13, 2012 to his left shoulder." (R. pp. 75-76) (*emphasis added*). The Appellate Panel summarily states that the left shoulder injury "affected his left arm" and then vaguely refers to the entire medical record as containing references to Claimant's left elbow symptoms and their causal relationship to the September 13, 2012 left shoulder injury. (R. pp. 75-76). Unfortunately for the Respondent, the opinions of the medical providers do not support this vague assertion by the Appellate Panel.

In finding the left elbow compensable, the Appellate Panel presumably relied on the opinion of Dr. Bruce Steinberg as he assigned Respondent a 5% permanent impairment rating to the "left shoulder/elbow." (R. p. 985). This was an error for several reasons. First, Dr. Steinberg initially saw Respondent on March 12, 2018 or <u>over 5 years after the accident</u>. (R. p. 666). He also has only seen Respondent as a patient twice compared with Dr. Barre who, upon information and belief, saw Respondent twenty-three times over three years. (R. pp. 374-441, 666-678, 985). Second, Dr. Steinberg's opinions were based on Respondent's claim that he had consistent left elbow pain <u>since the time of injury</u>. (R. p. 669). However, that claim was not supported by Dr.

Barre's testimony that Respondent did not have complaints of his left elbow at that time. (R. p. 226, lines 13-17).

The records stating Respondent had left elbow pain consistently since the accident are inconsistent with his own testimony because he admitted at his deposition[3] that the front of his left shoulder was the only place where he felt pain at the time of the accident. (R. p. 311, lines 22-25; p. 312, lines 1-3). In fact, Respondent also testified at the single commissioner hearing that he reported all of his complaints to Dr. Barre; however, again, Dr. Barre's testimony does not support his claim of consistent left elbow pain since the work accident. (R. p. 314, lines 8-11). Respondent is Dr. Steinberg's sole source of information as to the body part Respondent injured in the work accident; however, that source is unreliable because his description of the onset of his left elbow complaints were inconsistent with the testimony of the most qualified expert in this case.

There are other reasons why the opinion of Dr. Steinberg is speculative. Notably due to Respondent's left elbow complaints, Dr. Steinberg recommended an MRI of the left elbow. (R. pp. 669, 671). Interestingly, however, Dr. Steinberg opined that the MRI was "negative for [a] ligamentous injury of the elbow." (R. p. 673). To recap, an MRI of the left elbow—which Dr. Barre testified repeatedly was not causally related to the work accident anyway—was interpreted as negative for an injury to the elbow. Somehow the Appellate Panel still found Respondent suffered a left elbow injury as a result of the work accident.

Finally, Dr. Steinberg's opinion on the purported left elbow condition is also entitled to little weight, if any, by simply looking at the face of the document on which his opinions are contained. Specifically, Dr. Steinberg's medical opinions which were stated to a reasonable degree

[3] Respondent's attorney conceded at the single commissioner hearing that this excerpt from Respondent's deposition transcript was admitted into evidence at the single commissioner hearing for purposes of impeachment. (R. p. 321, lines 6-14).

of medical certainty were contained on the Form 14B completed on June 24, 2018. (R. p. 985). Directly under the statement on the Form labeled "the medical opinions below are stated to a reasonable degree of medical certainty," Dr. Steinberg indicates that the body part or parts injured was the "left shoulder." *Id.* The body part affected is listed as "left elbow." *Id.* At best, Dr. Steinberg is providing an opinion that the left shoulder was injured and that the left elbow was affected by the injury. However, upon further review of the medical opinions contained on the Form 14B, it is clear that Dr. Steinberg does not provide a second impairment rating for the left elbow injury. *Id.*

Further down on the Form 14B where the impairment ratings are listed by Dr. Steinberg, he provided a 5% "medical impairment to the left shoulder/elbow." *Id.* However, in response to the very next question, Dr. Steinberg notably did not provide an opinion. The following question states "if there is a permanent physical impairment to other body part(s) as a result of the work injury, please indicate below: _____ % medical impairment to the _____ (additional body part injured or affected)." *Id.*

Based on the Form 14B executed by Dr. Steinberg, his opinions are at most ambiguous. Arguably, Dr. Steinberg's Form 14B indicates that there is no additional impairment to the body part that he previously opined was affected by the left shoulder injury. This is based upon the fact that when specifically asked to identify the permanent physical impairment to the other body part that was injured or affected by the primary injury, Dr. Steinberg chose to leave those blanks empty.

For similar reasons the opinions of Dr. McConnell are speculative. Dr. McConnell saw Respondent once on May 23, 2018—2079 days after the work accident. (R. p. 679). Conveniently, Respondent reported he had "sudden onset of pain in his left shoulder and in the anterior bicipital

region of his elbow at the time of the event." *Id.* As previously stated, this was not supported by Dr. Barre's testimony.

Furthermore, neither Dr. McConnell nor Dr. Steinberg offered an opinion to a reasonable degree of medical certainty that Respondent has an injury or impairment to his left elbow as a result of the work accident of September 13, 2012. *See Colonna*, 404 S.C. at 546, 745 S.E.2d at 133 (stating a claimant bears the burden of proving that another body part was "impaired or injured for section 42-9-10 to apply"); S.C. Code Ann. § 42-1-160(E) (2015) (requiring an employee to establish by medical evidence that an injury arose out of employment in "medically complex cases"); S.C. Code Ann. § 42-1-160(G) (2015) (defining "medical evidence" to include expert medical testimony stated to a reasonable degree of medical certainty). Dr. Steinberg did complete a Form 14B assigning a 5% permanent impairment rating to the "left shoulder/elbow"; however, that report is unclear whether he was assigning a separate rating for the elbow because, despite having the opportunity to assign multiple ratings, he chose to only assign one rating. (R. p. 985).

In short, the evidence seemingly relied on by the Appellate Panel to support a finding of compensability for the left elbow came from doctors (1) who first saw Respondent over five years after the accident; (2) whose sole source of information as to the body part(s) injured in the work accident is Respondent who is unreliable since neither Dr. Barre's nor Respondent's testimonies support the claim that he had "consistent left elbow pain" since the work accident; and (3) where there was no objective medical evidence to support an injury to the left elbow related to the work accident of September 13, 2012.

To the extent Dr. Steinberg believed there was a left elbow injury it seems from his records that it occurred at the time of the initial injury, which, upon information and belief, was

inconsistent with Respondent's position at the hearing before the Appellate Panel where he argued that the left elbow complaints developed after the second work-related shoulder surgery:

> "[I]f you start to really read the medical, then what you see is that, after the second surgery, [Respondent] developed a radiculopathy coming from his shoulder, not his neck, there's no indication of any neck injury. After the second surgery, shooting pain that was shooting from his left shoulder, unrelenting down the arm and into his hand causing numbness in his hand. And that is in every single doctors' medical report."

(R. p. 336, line 25; p. 337, lines 1-9).

The inconsistency in Respondent's theory of compensability for the left elbow is also evident in the Appellate Panel's order. In one finding, it found that Respondent suffered injuries to the left shoulder and left arm on September 13, 2012. (R. pp. 96, 99). In another finding, the Appellate Panel noted Respondent sustained "compensable injuries to his left shoulder and [a] separate injury to his arm/elbow." (R. p. 99). Therefore, the Appellate Panel's finding of compensability for the left elbow is ambiguous as to whether it was (1) a direct result of the injury on September 13, 2012, (2) complications from the second surgery, or, apparently, (3) the result of a "separate injury" to Respondent's elbow/arm at some unknown date. (R. pp. 96, 99). As such, Appellants respectfully assert that the Appellate Panel's award is based on surmise, conjecture, or speculation and should therefore be reversed. *See Clade*, 330 S.C. at 11, 496 S.E.2d at 857; *Bundrick*, 248 S.C. at 503, 151 S.E.2d at 441.

Even assuming *arguendo* that the Appellate Panel's error was simply semantic, and it did find Respondent suffered impairment or injury to the left elbow as a result of the work accident,

there is not substantial evidence to support such a finding. Again, the undisputed, most qualified expert to discuss this issue testified repeatedly that the left elbow complaints were not causally related to the accident. (R. p. 226, lines 13-17; p. 260, lines 13-17; p. 261, lines 7-24). The medical evidence that purported to establish causation (*i.e.*, Dr. Steinberg and Dr. McConnell) never opined to a reasonable degree of medical certainty that Respondent suffered an injury or impairment to the left elbow as a result of the work accident. Likewise, the diagnostic imaging did not reveal objective medical evidence to support a left elbow injury due to the work accident as the MRI of the left elbow was negative for a ligamentous injury. (R. p. 673). Therefore, even assuming Respondent did have left elbow complaints since the accident, there is no objective medical evidence supporting an impairment or injury to the left elbow as a result of the work accident.

3. The Appellate Panel committed an error of law in finding that the injury need only *affect* the left elbow to invoke section 42-9-10.

As previously stated, South Carolina law requires an injury to do more than affect the body part in order to be compensable for purposes of invoking the two-body-part rule. *See Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 546, 745 S.E.2d 128, 133 (Ct. App. 2013), *cert dismissed as improvidently granted* (April 8, 2015). However, in this case, the Appellate Panel appears to have only required that the left shoulder injury affect the left elbow in order to allow Respondent to proceed under section 42-9-10. This error is clear from Respondent's argument at the hearing before the Appellate Panel. Specifically, he asserted at the hearing before the Appellate Panel that:

> "[O]ur [appellate courts] have told us that through *Colonna*, *Dent* [*v. E. Richland Cnty. Pub. Serv. Dist.*, 423 S.C. 193, 813 S.E.2d 886 (Ct. App. 2018), *cert. denied* (Sept. 21, 2018)], and their progeny, that you do not have to have an impairment rating in order to be

> successful in making an argument that, under [s]ection 42-9-10, you simply have to have another body part that is *impaired or affected* by the original injury, and over and over again, we see that in this case."

(R. p. 338, lines 23-25; p. 339, lines 1-6) (emphasis added).

Relying on this, the Appellate Panel found that Respondent "sustained a compensable injury to his left shoulder *affecting his left arm* . . . while performing duties arising out of and in the course and scope of his employment with [Appellants]." (R. p. 96 emphasis added)).

Appellants respectfully assert that this finding amounted to an error of law as *Colonna* and its progeny require that the injury must do more than affect the second body part in order to seek benefits beyond section 42-9-30. *Colonna* specifically states that a claimant "must prove not only that another body part was affected . . . but that another body part was *impaired or injured* for section 42-9-10 to apply." 404 S.C. at 546, 745 S.E.2d at 133 (emphasis added); *see also Dent*, 423 S.C. 202, 813 S.E.2d 890-91 (interpreting *Colonna* as holding a "claimant must prove *not only* that another body part was *affected* by an injury to a scheduled member, but that another body part was *impaired or injured* for section 42-9-10 to apply" (emphasis added)). Here, the Appellate Panel erred as a matter of law in finding that the left elbow need only be *affected*, rather than additionally be impaired or injured, in order to invoke section 42-9-10.

This error was compounded in this case particularly because, as explained by Dr. Barre, "any shoulder injury would *affect* the use of an individual's arm[.]" (R. p. 256, lines 16-19 (emphasis added)). Under the Appellate Panel's flawed reasoning, the mere fact that the left shoulder injury affected the left arm would be enough to circumvent the *Singleton* rule. This would

effectively turn every shoulder injury into a potential claim under section 42-9-10. This finding is in direct contravention of *Colonna* and its progeny, as well as the intention of the Legislature.

In short, the case law is clear that an injury or impairment to a second body part is required in order to proceed under section 42-9-10. Here, all we have are subjective complaints of pain by Respondent that are not supported by the objective medical evidence or the expert medical testimony in the case. As such, Appellants respectfully assert the Appellate Panel's decision should be reversed as it is clearly erroneous in view of the substantial evidence of the Record. *See Harrison v. Owen Steel Co.*, 422 S.C. 132, 137, 810 S.E.2d 433, 435 (Ct. App. 2018) (stating "[a]n appellate court may reverse a decision by the Appellate Panel if it is affected by an error of law or is clearly erroneous in view of the substantial evidence").

4. Because Respondent failed to show an injury or impairment to the left elbow as a result of the work accident, the Appellate Panel's decision should be reversed, and the case remanded for an award of PPD under section 42-9-30.

As previously stated, an individual with an injury to a scheduled member is limited to recovery of benefits under section 42-9-30. Thus, the Appellate Panel should have analyzed this case under section 42-9-30 and awarded benefits under same. The Appellate Panel found Respondent reached MMI and neither party appealed that finding. (R. pp. 98-99). Therefore, Appellants respectfully assert that finding is now the law of the case. *See Frampton v. S.C. Dep't of Nat. Res.*, Op. No. 5726 (S.C. Ct. App. filed May 13, 2020) (Shearouse Adv. Sh. No. 19 at 84) (stating an unchallenged ruling right or wrong is the law of the case and requires affirmance) (Lockemy, C.J., concurring in part and dissenting in part).

Moreover, as the Court is well aware once a claimant reaches MMI, temporary benefits end and permanent disability benefits are awarded. *See O'Banner v. Westinghouse Elec. Corp.*,

319 S.C. 24, 28, 459 S.E.2d 324, 326 (Ct. App. 1995) ("Workers' compensation awards have generally provided for [TTD] benefits until maximum medical improvement, at which point a claimant receives permanent partial disability if warranted."). As such, Appellants respectfully request that the Court of Appeals reverse the Appellate Panel's award of permanent and total disability benefits under section 42-9-10 and remand the case to the Appellate Panel with instructions that it enter an award of PPD for the left shoulder pursuant to section 42-9-30. Appellants further request that as part of the remand instructions the Court instruct the Appellate Panel to refrain from considering vocational evidence in this claim because, under the medical model (section 42-9-30), vocational evidence is irrelevant. *See Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 103-04, 580 S.E.2d 100, 102 (2003) ("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, *even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity*.") (*quoting Singleton v. Young Lumber Company*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added))).

II. The Appellate Panel erred in awarding Respondent lifetime causally related medical care under subsection 42-15-60(C) of the South Carolina Code (2015) including a future reverse head total joint arthrosis of the shoulder.

Under subsection 42-15-60(C):

> In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital, and other treatment or care shall be paid

> during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.

As previously stated, the Appellate Panel ordered Appellants to provide all causally related medical care and treatment recommended by the authorized treating physicians including, based on the opinion of Dr. Bruce Steinberg dated May 25, 2018, a "reverse head total joint arthrosis of the left shoulder." (R. pp. 97, 101-102).

Appellants initially note that the Appellate Panel erred in awarding lifetime future medical treatment under subsection 42-15-60(C) because Respondent suffered an injury to only one scheduled member and, therefore, is barred from proceeding under section 42-9-10 for the same reasons discussed in Argument section I. Instead, Respondent should have been awarded future medical treatment under subsection 42-15-60(B) of the South Carolina Code (2015), which provides for future medical treatment in cases of permanent partial disability. Therefore, the Appellate Panel erred in awarding future medical care to Respondent under subsection 42-15-60(C).

Appellants also specifically take issue with the Appellate Panel's finding that Respondent was entitled to the "reverse head total joint arthrosis of the left shoulder" as that finding amounted to an error of law and was against the greater weight of the evidence. (R. pp. 97, 101-102). As was specifically pointed out at the single commissioner hearing (R. p. 276, lines 10-17), and the Appellate Panel hearing, (R. p. 343, lines 6-12), Dr. Steinberg completed a Form 14B on June 24, 2018 after his May 25, 2018 questionnaire wherein he opined that no future medical treatment was reasonably necessary as a result of Respondent's work injury. (R. p. 985). Dr. Steinberg's opinions in this Form 14B are also supported by the medical records from Respondent's visits with him. On March 12, 2018, Dr. Steinberg stated he did not recommend further arthroscopic surgery;

however, "in the future it is possible he may require a reverse head total joint arthrosis." (R. p. 668 (emphasis added)). A medical opinion that future surgery is possible fails to meet the requirement that recommended medical treatment be evidenced by expert medical evidence stated to a reasonable degree of medical certainty. *See* S.C. Code Ann. § 42-15-60(A) (stating the employer shall provide medical treatment beyond 10 weeks after the accident only if such treatment will "tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty"); *Michau v. Georgetown Cnty.*, 396 S.C. 589, 596, 723 S.E.2d 805, 808 (2012) (holding a doctor's report related to causation was a medical opinion and therefore had to be stated to a reasonable degree of medical certainty). Likewise, in his March 30, 2018 report, Dr. Steinberg indicated that he had no further treatment to offer Respondent, which supports the opinions Dr. Steinberg expressed in the June 24, 2018 Form 14B. (R. pp. 674, 985). Consequently, Appellants respectfully assert the Appellate Panel erred in ordering Appellants to provide lifetime causally related future medical treatment under subsection 42-15-60(C) including but not limited to the future reverse total head joint arthrosis.

CONCLUSION

Appellants respectfully assert the Appellate Panel erred in permitting Respondent to proceed under section 42-9-10 because he failed to show a causally-related injury or impairment to his left elbow. Consequently, the Appellate Panel erred in awarding Respondent permanent and total disability benefits under section 42-9-10, and, instead, should have awarded him permanent partial disability benefits under section 42-9-30 for his admitted left shoulder injury. Similarly, the Appellate Panel erred in awarding Respondent lifetime future causally related medical care under subsection 42-15-60(C) including a reverse total head total joint arthrosis of the left shoulder. We therefore ask that the Court of Appeals reverse the Appellate Panel's order and remand the case to the Appellate Panel to render an award of permanent partial disability benefits to Respondent under section 42-9-30 and, if warranted, an award of future medical treatment under subsection 42-15-60(B). As part of the remand, we ask that the Appellate Panel be instructed to refrain from considering vocational evidence in rendering the PPD award under section 42-9-30 consistent with the Supreme Court's finding in *Wigfall*.

Respectfully Submitted,

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September 16, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2020-000351

Gene Grady, Employee, Respondent,

v.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the Brief of Appellants complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

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