

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0822640

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MAY 03 2021

SC Court of Appeals

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

FULL COMMISSION ORDER

This matter comes before the Full Commission on remand from the South Carolina Court of Appeals, *Contreras v. St. John's Fire District Commission*, 2019—UP-040. On February 3, 2021, the parties notified the Commission pursuant to S.C. Code Ann. Reg. 67-712 that the matter was ripe for adjudication.

PROCEDURAL HISTORY

The Hearing Commissioner issued his original Order on August 27, 2013. Appeal was taken by Defendants to the Full Commission, for which oral arguments were held December 16, 2013, and the Appellate Panel issued its Order on May 5, 2014, remanding the case to the Single Commissioner. Claimant appealed the Full Commission's Order to the Court of Appeals, which issued its Order, citing *Bone*, on April 3, 2015. Upon notice of the Order from the Court of Appeals, the Hearing Commissioner (upon remand) issued his second Order on October 22, 2015, from which Claimant appealed. After re-review of the record, the Full Commission issued its

second Appellate Order on May 27, 2016, from which Order Claimant appealed to the Court of Appeals. The Court of Appeals issued its Opinion on January 23, 2019, “vacat[ing] the Appellate Panel’s order” and remanding the case to the Commission for additional findings regarding the (a) shoulder, arm, and clavicle, and (b) amount of temporary partial benefits which Claimant is entitled to receive.

On February 3, 2021, the Commission received notice (See attached letter) from the prevailing party, as required by Regulation 67-712, that the case was being remitted to the Commission from the Court of Appeals. Upon the Commission’s receipt of notice on February 3, 2021, that the Court of Appeals (a) vacated the Commission’s Order, and (b) requested additional findings, the Commission re-reviewed the record and hereby issues the following new Order, in compliance with the directives of the Court to (a) “*make specific findings of fact regarding Contreras’s right arm, right shoulder, and right clavicle*” and (b) “*make specific findings of fact and conclusions of law regarding awarding TPD benefits to Contreras*” [emphasis added].

FINDINGS OF FACT

1. The South Carolina Workers’ Compensation Commission has jurisdiction over this matter.
2. Venue is proper.
3. As to right shoulder compensability, the Defendants admit an injury to the right shoulder arising out of and in the course and scope of Claimant’s employment on October 8, 2008. To the Commission’s knowledge, the compensability/admitted

status of Claimant's right shoulder injury has never been in dispute; therefore, the Commission has never adjudicated or questioned the compensability of the right shoulder. In cases where there is no controversy as to a body part or condition (*i.e.*, where there is a stipulation of the parties as to an admitted body part/condition), the Commission does not make findings as to compensability. However, out of an abundance of caution in order to comply with the Court's directive to make findings regarding the right shoulder, the Commission would point to the Court's attention (a) Defendants' pleadings before the Commission in which Defendants admit a right shoulder injury; (b) Defendants' counsel's stipulations at the original Hearing in May 2013 (*e.g.*, Hearing Transcript, page 4, lines 13-14, as contained in Record, page 534; page 9, lines 9-10, as contained in Record, page 539); (c) the Consent Order of March 19, 2012, wherein the parties agreed that no hearing would be held at that juncture as Claimant was not yet at maximum medical improvement for his "admitted" right shoulder injury; and (d) the fact that Defendants paid for Claimant's four shoulder surgeries (two performed by authorized treating physician Dr. Jaskwhich* on January 29, 2009, and October 1, 2009, respectively; and two performed by authorized treating physician Dr. DeMarco on October 11, 2010, and March 29, 2012, respectively--See operative notes of Drs. Jaskwhich and DeMarco as contained in Record, pages 138-145, 401-402, and 421-423).

*Notwithstanding any pleadings/counsel statements in the record to the contrary (*e.g.*, Record, page 500), Dr. DeMarco did not perform all four of Claimant's shoulder surgeries, as Dr. Jaskwhich's two sets operative notes will attest. Dr. Jaskwhich was an authorized treating physician who performed Claimant's first two shoulder surgeries. The Commission alerts the Court to this fact solely for purposes of accuracy of the record.

4. As to permanency of the right shoulder, the Appellate panel agrees with the 35% permanency award (\$69,435.45) made by the Hearing Commissioner (.35 x 300 weeks per scheduled loss under Section 42-9-30(14) x Claimant's compensation rate of \$661.29). Based upon our review of the Record, including but not limited to the following evidence, we affirm the Single Commissioner's award of 35% to the right shoulder: (a) Dr. DeMarco's 15% impairment rating to the shoulder; (b) although Dr. DeMarco instructed Claimant on the date of maximum medical improvement (August 7, 2012) to return "PRN," that as of the date of the Hearing, Claimant had not returned to Dr. DeMarco—or any other physician—for treatment for Claimant's shoulder injury; (c) Claimant's restrictions from authorized treating physician Dr. DeMarco (50 lbs. two-handed carrying/pushing/pulling; 40 lbs. overhead lifting with both hands; and 20 lbs. overhead with right arm), to which restrictions we accord the greatest weight, rather than those restrictions recommended by a one-time IME in 2011 prior to Claimant's 4th surgery in 2012; (d) the final 7 pages of physical therapy treatment notes (2012) including the physical therapy discharge summary, that speak to objective findings/improvement in Claimant's condition (range of motion and strength) and Claimant's subjective admissions to these providers (e.g., pain reduction and ability to engage in recreational activities), notwithstanding any self-serving Hearing testimony or earlier statements to a vocational expert to the contrary (e.g., Record, page 88). For instance, the physical therapy discharge summary and other physical therapy records state that Claimant's pain at rest is "0/10," and with activity "2/10;" that Claimant has returned to his recreational activities; that Claimant has "achieved all physical therapy goals at 90-100%;" that Claimant made "excellent progress" with shoulder rehab; and

that as to problems as of July 19, 2012, physical therapy providers wrote “none apparent” other than periodic “L shld [unrelated] pain;” (e) that Claimant no longer takes prescription pain medication for his injury (including any prescribed by his own family physician, although Claimant treats with this physician for other conditions such as diabetes and colds); and (f) that Claimant has no driving restrictions, and in fact drives himself to the bowling alley where he works, drives to run errands, and also drives his mother to the store and to her appointments (See e.g., Hearing Transcript, pages 39-41, as contained in Record, pages 569-571; Claimant’s Deposition, pages 23-24 and 30, as contained in Record, pages 455 and 457; Record, e.g., pages 104, 223-229, and 449).

5. As to prescription medication for Claimant’s shoulder injury specifically, Claimant told providers in 2010 that “*It feels fine as long as long as I’m on my Celebrex.*” [emphasis added]. Similarly, when Claimant saw his one-time IME (Dr. Hughes) in 2011, Claimant was still taking Celebrex once a day. However, as of the date of the Hearing, Claimant admitted that he does not take any prescription pain medication for his work injury, whether from his family physician or otherwise; we also find this fact instructive as to the improvement in Claimant’s condition. Prior to the date of the Hearing, as of the date of Claimant’s deposition, pages 27-28, as contained in Record, 456, Claimant had only a few pain patches left, and was using over-the-counter medication only a “a few times a week.” (See Hearing Transcript, page 39, as contained in Record, page 569; Record, e.g., pages 98 and 261).

6. As to the right clavicle and right arm, Claimant pled both body parts. Defendants denied both the right clavicle and the right arm as injured body parts. No body parts other than the right shoulder were admitted by Defendants, whether in pleadings or at the Hearing. We base this finding in part on Hearing Transcript, pages 4, 9, and 12, as contained in Record, pages 534, 539, and 542).

7. As to the right clavicle, we interpret the Hearing Commissioner's Order of August 27, 2013, to show that (a) under "Stipulations," Claimant's only admitted injury is to his right shoulder (Order of Commissioner McCaskill, pages 1-2, as contained in Record, pages 3-4); (b) in his "Statement of the Case," Commissioner McCaskill specifically recognized that the right clavicle was alleged/pled, but denied by Defendants (Order of Commissioner McCaskill, page 2, as contained in Record page 4; Hearing Transcript, pages 11-12, as contained in Record, pages 541-542); (c) in his findings of fact, Commissioner McCaskill specifically set forth or listed the body parts he found injured and therefore compensable: the right shoulder and right arm (Order of Commissioner McCaskill, page 20, Finding of Fact #3, as contained in Record, page 22); (d) the right clavicle was not included in that list of compensable body parts--*expressio unius est exclusio alterius*; (e) Commissioner McCaskill did not hold the compensability of the right clavicle in abeyance or otherwise defer the issue until a later point in time; and therefore, based upon these factors, (f) we find that Commissioner McCaskill found the right clavicle not compensable. **Claimant appealed neither (a) the denial of the compensability of the right clavicle, or (b) any alleged failure on Commissioner McCaskill's part to address the right clavicle although this body part was**

specifically pled, raised at the Hearing, and recognized in the Order as an alleged body part. Further, at the first oral argument before the Appellate Panel on December 16, 2013, the Panel interpreted Claimant's counsel's comments as a concession that-- as the right clavicle is not listed among those body parts Commissioner McCaskill found injured--the clavicle is non-compensable and/or abandoned which is the law of the case, and as such, no longer a body part/condition subject to the Commission's adjudication. We base this finding on the colloquy between Commissioner Beck and Claimant's counsel, as located in the Appellate Hearing Transcript, pages 13-14 (Record, pages 593-594, dated December 16, 2013), as set forth below:

COMMISSIONER BECK: The [Single/Hearing Commissioner's] order only addressed right shoulder and right upper extremity, that I see. I don't see anything in here with regard to the clavicle.

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

COMMISSIONER BECK. Your argument that the clavicle as another body part, while it may be dispositive at a hearing, it's sort of --the law of the case is [sic] not in here.

MR. CHRISTMAS: Sure.

COMMISSIONER BECK: Would you disagree with that?

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

COMMISSIONER BECK: *So we've got [before the Appellate Panel] right shoulder and right upper extremity. And I assume by the right upper extremity, you're referring to the bicep?*

MR. CHRISTMAS: Yes, Sir. [emphasis added].

See *also* Record, *e.g.*, pages 595-596. There was no assertion made during oral argument that the issue was deferred/preserved and subject to a future Hearing as to compensability. The Panel believes it would be procedurally improper to rule on additional body parts not found as compensable/injured, unless a hearing commissioner's (a) denial of compensability is appealed, or (b) failure to address a pled body part is appealed. However, if the Court's instruction is for the Appellate Panel to adjudicate the compensability of the right clavicle, we would make the following substantive findings of fact:

- (a) The shoulder is the situs of the injury, a finding we base upon the greater weight of the evidence; if the right clavicle is implicated, it is in an incidental way for reasons set forth *infra*;
- (b) No diagnostic study of the right clavicle itself (*e.g.*, an x-ray of the right clavicle) has ever been ordered by any physician, including but not limited to Emergency Room providers on the date of the accident, authorized treating physician Dr. Jaskwhich (who performed the first two shoulder surgeries), or Dr. DeMarco (who performed the second two shoulder surgeries); only Claimant's right "shoulder" has been x-rayed (diagnostic test labeled as "shoulder" x-ray); and the only MRI's in evidence were ordered for Claimant's right "shoulder" (Record, *e.g.*, page 150; page 175: "here for follow up of his *right shoulder MRI*"; [emphasis added]; page 403: "MRI RIGHT SHOULDER [emphasis supplied]; page 443

- ("XR shoulder"); and page 445: "MRI OF THE RIGHT SHOULDER" [emphasis supplied]);
- (c) When Claimant completed Employer's accident report, under "What was the injury or illness? Tell us the part of the body that was affected and how it was affected; be more specific than 'hurt,' 'pain,' or 'sore.'" Claimant wrote: "My *right shoulder*. I feel pain in the back and top of my *shoulder*" (Record, page 344);
 - (d) Although not dispositive, the First Report of Injury contains no mention of the right clavicle, and instead states that Claimant hurt his right *shoulder* while lifting weights [emphasis added] (Record, page 347);
 - (e) The "Incident Investigation Report: contains the statement that Claimant "felt something pull in his right *shoulder*" [emphasis added] (Record, page 348);
 - (f) In medical intake sheets completed by Claimant, Claimant never mentions his right clavicle as injured or painful or as the location of pain; by contrast, Claimant instead describes his problem/injury and its "Location" as the "shoulder" or "right shoulder" (Record, e.g., page 415);
 - (g) The only subjective reference to the right clavicle itself that we locate in **treatment** records is in January 2011 ("tenderness" in clavicle), just a few months after Claimant's 3rd surgery, involving "acromioclavicular joint resection"-- but as part of an operation specifically described as to the "right shoulder" (Record, pages 119 and 140);
 - (h) On January 21, 2011 (after Claimant's 3rd surgery in 2010—which 3rd surgery involved the right clavicle resection--Dr. Demarco assigned a 7% *right upper extremity rating "which converts to [an] 11 percent right shoulder impairment"*

[emphasis added]. We find it instructive that there is no additional impairment for the right clavicle attached to this narrative treatment note. Nor in Dr. DeMarco's addendum does he assign an impairment to the right clavicle (Record, e.g., pages 118-119, 331, and 408).

- (i) Dr. DeMarco's second impairment rating (May 2011), as stated on the Commission's Form 14B, is 11% to the right shoulder; and no other body part is indicated as affected, including but not limited to the right clavicle (Record, page 100).
- (j) On the date of maximum medical improvement after Claimant's 4th and final surgery (August 7, 2012), Dr. DeMarco assigned a 9% impairment rating, with no mention of the right clavicle as impaired, disabling, or complained of (Record, page 104);
- (k) On the same date (August 7, 2012), Dr. DeMarco listed, under both "Assessment" and "Treatment," only "Shoulder pain"—there is no reference to or mention of right clavicle pain or other clavicle problem under these categories (Record, pages 103-104);
- (l) On September 4, 2012, Dr. DeMarco's Form 14B (to which Commission Form we give great weight) states that as to "Body part(s) injured," it is Claimant's "Rt. Shoulder;" and as to "Body part(s) affected:" **Dr. Demarco did not include the right clavicle, although there was a blank for this physician to write in or otherwise include the right clavicle.** In this document, Dr. Demarco states that Claimant has a 9% right upper extremity impairment rating, which rating Dr. DeMarco converts to a 15% shoulder rating (Record, page 449).

- (m) In the “check-the-box” questionnaires (October 2012) sent by Claimant to the authorized treating physician, there are no causation/aggravation statements with regard to the right clavicle in either items (1) or (2); we give greater weight to this evidence from the authorized treating physician than we give to the causation opinion from Claimant’s one-time IME who evaluated Claimant prior to the date of (i) Claimant’s last surgery, (ii) physical therapy discharge notes, and (iii) maximum medical improvement (Record, pages 101-102; *See also* Record, pages 94-95);
- (n) Claimant’s vocational evaluator states that Claimant “continues to have pain in his right *shoulder*” and which radiates *up to the top* of his right *shoulder* [emphasis added]. We cannot locate in this report where Claimant himself separately and subjectively refers the evaluator to his “*clavicle*.” However, as far as any practical or functional limitations are concerned, Claimant’s condition has clearly improved since the date of his vocational assessment: Claimant told his vocational evaluator (in 2011) that he is no longer able to bowl or fish, a statement inconsistent with Claimant’s abilities as later expressed to other providers that he has returned to recreational activities (2012) and an admission at his deposition (2013) that he has “sort of cut down on [fishing]” and that jetties are “*where I like* [present tense] *to go*”—*i.e.*, not “*liked*” to go or “*used*” to go [emphasis added]. Additionally, we note that Claimant admitted to Dr. Hughes that he does in fact bowl (Record, page 98), but Claimant inconsistently told his vocational evaluator, just four days later (Record, pages 87-88), that he cannot bowl and even “*cannot allow his right arm to swing naturally*” [emphasis added]

(e.g., Record, pages 86-93, dated 2011; Cf. Record, page 98: able to do some bowling, dated 2011; page 223: returned to recreational activities, dated 2012; page 456, dated 2013); and

- (o) Claimant takes no prescription medication for his right clavicle, a finding we base on Claimant's admission that he takes no pain medication for his work related condition, although he treats with a family physician for other conditions/illnesses such as diabetes and colds (Hearing Transcript, page 39, as contained in Record, page 569, lines 21-23; Record, page 455).

8. As to the right arm, we find the following:

- (a) The situs of the injury is the shoulder, a finding we base on the greater weight of the evidence, including but not limited to the specific evidence cited herein;
- (b) No specific or separate diagnostic study of the arm/humerus/radius/ulna/bicep muscle itself has ever been ordered by any physician in this case--whether by x-ray or MRI, and whether before or after Claimant's surgeries; the only diagnostic studies ever ordered for Claimant are labeled for the "*shoulder*" or "*right shoulder*" after "*Injury to shoulder*" (e.g., Record, pages 146 and 149-150; page 175: "here for follow up of his *right shoulder MRI*; [emphasis added]; page 403: "MRI RIGHT SHOULDER [emphasis supplied]; page 443 ("*XR Shoulder*"); and page 445: "MRI OF THE RIGHT SHOULDER" [emphasis supplied]);
- (c) Claimant's 2008 shoulder MRI, as interpreted by both Dr. Thesing and authorized treating physician Dr. Jaskwhich, does not identify a "biceps"

injury: Dr. Thesing found “1. Supraspinatus tendinitis but no evidence of a full thickness rotator cuff tear. 2. Probable superior labral tear; and 3. Moderate AC joint arthrosis.” Dr. Thesing lists no pathology with regard to the biceps tendon; similarly, Dr. Jaskwhich (the authorized treating orthopedist), upon his review of this MRI, identified a labral tear, but did not document any biceps pathology (See e.g., Record, pages 149, 175, and 403);

- (d) For Claimant's first surgery (January 2009), a right shoulder arthroscopy, the pre-operative diagnosis was “right shoulder pain” and SLAP tear; the post-operative diagnosis is the same. During surgery, the authorized surgeon specifically examined Claimant's biceps tendon and documented the fact that “*The biceps tendon itself was intact*” and that “Care was taken to avoid undue tension on the biceps tendon;” the anesthesiologist also refers to Claimant's surgery as “*right shoulder arthroscopy*” [emphasis added] (Record, e.g., pages 144, 153, and 401);
- (e) As to the August 2009 MRI, Dr. Jaskwhich (the authorized treating orthopedist) interpreted the MRI as showing, other than the labral pathology, “no other abnormality noted except for some tendinosis in the rotator cuff;” although the radiologist had noted some “mild” tendinopathy of the intra-articular portion of the biceps tendon, Dr. Jaskwhich did not so opine, and Claimant's subsequent surgery (as referenced in the next item) showed that the tendon was intact with no documented issue (Record, pages 146 and 169);

- (f) Claimant's second surgery (October 2009) was also labeled a "*right shoulder*" arthroscopy during which surgery the biceps tendon itself was examined again and found to be "intact," and the biceps was also "intact with no evidence of tearing" [emphasis added] (Record, page 142);
- (g) On the intake sheet Claimant completed at his first visit with Dr. DeMarco (2010), Claimant wrote that as to the "Location" of his "problem/injury" was his "right shoulder." As to the description of his problem, Claimant wrote "shoulder pain;" under "nature of the injury," Claimant wrote "shoulder pain, pressure, popping." Under "Other medical problems:" Claimant did not write "arm" or "biceps;" he left this line blank. To the question, "What is the most active thing you do with your arms, *i.e.*, sports, chores, home repair or work related activity?", Claimant wrote "*work on computer, bowling, fishing*" [emphasis added] (Record, *e.g.*, pages 134-136; Hearing Transcript, page 32, lines 2-3, as contained in Record, page 562, as to Claimant's right hand dominance).
- (h) During the 2010 shoulder surgery (Claimant's 3rd—the first one performed by Dr. DeMarco), Dr. DeMarco documented that "The biceps was pulled and the joint seemed to be completely normal." Some scar tissue interfered with the biceps gliding in and out of the bicipital groove, but after "good debridement," he was "able to see that in full internal and external rotation there was no undue pulling on the biceps like it was at the beginning of the case prior to the resection." (Record, pages 140-141 and pages 421-423). Dr. DeMarco later wrote (Record, page 114) that during this 3rd surgery, he had "pulled in as

much of the biceps into the joint, and this is typically what we do, and in that region it appeared normal and so I did not decide to look further or release anything” (See *also* page 98, wherein Dr. Hughes also noted that during this 3rd surgery, the intra-articular biceps tendon was found to be “intact”);

- (i) Because Claimant was left with some causally-related bicep pain after the 3rd surgery, Dr. DeMarco performed a 4th surgery: the Appellate Panel finds instructive the fact that Dr. DeMarco wrote that the 4th surgery (including the “right shoulder long head biceps tenodesis”) is “absolutely the last thing that can be done *in the shoulder...*” [emphasis added]. During the surgery, Dr. DeMarco noted a “very small area” of grade II changes of the upper anterior humeral head, but the remainder of the cartilage was within normal limits. He noted some tendinopathic changes of the biceps and in his repair, “applied gentle fixation to the tendon” (Record, pages 114, 138-139, and 406);
- (j) On January 21, 2011, the date of Dr. DeMarco’s first impairment rating, he assigned an 11% permanent **right shoulder** impairment and converted to/from both a 7% right upper extremity and 4% whole person rating (Record, pages 118-119, 331, and 408);
- (k) In May 2011 (after Claimant’s 3rd shoulder surgery), Dr. DeMarco assigned a second impairment rating, as stated on the Commission’s Form 14B, as **11% to the “right shoulder” with no other body part listed as affected** [emphasis added] (Record, page 100);
- (l) After Claimant’s 4th shoulder surgery, his condition improved, a finding we base upon the clinical treatment findings of Dr. DeMarco in his last two

narrative treatment notes (June 26, 2012, and August 7, 2012--date of MMI). On June 26, 2012, Claimant was using Celebrex and Flector patches but reported that his pain was "*minimal*" but with some "*spasms*" around his bicep; however, Dr. DeMarco's "Assessment" and "Treatment" both refer to Claimant's shoulder only, as "The upper extremity was grossly neurologically and vascularly intact. Motor function was also intact distally" (Record, pages 105-106). On August 7, 2012—the date of MMI and the last date Claimant saw Dr. DeMarco--**Dr. DeMarco also found Claimant's upper extremity gross neurologically and vascularly intact. Dr. DeMarco's only Assessment" on this date (located on page 2 of this record) was "Shoulder pain" [emphasis added].** Claimant reported that he was "doing well" (Record, pages 103-104);

- (m) In his narrative note of August 7, 2012 (after the last of Claimant's shoulder surgeries), Dr. DeMarco assigned a 9% impairment rating, of which rating Dr. DeMarco attributed 3% to biceps atrophy. We find instructive that Dr. DeMarco again refers to Claimant's last surgery as the second surgery Dr. DeMarco performed on "*this shoulder*" [emphasis added] (Record, pages 103-104);
- (n) On September 4, 2012, Dr. DeMarco completed the Commission's Form 14B, which states that as to "**Body part(s) injured,**" Dr. DeMarco wrote "**Rt. Shoulder,**" and under "**Body part(s) affected,**" Dr. DeMarco listed no others (*i.e.*, the line is left blank as to other body parts affected). Dr.

DeMarco specifically converted Claimant's 9% right upper extremity impairment rating to a 15% shoulder rating (Record, page 449);

- (o) We find instructive Claimant's statement to his vocational expert that in the mechanics of the injury, Claimant "felt a 'pop' with significant pain in his *right shoulder*" [emphasis added] (Report of Hutchinson, page 2, dated October 12, 2011, as contained in Record, page 87). As of the time of the evaluation, the vocational expert goes on to say that Claimant "continues to have pain in his *right shoulder* that he described as 'stabbing' with 'sharp' pain *radiating up to the top of his shoulder*" (Page 2 of the Report, as contained in Record, page 87); by contrast, the check-the-box questionnaires provided by Claimant inconsistently state that Claimant's shoulder pain radiates *downward* "into his right biceps" [emphasis added] (Record, pages 101-102);
- (p) All four surgeries that Claimant underwent are, in their captions/descriptions, labeled both pre- and post-operatively as "*Right shoulder*" procedures (including but not limited to "Right shoulder long head of biceps tendinopathy"); similarly the pre- and post-operative diagnoses begin with the words "*Right shoulder*" [emphasis added] (Record, pages 138-145 and 421-423);
- (q) We give great weight to the fact that Claimant has not returned for treatment with Dr. DeMarco since August 2012 for his right "arm" or "bicep." Nor is there any other evidence in the record that Claimant has sought any further treatment whatsoever with any other physician for his right "arm" and/or "bicep" (Record in its entirety);

- (r) We considered Claimant's "check-the-box" questionnaires, sent by Claimant to the authorized treating physician, but note that these questionnaires were not part of or in response to or accompanied by any clinical treatment visit. We are mindful of the fact that these questionnaires do state that there was an injury and/or aggravation to the right biceps, but then qualify that statement by saying the affect is radiating pain and tenderness "into" the right biceps; the Appellate Panel finds this check-off response inconsistent with Claimant's subjective complaint to his vocational expert, whose 2011 report states that Claimant reported that his pain radiates upwards. The questionnaires are also inconsistent with Dr. DeMarco's 14B's to which we give great weight (Record, pages 87, 100-102, and 449);
- (s) During the time of Claimant's one-time IME (2011), Claimant was still taking Celebrex; however, after the 4th and final surgery, Claimant had stopped taking Celebrex. By May 2012, in a narrative treatment note, Dr. DeMarco states that Claimant has stopped taking Celebrex, that he was "doing very well and is making improvements;" the assessment is "shoulder pain;" and Claimant was still, however, using Flector patches for *morning* pain over the biceps [emphasis added]. By the date of his deposition (2013), Claimant was no longer taking Celebrex. By the date of the Hearing in 2013, Claimant was not using prescription pain medication, including any prescribed by his family physician, although Claimant undergoes treatment with his family physician for other maladies and illnesses (*e.g.*, Hearing Transcript, page 39, as contained in Record, page 569; Record, pages 107-108);

- (t) We also considered and are therefore mindful of the fact that Claimant received an injection into his biceps tendon--in May 2010 (prior to his third surgery). This injection was administered after Claimant reported pain after *working in his yard and "thinks he may have aggravated the shoulder"* [emphasis added] (Record, page 164); and
- (u) As far as any practical or functional limitations are concerned, Claimant's condition has clearly improved since the date of his vocational assessment in 2011: Claimant told the vocational evaluator that he is no longer able to bowl or fish, a statement inconsistent with Claimant's abilities as later expressed to other providers that he has returned to recreational activities (2012) and an admission at his deposition (2013) that he has "sort of cut down on [fishing]" and that jetties are "*where I like* [present tense] *to go*"—*i.e.*, not "*liked*" to go or "*used*" to go [emphasis added]. Additionally, we note that Claimant told Dr. Hughes that he does in fact bowl (Record, page 98), but just 4 days later Claimant inconsistently told his vocational evaluator (Record, pages 87-88) he cannot bowl and even "*cannot allow his right arm to swing naturally*" [emphasis added] (*e.g.*, Record, pages 86-93, dated 2011; Record, page 98: able to do some bowling, dated 2011; page 223: returned to recreational activities, dated 2012; and page 456, dated 2013).

9. As to any other part of the right arm (*i.e.*, not the biceps area), Dr. DeMarco found that Claimant's "elbows, wrists, and neuro reveal full range of motion appropriate for the patient's age without tenderness, effusion, instability, ecchymosis, edema, atrophy or spasticity." After Claimant's final surgery, there are no deficits noted at the elbows or

wrists; Dr. DeMarco in treatment records found the *upper extremity* to be “neurologically and vascularly intact. Motor function was also intact distally” [emphasis added] (Record, e.g., pages 106-108, 110, 112, and 114).

10. As to both the right arm and right clavicle, we give the greatest weight to the treatment records accompanied by a clinical visit, rather than to check-the-box questionnaires sent by Claimant and for which there was no accompanying clinical visit and/or narrative treatment note. For instance, in the last narrative treatment note from Dr. DeMarco of August 7, 2012 (the date of maximum medical improvement), Dr. DeMarco’s “Assessment” was “Shoulder pain” (under this particular heading), and the “Treatment” heading lists only “Shoulder Pain” as well. As part of the impairment rating to the right shoulder, Dr. DeMarco assigned 3% for biceps atrophy and 1% for **pain/spasm** [emphasis added]. This appears to the Appellate Panel to be the extent of any incidental involvement regarding the arm with nothing specifically regarding the clavicle (Record, pages 103-104 and 404-405).

11. As to both the right arm and right clavicle, we considered Claimant’s one-time IME opinion (Dr. Hughes—who provided no treatment in this case), but find that (a) the report was created prior to Claimant’s final surgery and recovery; and (b) we cannot ignore or overlook the fact that Dr. Hughes specifically states in his opening paragraph under “HISTORY OF PRESENT ILLESS [SIC]:” “I have been asked to perform an independent medical evaluation for the right *shoulder*”—as to the situs of the injury, we find it instructive that Dr. Hughes was not asked to perform an independent medical

evaluation for the "clavicle" or "arm" or "biceps." [emphasis supplied; emphasis added]. Dr. Hughes in the second paragraph of the report states that Claimant "*injured the shoulder*" (*i.e.*, no other body parts are referenced in this narrative as injured) when Claimant was lifting weights at work [emphasis added]. In an accompanying "check-the-box" questionnaire dated October 6, 2011 (the same date as the right shoulder IME evaluation), Dr. Hughes checked off that Claimant's injuries to his right shoulder, right upper extremity, right biceps and right clavicle were caused by and/or aggravated by the accident. In the next "check the box" statement, Dr. Hughes clarifies that the right shoulder injury "affects the right upper extremity *by way of pain and tenderness into* his right biceps and clavicle," which we interpret as radiating pain and tenderness from the shoulder. However, Dr. Hughes provides no impairment in the blank after "RIGHT UPPER EXTREMITY" (as to any percentage for arm/biceps) and rates the right clavicle as to the "A-C joint" as 10% to the upper extremity [emphasis added] (Record, pages 94-99).

12. As to the right arm and right clavicle, when Claimant was deposed in late April 2013 (approximately 8 months after he reached MMI and received his last treatment with any physician), Claimant initially answered the question "Now, have you injured any other body parts other than your right shoulder?" Claimant did not answer arm, biceps, or clavicle, and instead only answered "right shoulder" and his previous (unrelated) left shoulder workers' compensation injury. Only in later testimony did Claimant add his right biceps, but he did not include his right clavicle (Claimant's Deposition, page 24, lines 6-8, as contained in Record, page 455; Deposition, page 25, as contained in

Record, page 456; *Cf.* pages 37-38 of the deposition, when Claimant was later questioned by his counsel; *See also* Hearing Transcript, pages 34-35, as contained in Record, pages 564-565).

13. As to the right arm and right clavicle, when Claimant was completing his state disability form in November 2010, Claimant was asked "What is your injury or sickness?" Claimant wrote "torn labrum" which occurred while "lifting weights" at work. Claimant did not mention or list his arm, biceps, biceps tendon, or clavicle (Record, *e.g.*, page 232).

14. As to the right arm and right clavicle, when Claimant reached MMI (August 7, 2012), the last narrative treatment (See "History of present illness"), Claimant presented for follow up on his right *shoulder*--not his right clavicle and/or biceps. Claimant was noted to be doing well, and that his only issues were some muscles [sic] spasms and pain "*if he leans on his arm* but nothing terrible;" Claimant had already stopped taking the Celebrex but was still using Flector patches [emphasis added] (Record, page 103).

15. As to the right arm and right clavicle, by the date of the 2013 Hearing, Claimant was not using any prescription pain medication (Hearing Transcript, page 39, as contained in Record, page 569).

16. As to the right arm and right clavicle, we find that there is no functional disability or loss of use in addition to that which Dr. DeMarco encompassed within his 15%

shoulder rating, and which we find included in our 35% award (\$69,435.45) to the right shoulder. Even prior to the 4th surgery, Claimant is documented as able to engage in recreational bowling, one of Claimant's hobbies (Record, *e.g.*, page 98). As of the date of the Hearing, Claimant continues to work at a bowling alley where he has done so for the previous 12 years (Hearing Transcript, pages 35, 39, and 43, as contained in Record, pages 565, 569, and 573). As Claimant's specific duties as front desk clerk at the bowling alley require him to check customers in, rent shoes, and coordinate leagues--nowhere in the record is there any evidence that Claimant is required to bowl or demonstrate any bowling technique---the greater weight of the evidence shows that Claimant bowls on a voluntary, recreational basis--and not as a requirement of employment. Similarly, according to the physical therapy discharge records after Claimant's 4th and final shoulder surgery, Claimant "demonstrates a return to his recreational activities," evidence to which we give greater weight than self-serving statements, previous statements, or testimony at the Hearing to the contrary. For instance, one physical therapy record dated prior to the 4th surgery states that Claimant bowled with a 12-lb. ball during which activity Claimant felt "stiff but no [increased] pain." In contrast to the physical therapy discharge notes stating that Claimant had returned to recreational activities, Claimant inconsistently told his vocational evaluator in October 2011 that he is no longer able to bowl or fish, which statement we find unsupported by the records cited in this finding as well as by Claimant's deposition testimony in which he testified that he has "cut back" on fishing. Alternatively, we find that Claimant's condition greatly improved after the date of his vocational evaluation. It does not seem reasonable to the Appellate Panel that a person who (a) is able to bowl with his injured

arm (as even Dr. Hughes documented in 2011), and (b) has returned to bowling recreationally (as physical therapists documented in 2012), has a physical deficit of significance with regard to either Claimant's right arm or right clavicle. We give greater weight to these physical therapy records as to Claimant's functional improvement and abilities than we give to any self-serving statements/testimony to the contrary. The treatment records speak to the shoulder as the (a) situs/source of Claimant's injury/condition, (b) labeled operative procedures which Claimant underwent, and (c) diagnostic testing Claimant underwent (medical evidence in its entirety; *See also e.g.*, Claimant's Deposition, pages 7-9, as contained in Record, pages 451-452; Claimant's Deposition, page 26, as contained in Record, page 456; Record, *e.g.*, pages 86-93, 98, 223, and 234).

17. As to the right arm and right clavicle, we also find it instructive as to any additional impairment or involvement of another body part that the record before the Panel is devoid of any evidence that Claimant has returned to Dr. DeMarco since August 7, 2012 (MMI), with any complaints and/or for treatment for either the right arm or right clavicle, although Dr. DeMarco had advised Claimant to return for treatment as needed. In fact, Claimant admits that he has not returned to Dr. DeMarco for treatment for his shoulder (or biceps/arm or clavicle). Nor is there any other treatment record in evidence from any other physician—whether personal, authorized, or IME--showing that Claimant has sought treatment for either his right arm or right clavicle since he was released at maximum medical improvement (Hearing Transcript, page 39, lines 15-20, as contained in Record, page 569; Record in its entirety).

18. Claimant has an average weekly wage of \$1,174.20, making for a compensation rate of \$661.29, the maximum compensation rate for 2008.

19. Claimant was 51 years old at the time of the 2013 hearing.

20. Claimant is a high school graduate (1979).

21. Claimant is a US Army veteran who was honorably discharged.

22. All of Claimant's jobs prior to his work at the fire department were physical in nature.

23. Claimant's job at the fire department which he held for over twenty-two years is physical by description.

24. Dr. James DeMarco, the authorized treating physician, states on the Form 14B (dated 05/16/11) that Claimant is unable to return to work at his employment with the St. John's Fire District Commission.

25. Dr. DeMarco's opinion is corroborated by Jean R. Hutchinson, M.Ed., who is a certified rehabilitation counselor and is certified in vocational evaluation. Dr. Charles

Hughes (Claimant's IME) also opines that he does not think the Claimant can return to his prior employment.

26. Defendants did not submit a vocational evaluation. However, as we are specifically instructed to make findings regarding the right shoulder, we find that Claimant's right shoulder has improved since the date of the 2011 vocational evaluation, based upon evidence from 2012 (*e.g.*, physical therapy notes) and 2013, as referenced herein, although not to the extent that Claimant can return to his heavy job with Employer.

27. Claimant reached maximum medical improvement as of August 7, 2012.

28. Claimant has suffered 35% permanent partial disability to his right shoulder, equating to an award of \$69,435.45.

29. Based upon the evidence set forth herein, **we conclude that any effect of Claimant's right shoulder injury on Claimant's right clavicle and/or right arm is (a) incidental, and (b) functionally inconsequential, and in any event a part of and encompassed within our 35% award to the right shoulder.**

30. The Hearing Commissioner's prior Orders with regard to (a) future medical care as recommended by the authorized treating physician, and (b) his other findings not inconsistent with the findings in this Appellate Panel Order, are hereby affirmed.

31. As to the location of any evidence in the Record referenced herein, the Commission will provide, upon the Court's request, any additional citations for the Court's convenience and review prior to the issuance of the Court's order. See *Burnette v. City of Greenville*, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012): "*Because no evidence indicates ... we are forced to conclude ...*" [emphasis added].

32. As to temporary partial disability benefits, we find that Claimant is entitled temporary partial disability benefits in the amount of \$47,412.65, for the period of January 22, 2011 (the day after the day Claimant last worked for Defendant-Employer) until August 7, 2012 (date of maximum medical improvement). This finding is based upon the following figures/calculations: (a) January 22, 2011 to August 7, 2012 = 563 days or 80 and 3/7 weeks; (b) Claimant's average weekly wage: \$1,174.21; (c) Claimant's actual earnings at secondary/concurrent bowling alley job per records from 1/22/11 to 8/7/12 were \$290.00 per week; (d) Claimant is entitled to 66 2/3% of the difference between his pre-accident average weekly wage minus his actual earnings for the period of TPD: $\$1,174.21 - \$290.00 = \$884.21$. (AWW minus actual weekly earnings); (e) $\$884.21 \times .6667 = \589.50 (difference between AWW and actual earnings, multiplied by .6667); and (f) $\$589.50 \times 80 \frac{3}{7} = \$47,412.65$.

33. In addition to his permanency award of \$69,435.45 for the right shoulder, Claimant is entitled to \$47,412.65 in temporary partial disability benefits.

RULINGS OF LAW

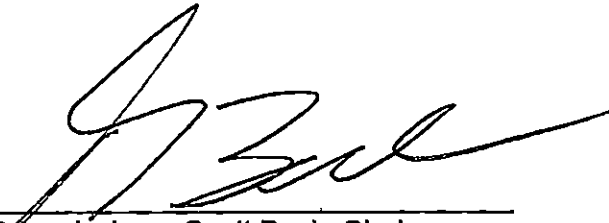
The following sections of the South Carolina Code of Law give the appropriate definition of divisions of the South Carolina Workers' Compensation Act as applicable to this case:


1. S.C. Code Ann. Regs. 67-712 requires that "[t]he prevailing party shall . . . notify the Commission in writing when a final order issued by the courts on appeal remits jurisdiction to the Commission."
2. S.C. Code Ann. § 42-1-40 is applicable as it defines 'average weekly wages'.
3. S.C. Code Ann. § 42-9-20 provides the amount of compensation for partial disability. South Carolina Code Section 42-9-30 governs schedule of period of disability and compensation.
4. S.C. Code Ann. § 42-9-30(14) provides the scheduled period of disability for the loss of use of the shoulder.

ORDER

IT IS HEREBY ORDERED AND DECREED that Claimant is awarded 35% permanency to the right shoulder (105 weeks of compensation) equating to \$69,435.45. This award encompasses and includes any incidental effect on Claimant's right clavicle, right bicep, and/or right bicep tendon. Claimant is not entitled to receive separate awards for either the right arm or right clavicle.

IT IS HEREBY ORDERED AND DECREED that Claimant is additionally entitled to temporary partial disability benefits in the amount of \$47,412.65.

By: 
Commissioner Scott Beck, Chair

By: 
Susan S. Barden

By: 
Commissioner Aisha Taylor