THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2021-000683

Thomas Contreras, Claimant, ... Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred in reversing the Single Commissioner § 42-9-20 disability award and limiting disability compensation to the shoulder, despite overwhelming evidence of injury to multiple scheduled body parts (shoulder, arm, and clavicle).

2. Whether the 2021 Appellate Panel erred in substituting its judgment for the 2014 Appellate Panel.

3. Whether the Appellate Panel erred in failing to award compensation under § 42-9-20 when Appellant suffered a permanent loss of earnings capacity from distinct injuries resulting in physical affect and impairment to multiple scheduled body parts (shoulder, arm, and clavicle).

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries to the right arm, shoulder and clavicle sustained by the Appellant, Thomas Contreras, on October 8, 2008 in his employment with the St. Johns Fire District (hereinafter "St. John's."). St. John's accepted Contreras's claim and began providing various benefits under Title 42, the Workers' Compensation Act. Contreras received medical treatment primarily from Dr. David Jaskwich and Dr. James DeMarco. Contreras underwent 4 operations – all for the shoulder, with the last including surgery to the arm itself (the long head of the biceps muscle). [R.P. 258-259). As a result of these injuries, Contreras is unable to return to his previous employment as a firefighter. He reached MMI on August 7, 2012.

On February 12, 2013, Contreras filed a Form 50 (Employee's Request for Hearing) seeking additional medical treatment and disability compensation. He specifically alleged he had suffered a permanent loss of earnings capacity as defined under S.C. Code Ann. § 42-9-20 (2007). [R.P. 118-119].

St. John's timely filed a Form 51(Employer's Answer), admitting a "right shoulder injury only." [R.P. 120].

A hearing was held before Commissioner Gene McCaskill on May 14, 2013. Contreras testified on his own behalf. Evidence was presented regarding medical treatment, the extent of injuries and impairment, and vocational evidence establishing Contreras' injury related loss of earnings capacity.

Commissioner McCaskill issued a Decision and Order on August 27, 2013, making the following pertinent findings of fact:

> That, I find, that on or about October 8, 2008, Claimant suffered injury by accident arising out of and in the course and scope of employment, wherein he injured his **right shoulder and right upper extremity**. [R.P. 22, Finding of Fact #3 (emphasis added)].
>
> That, based on the record as a whole, I conclude the greater weight of the evidence, dictates that the Claimant has suffered permanent partial wage loss, pursuant to S.C. Code Ann. § 42-9-20. [R.P. 25, Finding of Fact #23].

Based on these findings, Commissioner McCaskill ordered St. John's to pay 340 weeks of permanent partial disability to Contreras, along with providing ongoing post-MMI medical treatment.

St. John's timely filed a Form 30 (Notice of Appeal) on September 3, 2013. [R.P. 121].

The Appellate Panel heard oral arguments on December 16, 2013. The Appellate Panel issued a Decision and Order on May 5, 2014. The Appellate Panel affirmed in part, reversed in part and remanded to the jurisdictional Commissioner for a determination of an award to the Claimant's right shoulder under 42-9-30. [R.P. 36-52].

Specifically, the Appellate Panel deleted the injury to the right upper extremity in Commissioner McCaskill's finding of fact #3, changing it to read: "Claimant suffered an injury to his right shoulder on October 8, 2008 in the course and scope of his employment." [R.P. 46, Finding of Fact 4]. Although still finding Contreras had proven an actual loss of earning capacity, the Appellate Panel reversed the award for lost earning capacity based on the injury being limited to the shoulder alone. As such, the Appellate Panel held the award should be made under the scheduled member statute, section 42-9-30, rather than under Section 42-9-20.

The Panel also added five other findings relevant to this appeal:

> That Dr. DeMarco, the authorized treating orthopedic surgeon, issued a rating on August 7, 2012. Dr. DeMarco found that the Claimant had a 9% permanent partial impairment to the shoulder and that **this included 3% biceps atrophy**, 3% for loss of internal rotation, 2% for loss of forward flexion and 1% for pain and muscle

> spasm. There is no separate rating to the upper extremity. [R.P. 47, Finding of Fact 7 (emphasis added)].
>
> Dr. Hughes, an orthopedist, performed an IME at the Claimant's request and issued a 14% permanent impairment rating to the Claimant's right shoulder and a 10% rating for the clavicle injury. [R.P. 47, Finding of Fact 8].
>
> That the Single Commissioner did not find the clavicle compensable and that issue was not appealed. [R.P. 47, Finding of Fact 10].
>
> That the Claimant's injury is limited to the right shoulder. [R.P. 50, Finding of Fact 32].
>
> Claimant is entitled to an award under 42-9-30 for the right shoulder. [R.P. 50, Finding of Fact 33].

Additionally, the Appellate Panel held Appellant "is entitled to a lump sum payment for any and all past due temporary partial disability benefits." [R.P. 49, Finding of Fact 27]. However, the Panel eliminated a specific finding of fact supporting the award and made no findings of its own as to what the award should be.

On June 3, 2014, Contreras timely filed his Notice of Appeal to the Court of Appeals. The Court dismissed the appeal as interlocutory pursuant to Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). [R.P. 53-54].

The Appellate Panel then remanded to the original Single Commissioner, Commissioner McCaskill. The Single Commissioner issued a Decision and Order on October 22, 2015, wherein he found Contreras had suffered a 35% permanent partial disability to his right shoulder. [R.P. 62]. The Single Commissioner added he was limited by the remand instructions strictly to addressing permanent partial disability to the right shoulder. He therefore did not address the past due temporary partial disability benefits.

Contreras timely filed his Form 30 (Notice of Appeal) to the Full Commission on November

3, 2105. [R.P. 123-125].

The Appellate Panel issued its Decision and Order on May 26, 2016 fully affirming the Single Commissioner's Order on remand – including the holding that temporary partial could not be addressed. [R.P. 63-71].

Contreras appealed to this Court. In an unpublished opinion, the Court vacated and remnaded the Appellate Panel's Orders. The Court held "Without specific and definite findings upon the evidence, we must remand because we cannot determine whether the Appellate Panel" findings are unsupported by substantial evidence or controlled by an error of law." The Court remanded with instructions "to the Commission to make specific findings of fact regarding Contreras's right arm, right shoulder, and right clavicle;" and "to make specific findings of fact and conclusions of law regarding awarding TPD benefits to Contreras." Contreras v. St. John's Fire District Commission, Unpublished Opinion No. 2019-UP-040 (S.C. Ct. App. filed January 23, 2019). [R.P. 72-75].

The Appellate Panel issued a wholly new Full Commission Order on June 4, 2021. [R.P. 76-106]. The new Order disregarded the previous orders making different findings of fact. The Appellate Panel "awarded 35% permanency to the right shoulder [which] 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." The Appellate Panel further ordered "that Claimant is additionally entitled to temporary partial disability benefits iin the amount of $29,824.18." [R.P. 104].

This appeal followed.

STATEMENT OF THE FACTS

Thomas Contreras was employed with the St. John's Fire District for twenty-two years, rising to the rank of Captain. He also worked part-time in a bowling alley and as a vending machine tender.

As being a firefighter requires great physical strength and stamina, St. John's requires its employees to engage in physical training. On October 8, 2008, Contreras injured his right shoulder and right bicep while lifting weights at the fire station. [R.P. 146, line 3-p. 147, line14, lines 3-2].

Following the injury, Contreras never returned to fighting fires. After undergoing 4 operations to his shoulder – including one specifically to the biceps in his right arm[1] – Contreras was formally terminated from the Fire Department in January 21, 2011 due to his physical limitations. [R.P. 144, line 9-p.145, line 20; p. 150, lines 12-18].

Dr. David Jaskwich performed the first two surgeries. Dr. James DeMarco performed the last two surgeries.[2] The fourth and final surgery was done on March 29, 2012. Dr. DeMarco described it as "arthroscopic major debridement of intra-articular synovitis with coracoid decompression, subacrominal decompression and bursectomy, and long head of biceps tenodesis."[3] [R.P. 223]. The surgery involved implanting a "biceps tenodesis screw." [R.P. 260]

Contreras described it in layperson's terms: "The fourth surgery was the bicep where he cut

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[1]A "distal clavicle resection" was one of several procedures done in the October 11, 2010 operation. [R.P. 261].

[2]Dr. Jaskwich operated on January 29, 2009 and October 1, 2009. [R.P. 262-265]. Dr. DeMarco operated on October 11, 2010; and March 29, 2012. [R.P. 258-261].

[3]The biceps is a two-headed muscle that lies on the upper arm between the shoulder and the elbow. It is made up of two bundles of muscles - the long head and short head. The surgery was specifically to address "long head of the biceps pain."[R.P. 260].

it up right in here and moved it and screwed it to the bone." Contreras stated he still had pain and permanent problems in both his right shoulder and bicep. [R.P. 149, line 24-p. 150, line 11].

Dr. DeMarco's records confirm that the fourth surgery was specifically intended - albeit unsuccessfully – to alleviate arm pain, specifically "biceps tendinopathy" [R.P. 260-261]. Dr. DeMarco described the scenario at length on November 22, 2011:

> At this point Mr. Contreras continues to complain persistently of **long head of the biceps** and bicipital groove pain. . . . He has failed injections, it has been over a year, he continues having pain, and the 1 thing about him is that he has been completely consistent with where his pain is, directly over the bicipital groove. [The previous surgeries] did help with some of the other pain, but he is left with **biceps pain** which now need to be addressed. This is still considered as workers' comp injury as directly and causely [sic] related to his injury on 10/08/2008. [R.P. 234 (emphasis added)].

Dr. DeMarco definitively confirmed that both the shoulder and arm were injured and affected on October 24, 2012. Dr. DeMarco opined: "Most probably, and to a reasonable degree of medical certainty, Mr. Contreras' injuries to his right shoulder and right upper extremity, (right biceps) are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work." He further opined: "Mr. Contreras' injuries to his right shoulder affects his right upper extremity by way of radiating pain and tenderness into his right biceps as a result of his October 8, 2008 accident at work." [R.P. 221]. Finally, when he did address the permanent impairment rating, he specifically assigned a 3% permanent impairment for "biceps atrophy." [R.P. 224].

The second opinion doctor, Dr. Hughes, agreed. He opined similarly, stating: "Most probably and to a reasonable degree of medical certainty, Mr. Contreras' injuries to his right shoulder, right upper extremity, right biceps and clavicle are caused by and/or aggravated by the injuries he sustained in his October 8, 2008, accident at work." [R.P. 214]. Dr. Hughes added the "injuries to his right shoulder affects his right upper extremity by way of pain and tenderness into

his right biceps and clavicle as a result of his October 8, 2008 accident at work." [R.P. 214].

Dr. Hughes examined Contreras on October 6, 2011 – before the third and fourth surgeries. He assigned impairment ratings of 14% to the arm and 10% to the upper extremity. Notably, he also opined Contreras was limited to 10 pounds lifting due to "Limited strength and endurance secondary to right arm impairment and [acromio-clavicular joint] resection." [R.P. 214-216]. Dr. Hughes assigned the impairment rating and restrictions to the right arm even before the unsuccessful biceps tenodesis.

Both doctors concurred that Contreras is unable to return to work as a fire fighter. Both doctors stated he would need additional post-MMI treatment.

After his medical termination from the fire department in 2011, Contreras continued working part time as a cashier at the bowling alley. He hoped to be offered a manager job, but none was forthcoming. He sought work with the Federal Government and elsewhere, with no success.

Contreras underwent an Employability Evaluation by a certified vocational consultant, Jean Hutchinson, on October 10, 2011. [R.P. 206-213]. The vocational expert reviewed Contreras' physical limitations, work history, education, and transferable skills. She opined:

> I am of the opinion that Mr. Conteres [sic] is unable to perform the required job tasks of his former work as a fire department chief, is unable to return to his past employment as a landscape laborer, and does not have transferable skills to perform other work that is within his residual restrictions. [R.P. 213].

Hutchinson noted Contreras is earning $8.00 per hour working approximately five hours per week in an accommodated position. She opined should his physical limitations resolve to the point where he has more function and stamina, "[he] can expect to earn at or near minimum wage ($7.25 - $8.00 per hour) and would continue to experience a significant loss of earning capacity." [R.P. 213].

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

Despite its tortuous procedural history, this is a simple case. Thomas Contreras injured his right shoulder, arm and clavicle – all of which are separate scheduled members under the Workers' Compensation Act.[4] He underwent 4 operations – including separate procedures on his right arm and right clavicle. He has separate impairment ratings for the shoulder, the arm and the clavicle. [R.P. 214, 224]. As his injury affected multiple body parts, he is legally entitled to a compensation award for actual loss of earning capacity under the economic model rather than being limited to 35% permanent partial disability to one body part (the shoulder) under the medical model.

The Appellate Panel not only disregarded overwhelming evidence that the right arm and clavicle were affected and impaired, but committed another legal error by completely reversing its own previous findings to justify its already unsupportable ruling in this case.

1. The Appellate Panel erred in making a single member disability award to the right shoulder when the evidence showed disability should have been awarded under the loss of earnings capacity statute.

In the instant case, although Contreras undoubtedly suffered a serious injury to his shoulder, he also injured his right arm, specifically the biceps. The arm injury was serious enough to require a separate surgery, resulted in definable permanent impairment ratings, and left him with permanent pain, weakness, muscle atrophy and restrictions. Both Dr. DeMarco and Dr. Hughes opined Contreras suffered injuries to "right shoulder and right upper extremity, (right biceps)..." [R.P. 214, 221].

The fourth and final surgery was specifically to address "long head of the biceps pain." [R.P.

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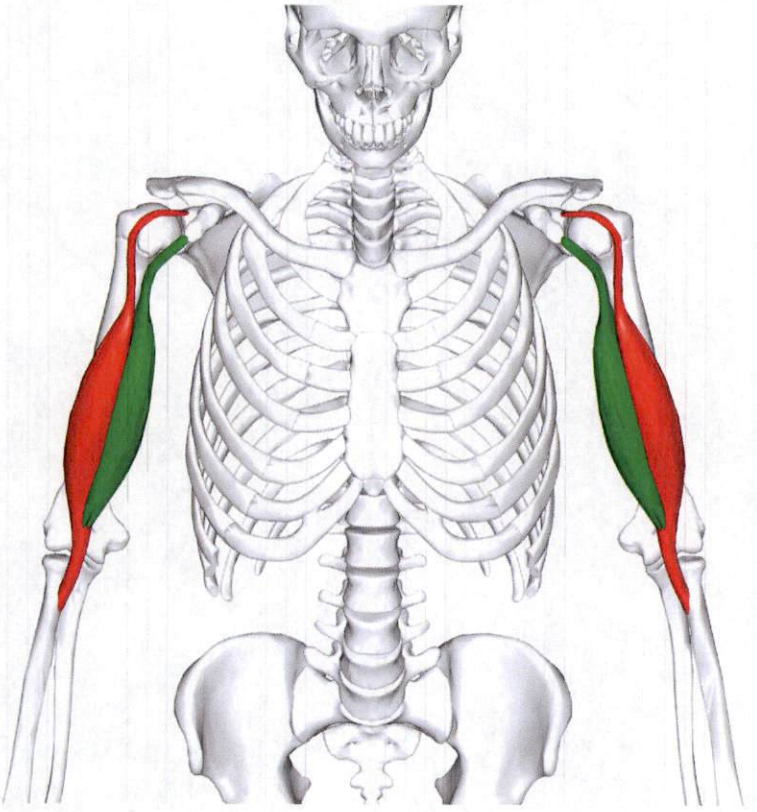
[4]The shoulder is valued at 300 weeks, the arm is valued at 220 weeks, and the clavicle is valued at 10-100 weeks. See S.C. Code Ann. § 42-9-30(13-14) 2007, and S.C. Code Reg. 67-1101 C (2007).

260]. The biceps is made up of two bundles of muscles - the long head and short head. While the biceps crosses both the shoulder and elbow joints, its main function is to flex the forearm at the elbow.[5]

The location of the biceps in the arm is most obvious in an illustration:[6]



The long head is shown in the outer darker area; the short head is on the inside.

The primary issue on appeal is a repeat of virtually the same issue decided in Hutson v. S.C.

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[5]Lippert, Lynn S. (2006). Clinical kinesiology and anatomy (4th ed.). Philadelphia: F. A. Davis Company. pp. 126–7.

[6]"Biceps brachii muscle06" by Anatomography - en:Anatomography (setting page of this image). Licensed under CC BY-SA 2.1 jp via Wikimedia Commons - http://commons.wikimedia.org/wiki/File:Biceps_brachii_muscle06.png#mediaviewer/File:Biceps_brachii_muscle06.png

State Ports Auth., 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)("We agree with Hutson, however, that he may be entitled to additional compensation under section 42-9-30 for the symptoms he was experiencing with his leg after his accident."), *reversed on other grounds,* Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012)(holding "radicular symptoms [from back injury] which affected the function of his right leg," entitled claimant to disability compensation for loss of earnings capacity under § 42-9-20).

In Hutson, the employee suffered a back injury. Notwithstanding the fact "Hutson suffered radicular symptoms which affected the function of his right leg," the Appellate Panel awarded 30% to the back but no benefits for the leg. Id. This Court reversed, holding that "Hutson may be entitled to additional compensation under section 42-9-30 for injuries to his leg . . ." Id.

In the instant case, the Appellate Panel repeated the same error it made in Hutson. Despite the uncontroverted medical evidence that the right arm and clavicle are affected and impaired, the Panel "awarded 35% permanency to the right shoulder . . . This award encompasses and includes any incidental affect 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." [R.P. 104].

As the disability is not limited to the shoulder, the Appellate Panel erred when it denied compensation for the arm and clavicle – either as an award for lost earnings capacity under § 42-9-20 or as separate awards for loss of use under § 42-9-30 (13) and regulation 67-1101 C. Contreras proved his right to proceed under the loss of earnings capacity statutes. S.C. Code Ann. § 42-9-20 (2007).

A. Framework for Disability Compensation in Workers' Compensation Cases.

The Workers' Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)("The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section."); Gupton v. Builders Transport, 357 S.E.2d 674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987)("where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable."); McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy).

In this case, the Single Commissioner made a § 42-9-20 disability award for partial loss of earning capacity under the economic model. The Appellate Panel reversed making a lesser award of specific disability to the shoulder under the medical model. See S.C. Code Ann. § 42-9-30

(14)(2007)(providing compensation for loss of use of the shoulder). Had Contreras not suffered the injury to his upper extremity, such that his injury was *entirely* limited to his shoulder, then he would be limited to significantly less compensation under the medical model – not withstanding the fact he suffered a significant loss of his pre-injury earning capacity.

The basic rule set out in Singleton states, "Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). The principle espoused in Singleton recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Wigfall, 354 S.C. 100, 106-07, 580 S.E.2d at 103. This rule is colloquially referred to as the "two-body part rule."

The part of Singleton relevant to this case states, "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." [Id.]. The point here is that if two or more scheduled members are injured, the claimant is entitled to proceed under general disability as a matter of law without further inquiry. However, if the actual injury is confined strictly to one body part, the claimant can still proceed under the general disability statutes if he can "show that some other part of his body is affected." Id. See. also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that affected other parts of body compensable as general disability). It is enough that the other body part be *affected*. There is no requirement that a separate impairment rating be given (although the Court should note Contreras was given a separate impairment rating for his biceps injury). "The Singleton

Court intended 'impairment' to encompass a physical deficiency." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Cf. Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)(for workers' compensation purposes, there is no requirement that loss of use, or partial loss of use, of member of body requires evidence of direct injury to member itself).

B. Injuries to the Shoulder, Clavicle and Arm/Upper Extremity.

The Single Commissioner found as fact "that on or about October 8, 2008, Claimant suffered injury by accident arising out of and in the course and scope of employment, wherein he injured his **right shoulder and right upper extremity**."[7] [R.P. 22, Finding of Fact #3 (emphasis added)].

In a detailed order, the Commissioner described in detail the evidence on which he relied in reaching this finding. He recounted Dr. Hughes' opinions on the injury to the right upper extremity itself, as well as the opinion that "Claimant's injury to his right shoulder affects his right upper extremity by way of pain and tenderness into his right biceps and clavicle . . ." He noted Dr. Hughes' descriptions of work restrictions specifically to the arm along with separate impairment ratings to the right shoulder (14%) and right upper extremity (10%). [R.P. 16-17].

The Commissioner then went into more description of the evaluations and treatment by Dr. DeMarco from August 6, 2010 through October 14, 2012. As with Dr. Hughes, Dr. DeMarco opined "Claimant's injuries to his right shoulder and upper extremity, (right bicep) are caused and/or aggravated by the injuries that he sustained in his October 8, 2008 accident at work." The Single Commissioner then restated Dr. DeMarco's opinion that: "Mr. Contreras' injuries to his right

[7]In his own handwriting, Dr. Hughes noted the 10% permanent impairment for the clavicle was to the "upper extremity." [R.P. 215]. Dr. DeMarco's overall impairment rating included "3% for biceps atrophy" which, as shown *infra,* is a rating to the arm.

shoulder affects his right upper extremity by way of radiating pain and tenderness into his right biceps as a result of his October 8, 2008 accident at work." [R.P. 17-18, 221]. He noted the permanent impairment rating, particularly that Dr. DeMarco assigned a 3% permanent impairment for "biceps atrophy." [R.P. 17-18, 224].

The Single Commissioner did not rely solely on the medical evidence. He also recounted Contreras' testimony, to wit:

> Claimant testified that prior to this work related accident he has never had any pain or symptoms to his right shoulder or bicep. Claimant testified that prior to his work accident, he had not problem with range of motion in his right shoulder, but that he does now because he cannot hold his shoulder in an upward position. Claimant testified that he has pain the front and back of his bicep and pointed to the bicep near the bend of his elbow. Claimant testified that prior to his work-related accident he did not have any problem with strength in his right shoulder but that he does now because if he lifts his shoulder up same causes pain and his right bicep will spasm. [R.P. 10].

This testimony is completely consistent with the medical evidence. Not only is the medical evidence and testimony of shoulder *and* arm pain unrefuted, Respondents' counsel never even asked one single question about the above testimony on cross-examination. None of the doctors were cross-examined.

This was the evidence at trial – recounted accurately by the Single Commissioner. Yet, despite this completely one-sided evidence, the Appellate Panel inexplicably reversed the key findings of fact supporting the Single Commissioner's § 42-9-20 disability award. In the original order, there was no analysis; no explanation; no reasoning – simply a slightly different set of factual findings with a vastly different result. Certainly there was no evidentiary basis for deleting the Single Commissioner's findings that Contreras injured his right shoulder and right upper extremity." [R.P. 22, Finding of Fact #3].

In Contreras I, the original "findings of fact and conclusions of law [were] not sufficiently detailed to allow [the Court] to determine whether the decision was erroneous." As such, the Court vacated and remanded with instructions to "make specific findings of fact regarding Contreras's right arm, right shoulder, and right clavicle" Contreras v. St. John's Fire District Commission, Unpublished Opinion No. 2019-UP-040 (S.C. Ct. App. filed January 23, 2019).

On remand, the Appellate Panel issued an *entirely* new Order on June 4, 2021. The Appellate Panel disregarded its previous order, instead making new findings of fact *wholly contradictory* to its previous findings.

In the first Appellate Panel Order dated May 5, 2014, the Appellate Panel made specific findings of fact as to what medical evidence should be relied upon to support its findings. The Appellate Panel addressed whether it should rely on a Form 14B issued by Dr. DeMarco on May 16, 2011 or on questionnaires completed later on October 8 and October 24, 2012. The later reports were more specific as to the injuries, impairment and need for future medical treatment. The 2014 Panel held "we give *more weight* to the opinions given in [the later] reports given that they were provided at a later date than the 14-B, were provided closer to Claimant's hearing date and more accurately reflect Claimant's current condition and need for future medical care and treatment." [R.P. 50, Finding of Fact 29 (emphasis added)].

In the 2021 Order following remand, the Appellate Panel turned this finding on its head, stating:

> 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

> or tenderness 'into" the right biceps;[8] 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.* [R.P. 93, Finding of Fact 8 (r)(emphasis in italics added)].

The Appellate Panel also found: "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." [R.P. 95, Finding of Fact 10].

The Commission on remand did not have authority to dispense with the original findings. When the Appellate Panel had previously given "more weight" to the questionnaires than the 14B, it could not reverse itself by holding "[t]he questionnaires are also consistent with Dr. DeMarco's 14B's to which we give great weight. [R.P. 93, Finding of Fact 8 (r)]. No matter how much the Appellate Panel wants to hold onto a decision being challenged on appeal, it does not get a second bite of the apple as to the evidence. The commissioners cannot change their minds, contradict their previous findings, and give "great weight" to records which they previously (and correctly) found to be inconsequential. The Panel was instructed to add to its previous findings to explain its reasoning – it cannot ignore what it has already established as fact merely to find different grounds to support an already erroneous decision. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011)("A court may not . . . exceed its authority and assume the role of a second jury.

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[8]"[R]adiating pain or tenderness 'into' the right biceps" constitutes an *affect* on the arm as a matter of law. See Hutson v. S.C. State Ports Auth., 390 S.C. 108, 700 S.E.2d 462 (S.C. App. 2010)("We agree with Hutson, however, that he may be entitled to additional compensation under section 42-9-30 for the symptoms he was experiencing with his leg after his accident."), *reversed on other grounds,* Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (S.C. 2012)(holding "radicular symptoms [from back injury] which affected the function of his right leg," entitled claimant to disability compensation for loss of earnings capacity under § 42-9-20).

Rather, the appellate court's instructions circumscribe the trial court's authority on remand."); Cf. Charleston County Dept. of Social Services v. Father, Stepmother, and Mother, 454 S.E.2d 307, 317 S.C. 283 (1994)("a successor judge may not substitute his own judgment for that of the trial judge"); Parker v. South Carolina Public Service Com'n, 342 S.E.2d 403, 288 S.C. 304 (1986)(error of administrative agency to exceed scope of remand instructions); Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950)(one judge of the same court cannot overrule another).

Instead of considering the entire record and adding additional specific findings, the Appellate Panel "threw the baby out with the bath water."[9] The Appellate Panel combed the medical records to cobble together numerous incidental – often trivial – findings to justify its ultimate conclusion. Respectfully, any conclusions reached by the exercise of this *unusual finesse of reasoning* cannot survive meaningful appellate review.[10] See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). Cf. Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how

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[9]The idiomatic expression "throw the baby out with the bath water" means to "reject the essential with the inessential." Jewell, Elizabeth, ed. (2006). The Pocket Oxford Dictionary and Thesaurus (2nd edition), p. 53. The remand instructions were to make "specific findings of fact;" not to rewrite the entire order to bolster the same erroneous result.

[10]The phrase is drawn from an older Supreme Court case illustrating that stretching evidence to find a mere scintilla of evidence defies common sense and reason. "Whilst adhering to the scintilla rule, this court has recognized a rule supplemental to the scintilla rule, which is thus propounded in the case of National Bank v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581, 582 (1934); 'If it be conceded that there may be deduced by a process of *unusual finesse of reasoning* that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.'" Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 40 S.E.2d. 626 (1946)

an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."). This method of analysis – focusing on trivial minutiae to the exclusion of qualified expert opinions on the ultimate issue – is merely the Commission's lay speculation about a medical diagnosis it refuses to accept. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding).

As in Burnette, "The record contains [Contreras'] medical records and testimony, as well as written opinions by [his] treating physicians and a vocational rehabilitation expert. We find no evidence that challenges the conclusions of [Contreras'] doctors concerning [his injuries]." Id. The Appellate Panel repeated the error it made in Burnette when it substituted its own medical opinions for the opinions of the doctors.

This is the evidence of the case. *Nothing* contradicts the opinions of the doctors and the testimony of Mr. Contreras. The Appellate Panel simply got it wrong. The Panel's decision finding compensation should wholly limited to the shoulder is controlled by errors of law, unsupported by substantial evidence and should be reversed.

C. Evidence of Loss of Earnings Capacity.

The Single Commissioner made specific and detailed findings regarding Contreras' actual loss of earning capacity. He specifically relied on the undisputed medical evidence that Contreras was unable to return to his previous employment as a firefighter, along with limiting him from nearly any other employment. He also relied on the vocational expert, noting "defendants did not choose to submit a vocational evaluation in this case." [R.P. 25; Finding of Fact 20]. This was also noted by the Appellate Panel, who agreed Contreras was unable to return to his previous employment. [R.P. 48-49, Finding of Fact 19; R.P. 100-101, Findings of Fact 23-26].

After reviewing the evidence, the Single Commissioner made an award for a specific amount under § 42-9-20. This award is undisputedly supported by substantial evidence. The calculations are consistent with Contreras' limited earnings at the time of the hearing – confirmed by the opinion of the vocational expert. See Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970)("Loss of earning capacity alone is the criterion and medical opinion as to the extent of physical disability can have no probative value against actual earnings."). Contreras proved the extent of his loss of earning capacity by both expert vocational evidence and by his own unsuccessful search for alternative employment. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(setting out three alternative methods of proof for lost earnings capacity: (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment.").

There is no evidentiary basis for vacating the § 42-9-20 award. The evidence completely supports the award, such that no other result is possible. Cf. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing denial of § 42-9-20 award where only evidence of

residual earnings capacity was claimant's unsupported speculation that he could open a restaurant, "thus, there is no evidence in the record supporting the commissioner's order."). While the Appellate Panel speculated that Contreras's condition had improved since his vocational assessment in 2011, there was no evidence Contreras as able to work in an capacity other than the very limited work he was doing in a bowling alley. As such, the Single Commissioner's § 42-9-20 disability award should be reinstated.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel and reinstate the original Order and Award of the Single Commissioner. The Court should hold Contreras should receive compensation for lost earning capacity under § 42-9-20.

Respectfully Submitted,

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May 6, 2022
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2021-000683

Thomas Contreras, Claimant, ... Appellant,

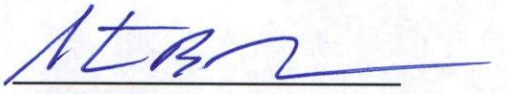
v.

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

CERTIFICATE OF COUNSEL

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

Respectfully Submitted,



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