

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision
SCWCC No. 1102937

Case No. 2019-001141

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Aug 17 2020

SC Court of Appeals

Barry Adickes, Claimant,

Respondent,

v.

Philips Healthcare, Employer, and Fidelity and
Guarantee Insurance Company, Carrier,

Appellants.

RECORD ON APPEAL

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Adickes,

Claimant,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier/Defendants.

WCC FILE NO: 1102937

DECISION AND ORDER

August 27, 2015

STIPULATIONS

The parties stipulated at the hearing to the following issues:

1. This is an admitted accident; the date of the accident being March 22, 2011.
2. The claimant has an average weekly wage of \$ 2,608.52 with a corresponding compensation rate of \$ 704.92.
3. Notice of the hearing was timely and properly served on all parties of interest.
4. Venue was proper in Lancaster County.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the following were submitted into evidence:

CLAIMANT'S SUBMISSIONS

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APA 1.	L. Randolph Waid, Ph.D.	10/7/14	1-9
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APA 5.	Jerry L. Barron, M.D.	12/12/12 – 1/14/15	75-77a
APA 6.	John Welshofer, M.D.	10/31/12 - 9/26/13	78-96
APA 7.	Howard Mandell, MD	4/06/11 - 10/08/13	97-134
APA 8.	Nicholas H. Tuttle, M.D.	3/24/11 - 9/12/14	135-159
APA 9.	James Rentz, MD	8/25/11 - 10/10/14	160-185
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DEPOSITION

De Benne Esse deposition of Dr. Howard Mandell

DEFENDANT'S SUBMISSIONS

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STATEMENT OF THE CASE

Claimant suffered an admittedly compensable accident on March 22, 2011 when he accidentally drove his company car off the side of a mountain on a winding road. Claimant suffered a closed head injury (brain), bilateral shoulder injuries, and cervical spine injury.

Claimant alleges entitled to a significant wage loss award pursuant to §42-9-20 commencing from January 17, 2014 when his employment with Philips ended. Claimant further alleges he has reached maximum medical improvement but will require ongoing Dodge medical care for his shoulder, neck, and post traumatic headaches as outlined by his physicians. Alternatively, if permanent wage loss is not found, claimant alleges very significant permanent partial disability to his shoulders, spine, and brain.

Defendants, on the other hand, deny that claimant has sustained a permanent loss of wage earning capacity and allege that any reduction in earnings is not caused by his injury. Defendants also argue that if the case is awarded as wage loss, the 340 weeks should commence as of the date of injury. If the case is awarded as a specific disability, defendants deny any

disability to the shoulders. Finally, defendants contend Claimant has not reached maximum medical improvement.

EVIDENCE OF THE CASE

Claimant is a fifty three (53) year old father of four, with a bachelor of science degree in marketing management from the University of South Carolina. His work history includes working in sales at Philips (as well as the predecessor company Philips acquired in 2006) for nearly twenty-one (21) years. His work in sales and distribution required loading products into and out of a car as well as spending many hours driving and flying.

Claimant testified that while traveling as a general manager of distribution, he was involved in a work related automobile accident in which he approached a sharp curve in the road too quickly causing his car to flip off the road into a mountainous ravine. Hearing Transcript p. 16. Claimant injured both of his shoulders and his neck and he also suffered a traumatic brain injury. Claimant testified that once he regained consciousness, he called emergency services. The Burke County EMS team assembled gear and traversed down a 75-100 foot embankment to reach claimant. With help, claimant was able to escape the vehicle and get up the embankment. Claimant refused transport from the EMS and his wife picked him up that night and took him back to his home in Rock Hill, South Carolina.

Upon returning home, claimant went to his family doctor, Dr. Nicholas Tuttle for treatment. From there claimant was treated by Dr. James Rentz and ultimately underwent shoulder surgery with Dr. Rentz. Claimant also suffered significant neck pain as well as post concussive headaches. Since that time claimant has primarily been treated by Dr. Rentz for his shoulder injuries, by Dr. Howard Mandell for his headaches and post concussive syndrome, and

Dr. Richard Park for his cervical spine. Claimant has undergone a variety of treatment including nerve root ablations by Dr. Park and a host of medication therapy by Dr. Mandell.

As stated earlier, claimant has worked for Philips and the company that Philips purchased for twenty-one (21) years. In 2008, claimant worked as a product sales specialist for the same division of Philips. He continued in that position until he was transitioned into a new position in 2011. Shortly after taking the new position in January of 2011, claimant suffered this injury on March 22, 2011. Claimant testified that he had performed well in his job prior to his injury. There was a period in 2009 when he was placed on a PIP (personal improvement program) because sales were low. However, claimant testified that this was during the height of the recession and they had also experienced difficulty getting product during that time. Claimant's performance evaluations backed up this testimony. In the calendar year prior to this injury claimant earned over \$128,000.

Claimant testified that following his injury he had great difficulty with headaches. Migraine headaches would appear that would put claimant out of commission for twenty-four (24) to forty-eight (48) hours. These headaches occurred every four to eight weeks and claimant's wife kept a headache diary of when the headaches occurred. Claimant also testified that he began noticing other cognitive problems that he tried to shrug off at first. Claimant testified that he experiences additional cognitive problems such as forgetfulness and an inability to process thoughts. For example, composing an email takes him much longer than it did previously. Claimant also has to deal with his headaches as well as chronic neck pain and shoulder pain. Claimant testified he has to have nerve root ablations done every six months to a year in his neck, has to take medication daily for his migraine headaches as well as break through

medication when headaches occur, and knows that he will require repeat surgery on his shoulder in the future.

Claimant was out of work during the time that he recuperated from his shoulder surgery. He returned to work and encountered the difficulties noted above. Claimant was terminated on January 17, 2014. The termination was part of a companywide layoff but claimant testified that he was told that it was, in part, performance related. The personnel evaluations showed that claimant was given glowing comments in the years prior to his accident but that those evaluations became worse following his accident. Claimant was out of work completely for a period of time while looking for work but eventually obtained a job with VRI in which he earned \$55,000 a year. The application submitted by the defendants showed that claimant's requested salary was \$55,000. However, claimant testified that he put that number on the job application because he was told that was what the job paid when he applied. Shortly before the hearing, claimant lost his job with VRI and he was unemployed at the time of the hearing.

Jeanie Adickes, wife of the claimant testified. She testified that she and the claimant have been married for twenty-eight (28) years and she had an opportunity to observe him on a daily basis during that time. Prior to his injury she testified the claimant was able to do his job, multi-task, and never had headaches. However, following his accident their life changed. Claimant takes medication on a daily basis and has trouble with focus, memory, and multi-tasking. She testified that it takes much longer for him to get things done. She also testified that claimant is a stoic individual and is not a complainer. She testified that claimant's severe headaches occur about anywhere from four to eight weeks depending on his medications and that the medications have to be tweaked from time to time. She testified that she did keep a headache calendar. She testified that when a headache comes on she can tell that it is coming and claimant

has to give himself an injection. He then will have to lay down and go to sleep. He often will have to take two of the injections during one of his headaches. The following day after one of his headaches he is very sluggish and foggy and often has a rebound headache. She further testified that claimant has trouble with his short term memory and he becomes distracted easily. She also testified that claimant has little patience which is a great change from prior to the accident.

Mark Johnson, regional manager for Philips Healthcare, testified on behalf of defendants. He testified that at the time of the accident that he was claimant's supervisor. He did not know the claimant well before he became his supervisor but knew of him. He testified that claimant had a history of poor follow-up with team members and an over all lack of urgency. He testified that during the time that claimant reported to him from January 1, 2011 until his termination in 2014 that claimant received middle of the road performance reviews and was not a top performer. He indicated claimant was in the bottom third of the ranking but was doing an adequate job. He testified that claimant was terminated as part of a reduction in force and that he did not tell claimant that he was being terminated in part because of performance.

Mr. Johnson testified that claimant did report to him that he was still having headaches from time to time immediately after the accident. However, he indicated that it was not routine and that over time he did not recall hearing further about the headaches.

On cross examination Mr. Johnson indicated that claimant was transferred to his team on January 1, 2011 and that he had only supervised claimant for a period of eleven (11) weeks prior to his accident. Further, because they worked remotely he would rarely see claimant and that any contact with the claimant was usually by email or telephone. Mr. Johnson was also cross

examined from the performance appraisals for the period prior to his accident that were completed by Paul Stoddard who served as both claimant and Mr. Johnson's superior. The performance evaluation showed that during the time claimant was on the PIP program that he was placed on that program because of a drop in sales that coincided with the recession of 2008 and 2009. Claimant was then the number one salesman in the region at the end of 2009. Mr. Johnson was also questioned regarding performance appraisals that he completed on Mr. Adickes after his injury that contained numerous quotes questioning Mr. Adickes' focus.

All of the medical reports were reviewed. The reports of Dr. Richard Park show that claimant was under his care beginning July 30, 2013. Dr. Park has performed facet joint injections, medial branch blocks, and radio frequency ablations. Dr. Park opined that Mr. Adickes would likely continue to require radio frequency ablations every six to twenty-four months for pain relief. APA p. 52. Claimant was treated for his shoulders by Dr. James Rentz. Dr. Rentz performed arthroscopic surgery on the right shoulder including a debridement of a grade IV slap tear and an anterior labrum, biceps tendonotomy, and open biceps tendodisis to the proximal humerus. Claimant did not undergo surgery on the left shoulder. A right shoulder MRI performed on October 10, 2014 showed supraspinatus and infra-supraspinatus insertional tendonopathy with an intra-substance delamination tear at their confluence.

Claimant was also evaluated by shoulder surgeon, Jerry L. Barron, MD. Dr. Barron saw claimant on December 12, 2012 and found that claimant did sustain an acute injury to his head, neck, and bilateral shoulders. He recommended an MRI/arthrogram of the right shoulder as well as a MRI of the cervical spine. Dr. Barron later reviewed the MRI report of October 10, 2014 and rated claimant as having a 15% impairment to the right shoulder and a 0% impairment to the left shoulder. He further opined that claimant would most probably eventually require surgery to

the right shoulder but that it was reasonable for Mr. Adickes to try to avoid surgery as long as possible. APA p. 77a.

Claimant was also evaluated by Dr. John Welshofer. Dr. Welshofer indicated that claimant has underlying cervical degenerative spondylosis that was made materially worse by the on the job motor vehicle accident of March 22, 2011. Dr. Welshofer also evaluated claimant's brain injury and diagnosed him with a post-concussive disorder. He rated claimant as having a 15% permanent impairment of the brain.

Claimant was also evaluated by neuropsychiatrist, Dr. Randolph Waid. Dr. Waid performed a neuropsychological evaluation and found that claimant had sustained a good recovery under the circumstances. However, he noted that claimant demonstrated variability in his capacity to sustain attention/concentration. He noted that claimant had compromise in the attentional executive aspects of immediate learning which caused complaints or forgetfulness in day to day pursuits. He found that claimant was suffering executive dysfunction potentially affecting both cognitive and emotional domains. He noted that in day to day pursuits claimant likely experienced episodic forgetfulness due to the interfering effects of attention-executive difficulties and headaches.

The physician that claimant has seen most for treatment throughout his ordeal has been neurologist Dr. Howard Mandell. Dr. Mandell noted that he had been treating Mr. Adickes for traumatic brain injury and post concussive syndrome as a result of his on the job injury. He opined that claimant would need ongoing care for post traumatic headaches to include doctor visits two or three times per year, medications for prevention and abortive treatment of headaches as well as possible missed days at work for headaches that were not aborted by

medications. He testified that claimant attempted to minimize his problems and understated the problems. Dr. Mandell reviewed the neuropsychological evaluation of Dr. Waid and testified that the problems shown on the neuropsychological examination were exactly the same as the problems that he observed with Mr. Adickes and he believed that these problems came from claimant's traumatic brain injury and post concussive syndrome. Dr. Mandell testified that claimant has problems with concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate learning, forgetfulness in daily pursuits, mild executive dysfunction, shorter fuse, and easier frustration. These skills affect people who perform jobs with higher aspects of functioning rather than those with menial jobs. He further testified that these problems could limit claimant's employment opportunities particularly those at a high level of employment.

Claimant was evaluated by vocational expert, Joel Leonard. Mr. Leonard reviewed all of the claimant's medical records, interviewed claimant, and administered some achievement and reading testing. In his report he outlined three potential vocational profiles. However, he endorsed profile "B" that acknowledges that Mr. Adickes was part of a general reduction in force in his employment but also finds that the amount of money that claimant is currently earning is a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident because of his limitations and restrictions from his accident. Mr. Leonard's deposition was offered as evidence and he was cross examined regarding his opinion. However, he maintained his opinion that the \$55,000 job with VRI was an accurate reflection of claimant's post injury earning capacity because of his cognitive difficulties.

Based on the above-stated evidence as well as a review of the entire record, the following are made as:

FINDINGS OF FACT

1. The Claimant suffered injuries to his head/brain, bilateral shoulders and cervical spine in a work-related automobile accident on March 22, 2011.
2. This is an admitted accident, and the Defendants have provided medical care and treatment.
3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, "...has sustained permanent impairment of 15% to the right shoulder and 0% to the left shoulder." (Claimant's APAs, page 77a).
7. While the ratings are necessary to determine disability to the shoulders if any, the language is also determinative as to MMI. Assigning "permanent impairment" to the shoulders attests to Dr. Barron's opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of "permanent" – plain meaning of the word – impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders.
8. That being the case, I have reviewed this case in its entirety.
9. It is clear that the Claimant has had extensive treatment with a number of providers as well as evaluations as to his cognitive function.

10. Medical care and treatment has been provided by Burke County EMS, Piedmont Medical Center, Dr. James Rentz, Dr. Nicholas Tuttle, Dr. Howard Mandell, Dr. John Welshofer, and Dr. Richard Park.
11. The Claimant has seen Dr. Jerry L. Barron for an IME.
12. The Claimant has also seen L. Randolph Waid, Ph.D. for a neuropsychological evaluation.
13. A vocational evaluation was conducted by Joel Leonard, M.Ed., CRC, CVE.
14. The Defendants' position is this is a scheduled member case pursuant to §42-9-30.
15. The Claimant contends that this is a wage loss case pursuant to § 42-9-20.
16. Dr. Welshofer opines as to the spine, "...he has a 10% impairment of the spine based upon the AMA guidelines. I will see the patient as necessary I don't think that there is anything else to offer him at this time." (Claimant's APAs, page 82).
17. As to his brain injury, Dr. Welshofer opines, "I believe the patient's injury was a SOUTH CAROLINA injury based upon the AMA guidelines. I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive (sic) symptomatology and headaches." (Claimant's APAs, page 96).
18. Dr. Barron's ratings as to both shoulders are cited above in Finding of Fact #6.
19. In his neuropsychological evaluation of the Claimant, Dr. Waid opines after extensive testing, "The current evaluation revealed Mr. Barry Adickes to be functioning in the high average range of intellectual abilities. Neuropsychological evaluation generally provided favorable results. Mr. Adickes did demonstrate variability in his capacity to sustain attention/concentration. Otherwise, his performance was suggestive of intact brain behavior functioning. It appears that compromise in the attentional/executive aspects of

immediate learning are causal for complaints of forgetfulness in day to day pursuits...

Mild executive dysfunction appears to be present potentially affecting both cognitive and emotional domains.” (Claimant’s APAs, page 8).

20. Dr. Mandell, who is the treating neurologist in this case, testified via deposition. I have read that deposition in its entirety.

21. Commenting on his review of the neuropsychological evaluation of the Claimant conducted by Dr. Waid, Dr. Mandell testified, “Then you see the summary, this is what they mean. What those mean is that he did very well on most things. However, what he did have difficulties with were concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate learning, or thought to be the complaints for forgetfulness on daily pursuits, mild executive dysfunction, shorter fuse, easier frustration... So basically, it says exactly what I’m saying, executive functioning is kind of like the CEO of the brain. What it does is, starts off with an idea, and then it gets a plan, and then it takes it all the way down to the deadline. So you need to have planning skills. You need to have memory skills. You need to have time management. You need to have mental flexibility. That’s executive functioning... So the executive functioning, so that – that’s what they’re saying here. He did very well on everything else, which is what my examination would say as well. But those areas of concentration, focus, and things that he showed his weakness in.”

(Deposition of Howard Mandell, MD, page 35, lines 12-25 and page 36, lines 1-18).

22. Dr. Mandell’s deposition continues, “Q. Are the problems that you have just outlined from this report caused by his traumatic brain injury and post-concussive syndrome from his on-the-job injury? A. Yes Q. Do those problems limit his performance and

employment opportunities? A. . I think they could, depending upon which type of employment; but, yes, at a high level of employment with high skills, it would limit.”

(Deposition of Howard Mandell, MD, page 36, lines 19-25 and page 37, lines 1-2).

23. In addition to providing medical care and treatment, the Defendants provided the Claimant with two months of TTD while he was recovering.
24. The Claimant returned to work for the Employer and continued working for them for 2.5 years until his job was eliminated as part of a reduction in force.
25. The Defendants contend that the Claimant lost his job solely because of the RIF and that it had nothing to do with his work injury.
26. The Claimant testified that he worked for the Employer for over twenty years and that employment ended on 01/17/14.
27. The Claimant alleges that he was told that it was performance related.
28. The Claimant testified that after his termination he reached out to over 15 potential employers.
29. He took a job that paid \$55,000; but that employment has now ended.
30. It is the Claimant’s position that he indicated to that employer that the salary listed was the salary he was seeking because that was the amount the position paid.
31. The Claimant underwent a vocational evaluation with Joel Leonard who is a vocational expert.
32. Mr. Leonard was also deposed. I have read that deposition in its entirety.
33. This evaluation was conducted on 08/25/14. The neuropsychological evaluation conducted by Dr. Waid was on 10/07/14.

34. While Mr. Leonard had to rely on the subjective complaints of the Claimant in the absence of a neuropsychological evaluation, those complaints are, for the most part, congruent with the findings of the neuropsychological evaluation.
35. Further affirmation of candid cooperation of the Claimant is the results of the neuropsychological testing conducted by Dr. Waid. In many of those measurements, the Claimant scored quite high, while others indicated deficits which tract with the opinions of both Dr. Waid and Dr. Mandell. It would take a neuropsychological expert to skew the results to the objective testing performed by Dr. Waid to match the presentation of the Claimant. That being said, I find that the Claimant was cooperative and candid in both his presentation to the experts in this case as well as in his testimony. The Claimant is reliable.
36. Mr. Leonard presents three possible profiles as to future earnings potential of the Claimant. It is Mr. Leonard's expert opinion that Profile B best represents the likely outcome with respect to the Claimant's residual employability and prospective earning capacity subsequent to the 03/22/11 accident.
37. The profile reads in part, "Within the parameters of Profile B, Mr. Adickes' current weekly wage (estimated at \$1,057.69) would be considered a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. While he would be capable of performing other occupations in addition to his position with VRI, such work would not be expected to pay wages that significantly exceed his current compensation." (Claimant's APAs, page 45).
38. It is clear from the record that the Claimant experienced significant injuries in his work-related accident of 03/22/11.

39. Where an injury is confined to a scheduled body member and there is no injury or affect to another body member, the recovery is limited to the medical model of §42-9-30. (Singleton and Colonna). However, the Claimant has impairment to more than one body member. He is therefore entitled to his requested analysis under the economic model of §42-9-20.
40. There are expert opinions in this case from Dr. Waid, Dr. Mandell and Mr. Leonard.
41. The vocational evaluation from Mr. Leonard is the only vocational evaluation in the record. There is no competing vocational opinion.
42. The neuropsychological evaluation from Dr. Waid is the only neuropsychological evaluation in the evidence. There is no competing neuropsychological evaluation.
43. The opinion of Dr. Mandell is given in his deposition under oath.
44. When I consider all of those opinions and the evidence as a whole, the Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11.
45. The impact of that deficiency is limited to his executive functioning. That being said, it is that executive functioning that is determinative of the Claimant's ability to hold employment similar to his employment for Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, he no longer works there and the cogent question is now can he find like employment at similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?
47. It is reasonable to conclude that if the Claimant could find employment at a wage comparable to what he earned for the Employer, he would. There is no evidence in the record that the Claimant would choose to self-limit as to his earning potential.

48. I find that the Claimant has suffered wage loss as the result of his 03/22/11 work-related accident. Based on a review of the evidence as a whole, the Claimant is clearly not as he was before this work-related accident.
49. I find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.69). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident of March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

CONCLUSIONS OF LAW

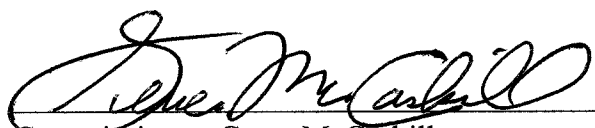
1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83. This computes to a compensation rate of \$1,033.94. However, the maximum compensation rate for 2011 is \$704.92. Therefore, the claimant is awarded \$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that claimant's wage loss began. Claimant had previously received temporary total disability while he was out of work so the period of partial disability began after a period of total disability.
3. Pursuant to Section 42-15-60, claimant is entitled to ongoing care for his neck including injections, ablations, and medications as directed by Dr. Park; continuing medications and doctor visits for his post concussive syndrome as outlined by Dr. Mandell; and future surgery to his right shoulder as outlined by Dr. Barron.

ORDER

IT IS THEREFORE ORDERED that defendants shall make the following payments:

1. \$704.92 per week for three hundred forty (340) weeks commencing January 17, 2014;
2. Payment of future medical care for the right shoulder to include surgery as recommended by Dr. Barron;
3. Payment for medical care and treatment to include prescription, medications, and follow-up visits with Dr. Mandell for post concussive headaches;
4. Payment for ongoing radio frequency ablations for the neck with Dr. Park.

AND IT IS SO ORDERED!



Commissioner Gene McCaskill
South Carolina Worker's Compensation Commission

Dated: August 27, 2015 .

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kellie Lindler on August 27, 2015

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Barry Adickes,

CLAIMANT,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1102937

Appellate Panel Review held in Columbia, South Carolina on

December 14, 2015,

Appellate Panel Decision and Order filed on February 8, 2016

Appearances: Claimant represented by William L. Smith II, Esquire
Defendants represented by Brooke A. Payne, Esquire

STATEMENT OF THE CASE

This case came before the Single Commissioner pursuant to a Form 50 filed by the Claimant, Barry Adickes, and a Form 51 filed by Defendants. Claimant contended that he suffered an admittedly compensable accident on March 22, 2011 when he accidentally drove his company car off the side of a mountain on a winding road. Claimant suffered a closed head injury (brain), bilateral shoulder injuries, and cervical spine injury. Claimant alleged entitlement to a significant wage loss award pursuant to §42-9-20 commencing from January 17, 2014 when his employment with Phillips Healthcare ended. Claimant further alleged he had reached maximum medical improvement but would require ongoing Dodge medical care for his shoulder, neck, and post traumatic headaches as outlined by his physicians.

Defendants denied that Claimant had sustained a permanent loss of wage earning capacity and alleged that any reduction in earnings was not caused by his injury. Defendants also argued that if the case was awarded as a wage loss claim, the 340 weeks would commence as of the date of injury. Further, Defendants contended Claimant had not reached maximum medical improvement.

The hearing was held before the Single Commissioner on January 21, 2015, in Lancaster, South Carolina pursuant to timely and properly notice served on all interested parties. No objection was raised by either party regarding jurisdiction or venue.

On August 27, 2015, the Single Commissioner issued his Decision and Order, making the following Findings of Fact:

1. The Claimant suffered injuries to his head/brain, bilateral shoulders and cervical spine in a work-related automobile accident on March 22, 2011.
2. This is an admitted accident, and the Defendants have provided medical care and treatment.

3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, "...has sustained permanent impairment of 15% to the right shoulder and 0% to the left shoulder." (Claimant's APAs, page 77a).
7. While the ratings are necessary to determine disability to the shoulders if any, the language is also determinative as to MMI. Assigning "permanent impairment" to the shoulders attests to Dr. Barron's opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of "permanent" – plain meaning of the word – impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders.
8. That being the case, I have reviewed this case in its entirety.
9. It is clear that the Claimant has had extensive treatment with a number of providers as well as evaluations as to his cognitive function.
10. Medical care and treatment has been provided by Burke County EMS, Piedmont Medical Center, Dr. James Rentz, Dr. Nicholas Tuttle, Dr. Howard Mandell, Dr. John Welshofer, and Dr. Richard Park.
11. The Claimant has seen Dr. Jerry L. Barron for an IME.
12. The Claimant has also seen L. Randolph Waid, Ph.D. for a neuropsychological evaluation.
13. A vocational evaluation was conducted by Joel Leonard, M.Ed., CRC, CVE.
14. The Defendants' position is this is a scheduled member case pursuant to §42-9-30.
15. The Claimant contends that this is a wage loss case pursuant to § 42-9-20.
16. Dr. Welshofer opines as to the spine, "...he has a 10% impairment of the spine based upon the AMA guidelines. I will see the patient as necessary I don't think that there is anything else to offer him at this time." (Claimant's APAs, page 82).

17. As to his brain injury, Dr. Welshofer opines, "I believe the patient's injury was a SOUTH CAROLINA injury based upon the AMA guidelines. I would grade him at a permanent impairment rating of 15% of the brain for continuous post concussive (sic) symptomatology and headaches." (Claimant's APAs, page 96).
18. Dr. Barron's ratings as to both shoulders are cited above in Finding of Fact #6.
19. In his neuropsychological evaluation of the Claimant, Dr. Waid opines after extensive testing, "The current evaluation revealed Mr. Barry Adickes to be functioning in the high average range of intellectual abilities. Neuropsychological evaluation generally provided favorable results. Mr. Adickes did demonstrate variability in his capacity to sustain attention/concentration. Otherwise, his performance was suggestive of intact brain behavior functioning. It appears that compromise in the attentional/executive aspects of immediate learning are causal for complaints of forgetfulness in day to day pursuits... Mild executive dysfunction appears to be present potentially affecting both cognitive and emotional domains." (Claimant's APAs, page 8).
20. Dr. Mandell, who is the treating neurologist in this case, testified via deposition. I have read that deposition in its entirety.
21. Commenting on his review of the neuropsychological evaluation of the Claimant conducted by Dr. Waid, Dr. Mandell testified, "Then you see the summary, this is what they mean. What those mean is that he did very well on most things. However, what he did have difficulties with were concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate learning, or thought to be the complaints for forgetfulness on daily pursuits, mild executive dysfunction, shorter fuse, easier frustration... So basically, it says exactly what I'm saying, executive functioning is kind of like the CEO of the brain. What it does is, starts off with an idea, and then it gets a plan, and then it takes it all the way down to the deadline. So you need to have planning skills. You need to have memory skills. You need to have time management. You need to have mental flexibility. That's executive functioning... So the executive functioning, so that – that's what they're saying here. He did very well on everything else, which is what my examination would say as well. But those areas of concentration, focus, and things that he showed his weakness in." (Deposition of Howard Mandell, MD, page 35, lines 12-25 and page 36, lines 1-18).
22. Dr. Mandell's deposition continues, "Q. Are the problems that you have just outlined from this report caused by his traumatic brain injury and post-concussive syndrome from his on-the-job injury? A. Yes Q. Do those problems limit his performance and employment opportunities? A. . I think they could, depending upon which type of employment; but, yes, at a high level of employment with high skills, it would limit." (Deposition of Howard Mandell, MD, page 36, lines 19-25 and page 37, lines 1-2).
23. In addition to providing medical care and treatment, the Defendants provided the Claimant with two months of TTD while he was recovering.

24. The Claimant returned to work for the Employer and continued working for them for 2.5 years until his job was eliminated as part of a reduction in force.
25. The Defendants contend that the Claimant lost his job solely because of the RIF and that it had nothing to do with his work injury.
26. The Claimant testified that he worked for the Employer for over twenty years and that employment ended on 01/17/14.
27. The Claimant alleges that he was told that it was performance related.
28. The Claimant testified that after his termination he reached out to over 15 potential employers.
29. He took a job that paid \$55,000; but that employment has now ended.
30. It is the Claimant's position that he indicated to that employer that the salary listed was the salary he was seeking because that was the amount the position paid.
31. The Claimant underwent a vocational evaluation with Joel Leonard who is a vocational expert.
32. Mr. Leonard was also deposed. I have read that deposition in its entirety.
33. This evaluation was conducted on 08/25/14. The neuropsychological evaluation conducted by Dr. Waid was on 10/07/14.
34. While Mr. Leonard had to rely on the subjective complaints of the Claimant in the absence of a neuropsychological evaluation, those complaints are, for the most part, congruent with the findings of the neuropsychological evaluation.
35. Further affirmation of candid cooperation of the Claimant is the results of the neuropsychological testing conducted by Dr. Waid. In many of those measurements, the Claimant scored quite high, while others indicated deficits which tract with the opinions of both Dr. Waid and Dr. Mandell. It would take a neuropsychological expert to skew the results to the objective testing performed by Dr. Waid to match the presentation of the Claimant. That being said, I find that the Claimant was cooperative and candid in both his presentation to the experts in this case as well as in his testimony. The Claimant is reliable.
36. Mr. Leonard presents three possible profiles as to future earnings potential of the Claimant. It is Mr. Leonard's expert opinion that Profile B best represents the likely outcome with respect to the Claimant's residual employability and prospective earning capacity subsequent to the 03/22/11 accident.

37. The profile reads in part, "Within the parameters of Profile B, Mr. Adickes' current weekly wage (estimated at \$1,057.69) would be considered a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. While he would be capable of performing other occupations in addition to his position with VRI, such work would not be expected to pay wages that significantly exceed his current compensation." (Claimant's APAs, page 45).
38. It is clear from the record that the Claimant experienced significant injuries in his work-related accident of 03/22/11.
39. Where an injury is confined to a scheduled body member and there is no injury or affect to another body member, the recovery is limited to the medical model of §42-9-30. (Singleton and Colonna). However, the Claimant has impairment to more than one body member. He is therefore entitled to his requested analysis under the economic model of §42-9-20.
40. There are expert opinions in this case from Dr. Waid, Dr. Mandell and Mr. Leonard.
41. The vocational evaluation from Mr. Leonard is the only vocational evaluation in the record. There is no competing vocational opinion.
42. The neuropsychological evaluation from Dr. Waid is the only neuropsychological evaluation in the evidence. There is no competing neuropsychological evaluation.
43. The opinion of Dr. Mandell is given in his deposition under oath.
44. When I consider all of those opinions and the evidence as a whole, the Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11.
45. The impact of that deficiency is limited to his executive functioning. That being said, it is that executive functioning that is determinative of the Claimant's ability to hold employment similar to his employment for Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, he no longer works there and the cogent question is now can he find like employment at similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?
47. It is reasonable to conclude that if the Claimant could find employment at a wage comparable to what he earned for the Employer, he would. There is no evidence in the record that the Claimant would choose to self-limit as to his earning potential.

48. I find that the Claimant has suffered wage loss as the result of his 03/22/11 work-related accident. Based on a review of the evidence as a whole, the Claimant is clearly not as he was before this work-related accident.
49. I find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.69). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident of March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

The Single Commissioner further made the following Conclusions of Law:

1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83. This computes to a compensation rate of \$1,033.94. However, the maximum compensation rate for 2011 is \$704.92. Therefore, the claimant is awarded \$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that claimant's wage loss began. Claimant had previously received temporary total disability while he was out of work so the period of partial disability began after a period of total disability.

3. Pursuant to Section 42-15-60, claimant is entitled to ongoing care for his neck including injections, ablations, and medications as directed by Dr. Park; continuing medications and doctor visits for his post concussive syndrome as outlined by Dr. Mandell; and future surgery to his right shoulder as outlined by Dr. Barron.

The Single Commissioner then ordered the Defendants shall make the following payments:

1. \$704.92 per week for 340 weeks commencing January 17, 2014;
2. Payment of future medical care for the right shoulder to include surgery as recommended by Dr. Barron;
3. Payment for medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for post concussive headaches;
4. Payment for ongoing radio frequency ablations for the neck with Dr. Park.

Within the statutory period, the Defendants timely filed an application for review and Form 30 in the case setting forth their numerous grounds for review, copies of which were furnished to all interested parties. The Appellant asserted the Single Commissioner erred:

1. Whether the Single Commissioner erred in finding (Finding of Fact Nos. 5 and 7) that the questionnaire of Dr. Barron provides a determination of MMI, the error being that the preponderance of the evidence in record does not support this finding, Finding of Fact Nos. 5 and 7 also constitute an error of law.
2. Whether the Single Commissioner erred in finding (Finding of Fact No. 44) that the Claimant suffered a cognitive deficiency as a result of the work-related accident, the error being that the preponderance of the evidence in the record does not support this finding. Finding of Fact No. 44 also constitutes an error of law.
3. Whether the Single Commissioner erred in concluding (Finding of Fact No. 48 and Conclusion of Law No. 2) that the Claimant suffered permanent loss of wage earning capacity as a result of his work-related accident, the error being that the preponderance of

the evidence in record does not support this finding. Finding of Fact No. 48 and the supporting Conclusion of Law also constitute an error of law.

4. Whether the Single Commissioner erred in concluding (Finding of Fact No. 49 and Conclusion of Law No. 2) the Claimant's residual earning capacity to be \$1,057.69, the error being that the preponderance of the evidence in the record does not support this finding. Finding of Fact No. 49 and the supporting Conclusion of Law No. 2 constitutes an error of law.
5. Whether the Single Commissioner erred in finding (Conclusion of Law No. 2) that the Claimant is entitled to wage loss benefits commencing on January 17, 2014, a date prior to MMI. Conclusion of Law No. 2 constitutes an error of law.
6. Whether the Single Commissioner erred in finding (Finding of Fact No. 50 and Conclusion of Law No. 2) that the Claimant is entitled to three hundred and forty (340) weeks of wage loss benefits, when Section 42-9-20 states "[i]n no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury," the error being that this finding is not in accordance with the plain language of the statute, constituting an error of law.
7. Whether the Single Commissioner erred in finding (Finding of Fact Nos. 51 and 52 and Conclusion of Law No. 3) that the Claimant is entitled to future medical care with Dr. Barron, to include right shoulder surgery, the error being that the preponderance of the evidence in the record does not support this finding. Finding of Fact Nos. 51 and 52 and the supporting Conclusion of Law also constitute an error of law.

Briefs were submitted prior to oral arguments, which were presented before the Appellate Panel on December 14, 2015. All proffered testimony has been taken. Such together with all documentary evidence has been delivered by oral argument to individual members of the Appellate Panel and has since been under study and consideration. In an appellate review, the Appellate Panel shall, pursuant to SC Code and Section 42-17-50 (1976 as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own finding of fact and reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner. Counsel for the Claimant and for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties.

A review of the record in its entirety shows that the evidence supports the Single Commissioner's findings and rulings. The reports and depositions of Dr. Mandell, Dr. Waid, and Joel Leonard establish that Claimant has cognitive difficulties affecting his executive function of his brain and those difficulties have resulted in a permanent loss of wage earning capacity that began at the time of Claimant's termination. The evidence further established Claimant had reached maximum medical improvement although he would need continuing maintenance care.

Having heard oral arguments on behalf of the parties, considered the briefs, and viewed the record as a whole, the Appellate Panel affirms the hearing commissioner's order in full and makes the following finding of fact and conclusions of law:

FINDINGS OF FACT

1. The Claimant suffered injuries to his head/brain, bilateral shoulders and cervical spine in a work-related automobile accident on March 22, 2011.
2. This is an admitted accident, and the Defendants have provided medical care and treatment.

3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
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49. We find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.69). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident of March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

CONCLUSIONS OF LAW

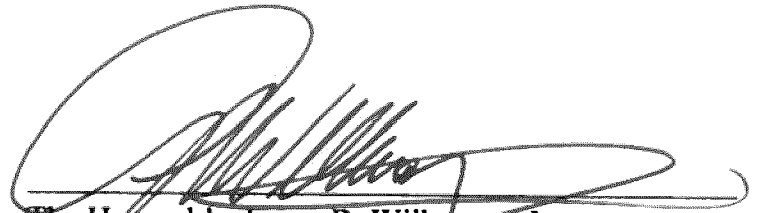
1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83. This computes to a compensation rate of \$1,033.94. However, the maximum compensation rate for 2011 is \$704.92. Therefore, the claimant is awarded \$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that claimant's wage loss began. Claimant had previously received temporary total disability while he was out of work so the period of partial disability began after a period of total disability.
3. Pursuant to Section 42-15-60, claimant is entitled to ongoing care for his neck including injections, ablations, and medications as directed by Dr. Park; continuing medications and doctor visits for his post concussive syndrome as outlined by Dr. Mandell; and future surgery to his right shoulder as outlined by Dr. Barron.

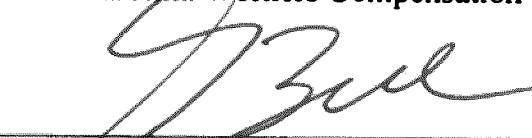
ORDER

IT IS THEREFORE ORDERED: The Decision and Order of the single commissioner filed in the above entitled matter on August 17, 2015 is hereby affirmed by the Appellate Panel of the South Carolina Workers' Compensation Commission. We Order Defendants to make the following payments:

1. \$704.92 per week for three hundred forty (340) weeks commencing January 17, 2014.
2. Payment of future medical care for the right shoulder to include surgery as recommended by Dr. Barron.
3. Payment for medical care and treatment to include prescription medications, and follow-up visits with Dr. Mandell for post concussive headaches;
4. Payment for ongoing radio frequency ablations for the neck with Dr. Park.

AND IT IS SO ORDERED!


The Honorable Avery B. Wilkerson, Jr.
South Carolina Workers Compensation Commission


The Honorable T. Scott Beck
Commissioner for the Appellate Panel


The Honorable Aisha Taylor
Commissioner for the Appellate Panel

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on February 8, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Barry Adickes, Claimant, Respondent,

v.

Philips Healthcare, Employer, and Fidelity and
Guarantee Insurance Company, Carrier, Appellants.

Appellate Case No. 2016-000514

Appeal From the Workers' Compensation Commission

Unpublished Opinion No. 2018-UP-027
Heard November 9, 2017 – Filed January 17, 2018

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Brooke Ann Payne and Ryan Daniel Oxford, both of
Lueder, Larkin & Hunter, of Mount Pleasant, for
Appellants.

William L. Smith, II, of Chappell Smith & Arden, and
Blake A. Hewitt, of Bluestein Nichols Thompson &
Delgado, LLC, both of Columbia, for Respondent.

PER CURIAM: In this workers' compensation case, Philips Healthcare (Employer) and Fidelity and Guarantee Insurance Company (collectively, Appellants) appeal the order of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) affirming the single commissioner's award of benefits to Barry Adickes. On appeal, Appellants argue the Appellate Panel erred by (1) finding Adickes to be at maximum medical improvement (MMI) for all of his work-related injuries, (2) determining Adickes was entitled to permanent partial disability (PPD) benefits due to loss of earning capacity, and (3) inaccurately awarding PPD wage loss benefits pursuant to section 42-9-20 of the South Carolina Code (2015). We affirm in part, reverse in part, and remand.

1. We find substantial evidence in the record supports the Appellate Panel's finding Adickes was at MMI for his right shoulder.¹ *See Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 599 (Ct. App. 2009) ("The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record."). Dr. Jerry Barron rated Adickes's right shoulder as having a fifteen-percent "permanent impairment" and noted, "It is further my opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible." Appellants correctly note Dr. Barron did not specifically state Adickes was at MMI, but we find he meant exactly that by referring to the fifteen-percent impairment as "permanent." The fact Dr. Barron recommended additional treatment—surgery or otherwise—does not negate his opinion Adickes's impairment was permanent. *Curiel v. Env'tl. Mgmt. Servs. (MS)*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) ("The term '[MMI]' means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment."). Importantly, Appellants did not provide a contrary medical opinion to the Appellate Panel, and Appellants had the right to seek such a contrary opinion. *See* S.C. Code Ann. Regs. 67-509(A) (2012) ("The employer's representative chooses an authorized health care provider and pays for authorized treatment.").

2. We find substantial evidence in the record supports the Appellate Panel's finding Adickes's injuries caused a loss of earning capacity. *See Fishburne*, 384 S.C. at 85, 681 S.E.2d at 599 ("The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record."). Both the single commissioner

¹ Appellants present their issue on appeal as challenging the Appellate Panel's finding of MMI for "all of his work-related injuries" but concede in their brief Adickes was at MMI for his head and cervical spine.

and Appellate Panel relied on Dr. L. Randolph Waid's neuropsychological evaluation, Dr. Howard Mandell's deposition testimony, and Joel Leonard's vocational evaluation and related deposition. Dr. Waid's evaluation noted Adickes likely experiences "executive dysfunction" that "potentially affect[s] both cognitive and emotional domains." He further opined Adickes "experiences episodic forgetfulness due to the interfering effects of attention/executive difficulties and headaches."

Dr. Mandell was Adickes's treating neurologist for more than three years following the accident. He testified directly regarding Adickes's injuries and consequences thereof, opining the effects of Adickes's injuries were likely "barriers" to his employment potential. Dr. Mandell explained Adickes's struggle with concentration and focus were "clearcut[,] persistent problem[s] that [weren't] going away" and noted, "I think this is the way he is, and [these are] the leftovers that happened from the traumatic brain injury." Dr. Mandell also endorsed Dr. John Welshofer's fifteen-percent permanent impairment rating of Adickes's brain for continuous postconcussive symptomatology and headaches.

Leonard's vocational evaluation² opined Adickes's employability was "most consistent" with Profile B. Leonard explained, "Within the parameters of Profile B, [Adickes's] current weekly wage (estimated at \$1,057.69 [or \$55,000 annually]) would be considered a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident." During Leonard's deposition, he reviewed additional information that was unavailable to him initially, including an extensive review of Adickes's work history with Employer, Dr. Mandell's deposition testimony, and Dr. Waid's neuropsychological evaluation. Despite the additional information, Leonard maintained his opinion that Profile B best described Adickes's employment potential. He explained the evidence in the record supported Adickes's wage loss was "due to some cognitive dysfunction."

We find Adickes's PPD and resulting wage loss is supported by competent expert opinion, including Dr. Welshofer's permanent impairment rating, Dr. Mandell's deposition testimony, Dr. Waid's neuropsychological evaluation, and Leonard's vocational evaluation.

² Appellants contend Leonard's vocational report should be "discredited as wholly unsubstantiated." However, the Appellate Panel found the evaluation credible and helpful to its ruling. *See Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel.").

3. We find the Appellate Panel erred in its interpretation and application of section 42-9-20 of the South Carolina Code (2015). *See State Acc. Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 245, 762 S.E.2d 19, 21 (2014) ("Although the [c]ourt may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, the [c]ourt may reverse a decision of the [Appellate Panel] if it is affected by an error of law"). Accordingly, we reverse Adickes's award of PPD benefits and remand to the Appellate Panel for a new calculation.

The applicable portion of section 42-9-20 reads: "In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury." We find this is a limiting clause that restricts the timeframe and amount of coverage and should be strictly interpreted. *See Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015) ("We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only *exceptions and restrictions to coverage are strictly construed*." (emphasis added)).

We find the plain language of the statute limits PPD benefits to 340 weeks from the date of injury, contrary to the Appellate Panel's interpretation and award. The statute explicitly mandates that in "no case" will PPD benefits be available to a claimant beyond the term of 340 weeks "from the date of injury." *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."). We further hold this interpretation of section 42-9-20 accords with the legislature's intent. *See id.* ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). PPD benefits are intended to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks from the date of injury, rather than compensate an injured claimant with a 340-week "award" of PPD benefits for specific injuries. *See Owens v. Herndon*, 252 S.C. 166, 169, 165 S.E.2d 696, 698 (1969) ("[C]ompensation under the Act is not awarded for the physical injury as such, but for 'disability' produced by such injury. The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury." (quoting *Keeter v. Clifton Mfg. Co.*, 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954))). The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. He cannot be compensated for "lost wages" while he worked and earned his usual full-time salary. Under the

Appellate Panel's interpretation, Adickes would receive PPD wage loss compensation for the period he worked full-time and earned a full-time salary. We hold the Appellate Panel erred by extending the timeframe and award for PPD benefits in contravention of the plain language of section 42-9-20 and the legislative intent for compensation. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). Accordingly, we reverse the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and KONDUROS and HILL, JJ., concur.

SCWCC JUDICIAL DEPARTMENT
REMITTITUR ROUTING SHEET

Barry Adickes v Philips HeathCare
SCWCC: 1102937
Commissioners: Wilkerson, Beck, Taylor

Claimant: William L. Smith

Defendant: Brooke Payne

This is a remittitur from a higher court

SINGLE COMMISSIONER: McCaskill

ORIGINAL APPELLATE PANEL: Wilkerson, Beck, Taylor

ASSIGN TO: Single Commissioner OR **Reconstituted Panel**

____Beck

____McCaskill

____Barden

____James

____Campbell

____Taylor

____Wilkerson

Chair: [Signature]

Date: 7/16/18

CERTIFICATE OF SERVICE

**THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER
IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY
DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL**

This 16 day of July, 2018.

By: Valerie D. Beller
SCWCC Judicial Department

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Simmons Adickes,

Claimant,

vs.

Philips Corporation,

Employer,

Gallagher Bassett Services,

Carrier/Defendants.

WCC FILE NO: 1102937

DECISION AND ORDER

HEARING:

Date: October 9, 2018

Location: Rock Hill, South Carolina

APPEARANCES:

Claimant, Barry Simmons Adickes, represented by
William L. Smith, II, Esquire

Defendants, Philips Healthcare and Fidelity and Guaranty
Insurance Co, represented by Brooke A. Payne, Esquire

PURPOSE OF HEARING:

Determination of issue on remand from the Court of
Appeals

COMMISSIONER:

Susan S. Barden

FILED:

January 17, 2019

STATEMENT OF THE CASE

This matter was originally tried before the Honorable Gene McCaskill who issued an Order on August 27, 2015, in which he found that Claimant had reached maximum medical improvement; found that Claimant had suffered a permanent loss of wage earning capacity; awarded 340 weeks of benefits under § 42-9-20 commencing when the wage loss began on January 17, 2014; and ordered ongoing and future medical care.

That Order was appealed to an Appellate Panel of the Workers' Compensation Commission. The Appellate Panel unanimously affirmed that decision on February 8, 2016. Defendants then appealed to the Court of Appeals.

The Court of Appeals issued an Order on January 17, 2018, that (1) affirmed that Claimant was at maximum medical improvement; (2) affirmed that Claimant's injuries caused a loss of earning capacity; and (3) and reversed the award of 340 weeks commencing on the date the wage loss began, limiting the award to 340 weeks from the date of injury. The Court then remanded the matter to the Workers' Compensation Commission for a new calculation of benefits consistent with the plain language of § 42-9-20. Thus, the sole issue before the undersigned is the remand from the Court of Appeals for a recalculation of the wage loss award.

Claimant is represented by William L. Smith, II, Esquire of Columbia, South Carolina. Defendants are represented by Brooke A. Payne, Esquire of Mt. Pleasant, South Carolina.

EVIDENCE OF THE CASE

No new evidence was submitted. The record consists of the APA Submissions and exhibits that were admitted at the prior hearing, the witnesses' testimony contained in the transcript from the prior hearing; the expert witness depositions from the prior hearing, as well as the briefs and record on appeal from the Court of Appeals, and the opinion from the Court of Appeals. As before, the Commission file was made a part of the record. This matter was set for hearing before the undersigned on October 9, 2018, in Rock Hill, South Carolina. The attorneys appeared and argued their respective positions on the record. The parties also submitted memoranda as to their respective positions. The previously submitted evidence, argument by attorneys, and their memoranda were all reviewed and considered in rendering this decision.

POSITIONS OF THE PARTIES

Claimant

It is the position of the Claimant that he is entitled to \$53,372.51 as of the date of hearing (October 9, 2018). The Court of Appeals limited the award to 340 weeks from the date of injury. This is an unusual situation where Claimant worked most of the first 147 weeks immediately following his accident and his wage loss did not manifest itself until he was terminated on January 17, 2014, as a result of the effects from his injury. Thus, the Court of Appeals' decision reduces the award by 147 weeks. Those weeks are, therefore, credited against the award leaving 193 weeks to be paid.

However, once the order of the Commission's Appellate Panel was filed, Defendants began making the required weekly payments to Claimant. Claimant believes 125 weeks had been paid at the time of hearing reducing the amount owed to 68 weeks.

Claimant had been paid temporary total compensation from March 23, 2011, through May 5, 2011, and March 9, 2016, through March 22, 2016, for a total of seven weeks and five days. Section 42-9-20 states that when a period of total disability benefits is paid the number of weeks such benefits were paid "shall not be deducted from the maximum period allowed for partial disability." As such the amount owed would increase by $7\frac{5}{7}$ weeks to 75 weeks and five days.

In support of his position, Claimant argues:

1. The Court of Appeals did not reverse the finding that Claimant's disability/ wage loss began on January 17, 2014, as they simply limited the award to 340 weeks from date of injury and the finding of the Commission is the law of the case. In fact, the Court of Appeals affirmed the award beginning on January 17, 2014.

2. The record is clear that the wage loss began at Claimant's termination by the Defendant

Employer and section 42-9-20's plain reading makes no distinction between temporary and permanent wage loss as those words do not even appear in the statute. The test for wage loss is the same as the definition of disability under section 42-1-120. That test is the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

3. If the defense argument prevailed in limiting the award on the front end (340 weeks from date of injury) as well as on the back end (no award until maximum medical improvement) the statute would then provide no remedy and would be a violation of due process. The "grand bargain" would be breached.

4. No date of maximum medical improvement is contained in Commissioner McCaskill's Order because MMI is irrelevant. Moreover, to find a date of maximum medical improvement would be beyond the scope of remand. While reserving this argument, Claimant argues in the alternative that if it is necessary to find a date of maximum medical improvement, the MMI date would be November 1, 2012, the date Claimant's brain was rated by Dr. Welshofer, as it is the brain injury that is chiefly causing the wage loss.

5. Defendants are precluded from arguing that wage loss benefits may not be ordered for any period before maximum medical improvement as that issue was not properly preserved before the Court of Appeals.

Defendants

Defendants argue that Claimant's award of permanent wage loss benefits is limited to 141 weeks, and 135 of these weeks had been paid as of the date of hearing.

In support of this position, Defendants argue:

(1) Permanent benefits start at maximum medical improvement;

- (2) The maximum medical improvement date is January 14, 2015;
- (3) There would only be 141 weeks of wage loss benefits available after maximum medical improvement;
- (4) The date of commencement of wage loss benefits is on remand;
- (5) Claimant sought permanent benefits and can only receive an award for same;
- (6) Commencing wage loss benefits from the date of maximum medical improvement is not a violation of due process;
- (7) The last line of section 42-9-20 does not extend the 340 weeks of wage loss entitlement.

DISCUSSION AND RATIONALE

The undersigned has studied the Order of the Court of Appeals intently to undertake the calculation on remand.

That order states:

Permanent partial disability benefits are intended to compensate an injured Claimant for the loss of earning capacity over the designated 340 weeks from the date of injury, rather than compensate an injured Claimant with a 340 week “award” of permanent partial disability benefits. For specific injuries. See Owens v. Herndon, 252 S.C. 166, 169, 165 S.E.2d 696, 698 (1969) “Compensation under the Act is not awarded for the physical injury as such, but for “disability” produced by such injury. The “disability is to be measured by the employee’s capacity or incapacity to earn the wages which he was receiving at the time of his injury.” (Quoting Keeter v. Clifton Mfg. Co., 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954)). The record is clear Adickes did not suffer a wage loss until he was terminated from employer.

It seems clear that the Court of Appeals reversed and remanded over the issue of limiting the award from 340 weeks from date of injury under the plain language of section 42-9-20. In fact, they specifically note that, “The record is clear Adickes did not suffer a wage loss until he was terminated by his employer” (1-17-14). Nowhere in the decision do they ever discuss limiting the award beyond that. The only substantive mention of maximum medical improvement in the order is in Section 1 of the order and that section was fully affirmed and had nothing to do with

when the wage loss benefits began. Despite Defendants raising this issue, the Court of Appeals did not reverse the decision on this basis.

Next, the record is clear that Claimant's wage loss began on January 17, 2014. Before his termination, Claimant was earning close to his pre-injury earnings. However, the record shows that Claimant was never able to earn close to that amount again following his termination. In a fully affirmed finding, the Single Commissioner and Appellate Panel found in finding of fact 49, "Claimant has a post-accident average weekly wage of \$1,057.69" which resulted in a wage loss of \$1,550.83 per week. FOF 49.

Section 42-9-20, given a plain reading as required by the remand, does not distinguish between temporary and permanent benefits. It only provides that:

Except as otherwise provided in Section 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this state for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

This section simply pays two-thirds of the difference between the preinjury average weekly wage and the post injury average weekly wage during such disability. Disability is defined by section 42-1-120 as "the incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." A plain reading of the statute does not distinguish between temporary and permanent. Rather, the issue is whether the definition of disability is met, and it has been met in the case at bar.

Additionally, with regard to Defendants' argument that benefits cannot be paid until after maximum medical improvement, the affirmed order does not contain a date of maximum medical

improvement – only an affirmation that Claimant had reached maximum medical improvement. To find an actual date of maximum medical improvement would require the undersigned to determine an issue that is beyond the issue on remand. Even so, Defendants argue an inferred date of maximum medical improvement as the date the questionnaire was signed by Dr. Barron. However, this was not a date of medical treatment or examination.

Further, with regard to defendant’s argument that permanency benefits can only be paid after MMI, this position is contrary to Bass v. Kenco, 366 SC 450, 622 S.E.2d 577 (Ct. App. 2005) and McMahon v. SC Department of Education Transportation, 417 S.C. 481, 790 SE 2d 393 (Ct. App. 2016). In McMahon, the court stated,

Our conclusion is buttressed by Dodge v. Brucoli, Clark, Layman, Inc. in which we stated that MMI and disability are not always inextricably intertwined. 334 SC 574, 581, 514 SE 2d 593, 596 (Ct. App. 1999) (Maximum medical improvement is a distinctly different concept from disability.) Although a finding of MMI often coincides with an award of permanent disability benefits, see South v. SC Department of Mental Health, 335 SC 396, 399, 517 SE 2d 694, 695-96 (1999) (holding it was inappropriate to terminate temporary benefits in favor of permanent benefits upon a finding of MMI), an individual can also be permanently disabled and still yet to achieve MMI.

In a footnote, the McMahon court affirmed Bass v Kenco and went on to explain further:

³We find the Appellate Panel misstated the law in its final order when it found “[i]t is well settled in South Carolina that the award of disability benefits is premature prior to the claimant reaching MMI.” The Appellate Panel supported this statement by citing to *Smith* and stating our supreme court “not[ed] that the degree of permanent disability cannot be determined prior to MMI.” The issue in *Smith*, however, was whether an employer could cease payment of temporary benefits if an employee had achieved MMI. 335 SC at 398, 517 SE2d at 695. Although our supreme court concluded it was appropriate to terminate temporary benefits in favor of permanent benefits upon a finding of MMI, the court never held an individual was precluded from a permanent disability award without a finding of MMI. *Id* at 399-400, 517 SE 2d at 695-96. We believe the correct interpretation of the law was aptly stated in *Bass v. Kenco Group*, wherein this court held as follows:

A declaration of [MMI] is irrelevant to the award of permanent partial disability in this case. “[MMI]” is a distinctly different concept from “disability.”....It is true that when a claimant receiving temporary benefits reaches [MMI] and is still disabled, temporary benefits are terminated and the claimant is awarded permanent benefits.... It does not follow, however, that a claimant who has not reached [MMI] is precluded from an award of permanent benefits.

366 SC 450, 466-67, 622 SE 2d 577, 585-86 (Ct. App. 2005) (internal citations omitted).

Finally, Claimant has argued that the seven weeks and five days of temporary total disability paid should not be deducted from the three hundred forty week award. Section 42-9-20's last sentence states, “In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.” This section was applied in Bass v. Kenco, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005) and the employer carrier was not given credit for temporary total disability paid during the 340 week period. As such, the temporary total disability paid during the 340 weeks does not get credited against the 340 week award and essentially prolongs the award to 347 weeks and five days. This is the plain reading of § 42-9-20 as well as the Court of Appeals' finding in Bass v. Kenco.

This rationale encompasses most of the arguments and positions raised by the parties. In light of the above reasoning, it is unnecessary to address the due process or issue preclusion arguments. The findings of fact have already been issued in this case and the only issue is the calculation of the award pursuant to the remand from the Court of Appeals.

As such, the following are made as:

RULINGS OF LAW

1. Claimant's wage loss began on January 17, 2014.
2. The Court of Appeals did not reverse the date wage loss began. The Court of Appeals simply ruled that the 340 week allowable period begins with date of injury and not at a later date. In fact, the order states, "The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. He cannot be compensated for "lost wages" while he worked and earned his usual full-time salary. Under the Appellate Panel's interpretation, Adickes would receive permanent partial disability wage loss compensation for the period he worked full-time and earned a full-time salary. We hold the Appellate Panel erred by extending the timeframe and award for permanent partial disability benefits in contravention of the plain language of § 42-9-20 and the legislative intent for compensation."
3. Defendants raised their argument that benefits could not start until maximum improvement before the Court and the Court did not reverse or remand on that ground.
4. The issue of maximum medical improvement is immaterial in a wage loss claim. Bass v. Kenco 622 S.E.2d 577, and benefits can be awarded before or after maximum medical improvement. This issue for determination of benefits under § 42-9-20 is the employee's capacity or incapacity to earn the wages he was receiving at the time of injury. Keeter v. Clifton Mfg. Co., 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954).
5. The affirmed order does not contain a date of maximum medical improvement and to find such a date would be determining an issue beyond the scope of the remand from the Court of Appeals.
6. Defendants do not receive credit against the 340 weeks for the seven weeks and five days of previous temporary total disability paid. These weeks are shown on the Form 18

contained in the Commission file. The clear reading of § 42-9-20 and the application as shown in Bass v. Kenco shows that these weeks are not credited against the 340 weeks and essentially add seven weeks and five days to the award.

ORDER

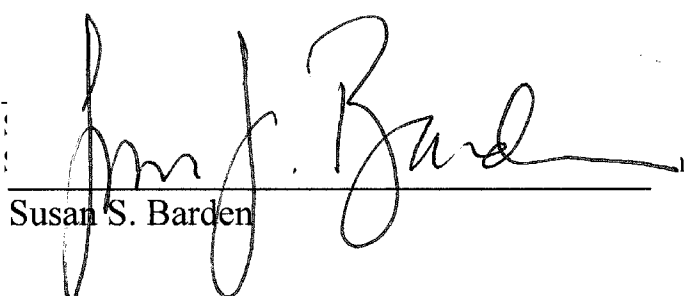
IT IS THEREFORE ORDERED that Claimant is entitled to an award of wage loss benefits beginning on January 17, 2014 to be paid by Defendants as per the following:

1. Claimant is limited to 340 weeks from the date of injury March 22, 2011;
2. As such, the award beginning on January 17, 2014 is for 193 weeks as Claimant worked 147 weeks between March 22, 2011 and January 17, 2014.
3. Defendants do not receive credit for the seven weeks and five days of temporary total disability paid, and these weeks extend the period and are added to the award.
4. This makes the total award payable to Claimant 200 weeks and five days.
5. Defendants began making weekly payment of the award under § 42-17-60 when the Order of the Commission's Appellate Panel was filed and continue to make those payments. Thus, any weekly payments made since the appeal was filed shall be credited against the amount due to Claimant.
6. More than 340 weeks have elapsed since the injury so all of the weeks owed have accrued and would not be subject to commutation.
7. Pursuant to § 42-17-60 and § 34-31-20(B) interest would be due to Claimant on benefits owed between January 17, 2014 and when weekly payments were commenced at the time of appeal. No interest would be due on weeks after the date weekly payments began. The interest

rate per the statute was 7.50% per annum during the weeks compensation was owed yet not paid.

AND IT IS SO ORDERED

Dated: January 17, 2019



Susan S. Barden

IT IS SO ORDERED.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Barbara Skarbek on January 17, 2019

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Simmons Adickes,

Claimant,

vs.

Philips Corporation,

Employer,

and

Ghallager Bassett Services,

Carrier/Defendants.

WCC FILE NO: 1102937

DECISION AND ORDER

HEARING:

Date: April 19, 2019

Location: Columbia, South Carolina

APPEARANCES:

Claimant, Barry Simmons Adickes, represented by
William L. Smith, II, Esquire

Defendants, Philips Healthcare and Fidelity and Guaranty
Insurance Co, represented by Brooke A. Payne, Esquire

PURPOSE OF HEARING:

Determination of issues as set forth on the Form 50, 52
and by operation of R.67-603

COMMISSIONER:

Melody L. James

FILED:

June 19, 2019

STATEMENT OF THE CASE

This matter was tried before Commissioner McCaskill and an order issued on August 27, 2015. Commissioner McCaskill awarded wage loss benefits from January 17, 2014 for 340 weeks. He also ordered defendants to provide medical care as prescribed by Dr. Mandell and Dr. Park. Defendants appealed the wage loss award but did not appeal the findings requiring them to provide medical treatment.

The Appellate Panel affirmed the wage loss award. Defendants then appealed to the Court of Appeals and began making weekly payment of the award as required by § 42-17-60. The Court of Appeals affirmed in part, reversed in part, and remanded to the Commission for a determination of the wage loss benefit.

Defendants petitioned the Court of Appeals to be allowed to stop payment of the weekly benefit. The Court of Appeals deferred to the Commission. Defendants next filed a motion to stop payment of the weekly benefits before the Workers' Compensation Commission. Commissioner Susan Barden denied their motion. Commissioner Barden then heard the issue remanded by the Court of Appeals and ordered defendants to make payment of 200 weeks and 5 days with credit for weeks already paid.

On February 5, 2019, Defendants stopped payment of the weekly benefit.

Claimant alleged that Defendants have been under order to provide medication as prescribed by Dr. Mandell since the Single Commissioner order of August 27, 2015. (FOF 53, p. 17-18). They appealed the order, but not this issue. (See Form 30). Claimant alleges defendants repeatedly refused to authorize medications from Dr. Mandell in July, August, September, October, and November 2018. These failures occurred on July 9, 2018 – July 12, 2018, totaling 3 days (APA p. 75-78); August 31, 2018 to September 6, 2018, totaling 6 days (APA p. 79-84); September 17, 2018 to September 25, 2018, totaling 8 days (APA p. 85-88);

and October 16, 2018 to November 12, 2018, totaling 27 days (APA p. 89-116); for a grand total of 44 days. Under §42-3-175(A)(1) the Plaintiff sought attorney's fees and costs and fines of \$500.00 per day.

Claimant also alleges defendants illegally stopped payment of the weekly benefits. Defendants appealed the 340 week wage loss award to the court of appeals. They started making payment of the award pursuant to § 42-17-60, which requires payment "until the questions at issue have been fully determined in accordance with the provisions of this title." Defendants twice filed motions to suspend payment. They were denied by the Court of Appeals and Commissioner Barden.

Defendants stopped payment on February 5, 2019. Claimant seeks fines pursuant to § 42-9-90 seeking 10% for nonpayment when due, § 42-3-175 seeking fines and fees at \$500.00 per day, § 42-3-105 thereby doubling the fines, and § 42-9-260 seeking 25% for suspension or termination of disability benefits to Claimant.

Defendants, on the other hand, admit that there were some delays in authorizing medications but deny that this was willful conduct. Defendants further alleged that once Commissioner Barden issued her order determining the amount due on remand, they were no longer required to continue payments to Claimant.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act, the following were submitted into evidence:

CLAIMANT'S SUBMISSIONS

	Provider	Date of Service	Page Nos.
APA 1	Appellate Panel Order	02/08/16	1-16
APA 2	Deposition of Dr. Howard Mandell	12/09/14	17-73
APA 3	Motion Order of Commissioner Barden	10/02/18	74

APA 4	Emails to Defense Counsel	07/09/18-07/12/18 08/31/18-09/06/18 10/16/18-11/13/18	75-116
APA 5	Prescription Denial Letter	10/24/18	117
APA 6	Dr. Howard Mandell, M.D.	10/05/16-08/03/18	118-127
APA 7	Walgreens Pharmacy	06/06/17-01/07/19	128-143

DEFENDANT’S SUBMISSIONS

Exhibits

A.	Prescription Payout History	1
B.	Defendant’s Form 30	2-6

EVIDENCE OF THE CASE

The APA Submissions and exhibits from the parties were admitted as evidence and reviewed by the undersigned. Arguments were heard from counsel for each party. The Commission file was made a part of the record.

The evidence reveals that defendants have been under order to provide treatment including medications from Dr. Mandell since the original order was filed by Commissioner McCaskill on August 27, 2015 (Finding of Fact No. 53). The Form 30 filed on September 3, 2015 did not appeal this issue and it became the law of the case.

Dr. Mandell’s deposition was taken on December 9, 2014. In that deposition he testified as to Claimant’s need for multiple medications for his post concussive migraine headaches. Deposition pp 28-32. Dr. Mandell’s office notes confirm the continuing need for those medications and the continuing prescriptions. APA, pp. 118-127.

Numerous email exchanges between counsel were admitted as evidence that shows requests for medication authorizations and delays in approvals. One particular exchange shows Claimant’s medications being denied for a period of 27 days. APA pp 89-116.

The delays in authorization described in the emails are confirmed by the Walgreen's Pharmacy records that show when prescriptions were filled. APA pp 128-143.

The record shows defendants started making weekly payments by way of a form 15 dated March 22, 2016. The record also shows that Commissioner Barden denied defendant's request to stop paying benefits by order dated October 2, 2018. APA p 74. Thereafter, Commissioner Barden heard the issue on remand from the Court of Appeals and issued an order on January 17, 2019 ordering defendants to pay 200 weeks and five days of benefits with any weekly payments made since the appeal was filed to be credited against that amount. A substantial number of weeks remain unpaid so there is not full payment under the current order.

Defendants filed another appeal to Commissioner Barden's order by way of form 30 filed on January 21, 2019. There is no order in the file or record allowing defendants to stop payment of the weekly benefit. The form 18 in the Commission file dated March 19, 2019 shows defendants have paid no weekly benefits since February 5, 2019.

Based on the above-stated evidence and a review of the entire record, the following are made as:

FINDINGS OF FACT

1. A form 15 was filed on March 22, 2016 starting weekly benefits.
2. There is no order in the file allowing defendants to stop payment of weekly benefits.
3. The award has not been fully paid under the current order.
4. Defendants illegally stopped payment of weekly benefits on February 5, 2019.
5. Defendants are required to reinstate weekly payments at \$704.92 commencing February 6, 2019.
6. §42-17-60 provides that, "In case of an appeal from the decision of the Commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the

employer is required to make weekly payments of compensation and to provide medical treatment ordered by the Commission involved in the appeal or certification until the questions at issue have been fully determined in the accordance with the provisions of this title.” Here, defendants filed a further appeal from Commissioner Barden’s order for the issue that was on remand from the Court of Appeals. Thus, the questions at issue have not been fully determined in accordance with the provision of this title.

7. Since defendants illegally stopped payment of weekly benefits, they are subject to fines and penalties.
8. Defendants have been under order to provide medications directed by Dr. Mandell since August 27, 2015.
9. Despite repeated requests and demands defendants denied or failed to authorize prescription medications despite being under order to do so. The failure to authorize medications after this many requests while being under order to do so constitutes willful disobedience of an order and defendants are subject to fines for such disobedience.

CONCLUSIONS OF LAW

1. Pursuant to §42-17-60, defendants are required to make payment of weekly benefits beginning February 6, 2019, as they illegally terminated weekly compensation benefits.
2. Pursuant to §42-9-90 defendants are hereby fined ten (10%) of the total unpaid weekly disability installments, beginning February 6, 2019.
3. Pursuant to §42-3-175, defendants are fined \$200.00 per day for the period of 27 days for willful disobedience of the order requiring provision of medication as prescribed by Dr. Mandell.

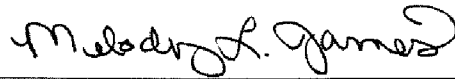
4. Pursuant to §42-3-175 defendants are required to reimburse Claimant's attorney for the \$50.00 hearing filing fee.

ORDER

IT IS THEREFORE ORDERED that defendants will pay the following amounts:

1. Weekly benefits to the Claimant beginning February 6, 2019 in the amount of \$704.92 per week.
2. An amount of ten (10%) percent of the unpaid disability installments (beginning February 6, 2019) to be paid to the Claimant for illegal termination of benefits pursuant to §42-9-90.
3. Fines payable to the State of South Carolina General Fund pursuant to §42-3-175 in the amount of \$5,400.00.
4. \$50.00 payable to Claimant's attorney, Chappell, Smith & Arden, for costs associated in enforcing the order.

AND IT IS SO ORDERED!



Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 19, 2019

By: Tamara Morris, Administrative Assistant to Commissioner James

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Barry Adickes,

CLAIMANT,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1102937

DECISION AND ORDER

Appellate Panel Review held in Columbia, South Carolina on

April 30, 2019,

Appellate Panel Decision and Order filed on June 20, 2019

Appearances: Claimant represented by William L. Smith II, Esquire
Defendants represented by Brooke A. Payne, Esquire

STATEMENT OF THE CASE

This case was originally tried before Commissioner Gene McCaskill who ruled that Claimant had sustained a significant wage loss and awarded 340 weeks of wage loss benefits under § 42-9-20. Claimant had sustained injuries to his brain, cervical spine, and shoulders. Commissioner McCaskill found that it was Claimant's brain injury that caused his loss of earning capacity. The Appellate Panel affirmed the order in its entirety.

Defendants filed an appeal to the Court of Appeals on several issues. In an unpublished decision, the Court of Appeals affirmed that Claimant was at MMI and that Claimant had sustained wage loss as a result of his cognitive dysfunction. However, the Court reversed the 340 week wage loss award by finding that the wage loss award could not be greater than 340 weeks from the date of injury and remanded to the Commission for a new calculation consistent with the plain language of § 42-9-20.

The case was remanded and eventually heard by Commissioner Barden. Commissioner Barden issued an order on January 17, 2019, making the following Rulings of Law:

1. Claimant's wage loss began on January 17, 2014.
2. The Court of Appeals did not reverse the date wage loss began. The Court of Appeals simply ruled that the 340 week allowable period begins with the date of injury and not at a later date. In fact, the order states, "The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. He cannot be compensated for "lost wages" while he worked and earned his usual full-time salary. Under the Appellate Panel's interpretation, Adickes would receive permanent partial disability wage loss compensation for the period he worked full-time and earned a full-time salary. We hold the appellate Panel erred by extending the timeframe and award for permanent partial disability benefits in contravention of the plain language of § 42-9-20 and the legislative intent for compensation."
3. Defendants raised their argument that benefits could not start until maximum improvement before the Court and the Court did not reverse or remand on that ground.
4. The issue of maximum medical improvement is immaterial in a wage loss claim. Bass v. Kenco 622 S.E.2d 577, and benefits can be awarded before or after maximum medical improvement. This issue for determination of benefits under § 42-9-20 is the employee's capacity or incapacity to earn the wages he was receiving at the time of injury. Keeter v. Clifton Mfg. Co., 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954).
5. The affirmed order does not contain a date of maximum medical improvement and to find such a date would be determining an issue beyond the scope of the remand from the Court of Appeals.
6. Defendants do not receive credit against the 340 weeks for the seven weeks and five days of previous

temporary total disability paid. These weeks are shown on the Form 18 contained in the Commission file. The clear reading of § 42-9-20 and the application as shown in Bass v. Kenco shows that these weeks are not credited against the 340 weeks and essentially add seven weeks and five days to the award.

The Single Commissioner further issued the following order:

1. Claimant is limited to 340 weeks from the date of injury March 22, 2011;
- ~~2. As such, the award beginning on January 17, 2014 is for 193 weeks as Claimant worked 147 weeks between March 22, 2011 and January 17, 2014;~~
3. Defendants do not receive credit for the seven weeks and five days of temporary total disability paid, and these weeks extend the period and are added to the award;
4. This makes the total award payable to Claimant 200 weeks and five days;
5. Defendants began making weekly payment of the award under § 42-17-60 when the Order of the Commission's Appellate Panel was filed and continue to make those payments. Thus, any weekly payments made since the appeal was filed shall be credited against the amount due to Claimant;
6. More than 340 weeks have elapsed since the injury so all of the weeks owed have accrued and would not be subject to commutation;
7. Pursuant to § 42-17-60 and § 34-21-20(B) interest would be due to Claimant on benefits owed between January 17, 2014 and when weekly payments were commenced at the time of appeal. No interest would be due on weeks after the date weekly payments began. The interest rate per statute was 7.50% per annum during the weeks compensation was owed yet not paid.

Within the statutory period, the Defendants timely filed an application for review and Form 30 in the case setting forth their numerous grounds for review, copies of which were furnished to all interested parties. The Appellant/Defendants asserted the Single Commissioner erred:

1. Whether the Single Commissioner erred in ruling (Rulings of Law 2) that the Court of Appeals did not reverse the date wage loss began, the error being that the preponderance of the evidence in the record does not support this ruling. The supporting Order directive (§ 2) also constitutes an error of law.
2. Whether the Single Commissioner erred in ruling (Rulings of Law 3) that the Court of Appeals did not reverse or remand with regard to whether wage loss benefits commence as of the date of the MMI, the error being that the preponderance of the evidence in the record does not support this ruling. The supporting Order directive (§ 2) also constitutes an error of law.
3. Whether the Single Commissioner erred in ruling (Rulings of Law 4) that the issue of MMI is immaterial in a wage loss claim, as this ruling constitutes an error of law. The supporting Order directive (§ 2) also constitutes an error of law.
4. Whether the Single Commissioner Erred in ruling (Rulings of Law 5) that determining the date of the

MMI is beyond the scope of the remand from the Court of Appeals, the error being that the preponderance of the evidence in the record does not support this ruling. This ruling also constitutes an error of law. The supporting Order directive (§ 2) also constitutes an error of law.

5. Whether the Single Commissioner erred in ruling (Rulings of Law 6) that the proper application of § 42-9-20 allows for the Claimant to receive credit for TTD benefits received in the form of an additional 7 weeks and 5 days of wage loss benefits beyond the 340 week limitation period, as this ruling constitutes an error of law. The supporting Order directive (§ 3) also constitutes an error of law.

-
- ~~6. Whether the Single Commissioner erred in ordering the Defendants to commence his wage loss~~
benefits on January 17, 2014, a date prior to a designation of MMI, as this Order directive (§ 2) constitutes an error of law as it is in direct contradiction to existing case law.

7. Whether the single commissioner erred in ordering the Defendants to pay interest on the benefits owned from January 17, 2014 through the date that Defendants commenced benefits, as this Order directive (§ 7) constitutes an error of law.

The Claimant/Appellant also filed a Form 30, asserting the Single Commissioner erred:

1. Did the Single Commissioner err in her order in failing to rule that limiting the award on both the front end (340 weeks from the date of injury) and on the back end (no award under §42-9-20 until maximum medical improvement) would be violative of due process as an additional ground to support the award the error being that due process of law would also support the Commissioner's decision?
2. Did the Single Commission err in her order in failing to rule that the defendants are precluded from arguing the wage loss benefits may not be ordered before maximum medical improvement as the issue was not properly preserved before the Court of Appeals as an additional ground to support the award the error being that defendants did not properly preserve the issue and had, therefore, waived it?

Briefs were submitted prior to oral arguments, which were presented before the Appellate Panel on April 30, 2019. All proffered testimony has been taken. Such together with all documentary evidence has been delivered by oral argument to individual members of the Appellate Panel and has since been under study and consideration. In an appellate review, the Appellate Panel shall, pursuant to SC Code and Section 42-17-50 (1976 as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own finding of fact and reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner. Counsel for the Claimant and for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties.

A review of the record in its entirety shows that the evidence supports the Single Commissioner's findings and rulings. The Single Commissioner performed a detailed analysis of the issues, followed the directions from the Court of Appeals on remand, and issued an order that follows the plain reading of Section 42-9-20

and supporting case law.

Having heard oral arguments on behalf of the parties, considered the briefs, and viewed the record as a whole, the Appellate Panel affirms the hearing commissioner's order in full and makes the following conclusions of law:

CONCLUSIONS OF LAW

1. Claimant's wage loss began on January 17, 2014.
2. The Court of Appeals did not reverse the date wage loss began. The Court of Appeals simply ruled that the 340 week allowable period begins with the date of injury and not at a later date. In fact, the order states, "The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. He cannot be compensated for "lost wages" while he worked and earned his usual full-time salary. Under the Appellate Panel's interpretation, Adickes would receive permanent partial disability wage loss compensation for the period he worked full-time and earned a full-time salary. We hold the appellate Panel erred by extending the timeframe and award for permanent partial disability benefits in contravention of the plain language of § 42-9-20 and the legislative intent for compensation."
3. Defendants raised their argument that benefits could not start until maximum improvement before the Court and the Court did not reverse or remand on that ground.
4. The issue of maximum medical improvement is immaterial in a wage loss claim. Bass v. Kenco 622 S.E.2d 577, and benefits can be awarded before or after maximum medical improvement. This issue for determination of benefits under § 42-9-20 is the employee's capacity or incapacity to earn the wages he was receiving at the time of injury. Keeter v. Clifton Mfg. Co., 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954).
5. The affirmed order does not contain a date of maximum medical improvement and to find such a date would be determining an issue beyond the scope of the remand from the Court of Appeals.
6. Defendants do not receive credit against the 340 weeks for the seven weeks and five days of previous temporary total disability paid. These weeks are shown on the Form 18 contained in the Commission file. The clear reading of § 42-9-20 and the application as shown in Bass v. Kenco shows that these weeks are not credited against the 340 weeks and essentially add seven weeks and five days to the award.

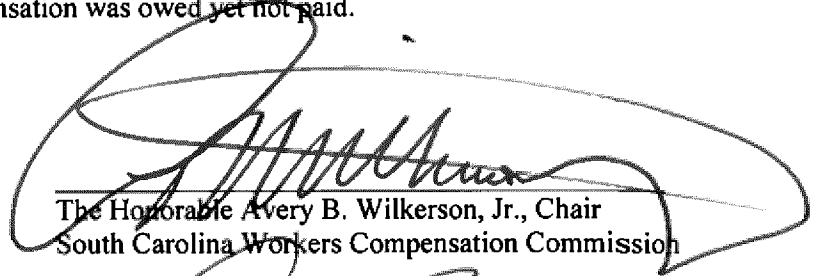
ORDER

IT IS THEREFORE ORDERED: The Decision and Order of the single commissioner filed in the above entitled matter on January 17, 2019 is hereby affirmed by the Appellate Panel of the South Carolina Workers' Compensation Commission.

1. Claimant is limited to 340 weeks from the date of injury March 22, 2011;
2. As such, the award beginning on January 17, 2014 is for 193 weeks as Claimant worked 147 weeks between March 22, 2011 and January 17, 2014;

3. Defendants do not receive credit for the seven weeks and five days of temporary total disability paid, and these weeks extend the period and are added to the award;
4. This makes the total award payable to Claimant 200 weeks and five days;
5. Defendants began making weekly payment of the award under § 42-17-60 when the Order of the Commission's Appellate Panel was filed and continue to make those payments. Thus, any weekly payments made since the appeal was filed shall be credited against the amount due to Claimant;
- ~~6. More than 340 weeks have elapsed since the injury so all of the weeks owed have accrued and would not be subject to commutation;~~
7. Pursuant to § 42-17-60 and § 34-21-20(B) interest would be due to Claimant on benefits owed between January 17, 2014 and when weekly payments were commenced at the time of appeal. No interest would be due on weeks after the date weekly payments began. The interest rate per statute was 7.50% per annum during the weeks compensation was owed yet not paid.

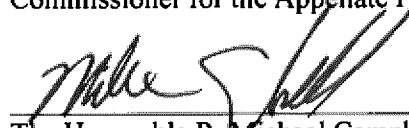
AND IT IS SO ORDERED!



The Honorable Avery B. Wilkerson, Jr., Chair
South Carolina Workers Compensation Commission



The Honorable T. Scott Beck
Commissioner for the Appellate Panel



The Honorable R. Michael Campbell, II
Commissioner for the Appellate Panel

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on June 20, 2019

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Barry Adickes,

CLAIMANT,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1102937

DECISION AND ORDER

Appellate Panel Review held in Columbia, South Carolina on

September 16, 2019,

Appellate Panel Decision and Order filed on November 8, 2019

Appearances: Claimant represented by William L. Smith II, Esquire
Defendants represented by Brooke A. Payne, Esquire

STATEMENT OF THE CASE

The case came before the Single Commissioner pursuant to a Form 50 filed by the claimant on September 19, 2018 and by operation of Regulation 67-603. Claimant alleged defendants had repeatedly refused to provide medications to claimant that they were under order to provide for four separate periods of time totaling 44 days. Claimant sought fines, penalties, and attorneys fees for enforcing the orders.

Claimant also alleged defendants illegally stopped making payment of weekly benefits that were being paid during the pendency of the appeal and remand from the Court of Appeals pursuant to §42-17-60. Claimant sought an order reinstating the benefit along with fines pursuant to §42-9-90; §42-3-175, §42-3-105, and §42-9-260.

Defendants admitted some delays in authorizing medications but denied that it was willful conduct. Defendants also alleged that once Commissioner Barden issued her order determining the amount due on remand, they were no longer required to continue payments to claimant.

The hearing was held before the Single Commissioner on April 19, 2019 in Columbia, South Carolina pursuant to timely and properly served notice on all parties. No objection was raised by either party regarding jurisdiction or venue.

On June 19, 2019, the Single Commissioner issued her Decision and Order, making the following Findings of Fact:

1. A Form 15 was filed on March 22, 2016 starting weekly benefits.
2. There is no order in the file allowing defendants to stop payment of weekly benefits.
3. The award has not been fully paid under the current order.
4. Defendants illegally stopped payment of weekly benefits on February 5, 2019.

5. Defendants are required to reinstate weekly payments at \$704.92 commencing February 6, 2019.
6. §42-17-60 provides that, "In case of an appeal from the decision of the Commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the Commission involved in the appeal or certification until the questions at issue have been fully determined in the accordance with the provisions of this title." Here, defendants filed a further appeal from Commissioner Barden's order for the issue that was on remand from the Court of Appeals. Thus, the questions at issue have not been fully determined in accordance with the provision of this title.
7. Since defendants illegally stopped payment of weekly benefits, they are subject to fines and penalties.
8. Defendants have been under order to provide medications directed by Dr. Mandell since August 27, 2015.
9. Despite repeated requests and demands defendants denied or failed to authorize prescription medications despite being under order to do so. The failure to authorize medications after this many requests while being under order to do so constitutes willful disobedience of an order and defendants are subject to fines for such disobedience.

The Single Commissioner further made the following Conclusions of Law;

1. Pursuant to §42-17-60, defendants are required to make payment of weekly benefits beginning February 6, 2019, as they illegally terminated weekly compensation benefits.

2. Pursuant to §42-9-90 defendants are hereby fined ten (10%) percent of the total unpaid weekly disability installments, beginning February 6, 2019.
3. Pursuant to §42-3-175 defendants are hereby fined \$200.00 per day for the period of 27 days for willful disobedience of the order requiring provision of medication as prescribed by Dr. Mandell.
4. Pursuant to §42-3-175 defendants are required to reimburse Claimant's attorney for the \$50.00 hearing filing fee.

The Single Commissioner then ordered the Defendants to make following payments:

1. Weekly benefits to the Claimant beginning February 6, 2019 in the amount of \$704.92 per week.
2. An amount of ten (10%) percent of the unpaid disability installments (beginning February 6, 2019) to be paid to the Claimant for illegal termination of benefits pursuant to §42-9-90.
3. Fines payable to the State of South Carolina General Fund pursuant to §42-3-175 in the amount of \$5,400.00.
4. \$50.00 payable to Claimant's attorney, Chappell, Smith & Arden, for costs associated in enforcing the order.

Within the statutory period, the Defendants timely filed an application for review and Form 30 in the case setting forth their numerous grounds for review, copies of which were furnished to all interested parties. The Appellant asserted the Single Commissioner erred:

1. Whether the Single Commissioner erred in conducting a hearing in this claim on the issue of payment of permanency benefits, while the issue of calculation of the Claimant's permanency benefits was pending before the Full Commission.

2. Whether the Single Commissioner erred in finding (Finding of Fact No. 2) that there is no order in the file allowing defendants to stop payment of weekly benefits. Finding of Fact No. 2 constitutes an error in law.
3. Whether the Single Commissioner erred in finding (Finding of Fact No. 3) the award has not been fully paid under the current order. The error being that Commissioner Barden's Order was on appeal. Finding of Fact No. 3 constitutes an error of law.
4. Whether the Single Commissioner erred in finding (Findings of Fact Nos. 5 and 6) that the questions at issue have not been fully determined in accordance with SC Code Ann. §42-17-60, requiring Defendants to reinstate weekly benefit payments. Finding of Fact Nos. 5 and 6 constitute an error of law.
5. Whether the Single Commissioner erred in finding and concluding (Findings of Fact Nos. 4 and 7 and Conclusions of Law Nos. 1 and 2) that the Defendants illegally stopped payment of weekly benefits on February 5, 2019 and are subject to fines and penalties for same. Findings of Fact Nos. 4 and 7 and the supporting Conclusions of law also constitute an error of law.
6. Whether the Single Commissioner erred in finding and concluding (Finding of Fact No. 9 and Conclusion of Law No. 3) that the 27 day delay in authorization of a medication constituted willful disobedience of an order, subjecting Defendants to fines of \$200.00/day, as this is unsupported by the preponderance of evidence in the record. Finding of Fact No. 9 and the supporting Conclusion of Law also constitute an error of law.

Briefs were submitted prior to oral arguments, which were presented before the Appellate Panel on September 16, 2019. All proffered testimony has been taken. Such together with all documentary evidence has been delivered by oral argument to individual members of the Appellate Panel and has since been under study and consideration. In an appellate review, the Appellate Panel shall, pursuant to SC Code and Section 42-17-50 (1976 as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own finding of fact and reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner. Counsel for the Claimant and for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties.

A review of the record in its entirety shows that the evidence supports the Single Commissioner's Findings and Rulings with one exception. The Single Commissioner instituted fines of \$200 per day for 27 days – the fourth period of failing to provide ordered prescription medications. We find this fine to be inadequate and increase the fine to \$500 per day pursuant to §42-3-175 for the willful disobedience of the Order.

We agree that claimant's benefits were improperly terminated and affirm all of the Single Commissioners other findings as set forth below.

Having heard oral arguments on behalf of the parties, considered the briefs, and viewed the record as a whole, the Appellate Panel affirms the hearing Commissioner's order with one amendment and makes the following Findings of Facts and Conclusions of Law:

FINDINGS OF FACT

1. A form 15 was filed on March 22, 2016 starting weekly benefits.
2. There is no order in the file allowing defendants to stop payment of weekly benefits.
3. The award has not been fully paid under the current order.
4. Defendants illegally stopped payment of weekly benefits on February 5, 2019.
5. Defendants are required to reinstate weekly payments at \$704.92 commencing February 6, 2019.
6. §42-17-60 provides that, "In case of an appeal from the decision of the Commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the Commission involved in the appeal or certification until the questions at issue have been fully determined in the accordance with the provisions of this title." Here, defendants filed a further appeal from Commissioner Barden's order for the

issue that was on remand from the Court of Appeals. Thus, the questions at issue have not been fully determined in accordance with the provision of this title.

7. Since defendants illegally stopped payment of weekly benefits, they are subject to fines and penalties.
8. Defendants have been under order to provide medications directed by Dr. Mandell since August 27, 2015.
9. Despite repeated requests and demands defendants denied or failed to authorize prescription medications despite being under order to do so. The failure to authorize medications after this many requests while being under order to do so constitutes willful disobedience of an order and defendants are subject to fines for such disobedience.

CONCLUSIONS OF LAW

1. Pursuant to §42-17-60, defendants are required to make payment of weekly benefits beginning February 6, 2019, as they illegally terminated weekly compensation benefits.
2. Pursuant to §42-9-90 defendants are hereby fined 10% of the total unpaid weekly disability installments, beginning February 6, 2019.
3. Pursuant to §42-3-175, defendants are fined \$500 per day for the period of 27 days for willful disobedience of the order requiring provision of medication as prescribed by Dr. Mandell.
4. Pursuant to §42-3-175 defendants are required to reimburse claimant's attorney for the \$50.00 hearing filing fee.

ORDER

IT IS THEREFORE ORDERED: The Decision and Order of the Single Commissioner filed in the above entitled matter on June 19, 2019 is hereby affirmed with amendment by the Appellate Panel of the Workers' Compensation Commission. We order the Defendants to make the following payments.

1. Weekly benefits to the claimant beginning February 6, 2019 in the amount of \$704.92 per week.
2. An amount of ten (10%) of the unpaid disability installments (beginning February 6, 2019) to be paid to the Claimant for illegal termination of benefits pursuant to §42-9-90.
3. Fines payable to the State of South Carolina General Fund pursuant to §42-3-175 in the amount of \$13,500.00
4. \$50.00 payable to claimant's attorney, Chappell, Smith & Arden, for costs associated in enforcing the order.

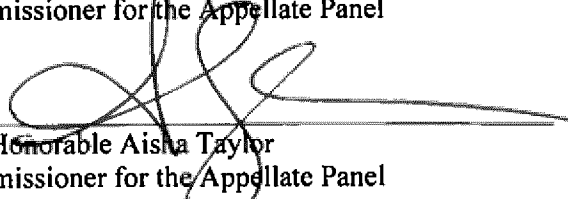
AND IT IS SO ORDERED!



The Honorable T. Scott Beck
South Carolina Workers Compensation Commission



The Honorable Mike Campbell
Commissioner for the Appellate Panel



The Honorable Aisha Taylor
Commissioner for the Appellate Panel

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5723 www.wcc.sc.gov

WCC File #: 1102937

Carrier File #: 002380009116WC01

Carrier Code #:

Employer FEIN #:

Claimant's Name: Barry Simmons Adickes SSN: 251-31-7784Employer's Name: Philips HealthcareAddress: 1137 Hummingbird LaneAddress: 3000 Minuteman RoadCity: Rock Hill State: SC Zip: 29732City: Andover State: MA Zip: _____Home Phone: (803) 328-0160 Work Phone: _____Insurance Carrier: Gallagher Bassett ServicesPreparer's Name: William L. Smith IILaw Firm: Chappell, Smith and Arden, PAPreparer's Phone #: 803-929-3600**A claim for workers' compensation benefits is made based on the following grounds:**Date of Injury or Illness: 3/22/2011☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☒ Physical Brain Injury ☐ Concurrent Jurisdiction1. The claimant sustained an injury to brain, shoulders, & cervical spine (Part(s) of Body Injured) on 3/22/2011 (Month/Day/Year) in Burke county, state of NC. Body part(s) affected are: brain, shoulders, & cervical spine2. Briefly describe how the accident occurred. Claimant injured in an on the job car accident.

3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

4. The relationship of employer and employee existed at the time of injury.

5. At the time of the injury the claimant was performing services arising out of and in the course of employment.

6. Notice of the accidental injury was given to the Employer on 3/22/2011 (Month/Day/Year) in the following manner:
Notified supervisor☒ 7. Due to injury, the claimant is in need of (check one):☐ (a) medical examination and treatment for: _____☒ (b) additional medical examination and treatment for: brain, shoulders, & cervical spine - will be necessary through claimant's lifetime.☒ 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
TTD has been paid.☒ 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):☐ (1) General Disability: ☐ Total ☐ Partial☐ (2) Specific Disability: ☐ Total ☐ Partial☒ (3) Wage Loss☐ 9a. ☐ A determination of permanent disability is premature at this time.☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$2,608.52, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:

Philips Healthcare; VRI

11. Further grounds or unusual aspects of claim:

Claimant has suffered permanent wage loss.

11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:

Dr. Jerry Barron, Dr. Howard Mandell, Dr. Nicholas Tuttle, Dr. James Rentz, Piedmont Medical Center, Grace Hospital, Dr. Welshofer

11b. To the best of your knowledge, did you have any prior permanent disability?

If yes, describe: No

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. I am filing a claim. I am not requesting a hearing at this time.14. Estimated time needed for hearing: 1 hour☒ 13b. I am requesting a hearing. A \$25 fee is required.☐ **Mediation**☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.☐ b. Mediation is required pursuant to Reg. 67-1802.☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.Questions regarding mediation may be submitted to mediation@wcc.sc.gov.I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Brooke A. Payneaddress 1037-D Chuck Dawley Blvd, #210, Mt. Pleasant, SC 29464 on the day of 2014, by ☒ first class postage ☐ certified mail ☐ personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature William L. Smith II

Title _____

Email bsmith@csa-law.comDate 9-23-14

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

WCC Form # 50

Revised 7/13

50

-0073-

**Employee's Notice of Claim and/or
Request for Hearing**



Claimant's Name: Barry Simmons Adickes SSN: 251-31-7784 Employer's Name: Phillips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA 01810
Home Phone: (864) 328-0160 Work Phone: () - Insurance Carrier: Galagher Basset Services
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353 - 0796

Date of Injury or Illness: **03/22/2011**

Estimated time for hearing: **1 hour**

Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:

1. It is ☒ Admitted ☐ Denied the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are: _____
2. It is ☒ Admitted ☐ Denied both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is ☒ Admitted ☐ Denied the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is ☒ Admitted ☐ Denied at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: _____
5. It is ☒ Admitted ☐ Denied notice of injury was given the employer. The reasons for denial are: _____
6. It is ☒ Admitted ☐ Denied the employee ☐ Needs ☒ Is Entitled to Additional medical care as a result of injury or illness. The reasons for denial are: _____
7. It is ☐ Admitted ☒ Denied the employee is entitled to temporary total disability for the period(s) of : _____
8. It is ☐ Admitted ☒ Denied the employee is permanently disabled. The reasons for denial are: Permanency determination is premature at this time.
9. It is ☐ Admitted ☒ Denied the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ 2,608.52 applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are: As evidenced by the medical records and Claimant's Form 50, permanency is premature. Thus, the claimant is not entitled to wage loss.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

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

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature

Attorney for Employer/Insurer
Title

bpayne@luederlaw.com
Email

October 15, 2014
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Refer to R. 67-1801 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803-737-5675 or judicial@wcc.sc.gov or mediation@wcc.sc.gov. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.



Claimant's Name: Barry Simmons Adickes

Address: 1137 Hummingbird Lane

City: Rock Hill

State: SC Zip: 29732

Home Phone: (803) 328-0160

Work Phone: _____

Preparer's Name: _____

William L. Smith II

Employer's Name: Phillips Healthcare

Address: 3000 Minuteman Road

City: Andover

State: MA

Zip: _____

Carrier: _____

Fidelity & Guaranty Company

Preparer's Phone #: _____

803-509-5839

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$ 704.92

2. AWW: \$ 2,608.52

Date of Injury: 3/22/2011

3. Type of injury and body part(s): See attached

4. Facts in controversy:
See attached.

5. Legal Issues Involved:
See attached.

6. Unusual aspects: See attached.

7. Witnesses (designate if expert):*
See attached.

8. Exhibits:
See attached.

9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See attached.

10. Name, address, and specialty, if any, of the treating physician:
See attached.

11. Impairment rating(s); body part(s); physician and date of opinion:

12. I am amending my Form 50/51 in the following manner:

☒ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☒ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

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

I verify the contents of this form are accurate and true to the best of my knowledge.
I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Brooke A. Payne, Esq.

address Lueder, Larkin & Hunter LLC 1037-D Chuck Dawley Blvd, #210 Mount Pleasant, SC 29464

by first class postage

on the 6th day of January 20 15

Signature: [Signature]

Email: bsmith@csa-law.com

Date of hearing: 1/21/2015

Time needed for hearing: _____

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58

Revised 7/13

3. Type of injury: Claimant was in a very serious car accident resulting in traumatic brain injury; post concussive syndrome; traumatic headaches; cervical spine injury, and bilateral shoulder injuries resulting in surgery to the right shoulder for a grade IV SLAP tear of the right shoulder; a bucket handle tear of the biceps attachment with labral fraying. Recent MRI shows an intrasubstance rotator cuff tear and moderate to severe AC joint arthropathy.

4. Fact in Controversy: Claimant's traumatic brain injury, post concussive headaches and need for daily medication has resulted in a significant loss of earning capacity. Claimant had a pre-injury AWW of \$2,608.52. He lost his position at Philips after 21 years and is now earning only \$55,000 per year (post injury AWW is \$1,057.69). This residual earning capacity also is supported by the report and deposition of vocational expert, Joel Leonard.

Claimant's loss of executive function in his brain is documented by the neuropsychological report of Dr. Randy Waid and the deposition testimony of treating neurologist, Dr. Howard Mandell.

Claimant also requires ongoing medical care as outlined by Dr. Mandell (APA, p. 101) and Dr. Richard Park (APA, p. 52). Claimant may also require additional shoulder surgery in the future (APA, p. 77 and APA, p. 160).

5. Legal issues involved: Extent of permanent wage loss under §42-9-20; lump sum payment; Dodge medicals under §42-15-60.

6. Unusual aspects: Claimant's attorney very recently received the most recent shoulder MRI report and he has been attempting to schedule depositions of Dr. James Rentz or Dr. Jerry Barron. So far, neither have been available prior to hearing but attempts to schedule continue.

7. Witnesses: Claimant; Jeannie Adickes; de benne esse deposition of Dr. Howard Mandell (expert); de benne esse deposition of Joel Leonard, CVE (expert); possible de benne esse depositions of Dr. James Rentz or Dr. Jerry Barron (expert). Dr. Rentz may potentially be subpoenaed to hearing.

8. Exhibits: Wage records before and after accident; documents from personnel file including emails and personnel evaluations from before and after accident, photos of car involved in the accident.

9. Medical evidence: See attached sheet. APA – Dr. Randolph Waid, Joel Leonard, CVE, Dr. Richard Park, Dr. Jerry Barron, Dr. John Welshofer, Dr. Howard Mandell, Dr. Nicholas Tuttle, Dr. James Rentz, Piedmont Medical Center, Burke County EMS. De benne esse deposition of Dr. Howard Mandell and Joel Leonard (CVE).

10: Treating Physicians:

Dr. James Rentz
Dr. Richard Park
Dr. Howard Mandell
Dr. John Welshofer

Orthopedics (shoulders)
Pain management (cervical spine)
Neurologist (brain injury/headaches)
Neurosurgeon (brain/ cervical spine)

11. Impairment ratings:

Dr. John Welshofer

10% spine- 6/20/13 APA p. 82

Dr. Howard Mandell

15% brain- 11/01/12 APA p. 96

Concurred with 15% brain rating. (deposition
p. 42) 12/09/14

Shoulders have not yet been rated.

Joel Leonard opined in report and deposition that claimant's current earnings of \$1,057.69 are a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. APA p. 45



Claimant's Name: Barry Simmons Adickes SSN: 251-31-7784 Employer's Name: Phillips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA 01810
Home Phone: (864) 328-0160 Work Phone: () - Insurance Carrier: Gallagher Basset Services
Preparer's Name: Brooke A. Payne Law Firm: Lueder, Larkin & Hunter, LLC Preparer's Phone #: (843) 353-0796

A claim for workers' compensation benefits is made based on the following grounds:

X Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$704.92 2. AWW: \$2,608.52 Date of Injury: 3/22/11
3. Type of Injury and body part(s): Head/Brain, Bilateral Shoulders, Cervical spine
4. Facts in controversy: Whether the claim is ripe for a permanency determination. If so, a determination of the Claimant's permanent disability and whether he is entitled to permanent wage loss benefits.
5. Legal issues involved: 42-9-30; 42-9-20; If Claimant is entitled to wage loss benefits, determination of the number of weeks to be included in such benefits.
6. Unusual aspects: Whether the claim is ripe for a permanency determination, as he has yet to receive a PPD rating in 2 of his 4 accepted injuries.
7. Witnesses (designate if expert):* Mark Johnson - Phillips Healthcare National Sales Director, Emergency Care and Resuscitation.
8. Exhibits: See Employer/Insurer's Notice of Submission of Written Expert Reports and Exhibits as Direct Evidence, attached. Defendants reserve the right to supplement any additional information received from subpoenas served on subsequent employers and/or employers with whom the Claimant has allegedly applied. Additionally, Defendants will supplement additional post-injury wage records and any records received as a result of subpoenas served as a result of information learned in the Claimant's upcoming discovery deposition.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See Employer/Insurer's Notice of Submission of Written Expert Reports and Exhibits as Direct Evidence, attached. Defendants reserve the right to supplement with any medical records received pursuant to subpoenas served, or those served as a result of information learned in the Claimant's upcoming discovery deposition. Defendants also reserve the right to supplement with their own vocational expert report, should the further investigation into the Claimant's vocational opinion warrant same.
10. Name, address, and specialty, if any, of the treating physician: Dr. James Rentz (right shoulder); Dr. Nicholas Tuttle (left shoulder); Dr. Howard Mandell (head/brain); Dr. Richard Park (cervical spine, pain management); Dr. James Welshofer (cervical spine, head/brain).
11. Impairment rating(s); body part(s); physician and date of opinion: 10% to cervical spine, Dr. Welshofer, 7/19/13; 15% to brain, Dr. Welshofer, 11/1/12.
12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

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

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to William L. Smith II, P.O. Box 12330

Columbia, SC 29211 on the 9th day of January 2015 by: ☒ first class postage ☐ certified mail ☐ personal service.

Signature: [Signature]
Date of hearing: January 21, 2015

Email: bpayne@luederlaw.com
Time needed for hearing: 1.5 hours

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

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Noteworthy Excerpts from the Defendants' Exhibits

1) Joel Leonard's Vocational Evaluation

- (a) The Claimant reported that he was informed that his termination was performance-related, however, there is evidence to show the contrary.
- (b) The Claimant reported that he had always met or exceeded his production goals, however, **the Claimant failed to meet his goals in 2009, and the first quarter of 2010.**
- (c) The Claimant purports his \$55,000 base salary as a significant loss in wage, however, **the Claimant requested this salary on his application** with his current employer.
- (d) Leonard notes that the Claimant, at the time of his report, had not been evaluated by a neuropsychologist, and notes that as of "May 8, 2012, [the Claimant's] treating neurologist was of the opinion that his cognitive issue had resolved."
- (e) Leonard assesses certain profiles to determine the Claimant's vocational ability, and places the Claimant within Profile "B," which assumes the Claimant's termination was performance-based, and that his current employment represents a reduction in earning capacity; both of these assumptions are based on the Claimant's own statements, to which, evidence exists to prove otherwise.
- (f) Leonard's report relies exclusively upon ". . . [the Claimant's] word with respect to his representation of the events surrounding his claim and their relevant impact on his functional status and prospective employability," however, significant evidence and testimony exists to dispute the Claimant's representations, none of which were considered prior to Leonard reporting his evaluation.

2) Dr. Randolph Waid's Neuropsychological Evaluation

- (a) The Claimant is "functioning in the high average range of intellectual abilities."
- (b) "Neuropsychological evaluation generally provided favorable results."
- (c) With respect to the Claimant's loss of memory, Dr. Waid found that "assessment of anterograde memory generally **revealed intact immediate learning/memory** as well as an efficient ability to retain and recall information. . . "
- (d) Neuropsychological evaluation showed that there was no evidence of visual spatial/perceptual reasoning abilities, **receptive and expressive language is intact**, no evidence of compromise in sensory perceptual functions, and the Claimant is generally able to meet the demands of higher reasoning/problem solving tests.
- (e) The Claimant has had a good recovery from head and other injuries sustained in a motor vehicle accident.

3) Mark Johnson Deposition Testimony

- (a) "A. . . . There were performance issues in the past with Barry and that there was concern about Barry's ability to comprehend the complicated sale that he was being asked to engage." (T. 13)
- (b) "Q. Would you characterize Barry had done very well in sales during the time prior to him coming to work for you?
A. No, sir, I would not characterize that." (T. 15)
- (c) "Q. . . . Now did you see the problems that Barry had following his injury with concentration, focus, those sorts of things?
A. No, sir. I didn't notice any difference in Barry pre-accident to post-accident" (T. 15)
- (d) "Q. . . . What was the reason that you were told for his termination?
A. Reduction in Force.
Q. Okay. Did you tell Barry that it was somewhat performance related?
A. No, sir." (T. 20)
- (e) With respect to the notification to the Claimant of his termination, Mr. Johnson testified that he was specifically trained to "let employees know that this was a business decision by the company and that it's not performance related." (T. 21)

4) Joel Leonard Deposition Testimony

Based on the following deposition testimony given by Joel Leonard on December 30, 2014, Mr. Leonard's report should be disregarded wholly, or at least not given any persuasive weight as evidence.

Testimony Related to the Claimant's Termination as he First Understood it, and Now:

- (a) Q So depicted wage loss requires you to accept an assessment of same from the claimant. What does that mean; that you just have to accept that what the claimant is telling you is true?
A Not so much necessarily true in that strict a manner, yes, but that the turn of events and the circumstances adequately portray what transpired. And, you know, to a certain degree, yes, that is that you accept at face value, what's going on. But the issue of, you know, the strict truth, can sometimes be difficult in these cases, especially when you're dealing with multiple parties that you don't always have access to. (T. 13)
- (b) Q It looks like you chose Profile B, which essentially is based on your conclusion, based on the facts as you understood them, was that his release

from Phillips Healthcare was due, at least in part, to performance-based deficits arising from his work-related injury; right?

A That's correct.

Q And that's just based on the information relayed to you by Mr. Adickes?

A That is correct.

Q You'll agree that Mr. Adickes had informed you that, prior to his work-related injury, he didn't have any performance issues at Phillips Healthcare?

A No, nothing in a significant manner. That's correct.

Q So now that you've had an opportunity to review the documents regarding his performance at Phillips, would you agree that, in 2009, he actually had been placed on a performance improvement plan because of his issues with performance?

A Yes; that's my understanding after reading that document. I don't -- I couldn't find in that document where it said the PIP was, but that might just be it. (T. 22)

(c) Q So you'll agree that, based on this Performance Improvement Plan which you are now being shown 3 for the first time, Mr. Adickes actually did have issues with his performance, prior to his work-related injury?

A According to that document; yes.

Q Okay. So when you testified earlier that you had seen that there was a Performance Improvement Plan mentioned and you hadn't seen it, were you referring to 9 the People Performance Management, 2009?

A Yeah. (T. 26)

(d) Q But my question isn't would you agree that that was his testimony. My question is, based on the fact that two months prior to the work-related injury, Mr. Adickes was placed in a less-complicated position by his supervisor. Wouldn't you agree that that indicated issues with performance?

A It could. My understanding was, though -- and this could be an issue. My understanding was that it was more of a promotion than a demotion.

Q But your understanding is based on what Mr. Adickes told you?

A That's correct. (T. 33)

(e) Q You'll agree that he also had job performance issues before his injury?

A That is documented; yes. And the interesting thing though -- and you know, I never knew -- I was unaware that the concept of the job that he identified as a promotion is depicted within Mr. Johnson as being almost

a -- not necessarily a demotion, but a reduction in tasks that he is required to accomplish because of the sophistication of who he is selling to and what he is doing. To me, that's sort of interesting that he then had further demise after that, meaning after they put him in an easier job per their arguments, but he then had demise after that. There's potential for that to be interpreted and implied as -- you know, that there is a greater degree of dysfunction that persisted.

Q You would agree that could also be interpreted or implied as he's just bad employee?

A Yes (T. 70).

(f) Q Okay. So you'll agree that even following the 12/2009 performance review, that there is documentary evidence of continued performance issues with Mr. Adickes?

A As of March 2010, that appears to be so.

Q When was that email sent to Mr. Adickes?

A May 2010.

Q Okay. So he was counseled about it at least in May of 2010? (T. 93)

(g) Q I want you to read the first sentence in the second paragraph in its entirety.

A The first sentence, "Barry, in 2010, you were on a PIP for lack of performance. I'd like to bring your attention to some concerns that I have" -- that I have -- "I have that are resurfacing."

Q What does "resurfacing" mean to you?

A That would mean coming back to the top.

Q Coming back from 2010; right?

A In that case it would appear to be the frame of reference; yes.

Q So you'll agree that, based on your reading of this email, it indicates that Tracey is informing Barry that he is now suffering from the same performance concerns that he had back in 2010?

A I don't know if it says the same performance concerns, but some performance concerns of some type -- (T. 94).

(h) Q Based on the information that you have been provided with today, you will agree that his performance before the accident was actually not all favorable performance?

A Based upon what you presented, I think that's reasonable.

Q That at least within two years, in 2009, he goes on a PIP plan, and then in 2010 he received an email about his being below quota, and then in 2012 the HR representative kind of reminded him of the issues that he had in 2010 that she's bringing back up again in 2012. So you will agree that he

- definitely had performance issues prior to date of accident?
- A Based upon the evidence presented, I think that supports some of that; yes. (T. 95)

Testimony Related to Mr. Leonard's Overall Impression of the Findings in Dr. Waid's Report:

- (a) Q And Dr. Waid's report?
- A And Dr. Waid's report, which basically attended to some attention and concentration, persistence issues.
- Q So reading that lengthy report from Dr. Waid, that was what you took away from it, was that he did have attention issues?
- A In summary; yes. I mean there was some other things that -- in looking at the report, that concerned me. I mean overall, I mean from a neuropsych perspective, it just seemed that he had a lot of intact functioning issues. There was some issues that were -- you know, at one point you would think he would have problems with memory, then some of the testing didn't necessarily show that out. But then he had some other -- You know, with the Stroop test, he was well below -- I don't know how to put -- I don't recall, impaired performance or low or poor performance, or something to that effect. But in the end, he -- I felt like he was having attention/concentration deficits, source attributable, if I can remember, possibly to the headache issues and what-not. (T.19)

Testimony Related to Issues Obtaining Employment with other Employers:

- (a) Q Okay. Did Mr. Adickes ever inform you that he was seeking a salary of \$55,000 when he applied to VRI?
- A No, ma'am. (T. 21)
- (b) Q So you haven't seen any indication of Mr. Adickes being unable to secure any jobs following his termination from Phillips, related to his cognitive abilities or disabilities?
- A I have no specific evidence indicating that he can't secure a job due to his cognitive abilities or limitations. (T. 68).
- (c) Q Well, my question is, where is the evidence to prove that he is now earning lesser wages than he would be earning if it weren't for his cognitive issues?
- A Well, to a certain degree, in his demonstrated work activity.
- Q So you're just basing that on his base salary at VRI?
- A To a certain degree; yes. Also, to the evidence within the record that suggests consistency with the pattern of dysfunction in terms of the

- nature of his injury and how it impacts him. (T. 69)
- (d) Q You'll agree that you haven't spoken to any of his supervisors for his current employment at VRI; right?
- A That's correct.
- Q And you haven't spoken with anyone at Phillips?
- A That's correct.
- Q And you don't have any sort of documentation of time cards or wage statements as definitive proof that he's missed any days or had any absences due to headaches?
- A That's correct. In this particular case, I don't think that the headaches are -- I think they are a significant issue for him, but I don't think that they're a preclusive area for him; that's correct.
- Q In fact, Mr. Adickes never even reported to you that he had to miss significant periods of days a month or for per year due to his headaches; did he?
- A No. He did report to me that there were days that he was out of commission.
- Q And that was right after the accident; right?
- A Well, no; that persists presently. But, you know, his statement is I just deal with it, you know, to that degree.
- Q He just deals with it by continuing to work?
- A That's right.
- Q Right. So he hasn't actually missed any days of employment due to his headaches?
- A That, I don't know for sure. (T. 91)

Testimony regarding Whether the Additional Information Changes his Overall Opinion:

- (a) Q I know you said you were provided with the deposition transcript of Dr. Mandel's deposition. Were you provided with the deposition transcript from Mark Johnson's deposition?
- A I am not in possession of that deposition; no, ma'am. (T. 26)
- (b) Q Assuming Mr. Johnson's testimony --
- A Assuming everything you just said is to be accurate?
- Q That's correct.
- A Yes, ma'am.
- Q Okay. And assuming Mr. Johnson's -- or assuming all those facts to be true with regard to Mr. Johnson's testimony as well as, you know, the 3 documentation that we've looked at here regarding his 2009 performance issues, as well as the issues right before his 5 work-related injury, wouldn't you agree that assuming all those facts to be true, if you

had to reevaluate these profiles, that again you would place Mr. Adickes in a different profile?

A It's possible. But if I have to give you a definitive opinion, I would say no, at this juncture.

Q What is that based on?

A Well, I think it's based on a couple of things. I would agree that as you present that information that it certainly begs for further consideration to move away from my opinion on that matter. I agree with that. But my definitive statement as to halting my opinion would be basically this with respect to it. I would want to know a little bit about the e-mail document that I have been given in which in 2012, I believe it's Mr. Johnson apparently sent an e-mail concerning Barry's (T. 38) performance. Also within the context of the performance appraisal that I believe was done the year before, and I may be messing up the dates, I hope not, where he apparently performed very well, if I'm not mistaken, in 2010. And there was a lot of very kind statements about him, if I remember correctly, from whoever the manager is, which in that case I believe would be Mr. Johnson, if I remember that correctly. And then you have a pop-up of his performance issue roughly one year following the injury within the context of that email. Now let me also say that in addition to that some of the additional evidence provided by Dr. Waid, as well as Dr. Mandel, would factor into that opinion, as well. I would state that there is perhaps additional evidence that might pull me off of that opinion. But at this point, it is still not fully compelling enough until I find some resolution as to the outcome of where that person is with that performance issue, also understanding that I can't necessarily make that determination. (T. 39). So what I would generally do is hold a conservative opinion until I get to see that evidence come to fruition in a final manner. So at the current state, I wouldn't change my opinion with respect to my impression of his employability. I would agree, though, that there is some additional evidence that may impact it and may potentially pull it off from where it is. But it hasn't -- in my opinion, it's not fully resolved because in addition to the issue with Johnson, you then have the stuff with Waid, you then have the stuff with Mandel. It's not enough for me to say, you know what, yeah, I think I need to switch my opinion. I agree that it is -- it gives me greater contemplation to that, but not enough for me to definitively move off of it at this point.

Q Okay. Well, knowing what you've heard about Mark Johnson's testimony where he testified that the reduction in force had absolutely nothing to do with performance issues or production or meeting quota, or anything like that, that it was solely a reduction of force, and it didn't even come from him, it came from a higher chain of command. Wouldn't you agree

that just knowing that information alone would place him in your Profile A, which characterizes his departure from Phillips. (T. 41)
Healthcare as an unfortunate personnel event completely unrelated to the March 2011 injury? It discounts a potential impact of any adverse functional deficits attributable to the accident and points to his length of employment at Phillips as support of such circumstances?

A It could potentially move it towards that, that certainly would be a potential impact of that information. Whether or not it is the definitive 10 outcome --

Q But you'll agree that if you assume Mr. Johnson's testimony to be accurate, it would place him within Profile A?

A As a sole directive variable, exclusive of the other information; yes. (T. 42)

(c) Q Wouldn't you agree that, based on information you have been presented with today, there is a likelihood that Mr. Adickes could also or could fall into Profile A?

A There is a possibility of it; certainly. (T. 71).

Testimony Regarding Whether the Claimant has Cognitive Issues Resulting from his Work injury that has Impacted his Employment:

(a) Q So now I'm just focused on the second part of your consideration, which was that Mr. Adickes continues to experience level functional compromise that precludes his ability to return to work -- or return to such work, I (T. 51) should say. You already stated in your report, the presence or absence of cognitive difficulties is of great importance with respect to his employability and you'll agree that the best way to test cognitive abilities or inabilities is through a neuropsych eval?

A I'm sorry?

Q **The best way to test cognitive abilities or inabilities is through a neuropsych evaluation?**

A **It's the best way we have, but I know of no other than performance-based assessments. But, yes; I think that's a fair statement.**

Q And that's why in your report you actually recommended that one be performed?

A That's correct. (T. 52)

Q Have you had any reason to disagree with any of his opinions?

A No. I mean he's a neuropsychologist; I'm a vocational expert.

Q So you would defer to him when it comes to an analysis of Mr. Adickes' neuropsychological abilities?

A Yes ma'am. (T. 53)

- (b) Q Well, would you agree that falling in a high average range for his age and educational level when it comes to information processing speed and attentional regulation doesn't indicate any sort of cognitive deficiencies that would impact his performance at work?
- A I'm not so sure I would agree with that, either. I would say he's got a high average, high range, was at high average range with a T score of 59, on the 21 PASAT, but that there are -- if you drill down they are very subtle, perhaps subtle, perhaps not subtle. This is one of the concerns I have with these circumstances. I'm not sure to what point some of these individual citations of impaired performance or lower (T. 57). performance. I'm not sure to what degree they represent any functional manifestation. So in this circumstance, I would agree that he got the test scores that he got and that some are suggesting that he has capacities and is capable without deficits and impairments in those areas, and that some of the subtests suggest he has a weakness or perhaps a deficit. And I use the term "weakness" or "deficit," ma'am, because I don't know if it is a weakness in his cognitive functioning, in the way he analyzes, or if it represents a deficit derived from impairment. I don't know.
- Q Would you agree that his performance on tests that assessed his immediate memory was in the high average range? That's on page six, second paragraph. And he was superior when it came to delayed memory tests?
- A Yes, ma'am; I agree that's what that says. (T. 58).
- (c) Q So how is it that, based on Dr. Waid's summary where he essentially performed all of these tests and found Mr. Adickes to be very high functioning when it comes to his neuropsychological capabilities, how is it that your takeaway from this report is that he's got deficits?
- A Because he cited them. He said certainly, in day-to-day pursuits, he likely experiences episodic (T. 60). forgetfulness due to the interfering effects of attention/executive difficulties and headaches.
- Q But you will agree that he didn't -- there is no test to perform on complaints of forgetfulness?
- A There is no test? Apparently, he did test him.
- Q He tested forgetfulness?
- A On issues of memory.
- Q And he found that --
- A Semantically, I'm not sure.
- Q -- the tests of -- the memory tests revealed intact immediate learning/memory as well as an efficient ability to retain and recall information once it is effectively learned?
- A Yes. I agree.

- Q I believe that what he stated is even though Mr. Adickes complains of forgetfulness, that his findings with regard to the memory show otherwise.
- A I agree. And further up on page eight, the third paragraph, he basically says he's got -- mild executive dysfunction appears to be present potentially (T. 61). affecting both cognitive and emotional demands.
- Q So your reading of this report is that Dr. Waid has determined him to be impaired?
- A Yes. And, generally -- but I would consider that from my impression, appears to be relatively mild in nature. But I would certainly defer to Dr. Waid, as anyone would expect that I would, as to the quantification thereof.
- Q Well, when Dr. Waid states here that Mr. Adickes is generally able to meet demands of higher reasoning/problem-solving tests, doesn't that indicate to you that there are no cognitive disabilities with regard to problem solving and higher reasoning that would affect his employability? (T. 62).
- A Not necessarily. I mean he met the demands of higher reasoning/problem solving tests. If that is your only measure of employability and in those specific two domains, then yes. Keep in mind the guy is working. It's not like he's not working.
- Q Right. But if you're referring to Dr. Waid, Dr. Waid found that he was -- Mr. Adickes was able to meet the demands of higher reasoning/problem-solving tests. He was functioning at a high average range of intellectual abilities. The neuropsychological evaluation provided favorable results. The assessment of his memory revealed that he had intact immediate memory and he was able to retain information. How can you look at all of those and state that he has any sort of disability which could (T. 63). affect his employability?
- A Because of what else Dr. Waid has stated.
- Q **Because of the one sentence that states mild executive dysfunction?**
- A Well, it's not the one sentence. There's additional sentences, as well. I think that for the most part he has a pretty decent neuropsych. I mean he's got good tests and demonstrates good functioning in a number of areas.
- Q Well, you would agree that he --
- A He has these --
- Q -- actually has favorable neuro -- if you're going to defer to Dr. Waid, it's actually a favorable neuropsych --
- A Yes.
- Q -- evaluation?
- A Yes.

Q Okay. We can agree that the findings of Dr. Waid's neuropsychological evaluation actually contradicts the subjective complaints relayed to you by Mr. Adickes about his ability to function at work?

A Possibly, and possibly not. It's hard to answer that question right now based upon the evidence in the record. (T. 64).

(d) A Granted, he did well. I'm not trying to make him have greater dysfunction than what he has. **He did well on the neuropsych and he should be happy about that**, all right, but there's a lot more that needs to be drilled down out of this stuff. (T. 67).

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937**

BARRY ADICKES,	)	
	)	
Claimant,	)	
	)	
Respondent,	)	APPELLANTS' BRIEF TO
	)	THE FULL COMMISSION
vs.	)	
	)	
PHILIPS HEALTHCARE and FIDELITY,	)	
AND GUARANTEE INSURANCE CO.,	)	
	)	
	)	
Defendants,	)	
	)	
Appellants.	)	
_____	)	

STATEMENT OF THE CASE

A Form 50/51 Hearing was held before Commissioner Gene McCaskill (“the Single Commissioner”) of the South Carolina Workers’ Compensation Commission (“the Commission”) on January 21, 2015, in Lancaster, South Carolina. The parties and/or their representatives appeared at the Hearing and presented evidence in the case.

At the Hearing, the Defendants (“the Appellants”) took the position that the Respondent had not yet reached maximum medical improvement as to his bilateral shoulders and a hearing was premature. The Appellants also argued the Respondent had failed to show by a preponderance of the evidence that he had sustained a causally related wage loss based on the facts that the Respondent retained his position with the Employer for over two years and that he specifically requested a salary of \$55,000.00 per year with subsequent employer, Valued Relations Incorporated. Finally, the Respondents also argued that Section 42-9-20 of the South

Carolina Code of Laws must be applied by the plain language of the statute, and that any wage loss benefits shall not exceed three hundred forty (340) weeks from the date of accident.

The Claimant (“the Respondent”) alleged that he sustained an injury by accident arising out of and in the course of his employment with the Employer on March 22, 2011, injuring his neck, bilateral shoulders, and head. The Respondent argued that he has reached MMI for all alleged injuries, including MMI as to his shoulders by way of an IME conducted by Dr. Jerry Barron on January 14, 2015. The Respondent further alleged that he has sustained cognitive impairment which has affected his ability to work, and as a result, has experienced a loss of wages and earning capacity.

After considering the testimony from the Respondent, Respondent’s wife, and Employer Representative, Mark Johnson; reviewing the APA Submissions provided by the parties; and consideration of the applicable law, the Single Commissioner issued a Decision and Order dated August 27, 2015 (hereinafter “August 27, 2015 Decision and Order”) in which the Single Commissioner found as fact and concluded as matters of law (in part pertaining to the request for review):

Findings of Fact:

1. ...
The Claimant suffered injuries to his head/brain, bilateral shoulders and cervical spine in a work-related automobile accident on March 22, 2011.
3. ...
It is the Defendants’ position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant’s counsel as to a determination of MMI.

6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, “. . . has sustained permanent impairment of 15% to the right shoulder and 0% to the left shoulder.” (Claimant’s APAs, page 77a).
7. While the ratings are necessary to determine disability to the shoulders if any, the language is also determinative as to MMI. Assigning “permanent impairment” to the shoulders attests to Dr. Barron’s opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of “permanent” — plain meaning of the word — impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders.
14. . . .
The Defendants’ position is this is a scheduled member case pursuant to §42-9-30.
15. The Claimant contends that this is a wage loss case pursuant to § 42-9-20.
16. Dr. [John] Welshofer opines as to the spine, “. . . he has a 10% impairment of the spine based upon the AMA guidelines. I will see the patient as necessary I don’t think that there is anything else to offer him at this time.” (Claimant’s APAs, page 82).
17. As to his brain injury, Dr. Welshofer opines, “I believe the patient’s injury was a SOUTH CAROLINA injury based upon the AMA guidelines. I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive (sic) symptomatology and headaches.” (Claimant’s APAs, page 96).
23. . . .
In addition to providing medical care and treatment, the Defendants provided the Claimant with two months of TTD while he was recovering.
24. The Claimant returned to work for the Employer and continued working for them 2.5 years until his job was eliminated as part of a reduction in force.
25. The Defendants contend that the Claimant lost his job solely because of the RIF and that it had nothing to do with his work injury.
26. The Claimant testified that he worked for the Employer for over twenty years and that employment ended on 01/17/14.
27. The Claimant alleges that he was told that it was performance related.
28. The Claimant testified that after his termination he reached out to over 15 potential employers.
29. He took a job that paid \$55,000; but that employment has now ended.

30. It is the Claimant's position that he indicated to that employer that the salary listed was the salary he was seeking because that was the amount the position paid.
31. The Claimant underwent a vocational evaluation with Joel Leonard who is a vocational expert.
- ...
36. Mr. Leonard presents three possible profiles as to future earnings potential of the Claimant. It is Mr. Leonard's expert opinion that Profile B best represents the likely outcome with respect to the Claimant's residual employability and prospective earning capacity subsequent to the 03/22/11 accident.
37. The profile reads in part, "Within the parameters of Profile B, Mr. Adickes' current weekly wage (estimated at \$1,057.69) would be considered a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. While he would be capable of performing other occupations in addition to his position with VRI, such work would not be expected to pay wages that significantly exceed his current compensation." (Claimant's APAs, page 45.)
- ...
39. Where an injury is confined to a scheduled body member and there is no injury or affect to another body member, the recovery is limited to the medical model of §42-9-30. (Singleton and Colonna). However, the Claimant has impairment to more than one body member. He is therefore entitled to his requested analysis under the economic model of §42-9-20.
- ...
44. When I consider all of those opinions and evidence as a whole, the Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11.
45. The impact of that deficiency is limited to his executive functioning. That being said, it is that executive functioning that is determinative of the Claimant's ability to hold employment similar to his employment with Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, the no longer works there and the cogent question is now can he find like employment at similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?
47. It is reasonable to conclude that if the Claimant could find employment at a wage comparable to what he earned for the Employer, he would. There is no evidence in the record that the Claimant would choose to self-limit as to his earning potential.
48. I find that the Claimant has suffered wage loss as the result of his 03/22/11 work-related accident. Based on a review of the evidence as a whole, the Claimant is clearly not as he was before this work-related accident.

49. I find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.83). This computes to a compensation rate of \$1,033.94 ($\$1,550.83 \times .667$). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident on March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.

Conclusions of Law:

1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83. This computes to a compensation rate of \$1,033.94. However, the maximum compensation rate for 2011 is \$704.92. Therefore, the claimant is awarded \$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that claimant's wage loss began. Claimant had previously received temporary total disability while he was out of work so the period of partial disability began after a period of total disability.

This claim now comes before the Full Commission of the South Carolina Workers' Compensation Commission on Appellants' Form 30, Request for Review of the Decision and Order issued by the Single Commissioner on August 27, 2015. Appellants assign errors in the Commissioner's Decision and Order in the findings of fact and conclusions of law that the Respondent has reached MMI as to his bilateral shoulder injuries. The Appellants also argue that the Single Commissioner erred when he found that the Respondent has sustained wage loss as a

result of his work accident in light of evidence presented showing that the Respondent has not suffered from a decreased earning capacity as a result of his work injury. Further, Appellants assign error in the Single Commissioner concluding as a matter of law that the Respondent is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014, when the plain language of Section 42-9-20 states that, “[i]n no case shall the period covered by such compensation be greater than three hundred forty weeks *from the date of injury*,” and case law evidences that permanent benefits are not commenced until after the Claimant reaches MMI. (emphasis added). Appellants assert that the greater weight of the evidence does not support the above findings and conclusions.

STANDARD OF REVIEW

S.C. Code Ann. §42-17-50 governs appeals from the Single Commissioner to the Full Commission. Section 42-17-50 statutorily empowers the Full Commission to review the Decisions and Orders of the Single Commissioner, and when appropriate; to make its own Findings of Fact and Rulings of Law. Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E.2d 767 (1991). The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). *See also* Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) (Full Commission is fact finder and it is not within Supreme Court's province to reverse Commission's findings if they are supported by substantial evidence). Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of

law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992).

SUMMARY OF EVIDENCE

The Respondent earned a Bachelor's degree in Marketing from the University of South Carolina. (Hr. Tr. p. 9). Prior to the work-related accident on March 22, 2011, the Respondent worked in his position for over twenty years, approximately five of those years directly for Philips Healthcare after an acquisition. (Hr. Tr. pp. 10–11). Several years prior to the work accident, the Respondent transitioned into a new position where he was engaged in direct sales. (Hr. Tr. pp. 11–12). According to his personnel records and annual reviews, his sales were inadequate in 2009 and the Respondent was placed on a probationary period for his low sales volume. (See Ex. D). The Respondent eventually came out of the probationary period, but his sales volume remained low. (Ex. D, pp. 21, 24; Ex. 4, p. 199). The Respondent was involved in a single-car accident on March 22, 2011, in which he sustained injuries to his head, neck, and bilateral shoulders. He remained out of work until May 1, 2011 when he returned to his normal job duties. (Hr. Tr. p. 29).

As corporate restructuring was commonplace within Philips Healthcare, and the Respondent was transferred into a new sales position in January 2011, placing him under the direct supervision of Mark Johnson. (Hr. Tr. p. 122). Mr. Johnson testified that he had met the Respondent one time prior to the work injury, but that his reputation preceded him regarding his poor follow-through with clients and co-workers alike. (Hr. Tr. pp. 120–21, 124–25). As a result, prior to the work injury, Mr. Johnson suggested that the Respondent be assigned to a less complex sales position. (Hr. Tr. 123). Mr. Johnson went further testified that the Respondent was often slow to respond to emails and phone calls and he was able to witness first-hand the

performance issues which he had heard prior to taking over management of the Respondent. (Hr. Tr. 124–25).

The Respondent was involved in a car accident on March 21, 2011, wherein he sustained compensable injuries to his head, neck and bilateral shoulders. Dr. Welshofer assigned a 10% rating to his cervical spine on July 19, 2013 and a 15% rating to his brain on November 1, 2012. He underwent an MRI scan of his right shoulder on October 10, 2014 however, he never returned to his authorized treating physician, Dr. Rentz, following the scan. (APA 9, p. 160). Dr. Rentz has yet to place the Respondent at MMI or assign a PPD rating associated with his right shoulder. An IME physician, Dr. Jerry L. Barron, completed a questionnaire provided by Claimant’s counsel, wherein he opined that the Respondent had sustained an impairment rating of 15% to the right shoulder, but also stated that the Respondent will “most probably eventually require additional surgery to the right shoulder.” (APA 5, p. 77a).

According to Mr. Johnson’s testimony, the Respondent did not display any different performance or behavioral issues following the accident. (Hr. Tr. p. 125). He continued to receive complaints about the Respondent’s follow-up and performance after the March 22, 2011 accident. (Hr. Tr. p. 124). Specifically, Mr. Johnson testified that the Respondent was consistently in the “bottom third of the ranking” among fellow employees in his position. (Hr. Tr. p. 125). Mr. Johnson recalled challenging the Respondent in his work performance but that he was difficult to coach. (Hr. Tr. p. 129). He also testified about Respondent’s disciplinary issues, one involving the improper use of his company credit card. (Hr. Tr. p. 130). According to Mr. Johnson, the Respondent did not mention any of the alleged symptoms related to his head injury, including headaches, lack of focus, or any other cognitive impairments. (Hr. Tr. p. 133–34).

Mr. Johnson remained the Respondent's direct supervisor for approximately three years until Philips Healthcare underwent another corporate restructuring and the Respondent's position was eliminated. Mr. Johnson testified that he spoke with the Respondent in January 2014 and informed him that he was being let go as part of a Reduction in Force ("RIF"). (Hr. Tr. p. 126). Mr. Johnson is adamant that he informed the Respondent that the RIF was commenced at a higher corporate level and that the Respondent's termination was not related to performance or any other motive, as there is a script that he is required to follow when informing an employee they are being let go as a result of a RIF which is resolute about not discussing performance issues. (Hr. Tr. pp. 126, 128). Mr. Johnson recalled that the Respondent requested a probationary period similar to his previous performance-related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was company-wide and was solely the result of a restructuring. (Hr. Tr. p. 128).

The Respondent testified that he began looking for employment immediately after being released from Philips Healthcare. (Hr. Tr. p. 35). According to his testimony, the Respondent applied for employment with D-E-X, ZOLL, McKesson and Valued Relations, Inc. ("VRI"). (Hr. Tr. p. 68). Within the various applications and resumes submitted to potential employers, he portrayed himself as an "impactful" public speaker and communicator as well as being "expertly organized and focused. (Hr. Tr. p. 69; Ex. J, p. 76). Respondent disclosed to these potential employers that he was no longer employed by his prior employer because had recently been involved in a "downsizing and his position was eliminated." (Ex. J, p. 72).

The Respondent testified that he was offered a position with VRI in January 2015, but did not immediately accept the position. (Hr. Tr. p. 36). He alleges that he was turned down for employment with McKesson due to his brain injury which was discovered during a prescription

medication questionnaire; however, subpoena responses from McKesson failed to show where the Respondent completed any such questionnaire or informed McKesson of any such injury. (Hr. Tr. pp. 75, 77; Ex. J).

When he eventually accepted the position with VRI in May 2015, the Respondent received a salary of \$55,000 annually with additional incentives and commissions for sales performance. In his official application for employment with VRI the Respondent specifically requested this salary. (Hr. Tr. p. 78; Ex F). At the time of the hearing, the Respondent had not completed any sales for VRI, thus he did not earn any additional compensation by way of commission. (Hr. Tr. p. 100). In January 2015 the Respondent was terminated from VRI due to his failure to complete any sales during his employment. (Hr. Tr. p. 39).

The Respondent underwent numerous evaluations related to his alleged neurological deficits, including a neuropsychological evaluation with Dr. Randy Waid on October 7, 2014. (See APA 1). In this evaluation, Dr. Waid concluded that the Respondent had a high range of intellectual ability. (APA 1, p. 8). Similarly, the Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (See APA 3). Mr. Leonard opined that the Claimant was likely limited in his employment options and should not expect to earn more than he was earning (at the time) with VRI; however, the Respondent did not accurately report his prior work history, especially as to his poor performance records prior to his March 22, 2011 work injury, which was discovered by Mr. Leonard during his subsequent deposition. (Ex. K, p. 22). According to Mr. Leonard's report, the Respondent had never had any performance issues in the past, allowing him to erroneously conclude that the Respondent's vocational aptitude was limited by his alleged psychological injuries. In fact, the Respondent testified that he did not inform Mr. Leonard of his 2010 Performance Improvement Plan, stating that the topic was not brought up during the

evaluation. (Hr. Tr. p. 50). Moreover, Mr. Leonard concluded in his report that the Respondent's reduction in wages with VRI was due to his work injury based on the Respondent's statements that he was terminated from Philips due to poor work performance and that his alleged cognitive disabilities arose from his work injuries. (APA 3, pp. 44–45). With respect to the Respondent's overall neuropsychological condition, Mr. Leonard deferred to a neuropsychological evaluation (APA 3, p. 46), yet largely disregarded Dr. Waid's report during his deposition testimony. (Ex. K, p. 19).

QUESTIONS PRESENTED

1. Whether the Single Commissioner erred when he determined that the Respondent had reached maximum medical improvement for all accepted injuries, specifically the Claimant's right shoulder, when the preponderance of evidence in the record does not support that finding?
2. Whether the Single Commissioner erred when he awarded permanent wage loss benefits to the Respondent for three hundred forty (340) weeks commencing on January 17, 2014, when the preponderance of evidence in the record does not support that finding?

ARGUMENT

I) THE PREPONDERANCE OF EVIDENCE IN THE RECORD SHOWS THAT RESPONDENT HAS NOT REACHED MMI AS TO ALL ACCEPTED INJURIES, SO PERMANENCY IS PREMATURE.

The Respondent has proposed that he has reached maximum medical improvement as to all of his accepted injuries, including his right shoulder, which he claims is supported by a medical questionnaire completed by Dr. Barron on January 14, 2015. Appellants contend that the Respondent has not yet reached MMI for his right shoulder, as demonstrated by the lack of rating from the ATP, Dr. Rentz, and Dr. Barron's opinion that the Respondent will require

additional surgery. The Single Commissioner found that the Respondent had reached MMI for his right shoulder, citing Dr. Barron's medical questionnaire as supporting evidence (Order, Findings of Fact ¶5); the Appellants maintain that this finding is incorrect and also constitutes an error of law.

a) The Respondent has Not Reached MMI as to His Right Shoulder.

Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is *no further medical care or treatment* which will tend to lessen the degree of impairment. O'Banner v. Westinghouse Elect. Co., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (1995). (emphasis added). However, it is well established that the fact that a claimant has reached MMI does not preclude a finding that the claimant may still require additional medical care or treatment. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). In making the determination as to whether additional medical treatment is supplemental to a determination of MMI or whether it prevents MMI, the Court must consider whether, "additional medical treatment may improve [a Claimant's] overall quality of life and ability to cope, but not otherwise impact the finding of maximum medical improvement." Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997).

Ultimately, MMI is a factual determination left to the discretion of the Appellate Panel. Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (2006). Further, "[a]ny disagreements in the evidence are to be resolved exclusively by the Appellate Panel. Martin v. Rapid Plumbing, 369 S.C. 278, 278, 631 S.E.2d 547, 553 (Ct. App. 2006) (citing Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) (instructing that the

Appellate Panel's findings of fact are conclusive as to conflicting evidence, whether from different witnesses or *from the same witness.*) (emphasis added)).

The award of certain additional medical treatment has been upheld when the prescribed treatment tends to lessen the period of disability, and to at least maintain the Claimant's degree of physical impairment. Lee v. Harborside Cafe, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002); See also Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (claimant awarded continuation of physical therapy after determination of MMI); O'Banner, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) (renewing the claimant's prescription for pain killers was not inconsistent with MMI). However, not all determinations of MMI can be sustained when additional treatment is necessary. In Hall v. United Rentals, the claimant had been released at MMI by his authorized treating physician in relation to his back injury with future medical care to include pain medication and epidural spinal injections. [371 S.C. 69, 636 S.E.2d 876 (2006)]. The authorized treating physician opined that the claimant had exhausted all of his treatment options and was not a candidate for surgery. (Id. at 76.). After his release, the claimant received a second opinion from a physician who recommended surgery, which was carried out successfully and with significant improvements in the Claimant's pain. (Id. at 77.). The Claimant sought payment of his surgery by the carrier, who had declined additional treatment in light of his previous release at MMI. The Court found that the claimant's significant pain relief from surgery was sufficient evidence to find that the claimant had not reached MMI initially. (Id. at 89.) In support of its opinion, the Court discussed that it had been presented with conflicting expert evidence, yet the evidence as a whole supported the conclusion that the claimant had not reached MMI prior to the recommended surgery. (Id. at 90.).

Similarly, in Gadson v. Mikasa Corporation, the South Carolina Supreme Court affirmed a determination of MMI when a claimant was released by her authorized treating physician with future medical care to include injections and physical therapy. [368 S.C. 214, 225, 628 S.E.2d 262, 268 (2006)]. In Gadson, the Claimant's physician specifically addressed surgical intervention and opined that she was not a candidate, and that the continued treatment was "nothing more than maintenance care to maintain Gadson's condition." (Id.) The distinction between maintenance care and surgery allow the Commission to consider the two types of future treatment as distinct from one another. The Appellants argue that, while maintenance care does not prohibit a determination of MMI, surgical treatment belongs in a separate category as it is a procedure used to attain MMI, not to maintain it, and to lessen the degree of physical impairment.

In the present case, the Commission has been presented conflicting expert evidence albeit contained within a single document. In Dr. Barron's report, he opines that the Respondent has sustained a permanent impairment rating to his right shoulder of 15%, which the Single Commissioner has interpreted as a statement of MMI. However, within the same questionnaire response, Dr. Barron also opines that the Respondent will "most probably eventually require additional surgery to the right shoulder." The Appellants contend that Dr. Barron is not in a position to declare the Respondent at MMI nor to assign impairment ratings as he is not the Claimant's authorized treating physician. Further, Dr. Barron has not unequivocally stated that the Respondent has reached MMI; in fact, he has contradicted himself by also stating that the Respondent will require surgery to his right shoulder.

Although it has been well established that additional medical treatment does not necessarily impede a determination of MMI, case law affirming that issue has largely consisted

of ongoing physical therapy, prescription medications, epidural spinal injections, and other pain management services which allow a claimant to enjoy a stabilized level of disability rather than an invasive surgery which is expected to correct a physical injury. As such, the Appellants argue that the medical questionnaire completed by Dr. Barron, being the only evidence to support MMI as to the Respondent's right shoulder, does not rise to the level of substantial evidence to support the single Commissioner's determination of MMI. The Appellants respectfully request that the Full Commission reverse the Decision and Order wherein the single Commissioner determined that the Respondent had reached MMI as to his right shoulder solely based on the opinion of Dr. Barron.

b) Permanency Benefits Cannot be Awarded At This Time.

The South Carolina Supreme Court has held that, “[e]ssentially, workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member.” Curiel v. Environmental Management Services (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (citing Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)). This schedule of benefits places a definite milestone at MMI, where permanent benefits, whether under § 42-9-10, § 42-9-20, or § 42-9-30, may be appropriately awarded by the Commission. Prior to a claimant reaching MMI for all of his accepted injuries, he is only entitled to temporary benefits, if applicable.

In Curiel, the Claimant sustained an injury to his eye after being struck while working. Id. at 26. The claimant was eventually terminated for falsely exaggerating his vision, further complicating his medical treatment. (Id. at 30.) The Supreme Court affirmed the single

Commissioner's ruling that the Claimant was not entitled to temporary total disability benefits between his date of termination and MMI. (*Id.* at 30–31.) That Court further established the continuum of benefits, where permanent benefits are not proper until a claimant has reached MMI. (*Id.* at 29.)

In the case *sub judice*, the Appellants argue that the Respondent has yet to reach MMI for his right shoulder injury, as discussed *supra*. The Respondent has abandoned treatment with his authorized treating physician, Dr. Rentz, who conducted an MRI scan on his right shoulder on October 10, 2014, yet the Respondent did not return for further treatment or evaluation. Rather, the Respondent presented his MRI scan results to an IME physician, Dr. Barron, who assigned an impairment rating, yet did not definitively state that he had reached MMI. In direct contradiction to a declaration of MMI, Dr. Barron opined that the Respondent will “most probably eventually require additional surgery to his right shoulder.” As a result, the Respondent has yet to achieve MMI as to his right shoulder, and pursuant to the ruling in *Curiel*, an award of permanent disability is premature. The Appellants respectfully request that the Commission reverse the Order of the single Commissioner in light of the Claimant's failure to achieve MMI in relation to all of his injuries.

II) ALTERNATIVELY, IF THE RESPONDENT IS DEEMED TO BE AT MMI, HE IS NOT ENTITLED TO WAGE LOSS BENEFITS

The Commissioner found that the Respondent is entitled to wage loss benefits attributable to his work injury, finding that the Respondent suffered a cognitive deficiency as the result of his work-related accident of March 22, 2011. (Order, Findings of Fact ¶ 44). He further found that the Respondent's impact of that deficiency is limited to his executive functioning, which is determinative of the Respondent's ability to hold employment similar to his employment at Philips Healthcare. (*Id.* at ¶ 45). The Commissioner found that “the Respondent is clearly not as

he was before this work-related accident,” and he is unable to find comparable employment as a result. (*Id.* at ¶¶47-48). As such, the Commissioner ordered the Employer/Insurer to pay \$704.92 per week for three hundred forty weeks commencing January 17, 2014. (*Id.* at Order ¶1).

As the Full Commission is aware, pursuant to SC Code Ann. § 42-9-20, “when the incapacity to work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation rate equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter.” Further, SC Code Ann. § 42-1-120 defines “disability” as “incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.”

With regard to the award of wage loss benefits, the Commissioner erred in (1) finding the Respondent to be entitled to wage loss benefits, (2) ordering the benefits to commence the date of his termination from Philips Healthcare and (3) ordering the benefits to be paid for a period of 340 weeks.

a) The Respondent Did Not Meet His Burden of Proving that He Has Suffered an Incapacity to Work Resulting From the Work-Related Injury.

(i) The Respondent Earned Higher Wages Immediately Thereafter His Work Injury.

The most compelling evidence on the Respondent’s ability to earn wages is his actual history of having done so. The Respondent returned to work on May 1, 2011 and remained in his pre-injury position until January 2014 when his position was eliminated as part of a reduction in force. During this 2.5 year period, the Respondent’s wages were higher than pre-injury, which is corroborated by the Respondent’s actual earnings. During the three years preceding the March

22, 2011 work accident, the Respondent averaged approximately \$85,354 per year, compared to the approximately \$108,876 per year that he earned from 2011–2013.

Similar to the Floyd v. City of Charleston claim, the Respondent's ability to return to work earning pre-injury wages or higher indicates that he did not suffer a loss of earning capacity related to his work injury. [287 S.C. 474 (1986)]. In Floyd, a firefighter sustained a work-related neck injury, continued to work for a period of time, was subsequently admitted to the hospital for a few weeks, then resumed work at the fire department performing all of his usual tasks. The Claimant passed the Air Force physical entrance exam and entered the reserves in April 1981, completing basic training. In January 1982, he opened his own part-time washer-dryer repair service. During this time, Floyd remained employed by the fire department. In April 1982, he returned to a physician that had previously treated him, and was diagnosed with degenerative disc disease with spur formation. Floyd then brought a claim against the Fire Department for loss of earnings, as he was no longer able to perform his part-time job. The Floyd court held that the Claimant was unable to sustain his burden of showing that he could neither hold any other employment nor locate a second job. Moreover, the court found that the fact that he was able to physically continue working for the fire department, his physician advised him that he could return to work without any restrictions and he was well enough to pass the Air Force physical exam indicated that he did not suffer a loss of earning capacity arising from the injury.

(ii) The Respondent's Termination Was Not a Result of Work Injury.

Mr. Johnson remained the Respondent's supervisor when he returned following the injury, and testified that he spoke with the Respondent in January 2014 and informed him that he was being let go as part of a reduction in force. He specified that the reduction in force was

commenced at a higher corporate level and that the Respondent's termination was not related to performance or any other motive. Mr. Johnson recalled that the Respondent requested a probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was company-wide and was solely the result of a restructuring, not performance.

(iii) Respondent Failed to Perform a Diligent Job Search.

The Respondent failed to make reasonable efforts to obtain gainful employment after his employment with Philips ended due to a reduction in force. He was unemployed for five months thereafter. The Supreme Court has held that, "whenever a Respondent depends in part upon a showing that he has been unable to get work because of his physical condition, it naturally follows that the Respondent must prove that he has made reasonable efforts to secure employment." Coleman v. The Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Similarly, a Respondent must demonstrate that he has made "reasonable effort to obtain employment, and failed to do so because of an injury produced handicap." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1967).

The Respondent testified that he attempted to obtain employment with many different employers, stating that he began his employment search within an hour after learning of the reduction in force. In contrast to this testimony, he was only able to produce the names of four companies to which he applied: McKesson, Zoll, D-E-X and VRI. The position to which he applied at McKesson was at a higher corporate level than his previous position with Philips Healthcare. By his own admission, in his resume and application responses, the Respondent represented to McKesson that he was a capable individual and an impactful public speaker, as well as being "expertly organized and focused." The Respondent testified that he did not get

offered employment with McKesson due to a medical questionnaire wherein he alleged that he declared Nadalol as his headache medication; however, subpoena responses from McKesson failed to produce any such medical questionnaire despite ample documents related to his application process and subsequent interviews. Subpoena responses from ZOLL failed to provide any documentation of the Respondent. Moreover, the Respondent admitted that he was offered a position with Valued Relations, Inc. (“VRI”) in January 2015, but did not immediately accept the position. The evidence above proves that the Respondent did not make a reasonable effort to obtain employment and that his efforts failed due to his handicap; thus, the Appellants argue that he is unable to prove entitlement to wage loss benefits.

(iv) Respondent’s Subsequent Decrease in Wages Are Not a Result of His Work Injury.

Prior to his work accident on March 22, 2011, the Respondent had significant performance issues related to work performance. Specifically, in 2009, he was placed on a Performance Improvement Plan. During frequent follow-up correspondences with his supervisors, it is apparent that the Respondent struggled with performance, failing to meet his sales quota in October 2009 and failure to achieve 65% of his goal five times in a six-month period. He did eventually come out of the PIP, but his supervisors did not believe that his job was right for him. The Respondent continued to exhibit poor performance following his March 22, 2011 accident, but his performance was merely a “resurfacing” of his prior issues from 2010 according to Mr. Johnson.

Despite the Respondent’s increase in average wages after the accident, Mr. Johnson testified that he continued to receive complaints about the Respondent’s follow-up and performance. According to Mr. Johnson’s credible testimony, the Respondent did not display any performance or behavioral differences following the accident, indicating no change in his

cognitive abilities resulting from the work injury. Specifically, Mr. Johnson testified that the Respondent was consistently in the “bottom third of the ranking” among fellow employees in his position. Mr. Johnson recalled challenging the Respondent in his work performance but that he was difficult to coach. According to Mr. Johnson, during that 2.5 year period, the Respondent did not mention any of the alleged symptoms that he relates to his head injury including headaches, lack of focus, or any other cognitive impairments.

Most importantly, the Respondent specifically requested the salary he was given at VRI. The Single Commissioner erroneously found that there is no evidence in the record that the Respondent would choose to self-limit as to his earning potential. (Order, Findings of Fact ¶47). In contrast, on his application for VRI, next to “requested salary,” the Respondent specifically indicated \$55K.

(v) There is No Objective Evidence that his Work Injury Impacted his Earning Capacity.

(i) The Respondent Portrayed Himself as a Proficient Executive When Applying for Jobs.

The Respondent has a Bachelor’s degree of Science from the University of South Carolina in Marketing. (Hr. Tr. p. 9). In addition, he has had over twenty years’ experience in direct sales and earned a presence achievement award eight times earlier in his career. (Hr. Tr. pp. 10, 73). In addition to his education and experience, the Respondent portrayed himself as an impactful public speaker and as “expertly organized and focused” to subsequent employers. (Hr. Tr. p. 69, 70).

(ii) Dr. Randy Waid's Neuropsychological Evaluation Evidences that the Respondent Suffers From No Cognitive Deficits.

The Single Commissioner found that in many of the measurements in Dr. Waid's report, the Respondent scored quite high, while others indicated deficits. (Decision and Order, Findings of Fact ¶35) Even so, he found that the impact of the Respondent's deficiency is limited to his executive functioning. (Id. at ¶45). The Single Commissioner further found that it is the executive functioning that is determinative of the Respondent's ability to hold employment for Philips Healthcare. (Id.).

In contrast to the Commissioner's findings, Dr. Waid found the Respondent to be neuropsychologically intact, as his detailed 9-page report thoroughly tested and examined all of the potential cognitive deficits, which determined that he was functioning in the high average range of intellectual abilities, no loss of memory, no evidence of issues with language or reasoning abilities and an ability to meet the demands of higher reasoning/problem solving. Further, Dr. Waid referred to the Respondent as "a resilient individual who is functioning reasonably well," and that he is "functioning in the high average range of intellectual abilities." Dr. Waid also found the Respondent to have average to above-average performance on most of the tests that were performed during his evaluation. Most notably, he found that the Respondent has a high average IQ, and performed within the 90th percentile on many occasions, particularly when reasoning, computation, and memory were involved. In sum, Dr. Waid determined that the Respondent's neuropsychological evaluation provided favorable results, that the Respondent's brain behavior functioning is intact and that Respondent made a good recovery from his head and other injuries.

(iii) The Vocational Report by Mr. Joel Leonard Should be Granted No Persuasive Weight.

The Single Commissioner found that Mr. Leonard had to rely on the subjective complaints of the Respondent in the absence of a neuropsychological evaluation. (Decision and Order, Findings of Fact ¶ 34). Not only does this evidence that the Single Commissioner did not even read Mr. Leonard's deposition transcript tendered into evidence which evidenced that Mr. Leonard was provided with the report and questioned about same, but the Single Commissioner also erred in noting that "those complaints are, for the most part, congruent with the findings of the neuropsychological report."

Mr. Leonard concluded his report by finding that the Respondent's reduction in wages with his subsequent employer is due to his work injury based on: (1) Mr. Leonard's understanding that the Respondent was terminated from Philips due to his poor work performance, and (2) Mr. Leonard's understanding of the Respondent's cognitive disabilities arising from his work injury. Mr. Leonard's report stated that he would defer to the findings of a neuropsychologist and any additional information about his termination, but he went out of his way when deposed to disregard or misinterpret those findings when presented to him.

As reflected in the vocational report, the Respondent informed Mr. Leonard that he had no performance issues prior to his work injury; however, Mr. Leonard was subsequently presented with his Philips employment file at his deposition. Mr. Leonard agreed that the personnel documentation contradicted the information relayed by the Respondent. Further, Mr. Leonard was presented with the deposition testimony of Mark Johnson, indicating that the Respondent was terminated from the Employer due to a Reduction in Force. Even in the face of contradictory evidence, Mr. Leonard refused to take this additional information into account and re-evaluate whether the Respondent was better suited under a different profile.

Moreover, Mr. Leonard agreed that the best way to test cognitive abilities or inabilities is through a neuropsychological test and also admitted that he would defer to Dr. Waid's opinions in this regard, yet he went out of his way to argue around Dr. Waid's actual findings. Mr. Leonard testified that his overall impression of Dr. Waid's report was that the Respondent has a "measurable or discernable degree of functional deficit." Further, he testified that "Dr. Waid's report basically attended to some attention and concentration, persistence issues," which is an intentional misrepresentation of the findings. Although Mr. Leonard agreed to the favorable results in each individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), he remained unyielding that the Respondent suffered from forgetfulness and attention issues, even though these issues were tested and no deficits were shown. No doubt, Mr. Leonard was grasping at straws to maintain his former opinion regardless of the actual facts; as such, his opinion as to the Respondent's vocational abilities should be disregarded.

Based on the preponderance of the evidence contained in the record, the Appellants request that the Full Commission reverse the Single Commissioner's determination that the Respondent is entitled to wage loss benefits.

b) If Respondent is Found to be Entitled to Wage Loss Benefits, his Benefits would Not Commence Until the Date of MMI for All Injuries.

The Single Commissioner erred in concluding that the Respondent is entitled to wage loss benefits commencing January 17, 2014, the date that the Respondent's wage loss began. (Decision and Order, Conclusions of Law ¶ 2). As discussed above, the Supreme Court in Curiel v. Environmental Management Services (MS) held that workers' compensation benefits accrue on a time continuum: temporary total disability (TTD) benefits are available from the date of injury through the date of MMI, and post-MMI benefits may be awarded either as permanent

total or permanent partial disability, or as a percentage impairment to a scheduled member. 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (citing Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)). Thus, any wage loss benefits awarded to the Respondent would not commence until the date of MMI.

Here, although the Single Commissioner did not specify a date of MMI, but one can only assume that it is the date of Dr. Barron's questionnaire response cited in the findings, which is dated January 14, 2015. Thus, in contrast to the Single Commissioner's Award, the wage loss award commences as of the date of MMI.

c) If Respondent is Found to be Entitled to Wage Loss Benefits, he Would Not Be Entitled to a Full 340 Weeks of Benefits.

The Single Commissioner erred in concluding that "the Respondent now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.83). This computes to a compensation rate of \$1,033.94. (\$1,550.83 x .667) However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Respondent is awarded \$704.92 a week for 340 weeks." (Order, Conclusions of Law, ¶ 2, with emphasis).

As the Full Commission is aware, SC Code Ann § 42-9-20 states that "In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury." In South Carolina, the "plain meaning" of a statute governs and, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right

to impose another meaning. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007). Moreover, the term “shall” in a statute means that a certain action is mandatory. Wigfall v. Tideland Utilities, Inc., 354 SC 100 (2003).

Here, SC Code Ann. § 42-9-20 is plain and unambiguous on its face and should be interpreted in accordance with its plain meaning. Explicitly, it states that a Respondent cannot receive wage loss benefits beyond 340 weeks from the date of accident. Thus, the Order of 340 weeks of wage loss benefits is against the rules of construction. The Respondent was injured on March 22, 2011, making 340 weeks from that date fall on September 26, 2017. Should the Full Commission uphold the Single Commissioner’s finding that the Respondent reached MMI as of the date of Dr. Barron’s IME (January 14, 2015) and is entitled to wage loss benefits, pursuant to the statute the Respondent would only be entitled to wage loss benefits for an additional 141 weeks, amounting to **\$96,729.12** (\$704.92 x 137.22 commuted weeks)

CONCLUSION

For the foregoing reasons, and in light of the accepted and established standard for review for review of the Single Commissioner’s Decision and Order by the Full Commission, the Appellants respectfully request the Full Commission reverse and vacate the Single Commissioner’s August 27, 2015 Decision and Order.

[signature on following page]

Respectfully submitted,

/s/ Brooke A. Payne

Brooke A. Payne

SC Bar #: 81085

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November 11, 2015

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

W.C.C. FILE NO.: 1102937

BARRY ADICKES,)
)
Employee,)
Claimant/Respondent,)
)
vs.)
)
PHILIPS HEALTHCARE.,)
)
Employer,)
)
and)
)
FIDELITY AND GUARANTEE)
INSURANCE CO.,)
)
Carrier,)
Defendants/Appellants)
)
_____)

**MEMORANDUM ON BEHALF OF
CLAIMANT/RESPONDENT TO THE
FULL COMMISSION**

STATEMENT OF THE CASE

This claim came before Honorable Commissioner Gene McCaskill (Single Commissioner) pursuant to Form 50 filed by the Claimant, Mr. Barry Adickes. The Claimant suffered an admittedly compensable accident on March 22, 2011, when he had a motor vehicle accident whereby his car went off the side of a mountain on a winding road while employed with Philips Healthcare. As a result of his accident, Claimant suffered from a closed head injury (brain), bilateral shoulder injuries, and a cervical spine injury. Accordingly, Claimant alleged entitlement to significant wage loss award pursuant to §42-9-20 commencing from January 17, 2014 when he was terminated from Philips Healthcare. Claimant further alleged he reached

maximum medical improvement but will require ongoing Dodge medical care for his shoulder, neck and post-traumatic headaches as outlined by his physicians. Alternatively, if permanent wage loss was not found, Claimant alleged very significant permanent partial disability to his shoulders, spine and brain.

Philips Healthcare and their carrier, Fidelity and Guarantee Insurance Company, (Defendants), denied that Claimant had reached maximum medical improvement as to his bilateral shoulders and a hearing was premature. Defendants further denied that Claimant had sustained a permanent loss of wage earning capacity as a result of his work-related injuries. Defendants further argued that if the case was awarded on a wage loss basis, that the 340 weeks should commence as of the date of injury. Defendants further argued that if the case was awarded as a specific disability, there was no disability to the shoulders.

A hearing on these issues was held before the Single Commissioner on January 21, 2015 in which all parties were present, medical evidence was submitted and testimony was given. The parties stipulated that jurisdiction and venue were proper in the case. The parties further stipulated to an average weekly wage of \$2,608.52 with a corresponding compensation rate of \$704.92. After considering the testimony from Claimant, Claimant's wife, and Employer Representative, Mark Johnson; reviewing the APA Submissions and Exhibits provided by both parties; and consideration of the applicable law, the Single Commissioner issued a Decision and Order dated August 27, 2017 (Order) in which the Single Commissioner listed his Findings of Fact and Conclusions of Law:

Findings of Fact:

1. The Claimant suffered injuries to his head/brain, bilateral shoulders and cervical spine in a work-related automobile accident on March 22, 2011.

2. This is an admitted accident, and the Defendants have provided medical care and treatment.
3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, "... has sustained permanent impairment of 15% to the right shoulder and 0% to the left shoulder. (Claimant's APAs, page 77a).
7. While the ratings are necessary to determine disability to the shoulders if any, the language is also determinative as to MMI. Assigning "permanent impairment" to the shoulders attests to Dr. Barron's opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of "permanent" – plain meaning of the word- impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders.
8. That being the case, I have reviewed this case in its entirety.
9. It is clear that the Claimant has had extensive treatment with a number of providers as well as evaluations as to his cognitive function.
10. Medical care and treatment has been provided by Burke County EMS, Piedmont Medical Center, Dr. James Rentz, Dr. Nicholas Tuttle, Dr. Howard Mandell, Dr. John Welshofer and Dr. Richard Park.
11. The Claimant has also seen Dr. Jerry L. Barron for an IME.
12. The Claimant has also seen L. Randolph Waid, Ph.D., for a neuropsychological evaluation.
13. A vocational evaluation was conducted by Joel Leonard, M.Ed., CRC, CVE.
14. The Defendants' position is this is a scheduled member case pursuant to §42-9-30.
15. The Claimant contends that this is a wage loss case pursuant to §42-9-20.
16. Dr. Welshofer opines as to the spine, "... he has a 10% impairment of the spine based on the AMA guidelines. I will see the patient as necessary I don't think that there is anything else to offer him at this time." (Claimant's APA, page 82)

17. As to his brain injury, Dr. Welshofer opines, “I believe the patient’s injury was a SOUTH CAROLINA injury based on the AMA guidelines. I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive (sic) symptomatology and headaches.” (Claimant’s APAs, page 96)
18. Dr. Barron’s ratings as to both shoulders are cited above in Finding of Fact #6.
19. In his neuropsychological evaluation of the Claimant, Dr. Waid opines after extensive testing, “The current evaluation revealed Mr. Barry Adickes to be functioning in the high average range of intellectual abilities. Neuropsychological evaluation generally provided favorable results. Mr. Adickes did demonstrate variability in his capacity to sustain attention/concentration. Otherwise, his performance was suggestive of intact brain behavior functioning. It appears that compromise in the attentional/executive aspects of immediate learning are causal for complaints of forgetfulness in day to day pursuits...Mild executive dysfunction appears to be present potentially affecting both cognitive and emotional domains.” (Claimant’s APAs, page 8).
20. Dr. Mandell, who is the treating neurologist in the case, testified via deposition. I have read that deposition in its entirety.
21. Commenting on his review of the neuropsychological evaluation of the Claimant conducted by Dr. Waid, Dr. Mandell testified, “Then you see the summary, this is what they mean. What those mean is that he did very well on most things. However, what he did have difficulties with were concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate learning, or thought to be the complaints of forgetfulness on daily pursuits, mild executive dysfunction, shorter fuse, easier frustrations....So basically, it says exactly what I’m saying, executive functioning is kind of like the CEO of the brain. What it does is, starts off with an idea, and then it gets a plan, and then it takes it all the way down to the deadline. So you need to have planning skills. You need to have memory skills. You need to have time management. You need to have mental flexibility. That’s executive functioning... So the executive functioning, so that – that’s what they’re saying here. He did very well on everything else, which is what my examination would say as well. But those areas of concentration, focus and things that he showed his weakness in.” (Deposition of Howard Mandell, MD, page 35, lines 12-25, and page 36, lines 1-18).
22. Dr. Mandell’s deposition continues, “Q. Are the problems that you have just outlined from this report caused by his traumatic brain injury and post-concussive syndrome from his on-the-job injury? A. Yes. Q. Do those problems limit his performance and employment opportunities? A. I think they could, depending upon which type of employment; but yes, at a high level of employment with high skills, it would limit.” (Deposition of Howard Mandell, MD, page 36, lines 19-25 and page 37, lines 1-2).
23. In addition to providing medical care and treatment, the Defendants provided the Claimant with two months of TTD while he was recovering.

24. The Claimant returned to work for the Employer and continued working for them for 2.5 years until his job was eliminated as part of a reduction in force.
25. The Defendants contend that the Claimant lost his job solely because of the RIF and that it has nothing to do with his work injury.
26. The Claimant testified that he worked for the Employer for over twenty years and that employment ended on 01/17/14.
27. The Claimant alleges that he was told it was performance related.
28. The Claimant testified that after his termination he reached out to over 15 potential employers.
29. He took a job that paid \$55,000; but that employment has now ended.
30. It is the Claimant's position that he indicated to that employer that the salary listed was the salary he was seeking because that was the amount the position paid.
31. The Claimant underwent a vocational evaluation with Joel Leonard who is a vocational expert.
32. Mr. Leonard was also deposed. I have read that deposition in its entirety.
33. This evaluation was conducted on 08/25/14. The neuropsychological evaluation conducted by Dr. Waid was on 10/07/14.
34. While Mr. Leonard had to rely on the subjective complaints of the Claimant in the absence of a neuropsychological evaluation, those complaints are, for the most part, congruent with the findings of the neuropsychological evaluation.
35. Further affirmation of the candid cooperation of the Claimant is the results of the neuropsychological testing conducted by Dr. Waid. In many of those measurements, the Claimant scored quite high, while others indicated deficits which tract with the opinions of both Dr. Waid and Dr. Mandell. It would take a neuropsychological expert to skew the results to the objective testing performed by Dr. Waid to match the presentation of the Claimant. That being said, I find that the Claimant was cooperative and candid in both his presentation to the experts in this case as well as in his testimony. The Claimant is reliable.
36. Mr. Leonard presents three possible profiles as to future earnings potential of the Claimant. It is Mr. Leonard's expert opinion that Profile B best represents the likely outcome with respect to the Claimant's residual employability and prospective earning capacity subsequent to the 3/22/11 accident.

37. The profile reads in part, "Within the parameters of Profile B, Mr. Adickes' current weekly wage (estimated at \$1,057.69) would be considered a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident. While he would be capable of performing other occupations in addition to his position with VRI, such work would not be expected to pay wages that significantly exceed his current compensation." (Claimant's APAs, page 45)
38. It is clear from the record that the Claimant experienced significant injuries in his work-related accident of 03/22/11.
39. Where an injury is confined to a scheduled body member and there is no injury or affect to another body member, the recovery is limited to the medical model of §42-9-30. (Singleton and Colonna). However, the Claimant has impairment to more than one body member. He is therefore entitled to his requested analysis under the economic model of §42-9-20.
40. There are experts opinions in this case from Dr. Waid, Dr. Mandell and Mr. Leonard.
41. The vocational evaluation from Mr. Leonard is the only vocational evaluation in the record. There is no competing vocational opinion.
42. The neuropsychological evaluation from Dr. Waid is the only neuropsychological evaluation in the evidence. There is no competing neuropsychological evaluation.
43. The opinion of Dr. Mandell is given in his deposition under oath.
44. When I consider all of those opinions and the evidence as a whole, the Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11.
45. The impact of that deficiency is limited to his executive functioning. That being said, it is that executive functioning that is determinative of the Claimant's ability to hold employment similar to his employment for Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, he no longer works there and the cogent question is now can he find like employment at a similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?
47. It is reasonable to conclude that if the Claimant could find employment at a wage comparable to what he earned for the Employer, he would. There is no evidence in the record that the Claimant would choose to self-limit as to his earning potential.
48. I find that the Claimant has suffered wage loss as the result of his 03/22/11 work-related accident. Based on a review of the evidence as a whole, the Claimant is clearly not as he was before this work-related accident.

49. I find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.69). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident of March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

Conclusions of Law

1. Pursuant to Section 42-1-160, Claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, Claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83. This computes to a compensation rate of \$1033.94. However, the maximum compensation rate for 2011 is \$704.92. Therefore, the claimant is awarded \$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date the claimant's wage loss began. Claimant had previously received temporary total disability while he was out of work so the period of partial disability began after a period of total disability.
3. Pursuant to Section 42-15-60, claimant is entitled to ongoing care for his neck including injections, ablations, and medication as directed by Dr. Park; continuing medications and doctor visits for his post concussive syndrome as outlined by Dr. Mandell; and future surgery to his right shoulder as outlined by Dr. Barron.

This claim now comes before the Full Commission of the South Carolina Workers' Compensation Commission on Defendants' Form 30, Request for Review of the Decision and Order issued by the Single Commissioner on August 27, 2015. Defendants allege the Single Commissioner erred in finding MMI to the bilateral shoulders, finding that Claimant sustained wage loss as a result of his work accident, concluding as a matter of law that Claimant is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014.

SUMMARY OF EVIDENCE

The Claimant is a fifty three (53) year old father of four, with a bachelor of science degree in marketing management from the University of South Carolina. His work history includes working in sales at Philips (as well as the predecessor company Philips acquired in 2006) for nearly twenty-one (21) years. His work in sales and distribution required loading products into and out of a car as well as spending many hours driving and flying.

Claimant testified that while traveling as a general manager of distribution, he was involved in a work-related automobile accident in which he approached a sharp curve in the road too quickly causing his car to flip off the road into a mountainous ravine. (Hr. Tr., p.16). Claimant injured both of his shoulders, his neck and also suffered a traumatic brain injury. Claimant testified that once he regained consciousness, he called emergency services. (Hr. Tr., pp. 16-17). The Burke County EMS team assembled gear and traversed down a 75-100 foot embankment to reach Claimant. With help, Claimant was able to escape the vehicle and get up the embankment. Claimant refused transport from the EMS and his wife picked him up that night and took him back to his home in Rock Hill, South Carolina to seek medical treatment. (Hr. Tr., pp. 17-19).

Upon returning home, Claimant went to his family doctor, Dr. Nicholas Tuttle for treatment. From there, Claimant was treated by Dr. James Rentz and ultimately underwent shoulder surgery with Dr. Rentz. Claimant also suffered significant neck pain as well as post concussive headaches. Since that time, Claimant has primarily been treated by Dr. Rentz for his shoulder injuries, by Dr. Howard Mandell for his headaches and post concussive syndrome, and by Dr. Richard Park for his cervical spine. Claimant has undergone a variety of treatments including nerve root ablations by Dr. Park and a host of medication therapy by Dr. Mandell. (Hr. Tr., pp. 21-29).

As mentioned earlier, Claimant worked for Philips and the company that Philips purchased for twenty-one (21) years. In 2008, Claimant worked as a product sales specialist for the same division of Philips. He continued in that position until he was transitioned into a new position in 2011. Shortly after taking the new position in January of 2011, Claimant suffered this injury on March 22, 2011. Claimant testified that he had performed well in his job prior to the injury. There was a period in 2009 when he was placed on a PIP (personal improvement program) because sales were low. However, Claimant testified that this was during the height of the recession and they had also experienced difficulty getting product during that time. (Hr. Tr., pp. 11-13). Claimant's performance evaluations back up this testimony. (Claimant's Exhibits No.'s 2-5). In the calendar year prior to this injury, Claimant earned over \$128,000. (Hr. Tr., p. 14; Defendant's Exhibit B, p. 11). However, Claimant's subsequent wages decreased every year after the date of injury. (Hr. Tr., pp. 31-32).

Claimant testified that following his injury he had great difficulty with headaches. Migraine headaches would appear that put Claimant out of commission for twenty-four (24) to forty-eight (48) hours. These headaches occurred every four to eight weeks and Claimant wife

kept a headache diary of when the headaches occurred. (Hr. Tr., pp. 25-28). Claimant also testified that he began noticing other cognitive problems that he tried to shrug off at first. Claimant testified that he experiences additional cognitive problems such as forgetfulness and an inability to process thoughts. For example, composing an email takes him much longer than it did previously. (Hr. Tr., pp. 28-29). Claimant also has to deal with his headaches as well as chronic neck pain and shoulder pain. Claimant testified that he has to have nerve root ablations done every six months to a year in his neck, has to take medication daily for his migraine headaches as well as break through medication when headaches occur, and knows that he will require an additional surgery on his right shoulder in the future.

Claimant was out of work during the time that he recuperated from his shoulder surgery. He returned to work and encountered the difficulties noted above. Claimant was terminated on January 17, 2014. The termination was a part of a companywide layoff but Claimant testified that he was told that it was, in part, performance related. (Hr. Tr., pp. 32-34). The personnel evaluations showed that Claimant was given glowing comments in the years prior to the accident, but that those evaluations became worse following his accident. (Claimant's Exhibits, No.'s 2-5). Claimant was out of work completely for a period of time while looking for work but eventually obtained a job with VRI in which he earned \$55,000 a year. The application submitted by the Defendants showed that Claimant's requested salary was \$55,000. However, Claimant testified that he put that number on the job application because he was told that was what the job paid when he applied and not because that was the salary he wanted. (Hr. Tr., pp. 36-37). Shortly before the hearing, Claimant lost his job with VRI and he was unemployed at the time of the hearing. (Hr. Tr., pp. 38-39).

Jeanie Adickes, wife of the Claimant, testified. She testified that she and the claimant have been married for twenty-eight (28) years and she had an opportunity to observe him on a daily basis during that time. Prior to his injury, she testified the Claimant was able to do his job, multi-task and never had headaches. (Hr. Tr., pp. 102-103). However, following his accident their life changed. Claimant takes medication on a daily basis and has trouble with focus, memory and multi-tasking. She testified that it takes much longer for him to get things done. (Hr. Tr., p. 103). However, she also testified that Claimant is a stoic individual and not a complainer. To the contrary, he minimizes his issues. (Id.). She testified that she attended doctor's appointments with the Claimant because his clarity wasn't there. (Id.). She testified that Claimant's severe headaches occur about anywhere from four to eight weeks depending on his medications and that the medications have to be tweaked from time to time. (Hr. Tr., pp. 103-104). She testified that she did keep a headache calendar, which was helpful for Dr. Mandell. She testified that when a headache comes on she can tell that it is coming and Claimant has to give himself an injection, which usually requires him to sleep, then he has to repeat the injection. (Hr. Tr., p. 106). The following day after one of his headaches is he is very sluggish and foggy and often has a rebound headache. He averaged being out of commission for two to four days on average after his headaches. (Hr. Tr., p. 107). She further testified that Claimant has trouble with his short term memory, focus and patience. She also testified that Claimant has little patience, which is a great change from prior to the accident. (Hr. Tr., p. 109).

Mark Johnson, regional manager for Philips Healthcare, testified on behalf of Defendants. He testified that at the time of the accident that he was claimant's supervisor. He did not know the Claimant well before he became his supervisor, but knew of him. He testified that Claimant had a history of poor follow-up with team members and an overall lack of urgency.

(Hr. Tr., p. 124). He testified that during the time the Claimant reported to him from January 1, 2011 until his termination in 2014 that Claimant received middle of the road performance reviews and was not a top performer. He indicated that Claimant was in the bottom third of the ranking but was doing an adequate job. (Hr. Tr., p. 125). He testified that Claimant was terminated as part of a reduction in force and that he did not tell Claimant that he was being terminated in part because of performance. (Hr. Tr., pp. 125-129).

Mr. Johnson testified that Claimant did report to him that he was still having headaches from time to time immediately after the accident. However, he indicated that it was not routine and that over time he did not recall hearing further about the headaches. (Hr. Tr., pp. 133-134).

On cross examination, Mr. Johnson indicated that Claimant was transferred to his team on January 1, 2011 and that he had only supervised Claimant for a period of eleven (11) weeks prior to his accident. (Hr. Tr., pp. 139-140). Further, because they worked remotely, he would rarely see Claimant except for five to six days per year and that any contact with the Claimant was usually by email or telephone. (Hr. Tr., pp. 147-148). Mr. Johnson was also cross-examined regarding the performance appraisals for the period prior to his accident that were completed by Paul Stoddard, who served as both Claimant's and Mr. Johnson's superior. The performance evaluation showed that during the time Claimant was on the PIP program that he was placed on that program because of a drop in sales that coincided with the recession of 2008 and 2009. Claimant was then a top salesman at the end of 2009. Mr. Johnson was also questioned extensively regarding the performance appraisals that he completed on Claimant after his injury that contained numerous quotes questioning Claimant's focus, concentration and time-management. (Hr. Tr., pp. 151-159).

All of the medical reports were reviewed. The reports of Dr. Richard Park show that Claimant was under his care beginning July 30, 2013. Dr. Park has performed facet joint injections, medial branch blocks, and radio frequency ablations. Dr. Park opined that Claimant would likely continue to require radio frequency ablations every six to twenty-four months for pain relief. (Claimant's APA #4, p. 52). Claimant was treated for his shoulder by Dr. James Rentz. Dr. Rentz performed arthroscopic surgery on the right shoulder including a debridement of a grade IV SLAP tear and an anterior labrum, biceps tendonotomy, and open biceps tenodesis to the proximal humerus. Claimant did not undergo surgery on the left shoulder. A right shoulder MRI performed on October 10, 2014 showed supraspinatus and infra-supraspinatus insertional tendonopathy with an intra-substance delamination tear at their confluence.

Claimant was also evaluated by shoulder surgeon, Jerry L. Barron, MD. Dr. Barron saw Claimant on December 12, 2012 and found that Claimant did sustain an acute injury to his head, neck and bilateral shoulders. He recommended an MRI/arthrogram of the right shoulder as well as an MRI of the cervical spine. (Claimant's APA #5, pp. 76-77). Dr. Barron later reviewed the MRI report of October 10, 2014 and rated Claimant as having a 15% impairment to the right shoulder and 0% impairment to the left shoulder. He further opined that Claimant would most probably eventually require surgery to the right shoulder but that it was reasonable for Claimant to try to avoid surgery as long as possible. (Claimant's APA #5, p. 77a).

Claimant was also evaluated by Dr. John Welshofer. Dr. Welshofer indicated that Claimant has underlying cervical degenerative spondylosis that was made materially worse by the on-the-job motor vehicle accident of March 22, 2011. He rated Claimant as having a 10% impairment to his spine. (Claimant's APA #6, p. 82). Dr. Welshofer also evaluated Claimant's

brain injury and diagnosed him with a post-concussive disorder. He rated Claimant as having a 15% permanent impairment of the brain. (Claimant's APA #6, p. 96).

Claimant was also evaluated by neuropsychiatrist, Dr. Randolph Waid. Dr. Waid performed a neuropsychological evaluation and found that Claimant had sustained a good recovery under the circumstances. However, he noted that Claimant demonstrated variability in his capacity to sustain attention/concentration. He noted that Claimant had compromise in the attentional executive aspects of immediate learning which caused complaints or forgetfulness in day to day pursuits. He found that Claimant was suffering executive dysfunction potentially affecting both cognitive and emotional domains. He noted that in day to day pursuits, Claimant likely experienced episodic forgetfulness due to the interfering effects of attention-executive difficulties and headaches. (Claimant's APA # 1, pp. 1-9).

The physician that Claimant has seen most for treatment throughout his claim has been neurologist Dr. Howard Mandell. Dr. Mandell noted that he had been treating Mr. Adickes for traumatic brain injury and post concussive syndrome as a result of his on the job injury. He opined that Claimant would need ongoing care for post-traumatic headaches to include doctor visits two or three times per year, medications for prevention and abortive treatment of headaches as well as possible missed days at work for headaches that were not aborted by medications. He testified that Claimant attempted to minimize his problems and understated these problems. Dr. Mandell reviewed the neuropsychological evaluation of Dr. Waid and testified that the problems shown on the neuropsychological examination were exactly the same as the problems that he observed with Mr. Adickes and he believed that these problems came from Claimant's traumatic brain injury and post concussive syndrome. Dr. Mandell testified that Claimant has problem with concentration, executive function, capacity to sustain attention and

concentration, difficulty with attentional executive aspects of immediate learning, forgetfulness in daily pursuits, mild executive dysfunction, shorter fuse, and easier frustration. These skills affect people who perform jobs with higher aspects of functioning rather than those with menial jobs. He further testified that these problems could limit Claimant's employment opportunities particularly those at a high level of employment. (See Dr. Mandell's deposition transcript).

Claimant was evaluated by vocational expert, Mr. Joel Leonard. Mr. Leonard reviewed all of the claimant's medical records, interviewed Claimant and administered some achievement and reading testing. In his report, he outlined three potential vocational profiles. However, he endorsed profile "B" that acknowledges that Claimant was part of a general reduction in force in his employment but also find that the amount of money that Claimant is currently earning is a reasonable and proper representation of his likely earning capacity subsequent to the March 2011 accident because of his limitations and restrictions from his accident. (Claimant's APA # 3, pp. 35-47). Mr. Leonard's deposition was offered as evidence and he was cross-examined regarding his opinion. However, he maintained his opinion that the \$55,000 job with VRI was an accurate reflection of Claimant's post-injury earning capacity because of his cognitive difficulties. (See Mr. Leonard's deposition transcript).

QUESTIONS PRESENTED

- 1. Whether the Single Commissioner was correct in finding that Claimant reached maximum medical improvement for his admitted injuries.**
- 2. Whether the Single Commissioner was correct in awarding permanent wage loss benefits under §42-9-20.**

ARGUMENT

1. The Single Commissioner was correct in finding that Claimant reached maximum medical improvement for his admitted injuries, including the right shoulder.

The Single Commissioner was correct in finding that Claimant reached maximum medical improvement (MMI) for his admitted injuries in this claim, including the right shoulder.

Maximum medical improvement is a term of art which indicates “that a person has reached such a plateau that in the physician’s opinion there is no further medical care or treatment which will lessen the degree of impairment...” *Bass v. Kenco Group*, 366 S.C. 450, 622 S.E.2d 577 (S.C. App. 2005); *Lee v. Harborside Café*, 350 S.C. 74, 564 S.E.2d 354 (S.C. App. 2002). However, the fact that a claimant has reached MMI does not preclude a finding the claimant still may require additional medical care or treatment. *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct. Ap. 1999).

Here, the overwhelming preponderance of the evidence in record clearly indicates that Claimant reached maximum medical improvement for the work-related injuries sustained on March 22, 2011. As to his spinal injury, Dr. Welshofer opined that Claimant has a 10% permanent impairment of the spine. (Claimant’s APAs, page 82). As to the brain injury, Dr. Welshofer opined that Claimant has a permanent impairment rating of 15% to the brain for continuous post-concussive symptomatology and headaches. (Claimant’s APAs, page, 96). There is no evidence in the record to dispute the findings of MMI and permanent impairment opined by Dr. Welshofer. Furthermore, Defendants’ brief does not allege that he has not achieved MMI for these injuries. Therefore, the only allegation made by Defendants that Claimant has not reached MMI is regarding his admitted right shoulder injury.

As to the right shoulder, the Claimant underwent an arthroscopic surgery by Dr. Rentz in October of 2011. (Claimant’s APAs, page 178). This was an extensive surgery involving

debridement of grade IV SLAP tear and anterior labrum, biceps tenotomy right shoulder, and an open biceps tenodesis to the proximal humerus. (Id.). Subsequently, the Claimant underwent additional conservative treatment for his right shoulder with Dr. Rentz, including injections.

Claimant was next seen by Dr. Rentz for a rating and release in September of 2014. However, he continued to have some pain in his right shoulder and was referred for an MRI. While the Claimant's counsel received this MRI shortly before the hearing, he was not able to see Dr. Rentz and Claimant's counsel was unable to schedule Dr. Rentz's deposition prior to the hearing. Accordingly, the Claimant's records were sent to Dr. Barron, who had previously evaluated the Claimant. After a thorough review of the records, including the updated MRI, Dr. Barron opined that Claimant had sustained a 15% permanent impairment to the right shoulder and a 0% permanent impairment to the left shoulder. While Dr. Barron indicated that Claimant most probably would eventually require surgery to the right shoulder, he specifically indicated that it **"is reasonable for Mr. Adickes to try to avoid surgery as long as possible."** (CAPA #5, p. 77a, emphasis added). There is no objective medical evidence or conflicting expert evidence in the record to dispute Dr. Barron's opinions.

Defendants have alleged in their brief that Claimant has not reached MMI as to his right shoulder for multiple reasons. First, Defendants have alleged that because Dr. Barron opined that Claimant will likely require additional surgery in the future, he is not at maximum medical improvement. However, Defendants ignore that Dr. Barron specifically stated that it was reasonable for Claimant to try to avoid surgery for as long as possible. They further assert that there is a distinction between maintenance care and surgery. They argue that if a Claimant needs surgical treatment in the future, then surgical treatment belongs in a separate category as it is a procedure used to attain MMI, not to maintain it, and to lessen the degree of physical

impairment. This argument is patently false. Following Defendants' reasoning, no claimant who will eventually require surgery could ever be placed at MMI until they undergo that surgery. For instance, if a claimant undergoes an arthroscopic knee surgery, but will eventually need a total knee replacement at some point in their future, they could ostensibly never reach MMI under Defendant's logic and remain in a perpetual legal limbo. This is patently against the spirit of the Act and would only act as a detriment to injured workers who are seeking timely adjudication of their claim. Moreover, this is exactly the situation addressed by Section 42-15-60 and the *Dodge* case. The undersigned scarcely believes that this argument warrants further discussion, as it is patently unreasonable on its face and unsupported by case law.

Second, Defendants have alleged that Claimant has not reached MMI because he was not rated by an authorized treating physician. Quite simply, there is no requirement in the Act that a Claimant be rated solely by an authorized treating physician. Defendants had every opportunity to send Claimant for an independent medical evaluation of their own, but did not elect to do so. Moreover, the Claimant has the innate right to seek medical evaluation on his own and without the authorization of Defendants. Dr. Barron's ratings are not disputed by any conflicting evidence in the record and he is an imminent shoulder surgeon who is highly qualified and experienced in this regard. (Claimant's APA #12, p. 199-202). Therefore, the argument that only an authorized treating physician can provide impairment ratings or determine MMI is also without merit.

Third, Defendants have also alleged that, although Dr. Barron assigned **permanent** impairment ratings to the shoulders, that he did not specifically say the words "maximum medical improvement." However, the Single Commissioner specifically addressed this issue in his Order. (See Findings of Fact No.'s 3-5). As the ratings are permanent in nature, this

language is also determinative as to maximum medical improvement. Using the plain meaning of the words “permanent impairment”, it is only logical for a determination of maximum medical improvement upon the assignment of such ratings. Therefore, the Single Commissioner was correct in finding that Claimant reached maximum medical improvement for all of his work-related injuries as of Dr. Barron’s January 14, 2015 statement. Accordingly, the Single Commissioner was also correct in proceeding with a determination of Claimant’s entitlement to permanent disability benefits as a matter of law.

2. The Single Commissioner was correct in awarding wage loss disability under §42-9-20

The preponderance of the evidence in the record supports the Single Commissioner’s finding that Claimant is entitled to an award of permanent partial disability under §42-9-20.

Section 42-9-20 provides:

“Except as otherwise provided in §42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such **disability** a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. **In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.**

(S.C. Code Ann. §42-9-20, emphasis added).

Here, the record is replete with evidence that Claimant sustained a traumatic brain injury with resulting permanent cognitive deficits that have resulted in a permanent loss of wage earning capacity.

A. MEDICAL EVIDENCE OF TRAUMATIC BRAIN INJURY AND COGNITIVE DEFICITS

Defendants have alleged that there is no evidence that Claimant has suffered a permanent loss of wage earning capacity due to the cognitive deficits resulting from his traumatic brain injury. However, the record is replete with evidence that supports the Single Commissioner's finding that Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11. (See Order, Finding of Fact No. 44).

i. Dr. Welshofer opined that Claimant has sustained a permanent impairment to his brain.

First and foremost, Dr. Welshofer provided treatment for Claimant's traumatic brain injury and related symptoms. On November 1, 2012, Dr. Welshofer stated, "I would grade him at a permanent impairment rating of 15% of the brain for continuous postconcussive symptomatology and headaches." (Claimant's APA #6, p. 96). There is no opinion from any other expert that disputes Dr. Welshofer's opinion as to permanent impairment or causation. Defendants make absolutely no mention of their own authorized treating physician's opinion that concretely establishes that Claimant has permanent impairment and symptoms causally-related to the admitted traumatic brain injury.

ii. Dr. Waid's neuropsychological evaluation is clear evidence of permanent cognitive deficits as a result of his traumatic brain injury.

Dr. Waid has opined that Claimant has sustained cognitive deficits as a result of his work-related traumatic brain injury. On October 7, 2014, Dr. Randolph Waid conducted a neuropsychological evaluation of the Claimant to determine the effects of his documented traumatic brain injury. (Claimant's APA #1, pp. 1-9). In his report, Dr. Waid performed a litany of neuropsychological tests to assess Claimant's cognitive function. While Defendants have

attempted to characterize Dr. Waid's report as evidence that Claimant suffers from no cognitive deficits. However, a thorough reading of Dr. Waid's report repudiates this characterization.

Specifically, Dr. Waid's summary of the neuropsychological evaluation notes several cognitive deficits. First, Dr. Waid stated that Claimant "did demonstrate variability in his capacity to sustain attention/concentration." (Claimant's APA #1, p.8). "It appears that compromise in the attentional/executive aspects of immediate learning are causal for complaints of forgetfulness in day to day pursuits." (Id.). Further, Dr. Waid opined that "mild executive dysfunction appears to be present potentially affecting both cognitive and emotional domains." (Id.). While Dr. Waid indicated that the results of the neuropsychological testing were generally positive, he still opined that "certainly, in day to day pursuits, he likely experiences episodic forgetfulness due to the interfering effects of attention/executive difficulties and headaches." (Claimant's APA #1, pp. 8-9).

The Single Commissioner cited to Dr. Waid's report in his Order, almost specifically quoting verbatim the above conclusions that Claimant suffered from cognitive deficits. (See Order, Findings of Fact #19). However, Defendants elected to omit this Finding of Fact in their brief. Yet, it is difficult to imagine how Defendants could attempt to characterize this report as evidence that Claimant suffers from no cognitive deficits whatsoever when Dr. Waid has clearly opined Claimant experiences ongoing problems with focus, attention, executive aspects of immediate learning, executive dysfunction and forgetfulness. Thus, Defendants characterization of Dr. Waid's uncontested neuropsychological report is patently false on its face and disingenuous at best. Rather, Dr. Waid's report is clear evidence of the cognitive dysfunction resulting from Claimant's traumatic brain injury and the Single Commissioner specifically found the same as a matter of fact.

iii. Dr. Mandell's records and testimony further confirm the presence of cognitive deficits as a result of traumatic brain injury.

Dr. Mandell's reports and deposition testimony offer clear support that Claimant suffered cognitive deficits as a result of his traumatic brain injury. Interestingly, Defendants have not mentioned Dr. Mandell's treatment or deposition testimony anywhere within their brief. Even further, they omitted the Single Commissioner's specific findings of fact related to Dr. Mandell's deposition testimony in their brief, including that he had read this deposition in its entirety. (See Defendants' brief, p.3; See also Order, Findings of Fact No.'s 20-22).

Dr. Mandell has been the authorized treating neurologist for Claimant's traumatic brain injury and resulting symptoms. In his deposition testimony, Dr. Mandell confirmed his diagnosis that Claimant has a traumatic brain injury and post-concussive syndrome to a reasonable degree of medical certainty. (Dep. Tr., p. 24). He further opined that Claimant's cognitive deficits were not a result of medications, but related to the traumatic brain injury. (Dep. Tr., p. 25). Dr. Mandell even further stated that he endorsed Dr. Welshofer's permanent impairment rating of fifteen (15%) percent to the brain as a result of his traumatic brain injury, post-concussive symptomatology and headaches. (Dep. Tr., p. 42).

As noted by the Single Commissioner in his Order, Dr. Mandell reviewed the neuropsychological testing performed by Dr. Waid prior to his deposition. (Dep. Tr., p. 33; Order, Finding of Fact No. 21). Dr. Mandell testified that this neuropsychological evaluation "basically says exactly what I've been saying word for word, practically yes." (Dep. Tr., p. 34). Per Dr. Waid's report, Dr. Mandell stated that while Claimant did very well on most things, "however, what he did have difficulties with were concentration, executive function, capacity to sustain attention and concentration, difficulty with attentional executive aspects of immediate

learning, or thought to be the complaints for forgetfulness on daily pursuits, mild executive dysfunction, shorter fuse, easier frustration.” (Dep. Tr., p. 35). Dr. Mandell then reaffirmed that these problems were caused by the traumatic brain injury and post-concussion syndrome from his on-the-job injury. (Dep. Tr., p. 36).

Accordingly, Dr. Mandell’s medical reports and deposition testimony are clear and compelling evidence that Claimant suffered cognitive deficits as a result of his traumatic brain injury and post-concussive syndrome. Dr. Mandell endorsed Dr. Welshofer’s impairment rating to the brain, both of whom are authorized treating physicians. Further, Dr. Mandell fully supported Dr. Waid’s neuropsychological findings that Claimant suffered from cognitive deficits as a result of his traumatic brain injury, post-concussive symptoms and headaches. Where two authorized treating physicians opine that Claimant has permanent impairment to his brain and further support a neuropsychological evaluation evidencing cognitive deficits, there is absolutely no support whatsoever for Defendants’ assertion to the contrary. When considering the purposeful omission of the Single Commissioner’s relevant Findings of Fact on this point and complete disregard of multiple experts’ medical opinions, Defendants’ allegation is misleading and patently false.

B. Vocational evidence supports Single Commissioner’s finding that Claimant has sustained permanent loss of wage earning capacity.

The vocational evaluation performed by Joel Leonard is clear evidence that Claimant has sustained permanent wage loss disability due to the cognitive deficits resulting from his admitted traumatic brain injury, post-concussive syndrome and headaches. Mr. Leonard performed his vocational evaluation on August 25, 2014 and was later deposed on December 30, 2014. The Single Commissioner further specifically indicated that he had read Mr. Leonard’s deposition in

its entirety. (See Order, Findings of Fact No.'s 31 – 34). However, Defendants have incredulously alleged in their brief that the Single Commissioner did not even read Mr. Leonard's deposition transcript tendered into evidence. (See Defendants' brief, pg. 23). It is one matter to disagree with a Commissioner's interpretation of evidence, but it is entirely another to allege judicial impropriety. Yet, despite this highly questionable allegation, a review of the relevant evidence and testimony supports Mr. Leonard's expert vocational opinion that Claimant suffered a permanent loss of earning capacity as a result of his work-related injury.

In his evaluation on August 25, 2014, Mr. Leonard reviewed medical evidence, interviewed the Claimant, and administered achievement and reading testing. Claimant indicated to Mr. Leonard during his evaluation that he continued to experience ongoing cognitive deficits with specific attention to speech formation, verbal fluency, attention, concentration, focus and overall ability to converse in a fluid manner. In the report, Mr. Leonard noted that he did have to rely on Claimant's subjective cognitive deficiencies in the absence of a neuropsychological evaluation at the time. Mr. Leonard provided three potential vocational profiles, but concluded that Claimant fell into "Profile B". Per the report, while "Profile B" acknowledged that Claimant was part of a general reduction in force, it accepts his impression that he became part of that reduction given his inability to effectively meet the demands of his job due to the effects of his injuries. This profile also considered that Claimant was unable to meet his production goals following his accident. Within this profile, Claimant's estimated weekly wage of \$1,057.69 would be considered a reasonable and proper representation of his likely earning capacity after the accident. Mr. Leonard then concluded that "within the continuum of the noted profiles, however, it is my opinion that Mr. Adickes' current capacity to work is most accurately portrayed by the outcomes associated with Profile B." (Claimant's APA #3, p. 46).

Defendants have alleged that Mr. Leonard's vocational evaluation should not be given any weight as evidence because he intentionally misrepresented Dr. Waid's neuropsychological findings in his deposition testimony and did not change his opinion in light of additional documents reviewed in the deposition. However, as discussed *supra*, Dr. Waid's findings of cognitive deficiencies were completely supported by Dr. Mandell's deposition testimony. Rather, it appears from the preponderance of the evidence in the record that it is Defendants who are intentionally misrepresenting the opinions of Dr. Waid and Dr. Mandell. Mr. Leonard further agreed with Dr. Mandell that people with higher IQ's can suffer more greatly from lesser cognitive deficits than those with low IQ's.

Even after reviewing the additional documents, records and depositions, Mr. Leonard stated "right now I don't think the evidence as a total is sufficient enough for me to change my opinion in this matter, though it appeared there is some evidence that I think strongly supports maintaining that opinion", but did state there was some evidence that could be interpreted in a different way. (Dep. Tr., p. 88-89). Mr. Leonard was then presented with the hypothetical that Claimant was terminated through no fault of his own and asked to consider the new evidence (Dr. Waid's neuropsychological evaluation, Dr. Mandell's deposition testimony, the documented headaches, medications and cognitive issues) and asked to provide an opinion on whether the new evidence alone would affect Claimant's residual earning capacity. Mr. Leonard definitively opined, "I would continue to endorse what I have within my report, which would be Profile B, which basically that his current earning capacity is a more than reasonable representation of his access to the labor market and his residual employability and earnings subsequent to the event." (Dep. Tr., p. 89-90).

Defendants have further alleged that Claimant did not prove entitlement to wage loss benefits because his termination was not the result of his work injury. Claimant showed that he was terminated as a result of his diminished cognitive function, as evidenced by the multiple performance reports following his injury showing repeated issues with focus, concentration and memory, despite the overall reduction in force. Yet, regardless of the reason for his termination, Claimant's ability to earn similar wages had been compromised because of his work-related injury, as discussed *supra*. Defendants further alleged that Claimant did not perform a diligent job search and self-limited his wages at his subsequent employer. However, Claimant's credible testimony shows he applied to numerous companies, but was unable to find employment that paid similar wages. In regards to the \$55,000 salary he purportedly "requested", Claimant clearly testified that this was what the job paid. If a fast-food employee knows the ranges of salary for his position, but requests a six-figure wage, it can hardly be said that would be reasonable to assert he purposefully limited his income and he would be less likely to even be offered that position.

Obviously, Claimant would have no reason whatsoever to intentionally limit his salary solely for the purpose of obtaining a workers compensation award. The reality of the situation is that Claimant would much rather have a six-figure job, as opposed to only a \$55,000 job, regardless of any one-time award. Additionally, Claimant even lost his job at VRI prior to the hearing and was unemployed and continuing to look for employment. The Single Commissioner specifically took note of the above issues in his Order, finding that Claimant credibly testified that he applied for over 15 potential employers, would have no reason to self-limit his earning potential, and could only find a job paying \$55,000, which has now ended. (See Order, Findings of Fact No.'s 24-30). Furthermore, the Single Commissioner found that Claimant was

cooperative and candid in both his presentation to the experts in this case as well as his testimony and is reliable. (See Order, Finding of Fact No.35).

C. Claimant is entitled to permanent partial wage loss disability benefits for 340 weeks.

The Single Commissioner was correct in finding that Claimant sustained a permanent loss of wage earning capacity and awarding permanent partial disability benefits in the amount of \$704.92 per week for 340 weeks as of January 17, 2014. As discussed exhaustively above, the preponderance of the evidence supports that Claimant suffered permanent impairment to the brain, cognitive deficits and a permanent loss of wage earning capacity as a result of his injuries.

Defendants have argued that Claimant is not entitled to permanent wage loss benefits under 42-9-20 until he reached maximum medical improvement on January 14, 2015, per Dr. Barron's report. Section §42-1-120 defines "disability" as "incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." However, 'maximum medical improvement' is a distinctly different concept from 'disability.'" *Dodge v. Brucoli*, 334 S.C. 574, 581, 514 S.E.2d 593,596 (Ct. App. 1999). Defendants assert that Claimant would not be entitled to wage loss benefits until maximum medical improvement for all injuries. However, Claimant's disability, in terms of his incapacity to earn the same wages at the time of his injury, clearly began on the date he was terminated from Philips Healthcare on January 17, 2014 and was unable to procure subsequent employment that paid the same wages.

Defendants have further argued that under §42-9-20, that Claimant is not entitled to permanent wage loss benefits past 340 weeks from the date of injury. However, the last sentence of this statute clearly states that "in case the partial disability begins after a period of total

disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.” (S.C. Code Ann. §42-9-20). This means that 340 weeks is the maximum Claimant could receive because the last sentence of §42-9-20 extends the period. The 340 week period from the date of injury only applies where no temporary total disability benefits were ever paid. Here, Claimant’s permanent partial disability began after two separate periods of total disability whereby he received temporary total disability benefits. Here, the Form 18 clearly shows that Claimant was paid a period of temporary total disability benefits prior to his period of permanent partial disability benefits. As the Form 18 is part of the Commission’s file, it is part of the record of evidence in the claim. (Hr. Tr., p. 5). Therefore, the Single Commissioner was correct in finding that Claimant was entitled to 340 weeks of permanent partial wage loss benefits as of the date his disability (incapacity to earn wages he previously earned) began on January 17, 2014.

CONCLUSION

As discussed exhaustively above, the record is replete with evidence to support the Single Commissioner’s Findings of Fact and Conclusions of Law. The medical evidence supports that Claimant reached MMI for all of his work-related injuries. The medical evidence in the record also supports that Claimant sustained a traumatic brain injury and resulting cognitive deficits, as evidenced by at least three experts’ opinions. Further, the vocational evidence in the record supports that Claimant suffered a permanent loss of wage earning capacity and is entitled to the award of 340 weeks of benefits as of the date his disability became permanent on January 17, 2014. While Defendants have alleged that the Single Commissioner did not even read Mr. Leonard’s deposition, that allegation speaks for itself and bears no comment from the

undersigned. However, the Single Commissioner specifically found that Dr. Waid, Dr. Mandell and Mr. Leonard had all provided expert opinions in this case. Further, the Single Commissioner found that there was no competing evidence from any other expert. Quite simply, Defendants don't agree with the expert opinions that constitute the evidence in the record, including those of their own authorized treating physicians. Yet, they had every opportunity during the four-plus years since the accident to obtain competing opinions from their own experts and failed to do so to support their defense. It is clear that the Single Commissioner exhaustively reviewed the evidence, testimony and legal standards in ruling in Claimant's favor. Therefore, Claimant respectfully requests the Full Commission affirm the Single Commissioner's Order in its entirety.

RESPECTFULLY SUBMITTED,



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December 4, 2015

NOTICE OF APPEAL FROM ADMINISTRATIVE TRIBUNAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Appellate Panel Decision
SCWCC No. 1102937

Barry Adickes,

Respondent,

v.

Philips Healthcare and Fidelity &
Guarantee Insurance Co.,

Appellants.

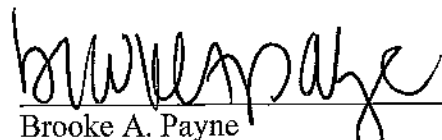
NOTICE OF APPEAL

Philips Healthcare and Fidelity & Guarantee Insurance Company appeal the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated February 8, 2016. Appellants received a copy of this Order on February 8, 2016.

Appellants allege errors of law as follows:

1. The Appellate Panel erred in concluding that Respondent reached Maximum Medical Improvement for all accepted injuries;
2. The Appellate Panel erred in concluding that Respondent met his burden of proving entitlement to permanent partial disability benefits resulting from loss of earning capacity under SC Code Ann. §42-9-20;
3. The Appellate Panel erred in awarding permanent wage loss benefits for three hundred forty (340) weeks commencing on January 17, 2014, in contravention to the statutory language of SC Code Ann. §42-9-20.

March 7, 2016



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1102937
Appellate Case No. 2016-000514

Barry Adickes, Claimant, ... Respondent,

v.

Philips Healthcare, Employer;
and Fidelity and Guarantee
Insurance Company, Carrier, ... Appellants.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Whether the Workers' Compensation Commission's findings of fact must be upheld when they are supported by the claimant's medical doctors and vocational expert.
- II. Whether the commission properly construed the partial disability statute to allow the claimant 340 weeks of benefits.

STATEMENT OF THE CASE

In September of 2014, Barry Adickes requested a hearing with the Workers' Compensation Commission, claiming reduced earning capacity after an injury. (R.p.36).

Phillips Healthcare (the employer) and Fidelity & Guaranty Company (the insurance carrier) disputed this and also said a hearing was premature. (R.p.37).

A single commissioner heard the claim in January of 2015. (R.p.115). He issued an award in August of 2015, finding the claim was timely. (R.pp.17-34).

Phillips and Fidelity appealed to the commission's appellate panel, (R.p.54), which heard oral arguments in December of 2015. (R.p.283). The panel affirmed the single commissioner's decision the following February. (R.pp.1-16). This appeal follows.

SUMMARY OF ARGUMENT

Barry Adickes was a traveling salesman who was hurt in a single car accident while driving on a mountain road. He received several injuries, including a concussion.

The commission awarded this case because it believed Barry and his witnesses. It found Barry's brain injury caused persistent headaches as well as impaired focus and concentration. It also found these things kept Barry from working a demanding (and high-paying) job as a salesman. The record supports these findings. The Court should affirm.

STATEMENT OF FACTS

Barry's summary of this case's history is below. Several of the medical records contain similar accounts of his car wreck, and the hearing commissioner's decision has an 8-page synopsis of the case, including citations. (R.pp.19-26).

On March 22, 2011, Barry accidentally drove his company car off a mountain road in North Carolina and crashed into a ravine. He lost consciousness for a period of time and spent 5 hours trapped in his car about 100 feet down the side of the mountain. He was rescued after he used his mobile phone to call EMS early the next morning. (R.p.129, line 16 - p.132, line 12) (Barry's description of the wreck).

Barry refused transportation to the hospital after being rescued. He said he knew the closest hospital to the crash site was two hours away from his home and he did not want to be admitted to a hospital so far away. (R.p.132, line 13 - p133, line 2). He went to a hotel, where his wife picked him up and drove him home to Rock Hill. (R.p.644). According to a medical record from two days after the wreck, Barry had severe headaches and vomited three times on the way home. *Id.*

Barry saw several physicians in the months that followed. Dr. James Rentz, a neighbor, examined Barry for broken bones. *Id.* He eventually performed shoulder surgery, in October. (R.pp.666-667). Dr. Nicholas Tuttle is Barry's family doctor, and he sent Barry to Dr. Howard Mandell, a neurologist, about 2 weeks after the wreck. (R.pp.617-620). Extensive records document Barry's concussion, his neck injury, and damage to his right shoulder. (R.pp.535-673). Doctors eventually gave Barry a 15% impairment rating to the right shoulder, a 10% rating to his spine, and a 15% rating to his brain. (R.pp.565, 570, 584).

Barry's case is unusual because he returned to work shortly after his injury and continued working for over 2 ½ years before he initiated these proceedings. Barry was out of work less than a month—the wreck was March 22, 2011, and he returned to work May 1. (R.p.143, lines 19-21). Phillips terminated Barry 32 months later, in January of 2014. (R.p.146, lines 13-21).

The parties dispute the details of the termination. Phillips says it was part of a companywide reduction-in-force and had nothing to do with Barry's work. (R.p.242, lines 12-24). Barry says he recalls the conversation well and that his boss specifically told him the firing was performance-related. (R.p.147, line 5 - p.148, line 19).

Regardless, Barry's job with Phillips ended and he sought other employment. He ultimately accepted a job in May of 2014, but he made substantially less money than he did with Phillips. (R.pp.493-494). Barry explained he wrote this lower salary on his application because he needed a job and a friend at the company in question told Barry exactly what the position paid. (R.p.150, line 2 - p.151, line 11). At the hearing with the single commissioner, Phillips claimed it was Barry's fault he made less money; after all, he had requested the lower salary in his application. (R.p.121, lines 10-15).

Barry claimed two things at the commission. First, he said the wreck left him with cognitive deficits; persistent headaches as well as impaired "executive function" impacting his focus, concentration, ability to multi-task, and similar skills. (R.pp.51-53). Second, he claimed these deficits prevented him from working a demanding and high-paying job like the one he had with Phillips. *Id.* He supported this claim with testimony from his wife, his doctors, and a vocational expert. *Id.*

The Appellants disagreed and offered multiple grounds for their disagreement.

They said the claim was not ripe; that Barry had not reached maximum medical improvement because Barry did not have disability ratings for his shoulders. (R.p.121, lines 15-21). Barry would actually have these ratings by the hearing. (R.p.565).

The Appellants also argued Barry had not suffered a wage loss, and on this point, they disputed *everything*. They disputed whether Barry's headaches caused him to miss work and whether Barry had any cognitive deficits at all. (R.pp.38-50). They disputed whether Barry was believable. *Id.* They disputed whether Barry had been a good worker, whether Barry lied about jobs he said he pursued, and why Barry took a lower salary at the job he found. *Id.* They said Barry—a 21-year employee—had “disciplinary” issues and was a poor performer who had been “demoted” before his wreck, but they also insisted Barry was not fired for poor performance. *Id.* Of course, the reason Phillips fired Barry would not matter if the wreck caused brain damage, but no point went unchallenged.

The hearing commissioner issued an 18-page decision, summarizing the claims as well as the evidence. (R.pp.17-34). He described the witness testimony, lay and expert. (R.pp.21-26). He wrote that he had examined the entire file—specifically referencing his review of several depositions and records. (R.p.27, ¶8; p.28, ¶19; p.29, ¶20; p.30, ¶32). The commissioner found Barry to be at MMI, (R.p.27, ¶¶ 6-7), and that Barry suffered a cognitive deficiency limited to his executive function. (R.p.32, ¶¶44-45). The commissioner also found executive function determined Barry's ability to hold a job like his sales job with Phillips. (R.p.32, ¶45). The appellate panel issued identical findings. (R.pp.10-15). The panel's decision to affirm the single commissioner was unanimous. (R.p.16).

ARGUMENT

For the most part, this is a “substantial evidence” case. The Appellants disagree with the commission’s factual findings, but as the Court is aware, the Court is bound by the commission’s findings unless they are clearly erroneous, made on an unlawful procedure, controlled by a legal error, or arbitrary. S.C. Code Ann. § 1-23-380 (5) (Supp. 2015).

The Appellants say the case was not ripe for a hearing, but ample evidence supports the commission’s decision. A doctor gave Barry a permanent shoulder rating and said it was reasonable for Barry to try and avoid shoulder surgery as long as possible. The commission relied on this assessment. That reliance was within the commission’s discretion.

The Appellants also say Barry did not suffer a wage loss, but the Court need only review four (4) items—Dr. Waid’s report, Dr. Mandel’s deposition, Joel Leonard’s report, and Joel Leonard’s deposition—to see that ample evidence supports the commission’s decision. Other evidence is favorable too: There are helpful points in Barry’s performance evaluations and in the witness testimony, but the easiest way out of this case is to examine the evidence from the experts. Barry’s concussion left him with impaired executive function, and executive function was unfortunately a key part of his job. The commission did not have to believe these witnesses, but it chose to do so. That decision was reasonable.

Finally, the commission correctly read the partial disability statute (section 42-9-20) to allow Barry 340 weeks of benefits. Barry’s claim did not ripen until Phillips terminated him. The Appellants say they are seeking equity, but they are not. They are seeking to delay MMI, to take advantage of Barry’s return to work, and to pay Barry a fractional award instead of the claim’s full value. The award was proper. The Court should affirm.

I. The Workers' Compensation Commission's findings of fact must be upheld because they are supported by the claimant's medical doctors and the vocational expert.

The Appellants challenge the commission's findings that Barry has reached the point of maximum medical improvement and that he suffered a wage loss, but in neither case can the Appellants meet the burden imposed by section 1-23-380 and demonstrate that the commission's findings are clearly erroneous, made on an unlawful procedure, controlled by a legal error, or arbitrary.

- a. Dr. Barron's permanent impairment rating to Barry's right shoulder is evidence that a permanency award is appropriate.

"Maximum Medical Improvement" describes the point at which someone's medical condition ceases to improve. It is commonly called a "plateau" in someone's care because when someone reaches MMI, there is no further treatment that will help cure that person's underlying injury. This Court discussed MMI and these concepts in *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995).

Importantly, a workers' compensation claimant can be entitled to additional medical care *after* reaching MMI. This is because the law allows someone to continue receiving medical care that will lessen the injured person's "period of disability." This was the holding in *Dodge v. Bruccoli, Clark, Layman, Inc.*, where this Court reversed the commission for holding that medical care ends at MMI. 334 S.C. 574, 580-82, 514 S.E.2d 593, 596-97 (Ct. App. 1999).

The week before the single commissioner's hearing, Dr. Jerry Barron gave Barry a 15% impairment rating to his right shoulder. (R.p.565). Dr. Barron said this rating was

enduring—he opined “Mr. Adickes has sustained *permanent impairment* of 15% to the right shoulder and 0% to the left shoulder.” *Id.* (emphasis added). He further explained Barry would probably require surgery in the future, but Dr. Barron believes it is reasonable for Barry to try to avoid surgery as long as possible. *Id.*

This is *not* the description of a patient whose condition has *yet* to plateau. Dr. Barron believes Barry has lost 15% of his right shoulder function—future surgery or not.

There is no contrary opinion in the record. No physician opined Barry is *not* at MMI. The Appellants did not send Barry for an independent medical evaluation, and the Workers’ Compensation Act gives the Appellants the power to direct Barry’s medical treatment, as this Court explained in *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 113-14, 576 S.E.2d 191, 197-98 (Ct. App. 2003) (discussing S.C. Code Ann. § 42-15-60 (2015)). The Appellants could have sent Barry to Dr. James Rentz, the authorized treating physician for his shoulders. They did not. Instead, Dr. Barron reviewed Dr. Rentz’s report and the MRI results, and Dr. Barron gave Barry a permanent rating. (R.p.565).

No authority holds that future surgery precludes a finding of MMI. Again, there are two ways an injured worker would be entitled to surgery. If surgery would help the *injury* improve, that would mean the injured worker is not at MMI. If surgery will not change the injury, but will nevertheless help alleviate the injury’s symptoms, that surgery will be proper even though the injured person is already at MMI. This Court’s decision in *Pearson v. JPS Converter & Indus. Corp.* describes these principles. 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997). Yes, Barry may need surgery, but Dr. Barron’s opinion supports the commission’s decision; the decision is not clearly erroneous.

- b. Multiple experts gave evidence that Barry has a cognitive deficiency preventing him from earning wages like he earned at Phillips.

The Workers' Compensation Act is designed to compensate injured workers for the reduction in their earning capacity caused by on-the-job injuries. *Singleton v. Young Lumber Co.*, 236 S.C. 454, 470, 114 S.E.2d 837, 845 (1960). When an injured worker suffers an injury that is isolated to a single body part, it is commonly called a "scheduled injury." Compensation for scheduled injuries is awarded under S.C. Code Ann. § 42-9-30 (2015) because the Legislature has conclusively presumed the loss of earning capacity for those injuries. *Wigfall v. Tideland Utils.*, 354 S.C. 100, 107, 580 S.E.2d 100, 103 (2003).

When an injured worker suffers multiple injuries, the worker is not limited to the schedule and may offer evidence to prove the extent to which his or her earning capacity has been diminished. This is because the disabling effect of multiple injuries may be greater than the sum total of the scheduled allowances. *Singleton* and *Wigfall* are two of the principal cases on this issue, and Barry brought this type of claim. See (R.p.36). He has multiple injuries and he says those injuries left him with a permanent wage loss.

Barry's monetary award is detailed in finding #50 and conclusion #2 of the hearing commissioner's order. (R.pp.33-34). The panel's decision repeats these paragraphs. (R.p.15).

The Appellants' only evidentiary challenge to this award is that no wage loss exists, period. Put differently, the Appellants do not claim the commission should have given Barry a slightly lower award, they claim it was clearly erroneous to give Barry anything but zero. Here again, the Appellants cannot carry their burden. The record forecloses it.

Joel Leonard's deposition is a useful starting point, because Mr. Leonard was deposed December 30, 2014, less than a month before the single commissioner's hearing in January. See (R.pp.357-452). As a consequence of this timing, the trial record was mostly complete: Mr. Leonard was able to review anything the parties presented to him and explain how particular evidence impacted his opinions that Barry has suffered a reduction in his earning capacity as a result of his work-related car wreck. This was a change; the deposition of Barry's treating neurologist and the results of Barry's neurological testing with Dr. Waid were not available at the time of Mr. Leonard's original vocational evaluation. See (R.p.398, line 16 - p.399, line 9) and (R.pp.522-534) (the vocational evaluation).

During the deposition, the Appellants emphasized multiple portions of Dr. Waid's neurological report, noting areas where there was no evidence of dysfunction. (R.p.409, line 14 - p.416, line 17). The Appellants eventually accused Mr. Leonard of focusing on one line of the report rather than the whole report. (R.p.418, lines 8-11).

Mr. Leonard answered that he *was* considering Dr. Waid's entire report and he was addressing the issues the report identified. (R.p.418, lines 12-19). He explained he read Dr. Waid's report as indicating Barry has cognitive deficits "Because he [Dr. Waid] cited them." (R.p.416, lines 18-24).

The Appellants presented Mr. Leonard with evidence Barry was a substandard worker. (R.p.378, line 18 - p.382, line 5). This "performance improvement plan" is in the record, see (R.pp.467-476), and like the remaining employment documents in the record, see (R.pp.691-707), it unsurprisingly discloses that Phillips—a sales company—is *overwhelmingly* concerned with "closing" sales. The Appellants said Barry's behavior

before the accident was the same as his behavior afterwards, and they emphasized their view that Barry was obviously not fired for poor performance, (R.p.392, line 15 - p.394, line 15), even though they also explained Barry was a poor sales performer who they moved to a less-complicated position shortly before his wreck. (R.p.389, line 17 - p.391, line 8).

Again, Mr. Leonard disagreed. He noted that there were glowing statements about Barry in some of his employment records, and he also read the employment records as suggesting a decline in Barry's abilities after the crash. (R.p.395, line 17 - p.396, line 6; p.425, line 24 - p.426, line 7). When discussing Barry's move to a new position at Phillips, Mr. Leonard explained that if this transition was indeed a reduction in responsibility, as the Appellants claimed it was, Barry's further decline following that move could suggest a *greater* degree of cognitive dysfunction. (R.p.426, lines 10-23).

Mr. Leonard explained that high intelligence makes it more difficult for cognitive testing to reveal deficits. (R.p.428, lines 20-25). He explained Barry's termination was immaterial to his opinion about Barry's wage loss in light of the evidence from Dr. Mandel and Dr. Waid. (R.p.445, line 8 - p.446, line 18). Mr. Leonard also had to correct the Appellants for misstating his opinions. (R.p.427, lines 2-9; p.451, line 25 - p.452, line 7).

Dr. Mandel's deposition is equally supportive. Dr. Mandel is the neurologist who treated Barry continuously since April of 2011, about 2 weeks after the wreck. (R.pp.585-620) (Mandell's records, in reverse chronological order). He explained he initially believed Barry had a good prognosis and was doing "ok" except for persistent headaches, but that the cognitive issues emerged over time. (R.p.314, line 17 - p.315, line 8; p.325, lines 5-25). Barry would not admit these, but Barry's wife kept a journal and provided Dr. Mandel with

examples. (R.p.326, lines 1-21). Dr. Mandel explained Barry has diminished ability to multi-task, that Barry's headaches could cause him to miss work, that Barry's deficits could limit his employment at a high level, and that Barry would require a job where he has more time. (R.p.343, line 23 - p.344, line 17). Dr. Mandel believed his opinion was consistent with Dr. Waid's report and that Dr. Waid's report said exactly what Dr. Mandel was saying. (R.p.341, lines 6-11) also (R.pp.513-521). All of these experts agree, yet the Appellants insist the experts are all misreading each other.

Reasonable minds can often reach different conclusions when reading a record *de novo*, but that is not the standard of review, as the Supreme Court recently reiterated in *Hartzell v. Palmetto Collision*. Under the substantial evidence standard, appellate courts "must not engage in fact-finding that would disregard the Commission's factual findings[.]" 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016).

The hearing commissioner specifically explained he had read the file, and he also cited these experts in his decision. (R.p.27, ¶8; p.28, ¶19; p.29, ¶20; p.30, ¶32). There is also the impairment rating; nobody contests Barry received a 15% rating *to his brain*. (R.p.348, line 20 - p.349, line 13); (R.p.584). There is ample evidence supporting the commission's decision that Barry has a cognitive deficiency limiting his earning capacity. Under the substantial evidence standard, the Court should affirm.

II. The commission properly construed the partial disability statute to allow Barry 340 weeks of benefits.

Awards for permanent partial disability are governed by section 42-9-20 of the South Carolina Code. In pertinent part, the statute explains "in no case shall *the period for such*

compensation be greater than three hundred forty weeks from the date of the injury.” (Emphasis added). The statute also explains that when the partial disability begins after a period of total disability, the period of total disability “shall not be deducted from the maximum period allowed [by the statute] for partial disability.”

The statute means partial disability awards are capped at 340 weeks. This is different from total disability awards, which are capped at 500 weeks unless the injury qualifies for lifetime benefits. See S.C. Code Ann. § 42-9-10 (A) & (C) (2015). Barry is entitled to 340 weeks of benefits because he has a permanent, partial disability. That is how the relevant provision operates.

The Court need not take Barry’s word for this. *Bass v. Kenco* dealt with an injured worker who received temporary total disability benefits after reaching MMI and was awarded 340 weeks of permanent partial disability benefits afterwards. 366 S.C. 450, 456, 622 S.E.2d 577, 580 (Ct. App. 2005). Relying on the statute, this Court explained that the employer was not entitled to a credit for the temporary benefits that were paid *after* MMI and *after* the date of the injury. *Id.* at 465-466, 622 S.E.2d at 585. The commission’s award was for 340 weeks of benefits, not 340 weeks minus the number of weeks that had passed from the date of the workers’ injury. *Id.* at 456, 622 S.E.2d at 580.

Under the Appellants’ view, the statute punishes someone like Barry—someone who goes back to work and whose wage loss is not readily evident. And the longer an injured worker takes to get to MMI, the less weeks of permanent benefits they will get. Remember also that the Appellants’ first argument is Barry is *not* at MMI. This is not surprising—they think postponing an award leads to a diminished obligation to pay Barry’s claim.

Barry's wage loss revealed itself gradually. His best year of earnings was 2010, the year before the injury, when his gross pay was nearly \$132,000. (R.p.463). This was down to \$118,500 in 2011 (when he missed a month of work), \$125,000 in 2012, \$115,000 in 2013, and Barry was terminated in January of 2014. (R.p.464-466). Barry's base salary at Phillips was \$80,000 with the opportunity for bonuses. (R.p.460). The base salary at his next job was \$55,000. (R.p.493).

This was the point when Barry's wage loss claim ripened. Barry lost his job at Phillips and he could not find comparable employment because of his disability. The commission explained this in its decision. (R.pp.14-15, ¶¶46-50). The "injury" to Barry's wage loss occurred when he could not longer find a similarly paying job because of his diminished executive function.

A comparable scenario was present in *Swilling v. Pride Masonry of Gaffney*. Though the issue there was different—it involved average weekly wage—the similarity is that like Barry, the injured worker in *Swilling* returned to work and delayed filing a claim. 401 S.C. 178, 181-183, 736 S.E.2d 672, 674-675 (Ct. App. 2012). This scenario seems like it will be unusual, but whether it is common or not does not matter. Section 42-9-20's purpose is to allow for a maximum of 340 weeks of benefits, and as the Supreme Court explained last year, the Workers' Compensation Act is *not* read strictly, as the Appellants suggest. The Act is read liberally; its limitations and restrictions are read narrowly. *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015).

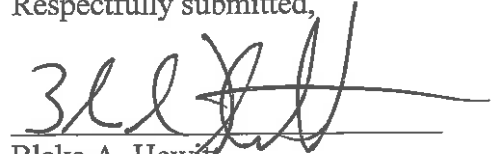
Barry is entitled to 340 weeks of benefits because he has a permanent, partial disability. That is how section 42-9-20 operates, as the commission properly held.

CONCLUSION

This Court should affirm. First, there is ample evidence supporting the commission's decision that this case was ripe for a hearing. Second, the expert testimony supports Barry's claim. Finally, the commission did not err in construing the partial disability statute (section 42-9-20) to allow Barry 340 weeks of benefits. The commission did not have to rule for Barry, but it chose to do so. The substantial evidence standard controls and the Court should affirm.

August 1, 2016

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner

W.C.C. File No. 1102937
SC Court of Appeals Case No. 2016-000514

Barry Adickes, Claimant,

Respondent,

v.

Philips Healthcare, Employer, and Fidelity and
Guarantee Insurance Company, Carrier,

Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. Did The Commission Err in Finding Respondent to be at MMI for All of his Work-Related Injuries?
- II. Did The Commission Err in Determining that Respondent Met His Burden of Proving Entitlement to Permanent Partial Disability Benefits Due to Loss of Earning Capacity?
- III. Did the Commission Err in Awarding Wage Loss benefits in Contravention of S.C. Code Ann. § 42-9-20?

STATEMENT OF THE CASE

Respondent Barry Adickes (“Respondent”) initiated these proceedings by filing a Form 50, Request for Hearing, on September 23, 2014. (R. p. 36; R. p. 119, lines 17-19). In his Form 50, Respondent alleged a loss of earning capacity as a result of his work injury under S.C. Code Ann. § 42-9-20. (R. p. 36; R. p. 120, lines 3-6). In the timely filed Form 51, Employer’s Answer, Philips Healthcare and Fidelity and Guarantee Insurance Company argued that a permanency determination was premature and denied that the Respondent was entitled to a wage loss award. (R. p. 37).

A Hearing was held before Commissioner Gene McCaskill on January 21, 2015, in Lancaster, South Carolina. (R. pp. 115-282). The Respondent alleged that he has sustained cognitive impairment resulting from his work-related accident causing a loss of earning capacity. (R. p. 119, line 25 – R. p.120, line 6). Respondent also sought ongoing medical care. (R. p. 120, lines 9-11).

Appellants argued that the Respondent had not yet reached maximum medical improvement, as to his bilateral shoulders and a permanency hearing was premature. (R. p. 121, lines 18–21). Appellants also argued Respondent had failed to show by a preponderance of the

evidence that he sustained a causally related wage loss. (R. p. 120, line 21 – R. p.121, line 1; R. p. 121, lines 10-15). Appellants further argued that the claim should be heard under the scheduled member statute, S.C. Code Ann. § 42-9-30. (R. p. 121, lines 15-18).

After receiving testimony from the Respondent, Respondent's wife, and Employer Representative, and considering the documentary evidence presented pursuant to the Administrative Procedures Act, Commissioner McCaskill issued a Decision and Order dated August 27, 2015 (R. pp. 17-34). By his Decision and Order, Commissioner McCaskill deemed the Respondent at MMI, found that he had sustained a permanent loss of wage earning capacity and awarded the Respondent "\$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that the Claimant's wage loss began." (R. p. 34). Additionally, Commissioner McCaskill ordered Appellants to pay for Respondent's future medical care for his right shoulder, to include surgery as recommended by Dr. Barron, post-concussive medical care and treatment with Dr. Mandell and ongoing cervical radiofrequency ablations with Dr. Park. (*Id.*).

On September 3, 2015, Appellants filed a request for review by the Workers' Compensation Commission's Appellate Panel. (R. pp. 54-56). Appellants argued that Commissioner McCaskill erred in finding and concluding that the Respondent has reached MMI and had sustained wage loss as a result of his work accident. (R. p. 287, line 22 – R. p. 295, line 3). Further, Appellants argued that Commissioner McCaskill erred in concluding as a matter of law that the Respondent is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014, against the plain language of S.C. Code Ann. § 42-9-20. (R. p. 304, line 12 – R. p. 305, line 14).

After reviewing the parties' briefs and holding oral arguments on December 14, 2015, the Commission's Appellate Panel issued a Final Decision and Order on February 8, 2016, affirming Commissioner McCaskill's findings of fact and conclusions of law in their entirety. (R. pp. 1 - 16).

This matter now comes before the South Carolina Court of Appeals from the Workers' Compensation Appellate Panel, as Appellants filed a Notice of Appeal on March 7, 2016. (R. p. 113).

SUMMARY OF EVIDENCE

Respondent Barry Adickes ("Respondent") earned a Bachelor's degree in Marketing from the University of South Carolina. (R. p. 123, lines 16-18). Prior to the work-related accident in March 2011, Respondent worked in his position for over twenty years, approximately five of those years directly for Philips Healthcare ("Philips"). (R. p. 124, line 23 – R. p. 125, line 1). On October 16, 2009, Respondent was placed on a Performance Improvement Plan ("PIP") as a result of low sales each quarter. (R. pp. 469-472). The following month, Respondent was informed via email by his supervisor, Jim Hendrix, informing him that his numbers were still low in October and needed to improve. (R. p. 468).

Similarly, in May of 2010, Regional Manager Paul Stoddard informed Respondent that his performance was still an issue, as he had only achieved his quota once in the prior 6 months. (R. p. 168, lines 15-22; R. p. 473). Respondent acknowledged that not meeting his quota meant not doing his job well. (R. p. 167, lines 20-24). In September of 2010, the VP of Sales and HR Manager discussed Respondent being on PIP and not being terminated because his sales were trending upwards, yet the HR Manager noted her opinion that it is "not the right job for him." (R. p. 476).

Respondent contends that he never had any issues performing his job pre-injury. (R. p. 143, lines 13-15). Respondent was of the opinion that the “PIPPIP (sic) was something that [he] --- that truly did not inhibit or influence [his] feelings of how [he] was doing [his] job.” (R. p. 164, lines 10-12). Respondent earned \$131,000.00 in 2010 at Philips. (R. p. 463).

Respondent was transferred into a new position in January 2011, placing him under the direct supervision of Mark Johnson. (R. p. 235, line 25 – R. p. 236, line 12). Mark Johnson is the Regional Manager at Philips, where he has been employed for 18 years. (R. p. 232, lines 2-9). Mr. Johnson became the Respondent’s direct supervisor on January 1, 2011, and remained his supervisor for three years. (R. p. 232, line 21 - R. p. 233, line 6). Before the Respondent came under his supervision, Mr. Johnson reached out to HR and other managers to solicit feedback about Respondent’s work performance. (R. p. 234, lines 19-24). Mr. Johnson learned that the Respondent was difficult to coach and had performance issues. (R. p. 235, lines 1-8). For this reason, Mr. Johnson recommended that the Respondent be placed on the Indirect Channel position, as opposed to the more challenging position in the EMS area, as it was more suited for his abilities. (R. p. 236, line 20 - R. p. 237, line 21). As a result, Mr. Johnson suggested that the Respondent be assigned to a less complex sales position in January 2011. (R. p. 237, lines 17-21).

Philips has a standard review procedure, which Mr. Johnson performs annually on all of the employees under his supervision, called the People Performance Management (“PPM”). (R. p. 235, lines 18-21). In these reviews, the employees are critiqued and given direction and a development plan for the following year. (R. p. 235, lines 21-23). Prior to the work injury, Respondent earned a base salary of \$85,000.00, plus commission and bonuses. Respondent’s pre-injury average weekly wage was \$2,608.52. (R. p. 35).

The Respondent was involved in a single-car accident on March 22, 2011. (R. p. 119, lines 24-25). An ambulance was called to the scene, but Respondent declined medical treatment. (R. p. 132, lines 13-16). His wife picked him up from the scene. (R. p. 133, lines 3-4). Respondent initially had pain in both shoulders, although worse on the right. (R. p. 134, lines 11-13). He remained out of work for less than two months, until May 1, 2011, when he returned to his normal job duties at Philips. (R. p. 143, lines 16-21). In his work-related accident, Respondent suffered injuries to his head, neck, and bilateral shoulders. (R. p. 134, line 23).

Head/Neurological Treatment/Evaluations:

Respondent initially treated at Piedmont Medical Center on March 23, 2011. (R. p. 674). A CT scan of his head was performed, which revealed no acute intracranial abnormality. (R. p. 677). On March 30, 2011, he treated with Dr. Nicholas Tuttle at Rock Hill Family Practice Associates. (R. pp. 644-647). Dr. Tuttle diagnosed a grade II-III concussion, post-concussive syndrome, headaches, left parietal scalp contusion, left shoulder contusion, multiple abrasions of forearms and legs. (R. p. 646). Dr. Tuttle eventually referred him to Dr. Mandell for further neurological evaluation. (R. p. 643).

Respondent was first evaluated by Dr. Mandell on April 6, 2011 (R. p. 617). Dr. Mandell noted that, over the last two weeks, Respondent had slowly improved, as he was no longer having nausea or vomiting, and his headaches waxed and waned in intensity. (*Id.*). Dr. Mandell indicated that he expected Respondent to have a full recovery and recommended he remain out of work for 4 weeks. (R. p. 619). An MRI scan of his brain was performed on July 11, 2011, which was normal. (R. p. 683). On January 29, 2011, Dr. Mandell noted that Respondent continued to improve and he would not need to do anything further if his headaches continued to improve. (R. pp. 612-613).

Respondent returned to Dr. Mandell on May 8, 2012, and it was noted that his cognitive issues had resolved, but he continued with intermittent migraines. (R. p. 608). At that time, Respondent reported only one bad headache since Christmas. (Id.). Mr. Mandell placed him at MMI. (R. p. 609). In September 2012 and January 2013, Respondent complained of forgetfulness and cognitive issues, which Dr. Mandell related to his medication, Zonisamide. (R. pp. 604-607). In April 2013, Dr. Mandell noted that his Zonisamide had been replaced by Nadolol, and Respondent had tolerated it quite well. (R. p. 594).

At his deposition in April of 2013, Respondent stated that his only cognitive issues were memory loss and difficulty putting words together. (R. p. 197, line 24 – R. p. 198, line 4). Respondent also testified at that time that his memory loss had not impacted his ability to do his job; in fact, he had adequately performed his job at Philips since his return to work. (R. p. 198, lines 12-21). At his return visit to Dr. Mandell in October of 2013, Respondent reported doing a lot better, yet continuing to have headaches once a month. (R. p. 592).

He was then evaluated by Dr. John Welshofer on October 31, 2012, for his post-concussive symptoms. (R. p. 581). Dr. Welshofer assigned a PPD rating of 15% to his brain for post-concussive symptomatology and recommended that he continue under the care of Dr. Mandell. (R. p. 584).

At his February 4, 2014 visit with Dr. Mandell, Respondent continued to report intermittent migraines once or twice a month. (R. p. 590). Additionally, it was noted that Respondent continued to have “minor issues with memory,” which he was “not sure if it is related to being 52 or if it is due to the work trauma, and he is willing to attribute it to age.” (Id.). He notes that Respondent is unsure of whether the memory issues are “different from any of his other friends.” (Id.). Overall, Dr. Mandell opined that Respondent was doing well and recommended a return visit

in 6 months. (R. p. 591). Respondent was last evaluated by Dr. Mandell on August 29, 2014, wherein he reported difficulty with focus and concentration. (R. p. 586). Dr. Mandell indicated that he suspected that it was related to his brain injury, and he wanted to give him a trial of Adderall. (Id.). Respondent has not returned to Dr. Mandell.

Two months later, Respondent underwent a Neuropsychological Evaluation with Dr. Randy Waid on October 7, 2014, at the request of his counsel. (R. pp. 513-521). Dr. Waid noted that it was Joel Leonard's (Respondent's vocational expert) recommendation that he undergo a neuropsychological evaluation. (Id.). With regard to cognitive functioning, Respondent reported to Dr. Waid that it took him "longer to do paperwork and complete tasks," and had difficulty with regard to "being able to formulate [his] thoughts and express them concisely." (R. p. 515).

Dr. Waid performed over 20 objective tests and found the Claimant to have average to above-average performance on nearly every exam. (R. pp. 516-521). Most notably, he found that the Claimant has a high average IQ, and performed within the 90th percentile on many occasions, particularly when reasoning, computation, and memory were involved. (Id.). Dr. Waid referred to the Respondent as "a resilient individual who is functioning reasonably well," and that he is "functioning in the high average range of intellectual abilities." (R. pp. 519-520). Dr. Waid noted that the Respondent complained of forgetfulness in day to day pursuits, and noted "yet, assessment of anterograde memory generally revealed intact immediate learning/memory as well as an efficient ability to retain and recall information once it is effectively encoded/learned. (Id.). Overall, Dr. Waid determined that the neuropsychological evaluation provided favorable results and that the Claimant's brain behavior functioning is intact. (R. p. 520).

Right and Left Shoulder Treatment/Evaluations:

Respondent initially treated with his neighbor, Dr. Rentz, at his home in regard to his shoulder and upper extremity complaints. (R. p. 201, lines 11-14; R. pp. 644). He then treated with Dr. Tuttle at Rock Hill Family Practice complaining of pain and stiffness in his left shoulder and bruising in his left biceps area. (R. p. 645).

Respondent returned to Dr. Rentz on August 25, 2011 for his right shoulder pain, and underwent an injection. (R. p. 673). He then underwent a right shoulder X-ray on October 5, 2011, which revealed a grade II/III acromion and no other abnormalities. (R. p. 671). Respondent underwent right shoulder arthroscopy, debridement of a grade IV SLAP tear and an anterior labrum, biceps tenotomy and open biceps tenodesis to the proximal humerus on October 21, 2011, 7 months after the accident. (R. p. 666). His post-op treatment with Dr. Rentz showed good recovery. (R. pp. 655-662). In fact, at his June 25, 2012 visit, Dr. Rentz noted that he was doing a lot better, his motion was essentially back to full. (R. p. 655). It was noted that Respondent was concerned about having some impingement in his shoulder, but that Dr. Rentz was of the opinion that it was just "some residual." (Id.).

At his counsel's request, Respondent then underwent an IME with Dr. Jerry Barron, in relation to his right shoulder on December 12, 2012. (R. pp. 562-564). He reported continued significant pain in his right shoulder and concerns of impingement. (R. p. 562). Dr. Barron noted that "unfortunately, he has not responded to surgical treatment on his right shoulder" and recommended that Respondent undergo a right shoulder MRI arthrogram. (R. p. 564).

At the request of the Appellants, Respondent returned to Dr. Rentz on September 14, 2014, and the office note indicates that he was seen for a "Rate and Release of his right shoulder." (R. p. 650). Respondent reported continued pain in his right shoulder with overhead activities and that

his shoulder “wants to pop and catch.” (R. p. 652). Rather than providing a rating, Dr. Rentz recommended that Respondent undergo a right shoulder MRI scan due to his continued complaints. (Id.). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint arthropathy and inferior osteophytosis and subacromial spur, and biceps tenodesis. (R. p. 648). Respondent never returned to his authorized treating physician, Dr. Rentz, following the scan. (R. p. 208, lines 9-11).

Dr. Jerry L. Barron, the IME physician, completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the left shoulder and that the Respondent will “most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms.” (R. p. 565). As of the date of the hearing, Respondent continues to have pain in his right shoulder, which feels like an impingement. (R. p. 137, line 14 - R. p. 138, line 23). He remains unable to raise his right arm above shoulder height without pain, and it is Respondent’s understanding that his right shoulder condition warrants surgery. (R. p. 153, lines 13-17).

Cervical Treatment/Evaluations:

Respondent has treated with Drs. Welshofer and Park in relation to his cervical injury. (R. p. 135, lines 14-17). He first treated with Dr. John Welshofer on October 31, 2012, for his complaints of cervical pain. (R. p. 581). Dr. Welshofer diagnosed chronic neck pain and recommended he undergo a cervical MRI scan. (R. p. 584). The cervical MRI scan was performed on March 28, 2013, revealing anterolisthesis at C4-5, small central disc protrusion without cord compression, facet arthropathy on the right side and the possibility of a non-healing fracture at C4. (R. pp. 574-575). Dr. Welshofer then recommended a whole body bone scan, which was

performed on June 13, 2013, revealing advanced facet joint arthropathy at C4-5. (R. p. 576). A cervical CT scan performed on the same date revealed significant degeneration at C4-5, but no fracture. (R. pp. 574-575). On June 19, 2013, Dr. Welshofer placed the Claimant at MMI for his cervical condition, assigned a PPD rating of 10% to his spine and referred him to Dr. Richard Park for injections. (R. p. 570).

Respondent began facet joint injection therapy with Dr. Park in July of 2013. (R. p. 559). He initially underwent medial branch blocks and was pleased with the improvement, and then began undergoing radiofrequency ablations in January of 2014. (R. pp. 540, 544). Dr. Park opined that Respondent will need radiofrequency ablations every 6 to 24 months for pain relief. (R. p. 539).

During his position under Mark Johnson, Respondent had numerous disciplinary issues, one involving the improper use of his company credit card. (R. p. 244, lines 5-11). Mr. Johnson witnessed first-hand the Respondent's performance issues, as he was difficult to get a hold of, had poor follow-up with customer and coworkers and an overall lack of urgency. (R. p. 238, line 15 – R. p. 239, line 1). Respondent's work ethic, behavior and communication skills were the same before and after the accident, according to Mr. Johnson. (R. p. 239, lines 2-22).

According to Mr. Johnson, the Respondent did not mention any of the alleged symptoms related to his head injury, including headaches, lack of focus, or any other cognitive impairments. (R. p. 247, line 20 – R. p. 248, line 8). In the year of his accident, 2011, the Respondent almost met his quota, even though he was out of work for nearly 2 months. (R. p. 175, lines 15-24). Mr. Johnson sent an email to Respondent on March 9, 2012, stating that that his performance issues from 2010 were resurfacing, involving time management and focus issues. (R. p. 176, lines 4-25).

Following his injury, Respondent earned \$125,000.00 in 2012, \$115,000.00 in 2013 at Philips. (R. pp. 462-466). Philips Healthcare underwent another corporate restructuring and the Respondent's position was eliminated in January of 2014. (R. p. 477). Mr. Johnson called the Respondent on January 17, 2014, with HR personnel on the phone, and informed him that he was being let go as part of a Reduction in Force ("RIF"). (R. p. 240, lines 1-3). Mr. Johnson informed the Respondent that the RIF was commenced at a higher corporate level and that the Respondent's termination was not related to performance or any other motive. (R. p. 243, lines 19-24). Terminations resulting from RIF's are highly monitored by Philips, and the supervisors delivering the news are instructed to read from a script to ensure that there is no mention of performance, as the RIF's are purely business decisions. (R. p. 241, lines 8-18). Mr. Johnson did not make any comments about performance in the RIF termination discussion, as the RIF script strictly forbids use of that phrase. (R. p. 241, lines 12-15, R. p. 242 line 25 – R. p. 243, line 3). In the termination discussion, Respondent requested a probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was solely the result of a restructuring and there are no probationary periods in this situation. (R. p. 242, lines 19-24). Respondent entered into a Settlement and General Release with Philips, wherein he was provided with a lump sum severance in the amount of \$90,139.00. (R. pp. 477-481).

Respondent was aware of RIF's taking place each year, and his position was not affected in the 2012, 2013 RIF's. (R. p. 242, lines 7-11). Philips did not hire anyone to replace Respondent's position; rather, as suspected, the company was correct in determining that the territory could be handled by fewer people. (R. p. 243, lines 10-18).

Respondent was deposed in September of 2014, wherein he was questioned about his termination discussion with Mark Johnson. (R. p. 177, line 19 – R. p. 179, line 23). Following his

deposition, Respondent sent a text message to Mr. Johnson which read, "I was deposed again today by Philips ... I'm hoping a recording was made and can be found of that phone call. I don't expect that you could recall exactly the dialogue. I cannot. But I remember my question of how I was selected and my follow-up question about the protocol of probationary period. With the reduction in force, RIF, I was perhaps, a natural selection for those making the call who did not know me..." (R. p. 178, line 18 – R. p. 179, line 7).

Respondent claims that he began looking for employment immediately after being released from Philips Healthcare, alleging that he applied for employment with D-E-X, ZOLL, McKesson and Valued Relations, Inc. ("VRI"). (R. p. 149, line 12 – R. p. 150, line 4; R. p. 182, lines 16-24). In his resume, he portrayed himself as an "impactful" public speaker and communicator, extensively trained practitioner of consultative sales, and "expertly organized and focused. (R. p. 183, line 18 – R. p. 184, line 25; R. p. 508).

ZOLL does not have any application or resume on file for the Respondent, which was confirmed by two ZOLL HR personnel. (R. p. 498). Similarly, Respondent offered no documentary or testimonial evidence in support of his alleged communications with D-E-X.

Respondent alleges that he applied for a director position at McKesson Corporation, which offered a similar salary to Philips. (R. p. 185, lines 7-12). Respondent underwent a phone interview with McKesson on March 4, 2014, the substance of which was documented in his McKesson file. (R. p. 503). Respondent disclosed to McKesson that he was no longer employed by Philips because he had recently been "involved in a downsizing and his position was eliminated." (R. p. 504). Respondent contends that he was turned down for the position at McKesson due to a drug test revealing medications associated with his work injury; specifically, he contends that a medical questionnaire during the application process brought to light that he was taking Nadolol, and that

response persuaded McKesson not to hire him. (R. p. 189, line 11 – R. p. 190, line 7). McKesson's Corporate Law Department advised that McKesson has no record of requesting or receiving results from any drug screening or testing. (R. p. 501). Additionally, McKesson has no denial of employment letter on file for the Respondent. (Id.). Respondent did not tender any evidence or present witness testimony in support of his contention that he was not hired by McKesson due to his work injury. (R. p. 191, lines 15-24).

In his application for employment with VRI, Respondent was asked to indicate his "Desired Salary," to which he responded "\$55K base." (R. p. 482). Respondent was offered a position with VRI in January 2014, the same month as his termination from Philips, but he did not accept the position until 5 months thereafter. (R. p. 150, lines 2-7; R. p. 188, lines 6-16). Respondent was offered his requested salary of \$55,000 annually with additional incentives and commissions for sales performance. (R. pp. 708-709). Respondent did not complete any sales for VRI; thus he did not earn any additional compensation by way of commission or bonuses. (R. p. 151, lines 22-25; R. p. 214, lines 23-25). In January 2015, the Respondent was terminated from VRI. (R. p. 153). Respondent did not present any witness testimony or tender documentary evidence in support of his contention that he was terminated from VRI as a result of his work injury. (R. p. 197, lines 8-12).

At his attorney's behest, Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (R. pp. 522-534). With regard to his employment with Philips, Respondent informed Mr. Leonard that he had "always met or exceeded his production goals" before the work injury. (R. p. 526).

Respondent reported residual problems concerning his concentration and focus; specifically, being unable to draft written correspondence in a proficient manner and inability to

comprehend/retain written material. (R. p. 523). Additionally, he reported issues formulating his thoughts and that his pace of speech was much slower. (Id.). Mr. Leonard noted that the relative presence or absence of cognitive difficulties is of great importance with respect to his prospective employability. (R. p. 527).

Mr. Leonard determined that there were three potential Profiles that could represent Respondent's prospective employability, but that it is most accurately portrayed by "Profile B." (R. pp. 532-533). Profile B is based on the conclusion that Respondent was terminated at least in part due to his post-accident performance issues. (R. p. 532). Profile B determined his current salary of \$55K to be a reasonable and proper representation of his earning capacity subsequent to the work accident, and that Respondent is capable of performing other occupations, but would not be expected to earn wages that significantly exceed the annual salary he was earning at VRI. (R. p. 532).

At the end of his report, Mr. Leonard acknowledged the competing impressions with regard to Respondent's cognitive status and recommended that he undergo a neuropsychological evaluation. (R. p. 534). He also indicated that he would be happy to review Respondent's personnel file. (Id.).

Mr. Leonard was subsequently provided with the additional documents (personnel file, emails from Mark Johnson, Dr. Waid's report, Dr. Mandell's deposition transcript) and was deposed on December 30, 2014 after his review of same. (R. pp. 536-454).

When Mr. Leonard wrote his report, he relied solely on the information that Respondent had provided him with regard to his cognitive abilities. (R. p. 399, lines 10-15). He recommended Respondent undergo a neuropsychological evaluation because he would defer to Dr. Waid when it came to the analysis of Respondent's neuropsychological abilities. (R. p. 409, lines 6-8). Mr.

Leonard testified that he had reviewed Dr. Waid's report with counsel for the Respondent prior to his deposition, and he found that there were "things that - - in looking at the report, that concerned me. I mean overall, I mean from a neuropsych perspective, it just seemed that he had a lot of intact functioning issues." (R. pp. 374, line 11 – R. p. 375, line 14). Mr. Leonard agreed to the favorable results in each of the individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), yet testified that "Dr. Waid is clearly indicating that he has some degree of problem in terms of executive dysfunction and some issues with attention and executive difficulties." (R. p. 418, lines 13-16).

With regard to Respondent's employment, Mr. Leonard's understanding was that the Respondent was promoted immediately before the injury. (R. p. 389, lines 11-13). When informed that Respondent was actually demoted, Mr. Leonard acknowledged that his misunderstanding "could be an issue." (R. p. 389, lines 6-11). Mr. Leonard further acknowledged that the demotion could be an indication that Respondent is just a bad employee. (R. p. 426, line 24 – R. p. 427, line 1).

When presented with the PIP documentation and emails from supervisors regarding Respondent's poor work performance before the injury, Mr. Leonard testified that it was "reasonable" to conclude that the documentation supports performance issues before his injury. (R. p. 451, lines 4-9). Mr. Leonard acknowledged that he had no specific evidence indicating that Respondent was unable to secure a job due to his cognitive abilities or limitations. (R. p. 424, lines 6-8). Mr. Leonard also acknowledged that the only evidence supporting Respondent's post-accident wage earning ability is the base salary he received at VRI. (R. p. 425, lines 13-17). Mr. Leonard admitted that he "does not know for sure" whether the Respondent had actually missed any days of employment due to his headaches. (R. p. 448, lines 9-11).

Mr. Leonard was asked whether, after reviewing the additional documentation, there is a likelihood that the Respondent would fall into Profile A, to which he replied “[t]here is a possibility of it; certainly.” (R. p. 427, lines 10-13). “Profile A” concludes that Respondent’s capacity to access the open labor market and earn a wage commensurate with past employment would not be impacted by the March 2011 accident. (R. p. 532). Under “Profile A,” any demise in his residual earning capacity, subsequent to his release by Philips, would be attributed to events and circumstances germane to the open labor market in general. (Id.).

STANDARD OF REVIEW

Judicial review of a Workers’ Compensation Appellate Panel’s Decision is governed by the substantial evidence rule of the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to the APA, the Court of Appeals’ review in a workers’ compensation proceeding is limited to deciding whether the decisions of the Appellate Panel of the Workers’ Compensation Commission is unsupported by substantial evidence or is controlled by some error of law. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App 2007).

For purposes of judicial review of the Appellate Panel of the Workers’ Compensation Commission, “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 the Appellate Panel reached in order to justify its action. Pratt v. Morris Roofing, Inc. 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s findings from being supported by substantial evidence. Sharpe v. Case

Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health and Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).

Under the scope of review established by the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs. Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(d)(2005).

ARGUMENTS AND CITATION OF AUTHORITY

I. The Commission Erred in Finding the Respondent Reached Maximum Medical Improvement for All Work-Related Injuries.

a. Permanency Benefits Are Premature Before a Finding MMI.

The South Carolina Supreme Court has held that “workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member.” Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Likewise, in Smith v. S.C. Dep’t of Mental Health, the court explained that the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, and noted that the degree of permanent disability cannot be determined prior to MMI. 335 S.C. 396, 399, 517 S.E.2d 694 (1994), citing Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975).

Additionally, the AMA Guidelines support the finding that MMI is necessary before a determination of permanent disability:

Permanency is the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability. This term is usually synonymous with MMI, usually occurring when all reasonable medical treatment expected to improve the condition has been offered or provided.

AMA Guidelines, 6th Ed, p. 26-27.

b. Respondent Has Not Reached MMI as to His Right Shoulder

Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will tend to lessen the degree of impairment. O'Banner v. Westinghouse Elect. Co., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). This Court explained this concept in Scruggs v. Tuscora Yarns, Inc., concluding that a finding of MMI was proper by the Single Commissioner because the evidence supported that additional medication or treatment prescribed for the Claimant was intended to help alleviate the Claimant's remaining symptoms, but *would not improve the Claimant's condition*. 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (emphasis added). This Court further evaluated which types of medical treatment do not impact the finding of MMI, and has held that "additional medical treatment may improve [a Claimant's] overall quality of life and ability to cope" which would not impact a finding of MMI. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997).

Additionally, the AMA Guidelines support that MMI is appropriate if further intervention will not improve the patient's impairment:

MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment.

AMA Guidelines, 6th Ed, p. 26.

The South Carolina courts have given us a glimpse into the specific medical treatment that will not lessen the Claimant's impairment, allowing for a finding of MMI. The courts have established that medical treatment consisting of ongoing physical therapy, prescription medications, epidural spinal injections, and other pain management services allow a claimant to enjoy a stabilized level of disability, as opposed to invasive procedures which are expected to correct a physical injury. Without definitively holding that a surgical recommendation precludes a finding of MMI, the courts have certainly alluded to the fact that a line is drawn at surgical procedures.

In Gadson v. Mikasa Corporation, the Court of Appeals affirmed a determination of MMI when a Claimant was released by her authorized treating physician with future medical care to include injections and physical therapy. 368 S.C. 214, 225, 628 S.E.2d 262, 268 (Ct. App. 2006). Gadson's physician had placed her at MMI and recommended additional medical treatment in the form of injections and possibly physical therapy. Most noteworthy, the court continuously noted that Gadson's physician opined that she was not a candidate for any further surgical intervention. (Id. at 224-225). The court found that the injections and physical therapy were "nothing more than maintenance care to maintain Gadson's condition," as they were medical treatments that may improve her quality of life and ability to cope, as opposed to medical treatment that will lessen her period of disability; as such, the Court held that the recommended future treatment did not preclude a finding of MMI. (Id. at 225). Although the Gadson court did not definitively state that surgical recommendation precludes a finding of MMI, there was certainly an indication that the lack of surgical recommendation impacted the Court's determination.

Similarly, in Hall v. United Rentals, the court analyzed the role that a surgical recommendation played in a determination of MMI. 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006).

Hall sustained a back injury, and his authorized treating physician placed him at MMI and recommended future medical care to include pain medication and epidural spinal injections. (*Id.* at 76). The physician opined that Hall had exhausted all of his treatment options and was not a candidate for surgery. (*Id.*). After his release, Hall obtained a second opinion, and that physician recommended he undergo surgery. Hall underwent the back surgery successfully and his post-op appointments revealed that his pain was lessened significantly for nine months or more. (*Id.* at 77). Hall sought payment of his surgery by the carrier, who had declined additional treatment in light of his previous release at MMI. (*Id.*). The Court explained that it had been presented with conflicting expert evidence, but the evidence as a whole supported the conclusion that Hall had not reached MMI prior to the recommended surgery. (*Id.* at 90). It reasoned that Hall's significant pain relief from surgery with the second physician was sufficient evidence to find that Hall had not reached MMI at the time his authorized treating physician had made the designation. (*Id.* at 89).

Here, it is undisputed that the Respondent is at MMI for his head and cervical spine. The issue is whether Respondent is at MMI for his right shoulder. In concluding that Respondent is at MMI for his shoulder, the Commission disregarded the opinion of his authorized physician, Dr. Rentz, and relied solely on an IME physician that evaluated the Respondent on only one occasion.

Respondent first treated with Dr. Rentz within days of his accident. (R. p. 201, lines 11-14; R. p. 666). Dr. Rentz performed a right shoulder arthroscopy, debridement of a grade IV SLAP tear and an anterior labrum, biceps tenotomy and open biceps tenodesis to the proximal humerus on October 21, 2011, 7 months after the accident. (R. p. 666). He continued post-op treatment with Dr. Rentz and, at his June 25, 2012 visit, Dr. Rentz noted that Respondent was concerned about having some impingement in his shoulder. (R. p. 655-662).

Respondent then underwent an IME with Dr. Jerry L. Barron, on December 12, 2012. (R. pp. 562-564). At this evaluation, Respondent reported continued significant pain in his right shoulder and concerns of impingement and Dr. Barron noted that “unfortunately, he has not responded to surgical treatment on his right shoulder” and recommended a **right shoulder MRI arthrogram**. (R. p. 564).

Respondent returned to Dr. Rentz on September 14, 2014, and the office note specifically indicated that he was seen for a “Rate and Release of his right shoulder.” (R. p. 650). At this visit, Respondent reported continued pain in his right shoulder with overhead activities and that his shoulder “**wants to pop and catch.**” (R. p. 652). Dr. Rentz **recommended that Respondent undergo a right shoulder MRI** scan due to his continued complaints, indicating that a rating was premature. (*Id.*). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint arthropathy, inferior osteophytosis and subacromial spur, and biceps tenodesis. (R. p. 648).

Dr. Barron, the IME physician, completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the L shoulder and that the Respondent will “**most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms.**” (R. p. 565).

Respondent reported to Joel Leonard in August of 2014 that he was unable to perform upper extremity tasks with his right arm that require a full range of motion, so he relies of his left arm for tasks that require him to reach overhead and out from his body in a forceful manner. (R. p. 523). Further, as of the date of the hearing in 2015, Respondent reported continued pain in his

right shoulder, which “feels like an impingement.” (R. p. 137, lines 12-14). He reported an inability to raise his right arm above shoulder height without pain, and that it is his understanding that his right shoulder condition warrants surgery. (R. p. 153, lines 14-17).

The Commission found that the language contained within Dr. Barron’s questionnaire response to be determinative of MMI, as “assigning ‘permanent impairment’ to the shoulders attests to Dr. Barron’s opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of ‘impairment’ – plain meaning of the word – impairment.” (R. p. 3). Appellants contend that the questionnaire response itself provides the most compelling evidence to contradict a finding of MMI, indicating that the Respondent will likely need future surgery. Dr. Barron never unequivocally stated that the Respondent was at MMI; rather he assigned a PPD rating and, at the same time, contradicted this determination by indicating that the Respondent will likely require surgical intervention in the future.

As detailed above, the evidence contained in Respondent’s medical reports related to his right shoulder show no indication that he is being released from care, has reached a plateau in his medical condition or that he is at MMI. Appellants contend that the Commission erred in relying solely on an arbitrary permanent impairment rating assigned by an IME physician, while ignoring the substantial medical evidence indicating that medical treatment in the form of an invasive surgery is warranted to further improve Respondent’s condition. The surgical recommendation, coupled with the MRI results, Dr. Rentz’s reports and the Respondents current complaints establish that the Respondent still has significant medical treatment ahead in relation to his right shoulder in order to improve his condition. Thus, the substantial evidence supports that Respondent is not at MMI and, therefore, a determination of permanency is premature.

II. The Commission Erred In Concluding That Respondent Met His Burden Of Proving Entitlement To Permanent Partial Disability Benefits Resulting From A Loss Of Earning Capacity.

The Commission found that Respondent is “clearly not as he was before this work-related accident.” (R. p. 7). The Commission found that the Respondent did continue to work for Philips for 2.5 years after his work injury, and noted that the “cogent question is whether he can find like employment at a similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?” (R. p. 6). In response to this question, the Commission found it reasonable to conclude that if the Respondent could find employment at a wage comparable to what he earned for the Employer, he would; thus, the Commission found that Respondent suffered wage loss as the result of his work injury. (*Id.*). It deferred to the vocational report prepared by Mr. Joel Leonard, noting there was no competing vocational opinion, and found that Respondent has a “post-accident average weekly wages of \$1,057.69. (R. pp. 6-7). As such, the Commission ordered the Appellants to pay \$740.92 per week for three hundred forty weeks, commencing January 17, 2014, the date his wage loss began. (R. p. 15).

Pursuant to SC Code Ann. § 42-9-20, “when the **incapacity to work resulting from the injury** is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation rate equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter.” (emphasis added). Further, SC Code Ann. § 42-1-120 defines “disability” as “**incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.**” (emphasis added).

The Commission erred in this determination, as Respondent did not suffer a reduction in wages immediately following his work injury, and neither his termination nor the wages earned by his subsequent employer are causally connected to his work injury.

a. Respondent did not suffer a reduction in wages following his work injury.

The most compelling evidence of Respondent's ability to earn wages following his work injury is his actual history of having done so. Similar to the facts in the Floyd case, Respondent's ability to return to work earning pre-injury wages or higher indicates that he did not suffer a loss of earning capacity related to his work injury. Floyd v. City of Charleston, 287 S.C. 474, 339 S.E.2d 166 (Ct. App. 1986). In Floyd, a firefighter sustained a work-related neck injury, continued to work for a period of time, was subsequently admitted to the hospital for a few weeks, then resumed work at the fire department performing all of his usual tasks. (Id. at 476-477). Floyd passed the Air Force physical entrance exam and entered the reserves in April 1981, completing basic training. (Id. at 477). In January 1982, he opened his own part-time washer-dryer repair service. (Id.). During this time, Floyd remained employed by the fire department. (Id.). In April 1982, he returned to a physician that had previously treated him, and was diagnosed with degenerative disc disease with spur formation. (Id.). Floyd then brought a claim against the Fire Department for loss of earnings, as he was no longer able to perform his part-time job. (Id.). The Floyd Court held that the Claimant was unable to sustain his showing that he could neither hold any other employment nor locate a second job. (Id. at 479). Specifically, the court found that the fact that he was able to physically continue working for the fire department, his physician advised him that he could return to work without any restrictions and he was well enough to pass the Air Force physical exam indicated that he did not suffer a loss of earning capacity arising from the injury. (Id. at 480).

Here, prior to the work injury, Respondent earned a base salary of \$85,000.00, plus commission and bonuses. (R. p. 35). Respondent's pre-injury average weekly wage was \$2,608.52. (*Id.*). Respondent was out of work for less than two months, then he continued working for Philips for 2.5 years in his pre-injury position, earning the same base salary of \$85,000.00. (R. pp. 464-466). Following the work injury, Respondent earned \$118,000.00 in 2011 (the year of his work injury), \$125,000.00 in 2012 and \$115,000.00 in 2013. (*Id.*).

b. There is No Causal Connection between Respondent's Termination from Philips and his Work injury.

Philips Healthcare underwent a nationwide corporate restructuring nearly 3 years after Respondent's work injury. Respondent's job was eliminated as part of this Reduction in Force ("RIF"), having nothing to do with his work injury. Mr. Johnson called the Respondent on January 17, 2014, with HR personnel on the phone, and informed him that he was being let go as part of the RIF. (R. p. 240, line 1 – R. p. 241, line 18). Mr. Johnson was very clear in specifying that the termination was purely a business decision and not related to his performance or any other motive. (R. p. 242, line 25 – R. p. 243, line 9). In this termination discussion, Respondent requested a probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was solely the result of a restructuring and there are no probationary periods in this situation. (R. p. 242, lines 19-24).

In fact, in his phone interview with potential employer, McKesson, Respondent disclosed that he was no longer employed by Philips because he had recently been "involved in a downsizing and his position was eliminated." (R. p. 504). Philips has not hired anyone to replace Respondent, which supports that Philips was correct in determining that the territory could be handled by fewer people. (R. p. 504). The substantial evidence in the record indicates that Respondent's termination had no connection to his work injury.

c. There is No Causal Connection between the Wages Earned with his Subsequent Employer and his Work Injury

The Commission erroneously found that there is no evidence in the record that the Respondent would choose to self-limit as to his earning potential. (R. p. 6). The substantial evidence in the record indicates otherwise, as Respondent specifically requested the salary he earned at VRI. (R. p. 482). On his application for VRI, next to “Desired Salary,” the Respondent specifically indicated “\$55K base.” (*Id.*).

i. Respondent’s Job Search Efforts Were Neither Diligent Nor Negatively Impacted by His Work Injury.

The Supreme Court has held that, “whenever [a Respondent] depends in part upon a showing that he has been unable to get work because of his physical condition, it naturally follows that ... [the Respondent] must prove that he has made reasonable efforts to secure employment.” Coleman v. The Quality Concrete Products, Inc., 245 S.C. 625, 631, 142 S.E.2d 43 (1965). Similarly, a Respondent must demonstrate that he has made “reasonable effort to obtain employment, [and] failed [to do so] because of an injury produced handicap.” Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1965).

Respondent alleges that he attempted to obtain employment with many different employers, beginning his employment search within an hour after learning of the reduction in force. (R. p. 249, lines 14-23). Respondent admitted that he was offered a position with VRI in January 2014, the month of his termination from Philips, yet he did not accept the position until May 2014. (R. p. 188, lines 6-16; R. p. 150, lines 2-7). Thus, Respondent’s four month period of unemployment is a result of his personal choosing to delay employment, having nothing to do with his work-injury.

Moreover, Respondent was only able to produce the names of four companies to which he allegedly applied: McKesson, Zoll, D-E-X and Valued Relations, Inc. (“VRI”). (R. p. 182, lines 20-24). There is no documentary or testimonial evidence that Respondent applied to either ZOLL or D-E-X. (R. p. 498). Additionally, although Respondent alleges that he was turned down for the position at McKesson due to a drug test revealing medications associated with his work injury, McKesson has no record of requesting or receiving results from any drug screening or testing. (R. p. 501; R. p. 189, line 11 – R. p. 190, line 7). The substantial evidence in the record supports that Respondent’s work injury played no part in his 4 month period of unemployment, or his inability to obtain employment with D-E-X, McKesson or Zoll.

ii. Respondent Does Not Suffer from Cognitive Deficits Resulting from his Work Injury

The Commission found that the Respondent has suffered a cognitive deficiency as a result of his work-related accident. (R. p. 6). It further found that the impact of his cognitive deficiency is limited to his executive functioning, and it is executive functioning that is determinative of Respondent’s ability to hold employment similar to his employment for Philips Healthcare. (R. p. 6). Appellants contend that the substantial evidence in the record supports that Respondent suffers from no cognitive deficits resulting from his work injury.

Respondent had performance issues following his work injury and, contrary to his testimony, he had the same issues before his work injury. (R. p. 143, lines 10-15). Specifically, on October 16, 2009, Respondent was placed on a Performance Improvement Plan (“PIP”) as a result of low sales each quarter. (R. pp. 469-472). The following month, Respondent was informed by his supervisor that his numbers were still low, then in May of 2010 the Regional Manager informed Respondent that his performance was still an issue. (R. p. 166, line 23 – R. p. 167, line 4; R. pp. 468, 473). Further, shortly before the work injury, in September of 2010, the VP of Sales

and HR Manager discussed Respondent being on PIP and not being terminated because his sales were trending upwards, and the HR Manager voiced her opinion that it is “not the right job for [Respondent].” (R. p. 476). Respondent acknowledged that not meeting his quota meant not doing his job well, yet he is of the opinion that the “PIP’s did not inhibit or influence his feelings about how he was doing his job.” (R. p. 167, lines 9-12; R. p. 167, lines 20-24). Due to the performance issues, Mr. Johnson recommended that the Respondent be placed in a less complicated position in the beginning of 2011, months before his work injury. (R. p. 236, line 20 – R. p. 237, line 21).

Following Respondent’s work injury, his performance issues continued. Mr. Johnson sent an email to Respondent on March 9, 2012, stating that that his performance issues from 2010 were resurfacing, involving time management and focus problems. (R. p. 176, lines 4-25; R. p. 687). Additionally, aside from performance concerns, Respondent had disciplinary issues, one involving the improper use of his company credit card. (R. p. 244, lines 5-11). Respondent used his corporate credit card for personal uses and ran up a significant bill. (*Id.*). Mr. Johnson witnessed first-hand the Respondent’s performance issues, as he was difficult to get a hold of, had poor follow-up with customer and coworkers and an overall lack of urgency. (R. p. 238, line 15 – R. p. 239, line 1). Respondent’s work ethic, behavior and communication skills were the same before and after the accident, according to Mr. Johnson. (R. p. 239, lines 2-22). As such, Respondent’s poor performance before and after the work injury is indicative of a longstanding problem with work ethic.

Further evidence of Respondent’s lack of cognitive deficits is his resume prepared following his termination from Philips, wherein Respondent portrayed himself as an impactful public speaker who was “expertly organized and focused.” (R. p. 508). Respondent also

characterized himself as an extensively trained practitioner of consultative sales, and “expertly organized and focused.” (Id.).

Moreover, the Respondent’s neuropsychological expert, Dr. Waid, found him to be neuropsychologically intact. With regard to cognitive functioning, Respondent reported to Dr. Waid that it took him “longer to do paperwork and complete tasks,” and had difficulty with regard to “being able to formulate [his] thoughts and express them concisely.” (R. p. 515). Dr. Waid performed over 20 objective tests and found Respondent to have average to above-average performance on nearly every exam. (R. pp. 516-521). His detailed 9-page report thoroughly tested and examined all of Respondent’s potential cognitive deficits, which determined that Respondent was functioning in the high average range of intellectual abilities, with no loss of memory, no evidence of issues with language or reasoning abilities and an ability to meet the demands of higher reasoning/problem solving. (R. p. 513). Most notably, he found that the Claimant has a high average IQ, and performed within the 90th percentile on many occasions, particularly when reasoning, computation, and memory were involved. (Id.). Dr. Waid referred to the Respondent as “a resilient individual who is functioning reasonably well,” and that he is “functioning in the high average range of intellectual abilities.” (R. pp. 519-520).

Notably, Dr. Waid noted two inconsistencies between the Respondent’s reports and the objective findings. First, Dr. Waid noted that the Respondent complained of forgetfulness in day to day pursuits, yet he found the Respondent’s memory to be intact and efficient. (R. p. 520). Additionally, Dr. Waid noted that the Claimant complained of being short-fused as a result of the accident, but his evaluation did not reveal any evidence of disruptive depression, sleep disturbance, anxiety or emotional compromises. (R. pp. 519-520). Overall, Dr. Waid concluded that

Respondent made a good recovery from his head and other injuries sustained, as the neuropsychological evaluation provided favorable results. (R. p. 520).

All in all, the substantial evidence in the record evidences that Respondent is a highly-functioning individual, quite the opposite of suffering from any work-related cognitive deficits.

iii. The Vocational Report by Joel Leonard Should be Granted No Persuasive Weight

The Commission erred in relying on the vocational opinion of Mr. Joel Leonard solely because there was no competing opinion. Appellants contend that there is no need to obtain a competing vocational opinion when the credible evidence in the record regarding Respondent's vocational capacity speaks for itself and the Respondent's vocational opinion should be discredited as wholly unsubstantiated.

Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (R. p. 515). With regard to his alleged cognitive deficits, Respondent reported residual problems concerning his concentration and focus; specifically, being unable to draft written correspondence in a proficient manner and inability to comprehend/retain written material. (R. p. 523). Additionally, he reported issues formulating his thoughts and that his pace of speech was much slower. (*Id.*). Respondent informed Mr. Leonard that he had "always met or exceeded his production goals" at Philips before the work injury. (R. p. 526).

Mr. Leonard concluded that there were three potential Profiles that could represent Respondent's prospective employability, but that it is most accurately portrayed by "Profile B." (R. pp. 532-533). "Profile B" is based on the conclusion that Respondent was terminated at least in part due to his post-accident performance issues. (R. p. 532). "Profile B" determined his current salary of \$55,000.00 to be a reasonable and proper representation of his earning capacity subsequent to the work accident, and that Respondent is capable of performing other occupations,

but would not be expected to earn wages that significantly exceed the annual salary he was earning at VRI. (Id.).

Mr. Leonard noted that the relative presence or absence of cognitive difficulties is of great importance with respect to his prospective employability. (R. p. 527). At the end of his report, Mr. Leonard acknowledged the competing impressions with regard to Respondent's cognitive status and recommended that he undergo a neuropsychological evaluation. (R. p. 534). He also recommended that Respondent's personnel file be sent to him, once obtained. (Id.).

Mr. Leonard was subsequently provided with the requested personnel file and neuropsychological report and deposed to determine whether additional information had modified his conclusions regarding Respondent's prospective earning capacity. (R. pp. 356-454). At his deposition, Mr. Leonard acknowledged that he had **no specific evidence indicating that Respondent was unable to secure a job due to his cognitive abilities** or limitations, and that the only evidence supporting Respondent's post-accident wage earning ability is the base salary he received at VRI. (R. p. 424, lines 6-8; R. p. 425, lines 13-17). Further, Mr. Leonard admitted that he relied solely on the information that Respondent had provided him with regard to his cognitive abilities, and he "does not know for sure" whether the Respondent had actually missed any days of employment due to his headaches. (R. p. 399, lines 10-15; R. p. 448, lines 9-11).

As reflected in the vocational report, Respondent informed Mr. Leonard that he had no performance issues prior to his work injury; however, Mr. Leonard was subsequently presented with Respondent's Philips employment file. When informed that Respondent was actually demoted immediately before his injury, as opposed to promoted, Mr. Leonard acknowledged that his misunderstanding "**could be an issue.**" (R. p. 448, lines 6-13). Mr. Leonard further agreed that the Respondent's pre-injury demotion **could be an indication that Respondent is just a bad**

employee. (R. p. 426, line 24 – R. p. 427, line 1). When presented with the PIP documentation and emails from supervisors regarding Respondent’s poor work performance before the injury, Mr. Leonard acknowledged that it is **“reasonable” to conclude that the documentation supports performance issues before his injury**, contrary to the information relayed to him by Respondent. (R. p. 451, lines 4-9).

Further, Mr. Leonard was presented with the deposition testimony of Mark Johnson, detailing the Reduction in Force termination. Mr. Leonard was asked whether, after reviewing the testimony from his supervisor and his personnel records, there is a **likelihood that the Respondent would fall into Profile A, to which he replied “[t]here is a possibility of it; certainly.”** (R. p. 427, lines 10-13). “Profile A” concludes that Respondent’s capacity to access the open labor market and earn a wage commensurate with past employment would not be impacted by the March 2011 accident. (R. p. 532). Under “Profile A,” any demise in his residual earning capacity, subsequent to his release by Philips, would be attributed to events and circumstances germane to the open labor market in general. (*Id.*).

Although Mr. Leonard indicated in his vocational report that he would defer to Dr. Waid when it came to the analysis of Respondent’s neuropsychological abilities, Mr. Leonard went out of his way to argue around Dr. Waid’s actual findings. When Mr. Leonard wrote his report, he relied solely on the information that Respondent had provided to him with regard to his cognitive abilities; thus, he recommended Respondent undergo a neuropsychological evaluation. (R. p. 399, lines 10-15; R. p. 409, lines 6-8). Mr. Leonard testified that he had reviewed Dr. Waid’s report with counsel for the Respondent prior to his deposition, and he found that there were “things that — in looking at the report, that concerned me. I mean overall, I mean from a neuropsych perspective, it just seemed that he had a lot of intact functioning issues.” (R. p. 374, line 11 – R.

p. 375, line 14). Mr. Leonard testified that he would defer to Dr. Waid and agreed to Respondent's favorable results in each of the individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), yet testified that "Dr. Waid is clearly indicating that he has some degree of problem in terms of executive dysfunction and some issues with attention and executive difficulties." (R. p. 418, lines 13-16).

No doubt, Mr. Leonard remained unyielding when it came to maintaining his opinion that Respondent's work injury has resulted in a loss of earning capacity, regardless of the documents/reports provided for contemplation after his vocational opinion was rendered – one of which was performed at his request! Appellants contend that Mr. Leonard's vocational opinion should be granted no weight in light of the fact that he was presented with credible evidence contradictory to the findings in his report, and while acknowledging that the additional information could significantly impact his conclusion to the detriment of the Respondent, he refused to do so. As such, Mr. Leonard's opinion as to the Respondent's vocational abilities should be disregarded.

III. The Commission Erred In Awarding Permanent Wage Loss Benefits For Three Hundred Forty (340) Weeks Commencing On January 17, 2014, in Contravention to the Statutory Language of S.C. Code Ann. § 42-9-20.

The Commission erred in concluding that Respondent is entitled to wage loss benefits commencing January 17, 2014, the date that the Respondent's wage loss began, and continuing for 340 weeks thereafter. (R. p. 15).

The statute providing for permanent partial disability benefits due to loss of wage earning capacity is SC Code Ann. § 42-9-20, which states that when an employee's capacity to work resulting from the injury is partial, he is entitled to compensation equal to 66 2/3 percent of the difference between his average weekly wages before the accident and his average weekly wages

which he is able to earn thereafter ... **“In no case shall the period covered by such compensation be greater than 340 weeks from the date of accident.”** (emphasis added).

As indicated by the South Carolina Supreme Court in Owens v. Hemdon, “[t]he rights and liabilities of employee and employer under the Workmen’s Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy consideration as to what benefits should be conferred or obligations imposed are strictly for the legislature.” 252 SC 166, 168, 165 S.E.2d 696, 698 (1969). Since workers’ compensation statutes provide an exclusive compensatory system in derogation of common law rights, courts must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities. Cox v. Bellsouth, 356 S.C. 468, 472 589 S.E.2d 766, 768 (Ct. App. 2003).

In South Carolina, the “plain meaning” of a statute governs and, it is not the court’s place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007). Moreover, the term “shall” in a statute means that a certain action is mandatory. Wigfall v. Tideland Utilities, Inc., 354 SC 100, 111, 580 S.E.2d 100, 105 (2003).

This is an issue of application of the plain language of the statute, not one of statutory interpretation, and Appellants contend that the Commission’s Order is in contravention of same. By misapplying the plain language of SC Code Ann. § 42-9-20, the Commission is exposing Philips to significantly higher exposure than our legislature intended.

As discussed above, the Supreme Court in Curiel held that workers' compensation benefits accrue on a time continuum: temporary total disability (TTD) benefits are available from the date of injury through the date of MMI, and post-MMI benefits may be awarded either as permanent total or permanent partial disability, or as a percentage impairment to a scheduled member. 376 S.C. 23, 29 (2007) (citing Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006)). Thus, any wage loss benefits awarded to the Respondent should not commence until the date of MMI. Here, although the Commissioner did not specify a date of MMI, one can only assume that it is the date of Dr. Barron's questionnaire response cited in the findings, which is dated January 14, 2015.

S.C. Code Ann. § 42-9-20 unambiguously prohibits a Claimant from receiving permanent partial disability benefits beyond 340 weeks from the date of the accident. Here, however, the Commission has awarded the Claimant permanent partial disability benefits commencing nearly 3 years from his date of accident and continuing for a period of 340 weeks; thus, the Claimant is being permitted to receive permanent partial disability benefits up through 487 weeks from his date of accident.

To illustrate the significance of this misapplication: under the Commission Order as it stands, the Claimant has been awarded \$239,672.80 in permanent partial disability benefits. Appellants argue that applying the statute properly, with Respondent's benefits commenced as of the date he reached permanency (MMI) and limited to 340 weeks from his date of accident (9/26/17), the Claimant would be awarded \$99,393.72 in wage loss benefits, amounting to a difference of around \$140,000.00.

Appellants contend that S.C. Code Ann. § 42-9-20 is plain and unambiguous on its face and should be interpreted in accordance with its plain meaning. Explicitly, it states that a

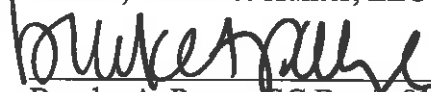
Respondent cannot receive wage loss benefits beyond 340 weeks from the date of accident; thus, the Order of 340 weeks of wage loss benefits commencing nearly 3 years after the date of accident is against the rules of construction.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission Order, and find that Respondent is not at MMI and this case is not ripe for a permanency determination. Alternatively, if this Court finds Respondent to be at MMI for all work injuries, Appellants request that this Court reverse the Commission's Order and find Respondent not entitled to wage loss benefits. Should this Court find Respondent entitled to wage loss benefits, Appellants respectfully request that this Court modify or correct the Commission's Order to reflect the just and accurate amount due under S.C. Code Ann. § 42-9-20.

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Dated: 8.9.14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner

W.C.C. File No. 1102937
SC Court of Appeals Case No. 2016-000514

Barry Adickes, Claimant,

Respondent,

v.

Philips Healthcare, Employer, and Fidelity and
Guarantee Insurance Company, Carrier,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ISSUES PRESENTED IN REPLY

- I. Did The Commission Err in Finding Respondent to be at Maximum Medical Improvement (“MMI”) for All of his Work-Related Injuries?
 - a. Did Respondent Misstate the Principle in Pearson v. JPS Converter & Industrial Corp.?
 - b. Did Respondent Misstate the Facts of the Claim?
- II. Did The Commission Err in Determining that Respondent Met His Burden of Proving Entitlement to Permanent Partial Disability Benefits Due to Loss of Earning Capacity?
 - a. Respondent Misstates the Evidence in the Record and Improperly Places the Burden on Appellants.
- III. Did the Commission Err in Awarding Wage Loss benefits in Contravention of S.C. Code Ann. § 42-9-20?
 - a. Did Respondent Misstate and Misapply the holding in Bass v. Kenco?
 - b. Is Respondent’s Reliance on Lewis v. L.B. Dynasty Misplaced?

ARGUMENTS AND CITATION OF AUTHORITY IN REPLY

I. THE COMMISSION ERRED IN FINDING THE RESPONDENT REACHED MAXIMUM MEDICAL IMPROVEMENT FOR ALL WORK-RELATED INJURIES.

- a. Respondent Misstates The Principle In Pearson v. JPS Converter & Industrial Corp.

Appellants respectfully contend that Respondent must be at MMI for all of his accepted physical injuries to be entitled to permanency benefits. Respondent incorrectly argues that Pearson v. JPS Converter & Indus Corp. describes the principle that if surgery will not change the injury, but will nevertheless help alleviate the injury’s symptoms, surgery will be proper even though the injured person is already at MMI. (Respondent Brief p. 7, citing Pearson v. JPS

Converter & Indus Corp., 489 S.E.2d 219, 327 S.C. 393 (1997)). While Appellants agree that Pearson is an influential case when it comes to which future medical treatment can be appropriately coupled with a finding of MMI, Appellants vehemently disagree that the holding in Pearson indicates that a future surgical recommendation will not prohibit a finding of MMI. Pearson sustained a closed head injury and his treating and rehabilitation physicians placed him at MMI and recommended additional medical treatment in the form of intensive rehabilitation, continued psychological care and treatment, referral to pain management/physical development program and center, supportive counseling and case management services. (Id. at pp. 398-399). There was no mention of surgery (Id.). The Pearson Court held that Pearson was at MMI since the recommended further medical care may improve his quality of life and ability to cope without improving his overall disability rating (Id.).

b. Respondent Misstates the Facts of the Claim.

In support of the argument that Respondent is not at MMI for all of his accepted injuries, Appellants argue that the substantial evidence in the record evidences that the Claimant is not at MMI for his right shoulder injury. Respondent replied by first misstating the facts of the claim, arguing that no physician opined that the Respondent is not at MMI, so there is no contrary opinion in the record. (Initial Brief of Respondent, p. 7). Further, Respondent argued that “The Appellants could have sent [Respondent] to Dr. James Rentz, the authorized treating physician for his shoulder. They did not.” (Id.). This assertion is false, as the substantial evidence in the record shows that, at the request of the Appellants, Respondent returned to Dr. Rentz on September 14, 2014 for an assessment of whether he was at MMI and, if so, the appropriate rating. (R. p. 650). The office note specifically indicated that he was seen for a “Rate and Release of his right shoulder.” (Id.). At this visit, Respondent reported continued pain in his right shoulder with

overhead activities and that his shoulder “**wants to pop and catch.**” (R. p. 652). As opposed to placing him at MMI and assigning a rating, Dr. Rentz **recommended that Respondent undergo a right shoulder MRI** scan due to his continued complaints. (*Id.*). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint arthropathy, inferior osteophytosis and subacromial spur, and biceps tenodesis. (R. p. 648).

Rather than return to Dr. Rentz following the MRI scan, Respondent chose to obtain an opinion from his prior IME physician, Dr. Barron, likely because it was not foreseeable that Dr. Rentz was going to place him at MMI. Dr. Barron completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the L shoulder and that the Respondent will “**most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms.**” (R. p. 565). As such, the credible evidence reflects that the Appellants did, in fact, send Respondent back to Dr. Rentz for a rating, yet, Dr. Rentz’s recommendations indicate his opinion that Respondent is not yet at MMI.

II. THE COMMISSION ERRED IN CONCLUDING THAT RESPONDENT MET HIS BURDEN OF PROVING ENTITLEMENT TO PERMANENT PARTIAL DISABILITY BENEFITS RESULTING FROM A LOSS OF EARNING CAPACITY.

a. Respondent Misstates the Evidence in the Record and Improperly Places the Burden on Appellants

Appellants argue that it is Respondent’s burden to prove that his work injury has caused an incapacity in earning his pre-injury wages, and he is unable to meet same. In response, Respondent argues that Appellants’ only evidentiary challenge to this award is that no wage loss exists,” and “[h]ere again, the Appellants cannot carry their burden.”

First, Appellants tendered ample evidence to prove that the Claimant has not suffered a loss in earning capacity related to his work injury, such as personnel documents showing his ability to continue working in his same position for 2.5 years following the injury and earning pre-injury wages, as well as medical records evidencing that not only does Respondent not suffer from cognitive issues, his neuropsychological evaluation revealed him to be a high-functioning individual with a high range of intellectual ability. Moreover, Appellants provided testimonial and documentary evidence proving that Respondent had the same employment issues prior to his injury, and that his termination was a business decision wholly unrelated to his work injury.

More importantly, Respondent incorrectly argues that the Appellants carry the burden in this regard, when it is well settled that it is the Employee's burden to prove an incapacity to work resulting from the work injury. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). In contrast to the aforementioned evidence provided by Appellants, Respondent provided no documentary or testimonial evidence in support of his alleged attempts at job searching, nor that he had problems securing jobs due to his work injury. Rather, Respondent merely tendered a vocational report which was wholly unsubstantiated and relied on inaccurate information provided by Respondent, so it should be granted no persuasive weight. Thus, the burden in this regard is on the Respondent, and the substantial evidence within the record proves that he is unable to meet same.

III. THE COMMISSION ERRED IN AWARDING PERMANENT WAGE LOSS BENEFITS FOR THREE HUNDRED FORTY (340) WEEKS COMMENCING ON JANUARY 17, 2014, IN CONTRAVENTION TO THE STATUTORY LANGUAGE OF S.C. CODE ANN. § 42-9-20.

a. Respondent Misstates and Misapplies the Court's Holding in Bass v. Kenco.

Appellants respectfully argue that the Commission erred in awarding permanent wage loss benefits for three hundred forty (340) weeks commencing on January 17, 2014, in contravention

to the statutory language of S.C. Code Ann. § 42-9-20, which reads in pertinent part, “**In no case shall the period covered by such compensation be greater than 340 weeks from the date of accident.**” (emphasis added).

Respondent boldly asserts that Bass v. Kenco stands for the proposition that S.C. Code Ann. § 42-9-20 operates to entitle Respondent to 340 weeks of permanent disability benefits, without limitations based on the number of weeks that had passed since the date of accident. (Respondent Brief p. 12, citing Bass v. Kenco, 366 S.C. 450, 465, 622 S.E.2d 577 (2005)). In Bass v. Kenco, the Court of Appeals noted that Kenco’s argument on appeal was that the Commission should have given it credit for the temporary total benefits paid after the date of MMI. 366 S.C. 450, 465, 622 S.E.2d 577 (2005). The Bass court was limited to review of the last sentence in S.C. Code Ann. § 42-9-20, dealing with a TTD offset. (Id. at 466). In doing so, the Court of Appeals held and the Supreme Court agreed that, the statutory language of the statute barred Kenco from receiving a credit (Id.).

Here, Appellants are not arguing that the award should be reduced by the amount of TTD benefits the Claimant has received, as Appellants fully understand and comprehend the last sentence of the statute. Rather, Appellants focus on the limitation language within the statute, which prohibits receipt of lost wage benefits beyond 340 weeks from the date of accident. A careful reading of Bass v. Kenco reveals that the decision did not address whether a 340 week award is limited to weeks from the date of accident whatsoever. As such, the Bass court did not render a decision as to whether the Commission’s award of 340 weeks without limitations based on the weeks that had passed since the date of accident was proper; thus, it is untenable for Respondent to suggest that the Bass v. Kenco provides guidance with regard to this issue.

b. Respondent's Reliance on Lewis v. L.B. Dynasty is Misplaced.

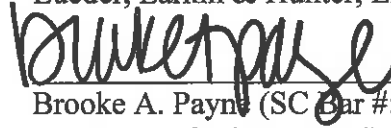
Appellants contend that S.C. Code Ann. § 42-9-20 is plain and unambiguous on its face and should be interpreted in accordance with its plain meaning. Explicitly, it states that a Respondent cannot receive wage loss benefits beyond 340 weeks from the date of accident; thus, the Order of 340 weeks of wage loss benefits commencing nearly 3 years after the date of accident is against the rules of construction. Respondent cites Lewis v. L.B. Dynasty, arguing that it stands for the proposition that the Act is read liberally, in contrast to the Appellants argument that the Act is read strictly. (Respondent Brief p. 13, citing Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 S.E.2d 393 (2015)). We disagree. While the Supreme Court in Lewis did hold that the Workers' Compensation Act is read liberally in favor of coverage to further benefit the purpose of the Workers' Compensation Act, it further explained that only exceptions and restrictions to coverage are strictly construed (Id.). *citing* James v. Anne's, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Here, we are dealing limitations and restrictions imposed by the Act which, according to Lewis and James, should be strictly construed. Thus, Respondent misapplied Lewis v. L.B. Dynasty, and a closer reading of the case evidences that the holding is more favorable for the Appellants.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission Order, and find that Respondent is not at MMI and this case is not ripe for a permanency determination. Alternatively, if this Court finds Respondent to be at MMI for all work injuries, Appellants request that this Court reverse the Commission's Order and find Respondent not entitled to wage loss benefits. Should this Court find Respondent entitled to wage loss benefits, Appellants respectfully request that this Court modify or correct the Commission's Order to reflect the just and accurate amount due under S.C. Code Ann. § 42-9-20.

Respectfully submitted:

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Attorneys for Appellants

Mt. Pleasant, South Carolina

Dated: 8.9.16

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937

BARRY ADICKES,	)	
	)	
Employee/Claimant,	)	
	)	
v.	)	
	)	MEMORANDUM
PHILIPS HEATHCARE and FIDELITY	)	
& GUARANTY INS. CO C/O	)	
GALLAGHER BASSETT	)	
SERVICES, INC.,	)	
	)	
Employer/Defendants.	)	
_____	)	

DEFENDANTS' MEMORANDUM OF LAW

The January 17, 2018 Court of Appeals Order upheld the Claimant's designation of MMI and wage loss award, yet held that the Appellate Panel erred in its interpretation and application of § 42-9-20 and remanded to the Appellate Panel for a new calculation. The COA Order states in no uncertain terms that the language of § 42-9-20 limits PPD benefits to 340 weeks from the date of injury; thus, the purpose of this remand is for a determination of the Claimant's permanent wage loss award consistent with the directives of the Court of Appeals Order.

We contend that the proper calculation of the Claimant's wage loss award commences as of the date of MMI and is limited to 340 weeks from the date of accident, amounting to 141 weeks, as detailed below:

I. Permanent Benefits Start at MMI.

It is well established in South Carolina that workers' compensation benefits run on a certain timeline, permanent benefits are awarded post-MMI. The South Carolina Supreme Court has held that "workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Likewise, in Smith v. S.C. Dep't of Mental Health, the court explained that the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, and noted that the degree of permanent disability cannot be determined prior to MMI. 335 S.C. 396, 399, 517 S.E.2d 694 (1994), citing Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975).

II. The Record Reflects the Claimant's MMI Date.

It was undisputed that the Claimant had been placed at MMI for his head and cervical spine, but the Defendants argued at the hearing that he was not at MMI for his right shoulder. The evidence in the record, cited in the Single Commissioner's Order, shows that Dr. Barron performed an IME on the Claimant on December 12, 2012, at which time Dr. Barron opined that "unfortunately, [the Claimant] has not responded to surgical treatment on his right shoulder." (Comm'r McCaskill Order, p. 8; Claimant's APA pp. 75 - 77). Dr. Barron did not place him at MMI when he performed the IME; rather, he specifically noted that the Claimant had not been rated in regard to his right shoulder and recommended that the Claimant undergo a right shoulder arthrogram. (Id. at p. 77).

The Claimant did not seek any additional treatment for his right shoulder after his IME with Dr. Barron. Prior to the hearing before Commissioner McCaskill, the Defendants scheduled a "rate and release" appointment with Dr. Rentz, the Claimant's authorized physician for his right shoulder. (Claimant's APA pp. 162 – 165). The Claimant was evaluated by Dr. Rentz on September 14, 2014, at which time he reported continued pain in his right shoulder, pain with overhead activities and some popping with motion. (Id. at p. 164). Rather than providing a rating, Dr. Rentz recommended that the Claimant undergo a right shoulder MRI scan and to return following same. (Id.).

The Claimant underwent a right shoulder MRI scan on October 10, 2014. (Claimant's APA p. 160). Rather than returning for Dr. Rentz to review, the Claimant provided the MRI scan to Dr. Barron. After review of same, Dr. Barron completed a questionnaire wherein he assigned the Claimant a 15% rating to his right shoulder. (Claimant's APA p. 77a). Specifically, Dr. Barron opined that the Claimant will "most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as the ongoing symptoms." (Id.). It was this questionnaire response, dated January 14, 2015, that persuaded Commissioner McCaskill that the Claimant was at MMI for all of his injuries.

In his Order, Commissioner McCaskill discussed the findings that led him to this Conclusion:

3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI for his shoulders.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant's counsel as to a determination of MMI.
6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant,

“...has sustained a permanent impairment of 15% to the right shoulder and 0% to the left shoulder.” (Claimant’s APA’s, p. 77a).

7. While ratings are necessary to determine disability to the shoulders if any, the language is also determinative as to MMI. Assigning “permanent impairment” to the shoulders attests to Dr. Barron’s opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of “permanent” – plain meaning of the word – impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders. (Comm’r McCaskill Order, p. 11).

Based on the above, there is no other date that can be used as the “date of MMI for all work-related injuries” other than the date that Dr. Barron completed the questionnaire response, providing a rating to his last work-related injury. Dr. Barron did not find the Claimant to be at MMI when he evaluated him in 2012; rather, he recommended that the Claimant undergo a right shoulder MRI scan. Following that IME, the Claimant returned to his authorized physician, and was sent for an MRI scan as opposed to being placed at MMI and rated. It was not until Dr. Barron reviewed the Claimant’s October 2014 MRI scan that Dr. Barron assigned an impairment rating, which was the rating that compelled Commissioner McCaskill to find him at MMI for his right shoulder. Thus, the Claimant was placed at MMI for all work-related injuries as of the date of Dr. Barron’s questionnaire responses, **January 14, 2015**.

III. The Claimant is Entitled to a Wage Loss Award of 141 Weeks.

The relevant dates in this claim are as follows:

Date of Accident:	3/22/2011
MMI for all injuries:	1/14/2015
TTD benefits commenced:	3/7/2016
340 weeks from Date of Accident:	9/24/2017

Pursuant to the applicable case law and directives from the Court of Appeals in this case, the Claimant is entitled to wage loss benefits from the date he reached MMI for all of his compensable injuries (1/14/2015) through 340 weeks from his date of accident (9/24/2017). This period encompasses 141 weeks.

The Defendants commenced indemnity benefits on March 10, 2016, when the case was taken up to the Court of Appeals, which is evidenced by the indemnity payment log. The Defendants continue to pay weekly benefits to the Claimant. As of the date of this Memo, the Defendants have paid the Claimant through October 11, 2018, amounting to 135 weeks of permanent benefits paid. As such, Defendants respectfully request that Your Honor issue an Award directing Defendants to pay the difference between 141 weeks and the amount of weeks paid at the time of Your Honor’s Award.

To Address the Arguments Raised by Claimant's Counsel:

I. The Date of Commencement of Wage Loss Benefits is on Remand.

The Claimant argues that the Court of Appeals did not overturn the Commission's findings that the Claimant's wage loss benefits are to commence as of the date of his termination (January 17, 2014) and, therefore, the date of commencement cannot be changed on remand. We disagree.

The date of commencement was specifically reversed. The last line of the Court of Appeals Order states "Accordingly, we reverse the Appellate Panel's award of 340 weeks' compensation **commencing January 17, 2014**, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20."

II. The Claimant Specifically Sought Permanent Benefits, and Can Only Receive an Award for Same.

The Claimant points to the definition of "disability" contained in § 42-1-120, arguing that it does not distinguish between temporary or permanent disability. We agree, as those words are not found within the language of § 42-1-120. They don't need to be.

The distinction between temporary and permanent benefits has been contemplated by the courts and legislature, as detailed in the above section. In summary, the South Carolina courts have held: the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, noting that a degree of permanent disability cannot be determined prior to MMI (Hines v. Hendricks Canning Co., 263 S.C. 399), termination of temporary benefits and replacement with permanent benefits is proper upon finding of MMI (Gilliam v. Woodside Mills, 319 S.C. 385), and an explicit finding by the WC Commission as to whether the Claimant had reached MMI from injuries to his arms from work-related accident was necessary because it was relevant to Claimant's entitlement to permanent benefits (Cranford v. Hutchinson Const., 731 S.E.2d 303).

The Claimant specifically sought permanent wage loss benefits. In the Form 50 filed by the Claimant on September 23, 2014, the Claimant specifically indicated that he was seeking permanent disability of the following nature: **Wage loss**. In response to whether the Claimant was seeking Temporary Total Disability benefits because of lost compensable time from work and wages, the Claimant responded: **TTD has been paid**.

III. Commencing Wage Loss Benefits from the Date of MMI is Not a Violation of Due Process.

The Claimant argues that calculation of wage loss benefits from the date of MMI could lead to scenarios where the Claimant could be barred from obtaining a wage loss award, amounting to a violation of due process. We disagree.

Claimants are provided two vehicles to obtain permanent partial disability benefits – wage loss benefits and scheduled member benefits. If a situation were to occur where a Claimant did not attain MMI until after 340 weeks from the date of accident, the Claimant could still seek permanent partial disability benefits under the scheduled member statute. Scheduled member awards are subject to the 500 weeks of compensation limit, but not restricted to the 340 weeks from the date of accident limitation.

For instance, in this claim, Mr. Adickes has been awarded the following ratings: 15% to his right shoulder, 10% to his cervical spine and 15% to his brain. Under § 42-9-30, these ratings amount to 45 weeks, 30 weeks and 37.5 weeks, respectively. Mr. Adickes' impairment ratings entitle him to 112.5 weeks of benefits under the scheduled member statute, amounting to \$79,303.50. The Commission would then apply a multiplier to represent the Claimant's total disability. Using only a multiplier of only 1.5, Mr. Adickes would be entitled to a scheduled member award of **\$118,955.25**.

As detailed above, a Claimant maintains the ability to receive a significant permanent partial disability award even if unable to proceed under the wage loss statute; thus, commencing wage loss benefits as of the date of MMI does not result in a violation of due process.

IV. The Last Line of § 42-9-20 Does Not Extend the 340 Weeks of Wage Loss Entitlement:

The Claimant argues that the last line of the pertinent statute extends the award of wage loss benefits, accounting for the TTD benefits he received in the beginning of his claim. We disagree.

The last sentence of § 42-9-20 states: "In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability." This sentence is an explicit mandate that these awards operate differently than PTD awards - the Employer/Insurer cannot reduce the 340 week limitation period by the amount of weeks paid in temporary benefits.

Pursuant to § 42-9-10, compensation awards are limited to 500 weeks; thus, when a Claimant is awarded PTD benefits, they are awarded as 500 weeks less the number of weeks the Claimant received temporary benefits. In contrast, wage loss awards are not limited by the amount of weeks a Claimant can receive the benefits - they are limited by the timeframe in which the Claimant can be entitled to same. For this reason, the Employer/Insurer cannot reduce the 340 figure, as it is set in stone based off the date of accident.

Application of the statute to real case facts is beneficial to understanding the purpose of

the last sentence. In this case, Mr. Adickes was out of work for nearly 6 weeks after the date of accident, and received temporary total benefits for that period – this is the “period of total disability” under the statute. He is now being awarded permanent partial disability benefits - this is the “partial disability beginning after a period of total disability.” The “period of total disability” is the “latter period” in the above sentence, and the statute directs that “the latter period shall not be deducted from a maximum period allowed in this section for partial disability.” The maximum period allowed in this section is 340 weeks; thus, this sentence is a directive that the 340 weeks cannot be reduced by the period of TTD benefits received by the Claimant.

Here, 340 weeks from Mr. Adickes’ date of accident falls on September 24, 2017. Although he received 6 weeks of temporary benefits, the last sentence of § 42-9-20 operates to keep this date in place, not allowing the Employer/Insurer to argue that the Claimant is now only entitled to 334 weeks of wage loss benefits. While this sentence does operate in the favor of a Claimant, it certainly does not extend the 340 week limitation, as argued by the Claimant.

In CONCLUSION, Defendants request that Your Honor issue an award in compliance with the Court of Appeals directives, awarding the Claimant 141 weeks of wage loss benefits.

Respectfully Submitted this 12th day of October, 2018,

/s/ Brooke A. Payne
BROOKE A. PAYNE
Attorney for Defendants
S.C. Bar #: 81085

PAYNE LAW GROUP, LLC
P.O. Box 2449
Mt. Pleasant, SC 29465
(843) 810-8955

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **Memorandum of Law** upon all parties to this matter via email, addressed as follows:

William L. Smith, II
Chappell, Smith & Arden
P.O. Box 12330
Columbia, SC 29211
bsmith@csa-law.com

This 12th day of October, 2018.

/s/ Brooke A. Payne
BROOKE A. PAYNE
Attorney for Defendants
S.C. Bar #: 81085

PAYNE LAW GROUP, LLC
P.O. Box 2449
Mt. Pleasant, SC 29465
(843) 810-8955

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Simmons Adickes,

Claimant,

vs.

Philips Healthcare,

Employer,

Fidelity & Guaranty Company,

Carrier/Defendants.

WCC FILE NO: 1102937

CLAIMANT'S MEMORANDUM IN
SUPPORT OF PAYMENT OF PARTIAL
DISABILITY BENEFITS

Claimant, Barry Simmons Adickes, would respectfully show unto the Commission that he is entitled to wage loss benefits in the amount of \$53,372.51 as of the date of this hearing, October 9, 2018.

Claimant's position is simple in light of the opinion of the Court of the Appeals and a plain reading of S.C. Code Ann. § 42-9-20: He is entitled to 2/3rd of the difference between his preinjury wages and his post-injury wages up to the average weekly wage of the state for the year preceding his accident for a total of 347 and 5/7 weeks. For the first 147 weeks post-accident, Claimant remained in the employ of the employer and received the same salary as before the accident. Thus, pursuant to the opinion of the Court of Appeals, those weeks are credited against the 340 week maximum recovery allowed from the date of injury and 193 weeks remain. For the remaining 193 weeks, however, Claimant earned, as a result of his on the job injury, substantially less than he earned preinjury and is therefore entitled to wage loss benefits in the amount of \$704.92 per week.¹

¹ The amount of Claimant's reduced earning capacity is not in dispute at this time.

As of this hearing, Defendants have paid 125 weeks of weekly benefits at the rate of \$704.92 per week, so the amount owed is reduced to 68 weeks.

This number of weeks, however, is increased by 7 and 5/7th weeks, for Claimant received temporary total disability benefits for that number of weeks over the course of two periods: March 23, 2011, to May 5, 2011, and from March 9, 2016, until March 22, 2016. The South Carolina Code at section 42-9-20 plainly states that when a period of total disability benefits is paid, the number of weeks such benefits were paid “shall not be deducted from the maximum period allowed in [section 42-9-20] for partial disability.” Therefore Claimant is entitled to compensation for 75 and 5/7th weeks of partial disability benefits. Finally, Claimant asserts, contrary to the argument of the Defendants, that the amount owed to Claimant shall not be commuted. Pursuant to the opinion of the Court of Appeals in this case, wage loss benefits could only be earned for the weeks between March 22, 2011, and September 26, 2017. Therefore all wage loss benefits to which Claimant is entitled have already accrued and are not subject to commutation.

Again, the Claimant’s position is simple: Pursuant to the opinion of the Court of Appeals he can receive 340 weeks of wage loss benefits, and the time for which those can be paid begins on the date of accident. Claimant suffered no statutory disability while he remained in the employ of the employer, but since his termination with the employer has suffered a disability and is entitled to compensation for those remaining weeks. In support of this position and in addition to the plain explanation offered above, Claimant posits several arguments:

First, the opinion of the Court of Appeals did not reverse the finding in Commissioner McCaskill’s August 27, 2015, Order where he found Claimant’s disability began January 17, 2014. The Court of Appeals simply found that Claimant’s award must be reduced by the number of weeks that elapsed between the date of injury and the date Claimant’s disability began. The date

on which Claimant became disabled was therefore never overturned by either the Appellate Panel of the Commission or by the Court of Appeals and is consequently the law of the case. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. Appeal & Error § 991 (2007)) (“Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.”). Furthermore, the Court of Appeals expressly affirmed the date benefits began. The court stated, “Compensation under the Act is not awarded for the physical injury as such, but for disability produced by such injury. The disability is to be measured by the employee’s capacity or incapacity to earn wages which he was receiving at the time of his injury.” The court went on to state, “the record is clear that Adickes did not suffer a wage loss until he was terminated from employer.”

Second, this is not a section 42-9-30 case and contrary to the position of Defendants, benefits may be awarded for a loss that accrues prior to and/or irrespective of maximum medical improvement. As stated by the Court of Appeals on page 4 of its opinion, “PPD benefits are intended to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks from of the injury, rather than compensate a clamant with a 340 week award of PPD benefits for specific injuries.” *See Owens v. Herndon*, 252 S.C. 166, 169, 165 S.E.2d 696, 698 (1969) *quoting Keeter v. Clifton Mfg. Co.*, 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954). Here, once Employer terminated Claimant, he began to suffer wage loss, wage loss that is well documented and no longer in dispute. As the Court of Appeals noted, Claimant suffered a decrease in his ability to earn wages, which was caused by his workplace injury, and which manifested itself when he was terminated on January 17, 2014. Section 42-9-20 compensates for that decrease in ability to earn wages. Whether that loss in capacity manifested itself before or after MMI is

irrelevant. The record is clear and the Court of Appeals agrees, there was no wage loss before Claimant's termination, but he suffered wage loss at the time of his termination.

Moreover, the Court of Appeals remanded for a plain reading of section 42-9-20. Section 42-9-20 makes no distinction between temporary and permanent benefits; the words "temporary" and "permanent" do not even appear in this general disability statute. It only awards benefits based on disability, which is defined under section 42-1-120 as "the incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." There is no distinction between temporary and permanent—the only issue is whether the definition of disability is met. *See Outlaw v. Johnson Service Co.*, 254 S.C. 486, 176 S.E.2d 152 (1970) (Loss of earning capacity alone is the criterion for compensation under the Act and medical opinion as to the extent of physical disability can have no probative value against actual earnings). Commissioner McCaskill and an appellate panel of the Commission found that it was met, and the Court of Appeals affirmed.

To limit an award to 340 weeks on the backend and while at the same time limiting the award on the front, by waiting until MMI to award, is nonsensical. Moreover, doing so would amount to a due process violation for it could provide no remedy. Under this approach, the compensation due to a claimant who suffered partial wage loss would, in essence, depend on how long it took her to reach MMI. The more time her treatment required until she stopped improving, the less she is entitled to in disability benefits; this is illogical and not the law of South Carolina.

Additionally, the argument of the Defendants that wage loss benefits can only run from the date of MMI fails, for the Defendants' argument relies on a presumed date of MMI, but no date of MMI has been found. The affirmed Order of Commissioner McCaskill finds Claimant reached maximum medical improvement, but finds no particular date of MMI. This is not unexpected, as

the date at which Claimant reached MMI is irrelevant. The only relevance of a finding of MMI is that it determines whether medical care is wide open or limited in scope by the final order. Therefore, to accept the Defendants' argument, the Commission would have to find a date of MMI. This is beyond the scope of the order of remand from the Court of Appeals. *Adickes v. Philips Healthare*, 2018-UP-027 (January 17, 2018) ("we reverse the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits.").

Nevertheless, if this Honorable Commissioner believes she must find a date of MMI and use that date as the basis for determining Claimant's entitlement to wage loss benefits, she should find the date of MMI to be November 1, 2012. Findings of Fact 44 – 48 in the Order of the Appellate Panel find that Dr. Welshofer rated Claimant's brain on November 1, 2012, and Dr. Mandell concurred with Dr. Welshofer on page 42 of his deposition in this matter. Moreover, Defendants appealed the Appellate Panel's findings of MMI, but conceded that Claimant had reached MMI for his injuries to his head and cervical spine. (See Appellant's final Brief, p. 22). The Commission found that Claimant's statutory disability was a direct result of his loss of executive function from his brain injuries. In essence, Claimant would have suffered the same statutory disability even if his only injury was to his head. As a result, if a date of MMI is needed to award wage loss benefits, then the date of MMI that is used should be the date Claimant reached MMI for the injury that most proximately caused the wage loss, November 1, 2012.

Finally, Claimant posits that Defendants are precluded from arguing that wage loss benefits may not be conferred for any period preceding maximum medical improvement. Defendants attempted to raise that issue before an appellate panel of the Commission and before the Court of Appeals but raised the issue improperly before the Court of Appeals. In order for an issue to be

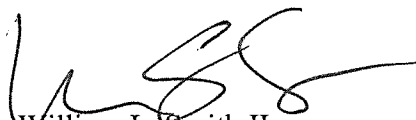
considered by the Court of Appeals, that issue must be presented as a concise and *direct* statement or question. Rule 208 (b)(1)(B), SCACR. When an issue is not set forth in the statement of the issues on appeal, the Court of Appeals will not consider it. *Id.* (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

Here, Defendants asserted their present argument as a subsection of their argument wherein they asked the Court of Appeals “Did the Commission err in finding respondent to be at MMI for all of his work related injuries.” That question is in no way a direct statement of the argument Defendants offered in their brief that “Permanency benefits are premature before a finding of MMI.” When this statement is viewed in light of Rule 208 (b)(1)(B), SCACR, it becomes evident the Court of Appeals did not consider Defendant’s current argument for it was not properly presented for review.

Since Defendants did not properly present their argument that a finding of MMI is required before an award of wage loss benefits can be made, that issue has been abandoned, the litigation of that issue is precluded, and the underlying findings of fact and conclusions of law are the law of the case and cannot be relitigated or reappealed. *See e.g. Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) *abrogated on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 80, 427 S.E.2d 552 (2013) (when an issue is not properly raised pursuant to the appellate court rules, the related findings of fact and law by the commission become the law of the case); *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (improperly appealed findings of fact become the law of the case and, right or wrong, cannot be altered); Jean Hoefer Toal et. al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) (an issue not properly raised in an intermediate appeal cannot later be raised).

Therefore, Claimant, by and through his undersigned attorney, respectfully requests an order of the Commission awarding payment of the remaining 75 weeks and 5 days of compensation to which he is entitled. Since the weeks have accrued, Claimant is entitled to a lump sum with post judgment interest. *See* S.C. Code Ann. § 42-17-60; S.C. Code Ann. 34-31-20(B) (the legal rate for interest for judgments and money decrees is 7.25% compounded annually).

Respectfully submitted,



William L. Smith II
Attorney for the Claimant

Dated: October 12, 2018



Claimant's Name: Barry Adickes SSN: 251 - 31 - 7784 Employer's Name: Phillips Healthcare (Appellant)
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA Zip: 0181086
Home Phone: (864) 328 - 0150 Work Phone: () - Insurance Carrier: Gallagher Bassett Services (Appellant)
Preparer's Name: Brooke Payne Law Firm: Payne Law Group, LLC Preparer's Phone #: (843) 732 - 6280

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 3/22/2011

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

Please see attached Addendum for questions presented.

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

☐ Mediation

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

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to William L. Smith
address PO Box 12330, Columbia, SC 29211 on the 21st day of January 2019, by X first class postage certified mail personal
service.

Brooke Payne

Preparer's Signature

Attorney for Appellants
Title

bpayne@paynelg.com
Email

1/18/2019
Date

Check this box if you are not represented by an attorney ☐

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

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

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937

BARRY ADICKES,

Respondent,

vs.

PHILIPS HEALTHCARE and FIDELITY
& GUARANTY INS. CO. C/O
GALLAGHER BASSETT
SERVICES, INC.,

Appellants.

**FORM 30 ADDENDUM:
QUESTIONS PRESENTED**

Form 30 Questions Presented:

- (1) Whether the Single Commissioner erred in ruling (Rulings of Law 2) that the Court of Appeals did not reverse the date wage loss began, the error being that the preponderance of the evidence in the record does not support this ruling. The supporting Order directive (§ 2) also constitutes an error of law.
- (2) Whether the Single Commissioner erred in ruling (Rulings of Law 3) that the Court of Appeals did not reverse or remand with regard to whether wage loss benefits commence as of the date of MMI, the error being that the preponderance of the evidence in the record does not support this ruling. The supporting Order directive (§ 2) also constitutes an error of law.
- (3) Whether the Single Commissioner erred in ruling (Rulings of Law 4) that the issue of MMI is immaterial in a wage loss claim, as this ruling constitutes an error of law. The supporting Order directive (§ 2) also constitutes an error of law.
- (4) Whether the Single Commissioner erred in ruling (Rulings of Law 5) that determining the date of MMI is beyond the scope of the remand from the Court of Appeals, the error being that the preponderance of the evidence in the record does not support this ruling. This ruling also constitutes an error of law. The supporting Order directive (§ 2) also constitutes an error of law.
- (5) Whether the Single Commissioner erred in ruling (Rulings of Law 6) that the proper application of § 42-9-20 allows for the Claimant to receive credit for TTD benefits received in the form of an additional 7 weeks and 5 days of wage loss benefits beyond the 340 week limitation period, as this ruling constitutes an error of law. The supporting Order directive (§ 3) also constitutes an error of law.
- (6) Whether the Single Commissioner erred in ordering the Defendants to commence his wage

loss benefits on January 17, 2014, a date prior to a designation of MMI, as this Order directive (§ 2) constitutes an error of law as it is in direct contradiction to existing case law.

- (7) Whether the Single Commissioner erred in ordering the Defendants to pay interest on the benefits owed from January 17, 2014 through the date that Defendants commenced benefits, as this Order directive (§ 7) constitutes an error of law.



Claimant's Name: Barry Simmons Adickes SSN: 251-31-7784 Employer's Name: Phillips Corporation
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
Rock Hill, SC 29732 Andover, MA
Home Phone: (803) 328-0160 Work Phone: Insurance Carrier: Fidelity & Guaranty Company
Preparer's Name: William L. Smith II Law Firm: Chappell, Smith & Ardan Preparer's Phone #: (803) 929-3600

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 3/22/2011 (m/d/yyyy)

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

See attached.

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

☐ Mediation

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

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Brooke A. Payne, Esq.
address Payne Law Group, PO Box 2448, Mt. Pleasant, SC 29485 on the _____ day of January 2011
by first class postage

[Signature] Attorney for Claimant bsmith@csa-law.com
Preparer's Signature Title Email Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov. If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, If you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

- 1) Did the Single Commissioner err in her order in failing to rule that limiting the award on both the front end (340 weeks from date of injury) and on the back end (no award under §42-9-20 until maximum medical improvement) would be violative of due process as an additional ground to support the award the error being that due process of law would also support the Commissioner's decision?
- 2) Did the Single Commissioner err in her order in failing to rule that defendants are precluded from arguing the wage loss benefits may not be ordered before maximum medical improvement as the issue was not properly preserved before the Court of Appeals as an additional ground to support the award the error being that defendants did not properly preserve the issue and had, therefore, waived it?

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Adickes,

Claimant/Appellate,

vs.

Philips Healthcare,

Employer,

Fidelity & Guaranty Insurance Co.,

Carrier/Defendants/Respondent

WCC FILE NO: 1102937

CLAIMANT'S MEMORANDUM
IN SUPPORT OF HIS APPEAL

STATEMENT OF THE CASE

This case has a tortured procedural history. After a hotly contested and lengthy hearing, Commissioner McCaskill awarded 340 weeks of wage loss benefits to claimant. The Appellate Panel affirmed. The Court of Appeals then affirmed in part, reversed in part, and remanded to the Commission. The Court of Appeals limited the award to 340 weeks from date of injury rather than from January 17, 2014 when the wage loss began. This was an unusual situation where the claimant had worked for a long time after his injury before his wage loss started.

The remand should have been a simple math problem for the Commission to determine. However, defendants took the position that not only was the award limited on the front end but now was also limited on the back end, because under their position benefits could not begin until January 14, 2015. This is a date that they presume to be MMI, although no MMI date appears in any order.

On remand, Commissioner Susan Barden properly ordered defendants to pay 340 weeks of benefits but reduced the award by the 147 weeks claimant worked after his accident and gave the

defendants credit for weekly payments made during the pendency of the appeal. Her order set forth the numerous legal grounds for that finding and claimant agrees with each of those findings. Defendants appealed those findings and claimant will respond to those arguments by reply when defendants file their brief.

However, claimant also appealed as there are two additional sustaining grounds that Commissioner Barden did not address. The order stated: "In light of the above reasoning, it is unnecessary to address the due process or issue preclusion arguments." Claimant appealed on those two grounds so as not to abandon those arguments. As such, this memorandum addresses those two additional sustaining grounds.

ARGUMENTS

I. DEFENDANTS ARE PRECLUDED FROM ARGUING THAT WAGE LOSS BENEFITS MAY NOT BE ORDERED FOR ANY PERIOD BEFORE MAXIMUM MEDICAL IMPROVEMENT AS THAT ISSUE WAS NOT PRESERVED BEFORE THE COURT OF APPEALS.

Defendants argued in their brief to the Court of Appeals that (1) claimant had not reached MMI and (2) that the 42-9-20 award could not commence until after MMI. This whole MMI argument will be addressed in claimant's reply brief. However, the point here is that the Court of Appeals did not reverse on the MMI argument or on defendant's argument that benefits could not commence until after MMI. The Court of Appeals simply reversed saying that benefits could not extend beyond 340 weeks from date of injury. If defendants wanted to pursue this further, they had to file a petition for rehearing with the Court of Appeals and then a petition for certiorari with the Supreme Court. Having failed to do so, they cannot now attempt to retry the case in violation of the remand order from the Court of Appeals. In effect, they have attempted to turn the simple math problem on remand to a retrial of issues that are not on remand.

II. DEFENDANTS' POSITION OF LIMITING THE AWARD ON THE FRONT END (340 WEEKS FROM DATE OF INJURY) AND ON THE BACK END (FROM MMI) WOULD AMOUNT TO A VIOLATION OF DUE PROCESS.

Numerous cases across the county have recently held all or parts of state workers' compensation acts unconstitutional under due process, equal protection, or separation of powers scrutiny when benefit levels have dropped so low as to breach the "Grand Bargain." The original seminal case that approved workers' compensation acts was N.Y. Central Railroad v. White, 243 U.S. 188 (1917). There, it was held that "the use of workers' compensation laws in place of constitutionally generated tort remedies must provide "significant" benefits and any substitution considerations must provide a "reasonable amount according to a reasonable and definite scale, by way of compensation for the loss of earning capacity incurred in the common enterprise."

Here, the Court of Appeals has limited the award to 340 weeks from date of injury. Defendants now assert that the award could not begin until January 14, 2015. This means that claimant could only receive 141 weeks of benefits at 704.92 per week. However, Commissioner McCaskill and the Appellate Panel found that claimant had lost \$1,550.83 per week in earning capacity after his injury. On March 22, 2011, claimant was 49 years old. If he had only worked until retirement age at 65, he would have lost \$1,290,290.50 in wages because of his on-the-job injury.

While even the full amount of a 340 week award pales to his actual wage loss, limiting the award on both ends would deliver a completely inadequate remedy and would violate due process.

CONCLUSION

Claimant requests the order of Commissioner Barden in general be affirmed. However, claimant requests the order be modified to add the additional sustaining grounds that (1) defendants waived their additional argument of limiting the award further by not taking that issue up further with the Court of Appeals and Supreme Court and (2) that limiting the award further would amount to a violation of due process.

Respectfully submitted,



William L Smith II
CHAPPELL, SMITH & ARDEN, P.A.
Post Office Box 12330
Columbia, South Carolina 29211
(803) 929-3600
Attorney for Employee/Claimant

Dated: March 26, 2019

Defendants filed a Notice of Appeal to the Court of Appeals on March 17, 2016 and properly commenced weekly benefits pursuant to the Appellate Panel Award. Defendants argued that the Appellate Division erred in not limiting the wage loss award to 340 weeks from the date of accident, pursuant to the language of S.C. Code Ann § 42-9-20. On March 7, 2016, the Appellants commenced weekly benefits in the amount awarded by the Single Commissioner, and during the pending appeal. On November 9, 2017, the case was heard before the Court of Appeals.

The Court of Appeals issued an Opinion on January 17, 2018, noting that the applicable portion of S.C. Code Ann. § 42-9-20 reads “[I]n no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. We find this to be a limiting clause that restricts the time frame and amount of coverage and should be strictly interpreted.” Adickes v. Philips Healthcare, Op. No. 2018-UP-027 (S.C.Ct.App filed January 17, 2018). Further, the Court of Appeals found that the “plain language of the statute limits PPD benefits to 340 weeks from the date of injury, contrary to the Appellate Panel’s interpretation and award. This statute explicitly mandates that in ‘no case’ will PPD benefits be available to a claimant beyond the term of 340 weeks ‘from the date of injury.’” The Court of Appeals reversed the Appellate Panel’s award of 340 weeks’ compensation commencing January 17, 2014 and remanded to the Workers’ Compensation Commission for a new calculation of benefits consistent with the plain language of S.C. Code Ann. § 42-9-20. Id.

The Full Commission issued a Remittitur Routing Sheet on July 16, 2018, assigning the case to a Single Commissioner, so a hearing was set before Commissioner Susan Barden on October 9, 2018. Commissioner Barden issued an Order on January 17, 2019 (hereinafter referred to as “Barden Order”), wherein she awarded the Claimant wage loss benefits for a period of 200 weeks and 5 days. This figure represents commencement of wage loss benefits as of the date of

his termination, July 17, 2014, through 340 weeks from his date of accident plus an additional 7 weeks and 5 days.

Appellants timely filed a Form 30 Request for Commission Review on January 18, 2019, which is now before the Full Commission for consideration. The Appellants assert that the Single Commissioner erred in that her calculation of wage loss benefits was not only in contravention of the guiding statutory authority and case law, but also the directives from the Court of Appeals.

Respondent also filed a timely appeal of Commissioner Barden's award on January 28, 2019, arguing that the Single Commissioner erred in (1) failing to rule that limiting the award on both the front and back ends would be violative of due process, and (2) failing to rule that Applicants are precluded from arguing that wage loss benefits may not be ordered before MMI as the issue was not properly preserved before the Court of Appeals.

SUMMARY OF EVIDENCE:

Appellants rely on and fully incorporate herein the Summary of Evidence detailed in Appellant's Brief to the Full Commission submitted to this Court on November 11, 2015.

STANDARD OF REVIEW

S.C. Code Ann. § 42-17-50 governs appeals from the Single Commissioner to the Full Commission. Section 42-17-50 statutorily empowers the Full Commission to review the Decisions and Orders of the Single Commissioner and, when appropriate, to make its own Findings of Fact and Rulings of Law. Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E.2d 767 (1991). The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). *See also* Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) (Full Commission is fact finder and it is not within Supreme Court's province to reverse

Commission's findings if they are supported by substantial evidence.) Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992).

QUESTIONS PRESENTED

1. Whether the Single Commissioner erred in ruling that Respondent's wage loss benefits commence as of January 17, 2014.
2. Whether the Single Commissioner erred in ruling that the Claimant is entitled to wage loss benefits beyond the 340 week limitation period expressly laid out in S.C. Code Ann. § 42-9-20.

ARGUMENT AND CITATION OF AUTHORITY:

1. PERMANENT WAGE LOSS BENEFITS ARE COMMENCED AS OF THE DATE OF MMI.

The Single Commissioner erred in ruling that the issue of MMI is immaterial in a wage loss claim. (Barden Order p. 9). It is well established in South Carolina that workers' compensation benefits run on a certain timeline, and that permanent benefits are awarded after a Claimant has reached MMI. The South Carolina Supreme Court held that "workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as permanent total or partial disability, or as a percentage of impairment to a scheduled member." Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Likewise, in Smith v. S.C. Dep't of Mental Health, the Court explained that the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, and noted that the degree of permanent disability cannot be determined prior to MMI. 335 S.C. 396, 399, 517, S.E.2d 694 (1994), citing Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975).

a. Respondent has Consistently Sought Permanent Benefits, just as Appellants have Consistently Asserted that Permanent Benefits Commence as of the Date of MMI.

Respondent points to the definition of "disability" contained in § 42-1-120, arguing that it does not distinguish between temporary or permanent disability. We agree, as those words are not found within the language of § 42-1-120. They don't need to be.

The distinction between temporary and permanent benefits has been contemplated by the courts and legislature, as detailed in the above section. In summary, the South Carolina courts have held: the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry

of a permanent award, noting that a degree of permanent disability cannot be determined prior to MMI (Hines v. Hendricks Canning Co., 263, S.C. 399), termination of temporary benefits and replacement with permanent benefits is proper upon finding of MMI (Gilliam v. Woodside Mills, 319 S.C. 385), and an explicit finding by the WC Commission as to whether the Claimant had reached MMI from injuries to his arms from a work-related accident was necessary because it was relevant to Claimant's entitlement to permanent benefits (Cranford v. Hutchinson Const., 731 S.E.2d 303).

Respondent specifically sought permanent wage loss benefits at each level of this litigation. In the Form 50 filed by the Claimant on September 23, 2014, the Claimant specifically indicated that he was seeking permanent disability of the following nature: **Wage Loss**. In response to whether the Respondent was seeking Temporary Total Disability benefits because of lost compensable time from work and wages, the Claimant responded: **TTD has been paid**.

Respondent further argues that the Court of Appeals did not overturn the Commission's findings that his wage loss benefits are to commence as of the date of his termination (January 17, 2014) and, therefore, the date of commencement cannot be changed on remand. We disagree.

The date of commencement was specifically reversed. The last line of the Court of Appeals Opinion states, "[a]ccordingly, we reverse the Appellate Panel's award of 340 weeks' compensation **commencing January 17, 2014**, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20." Thus, the date of commencement was properly before the Single Commissioner.

b. The Preponderance of the Evidence in The Record Supports that Respondent's Wage Loss Benefits Should Commence as of January 14, 2015, when he Reached MMI for His Work-Related Injuries.

It is undisputed that Respondent had been placed at MMI for his head and cervical spine, but Appellants argued at the January 21, 2015 Single Commissioner hearing that he was not at MMI for his right shoulder. The evidence in the record, cited in Commissioner McCaskill's Order, shows that Dr. Barron performed an IME on the Claimant on December 12, 2012, at which time Dr. Barron opined that "unfortunately, [the Claimant] has not responded to surgical treatment on his right shoulder." (Comm'r McCaskill Order, p. 8; Claimant's APA pp. 75 – 77). Dr. Barron did not place him at MMI when he performed the IME; rather, he specifically noted that the Claimant had not been rated in regard to his right shoulder and recommended that the Claimant undergo a right shoulder arthrogram. (*Id.* at p. 77).

The Claimant did not seek any additional treatment for his right shoulder after his IME with Dr. Barron. Prior to the hearing before Commissioner McCaskill, the Appellants scheduled a "rate and release" appointment with Dr. Rentz, the Claimant's authorized physician for his right shoulder. (Claimant's APA pp. 162 – 165). The Claimant was evaluated by Dr. Rentz on September 14, 2014, at which time he reported continued pain in his right shoulder, pain with overhead activities and some popping with motion. (*Id.* at p. 164). Rather than providing a rating, Dr. Rentz recommended that the Claimant undergo a right shoulder MRI scan and to return following same. (*Id.*).

The Claimant underwent a right shoulder MRI scan on October 10, 2014. (Claimant's APA p. 160). Rather than returning to Dr. Rentz to review, the Claimant provided the MRI scan to Dr. Barron. After review of same, Dr. Barron completed a questionnaire wherein he assigned the Claimant a 15% rating to his right shoulder. (Claimant's APA p. 77a). Specifically, Dr. Barron

opined that the Claimant will “most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as the ongoing symptoms.” (*Id.*). It was this questionnaire response, dated January 14, 2015, that persuaded Commissioner McCaskill that the Claimant was at MMI for all of his injuries.

In his Order, Commissioner McCaskill discussed the findings that led him to this conclusion:

3. It is the defendants’ position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI for his shoulder.
4. The Claimant contends that the questionnaire from Dr. Jerry L. Barron provides a determination of MMI.
5. I have reviewed the questionnaire of Dr. Barron and must agree with Claimant’s counsel as to a determination of MMI.
6. Dr. Barron opines to a reasonable degree of medical certainty that the Claimant, “... has sustained a permanent impairment of 15% to the right shoulder and 0% to the left shoulder.” (Claimant’s APA’s, p. 77a).
7. While ratings are necessary to determine disability to the shoulders, if any, the language is also determinative as to MMI. Assigning “permanent impairment” to the shoulders attests to Dr. Barron’s opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of “permanent” — plain meaning of the word — impairment. Given that fact, I find that the Claimant has reached maximum medical improvement for the shoulders. (Comm’r McCaskill Order, p. 11)

Based on the above, there is a clear date in which the Claimant can be found to have reached “MMI for all work-related injuries,” which is the date that Dr. Barron completed the questionnaire response that assigned a rating to the last body part injured. Dr. Barron did not find the Claimant to be at MMI when he evaluated him in 2012; rather, he recommended that the Claimant undergo a right shoulder MRI scan. Following that IME, the Claimant returned to his authorized physician, and was sent for an MRI scan as opposed to being placed at MMI and rated. It was not until Dr. Barron reviewed the Claimant’s October 2014 MRI scan that Dr. Barron assigned an impairment

rating, which was the rating that compelled Commissioner McCaskill to find him at MMI for his right shoulder.

The preponderance of the evidence in the record supports that Respondent was placed at MMI for all of his work-related injuries as of the date of Dr. Barron's questionnaire response, January 14, 2015.

c. Commencing Permanent Wage Loss Benefits as of the Date of MMI is Not a Due Process Violation.

Respondent argues that calculation of wage loss benefits from the date of MMI could lead to scenarios where a claimant could be barred from obtaining a wage loss award, amounting to a violation of due process. We disagree.

Claimants are provided two vehicles to obtain permanent partial disability benefits — wage loss benefits and scheduled member benefits. If a situation were to occur where a Claimant did not attain MMI until after 340 weeks from the date of accident, the Claimant could still seek permanent partial disability benefits under the scheduled member statute. Scheduled member awards are subject to the 500 weeks of compensation limit, but not restricted to the 340 weeks from the date of accident limitation.

For instance, in this claim, the Respondent has been awarded the following ratings: 15% to his right shoulder, 10% to his cervical spine, and 15% to his brain. Under § 42-9-30, these ratings amount of 45 weeks, 30 weeks, and 37.5 weeks, respectively. The Respondent's impairment ratings would entitle him to 112.5 weeks of benefits under the scheduled member statute, amounting to \$79,303.50. The Commission could then apply a multiplier to represent the Claimant's total disability. Using a conservative multiplier of 1.5, the Respondent would be entitled to a scheduled member award of **\$118,955.25**.

As detailed above, a Claimant maintains the ability to receive a significant permanent partial disability award even if unable to proceed under the wage loss statute; thus, commencing wage loss benefits as of the date of MMI does not result in a violation of due process.

2. WAGE LOSS AWARDS CANNOT EXTEND BEYOND 340 WEEKS FROM THE DATE OF ACCIDENT.

The Single Commissioner erred in ruling that the proper application of § 42-9-20 allows for a Claimant to receive credit for TTD benefits received, extending the award beyond the 340 week limitation. We respectfully disagree.

There are two forms of permanent benefits under the South Carolina workers' compensation act which compensate for decreased wage earning capacity: permanent total disability ("PTD") benefits and permanent partial disability ("PPD wage loss") benefits. While both are predicated on a showing of loss of earning capacity (partial vs. total), they differ significantly when it comes to how the awards are calculated.

In a PTD award under 42-9-10(A), the Claimant is entitled to a payout of 500 total weeks of total disability benefits, temporary and permanent combined. Thus, calculation of a PTD award is simple math: 500 weeks less the number of weeks of benefits paid to date. In contrast, PPD wage loss awards are limited by the timeframe in which a Claimant could potentially be entitled to same. It is this very difference that necessitated the inclusion of the last line of SC Code Ann. § 42-9-20, which states:

In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

Just as with the other sections of this statute, the plain language of this sentence is unambiguous. Simply put, since wage loss awards are much more restricted than PTD awards, the

legislature saw it fit to place this safeguard within SC Code Ann. § 42-9-20 in order to prevent the award from any additional reductions.

The facts of this case help illustrate this sentence in action: Respondent was out of work for nearly 8 weeks after the date of accident, and received temporary total disability benefits for that period. This is the “period of total disability” under the statute. He is now being awarded permanent partial disability benefits. This is the “partial disability beginning after a period of total disability.” The “period of total disability” is the “latter period” in the above sentence, and the statute directs that “the latter period shall not be deducted from the maximum period allowed in this section for partial disability.” Here, 340 weeks from the Respondent’s date of accident fell on September 24, 2017. Although Respondent received temporary benefits early on in the claim, the last sentence of § 42-9-20 operates to keep the 340-week date in place, preventing Appellants from arguing that the Claimant is now only entitled to 332 weeks and 2 days of wage loss benefits. Thus, this sentence operates as a protection to the Claimant, and Appellants have never argued otherwise.

Appellants concede that while this sentence is certainly for the benefit of a Claimant, it unquestionably does not extend the 340-week limitation as argued by the Respondent. Appellants are confounded as to how this sentence was interpreted to extend the 340 week limitation period; regardless, the Single Commissioner’s “application” of this provision amounts to a double recovery for the Respondent, which could not have been the legislature’s intent.

3. RESPONDENT IS ENTITLED TO A WAGE LOSS AWARD OF 141 WEEKS.

Pursuant to the applicable case law and directives from the Court of Appeals in this case, Respondent is entitled to permanent wage loss benefits from the date he reached MMI for all of

his compensable injuries (1/14/2015) through 340 weeks from his date of accident (9/24/2017).

The relevant dates in this claim are as follows:

Date of Accident:	3/22/2011
MMI for all injuries:	1/14/2015
TTD benefits commenced:	3/7/2016
340 weeks from Date of Accident:	9/24/2017

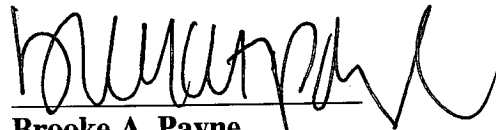
Thus, the preponderance of competent and credible evidence in the record supports a wage loss award of 141 weeks of benefits.

CONCLUSION

For the foregoing reasons, and in light of the accepted and established standard for review of the Single Commissioner's Decision and Order by the Full Commission, Appellants respectfully request the Full Commission reverse the Single Commissioner's calculation of Respondent's permanent wage loss award. As such, Appellants respectfully request that the Full Commission award Respondent 141 weeks of permanent wage loss benefits in accordance with S.C. Code Ann. § 42-9-20, as directed by the Court of Appeals.

This 27th day of March, 2019.

Respectfully submitted,



Brooke A. Payne
SC Bar #: 81085
Attorney for Applicants

Payne Law Group, LLC
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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Adickes,

Claimant/Appellant,

vs.

Philips Healthcare,

Employer,

Fidelity & Guaranty Insurance Co.,

Carrier/Defendants/Respondent

WCC FILE NO: 1102937

CLAIMANT'S MEMORANDUM
IN RESPONSE TO DEFENDANT'S APPEAL

STATEMENT OF THE CASE

This case was originally tried before Commissioner Gene McCaskill who, in a very thorough order, ruled that Claimant had sustained a significant wage loss and awarded 340 weeks of wage loss benefits under § 42-9-20. Claimant had sustained injuries to his brain, cervical spine, and shoulders. Commissioner McCaskill found that it was Claimant's brain injury that caused his loss of earning capacity. (Findings of Fact 44 and 45). The Appellate Panel affirmed the order in its entirety.

Defendants filed an appeal to the Court of Appeals on several issues. In an unpublished decision, the Court of Appeals affirmed that Claimant was at MMI and that Claimant had sustained wage loss as a result of his cognitive dysfunction. However, the Court reversed the 340 week wage loss award by finding that the wage loss award could not be greater than 340 weeks from the date of injury and remanded to the Commission for a new calculation consistent with the plain language of § 42-9-20. Defendants did not request rehearing or petition for certiorari.

The case was remanded and eventually heard by Commissioner Barden. Commissioner Barden issued an order on January 17, 2019, (1) limiting the award to 340 weeks from date of injury without giving credit for seven weeks and five days of temporary total disability previously paid, (essentially reducing the award by 147 weeks Claimant worked after his injury) (2) finding that wage loss began on January 17, 2014, when Claimant was terminated by his employer as previously found by Commissioner McCaskill, the Appellate Panel, and the Court of Appeals, and (3) giving defendants credit for any weekly payments made pursuant to § 42-17-60 during the pendency of the appeal.

Defendants then filed this appeal arguing the Single Commissioner erred in ruling (1) that Claimant's wage loss benefits commenced as of January 17, 2014, and (2) that the Single Commissioner erred in ruling the Claimant was entitled to wage loss beyond the 340 weeks (i.e. in not taking the seven weeks and five days of TTD off of the 340 week award). These arguments will be examined separately.

ARGUMENTS

I. THE SINGLE COMMISSIONER CORRECTLY FOUND THAT CLAIMANT'S WAGE LOSS BEGAN ON JANUARY 17, 2014, AND CORRECTLY ORDERED BENEFITS FROM THAT DATE.

a. The Law of the Case is that Benefits Commence on January 14, 2014.

In his Order of August 27, 2015, Commissioner McCaskill found that Claimant's wage loss began on January 17, 2014, when he was terminated. The Appellate Panel affirmed. Despite the arguments of the defense, the Court of Appeals did not reverse this finding. Rather, the court said,

The record is clear Adickes did not suffer a wage loss until he was terminated from Employer. Under the Appellate Panel's interpretation, Adickes would receive PPD wage loss compensation for the period he worked full time and earned a full time salary. We hold the Appellate Panel erred by expanding the timeframe and award for PPD benefits in contravention of the plain language of § 42-9-20 and the legislative intent for compensation. Accordingly, we reverse the Appellate Panel's award of 340

weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits consistent with the plain language of § 42-9-20.

The holding quoted above is important for two reasons. First, the Court explicitly affirms that the wage loss began on January 17, 2014. It only reversed the award to reduce the award by the number of weeks (147) that elapsed between the date of injury (March 22, 2011) and the date the wage loss began (January 17, 2014) which lessens the total award from 340 weeks to 193 weeks. The only instruction from the court on remand is to make the award fit this holding.

The Court of Appeals simply found that Claimant's award must be reduced by the number of weeks that elapsed between the date of injury and the date Claimant's disability began. The date on which Claimant became disabled was, therefore, never overturned by either the Appellate Panel of the Commission or by the Court of Appeals and is consequently the law of the case. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. Appeal & Error § 991 (2007)) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Furthermore, the Court of Appeals expressly affirmed the date benefits began. The court stated, "Compensation under the Act is not awarded for the physical injury as such, but for disability produced by such injury. The disability is to be measured by the employee's capacity or incapacity to earn wages which he was receiving at the time of his injury." As noted above the court stated, "the record is clear that Adickes did not suffer a wage loss until he was terminated from employer."

Secondly, Defendants made their "award does not begin until MMI argument" to the Court of Appeals. The Court did not agree and did not remand on that basis. To keep this issue alive the defendants were required to petition for rehearing and petition for certiorari. They did not do so.

Having failed to do so, they cannot relitigate that issue now. They have waived that argument, and the date wage loss began on January 17, 2014, is the law of the case.

b. The Issue of and Date of Maximum Medical Improvement is beyond the Scope of Remand from the Court of Appeals.

Commissioner McCaskill and the Appellate Panel found that Claimant had reached maximum medical improvement but the order finds no particular date of MMI. In the Court of Appeals Opinion, it notes, “Appellants present their issue on appeal as challenging the Appellate Panel’s finding of MMI for all of his work related injuries but concede in their brief Adickes was at MMI for his head and cervical spine.” The court went on to affirm that Claimant was at MMI. None of the orders find a particular date of maximum medical improvement, and the Court of Appeals did not remand for a determination of such.

The Court of Appeals has stated “where a case that has been appealed is remanded by the court to the workers’ compensation commission with specific directions, the commission must proceed in accordance with those directions.” *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen’s Compensation* § 790 at 37 (1958)). Further, the court opined, “[i]n such a case, the order limits the authority of the commission.” *Id.* The Supreme Court has additionally held that an administrative body can not consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for a determination pursuant to specific instructions. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

It is not unexpected that no commissioner, panel, or court found a date of MMI, for the date at which Claimant reached MMI is irrelevant. The only relevance of a finding of MMI is that it

determines whether medical care is wide open or limited in scope by the final order. Therefore, to accept the Defendants' argument, the Commission would have to find a date of MMI. This is beyond the scope of the order of remand from the Court of Appeals. *Adickes v. Philips Healthare*, 2018-UP-027 (January 17, 2018) ("we reverse the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits."). The Court of Appeals did not direct or empower the Commission to determine a date of MMI. To do so at the behest of defendants would be to go down a rabbit hole beyond the scope of the remand of the Court of Appeals and would be reversible error.

c. Any Date of MMI is Irrelevant and Unnecessary in a Wage Loss Award.

When a claimant pursues wage loss benefits, the commission has no need to determine a date at which that claimant reached maximum medical improvement. Section 42-9-20 provides:

Except as otherwise provided in Section 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

The words temporary or permanent do not appear in the above cited statute. It only awards benefits based on disability, which is defined as the incapacity to earn pre-injury wages. The Court of Appeals agreed, and Claimant clearly meets that definition of disability.

The Court of Appeals stated, "The record is clear Adickes did not suffer a wage loss until he was terminated from his employer." However, once Philips terminated Claimant, he did begin to suffer wage loss that is well documented and no longer in dispute. Implicit in the court's reasoning is this conclusion: Claimant suffered a decrease in his ability to earn wages, which was caused by his

workplace injury, and which manifested itself on January 17, 2014, when Claimant was terminated. Section 42-9-20 compensates for a loss in earning capacity. When that loss manifests itself in relation to MMI is of no consequence. See *Outlaw v. Johnson Service Co.*, 254 S.C. 486, 176 S. E. 2d 152 (1970) (Loss of earning capacity alone is the criterion for compensation under the act and medical opinion as to the extent of physical disability can have no probative value against actual earnings.) The record is clear and the Court of Appeals agreed, there was no wage loss before Claimant's termination, but he suffered wage loss at the time of and following his termination.

Defendants treat this case as if it were a 42-9-30 scheduled member case. In a scheduled member case, a Claimant has to reach that maximum medical plateau before an award for loss of use disability can be made. In those cases, loss of earning capacity is irrelevant. As the Single Commissioner noted, the law is settled that a 42-9-20 or 42-9-10 general disability award may be awarded before or without regard to MMI.

Defendants cite cases for the proposition that permanency benefits cannot be awarded until MMI. The cases cited largely deal with termination of TTD benefits and credit. Further, that position is not the law. In *McMahon v. SC Dept. of Education*, 417 S.C. 481, 790 S.E. 2d 393 (Ct. App. 2016), the court held that an individual can also be permanently disabled and still yet to have achieved MMI. The Court of Appeals expressed a similar maxim in *Dodge v. Brucoli, Clark, Layman, Inc.* where it stated "Maximum medical improvement is a distinctly different concept from disability." 334 S.C. 574, 581, 514 S.E.2d 593, 596 (Ct. App. 1999). Likewise, in *Bass v. Kenco Group* the Court of Appeals discussed the interplay between MMI and findings of permanent wage loss and stated, "A declaration of MMI is irrelevant to the award of permanent partial disability." 366 S.C. 450, 466, 622 S.E.2d 577, 585 (Ct. App. 2005).

d. If an MMI Date is Necessary, Claimant reached MMI on November 1, 2012

If the date at which Claimant reached Maximum Medical did matter and making a finding of MMI at this time was proper, then this Panel should find Claimant reached MMI on November 2, 2012, the date at which he was found to have reached MMI for his cognitive injuries by Dr. Welshofer.¹ The Commission previously found that Claimant's statutory disability was a direct result of his loss of executive function from his brain injuries. In essence, Claimant would have suffered the same statutory disability even without the shoulder injury. As a result, if a date of MMI is needed to award wage loss benefits, then the date of MMI that is used should be the date Claimant reached MMI for the injury that most proximately caused the wage loss, November 1, 2012.

e. Limiting an award of permanent partial disability on both ends of the award is violative of due process.

Claimant additionally asserts that restricting a claim for permanent partial wage loss to 340 weeks while simultaneously preventing such benefits from accruing until the date MMI is reached violates due process. This argument is fully elucidated in Claimant's memorandum in support of his appeal to this panel.

II. THE SINGLE COMMISSIONER CORRECTLY DID NOT GIVE DEFENDANTS CREDIT FOR THE SEVEN WEEKS AND FIVE DAYS OF TTD PAID TO CLAIMANT

The Single Commissioner properly refused to give Defendants credit for the seven weeks and 5 days Claimant received TTD. The South Carolina Code at section 42-9-20 plainly states that when a period of total disability benefits is paid, the number of weeks such benefits were paid "shall not be deducted from the maximum period allowed in [section 42-9-20] for partial disability." Therefore Claimant is entitled to an additional 7 and 5/7 weeks of wage loss benefits.

¹ Defendants appealed the Appellate Panel's findings of MMI, but conceded that Claimant had reached MMI for his injuries to his head and cervical spine. (See Appellant's final Brief, p. 22).

The contrary position taken by Defendants on this point is nonsensical. To assert that without the final sentence of 42-9-20 the maximum award for partial wage loss benefits would be reduced by the number of weeks of TTD paid is to undermine the remaining portions of 42-9-20. Moreover, it would make the final sentence redundant. It is not redundant and serves to increase the available weeks of wage loss benefits. This was the holding of the Court of Appeals in *Bass v. Kenco Group*, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005) (*holding* the commission properly awarded 340 weeks of partial wage loss benefits to an injured employee who received TTD for a period of time before manifestation of his wage loss). Therefore, the Single Commissioner properly interpreted the final sentence of 42-9-20 pursuant to its plain reading.

III. THE SINGLE COMMISSIONER PROPERLY AWARDED BENEFITS FOR ALL WEEKS CLAIMANT SUFFERED WAGE LOSS UNTIL THE 340 WEEKS AFTER HIS ACCIDENT

The Single Commissioner properly awarded wage loss benefits to Claimant for all weeks he suffered a reduced earning capacity, up to the 340 week limit. Claimant was injured March 22, 2011. After a period of total disability, Claimant worked with the employer at the same rate of compensation; however, he was terminated on January 17, 2014. At that point, he began suffering wage loss for he, undisputedly, could not find other work earning the same wages as a result of his loss of cognitive function. That is the proper date for the commencement of his wage loss benefits; the date his wage loss began. To predicate his entitlement to wage loss benefits on anything other than the date he began losing wages is either illogical or a gross conflation of wage loss benefits and benefits for loss of use. To accept the Defendants' position, the Commission must determine that Claimant was not entitled to any compensation during the weeks between January 17, 2014, and January 14, 2016, the week arbitrarily set by Defendants as the date Claimant reached MMI.

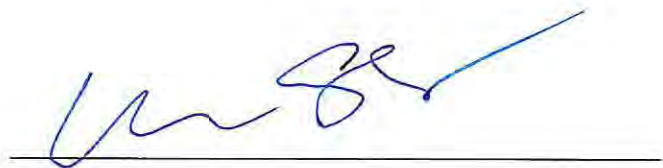
This would further limit the award to a severely injured worker who has already been penalized for attempting to work following his injury.

Claimant, however, suffered wage loss during that time as a result of his compensable, on the job injury. He received no benefits during that time, and he was incapable of earning his preinjury wages. Restricting Claimant's entitlement to benefits during this period serves no purpose. This is contrary to the goals of the workers' compensation act and only harms the Claimant. A claimant in a workers' compensation case has the right to seek wage loss benefits based on his limitations of earnings without regard to MMI. That is why, as stated above, MMI is irrelevant to this matter.

CONCLUSION

Based upon the foregoing, Claimant respectfully requests the Commission affirm the Single Commissioner's order and award of benefits as outlined above. Additionally, Claimant requests the Commission grant the relief sought in his memorandum filed in support of his appeal in this matter.

Respectfully submitted,



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Dated: April 8, 2019

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1102937**

BARRY ADICKES,	)	
	)	
Claimant,	)	
	)	
Respondent,	)	APPELLANTS' REPLY BRIEF
	)	TO THE FULL COMMISSION
vs.	)	
	)	
PHILIPS HEALTHCARE and FIDELITY	)	
AND GUARANTEE INSURANCE CO.,	)	
	)	
Defendants,	)	
	)	
Appellants.	)	

COME NOW, Philips Healthcare and Fidelity and Guarantee Insurance Co, Appellants,
and Reply to Respondent's Memorandum in Response to Appellants' Appeal as follows:

I. THE ISSUE OF MMI IS RELEVANT AND NOT BEYOND THE SCOPE OF REMAND:

1. The Court of Appeals Did Not Order Respondent's Wage Loss Benefits Commenced as of January 17, 2014:

The Full Commission held that Respondent's wage loss award began on January 17, 2014, which is when he was terminated from Philips. The Court of Appeals disagreed, holding "Accordingly, we *reverse the Appellate Panel's award of 340 weeks' compensation commencing January 17, 2014* and remand for a new calculation of benefits consistent with the plain language of § 42-9-20."

Respondent argues that the Court of Appeals did not reverse this finding, so this date of commencement is the "law of the case." Respondent cited the specific language cited above from

the Court of Appeals Order, yet immediately below the citation, he inexplicably argues that “the Court of Appeals explicitly affirms that the wage loss began on January 17, 2014.”

When, in reality, the Court of Appeals used the word Reverse. Not its antonym, Affirm. Thus, Appellants maintain that the plain language of the Court of Appeals Order evidences that the Full Commission’s determination as to the date of commencement of the wage loss award was reversed, so that issue is properly on remand.

2. Appellants Never “Waived” the Argument that Wage Loss Benefits are Commenced as of the Date of MMI:

Respondent argues that Appellants “made their ‘award does not begin until MMI argument’ to the Court of Appeals and the Court did not agree, so Appellants were required to petition for a rehearing in order to “keep the issue alive.” Respondent further argues that Appellants “cannot relitigate that issue now. They have waived that argument,” since Appellants did not “keep the issue alive.”

Respondent’s argument is wholly contradictory, as he acknowledges that the MMI argument was made by Appellants by the Court of Appeals; therefore, it cannot be said that Appellants “waived” the argument.

3. The Date of MMI Is Relevant and Necessary in a Wage Loss Award:

Respondent boldly argues that “It is Not the Law” that permanency benefits cannot be awarded until MMI. Bold because, the reality is that it is the law.

In fact, this is a law that Claimant’s counsel is well aware of, as evidenced by the arguments he made for years leading up to the Court of Appeals Order – back when a permanent wage loss award guaranteed a lump-sum payout of 340 weeks of benefits.

When this case was originally heard on January 21, 2015, the Claimant acknowledged that the date of MMI was relevant to a wage loss award. For this reason, the Claimant amended his

pre-hearing brief to include Dr. Barron's questionnaire response, in the hopes that it would persuade the Commissioner that the Claimant was at MMI for all of his injuries. As such, Commissioner McCaskill found that the case was ripe for a permanency determination because the permanent ratings assigned by Dr. Barron in his questionnaire were "determinative as to MMI."

In his brief to the Full Commission on the first appeal, Respondent argued that "the preponderance of the evidence in the record clearly indicates that the Claimant reached MMI for the work-related injuries sustained on March 22, 2011." (Clmt 12.14.15 FC Brief, p.16). As such, Respondent further argued that "the Single Commissioner was also correct in proceeding with a determination of permanent disability as a matter of law." (*Id.* at p. 19). Similarly, in Respondent's brief to the Court of Appeals, he argued that "Dr. Barron's permanent impairment rating to Barry's right shoulder is evidence that a permanency award is appropriate." (Clmt 8.4.16 Final Brief to COA, p.6).

The Claimant's recent U-turn in this regard flies in the face of well-established cases on this issue, such as Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). All of which are thoroughly laid out in Appellant's Brief.

4. The Cases Cited by Respondent in Support of the Argument that the Date of MMI Is Irrelevant and Unnecessary in a Wage Loss Award are Not Inapplicable to this Case:

a. Outlaw v. Johnson Service, 254 SC 486 (1970).

The Claimant cites Outlaw for the proposition that when loss of earning capacity manifests itself in relation to MMI is of no consequence. When, in reality, the phrases "MMI" and/or "maximum medical improvement" are nowhere to be found in the entire Outlaw opinion. Rather, the Outlaw Court dealt with the issue of whether the *degree* of medical impairment impacts a general disability award, nothing to do with the timing of MMI.

b. McMahon v. SC Department of Education, 417 S.C. 481 (2016).

Respondent cites McMahon for the proposition that an individual can be permanently disabled and still yet to achieve MMI. Yet, in reality, the McMahon court specifically stated that the decision did not hinge on whether the Claimant had reached MMI. Rather, since McMahon had died due to unrelated causes after his injury, the McMahon court's focus was on whether a Claimant could be entitled to a posthumous adjudication of permanent disability, under § 42-9-280.

c. Bass v. Kenco Group, 366 S.C. 450 (2005).

Respondent argues that Bass stands for the proposition that a declaration of MMI is irrelevant to the award of permanent partial disability. When, in reality, the *actual* holding from Bass states: "A declaration of MMI is irrelevant to the award of permanent partial disability *in this case*." (emphasis added). Bass suffered two compensable injuries – a shoulder injury and a subsequent mental injury resulting from same. The Bass court analyzed whether a Claimant could be entitled to permanent benefits having only reached MMI for his physical injuries, since there was no clear designation of MMI for his mental injury.

The Bass Court focused on the rationale for ceasing temporary benefits in favor of permanent benefits upon a finding of MMI, since the designation indicates that the injury is permanent. Thus, the court noted that the Claimant's psychologist, Dr. Estefano, stated that the Claimant will continue to suffer mentally as long as he suffers from his work-related injury. It follows that, since his physical injury was deemed to be permanent, the Court found that his mental injury was also permanent in nature.

This holding is only applicable to cases with particular facts as those in Bass. Here, Respondent does not suffer from a psychological injury; thus, Respondent's reliance on the Bass case is incorrect.

d. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574 (1999).

Respondent cites Dodge as standing for the proposition that MMI is a distinctly different concept from disability. The Dodge court was faced with the issue of whether a Claimant is entitled to additional medical treatment following designation of MMI, which is not an issue here.

5. The Proper Date of MMI for Purposes of Calculating a Wage Loss Award is When the Claimant Is at MMI for All Work-Related Injuries.

In his 2015 brief to the Full Commission, Respondent argued “[t]herefore, the Single Commissioner was correct in finding that Claimant reached MMI for all of his work-related injuries as of Dr. Barron’s January 14, 2015 statement.” Similarly, in his Conclusion, Respondent argued that “the medical evidence supports that the Claimant reached MMI for all of his work-related injuries.” (Id. at p. 28).

Now, in yet another about-face, Respondent argues that if the Commission finds that the date of MMI does matter, “the Commission should find that the Claimant reached MMI on November 2, 2012, the date of designation related to his cognitive injuries.” Respondent chose this date because the Commission previously determined that the Claimant’s loss of earning capacity was a result of his brain issues. Respondent cites no legal authority in support of his latest contention that the Claimant need only be placed at MMI for the injury found to have contributed to the loss of earning capacity because, in reality, there is none.

6. Commencing A Wage Loss Award at the Date of MMI is Not Violative of Due Process:

Respondent argues that restricting a claim for permanent wage loss benefits to 340 weeks while preventing the benefits from commencing as of the date of MMI is violative of Due Process.

Assuming Respondent is referring to the 5th Amendment, applied to the states via the 14th Amendment, Due Process requires that states respect the legal rights owed to a person – life, liberty and property. Appellants remain unclear of how this argument applies to this case.

II. THE FINAL SENTENCE OF S.C. CODE ANN. § 42-9-20 DOES NOT OPERATE TO EXTEND A WAGE LOSS AWARD:

Respondent argues that the final sentence of the statute warrants an extension of a wage loss award according to the amount of weeks of temporary benefits received. Respondent further argues that Appellant's position to the contrary is "non-sensical." In reality, interpreting this sentence as a means to "increase the available weeks of wage loss benefits" is non-sensical, as there is not a single word supporting the proposition that the Claimant is entitled to double recovery of temporary benefits when receiving a permanent wage loss award.

Moreover, Respondent's interpretation is completely in contravention to the strict directives of the Court of Appeals, which stated in no uncertain terms that "the statute explicitly mandates that in 'no case' will PPD benefits be available to a claimant beyond the term of 340 weeks 'from the date of injury.'" While Appellants are thrilled that Respondent has finally come around to acknowledging the importance of the "plain language of the statute," Appellants remain confounded at how Respondent arrived at this interpretation.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Full Commission reverse the Single Commissioner's calculation of Respondent's permanent wage loss award.

[SIGNATURE ON FOLLOWING PAGE]

This 18th day of April, 2019.

Respectfully submitted,



Brooke A. Payne

SC Bar #: 81085

Attorney for Appellants

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South Carolina Workers' Compensation Commission

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Columbia, South Carolina 29202-1715
(803) 737-5723 www.wcc.sc.gov



WCC File #: 1102937

Carrier File #: 002380009116WC01

Carrier Code #:

Employer FEIN #:

Claimant's Name: Barry Simmons Adickes SSN: 251-31-7784 Employer's Name: Phillips Corporation
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA Zip: _____
Home Phone: (803) 328-0160 Work Phone: _____ Insurance Carrier: Gallagher Bassett Services
Preparer's Name: William L. Smith II Law Firm: Chappell, Smith & Arden Preparer's Phone #: 803-929-3600

A claim for workers' compensation benefits is made based on the following grounds:Date of Injury or Illness: 3/22/2011

- ☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☐ Physical Brain Injury ☐ Concurrent Jurisdiction
- The claimant sustained an injury to brain, shoulders, neck, & cervical spine (Part(s) of Body Injured) on 3/22/2011 (Month/Day/Year) in North Caroli county, state of SC. Body part(s) affected are: brain, shoulders, neck, & cervical spine
 - Briefly describe how the accident occurred. Claimant injured in an on the job car accident.
 - Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 - The relationship of employer and employee existed at the time of injury.
 - At the time of the injury the claimant was performing services arising out of and in the course of employment.
 - Notice of the accidental injury was given to the Employer on 3/22/2011 (Month/Day/Year) in the following manner:

- ☒ 7. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: brain, shoulders, neck, & cervical spine- carrier is not providing medications prescribed by ATP.
- ☐ 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: N/A
- ☐ 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☐ Partial ☐ (2) Specific Disability: ☐ Total ☐ Partial ☐ (3) Wage Loss
- ☐ 9a. ☐ A determination of permanent disability is premature at this time.
- ☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
- 10a. At the time of the injury, the Claimant was paid weekly wages of 2,788.46, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
N/A
11. Further grounds or unusual aspects of claim:
Only issue is failure to provide treatment as per prior order. Request fines, penalties, interest, and attorney's fees.
- 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Dr. Howard Mandell; Dr. Jerry L. Barron; Dr. Richard Park; Piedmont Medical Center; Dr. Nicholas Tuttle; Dr. James Rentz
- 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe: N/A
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13a. I am filing a claim. I am not requesting a hearing at this time. 14. Estimated time needed for hearing: _____
- ☒ 13b. I am requesting a hearing. A \$50 fee is required.

Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Brooke A. Payne, Esq.
address Payne Law Group Charleston on the _____ day of September 2018, by ☐ first class postage ☐ certified mail ☐ personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: [Signature] Attorney: bsmith@csa-law.com Title: _____ Email: _____ Date: 9-20-18

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

WCC Form # 50

Revised 7/13

50
-0208-Employee's Notice of Claim and/or
Request for Hearing



Barry Adickes v. Philips Electronics
SCWCC Claim No.: 1102937

DEFENDANTS' RESPONSE TO PROPOSED ORDER
Submitted June 6, 2019

1) Whether the Defendants Improperly Suspended Benefits as of February 6, 2019:

First and foremost, Defendants reiterate our position that this issue isn't proper to be heard at the Single Commission level, as the issue of calculation of the wage loss Award is before the Full Commission. This decision has the potential to produce inconsistent awards, such as those contemplated in the recent Russell v. Wal-Mart opinion. 826 S.E. 2d 863 (2019). (2016).

In the alternative, Defendants urge the Commissioner to reconsider her ruling. As it stands, the Proposed Order is in direct contravention of the controlling authority on the issue of an employer's payment obligations during an appeal, Case v. Hermitage. 236 S.C. 515 (1960). As detailed below, Case v. Hermitage thoroughly analyzed the application of this statute. The Court weighed the need to provide financial support to the Claimant during the appeal process against the possibility of that award being reversed and the Employer being unable to recoup payments made. As a result, the Court of Appeals concluded that the fairest resolution is to only require the Employer to pay the weekly benefits accrued AFTER the date of the Full Commission Award, not payment of the Award itself.

In summary, Defendants were entitled to suspend Adickes' weekly benefits following the Court of Appeals decision because all of the weekly benefits that have accrued AFTER the date of a Full Commission Order have been paid.

The applicable statute is § 42-17-60:

*"In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to **make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined** in accordance with the provisions of this title."*

Application and interpretation of the above supersedeas provision had caused difficulties for the courts for years leading up to Case v. Hermitage. Id. at 530. In Case, the Court of Appeals looked at all of its prior decisions in this regard and recognized that the language *"until the*

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questions at issue have been fully determined” is susceptible to two different interpretations: (1) requiring the Employer to make payment of continuing weekly payments that become due, rather than lump-sum or recurring payments, or (2) all payments including those for disfigurement, medical expenses and accrued weekly compensation from the date of accident. (Id. at 533).

In its analysis, the Court discussed that the legislative intent behind the statute is to provide financial aid to an employee whose disability has been adjudged compensable by the Commission, to the extent of the weekly benefits provided for in the award. (Id.). On the other hand, the court acknowledged that employers cannot invoke the supersedeas provisions, which opens them up to the possibility of not being able to recoup payments made on an award that is subsequently reversed. (Id.). The Court determined that the fairest resolution is to provide weekly benefits to the Employee while the claim is on appeal, but limit the employer’s payment obligations to only those accruing during the pendency of the appeal. (Id.). As such, the Court of Appeals held that employers are only obligated to make payments of ongoing weekly benefits provided for in the Award following the commencement of the appeal (date of Full Commission Order), as opposed to paying the entire Award while on appeal. (Id.).

The McLeod case demonstrates proper application of this supersedeas payment statute when the Court of Appeals has issued a remand. McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466 (1984). The Full Commission Award (dated February 21, 1980) deemed McLeod’s back condition compensable, awarded a period of TTD benefits from June – December 1978, and awarded PPD benefits of 25% loss of use of his back. The Circuit Court affirmed. Piggly Wiggly appealed to the Court of Appeals. While on appeal, the Circuit Court ordered Piggly Wiggly to make payments of the PPD benefits accruing after the date of the Full Commission Award.

The Court of Appeals affirmed the compensability of McLeod’s back condition and his entitlement to a TTD award, but remanded to determine the proper dates of the TTD award. (Id. at 472). Additionally, the Court of Appeals reversed the PPD award and remanded for the court to redetermine whether the Claimant’s entitlement to PPD and, if so, the extent of same. (Id.). Specifically, the Court of Appeals decision was as follows: “Accordingly, all issues on appeal are affirmed except the ones relating to the extent of partial loss of use and the award of TTD. Those two issues are remanded for further factual findings consistent with this opinion. ***Because of the remand, no payments shall be required until the expiration of the thirty-day period following the Commission’s decisions on the remanded issues.*** (Id. at 472, *emphasis added*).

The Court also reviewed the Circuit Court’s Order compelling Piggly Wiggly to commence payment of the PPD award while on appeal. (Id.). The Court noted that PPD benefits are in the nature of support, just like TTD payments, and held that the Order compelling payment of the PPD benefits that had accrued after the date of the Full Commission Award was proper. (Id.).

The important takeaways from McLeod are as follows:

- The Full Commission Award ordered a period of TTD benefits which took place more than a year before the Full Commission's Award. The Full Commission Award also ordered payment of the 25% PPD award in weekly installments.
- During the pendency of the appeal, Piggly Wiggly was ordered to pay ongoing PPD benefits pursuant to the Full Commission Award providing for ongoing weekly payments of same. Piggly Wiggly was not ordered to pay the TTD benefits while on appeal.
- The Court of Appeals reversed the PPD award; thus, as of the date of its decision, the Order on appeal no longer provided for "ongoing weekly benefits" to McLeod. For this reason, the Court of Appeals directed Piggly Wiggly to not make any additional payments until the final award.
- Piggly Wiggly was not ordered to pay TTD benefits during the remand because the period of TTD provided in the order on appeal was in 1978, which was well BEFORE the Full Commission Award.

Application to this Case:

The Order on appeal and procedural posture of this case on remand is nearly identical to that in McLeod. The 2016 Full Commission Award ordered Defendants to commence benefits as of January 17, 2014 for a period of 340 weeks, which granted him weekly benefits until **July 24, 2020**. Defendants were under an Order providing ongoing weekly benefits to Adickes when this appeal was commenced, so Defendants properly commenced weekly payments of PPD as of the date of the Full Commission Award. The Court of Appeals agreed that Adickes was entitled to a § 42-9-20 award, but explicitly limited the wage loss award to 340 weeks from the date of accident and remanded to the Appellate Panel for a new calculation of same. 340 weeks from the date of accident in this case is **September 26, 2017**, which was 3 months before the Court of Appeals issued its decision. Thus, as of the date that the Court of Appeals issued its decision, Defendants were no longer under an Order to continue providing weekly PPD benefits to Adickes. Even so, Defendants continued paying Adickes on a weekly basis for 70 additional weeks.

Defendants have fully complied with § 42-17-60. Defendants commenced benefits as of the date of the Full Commission Award. Defendants continued to pay these benefits during the pendency of the appeal. The COA Order explicitly states that Adickes is not entitled to weekly wage loss benefits beyond September 26, 2017. It is undisputed that Defendants paid wage loss benefits for the period from the Full Commission Award to September 26, 2017. The current Order on appeal is Commissioner Barden's Award, wherein she ordered the Defendants to provide weekly wage loss benefits through November 21, 2017. It is also undisputed that Defendants paid wage loss benefits for the period from the Full Commission Award to November 21, 2017. Moreover, Commissioner Barden's Award acknowledges that all of the weeks at issue occurred before Defendants commenced benefits by stating: "More than 340 weeks have elapsed since the date of injury so all of the weeks owed have accrued."

Just like in McLeod, the only remaining issue on remand concerns Adickes' entitlement to weekly wage loss benefits for the period BEFORE the Full Commission Award. Defendants have

paid all of the weekly wage loss benefits accrued AFTER the Full Commission Award, which is all that is required under § 42-17-60, as demonstrated in McLeod. Defendants have no obligation to pay benefits accruing before the Full Commission Award while awaiting a final award. See Case, McLeod, supra.

Requiring the Defendants to continue paying the Award until it becomes final is the exact scenario that was contemplated in Case v. Hermitage and found to be unfair to employers. In exchange for providing Adickes with the weekly benefits accrued during the appeal, Defendants are not obligated to make payment of the benefits accruing before the Full Commission Award. Any ruling to the contrary is in violation of the proper application of § 42-17-60.

Moreover, Defendants anticipated that the Full Commission would comply with the directives of the Court of Appeals and issue an Order with a new calculation of benefits shortly after the remand. For this reason, Defendants continued paying Adickes weekly benefits with the understanding that it would offset the final wage loss award. Defendants had no reason to anticipate that the Full Commission would remand to a Single Commissioner and the Single Commissioner would then require a hearing. See Russell v. Wal-Mart. Defendants opted to stop payment of the weekly PPD benefits during these unnecessary delays caused by non-compliance with the remand directives.

In sum, Adickes should be appreciative to Defendants for continuing to provide financial assistance while under no obligation to do so.

2) Whether Defendants are subject to Sanctions under § 42-3-175:

S.C. Code Ann. § 42-3-175 allows the Commission to impose sanctions based on “willful disobedience” of an Order. The party seeking contempt has the burden of proving the necessary elements by clear and convincing evidence, the highest standard of proof known to the civil law. Durlach v. Durlach, 596 S.E.2d 908, 912 (S.C. 2004); Miller, 652 S.E.2d at 761. The conduct proscribed or prescribed by the order must be set forth in “clear and certain” terms; it must be stated specifically and definitely rather than by implication. Welchel v. Boyter, 196 S.E.2d 496, 498 (S.C. 1973). The contemptuous conduct must be a “willful disobedience” of the order, *i.e.*, contempt does not lie for a violation resulting from mistake, misunderstanding, confusion, or negligence. Henderson v. Henderson, 379 S.E.2d 125, 129 (S.C. 1989) (emphasis added). To be “willful,” the disobedience must be done “voluntarily and intentionally with the specific intent to do something” forbidden by the order (the proscribed conduct) or “with the specific intent to fail to do something” required by the order (the prescribed conduct). State v. Sowell, 635 S.E.2d 81, 83 (S.C. 2006), *quoting Spartanburg County DSS v. Padgett*, 370 S.E.2d 872, 874 (S.C. 1988).

The word willful is used in portions of the WC Act in relation to defenses provided to the Employer. With regard to the “willful intent” to injure defense, the courts have held that the “willful intent” defense finds application only in those cases where it is shown the acts of the employee are so serious and aggravated as to evidence a willful intent to injure. Ziegler v. S.C.

Law Enforcement Division, 250 S.C. at 329. In Reeves v. Carolina Foundry and Machine Works, the Court of Appeals held that the word “willful” means more than just “intentional.” 194 S.C. 403 (1940). The Reeves court determined that the phrase “willful intent” means deliberate intent or formed intent. (Id.). The burden of establishing such defense rests on the party asserting it. (Id.).

Moreover, this statute has been previously analyzed by Your Honor, in an decision which was subsequently upheld by the Full Commission. Apiphany Richie, Employee, Claimant Propel Peo, d/b/a Sonic Drive-in, Employer & Guarantee Ins. Co., Carrier, Defendants, No. WCC 1300421, 2014 WL 7927738 (S.C. Work. Comp. Comm. Feb. 11, 2014). In analyzing whether Defendants were subject to sanctions under this statute, it was held that “willful contempt is an act with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.” (Id.).

Defendants admit that there was a delay in authorization of his prescription medications prescribed by Dr. Mandell. During that time, Defendants remained in constant communication with his counsel about the status of approval. While we concede to the delays, in no way did Defendants delay the authorizations intentionally or do so to deliberately disregard the law. Adickes is claiming that the Employer/Insurer are in contempt of the Order; thus, it is his burden to prove that the Defendants acted with the requisite willful intent. Adickes has provided no evidence showing that Defendants acted with a bad purpose or intent to disobey the law.



Claimant's Name: Barry Adickes SSN: 251 - 31 - 7784 Employer's Name: Philips Healthcare
Address: 1137 Hummingbird Lane Address: 3000 Minuteman Road
City: Rock Hill State: SC Zip: 29732 City: Andover State: MA Zip: 01210
Home Phone: (864) 328 - 0150 Work Phone: () - Insurance Carrier: Gallagher Bassett Services
Preparer's Name: Brooke Payne Law Firm: Payne Law Group, LLC Preparer's Phone #: (843) 732 - 6280

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 3/22/2011

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

Please see attached Addendum for Questions Presented.

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

☐ **Mediation**

- ☐ a. Mediation is requested by consent of the Parties pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

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

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Williams Smith, Esq., Chappell, Smith & Arden

address bsmith@csa-law.com on the 3rd day of July 2019,

by ☐ first class postage ☐ certified mail ☐ personal service ☒ electronic service

Brooke Payne
Preparer's Signature

Attorney for E/I
Title

bpayne@paynelq.com
Email

07/03/2019
Date

Check this box if you are not represented by an attorney ☐

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

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

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1102937

BARRY ADICKES,)
)
Respondent,)
)
vs.)
)
PHILIPS HEALTHCARE and FIDELITY)
& GUARANTY INS. CO. C/O)
GALLAGHER BASSETT)
SERVICES, INC.,)
)
Appellants.)
_____)

**FORM 30 ADDENDUM:
QUESTIONS PRESENTED**

Form 30 Questions Presented:

1. Whether the Single Commissioner erred in conducting a hearing in this claim on the issue of payment of permanency benefits, while the issue of calculation of the Claimant's permanency benefits was pending before the Full Commission.
2. Whether the Single Commissioner erred in finding (Finding of Fact No. 2) that there is no order in the file allowing defendants to stop payment of weekly benefits. Finding of Fact No. 2 constitutes an error of law.
3. Whether the Single Commissioner erred in finding (Finding of Fact No. 3) the award has not been fully paid under the current order. The error being that Commissioner Barden's Order was on appeal. Finding of Fact No. 3 constitutes an error of law.
4. Whether the Single Commissioner erred in finding (Findings of Fact Nos. 5 and 6) that the questions at issue have not been fully determined in accordance with S.C. Code Ann. § 42-17-60, requiring Defendants to reinstate weekly benefit payments. Findings of Fact Nos. 5 and 6 constitute an error of law.
5. Whether the Single Commissioner erred in finding and concluding (Findings of Fact Nos. 4 and 7 and Conclusions of Law Nos. 1 and 2) that the Defendants illegally stopped payment of weekly benefits on February 5, 2019 and are subject to fines and penalties for same. Findings of Fact Nos. 4 and 7 and the supporting Conclusions of Law also constitute an error of law.
6. Whether the Single Commissioner erred in finding and concluding (Finding of Fact No. 9 and Conclusion of Law No. 3) that the 27 day delay in authorization of a medication constituted willful disobedience of an order, subjecting Defendants to fines of \$200.00/day,

as this is unsupported by the preponderance of evidence in the record. Finding of Fact No. 9 and the supporting Conclusion of Law also constitute an error of law.

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1102937**

BARRY ADICKES,	)	
	)	
Claimant,	)	
	)	
Respondent,	)	APPELLANTS' BRIEF TO
	)	THE FULL COMMISSION
vs.	)	
	)	
PHILIPS HEALTHCARE and FIDELITY	)	
AND GUARANTY INSURANCE CO.,	)	
	)	
Defendants,	)	
	)	
Appellants.	)	
_____	)	

STATEMENT OF THE CASE

A Form 50/51 Hearing was held before Commissioner Melody L. James of the South Carolina Workers' Compensation Commission ("the Commission") on April 19, 2019, in Columbia, South Carolina. Adickes sought recommencement of his weekly benefits as of February 6, 2019 and penalties related to the suspension of same. Adickes also sought penalties associated with delays in authorizations of Respondent's prescriptions.

In an Order dated June 19, 2019 ("James Order"), Commissioner James held that Appellants illegally terminated Adickes' disability benefits on February 6, 2019, in violation of S.C. Code Ann. § 42-17-60. The Single Commissioner further held that Appellants were subject to a 10% penalty on all unpaid weekly benefits pursuant to S.C. Code Ann. § 42-9-90. Lastly, the Single Commissioner held that Appellants had wilfully disobeyed a prior Order for a period of 27 days, and were subject to fines of \$200.00/day pursuant to S.C. Code Ann. § 42-3-175.

Appellants have filed a Form 30 Request for Review of the James Order, arguing that the issues before Commissioner James were not appropriate to be considered at a hearing in light of the fact that the calculation of Adickes' permanent partial disability benefits was pending before the Full Commission. Appellants also argue that Adickes is not entitled to weekly disability benefits, as the South Carolina Court of Appeals explicitly ruled that Adickes is not entitled to weekly benefits beyond 340 weeks from the date of injury, which was prior the decision date. Finally, Appellants assert that the delays in providing prescription authorizations was a matter of error, which does not rise to the level of wilful disobedience of a prior Order of the Commission.

SUMMARY OF EVIDENCE

Appellants rely on and fully incorporate herein the Summary of Evidence detailed in Appellant's Brief to the Full Commission submitted to this Court on November 11, 2015.

PROCEDURAL HISTORY

Commissioner McCaskill issued an Order ("McCaskill Order"), wherein he awarded Respondent 340 weeks of permanent partial disability benefits under S.C. Code Ann. § 42-9-20. The McCaskill Order was affirmed by the Full Commission on February 8, 2016 ("2016 Appellate Panel Award"). Appellants appealed to the South Carolina Court of Appeals, and properly commenced weekly disability benefits in March 2016 pursuant to the Full Commission decision.

The Court of Appeals issued an Opinion on January 17, 2018, noting that the applicable portion of S.C. Code Ann. § 42-9-20 reads "[I]n no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. We find this to be a limiting clause that restricts the time frame and amount of coverage and should be strictly interpreted." Adickes v. Philips Healthcare, Op. No. 2018-UP-027 (S.C.Ct.App filed January 17, 2018). The Court of Appeals held that the "plain language of the statute limits PPD benefits to

340 weeks from the date of injury, contrary to the Appellate Panel’s interpretation and award. This statute explicitly mandates that in ‘no case’ will PPD benefits be available to a claimant beyond the term of 340 weeks ‘from the date of injury.’” The Court of Appeals reversed the Appellate Panel’s award of 340 weeks’ compensation commencing January 17, 2014 and remanded to the Workers’ Compensation Commission for a new calculation of benefits consistent with the plain language of S.C. Code Ann. § 42-9-20. Id.

The Full Commission issued a Remittitur Routing Sheet on July 16, 2018, assigning the case to a Single Commissioner, so a hearing was set before Commissioner Susan Barden. Commissioner Barden issued an Order on January 17, 2019 (“Barden Order”), wherein she awarded the Claimant wage loss benefits for a period of 200 weeks and 5 days. This figure represents commencement of wage loss benefits as of the date of his termination, July 17, 2014, through 340 weeks from his date of accident plus an additional 7 weeks and 5 days. Appellants appealed the Barden Order to the Full Commission, and the Full Commission affirmed the Barden Order on June 20, 2019 (“2019 Appellate Panel Award”). Appellants have appealed the 2019 Appellate Panel Award to the South Carolina Court of Appeals.

STANDARD OF REVIEW

S.C. Code Ann. § 42-17-50 governs appeals from the Single Commissioner to the Full Commission. This statute statutorily empowers the Full Commission to review the Decisions and Orders of the Single Commissioner and, when appropriate, to make its own Findings of Fact and Rulings of Law. Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E.2d 767 (1991). The Full Commission is the ultimate fact finder in Workers’ Compensation cases and is not bound by the Single Commissioner’s findings of fact. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). *See also* Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)

(Full Commission is fact finder and it is not within Supreme Court's province to reverse Commission's findings if they are supported by substantial evidence). Although it is logical for the Full Commission, which did not have the benefit of observing the witness, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992).

QUESTIONS PRESENTED

1. Whether the Single Commissioner erred in conducting a hearing on issues which were pending before the Full Commission.
2. Whether the Single Commissioner erred in ruling that Appellants unlawfully suspended Respondent's weekly disability benefits.
3. Whether the Single Commissioner erred in finding Appellants willfully violated a prior Order of the Commission.

I. THE SINGLE COMMISSIONER ERRED IN HEARING THESE ISSUES WHILE CLAIM WAS PENDING BEFORE FULL COMMISSION.

This claim has a lengthy and complex procedural history. As of the date of this briefing, this claim has been heard by three Single Commissioners, two Appellate Panels, and the South Carolina Court of Appeals. At the time that the Single Commissioner held a hearing on these issues, the case was pending before the Full Commission for a determination of the proper calculation of Respondent's wage loss award. Commissioner James erred in hearing the issues presented in Respondent's Form 50 as it has the potential to produce inconsistent awards, such as those contemplated in the recent Russell v. Wal-Mart opinion. 826 S.E. 2d 863 (2019).

II. APPELLANTS WERE ENTITLED TO SUSPEND ADICKES' WEEKLY BENEFITS IN FEBRUARY 2019

A. Appellants Satisfied Their Obligation of Paying Weekly Benefits Accrued Following the Full Commission Order while the Case was on Appeal.

Pursuant to S.C. Code Ann. § 42-17-60:

In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title.

There is no supersedeas when a worker's compensation award is appealed beyond the full commission level, but an Employer/Insurer is only obligated to pay weekly benefits accrued following the Full Commission decision. The Single Commissioner's holding that Appellants unlawfully suspended Adickes' weekly disability benefits is in direct contravention to the controlling authority on the issue of an employer's payment obligations while pursuing an appeal, Case v. Hermitage. 236 S.C. 515 (1960).

In Case, the Full Commission and Circuit court awarded weekly benefits to the Claimant. The Employer/Insurer appealed the decision, and the Circuit Court entered an Order staying execution of the Circuit Court Order while the case was on appeal. The Claimant appealed from the Circuit Court's stay Order, arguing that the supersedeas only lasted for 30 days, after which the Employer/Insurer were obligated to pay the award. The Employer/Insurer argued that it was unfair to require payment of an award during the appeal when there was no guarantee that the Employer could recoup the payments if the award was overturned.

The Case court analyzed this question under § 72-356, which is the predecessor to S.C. Code Ann. § 42-17-60. At that time, the statute read "In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas the ***employer is required to make payment of the award*** involved in the appeal or certification until the questions have been fully determined in accordance with the provisions of this title." The Court recognized that the language "make payment of the award" was susceptible to different interpretations. There was no dispute that the Claimant was entitled to ongoing weekly benefits as a source of financial aid during the pendency of the appeal, but court was tasked with determining whether the Employer/Insurer was obligated to pay any other benefits under the award. The Court noted that on one hand, the phrase could refer only to weekly continuing payments awarded to the Claimant, but on the other, it could refer to all benefits awarded to the Claimant in the Award, including disfigurement, medical expenses, and accrued weekly compensation from the date of accident. (Id. At 533).

In its analysis, the Case Court discussed the possibility of an award being reversed on appeal and the fact that there was no way for an Employer to recoup payments made if that were to occur. For this reason, the Court held that an employer's payment obligations should be limited

to protect the Employer in those scenarios. As such, the Court held that employers appealing a Full Commission Award are only required to pay the weekly benefits accrued **after** the date of the Full Commission award.

S.C. Code Ann. § 42-17-60 was modified in 2007 to further clarify that the Employer is only obligated to pay two types of benefits while on appeal: weekly compensation and medical benefits. The 2016 Appellate Panel ordered Appellants to commence benefits as of January 17, 2014 for a period of 340 weeks, which entitled him to weekly benefits until July 24, 2020. Thus, when Appellants appealed the 2016 Appellate Panel Award in March of 2016, Appellants were under an Order to provide ongoing weekly benefits to Adickes and therefore commenced same. There is no dispute that Appellants properly commenced weekly benefits as of the Full Commission Award and continued providing medical treatment during the appeal to the Court of Appeals.

B. Appellants Were Under No Obligation to Continue Payment of Weekly Benefits Following the Court of Appeals Decision.

As discussed in Case, the legislative intent of the supersedeas statute was to provide financial aid to an Employee whose claim has been adjudged compensable in the form of weekly benefits provided for in the award, **so long as the award shall remain in force.** (*supra*, at 531). In January of 2018, the Court of Appeals held that Adickes was entitled to a wage loss award, but explicitly held that he was not entitled to weekly benefits beyond 340 weeks from the date of accident, a date which had already passed. The Court of Appeals answered the question of law in its January 2018 decision, rendering the Full Commission's award of ongoing weekly benefits no longer in force.

C. Appellants Are Under No Obligation to Pay Weekly Benefits While the Case Remains on Remand.

The South Carolina Supreme Court's holding in McLeod v. Piggly Wiggly Carolina Co. demonstrates how a remand could impact an employers' payment obligations. 280 S.C 466 (1984). In McLeod, the Full Commission (award dated February 21, 1980) deemed McLeod's back condition compensable, awarded a period of TTD benefits from June – December 1978, and awarded PPD benefits of 25% loss of use of his back; the Circuit Court affirmed, and Piggly Wiggly appealed. While on appeal, the Circuit Court ordered Piggly Wiggly to make weekly payments of the PPD benefits accruing after the date of the Full Commission award, which was upheld by the Court of Appeals.

The Court of Appeals affirmed the compensability of McLeod's back condition and his entitlement to a TTD award, but remanded the case to determine the proper dates of the TTD award (Id. At 472). Additionally, the McLeod Court reversed the PPD award and remanded for the court to redetermine the Claimant's entitlement to PPD and, if so, the extent of same. (Id.). As such, the Employer/Insurer in McLeod were no longer under an order requiring payment of weekly benefits after the Court of Appeals issued its decision. For this reason, the Court of Appeals included these instructions within its opinion: "***Because of the remand, no payments shall be required until the expiration of the thirty-day period following the Commission's decisions on the remanded issues.***" (Id. at 472, *emphasis added*).

Similar to McLeod, the Court here agreed that Adickes was entitled to benefits occurring before the Full Commission award and remanded for a calculation of same. Also similar, the remaining issue on remand is the determination of the date in which the Claimant's permanent partial disability entitlement began, whether that be the date of MMI, or the date of initial loss of earnings. PPD was commenced as of the date of the Full Commission Award so, without question,

any additional benefits that may be awarded to Adickes certainly occurred *prior* to the Full Commission's Award. It follows that no weekly payments are required during the remand, just as the Court ordered in McLeod.

D. Appellants Did Nothing “Illegal” By Suspending Adickes’ Benefits In February 2019

Appellants expected the Full Commission to perform the calculation and issue an order shortly after the remand pursuant to the directives, so rather than suspending, Appellants continued payment of his weekly benefits as a courtesy. Appellants paid weekly benefits to Adickes for 70 weeks beyond the date of the Court of Appeals decision. As it became evident that Adickes would incur an overpayment due to the ongoing weekly benefits, Appellants suspended his weekly benefits on February 5, 2019 to avoid the situation contemplated in Case, where Appellants would be unable to recover benefits from an employee which were in excess of his actual entitlement.

Adickes has no legal entitlement to ongoing weekly benefits as there is no Order in the case awarding same, so it cannot be said that Appellants have broken any laws by discontinuing those paid voluntarily. Rather than seeking fines and penalties against Appellants, Adickes should be thankful that Appellants opted to provide him financial assistance during the appeal.

III. APPELLANTS DID NOT WILFULLY DISOBEY A PRIOR ORDER.

It is well-established that the Commission has the ability to impose sanctions on either party under certain circumstances. Specifically, under S.C. Code Ann. § 42-3-175, the Commission is allowed to impose sanctions based on “willful disobedience” of an Order; however, “willful disobedience” is a high bar, and should not be attributed in most situations. Further, the party seeking contempt has the burden of proving the necessary elements by clear and convincing evidence, the highest standard of proof known to the civil law. (Durlach v. Durlach, 596 S.E.2d

908, 912 (S.C. 2004); Miller v. Miller, 652 S.E.2d 754, 761 (S.C. Ct. App. 2007)). The Conduct proscribed or prescribed by the Order must be set forth in “clear and certain” terms; it must be stated specifically and definitely rather than by implication. (Welchel v. Boyter, 196 S.E.2d 496, 498 (S.C. 1973)). The contemptuous conduct must be a “*willful disobedience*” of the Order, *i.e.*, contempt does not lie for a violation resulting from mistake, misunderstanding, confusion, or negligence. (Henderson v. Henderson, 379 S.E.2d 125, 129 (S.C. 1989) (emphasis added)). To be “willful,” the disobedience must be done “voluntarily and intentionally with the specific intent to fail to do something” required by the Order (the prescribed conduct). (State v. Sowell, 635 S.E.2d 81, 83 (S.C. 2006), quoting Spartanburg County DSS v. Padgett, 370 S.E.2d 872, 874 (S.C. 1988)).

The word “willful” is used in portions of the South Carolina Workers’ Compensation Act in relation to defenses provided to the Employer. With regard to the “willful intent” to injure defense, the courts have held that the “willful intent” defense finds application only in those cases where it is shown the acts of the employee are so serious and aggravated as to evidence a willful intent to injure. (Ziegler v. S.C. Law Enforcement Div., 250 S.C. 326, 329 (1967)). Further, in Reeves v. Carolina Foundry and Machine Works, the Court of Appeals held that the word “willful” means more than just “intentional.” (194 S.C. 403 (1940)). The Reeves Court determined that the phrase “willful intent” means deliberate intent or formed intent. (Id.). The burden of establishing such defense rests on the party asserting it. (Id.).

Moreover, this statute has been previously analyzed by the Single Commissioner (Richie, v. Propel Peo, d/b/a Sonic Drive-In, WCC No. 1300421, 2014 WL 7927738 (S.C. Work Comp. Comm. Feb. 11, 2014), and was later affirmed by the Full Commission (Richie v. Propel Peo, d/b/a Sonic-Drive-In, WCC No. 1300421, 2015 WL 851340 (S.C. Work Comp. Comm. Jan 6, 2015)). In analyzing whether the defendants were subject to sanctions under this statute, it was held that,

“willful contempt is an act with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.” (Id.)

Appellants admit that there was a delay in authorization of Adickes’ medications prescribed by Dr. Howard Mandell. During that time, Appellants remained in constant communication with Adickes’ counsel about the status of approval. While we concede to the delays, in no way did Appellants delay the authorizations intentionally or do so to deliberately disregard the law. Adickes raised this issue to the Commission, and is claiming that the Appellants are in contempt of an Order; therefore, it is his burden to prove that the Appellants acted with the requisite willful intent. In that regard, Adickes has provided no evidence showing that Appellants acted with a bad purpose or intent to disobey the law.

CONCLUSION

For the foregoing reasons, and in light of the accepted and established standard of review of the Single Commissioner’s Decision and Order by the Full Commission, Appellants respectfully request the Full Commission reverse the Single Commissioner’s award in its entirety

This 14th day of August, 2019.

Respectfully submitted,



Brooke A. Payne
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**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1102937**

BARRY ADICKES,)
)
 Claimant,)
)
 Respondent,)
)
 vs.)
)
 PHILIPS HEALTHCARE and FIDELITY)
 AND GUARANTY INSURANCE CO.,)
)
 Defendants,)
)
 Appellants.)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Appellants' Brief to the Full Commission upon all parties to this matter via electronic transmission and to counsel of record via US Mail as follows:

William L. Smith, II
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This 14th day of August, 2019.

Respectfully submitted,



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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Barry Simmons Adickes,

Claimant,

vs.

Phillips Corporation,

Employer,

Fidelity & Guaranty Insurance Company,

Carrier/Defendants.

CLAIMANT'S BRIEF TO THE APPELLATE
PANEL

WCC FILE NO: 1102937

STATEMENT OF THE CASE

The one thing that Claimants and Defendants agree on is that this case has a tortured procedural history. Claimant was originally awarded medical care and wage loss benefits by Commissioner McCaskill on August 27, 2015, and the Appellate Panel on February 8, 2016. Defendants appealed to the Court of Appeals and as required by §42-17-90, commenced payment of compensation. The Court of Appeals affirmed in part, reversed in apart, and remanded for a determination of the wage loss award consistent with their order. Defendants petitioned both the Court of Appeals and the Workers' Compensation Commission to be allowed to stop making weekly benefits prior to the ultimate decision on the calculation of the wage loss award. Both the Court and the Commission denied that request. Defendants then unilaterally stopped paying benefits on February 7, 2019.

Defendants have also been under order to provide medications as prescribed by Dr. Mandell since August 27, 2015. This part of the order was not appealed. During the summer and fall of 2018 claimant's medications were denied for a total of forty-four days.

Claimant filed a Form 50 seeking an order requiring defendants to bring his payments current as well as penalties for illegal termination of benefits and fines and penalties for enforcement of the order as it related to both weekly payments and provision of medical care. At the time of the hearing, there were a total of forty-four days of disobedience on medical care and seventy-one days of disobedience on failure to pay compensation.

A hearing was held before the Honorable Melody L. James and she ordered defendants to bring compensation current along with a 10% penalty under §42-9-90 as well as a fine under §42-3-175 in the amount of \$200 per day for twenty-seven days for willful disobedience of the order requiring provision of medication as prescribed by Dr. Mandell.

Defendants then filed this Appeal.

ARGUMENT

I THE SINGLE COMMISSIONER PROPERLY HEARD THESE ISSUES.

Defendants argue that the issue of illegal termination of benefits and fines for non-compliance with orders was not proper because they had appealed the ultimate amount of the award to the Full Commission. This argument has no merit. The ultimate amount of the award was the subject of the remand and has absolutely nothing to do with illegal cessation of benefits and refusal to provide benefits pursuant to an order. This argument is simply an attempt to circumvent the defendant's responsibility to provide benefits already ordered.

II DEFENDANTS WERE NOT ENTITLED TO SUSPEND BENEFITS AND FINES
WERE PROPERLY IMPOSED.

Claimant was awarded wage loss benefits and defendants appealed to the Court of Appeals. Pursuant to §42-17-60, they were then required to begin making weekly payment of the award. §42-17-160 provides:

The award of the commission, as provided in Section 42-17-40, if not reviewed in due time, or an award the commission upon the review, as provide in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not after, whichever is the longest, may appeal from the decision of the commission to the court of appeals. Notice of appeal must state the grounds of the appeal or the alleged errors of law. In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time the employer is required to make weekly payments of compensation and to provided medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title. Interest accrues on an unpaid portion of the award at the legal rate of interest as established in Section 34-3-20(B) during the pendency of an appeal.

Clearly, this section provides that “the employer is required to make weekly payments of compensation until the questions at issue have been fully determined in accordance with the provisions of this title.” Here, defendants were ordered to make payment of 340 weeks of wage loss benefits. The Court of Appeals affirmed the wage loss and remanded the issue for a new calculation of benefits consistent with the plain language of §42-9-20. The remand did not completely resolve the questions at issue and §42-9-20 requires continuing payments until questions at issue have been fully determined in accordance with the provisions of this title. Thus, defendants could not lawfully terminate the weekly payments.

Commissioner Barden since heard the case and determined the amount owed. Defendants once again appealed so the issues have still not been fully determined in accordance with the provisions of this title. The legislature intended that the weekly payments entered in an award are to be made until the questions are fully determined upon appeal. Bagwell v. Ernest Burwell, Inc. 227 S.C. 165, 4 S.E.2d 7 (1955).

Further, and perhaps ever more importantly defendants flouted two orders to terminate benefits. First, defendants petitioned the Court of Appeals to stop benefits. The Court of Appeals issued an order on May 11, 2018 declining to address the petition and finding the motion was more appropriate for the Workers' Compensation Commission since the matter had been remanded.

Defendants then filed a motion before the Workers' Compensation Commission on September 18, 2018. That motion was denied by Commissioner Barden on October 2, 2018. Despite being denied by both the Court of Appeals and Workers' Compensation Commission, defendants inexplicably and unlawfully terminated benefits.

Also, Defendants cite Case v. Hermitage Cotton Mills 236 S.C. 515 (1960). 115 S.E.2d 57 (1960) for the proposition that they are no longer under order to continue payment of benefits after the Court of Appeals decision and while the case is on remand. However, the holding in Case is just the opposite. There, the Court held:

"The Commission's award includes in many instances, in addition to weekly benefits, other payments, such as for disfigurement, medical expenses, etc. to be made to or for the account of the injured employee. We construe Section 72-356 as requiring payment, after the expiration of the thirty-day supersedeas period and during the pendency of employer's appeal to the circuit court (and, in case of affirmance there and appeal from that judgment, during the pendency of that appeal and until its final determination) not of such additional amounts, but only of the weekly compensation accruing after the date of the Commission's award.

Thus, defendants do not have to make payment of the full amount of the award but they absolutely had to keep making weekly payments until final determination.

Defendants also cite McLeod v. Piggly Wiggly Carolina Co. 280 S.C. 466 (1984) 313 S.E.2d 38 (1984) for the proposition that they were somehow relieved of responsibility to continue payments during their continued appeal. However, the McLeod court stated,

Finally, regarding the issue of whether the employers appeal of the Circuit Court order to the Supreme Court operated to stay the payment of permanent partial disability awarded by the Commission, we conclude that Case v. Hermitage Cotton Mills, supra, and Section 42-9-20 of the Code of Laws of South Carolina (1976) control the result which we must reach. We hold that an appeal does not suspend payment of weekly benefits awarded pursuant to Section 42-9-20. Cf. Walsh v. US Rubber Co., 238 S.C. 422, 120 S.E. (2d) 685 (1961). These payments, like temporary total disability payments, are in the nature of support. Case v. Hermitage Cotton Mills, supra.

Here, the benefits awarded were pursuant to §42-9-20 and the appeal does not suspend benefits. Benefits must continue until the questions at issue have been fully determined.

In short, statutory law, case law, and two prior orders required defendants to continue weekly payments. The Single Commissioner could have issued fines and penalties under both §42-9-90 and §42-3-175 for the illegal termination of weekly compensation. Defendants are extremely lucky they were only penalized under §42-9-90 as the fines and penalties should have been much higher.

III. DEFENDANTS WILFULLY DISOBEYED A PRIOR ORDER AND FINES WERE PROPER.

Defendants were placed under order to provide medications as prescribed by Dr. Howard Mandell as early as August 27, 2015. Defendants never appealed that portion of the order and, as such, was the law of case. In July 2018, defendants began denying claimant's medication. These refusals encompassed the periods of July 9 through July 12; August 31 through September 6,

September 17, through September 25 and most egregiously, October 16 through November 12, 2018. Medications were denied for a total of forty-four days over a four month period.

Evidence was offered showing (1) the orders requiring the provision of medicine, (2) the prescriptions form Dr. Mandell contained in his office notes and Dr. Mandell's deposition testimony explaining the need for the medications; (3) pharmacy records showing the delays in filling medications, (4) numerous emails from claimant's counsel demanding authorization for the medications along with responses from defense counsel and (5) a denial letter from the carrier.

The Single Commissioner quite understandably imposed fines under §42-3-175. That section provides:

(A)(1) If a claimant brings an action before the commission to enforce an order authorizing medical treatment or payment of benefits and the commission determines that an insurer a self-insured employee, a self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits when ordered to do so by the commission, the insurer, the self-insured employer, the self-insured fund, or the adjuster must pay the claimant's attorneys' fees and costs of enforcing the order. The commission may impose sanctions for willful disobedience of an order, including but not limited to a fine of up to five hundred dollars for each day of the violation.

Defendants argue that they did not wilfully disobey the order. However, their conduct shows exactly the opposite. Case law also amply supports the imposition of the fine. The following was stated in Miller v. Miller 652 S.E.2d 754 (S.C. Ct. App. 2007):

"Contempt results from the willful disobedience of an order of the court." Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E. 2d 594, 596 (1975); Smith v. Smith 359 S.C. 393, 396, 597, S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. §20-7-1350 (Supp. 2004) (A party may be found in contempt of court for the willful violation of a lawful court order.) "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Widman v. Widman 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting Spartanburg County Dep't of Soc. Servs. V. Padgett, 296 S.C. 79 (1988). 370 S.E.2d 872, 874 (1988)). "Where a contemnor is

unable, without fault on his part to obey an order of the court, he is not to be held in contempt.” Smith-Cooper v. Cooper, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App.2001).

The determination of contempt ordinarily resides in the sound discretion of the trial judge. State v. Bevilacqua 316 S.C. 292, 450 S.E.2d 41 (1994). “in a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent’s noncompliance with the order.” Hawkins v. Mullins 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004); Eddy v. Oliver, 345 S.C. 39, 42, 545 S.E. 2d 830, 832 (Ct.App.2001). “[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” Widman, 348 S.C. at 119, 557 S.E.2d at 705. “Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order.” Id. At 120, 557 S.E.2d at 705.

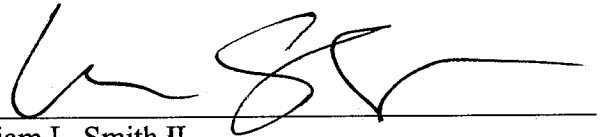
It is within the trial court’s discretion to punish by fine or imprisonment all contempts of authority before the court.” Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006) (citing S.C. Code Ann. § 14-5-320 (1976)). “In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” Id. (citing State ex rel. Mcleod v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979)).

Once the prima facie case is made as it was here, the carrier must show his inability to comply with the order. An example of this is Pratt v. DSS, 283 S.C. 5550, 324 S.E.2d 97 (1984). There, attorneys sought a contempt finding as SCDSS was ordered to pay them for representing minor children in abuse and neglect proceedings. However, DSS was able to show that they could not comply with the order because the legislature did not appropriate the funds to pay the attorneys fees. Thus, there was no abuse of discretion.

Here, defendants have shown absolutely no reason or excuse for failure to provide the ordered medications. Once again, defendants are quite lucky that the fines were not much higher. Defendants could have been subjected to forty-four days of fines at \$500 per day. In fact, since there were three occasions of refusal within a two year period, the license of the insurer could have actually been revoked.

CONCLUSION

Based on the above stated arguments the decision of the Single Commissioner should be affirmed in full.

A handwritten signature in black ink, appearing to read 'W L Smith II', written over a horizontal line.

William L. Smith II
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Post Office Box 12330
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(803)929-3600
Attorney for Employee/Claimant

Dated: August 23, 2019

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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1102937

Barry Adickes,	)	
	)	
Claimant,	)	
	)	
vs.	)	
	)	TRANSCRIPT OF PROCEEDINGS
Philips Healthcare,	)	
Employer,	)	January 21, 2015
	)	
and	)	
	)	
Fidelity and Guarantee	)	
Insurance Company,	)	
Carrier,	)	
	)	
Defendants.	)	

This hearing was held before
Commissioner Gene McCaskill, reported by
Kimberly T. Power, Court Reporter and Notary
Public in and for the State of South Carolina;
said proceedings were held at the South
Carolina Workers' Compensation Commission,
Lancaster City Hall, 216 South Catawba Street,
Lancaster, South Carolina, on Wednesday,
January 21, 2015, commencing at the hour of
11:15 a.m.

1 APPEARANCES

2
3 ATTORNEYS FOR THE CLAIMANT

4 CHAPPELL, SMITH & ARDEN, P.A.
5 BY: WILLIAM L. SMITH, II, ESQUIRE
6 322 Laurens Street, NW
7 Aiken, South Carolina 29801

8 ATTORNEYS FOR THE DEFENDANTS

9 LUEDER, LARKIN & HUNTER
10 BY: BROOKE A. PAYNE, ESQUIRE
11 RYAN D. OXFORD, ESQUIRE
12 503 Wando Park Boulevard
13 Mount Pleasant, South Carolina 29464
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1 THE COURT: Today's date is
2 January 21, 2015. This is Workers'
3 Compensation Commission File Number 1102937.
4 This is the case of Barry Adickes vs. Phillips
5 Healthcare. Fidelity and Guarantee Insurance
6 Company is the carrier. The claimant is
7 represented today by William L. Smith, II and
8 the employer/carrier are represented by Brooke
9 Payne and Ryan Oxford.

10 The date of accident is March 22,
11 2011. The claimant has an average weekly wage
12 of \$2,608.52, and I assume that the max comp
13 rate, because I don't keep these things in my
14 head, for 2011 was \$704.92.

15 MR. SMITH: Yes, sir.

16 THE COURT: All right. Very good.
17 Are there objections to jurisdiction, venue, or
18 APA submissions?

19 MR. SMITH: No, sir, Your Honor.
20 Commissioner, I don't have an objection to an
21 APA. They have an addendum to their
22 pre-hearing brief that cites -- and I know
23 that's not evidence, but it cites testimony
24 from Mr. Johnson's deposition. That deposition
25 is not in evidence. He's here to testify

1 today. So I would just ask that you not
2 consider those parts of their argument in that
3 pre-hearing brief that references Mr. Johnson's
4 deposition testimony. Certainly you can
5 consider anything he testifies to today.

6 THE COURT: You want to speak to
7 that?

8 MS. PAYNE: No.

9 THE COURT: Very well. Any
10 objection to jurisdiction or venue?

11 MR. SMITH: None from claimant.

12 MS. PAYNE: No.

13 THE COURT: All right. Very well.
14 The Commission file becomes a part of the
15 record with the exception of self-serving
16 declarations and unstipulated medical reports.

17 All right. We're here today,
18 Mr. Smith, pursuant to the Form 50 that you
19 filed on behalf of the claimant or your client.
20 If you would, please, place your client's
21 position on the record.

22 MR. SMITH: Yes, sir, Your Honor.
23 As we stated in the pre-hearing conference,
24 Mr. Adickes was involved in a very serious car
25 accident on the job on March 22, 2011. He

1 suffered injuries to both of his shoulders, to
2 his cervical spine, and he also had a traumatic
3 brain injury. We are here today seeking an
4 award for wage loss pursuant to Section 42-9-20
5 as he has had significant wage loss as a result
6 of this injury.

7 It is further our position, and you
8 have the records and my APA and I pointed out
9 in the pre-hearing brief, he's going to need
10 ongoing medical care as taken by the physicians
11 in this case. So we're here seeking the wage
12 loss award and the ongoing medical care
13 pursuant to Dodge.

14 THE COURT: All right. I really
15 don't know which one of you to call on.

16 MS. PAYNE: I'll go.

17 THE COURT: All right. If you would
18 place your client's position on the record,
19 please, ma'am.

20 MS. PAYNE: I will try to make it
21 more succinct than last time. It's the
22 position of the employer and insurer that the
23 claimant is not entitled to wage loss benefits
24 as any reduction in his salary since his
25 termination at Philips is not related to the

1 work injury that occurred on March 22, 2011.

2 It's further our contention that the
3 claimant did not sustain any -- is not
4 currently suffering from any cognitivecognitive
5 issues as a result of that work injury, and we
6 believe that that is not only supported by the
7 testimony of his supervisors at Philips, but
8 also supported in the neuropsychological report
9 by Dr. Randy Waid.

10 It's also our contention that the
11 reduction in salary that he received at his
12 most recent employer, which was ERI,VRI was due
13 to the fact that he specifically requested that
14 salary which, again, is not related to his work
15 injury at Philips. Should the Commission agree
16 with our arguments with regard to this not
17 being a wage loss case and analyze the case
18 under the scheduled member statute, it's our
19 contention that the claimant does not have a
20 PPD rating associated with either his right or
21 left shoulders.

22 THE COURT: Anything else?

23 MS. PAYNE: No, Your Honor.

24 THE COURT: Anything else?

25 MR. SMITH: Just briefly, Your

1 Honor. We certainly feel the evidence supports
2 a wage loss award in this case. Should you
3 disagree with us on that point, it is our
4 contention that he has sustained significant
5 permanent partial disability to all the
6 affected body parts, those being the brain,
7 cervical spine, and bilateral shoulders.

8 THE COURT: Anything else,
9 Ms. Payne?

10 MS. PAYNE: No.

11 THE COURT: All right. Ready to
12 hear from your witness?

13 MR. SMITH: Yes, sir.

14 THE COURT: All right. Mr. Adickes,
15 two things. First, I need you to speak up.
16 Actually, the P.A. system here is on.
17 Ms. Power is making a record of the proceeding,
18 so it's imperative that she hear you. And,
19 also, please avoid using uh-huh, huh-uh,
20 shaking and nodding your head, anything like
21 that. If you're asked a yes or no question,
22 please give me a yes or no verbal answer. That
23 will move it along and it will also keep it
24 very clean and clear in the record. Okay?

25 THE WITNESS: Yes, sir.

1 (BARRY ADICKES, being duly sworn to
2 tell the whole truth, testified as follows:)

3 THE COURT: Please state your full
4 name for the record.

5 THE WITNESS: Barry Simmons Adickes.

6 THE COURT: Thank you, sir.
7 Mr. Smith, your witness.

8 MR. SMITH: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Mr. Adickes, how old are you, sir?

12 A. Fifty-three.

13 Q. Excuse me?

14 A. Fifty-three.

15 Q. Okay. How far did you go in school?

16 A. I finished with a Bachelor's of
17 Science degree in marketing management,
18 University of South Carolina.

19 Q. Are you married?

20 A. Yes.

21 Q. And how long have you been married?

22 A. This is our 29th year.

23 Q. Do you have children?

24 A. I have four children.

25 Q. Are they all still at home?

1 A. They are not.

2 Q. How many are still at home dependent
3 upon you for support?

4 A. Well, now we have one. Al is now
5 12.

6 Q. And you have a couple in college?

7 A. I do.

8 Q. All right. So they're still
9 dependent upon you?

10 A. Very much.

11 Q. Okay. Mr. Adickes, before this
12 injury, had you ever had a workers' comp claim
13 before?

14 A. No.

15 Q. Had you ever been hurt in a car
16 wreck where you sued anybody or anything like
17 that?

18 A. No.

19 Q. Now, you were employed at the time
20 of this injury with Philips?

21 A. Yes.

22 Q. How long had you worked for Philips?

23 A. Philips acquired the company that I
24 was with in 2006. I had been with that company
25 for 14 years. Technically, I had 21 years --

1 nearly 20 and a half years tenure with Philips.

2 Q. At the time of your injury, what was
3 your job?

4 A. I was the general manager for
5 distribution -- one of the general managers of
6 distribution in the southern region.

7 Q. Let me go back with you. Let's go
8 back to 2008. What was your job in 2008?

9 A. I was the product sales specialist
10 for the same division of Philips, but different
11 capacity. I had just transitioned to the new
12 position just shortly before the accident in
13 2011.

14 Q. And I should back up a second. What
15 the heck does Philips do?

16 A. Philips is a worldwide leader of
17 development of invasions in this arena for --
18 and in this particular division for cardiac
19 resuscitation, cardiac monitors and
20 defibrillators.

21 Q. And in 2008, is that what you were
22 doing? You were selling cardiac
23 defibrillators?

24 A. Yes.

25 Q. Now, did your job change in 2008?

1 A. I transitioned after a year with --
2 the previous company that I was with was
3 Lifeline. It became Philips Lifeline. The
4 last year that I was with Philips Lifeline, I
5 became the business development manager
6 introducing a defibrillator into the line of
7 products that we were selling, Philips
8 Lifeline, into retirement communities.
9 Basically for a year I worked with our sales
10 people to train them on introducing
11 defibrillators to the product line that we had,
12 selling them to retirement communities
13 specifically.

14 Q. There's been a document offered as
15 evidence by the defense called a PIP, PIP which
16 is a performance improvement plan that you went
17 on in 2009. Are you familiar with that?

18 A. Yes.

19 Q. What was your job at that point in
20 time and what was the issue?

21 A. At the point in time of receiving
22 the PIP, I was in the -- I came in August of
23 2008 into this North and South Carolina
24 territory. In 2009, and I don't recall exactly
25 when, Mr. Hendrix, Jim Hendrix, my previous --

1 a few managers before Mark Johnson, introduced
2 this performance improvement plan potentially
3 five months into the year 2009.

4 Q. What was going on with that
5 territory and the economy at that time?

6 A. Well, the territory, and
7 specifically I will say in the state of North
8 Carolina, we began to develop opportunities,
9 develop business with some -- with some
10 opportunities coming to fruition. But
11 economically there were tough times certainly
12 all over the country. I know the state of
13 North Carolina particularly at that time was
14 bankrupt, so there were no purchases being
15 made. It's noted in the PIP previously by Jim
16 Hendrix and he was sympathetic in that regard
17 because there were -- there were economic
18 factors. We had some -- we had a recall issue
19 with our lead product, the HeartStart MRx and
20 sales were soft.

21 Q. Let's move into 2010. Did you come
22 off the performance improvement plan?

23 A. I don't recall exactly when I came
24 off the PIP, but, yes, I did.

25 Q. And were sales good?

1 A. Sales began to really escalate
2 favorably when North Carolina began to spend
3 some money. We actually by June of 2010 began
4 to have good signs for a positive year. A
5 positive year for us is achieving the financial
6 commitment to the company which is your quota
7 and that is how that is measured.

8 Q. And 2010 would have been the year
9 prior to your accident; is that correct?

10 A. 2010 was, right, the year prior to
11 my accident.

12 Q. And I am referring to the -- another
13 document in the exhibits admitted by the
14 defense --

15 MR. SMITH: And unfortunately, Your
16 Honor, I don't see a page number on it.

17 BY MR. SMITH:

18 Q. But it's the 2010 W2 form. Did you
19 earn \$128,276.01 that year?

20 A. Yes.

21 Q. And that would have been the year
22 prior to your injury?

23 A. Yes.

24 Q. Now, let me fast forward over to
25 2011. Did you get a promotion starting in

1 2011?

2 A. No, it was not a promotion. It was
3 a new position.

4 Q. Okay. You took a new position?

5 A. Took a new position.

6 Q. And when did that start?

7 A. Started into the year and I'm going
8 to say duties in that job began in February of
9 2011, still somewhat overlaid with some wrap-up
10 duties in the previous position.

11 Q. Now, you suffered your injury on
12 March 22, 2011?

13 A. Right.

14 Q. You had just taken that job?

15 A. Within a month of the new job.

16 Q. This is an admitted injury, so we
17 don't have to go into a whole lot of detail.
18 Describe for the Commissioner what happened to
19 you.

20 A. What happened in the accident?

21 Q. Yes, sir.

22 A. I was traveling south on Highway
23 181 -- North Carolina Highway 181 which is
24 above Morganton and in between Blue Ridge
25 Parkway and the Town of Morganton. I had just

1 previously wrapped up the day at the hospital's
2 critical transport station right at the
3 parkway. Instead of going back down into
4 traffic and get on I-40, I did travel on the
5 Blue Ridge Parkway and was able to get to the
6 point of the parkway, make some phone calls,
7 return some e-mails, return some phone calls,
8 call home. At that time I concluded that and
9 continued my route realizing on the map that
10 I've never driven 181, but said let's see if I
11 can book on down to 181, hit Morganton, and
12 then travel east on I-40.

13 It was about -- well, I don't know
14 exactly. It was three miles below the parkway
15 where there was a very sharp -- the speed limit
16 is 50 miles an hour. I was going 50 miles an
17 hour, 52 maybe, and did not heed the warnings
18 of an upcoming hairpin turn and went into the
19 turn way too fast. Right side rode the rail
20 for 100 feet, I think they measured out, and
21 then it barrel-rolled my car, left the road.
22 And based on the markings through the trees, it
23 barrel-rolled through the trees kind of a
24 corkscrew way and landed about 100 feet down
25 the mountain.

1 Q. Were you knocked unconscious?

2 A. Yes. I was out for a period. I'm
3 not really certain exactly how long.

4 Q. And I'm not going to try to make
5 this take long, but you were actually down the
6 mountain for quite a ways before you were
7 found; is that correct? Quite a long time?
8 Excuse me.

9 A. Yeah, it was five hours.

10 Q. Just to speed through this, you were
11 able to eventually hear your cell phone dying?

12 A. It was about 1:30 that -- 1:30, the
13 23rd, I guess that would make it, that my cell
14 phone chirped and I had already recombed the
15 vehicle to try to find my laptop, to try to
16 find my phone. I ended up finding my GPS and
17 used it as a flashlight, found one of my -- a
18 snack man apple and an orange and whatnot. But
19 then I went back and just kind of drifted back
20 off to sleep.

21 At about 1:30, the phone chirped.
22 The phone just let out a chirp and it was above
23 my head and it was -- as I was positioned
24 sideways, driver's side down, the phone was
25 inside the springs of the vehicle's passenger

1 seat. Well, there was a lot of dirt and
2 debris. There was a limb that had come
3 through. So I went and felt my way around and
4 did find, after digging through, found the
5 phone. That chirp was its dying breath, but
6 nicely I plugged it in. Nothing else was
7 working in the car, but the car charger worked
8 and it powered it up. I was able to call 911
9 County and Burke County EMS answered that call.

10 Q. They eventually located you and got
11 you off the mountain?

12 A. Right.

13 Q. And you were seen by -- the
14 ambulance came, but you declined to go to the
15 hospital; is that right?

16 A. I did.

17 Q. Tell me why.

18 A. At that time Grace Hospital would
19 have been the closest hospital. It's two hours
20 away from home. I knew potentially I would be
21 admitted. I didn't want to be that far away
22 from home. I wanted to be -- I wanted to get
23 back home. And I -- and I knew once I did -- I
24 knew that I didn't have -- I didn't feel -- I
25 could wiggle my toes and I could wiggle my

1 feet. I couldn't raise my arms above my head.

2 I just wanted to go home.

3 Q. Did your wife come get you?

4 A. She did.

5 Q. And took you for medical attention
6 when you got home?

7 A. Correct.

8 Q. I just want to get you to identify
9 this for me. This is Exhibit A in the
10 Claimant's APA package, Pages 219 through 224.
11 Are those photos of the vehicle that you were
12 driving at the time of the accident?

13 A. Yes.

14 Q. And is that the damage from the
15 accident?

16 A. Yes.

17 Q. And I just showed you one page, but
18 are those pages the vehicle?

19 A. That was the Philips car that I
20 drove, Philips Dodge.

21 Q. Now, what all was injured in the
22 accident, what all parts of your body?

23 A. At the time when I became aware of
24 what had just happened, my left shoulder was
25 causing the pain. And just from basic first

1 aid, I know how to put a shoulder -- I know how
2 to put my own shoulder back into joint, but I
3 did raise it up and was able to roll it like
4 that and it rolled right back into place.

5 (Witness indicates.) And after that, that was
6 most of the pain that was going on right there.
7 I just had an immediate release of, I guess,
8 endorphins because I felt -- after that, that
9 pain went away and I wasn't -- I had some
10 scrapes. I felt maybe I had broken my finger,
11 but that turned out not to be. My right
12 shoulder was not responding real well, even
13 worse than my left. Once I got my left back
14 into joint, I actually could move it a little
15 bit. But I assessed any critical issues I may
16 have had, determined that I was going to live,
17 I was all right, and just kind of fell back to
18 sleep after that.

19 Q. Let me interrupt you. And I'm not
20 so much focusing on that night now, but what
21 all parts of your body did you have injuries to
22 from the accident?

23 A. Neck, shoulders, head, my leg.
24 Lower extremities were very solid and strong.
25 It was the cervical injuries and right shoulder

1 became more of an issue. Left shoulder
2 recovered well. I ended up having surgery
3 October -- I guess that would be six, seven
4 months after the accident. I had surgery
5 repair on my right shoulder.

6 Q. Now, for this injury you have
7 been -- who has been your primary physicians
8 for each particular body part?

9 A. That day when we got back into
10 town --

11 Q. I mean over time?

12 A. Dr. Mandell, Howard Mandell, Jay
13 Rentz repaired my right shoulder.
14 Dr. Welshofer in Charlotte is who with the
15 cervical issues ultimately recommended Dr. Park
16 for -- to see if some type of therapy would
17 maybe give me relief in the cervical area.

18 Q. Let's start there. The treatments
19 that you have had for your neck, you've had --
20 well, most recently you've had ablations?

21 A. There's RFA -- radiofrequency
22 ablation actually is -- provides an incredibly
23 immediate relief because it disconnects the
24 nerve. It actually touches the nerve,
25 disconnects the nerve in my facet joint or

1 around the facet joint which immediately just
2 cuts off the signal to the pain that radiates
3 from neck down to -- down towards my right
4 shoulder. It's a nice procedure. At that time
5 Dr. Park said it could last six months, it
6 could last eight months, it could last 18
7 months depending on how fast the nerves
8 regenerates.

9 Q. And what has been your experience?

10 A. Six months seems to be at this
11 point -- and maybe that will change, but at
12 this point it seems to regenerate pretty
13 quickly. So I had a second one done June or
14 July -- July of this year. June or July of
15 2014.

16 Q. And are you about to have another
17 one done?

18 A. I have a February 11th procedure
19 scheduled for another RFA.

20 Q. How can you tell when you need one?

21 A. It's -- it happens upon waking. In
22 the two instances since the first that I wake
23 with the immediate sensation of a radiating
24 pain from my neck to my right shoulder and then
25 a numbness in my right hand. It's not a

1 gradual thing. It's like as soon as that
2 connection is remade, it begins the process of
3 sending those signals.

4 Q. And do you currently have pain in
5 your neck?

6 A. I've got the same issue. It's a
7 rolling-type. If I -- it's a limitation of
8 motion in my neck that will bring pain if I
9 exert -- bring it to one certain angle. Just
10 kind of a radiation of pain.

11 Q. You also had surgery done on your
12 right shoulder?

13 A. Yes.

14 Q. Do you continue to have problems
15 with your right shoulder?

16 A. There is issues and there's an
17 impingement that I was telling -- that I could
18 feel. Just from doing some homework, I know
19 about the impinged area of the shoulder when it
20 occurs and it's from a compression, which
21 compression injury apparently is what I had
22 along with a bicep tendon that was torn loose
23 from my leg, but that was repaired. And
24 apparently from -- there's an MRI that was
25 requested before this -- before this hearing --

1 Q. Do you --

2 A. -- for us to --

3 Q. I'm sorry. Tell me what your
4 current pain and problems are with your
5 shoulder.

6 A. I am not able to raise my right
7 shoulder without pain any further than this.
8 (Witness indicates.) I'm not able to do
9 chin-ups.

10 THE COURT: What is "this," sir?

11 THE WITNESS: I'm sorry. I would
12 say it's a 50 percent -- I mean, I can't go
13 beyond a certain point in this area without
14 having that impingement rub up against inside
15 of my --

16 THE COURT: You can't raise your --
17 I'm doing this for the record because "this"
18 means nothing in the record. You can't lift
19 it -- your arm shoulder heighth? Well, you can
20 if you do that, but --

21 THE WITNESS: Without discomfort and
22 pain, I am not able to reach it above shoulder
23 heighth. I'm sorry.

24 THE COURT: Not a problem.

25

1 BY MR. SMITH:

2 Q. Now, you have also had issues with
3 your head injury; is that correct?

4 A. Headaches are the new norm and
5 that's -- I think I've adjusted fairly well
6 with that, but yeah.

7 Q. Tell me what your headaches are
8 like.

9 A. Once a headache begins -- and that
10 is a gradual thing. And I know some triggers
11 and I've become aware of some things that I can
12 avoid. But once the particular headache
13 reaches to a point where I realize that that
14 one particular medicine won't work, an
15 inflammatory -- anti-inflammatory, then I have
16 to disengage from what I'm doing and go with an
17 Imitrex treatment.

18 Q. Do you take medication daily for
19 your headaches?

20 A. I do.

21 Q. What is that medication?

22 A. It's call Nadolol.

23 Q. And then what happens when you feel
24 a headache coming on? Medication-wise, what do
25 you do?

1 A. There's an Imitrex injection that I
2 will take. That injection has a fairly good
3 effect. It does -- it requires a little bit of
4 settling down, lying down. And then after two
5 hours, I can follow up with a second injection.

6 Q. Do you have another medication
7 called Frova?

8 A. Frova is the follow-through the
9 following day. This seems to be the regiment
10 that works on the onset of a severe headache,
11 the two Imitrex injections the next morning. I
12 initially thought that maybe this was the
13 hangover from the medicine because the medicine
14 has kind of an oddish -- but the next morning
15 Dr. Mandell suggested that I do begin to take
16 Frova the following morning to prevent the
17 rebound and to continue to knock it out so
18 within generally a 24- to 48-hour period I can
19 get back to where I can function and work.

20 Q. How often do you experience these
21 aches?

22 A. It's not as bad as it was. The
23 first year was a challenge. It's six to eight
24 weeks, maybe. Every six to eight weeks.

25 Q. When you have a headache like that,

1 how long does it keep you down?

2 A. Couple days.

3 Q. Now, Dr. Mandell's deposition has
4 been offered as evidence, and in that
5 deposition he talks about your wife keeping a
6 calendar or a journal of your headaches. Does
7 she do that?

8 A. She does.

9 Q. Is she the one that actually keeps
10 up with how long you go between headaches?

11 A. She's much better than I at putting
12 things together like that. She keeps a very
13 good calendar with all activities, but she
14 specifically notes, yes, those occurrences.

15 Q. When those headaches come on, how do
16 you manage your work?

17 A. I'm not sure exactly what you mean
18 by, "manage my work."

19 Q. When you're down with those
20 headaches for two days, are you able to work
21 during that period of time?

22 A. Certainly not the first -- after
23 taking Imitrex, I'm out, I'm down. Generally
24 within the following 24 hours after the
25 injection, Frova doesn't -- though it does

1 caution about dizziness or drowsiness or
2 whatnot, it doesn't have the same type of
3 collapsing effect as Imitrex does. For me, it
4 doesn't. And normally within that period
5 after -- 24 hours is a good -- I really am not
6 supposed to open up a laptop or look at a
7 computer screen because that can kind of drag
8 it on if I continue to do that visually, things
9 like that.

10 Q. So if you're not able to do it
11 during that time, what do you do to catch up?

12 A. What do I do to catch up?

13 Q. What do you do --

14 A. Like anyone would do who has
15 distractions within work, you work, you know.
16 You get back on schedule.

17 Q. Now, along with the headaches, have
18 you had other brain-type issues?

19 A. I would say in 2012, I began to
20 attribute some issues that I was having being
21 forgetful, slow. I was attributing it to a
22 particular medicine I was on. Jeanie will tell
23 you differently, but I just -- I've begun to --
24 I have accepted the realities of the new norm
25 for me in regards to not being quite as fast

1 formulating my thoughts or an e-mail. If I'm
2 in denial, I'm in denial. But I don't think
3 I'm impaired to the point where I'm no longer
4 able to work. I do continue to get the job
5 done. I just am not as quick to accomplish,
6 maybe, certain things. It may take -- it may
7 take an hour to conduct what previously might
8 have been 10 or 15 minutes to conduct an e-mail
9 or e-mail correspondence or anything like that.

10 Q. Did you have any difficulties like
11 that before this injury?

12 A. No.

13 Q. Did you have any difficulties doing
14 your job before this injury?

15 A. No.

16 Q. After the injury and you had all
17 these problems, did you return to work with
18 Philips?

19 A. Yes. I was -- from March 22nd -- I
20 do believe the first day written back in was
21 May 1. I believe I went back May 1.

22 Q. What type difficulties did you
23 experience on your job on the road?

24 A. I was fairly fortunate that I
25 never -- there was a time where we had some

1 training in Atlanta that I had a headache at
2 the end of the day. I think a lot of people
3 did because it was -- we were in front of our
4 laptops learning a new -- a new sales force
5 contact management and action thing. That was
6 really one of the other times that I actually
7 had one that I had to go in and not make it to
8 dinner that night and take the medication. I
9 didn't have the injections at that time. I'm
10 not sure exactly what the question was, Bill.

11 Q. I was asking you what difficulties
12 you had performing your job duties,
13 concentration issues, and that sort of thing?

14 A. I'm just only believing that some of
15 the issues that I had were staying quickly on
16 top of certain things. I never envisioned -- I
17 never really put myself in the category of
18 having difficulty continuing to do my job. I
19 had certain deficits that I began to do my best
20 to manage.

21 Q. Did you miss days because of your
22 headaches?

23 A. There were days off the road, yes.

24 Q. Did you make complaints about this
25 to your supervisors?

1 A. I don't -- not often. Mark would
2 ask occasionally how's it going. It's a very
3 competitive -- you want to be a positive member
4 of the team and the idea, yeah, you want to
5 say, "No sweat. Everything is good." But Mark
6 would ask how are things going and I would
7 mention the medications. My concern -- my
8 concern began to be the medications that I
9 ultimately had to be on and some of that would
10 be, say, drowsiness or dizziness, which wasn't
11 necessarily the case with me every time, but
12 that would begin to affect my ability to do my
13 job particularly in travel.

14 Q. I asked you earlier about your W2
15 form from the year before your injury and your
16 W2 forms have been offered as evidence by the
17 defense. In the years following starting with
18 2011 following your injury, did you ever earn
19 as much money as you did in 2010?

20 A. If you're asking was 2010 better
21 than the next three years, yeah. 2010 was a
22 better year than '11, '12, and '13.

23 Q. You earned \$124,000 -- excuse me,
24 \$128,000 in 2010 and then you earned \$24,000
25 less than that in 2011?

1 A. Right.

2 Q. And then in 2012, you earned \$16,000
3 less than that?

4 A. Uh-huh. Sounds right.

5 Q. Sound correct?

6 A. Yes.

7 Q. And then 2013, you would have earned
8 \$17,000 less than that. Does that sound right?

9 A. Yes.

10 Q. Now, did your employment end at
11 Philips?

12 A. Yes.

13 Q. And when did your employment end at
14 Philips?

15 A. January 14th, 15th. Whatever it is
16 on record. I'm not recalling.

17 Q. January of 2014?

18 A. Yes.

19 Q. Does January 17 sound correct to
20 you?

21 A. Sure.

22 Q. Tell me what happened.

23 A. Got a phone call from Mark and --

24 Q. You're referring to Mark Johnson?

25 A. Mark Johnson.

1 Q. Who is present in the courtroom
2 today?

3 A. Yes. Mark called.

4 Q. Was he your supervisor?

5 A. Yes. Sorry. So Mark called and I
6 think I immediately started like I do on
7 something that's going on, bring him up. And
8 then immediately Mark said, "Barry, I want to
9 tell you, I have someone here." And he likely
10 said the name from HR. Well, as soon as he
11 said that, I stopped talking and then just my
12 heart kind of sank. No one gets a call from
13 their boss with a representative from HR with
14 good news. And Mark proceeded to tell me that
15 with what was beginning -- at the beginning of
16 the year there were some changes to take place
17 and, unfortunately, I was affected by those
18 changes.

19 Q. Did he tell you you were being
20 terminated?

21 A. Right.

22 Q. Did he tell you the reason you were
23 being terminated?

24 A. Well, I asked and Mark -- this is
25 how -- and the reason why I recall it vividly

1 is because the follow-up question. I said -- I
2 asked in regards to -- I said, "Is this" -- and
3 I'm sorry. I'm just trying to remember.
4 Mark's response to my asking about the reason
5 for the termination was pretty simple. It was
6 performance related.

7 I said in a follow-up question,
8 "Normally there's -- normally there's a period
9 of time -- a probational period of time."
10 Mark's response was, "Not under these
11 circumstances."

12 Now, I know this is one of our
13 points of contention. I remember that -- those
14 words from Mark and he had to make a lot of
15 phone calls that day. So I'm not going to make
16 excuses for him in that regard, but I remember
17 it was performance related and my response, "So
18 no probation period would apply?"

19 "Not under these circumstances."

20 Q. Now, were you also told it was part
21 of a reduction of force?

22 A. Every year -- I don't remember the
23 terms, "reduction of force." We do know rift
24 means that. But every year we do have
25 reduction of force. I think for the last three

1 or four years, Mark could testify to that,
2 where we did have -- January was -- was a time
3 where we assessed where things were and, in
4 fact, 150 people did get terminated.

5 Q. Were you the only person on your
6 level on Mr. Johnson's staff that was --

7 A. I really don't -- I don't -- I don't
8 know if I was. I don't -- I do know from
9 conversations with my colleagues afterwards
10 that, perhaps, I was the only one within our
11 southern region that got terminated.

12 Q. After your termination, did you
13 search for work?

14 A. Oh, yeah, within an hour. In fact,
15 the way things are with me, I mean, I was upset
16 for five minutes and then I started making
17 phone calls. Within an hour I had a call back
18 from a previous acquaintance, a boss I've known
19 for 20 years.

20 Q. How many places back then do you
21 think you sent resumes to, contacted, whatever
22 it was?

23 A. Fifteen or more.

24 Q. Did you eventually locate
25 employment?

1 A. Yeah.

2 Q. And where did you locate employment?

3 A. ERI. I think my official date was
4 May 22nd or 23rd of 2014.

5 Q. So you were unemployed from January
6 17 until May 23?

7 A. Correct.

8 Q. How much did that job pay?

9 A. \$55,000 was the base salary which is
10 what the salary -- and I know Ms. Payne
11 mentioned this in her opening statement. Rob
12 McDonald is an acquaintance of mine for 18
13 years. I know him with Philips' lifeline. Rob
14 was someone that contacted me early in the
15 process. I wasn't -- I was sorting things out.
16 I was looking at different opportunities. He
17 said at that time, he said, "Look" --

18 MS. PAYNE: Objection. Hearsay.

19 THE COURT: You can't tell me what
20 someone told you, sir. They're not here for
21 Ms. Payne to cross-examine.

22 THE WITNESS: I apologize.

23 THE COURT: Not a problem.

24 BY MR. SMITH:

25 Q. Why did you put down \$55,000?

1 A. Because Rob told me that's what --

2 MS. PAYNE: Objection.

3 THE COURT: You can't tell me that,
4 sir. Help him out, Bill.

5 BY MR. SMITH:

6 Q. Did you know how much the job paid?

7 A. The job paid \$55,000.

8 Q. Is that why you put down \$55,000?

9 A. That's exactly why I put down
10 \$55,000. It's not what I wanted. It's what
11 the job paid.

12 Q. And was that the highest paying and
13 only job you were offered during your job
14 search?

15 A. Yes, ultimately that was the case.

16 Q. Now, you went to work in May and
17 were you paid at a rate that would have come
18 out to \$55,000 if you had worked the entire
19 year?

20 A. Yes.

21 Q. And defense also offered those
22 records as evidence as an exhibit. Did you
23 ever earn any commissions, bonuses, anything of
24 that nature while working at ERI?

25 A. No.

1 Q. So that is the extent of what you
2 earned during that year?

3 A. It is.

4 Q. Now, has that -- has your employment
5 with ERI come to an end?

6 A. It has.

7 Q. And when did that occur?

8 A. Well, I officially was on the
9 payroll until January 16th.

10 Q. What is your understanding of why
11 you no longer work there?

12 A. Things weren't moving fast enough,
13 is Rob's words.

14 MS. PAYNE: Objection. Hearsay.

15 THE COURT: Can't do that.

16 THE WITNESS: How should I answer
17 the question? I mean, I was told...

18 MS. PAYNE: Objection. Hearsay.

19 MR. SMITH: Your Honor, it's
20 actually not hearsay. It's not being offered
21 for the truth of the matter asserted. It's
22 being offered as words of legal significance as
23 to why he no longer works there.

24 THE COURT: I think he can speak to
25 what his understanding is. He can't tell me

1 what someone told him.

2 BY MR. SMITH:

3 Q. What's your understanding of why you
4 don't work there anymore?

5 A. I wasn't bringing the business in
6 quick enough.

7 Q. Are you looking for work now?

8 A. I am, very actively.

9 Q. Sending out resumes?

10 A. A bunch.

11 Q. Any job offers yet?

12 A. No.

13 Q. All right, sir. Going back just a
14 second to your shoulder. Is it your
15 understanding you will eventually have to have
16 surgery?

17 A. Yes.

18 Q. Do you want that surgery right now?

19 A. At this time -- in fact, it was
20 fairly definitive back earlier in the year
21 starting the new job that I was going to have
22 to have another procedure. With a new job, it
23 wasn't the thing to do. It just wasn't
24 conducive to the schedule of getting things
25 done with the new job. At this particular time

1 as I'm searching for a job, I don't anticipate
2 having one these ultra slings being in an
3 interview.

4 Q. And when we're talking about the
5 surgery, we're talking about your right
6 shoulder; is that correct?

7 A. Correct.

8 Q. Both shoulders were injured in the
9 accident. How is your left shoulder?

10 A. It's fine. It's better. It's
11 limited, but I've accepted the new norm of
12 several things in my life.

13 Q. All right, sir. You had a
14 neuropsychological evaluation done by Dr. Waid?

15 A. Yes.

16 Q. Did you do your best on that?

17 A. I did. I did everything, yes.

18 Q. You had a vocational evaluation done
19 with Joel Leonard?

20 A. Yes.

21 Q. Were you up front and honest with
22 Mr. Leonard?

23 A. Yes.

24 MR. SMITH: Thank you, sir. No
25 further questions.

1 THE COURT: All right. Ms. Payne.

2 CROSS-EXAMINATION

3 BY MS. PAYNE:

4 Q. Mr. Adickes, nice to meet you in
5 person. Last time we chatted over the phone.
6 So you guys have discussed the accident that
7 you sustained at Philips Healthcare when you
8 drove over the cliff?

9 A. (Witness nods head.)

10 Q. Is that yes?

11 A. Yes.

12 Q. Make sure to say yes or no because
13 the court reporter is taking everything down.

14 A. I'm sorry.

15 Q. Now, initially when you reported it
16 to Philips, you had a different rendition of
17 what had occurred that evening, right? Didn't
18 you report initially that you had driven from
19 the hotel to go on a job and then got back in
20 your car and fell asleep at the wheel?

21 A. No.

22 Q. You never reported that to Philips?

23 A. No.

24 Q. So if the first injury report from
25 the -- Philips first injury report noted,

1 "Barry was traveling on company business. That
2 evening he went for a jog in the park. Upon
3 returning, he had his accident," you would
4 dispute that?

5 A. I would absolutely dispute that. I
6 never mentioned that.

7 Q. Now, when you had that incident, you
8 had actually just began working for Mark
9 Johnson?

10 A. Correct.

11 Q. And you were a product sales
12 specialist?

13 A. Right.

14 Q. And you had changed into the channel
15 manager position?

16 A. Yes.

17 Q. When you began working for
18 Mr. Johnson, isn't it true that you actually
19 requested a larger vehicle due to your
20 pre-existing football injuries?

21 A. No, not exactly. I had a larger
22 vehicle. During the transition to the channel
23 manager's position, it was said to me that I
24 needed to swap vehicles with the person taking
25 over my territory and I -- I did not want to do

1 that. I had -- I mean, the idea -- in the
2 product sales position, you do carry around a
3 little bit more equipment.

4 Q. That was your prior position?

5 A. Yes. The car itself is higher up
6 off the ground and with a previous injury of a
7 hip from football, climbing from a lower
8 position was more difficult after particularly
9 a long drive than a higher up vehicle where you
10 could slide out.

11 Q. So you're admitting today that you
12 actually asked Mr. Johnson if you could keep
13 your vehicle because of your pre-existing
14 injury?

15 A. I did say that, but I already had
16 the vehicle is what I was disputing.

17 Q. Right. Do you remember when I took
18 your deposition most recently?

19 A. I do.

20 Q. And I specifically asked you about
21 why you requested that car -- why you requested
22 to keep your car?

23 A. I really don't, Ms. Payne. I'm
24 sorry. I do remember this came up and I
25 thought also that we addressed this.

1 Q. Let me refresh your memory.

2 A. Thank you.

3 MR. SMITH: Your Honor, I'm going to
4 interpose an objection to the relevance of what
5 vehicle he was driving --

6 MS. PAYNE: The claimant's
7 credibility is at issue.

8 MR. SMITH: -- prior to the
9 accident.

10 MS. PAYNE: It's a credibility
11 issue.

12 THE COURT: Overruled.

13 BY MS. PAYNE:

14 Q. My question to you was -- I'm on
15 Page 22 of the second deposition. "And when
16 you began working at Philips Healthcare and was
17 traveling through your territory, isn't it true
18 that you requested a SUV based on physical
19 injuries from your past?"

20 A. And I said no because Mark -- at the
21 time I had the vehicle. The vehicle came -- go
22 ahead.

23 Q. Finish your answer.

24 A. The vehicle -- it was an approved
25 vehicle for Philips' field people. Earlier

1 when Paul Stoddard transitioned from my
2 previous boss, my previous boss did not want
3 any of the product sales specialists to request
4 larger vehicles at the time because it
5 wasn't -- times were tough. We don't want to
6 request a larger vehicle.

7 When Paul Stoddard took over our
8 region, and I want to say that was
9 January 2010, I asked Paul at one of our team
10 meetings could product sales specialists
11 because we haul around three to four MRx's, our
12 luggage, literature pamphlets. We had a full
13 vehicle and smaller vehicle. We couldn't even
14 fit people in if we were going to take somebody
15 or entertain a guest for dinner. Paul said
16 that sounds reasonable. I'll take it up with
17 Julie and just fill out the form. So I filled
18 out the form. It became then standard practice
19 for all product sales specialists to have the
20 Dodge Journey if they chose to have it.

21 Q. I'm not referring to product sales
22 specialists. I'm referring to the position you
23 were in under Mark Johnson which was the
24 channel manager where your devices were
25 actually much smaller than what you were

1 selling in the product sales specialist which
2 is why you were asked to go to a smaller
3 vehicle?

4 A. Sure. Yes, ma'am. And the way I
5 understood your question at the deposition, did
6 you request from Mark a larger vehicle and I
7 said no. I already had the larger vehicle. I
8 had requested that through Paul Stoddard.

9 Q. My question to you was, "And when
10 you began working at Philips Healthcare and
11 were traveling through your territory, isn't it
12 true that you requested an SUV based on
13 physical injuries from your past?" Can you
14 read your response starting with "A?"

15 A. "Wow, this must have come from Mark
16 too. I'm in the changing of -- so the answer
17 would be no. I requested an SUV per Philips'
18 policies because product sales specialists had
19 to carry around a lot of stuff. There were --
20 there was equipment needs and particularly if
21 we were taking other folks, we were traveling
22 with other people. Either regional managers
23 are taking folks with us off-site to lunch."
24 And I stand by exactly that. That's exactly
25 what I said. The response to your question was

1 did I request from Mark a larger vehicle
2 because of disabilities. That was no. I
3 already had the larger vehicle from that very
4 statement there.

5 Q. You never said those words in the
6 deposition, is my point.

7 A. I'm sorry I wasn't clear.

8 Q. And you'll agree that when Mark
9 allowed you to keep the larger vehicle, it
10 was -- it was done under medical accommodation
11 due to your pre-existing injuries?

12 A. I'm sorry. Say that --

13 Q. He was able -- Mark was able to help
14 you keep that vehicle under -- he obtained a
15 medical accommodation due to your pre-existing
16 injuries? That's why you kept it?

17 A. Okay.

18 Q. Would you agree?

19 A. I don't even know how Mark approved
20 or disapproved. It turned out that I was able
21 to and I don't know if I...

22 Q. Do you remember receiving an e-mail
23 from Mark Johnson on January 31, 2011 that
24 said, "Barry, per our discussion last week, the
25 company is making an exception to the

1 automobile policy to accommodate your request.
2 You'll be keeping your existing Dodge Journey.
3 At that time you may utilize the medical
4 accommodation process to request a vehicle that
5 meets your needs." Do you recall that?

6 MR. SMITH: Your Honor, I'm going to
7 object to that e-mail coming into evidence. I
8 subpoenaed their entire personnel file. That's
9 not been provided to me prior to today.

10 MS. PAYNE: Your Honor, I wasn't
11 entering it into evidence. I was using it for
12 impeachment purposes. It doesn't need to come
13 in.

14 MR. SMITH: You're reading the
15 e-mail. It gets read into the record. That's
16 in evidence.

17 MS. PAYNE: It's used for
18 impeachment purposes. Not for evidentiary
19 purposes.

20 MR. SMITH: Same objection, Your
21 Honor.

22 THE COURT: So noted. Go ahead.
23 BY MS. PAYNE:

24 Q. Do you recall receiving that e-mail?

25 A. I do not. I do recall our

1 conversation and I will say that in regards to
2 the vehicle I had already been driving for over
3 a year that I mentioned to Mark, I said, you
4 know, aside from carrying around equipment and
5 people, it's just for me due to a left hip
6 injury easier to get in and out of a vehicle.
7 It's difficult to sit down particularly if
8 you're driving 400 miles or somewhere you get
9 kind of --

10 Q. Now, when you had this vocational
11 evaluation with Mr. Joel Leonard recently,
12 isn't it true that you told him that you had
13 never had any performance issues at Philips
14 Healthcare prior to the date of accident?

15 A. I'm not even -- if -- in 2009 during
16 the months that I was on PIP, it just didn't
17 stick in my mind that that was even a
18 performance issue. It was something that I
19 was -- that several of my colleagues had to
20 manage and deal with and continue to do your
21 job and try to work your way to making a
22 number.

23 Q. So you were under a performance
24 improvement plan in 2009 which involves going
25 through a process, a meeting. There's a memo.

1 It's titled "Performance Improvement Plan."

2 You continue to follow up with your supervisors
3 about how you're doing in that plan and how
4 you're trying to get off of that plan, but you
5 failed to tell Mr. Leonard that part, correct?

6 A. And I don't recall exactly the
7 wording. I guess it would potentially be there
8 in the documents. I just don't even remember
9 the question, but truly that PIPPIP
10 was something that I -- that truly did not
11 inhibit or influence my feelings of how I was
12 doing my job. I was continuing to do my job.

13 Q. When you were evaluated by
14 Mr. Leonard, you'll agree that you painted a
15 picture stating that, you know, prior to this
16 date of accident, I never had any performance
17 issues and then I had the date of accident and
18 I was fired and I was fired because of my work
19 injury; is that right?

20 A. I don't ever recall saying anything
21 those exact words, so I would say no.

22 Q. Wouldn't you agree that you informed
23 him that you had never had any performance
24 issues prior to your accident, but you had them
25 after date of accident and it was your opinion

1 that you were terminated because of your
2 performance issues which you related to the
3 work injury?

4 A. I just don't recall exactly how any
5 of that -- those questions came up during that
6 interview that it was black and white and this
7 is the way it was and then after the accident,
8 this is the way it was. I answered his
9 questions fully and truthfully, but I just --
10 there was never a position that I stated
11 anything exactly the way you just stated it.

12 Q. Would you agree that you informed
13 Mr. Leonard that your termination from Philips
14 Healthcare was due at least in part to
15 performance-based deficits arising from your
16 work injury?

17 A. I felt so.

18 Q. You did feel so. Right. And in
19 order to prove to him that that was the case,
20 you told him that before the date of accident
21 you had no performance issues, but after the
22 date of accident you were found to have
23 performance issues?

24 A. I just don't recall it coming up
25 exactly like that, like you're wording it.

1 Q. If that information was contained in
2 his report, would you dispute it?

3 A. No.

4 Q. So in 2009 you were on a performance
5 improvement plan and you didn't inform
6 Mr. Leonard, correct?

7 A. I was on a performance improvement
8 plan in 2009.

9 Q. You did not informed Mr. Leonard of
10 being on the performance improvement plan prior
11 to the date of accident?

12 A. I don't recall that coming up or the
13 question specifically being asked. I can tell
14 you it was never deliberately not discussed. I
15 don't ever remember the question specifically.
16 When I answered thoughts in regards to that it
17 was because that 2009 PIP was a distant memory
18 for me and not even something that was in my
19 consciousness.

20 Q. And not only were you receiving
21 correspondence between -- from your boss in
22 2009 about your performance plan and how you
23 were doing on it, in 2010 you also received an
24 e-mail regarding the first five months of 2010
25 and your poor performance in those months as

1 well, correct?

2 A. I saw the e-mail. I don't recall
3 all e-mails that come through, but, yeah, I do
4 remember seeing that e-mail.

5 Q. So you had these performance issues
6 in 2009 and 2010?

7 A. I'm not going to -- being on the
8 plan and having to document numbers is the way
9 that it works with Philips in regards to
10 keeping track of records in regards to
11 performance. So it wasn't --

12 Q. You would agree that in May 2010,
13 you were aware that the company was unhappy
14 with your inability to meet your quota in the
15 first months of 2010?

16 A. I don't categorize it as they were
17 unhappy and ready to cut the cord. It was
18 documenting where we were in the -- where my
19 territory was in Queue One.

20 Q. So as a salesperson, isn't it your
21 understanding that all they look at is your
22 quota? If you're not meeting your quota,
23 you're just not doing your job?

24 A. Exactly.

25 Q. So if they're not happy with you not

1 meeting your quota, does that not indicate to
2 you that they are unhappy with your
3 performance?

4 A. I gauged the level of my performance
5 and happiness within my performance on how my
6 boss would discuss issues with me or
7 opportunities with me. Paul Stoddard at that
8 time was encouraging like some of his comments
9 when he reflects back on that 2010 year that we
10 pulled -- we pulled a great year out
11 considering all things and we actually
12 performed a plan. Paul was encouraging
13 throughout the process. I told him, hey, we'll
14 get through this, I'll get through this.

15 Q. Okay. What about Paul's e-mail to
16 you in May of 2010 wherein -- this is Exhibit
17 D, Page 21 of the exhibits where he stated to
18 you, "As you can see you've achieved only --
19 over 65 percent only once in the last six
20 months. Please call me at your earliest
21 convenience to discuss these results." Do you
22 recall receiving that e-mail?

23 A. I do. I'm familiar exactly with it.
24 And I'll say this how this is managed because I
25 know this is keeping HR in the loop on

1 everything that's going on with this. When I
2 called Paul -- it's not -- it's going to be
3 hearsay.

4 Q. In May of 2010, you are aware that
5 Paul Stoddard wasn't happy with your
6 performance?

7 A. No, I won't agree with that. I
8 won't agree with that because though it's
9 hearsay, our verbal conversations were all
10 encouraging.

11 Q. That's hearsay.

12 MR. SMITH: Objection, Your Honor.
13 It's not hearsay. He's management employee.
14 In fact, he's Mr. Johnson's boss.

15 MS. PAYNE: He's not been
16 subpoenaed.

17 MR. SMITH: He doesn't have to be.
18 He's a management employee of Philips.

19 THE COURT: He's exactly correct.
20 You may answer that or you may continue.

21 THE WITNESS: Paul was very
22 encouraging as his words were in the
23 performance appraisal at the end of the year --
24 at the end of the 2010 period. He knew that we
25 were going to get through the PIP. He made a

1 funny comment. He said, "In our managers
2 meeting yesterday, everybody said Adickes is
3 still on PIP. He just had a month that led the
4 nation." And that's when he said, "I knew we
5 would get through it and you came through with
6 a good performance," which is generally how he
7 managed his employees and that's how he --
8 anyway in 2010, the performance appraisal for
9 that year spoke to how I maintained positive
10 attitude through everything, that he was
11 pleased and proud of how the year went. That's
12 why I said no, it was not in admittance to me
13 that he was displeased.

14 BY MS. PAYNE:

15 Q. Would you agree that if you don't
16 meet your quota, you are essentially falling
17 short of your production goals?

18 A. Yes, absolutely.

19 Q. Mr. Leonard has in his report that
20 you fell short of your production goals for the
21 years after the date of accident. I'm on Page
22 39 of your exhibits. "Prior to such he had
23 always met or exceeded his production goals.

24 A. 2010, I did. We had a -- we had a
25 very good year in 2010.

1 Q. You would agree I just showed you
2 the e-mail wherein the first five months of
3 2010 you didn't?

4 A. What counts as 12 months, Ms. Payne,
5 in this business, if you get 12 months, if
6 you're 70 percent to plan in June and 120
7 percent to plan in July, you've done your job.

8 Q. Be you will agree that you didn't
9 meet your production goals in 2009, did you?

10 A. I'm not sure what you're saying.
11 That I did what?

12 Q. You will agree that you didn't meet
13 your production goals in 2009?

14 A. 2009, we were short of plan.
15 Correct.

16 Q. You were short of plan?

17 A. Correct. Right.

18 Q. And you just didn't inform
19 Mr. Leonard of that, correct?

20 A. (No response.)

21 Q. Is that a yes?

22 A. I just don't remember that ever
23 coming up as a specific question, "Did you do
24 well in 2009?" No, I do not recall ever
25 discussing with Mr. Leonard 2009 specifics.

1 Q. So would you dispute that part of
2 his report?

3 A. No. I'm saying I do not -- I do not
4 recall us talking specifically about 2009's
5 performance.

6 Q. If that was obtained in his report,
7 would you want it struck?

8 A. No.

9 Q. Less than two months after your
10 accident, you returned to Philips working in
11 your regular duty capacity?

12 A. Yes.

13 Q. And during the years after your
14 accident, you continued to work for two and a
15 half months earning at least -- I'm sorry, two
16 and a half years earning at least \$120,000
17 every year which includes your base salary of
18 85 and your commission and your bonus, correct?

19 MR. SMITH: Objection, Your Honor.
20 That misstates the W2 form.

21 THE WITNESS: I think I was short of
22 that.

23 THE COURT: Hold on. What's your
24 objection?

25 MR. SMITH: That that misstates the

1 W2 forms that they offered as evidence.

2 BY MS. PAYNE:

3 Q. Okay. You'll agree that in 2011,
4 you earned \$114,000?

5 A. Yes.

6 Q. In the 2012, you earned \$120,000?

7 MR. SMITH: I'm sorry. What year
8 did you say?

9 MS. PAYNE: 2012.

10 THE WITNESS: I don't -- I need to
11 know the number on our paper. If it's on my
12 W2, then that would --

13 BY MS. PAYNE:

14 Q. In 2013, you earned \$110,000. Does
15 that sound about right? Do you have any reason
16 to dispute that?

17 A. No.

18 Q. You still were making good money?

19 A. I wasn't -- I wasn't satisfied with
20 it. I was ready to make more.

21 Q. Okay. Now, in the two and half
22 years that you continued working for Philips
23 underneath Mr. Johnson, only around 10 to 12
24 days were you affected by your headaches,
25 correct?

1 A. You'll have to forgive me. Restate
2 that.

3 Q. Wouldn't you agree that in those two
4 and a half years that you continued working for
5 Philips, you were only impacted by your
6 headaches or your job was only impacted by your
7 headaches 10 to 12 days?

8 A. During the total of two and a half
9 years?

10 Q. Correct.

11 A. I'm not sure of your math, but I
12 would say no.

13 Q. Wouldn't you agree that when you had
14 headaches while working with Philips, you would
15 just stay home for that day and work from home?

16 A. Right.

17 Q. You would tell Mr. Johnson you were
18 working from home?

19 A. Right.

20 Q. But you continued to work?

21 A. In most cases I have. The first
22 part of recovering, I would be able to do some
23 work from home, particularly on the telephone.

24 Q. Excuse me?

25 A. On the telephone primarily the day

1 after I was able to.

2 Q. So you never had to miss actual days
3 due to the headaches because you were still
4 able to work?

5 A. I missed a few days, I did, with
6 headaches. I'm not sure exactly what the
7 question was there.

8 Q. The question was, we've taken your
9 deposition twice in this case and you --
10 wouldn't you agree you testified that you did
11 have to miss days from work, but you would just
12 tell Mark you were working from home on those
13 days and you were able to work from home?

14 A. I'd say correct in those cases.

15 Q. Now, after the date of accident in
16 2011, even though you missed two months because
17 you were out of work due to the injury, you
18 still almost made your quota?

19 A. What, 86 percent?

20 Q. Eighty-seven.

21 A. Prorated to that. You stream a
22 couple of 87 percents in a row, you're on PIP.
23 So no, 87 is not almost making quota.
24 Eighty-seven gets you on PIP.

25 Q. But the 87 wasn't prorated for just

1 those months?

2 A. I'm not sure exactly how it came out
3 at the end, but I did not meet quota that year.

4 Q. And you'll agree that in 2012, you
5 received an e-mail from your supervisors about
6 performance issues and it was specifically
7 referenced that your performance issues that
8 you had in 2010 were resurfacing; is that
9 right?

10 A. The e-mail stated that --
11 resurfacing was the word used, yes.

12 Q. So in 2012, they thought that
13 whatever performance issues you had in 2010
14 were still there and were coming back?

15 A. "They" who?

16 Q. The report that you received from
17 Philips?

18 A. From Mark.

19 Q. Correct. So Mark was acknowledging
20 that some issues you had in 2010 were
21 resurfacing in 2012, correct?

22 A. As stated in his e-mail.

23 Q. So you're agreeing that you remember
24 receiving that e-mail?

25 A. Yes. I remembered after seeing the

1 e-mail being reminded, yes. It was not
2 something that I recalled from memory.

3 Q. Okay. And then you were terminated
4 from Philips in January of 2014. I'm a little
5 confused about your testimony earlier because
6 you testified that on the phone call with Mark,
7 that he specifically told you that your
8 termination was a result of poor work
9 performance?

10 A. The term was it was work-related. I
11 mean, it was performance related was the --
12 because at that time I said no probation period
13 and he said not under these circumstances.
14 That was the terminology that I recall Mark
15 using.

16 Q. Now, when I deposed you in September
17 of 2014 and you told me the same thing, that
18 Mr. Johnson had told you on the phone that it
19 was performance related, you -- when you got
20 home that night, you started texting
21 Mr. Johnson, didn't you?

22 A. No, I actually did it from the
23 parking lot afterwards. Mark and I have a
24 friendship even after, I guess, the termination
25 and my texts to Mark was ultimately saying,

1 "Hey, I know this was -- you made a few phone
2 calls that day and I know, perhaps, you don't
3 recall, but the reason why I recalled it that
4 way because of the follow-up question," is what
5 I was texting Mark. And what I was saying was
6 I wasn't saying, "Mark, you're not being
7 truthful," in that instance because I remember
8 saying something in the deposition that I felt
9 bad about later about suggesting that he or
10 someone else was being untruthful. I was
11 thinking that, perhaps, they just did not with
12 all the things they were doing that day recall
13 because it was very brief.

14 Q. Let me remind you of what your text
15 message stated. "Hey, Mark. Hope all is well
16 with you and your gals. I'm going to call you
17 tomorrow and if I can't reach you, I will leave
18 a message. I was deposed again today by
19 Philips' attorney. I wish more than ever that
20 I had ignored legal input and called you three
21 weeks ago. Just know that I never said a
22 disparaging word about you as a manager or a
23 friend before or after my termination. I'm
24 hoping that a recording was made and can be
25 found of that phone call. I don't expect that

1 you could recall exactly the dialogue. I
2 cannot. But I remember my question of how I
3 was selected in my follow-up question about the
4 protocol of probationary period. With the
5 reduction in force, RIF, I was, perhaps, a
6 natural selection for those making the call who
7 did not know me. Like I said, I'll call you
8 tomorrow."

9 So wouldn't you agree that within
10 that text message, you're actually telling Mark
11 Johnson that you don't remember the
12 conversation either? All you remember is that
13 you asked the question about a probationary
14 period, right?

15 A. No, it would not suggest that I
16 don't remember anything about it. It was
17 suggesting that verbatim -- I would not be able
18 to recreate it verbatim. But what I was saying
19 to him, maybe you don't recall this. But the
20 reason I recall it being performance related
21 was because of my follow-up question was, "No
22 probationary period?"

23 "Not under these circumstances."

24 Q. And then you --

25 A. My main reason for texting Mark was

1 on a personal level. It was not -- and then I
2 realized and then you contacted Bill and Bill
3 contacted me that it was inappropriate to do
4 that with an open case and I realized it
5 wasn't.

6 Q. But then you texted him again?

7 A. No, I did. I texted him actually
8 twice before getting Bill -- I didn't text him
9 back after Bill contacted me. It just was
10 coincidental that I sent one and I actually
11 sent it -- I didn't want to send it. But as
12 I'm typing it, I send it. You can see -- well,
13 you can chuckle if you like, Ms. Payne, but you
14 can see the time line. You match up your time
15 line with that time line, you will see I never
16 heard from Bill until after those two text
17 messages were sent. So the answer is no, I did
18 not send text messages after Bill told me not
19 to.

20 Q. So you contacted him at 6:30 that
21 evening after the deposition, had a
22 conversation about the termination discussion?

23 A. Uh-huh.

24 Q. And then following that he was then
25 contacted at 1:57 p.m. the following day

1 wherein stated, "Mark, perhaps making contact
2 with you at this point is not appropriate" --

3 A. You may want to check --

4 Q. I've not finished my question. "I
5 apologize. I just wanted you to hear from me
6 how this whole ordeal has been mismanaged into
7 and ugly -- has been mismanaged." Did you send
8 that text message?

9 A. I did, but please check and see if
10 that was maybe when Mark forwarded it to you
11 because my recollection -- and I we can -- if
12 this is actually --

13 Q. He took screen shots of it. My
14 question to you is, do you recall sending the
15 second text message?

16 A. Yeah. I sent it virtually
17 simultaneously as the second -- as the first.
18 It wasn't Bill -- after Bill said don't do
19 that, I didn't do it.

20 Q. So you sent one text message and
21 then immediately realized it was inappropriate
22 to send any so you sent another right after?

23 A. What I did -- and if you'll see my
24 last statement, "I'll call you tomorrow." Did
25 you read that part? That would suggest it was

1 the day before. And I wouldn't be saying,
2 "Hey, I'll call you tomorrow even though Bill
3 says not to." I wouldn't have done that.

4 Q. It says, "Hey, I'll call you
5 tomorrow." And then the next text message was
6 sent the next day after you were advised not to
7 do so. This is meaningless.

8 A. I would say it would be too. You're
9 pursuing it.

10 Q. Excuse me?

11 A. I said you're saying it's
12 meaningless and I say it would be too. You're
13 pursuing --

14 THE COURT: Let's move on.

15 BY MS. PAYNE:

16 Q. Let's move on. Following your
17 termination, you provided your resume to many
18 places, correct?

19 A. Yes.

20 Q. And the only three that you informed
21 me of in the deposition were McKesson, D-E-X, I
22 believe, ZOLL, correct?

23 A. Those were interviews and
24 opportunities.

25 Q. You had interviews at those places?

1 A. Those were opportunities that had
2 developed beyond my just sending out the
3 e-mails of resumes.

4 Q. Were you surprised when we
5 subpoenaed ZOLL Medical Supplies and they
6 responded that they had no applications on file
7 or resumes on file from you?

8 A. I'm surprised, no, that they didn't
9 have any because I didn't go through an
10 application process. It was a phone
11 conversation after sending into Jamie Sultsman
12 with ZOLL through one of our -- one of my
13 channel partners that's still a very big
14 customer of Philips, DXE, who wrote a nice
15 referral letter. I sent the referral letter
16 and a resume to Jamie and followed up with a
17 phone call.

18 Q. And these resumes that you were
19 providing to all these potential employers, you
20 held yourself out as an impactful public
21 communicator with comfortable ease and
22 delivery, correct?

23 A. Yes.

24 Q. Doesn't sound like there's any
25 cognitive deficits there?

1 MR. SMITH: Objection.

2 Argumentative.

3 BY MS. PAYNE:

4 Q. Wouldn't you agree?

5 THE COURT: Sustained.

6 THE WITNESS: I would not. I would
7 not agree.

8 BY MS. PAYNE:

9 Q. You also held yourself out as an
10 extensively trained practitioner of consultive
11 sales methods, correct?

12 A. Correct.

13 Q. And you informed them that you were
14 expertly organized and focused when moving
15 opportunities through the sales cycle?

16 A. That is a bullet point that I've
17 amended in my -- in my resume, but on that
18 resume I would say correct.

19 Q. And you informed potential employers
20 that you're diligent, trustworthy, and you've
21 got integrity?

22 A. Correct.

23 Q. So these are obviously qualities
24 that you feel about yourself, correct?

25 A. Correct.

1 Q. So you were confident going in the
2 job market that, you know, showing those
3 qualities that you would hopefully find a job
4 similar to the one you had at Philips, if not
5 better?

6 A. I was hopeful.

7 Q. In fact, when you applied at
8 McKesson, you were applying for like a director
9 position which would have been a step up from
10 where you were at Philips?

11 A. The salary -- base salary was about
12 the same.

13 Q. The position was direct which would
14 be a step up from where you were at Philips,
15 correct?

16 A. It was.

17 Q. It's more complicated. And you
18 underwent a telephone interview with McKesson,
19 didn't you?

20 A. Six total phone interviews.

21 Q. Do you remember the telephone
22 interview you underwent on March 4, 2014?

23 A. No. I don't remember the dates
24 exactly of all those.

25 Q. But you've seen the documents I

1 provided your counsel, the subpoena responses?

2 A. I'm just not -- that one I may not
3 have remembered exactly the dates.

4 Q. Within that application, the
5 question was asked if you were interviewing
6 with other companies and you informed them that
7 you were and that you had offers pending, but
8 you were strongly considering this position.
9 What offers were pending?

10 A. I don't recall saying that I had
11 offers pending. In fact, I don't think that's
12 very appropriate on an interview to say I have
13 offers pending. I think the question may have
14 been, "Are you actively pursuing other
15 opportunities?" And I said yes. I never used
16 a pending opportunity phrase.

17 Q. So you dispute what's contained in
18 the telephone interview?

19 A. I haven't seen it. I haven't seen
20 it, so...

21 Q. Do you remember when I took your
22 deposition we discussed this?

23 A. No, ma'am. I don't remember all.

24 Q. I said -- I'm on Page 34 of the
25 second deposition. "Now, the note from your

1 phone interview at McKesson indicates that you
2 were interviewing with other companies and have
3 pending offers. What offers were pending at
4 that time?" Can you read your response?

5 A. "VRI had extended an offer and I
6 don't remember ever saying that I had other
7 than if they asked the question, 'Do you have
8 other opportunities available?' That, to me,
9 is not professional to tell somebody on an
10 interview. A strike quick, I'm about to be
11 hired with someone else. The question may have
12 been posed to me, 'Do you have any other
13 opportunities you're pursuing?' or whatever."

14 Q. But your first sentence was, "VRI
15 had extended an offer."

16 A. And that -- okay. That, in
17 particular, was, yes, one from Ron McDonald
18 that did say, "Hey, come see me."

19 Q. But you didn't even apply at VRI
20 until the next month?

21 A. Right. He as an acquaintance knew
22 of my departure, knew my track record when he
23 was with me, knew previously I was an
24 eight-time presence achievement award with
25 Lifeline and said this is the business now

1 we're in. I'm the VP of this company. I would
2 love for you to come work for me. We pay
3 \$55,000 a year starting, but you can begin to
4 make some money. I know that's less than --
5 that's basically, again, we're talking hearsay.

6 Q. And when I deposed you back in
7 September, you testified that you had actually
8 had an offer from VRI in January which is the
9 same month you stopped working -- or were
10 terminated from Philips?

11 A. Okay. I'm not certain of the dates.
12 I did talk to Rob early in the process,
13 early --

14 Q. So you just chose not to accept it
15 for a few months?

16 A. Correct.

17 Q. Okay. And also in your phone
18 interview with McKesson, you informed them that
19 you were no longer working at Philips because
20 your position was eliminated, correct?

21 A. Okay.

22 Q. So you told them that you were
23 eliminated as part of a RIF?

24 A. I just don't even recall the
25 conversation exactly how that was positioned,

1 but that is based on what -- testimony.

2 Q. So if that is contained within the
3 summary of the telephone interview, would you
4 contest it?

5 A. The summary of what telephone?

6 Q. The telephone interview that you had
7 with McKesson?

8 A. I just -- if it's -- no, but I do
9 not recall saying to them even the discussion
10 of my leaving Philips.

11 Q. And when I deposed you back in
12 September, you testified that you were of the
13 opinion that you didn't get the job at McKesson
14 because you filled out some sort of medical
15 questionnaire and the medications you were on
16 were related to a work injury and that's why
17 they didn't hire you?

18 A. I felt strongly because of how it
19 was progressing. McKesson's, the Los Angeles
20 base where ZEE Medical, a subsidiary of
21 McKesson, was where the director's position
22 was. My contacts there suggested that you're a
23 front runner. Things were looking good after
24 that last interview.

25 San Francisco is where McKesson's

1 headquarters and their HR department. The last
2 two interviews -- or I should say the third and
3 the sixth interview were from folks from the
4 San Francisco office. That last one was
5 answering questions on the medical
6 questionnaire, "Why are you on Nadolol every
7 day? Why do you" --

8 MS. PAYNE: I'm just going to object
9 to this testimony because there is no evidence
10 a medical questionnaire was ever performed -- I
11 mean, received as full subpoena response from
12 McKesson which doesn't contain one. So I think
13 it's hearsay.

14 MR. SMITH: She opened the door,
15 Your Honor.

16 THE COURT: She did, indeed. He may
17 answer those questions, but you need to refrain
18 yourself to answering questions and not just
19 pontificating. Okay?

20 THE WITNESS: I'm sorry. Yes, sir.
21 BY MS. PAYNE:

22 Q. You don't have that medical
23 questionnaire with you, do you?

24 A. No.

25 Q. You don't have any applications you

1 submitted to ZOLL or McKesson with you?

2 A. No.

3 Q. And were you surprised when you saw
4 the subpoena response from McKesson stating
5 that there was never a medical questionnaire
6 done?

7 A. I'm sorry. What?

8 Q. Were you surprised when you saw the
9 subpoena response from McKesson without any
10 sort of medical questionnaire contained?

11 A. No, I'm not surprised one way or the
12 other with what you have there. I just don't
13 know how to respond to that as far as being
14 surprised with what you have and don't have.

15 Q. You haven't subpoenaed anyone from
16 McKesson to testify today about why you didn't
17 get the job, have you?

18 A. No.

19 Q. So you actually don't have or you
20 haven't brought with you any proof that you
21 didn't receive the job at McKesson because of
22 your work injury at Philips?

23 A. I would say there's no proof of
24 that. I would agree with you there.

25 Q. So then you became hired at VRI.

1 Looks like you applied in April 2014, correct?

2 A. I believe that's when I filled out
3 the application.

4 Q. And on that application there was a
5 specific square that said "desired salary"
6 which you indicated \$55,000 base, correct?

7 A. Per the understanding that that was
8 what the sales folks made.

9 Q. Even though it said the word
10 "desired?"

11 A. I put in what I knew what the salary
12 was.

13 Q. Now, the position that you had at
14 VRI was a very flexible position where, you
15 know, there weren't any specific days allocated
16 off for vacation, you know. You could kind of
17 take two days off or two months off, correct?

18 A. Correct.

19 Q. So you never had to miss any time
20 due to your headaches, right?

21 A. I never had to report any time that
22 I was down with a headache. Rob and I would
23 have conversations about how things were going.
24 Every week we talked at 1:00 p.m. on Mondays.

25 Q. So \$55,000 is what you -- it was

1 your understanding that \$55,000 was the base
2 salary for the position you held at VRI as
3 territory manager, right?

4 A. I learned that early in the process
5 and you asked the question earlier about why I
6 did not take that right away. I was hoping
7 to -- I was still hopeful that another position
8 would be available.

9 Q. So you just -- your earnings at VRI
10 are reflective of the base salary of all of the
11 territory managers which is \$55,000?

12 A. Yes.

13 Q. Has nothing to do with the fact that
14 you may be slower at doing things or anything
15 of that nature, correct?

16 A. That's correct.

17 Q. So all the other territory managers
18 make a base salary of \$55,000?

19 A. Yes.

20 Q. Now, when you applied to VRI and
21 spoke with the HR department, you never
22 notified them of your prior injuries or any
23 accommodations due to your work injury, did
24 you?

25 A. I did discuss with my boss. He knew

1 because he knew me from earlier that I was in
2 the accident in 2011, yes.

3 Q. The HR department was never made
4 aware?

5 A. Yes, Laura Schmitt would have been
6 aware. She was aware of this particular case
7 specifically because she was subpoenaed to
8 provide records and I wanted to share with her
9 why she was being subpoenaed for my records.

10 Q. So you talked to her?

11 A. Laura Schmitt would be the person I
12 talked to. This would have been back in May.
13 Whenever you subpoenaed the record, I called
14 her and let her know why.

15 Q. Would you be surprised if the
16 current HR position or current person that
17 holds the HR position who responded to our
18 subpoena said that the HR department is unaware
19 of any reasonable accommodations or --

20 A. Laura would know --

21 MR. SMITH: Objection. First of
22 all, there's been no records submitted into the
23 record to say that. So whatever she's talking
24 about is hearsay and it had not been provided
25 to me.

1 MS. PAYNE: I'll provide this to
2 Mr. Smith. We just got a response since we
3 were just provided with her name.

4 MR. SMITH: I still object to it as
5 hearsay if there is nobody here to testify to
6 it's authenticity.

7 MS. PAYNE: Well, Commissioner, we
8 just got the name of his supervisor. We asked
9 it on Tuesday and Thursday the supervisor said
10 we're going to have to send a subpoena to this
11 specific person within the HR department. We
12 had already subpoenaed all the records from VRI
13 and have never been provided with anything with
14 regard to his termination because that's what
15 we needed. And so on this past Tuesday -- just
16 this Tuesday, she responded with regard to the
17 subpoena that we sent for termination evidence.

18 THE COURT: And did you provide that
19 to Mr. Smith on Tuesday?

20 MR. OXFORD: This was just
21 yesterday.

22 THE COURT: Did you provide it to
23 Mr. Smith yesterday?

24 MR. SMITH: I haven't gotten it.
25 They sent a subpoena out of state which is not

1 a proper subpoena.

2 MS. PAYNE: It's not an -- we didn't
3 subpoena -- we didn't -- we were subpoenaing
4 the termination documents. We realized we
5 couldn't bring those. It's not our burden to
6 prove this, but we wanted to see why he was
7 terminated and we requested additional
8 documents that we thought would be contained in
9 the record that weren't provided the first
10 time. This was the first time we got her name
11 was last week, and then we just got this
12 response from her yesterday.

13 THE COURT: Mr. Smith hasn't seen it
14 prior to right now?

15 MR. OXFORD: It was mailed
16 yesterday.

17 THE COURT: If it was mailed
18 yesterday, how can he possibly have received it
19 if it went out in the mail yesterday?

20 MR. OXFORD: The subpoena was sent
21 to him yesterday.

22 MS. PAYNE: I'm not trying to tender
23 this in evidence. I'm using it for impeachment
24 purposes.

25 MR. SMITH: When you question him

1 about it, it's in evidence.

2 MS. PAYNE: It's not in evidence.

3 THE COURT: It's not going to come
4 in. I mean, if it was so critical to your
5 case, you should have asked for a postponement,
6 which you did not.

7 BY MS. PAYNE:

8 Q. You haven't brought with you any
9 documentation or any witnesses from VRI to
10 prove that you were terminated due to your
11 work-related injury, have you?

12 A. No.

13 Q. Now, with regard to the injuries
14 that you sustained in the incident, your
15 headaches have gotten better, correct?

16 A. Better than they were the year of
17 the accident. Less frequent.

18 Q. And you underwent an MRI scan of
19 your brain and CT scan of your head both of
20 which were normal?

21 A. The day of the accident I did have
22 an MRI, correct. There was no bleeding or
23 crack or broken skull, I guess.

24 Q. Now, with regard to the cognitive
25 issues that you are claiming, you'll agree that

1 when your deposition was taken back in April of
2 2013, that the only cognitive issues you
3 sustained were memory loss and difficulty
4 putting words together?

5 A. I do not recall categorizing -- you
6 showed me information I could say yea or nay.
7 I just don't -- I don't recall what you're --

8 Q. Do you recall in April of 2013
9 feeling like you had any other cognitive issues
10 resulting from the accident?

11 A. Just the ones that we've stated.

12 Q. And you also testified that your
13 memory loss hasn't impacted your ability to do
14 your job back at the time in April 2013?

15 A. I didn't feel like it had
16 significantly.

17 Q. And, in fact, when you were deposed
18 in April of 2013, you testified that you had
19 performed your job at Philips adequately since
20 returning to work?

21 A. Yes.

22 Q. And in some of your medical records,
23 specifically of Dr. Waddle, you related your
24 forgetfulness to your age?

25 A. I'm not sure what doctor.

1 Q. Do you recall informing any of the
2 doctors that you thought that your
3 forgetfulness was due to your age as opposed to
4 your work-related injury?

5 A. Is this from Dialogue Commentary
6 with Dr. Mandell? I'm not familiar with
7 Dr. Waddell.

8 Q. Mandell. I'm sorry.

9 A. If you can state the question again.

10 Q. Isn't it true that you have reported
11 to some of your doctors that your forgetfulness
12 is due to your age?

13 A. I felt that I was experiencing
14 things that a lot of 53-year-old men might
15 experience.

16 Q. And you reported that to your
17 doctors?

18 A. To Dr. Mandell.

19 Q. Do you recall undergoing a
20 neuropsychological evaluation with Dr. Randy
21 Waid?

22 A. I do.

23 Q. Have you reviewed the report?

24 A. I reviewed the summary of some of
25 the scoring which I really wasn't familiar with

1 and I'm trying to determine which test was
2 which. I just kind of reviewed the summary,
3 but not in detail.

4 Q. And you remember going through a lot
5 of tests?

6 A. A lot of tests. All day. Nine
7 hours' worth.

8 Q. And in reading the summary, I'm sure
9 you saw that Dr. Waid came to the conclusion
10 that you made a good recovery from your
11 injuries and you had a high range of
12 intellectual abilities, correct?

13 A. Correct.

14 Q. And that the neuropsychological exam
15 provided favorable results. Did they tell you
16 the results as you were getting tested?

17 A. No. I was really excited and
18 enthusiastic to get the report because I kind
19 of wanted to know what was going on as well
20 with my brain.

21 Q. And you also injured your right
22 shoulder and you initially underwent surgery in
23 October of 2011?

24 A. Yes.

25 Q. And you continued to treat with

1 Dr. Rentz thereafter, correct?

2 A. Yes.

3 Q. And Dr. Rentz is your neighbor?

4 A. Yes.

5 Q. And you went to his house after your
6 accident and got injections from him at his or
7 your house?

8 A. No. The day of the accident I went
9 to his office. He took x-rays, perhaps, a
10 couple weeks or maybe a couple months
11 afterwards. He gave me a cortisone injection
12 in my right shoulder.

13 Q. At your house?

14 A. Yes.

15 Q. So you underwent the surgery
16 October 21, 2011 and you treated with him seven
17 days thereafter and he stated that you were
18 having a good recovery; is that right?

19 A. Yeah, I was working it back in
20 shape.

21 Q. And the next month he reported that
22 you had full extension of your right -- full
23 extension of your right arm. Do you recall
24 that?

25 A. No, I don't recall having an

1 extension test with him.

2 Q. You don't recall --

3 MR. SMITH: May I interpose an
4 objection? The medical records speak for
5 themselves. I don't know what is the purpose
6 of these questions.

7 MS. PAYNE: Your Honor, I'm not
8 going through all of the medicals. I just
9 wanted to hit on a few involving the right
10 shoulder.

11 THE COURT: All right.

12 BY MS. PAYNE:

13 Q. So you don't recall doing any sort
14 of physical exams where he --

15 A. I don't remember a range test or --

16 Q. So if his medical records showed
17 that he did flexion tests, range of motion
18 tests, strength tests, you would dispute all
19 those?

20 A. I just don't recall doing that, no.
21 I wasn't -- I just don't even recall after
22 surgery and going through physical therapy
23 going through range of motions tests.

24 Q. It says in this medical note of June
25 25, 2012, it indicates that your range of

1 motion was back to full. So do you recall
2 doing a range of motion test on that date?

3 A. I do not. I do not recall seeing
4 him -- we're talking June of 2012, you say?

5 Q. Yes.

6 A. And this was an office visit?

7 Q. Yes.

8 A. I don't recall that, but I just -- I
9 don't dispute it. I don't recall it.

10 Q. Okay. Well, shortly after that it
11 looks like that was an issue in the case
12 whether your right shoulder was a compensable
13 injury or not and you guys went before the
14 Commissioner and had a situation something like
15 this and it was settled at pre-hearing. But
16 regardless, from that point forward it was
17 determined or it was found that your right
18 shoulder was a compensable injury and that you
19 were entitled to medical treatment in relation
20 to your right shoulder, correct?

21 A. Correct.

22 Q. And that was right around May 13th
23 of 2013, correct?

24 A. Correct. That sounds right.

25 Q. Now, your last office visit before

1 that hearing with Dr. Rentz was June 25, 2012,
2 almost a year prior to the hearing. Does that
3 sound about right?

4 A. That I went for an office visit?

5 Q. With Dr. Rentz?

6 A. Okay. Again, I don't recall the
7 dates of every appointment.

8 Q. Based on my time frame, June 25,
9 2012, Dr. Rentz stated that your shoulder was
10 back to full extension and the case was heard
11 and there was a decision in May 2013 where your
12 right shoulder was deemed compensable. Shortly
13 thereafter, wouldn't you agree that a month
14 later, June 16, 2013, you returned to
15 Dr. Rentz's office, but this time you were
16 complaining of your knee which you had injured
17 while playing baseball with your son; is that
18 right?

19 A. Correct.

20 Q. And you would agree that at that
21 visit you didn't have any complaints of right
22 shoulder pain?

23 A. Correct.

24 Q. So in between the dates that you --
25 in between May -- actually, sorry, June 25,

1 2012 was your last visit with Dr. Rentz in
2 relation to your shoulder. When we recently
3 were getting ready for this hearing, we sent
4 you back to Dr. Rentz because we wanted to see
5 if there was a rating and you went back to him
6 on December 16, 2014, right?

7 A. Yes.

8 Q. And that was in relation to your
9 right shoulder?

10 A. Yes.

11 Q. Okay. And you had seen him -- just
12 to clarify, you had seen him in between that
13 time, but it was for your knee and you had knee
14 surgery and all those kind of things?

15 A. That's right.

16 Q. There was no mention of your right
17 shoulder being in any pain during those visits?

18 A. Right.

19 Q. Okay. So you went back to him
20 September 16, 2014 and he sent you for an MRI
21 scan?

22 A. Yes.

23 Q. And you went to the MRI scan and it
24 was taken October 10, 2014?

25 A. Correct.

1 Q. That was a right shoulder MRI scan?

2 A. Yes.

3 Q. Okay. And then you returned to
4 Dr. Rentz's office six days later, October 16,
5 2014, but only reported pain in your low back,
6 correct?

7 A. This was not Jamie. This was not
8 Dr. Rentz. This was Dr. Heinig.

9 Q. It's Dr. Rentz's office, correct?

10 A. It wasn't Dr. Rentz. It was a lower
11 back spasm that wouldn't go away and he just
12 gave me some Prednisone.

13 Q. And you had been having low back
14 spasms for months due to doing yard work in
15 your yard?

16 A. There's different things in my lower
17 back that get exacerbated for compensation
18 because I can't do well with my shoulders and
19 my right knee and, therefore, I bent
20 inappropriately and put my back in a spasm. It
21 lasted several weeks. So normally a back spasm
22 for me will last four days and this was going
23 on four weeks. So I went to get Prednisone.

24 Q. But you would agree you had an MRI
25 done when you returned to Dr. Rentz's facility

1 and just treated with the other physician in
2 relation to your low back and didn't see
3 Dr. Rentz, correct?

4 A. That's correct.

5 Q. In fact, you haven't seen Dr. Rentz
6 since then? You've never returned after the
7 MRI?

8 A. I called to schedule an appointment
9 and at that time they said it needed to be
10 scheduled through --

11 MS. PAYNE: I object to hearsay.

12 BY MS. PAYNE:

13 Q. You haven't returned to Dr. Rentz
14 after the MRI exam?

15 A. I attempted to, but was told I
16 needed to go through the process.

17 Q. And you didn't tell your counsel
18 about that?

19 A. We've attempted to get either a
20 follow-through appointment, but they sent the
21 report on the MRI to Bill and not to me and
22 Bill is the one that shared with me the report
23 of the MRI.

24 Q. Actually, instead of going back to
25 Dr. Rentz, you wanted to return to the IME

1 physician that performed your IME back in 2012,
2 Dr. Barron, right?

3 A. He was always in the picture.
4 Dr. Barron was a second opinion.

5 Q. And he's the only one that provided
6 a PPD rating in relation to your right
7 shoulder?

8 A. I would say.

9 Q. And you haven't taken that rating to
10 Dr. Rentz to see if he had any opinions?

11 A. I haven't.

12 Q. And he gave you a zero percent
13 rating on your left shoulder?

14 A. Yes.

15 Q. You've actually --

16 A. Fifteen percent on the right, if I
17 recall.

18 Q. Right. From Dr. Barron who you've
19 only seen on one occasion?

20 A. Correct.

21 Q. And the questionnaire that he just
22 filled out within this past month was just a
23 questionnaire response. You never returned to
24 visit him this past month?

25 A. No.

1 Q. You haven't seen him in two years?

2 A. I've tried, but I have not.

3 Q. You've tried to see Dr. Barron?

4 A. Yes.

5 Q. You've never sent your prescriptions
6 under workers' compensation, have you?

7 A. I have them here, receipts that I
8 brought Bill this morning from the last year or
9 so.

10 Q. When you've been previously deposed,
11 you testified that you actually spoke with your
12 Blue Cross Blue Shield adjuster about it and
13 she said she would just take care of them and
14 you should submit them to Blue Cross Blue
15 Shield because Philips --

16 A. When I was employed by Philips, I
17 managed my prescriptions through the Blue Cross
18 Blue Shield plan.

19 Q. That was your personal choice?

20 A. That's what I was told to do by a
21 case manager with Blue Cross Blue Shield.

22 Q. Okay. Blue Cross Blue Shield.
23 Maybe I misheard you earlier, but I thought you
24 testified that you had never been involved in a
25 prior work-related accident?

1 A. I've never been involved in a
2 previous work-related accident.

3 Q. Isn't it true that you treated with
4 Dr. Rentz back in 2003 for a right wrist injury
5 due to a work-related accident?

6 A. It wasn't -- it was an accident, but
7 it wasn't a workers' comp accident. It was a
8 car accident.

9 Q. So if his notes indicate that you
10 were involved in a motor vehicle accident which
11 is a possible workplace injury, would you
12 contest that?

13 MR. SMITH: Your Honor, I would
14 object. Those records are not in evidence and
15 have not been provided to us.

16 MS. PAYNE: I'm using them for
17 impeachment purposes. I'm not offering them as
18 evidence.

19 THE WITNESS: I had a broken --

20 THE COURT: I will allow her to use
21 them for impeachment purpose.

22 THE WITNESS: It was not a workers'
23 compensation case.

24 BY MS. PAYNE:

25 Q. So you were involved in a car wreck?

1 A. In Rock Hill, my hometown.

2 Q. And were you working when it
3 happened?

4 A. No. I was going to be traveling
5 that afternoon, but that prevented me from
6 doing that.

7 Q. You hired an attorney as a result of
8 that?

9 A. I did not.

10 Q. So if Dr. Rentz's notes state on
11 January of 2004, that you returned complaining
12 of a work injury from a motor vehicle accident
13 and now lists that you have an attorney, you
14 would dispute that?

15 A. I would dispute that. That case
16 never involved an attorney.

17 Q. Now, you testified earlier that when
18 you were switched from the product sales
19 position to channel manager is when you became
20 under Mark Johnson and that it wasn't a
21 demotion. It was just a change of position; is
22 that right?

23 A. That's right.

24 Q. Have you had the opportunity to read
25 Mr. Joel Leonard's report from his deposition?

1 A. Yes. And I realized that in there
2 he stated that -- and there's also the use of
3 general manager. I think as I was saying
4 channel manager, maybe it was coming out. I
5 noticed that on a couple of depositions,
6 general manager. And I mentioned that to Bill
7 last week. I said it wasn't general manager.
8 It was channel manager.

9 Q. And did you realize that put
10 Mr. Leonard under the impression that you were
11 promoted to a higher position right before your
12 accident?

13 A. And I'm -- when I mentioned to Joel
14 that I went from product sales specialist to a
15 channel manager position, I stated there that
16 it was with my aspiration to be potentially the
17 management position with Philips later as a
18 regional manager and this was a good transition
19 to take.

20 Q. So you think Mr. Leonard just
21 misunderstood you?

22 A. I think, perhaps.

23 MS. PAYNE: That's all I have.

24 THE COURT: Let's go off the record.

25 (Off the record.)

1 THE COURT: All right. We are ready
2 to go back on the record. Mr. Adickes, I will
3 remind you that you are still under oath.

4 THE WITNESS: Yes, sir.

5 THE COURT: Mr. Smith.

6 MR. SMITH: Thank you, sir.

7 REDIRECT EXAMINATION

8 BY MR. SMITH:

9 Q. Mr. Adickes, when you applied for
10 the job at McKesson, how many interviews did
11 you go through?

12 A. Six.

13 Q. And just because this has been a
14 while, that was after your termination at
15 Philips?

16 A. Yes.

17 Q. At what point were you notified that
18 you did not get that job?

19 A. I really don't remember the day. It
20 was, I believe, April.

21 Q. Let me rephrase my question. Had
22 you sent them in the drug information?

23 A. The questionnaire, yes.

24 Q. What drugs did you notify them that
25 you were taking?

1 A. The ones that I mentioned before as
2 a preventative, the daily Nadolol, the Imitrex
3 injections as needed, and Frova as needed, and
4 Maxalt which is occasional.

5 Q. And are those the same drugs you're
6 taking now?

7 A. And Naprosyn was the other for minor
8 maintenance.

9 Q. Are those the same drugs you're
10 taking now?

11 A. Yes.

12 Q. Now, you were also questioned
13 regarding your employment with VRI and you had
14 a base salary of \$55,000?

15 A. Yes.

16 Q. Did you say all the sales executives
17 had the base salary of \$55,000?

18 A. Right.

19 Q. Did those -- all the sales
20 executives have the opportunity to make
21 commissions on top of that?

22 A. Yes.

23 Q. Did you make any commissions on top
24 of the \$55,000?

25 A. No.

1 MR. SMITH: Thank you, sir. No
2 further questions.

3 THE COURT: All right. Ms. Payne.

4 MS. PAYNE: Nothing further.

5 THE COURT: All right. You may step
6 down.

7 MR. SMITH: I call Ms. Jeanie
8 Adickes.

9 THE COURT: Ma'am, I have two
10 requests for you. The first is speak up. That
11 mic is on. So if you feel like you need to use
12 it, you can. It's imperative that the
13 attorneys hear and I hear you, but most
14 importantly that this young lady who is making
15 the record hear you.

16 The second is if you are asked a yes
17 or no question, please give us a yes or no
18 answer. If you nod your head like you're doing
19 now and I do all the time, she actually has to
20 put that in the record and it slows her down.

21 THE WITNESS: Yes, sir.

22 THE COURT: So try to remember to
23 give us an audible yes or no. Okay?

24 THE WITNESS: Okay.

25 (JEANIE ADICKES, being duly sworn to

1 tell the whole truth, testified as follows:)

2 THE COURT: Please state and spell
3 your full name for the record.

4 THE WITNESS: Jeanie Adickes.
5 J-E-A-N-I-E, A-D-I-C-K-E-S.

6 THE COURT: Thank you, ma'am.
7 Mr. Smith, your witness.

8 MR. SMITH: Thank you.

9 DIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Ms. Adickes, how are you related to
12 Barry Adickes?

13 A. I'm his wife.

14 Q. How long have you been married?

15 A. Twenty-eight years.

16 Q. Have you had an opportunity to
17 observe him on a daily basis over that period
18 of time?

19 A. Yes, sir.

20 Q. Tell me how he was before this
21 injury.

22 A. He's always been efficient. He's
23 always been focused, able to do his job,
24 multitask, never had headaches. And when I say
25 never, I guess that's an exaggeration. But in

1 28 years, I can count probably on one -- well,
2 20 years I can probably count on one hand how
3 many times he had complained of a headache
4 prior to this accident.

5 Q. Did that change after this accident?

6 A. It did.

7 Q. Tell me how it changed.

8 A. He has headaches on a regular basis.
9 We've dealt with that with Dr. Mandell, his
10 neurologist. He takes medication which he
11 never had to take prior. As far as his focus,
12 memory, multitasking, all of that has declined.
13 He does -- he takes longer to do things.
14 E-mails, processing thoughts, verbalizing those
15 thoughts. Everything takes more effort and a
16 little longer.

17 Q. Does he eventually get things done?

18 A. He does.

19 Q. Is Barry the type of guy to
20 complain?

21 A. He's the opposite. It's one thing I
22 love about him and it's the other thing that's
23 frustrating. He minimizes things. He -- I
24 think it's just his makeup. It's who he is.
25 He's never going to complain even prior to

1 this. Maybe he did have a headache more often
2 than I ever knew, but I never knew it if he
3 did. He's not a complainer. Never has been.

4 Q. Have you gone to doctor appointments
5 with him?

6 A. Yes.

7 Q. Why did you do that?

8 A. Because I knew his clarity in the
9 beginning wasn't there. He was having
10 headaches. I needed to know more about how we
11 were going to treat them because I'm his
12 partner.

13 Q. Did you go to Dr. Mandell's
14 appointments with him?

15 A. That's probably the one I've been to
16 the most with him.

17 Q. How often does Barry experience
18 these headaches?

19 A. It varies. Of course, when he first
20 had the accident, it was an ongoing headache
21 for many weeks and then we were just excited to
22 have a few days that we wouldn't have a
23 headache before he would have another one. Now
24 it's -- it ranges anywhere from four to eight
25 weeks, usually depending on what his medicine

1 is at that point in time. Once he's been on a
2 medicine for a certain period of time,
3 sometimes it will need to be tweaked. Those
4 headaches will become closer together, maybe
5 like every four weeks. But right now I would
6 say on average six to seven weeks that he has
7 one.

8 Q. How do you know that?

9 A. Well, I usually can look at him and
10 tell. And a lot of times I'll say, "Is your
11 head hurting?" And he will actually look at me
12 and say no and it is hurting.

13 Q. When I said how do you know, what I
14 meant by that is how do you know how often his
15 headaches are?

16 A. Oh, I keep a -- I'm not going to say
17 it's every single time, but 98 percent of the
18 time as soon as I know he has a headache, I
19 write it on my calendar.

20 Q. Is that something Dr. Mandell wanted
21 you to do?

22 A. It's something I started doing.
23 But, yes, Dr. Mandell said it was a very good
24 process of keeping up with a log.

25 Q. And did you share that with

1 Dr. Mandell --

2 A. I have.

3 Q. -- the results of your keeping track
4 of those records?

5 A. Uh-huh. When we go, I'm able to
6 tell him what date he had the last one, how
7 long it lasted, what he took, and it's just
8 become a process that I do.

9 Q. When he has these bad headaches,
10 tell me what you observe? How long does it
11 last, what the duration is, what's going on
12 with him?

13 A. Well, usually I can just tell
14 because he just has a little scowl in his head
15 and I'll ask him, "Do you have a headache?"
16 Typically when he decides that it's definitely
17 one that needs an injection, he'll do an
18 injection. Those usually make him kind of
19 drowsy and kind of needs to lay down and he'll
20 go to sleep, and then he usually repeats the
21 injection. It's normal that he needs two
22 injections, and he'll take that one and then
23 usually go to bed.

24 If it's the evening, even if it's
25 not, lay down on the couch, usually takes a

1 good long nap. It's followed up by the next
2 day by Frova, sometimes Maxalt, but that Maxalt
3 has taken a backseat to the Frova at this point
4 in time, one of those little medical --
5 medicine tweaks that Dr. Mandell has done and
6 it seems to be working for him.

7 Q. When these come on, how many days is
8 he out of commission?

9 A. That varies too. Always that first
10 day. Then the second day he's -- I've always
11 called it a hangover, but it's like he's just
12 kind of foggy and sluggish. Sometimes if he
13 has a rebound headache, which that happens, not
14 every time, but often enough to say it happens
15 enough, at least half of the time, he'll have
16 to sometimes take another injection that third
17 day. So it's kind of two to four on average
18 and you just never know.

19 Q. Now, aside from the headaches, what,
20 if anything, have you noticed from a memory
21 concentration standpoint? Can you give me
22 examples of problems you've seen?

23 A. Yeah. Well, we have four children
24 and we'll all be talking at the supper table
25 when they're home or whatever and things will

1 be told and said and he'll actually partake in
2 that conversation. So it's like we know he
3 knew what we were saying, but then there will
4 be times a day later and we'll say, "We talked
5 about that last night. Do you not remember?"
6 And he'll say -- we call supper time, blah,
7 blah, blah. Then he'll come back to, "Oh,
8 yeah, I do remember." But he didn't remember
9 until we recalled it to him. That's just not
10 the Barry that was prior to the accident.

11 It's more short-term memory things.
12 Maybe that's just because we've been dealing --
13 we deal with that more in the household than
14 what happened ten years ago. But it seems to
15 be that's what I notice the most because that's
16 daily life and that's what we're doing.

17 Focus, he just seems to be
18 distracted a little bit more than he used to
19 be. He's gotten better at this, but still not
20 as good as he was and it was excruciating that
21 first year to watch him put an e-mail together.
22 He would sit at that computer and compose an
23 e-mail that would have normally taken him 15
24 minutes, maybe 20, and it would take him an
25 hour and 15 minutes. Now it's probably a good

1 30 to 40 minutes when he is preparing an e-mail
2 that he wants to send to a client or a church
3 member or whoever. It just takes him longer.
4 Multitasking, he doesn't do that quite as well.

5 Q. How about mood, temper, that sort of
6 thing?

7 A. Barry has always been the patient
8 one in our household. I don't have quite as
9 much patience as he has. He doesn't have the
10 patience that he used to have. I don't want to
11 make it sound like he has no patience because
12 he does. But compared to what he had, there is
13 definitely a difference.

14 Q. Have you discussed all these things
15 with Dr. Mandell?

16 A. I have.

17 Q. I don't want you to tell me what
18 anybody said to you, okay, but have Barry's
19 co-workers and that sort of thing reported
20 issues to you with memory and forgetfulness?

21 A. Not co-workers.

22 Q. Excuse me?

23 A. Not co-workers.

24 Q. Have others?

25 A. Our kids always -- they'll look at

1 me and give me a look like, really, did he just
2 not remember that from three hours ago,
3 yesterday?

4 MS. PAYNE: Objection. Hearsay.

5 THE COURT: We're getting awful
6 close. You can't tell me what someone else
7 said.

8 BY MR. SMITH:

9 Q. Don't tell me what they told you.
10 Just tell me --

11 A. Yes.

12 Q. With regard to Barry's neck and
13 shoulder issues, what, if anything, have you
14 noticed there?

15 A. Well, after the accident, of course
16 his shoulder hurt, but we couldn't deal with
17 the shoulder before we got the headaches under
18 control. We were dealing with two things and
19 one was the bigger evil than the other at that
20 moment.

21 So we got the headaches under
22 control and then he had the shoulder surgery.
23 Shoulder surgery has never been 100 percent.
24 He said from the time that he has been, I
25 guess, healed, that it -- that it didn't feel

1 right. And the shoulder and neck kind of
2 sometimes I feel like are one in the same. But
3 once we started going to Dr. Park and he
4 started having the radiofrequency ablation,
5 that was huge. We would drive in a car and he
6 was constantly rubbing his neck and shoulder
7 while we were driving. I don't even know that
8 he knows he did it as much as he did it.

9 Once we went to Dr. Park and they
10 went through the whole process and finally came
11 to the conclusion that, yes, this would help
12 him, it was a slight miracle that,
13 unfortunately, only lasted about six to six and
14 a half months and we have to have it done
15 again. But it's just been a relief, a complete
16 relief, and it's made him a much happier person
17 to not have that constant pain going down his
18 arm and his fingers.

19 Q. Have you assisted Barry at all in
20 his job search and sending out resumes and that
21 sort of thing?

22 A. I have not.

23 Q. Have you witnessed him doing it?

24 A. I have.

25 MR. SMITH: Thank you, ma'am. No

1 further questions.

2 THE COURT: Ms. Payne.

3 MS. PAYNE: Just a few.

4 CROSS-EXAMINATION

5 BY MS. PAYNE:

6 Q. Hi, Ms. Adickes.

7 A. Hello.

8 Q. Now, you're the one that actually
9 first reported the injury and told Mr. Johnson
10 about what occurred, right?

11 A. I don't really recall that. It's
12 been four years ago, but I think that's
13 correct. I don't know if I called him or maybe
14 left him a voice mail. I don't think I talked
15 to him personally, but maybe I did.

16 Q. Do you remember sending him an
17 e-mail telling him about the accident?

18 A. Yeah, I think I do remember that.

19 Q. And you told him about how Barry had
20 been at his hotel, then he drove somewhere to a
21 park and he went for a jog, and then he got
22 back in his car and went back to the hotel?

23 A. I don't remember all that. It was
24 four years ago.

25 Q. Let me show you an e-mail real

1 quick. This was provided in the personnel
2 responses. This is the e-mail that starts
3 there and then goes to the next page. It's
4 dated. Can you tell the Court when it's dated?

5 A. March 24, 2011.

6 Q. Your e-mail?

7 A. Oh, March 23, 2011.

8 Q. Can you look at the body of your
9 e-mail that you sent and tell the Court who you
10 sent the e-mail to?

11 A. Well, it says that I sent it to Mark
12 Johnson.

13 Q. Okay. And in the body of the
14 e-mail, I just want you to look at the third
15 paragraph where it talks about how he was
16 injured.

17 A. "As best he can piece together" --
18 do you want me to read this?

19 Q. Yes.

20 A. "Barry says he completed his day
21 Tuesday afternoon in Marion, North Carolina,
22 took a scenic route to his hotel in Morganton
23 via Blue Ridge Parkway and went for a jog near
24 Mt. Mitchell State Park. Afterwards he
25 continued 20 miles or so on the parkway before

1 veering south down the mountain, Highway 181,
2 and ten miles above Morganton. It was around
3 8:00 p.m., he believes, when he approached a
4 sharp curve and realized he was going into it
5 too fast."

6 Q. That's all. Thank you. So do you
7 now remember sending that e-mail to
8 Mr. Johnson?

9 A. I do remember, you know. I was --
10 yes.

11 Q. Okay. And you guys share bank
12 accounts, right?

13 A. We do.

14 Q. And since Mr. Adickes' termination
15 from Philips, you have had financial
16 difficulties?

17 A. I don't wouldn't call it financial
18 difficulties.

19 Q. Remember when I deposed you and you
20 informed me about financial difficulties right
21 around the time of his termination requiring
22 you guys to take out a loan?

23 A. I didn't say financial difficulties.
24 You did.

25 Q. And you responded yes, that you had

1 to take out loans?

2 A. I said we took out a loan. I didn't
3 say that we had financial difficulties.

4 MR. SMITH: Your Honor, I object to
5 this line of questioning. Relevance.

6 MS. PAYNE: Relevance is bias, Your
7 Honor. It's a witness testifying on behalf of
8 her husband who, depending on how this case
9 turns out, is going to benefit from it
10 financially.

11 THE COURT: I'll allow it, but let's
12 don't go too far down this road.

13 MS. PAYNE: I won't.

14 BY MS. PAYNE:

15 Q. My question to you was, "And he just
16 testified earlier that you recently had to take
17 out a financial loan because of suffering
18 financially after the termination?"

19 A. I think I remember -- excuse me. I
20 think I remember saying no more than anybody
21 with four kids normally or something to that
22 effect. If I said we're having financial
23 difficulties, I didn't -- I don't think I said
24 that.

25 Q. Okay. That's why I was reading it

1 to you. So I said, "And he testified earlier
2 that you recently had to take out a financial
3 loan because of suffering financially after the
4 termination?" And your response was? Read it
5 into the record.

6 A. "Correct." And I said, "Correct."
7 I guess I was saying correct for the loan.

8 Q. Let me ask my question. And my
9 question is, "Is that right?" And you said?

10 A. "Correct."

11 Q. And then I said, "So how long did
12 you guys go before you needed financial
13 assistance?" And your response?

14 A. "I don't know the actual date we
15 took that out."

16 Q. And that was even in light of the
17 fact that he received a significant severance
18 package from Philips, correct?

19 A. We did.

20 MS. PAYNE: Thank you. Nothing
21 further.

22 THE COURT: Mr. Smith.

23 MR. SMITH: No redirect, Your Honor.

24 THE COURT: All right. Thank you,
25 ma'am. You may step down.

1 MR. SMITH: Your Honor, that along
2 with our APA submissions and the deposition of
3 Dr. Mandell that we have offered, that
4 concludes the claimant's case.

5 THE COURT: All right. Very well.
6 Thank you.

7 MR. SMITH: And our exhibits, of
8 course.

9 THE COURT: Thank you. Ms. Payne,
10 witnesses?

11 MR. OXFORD: We have one, Your
12 Honor. We call Mark Johnson.

13 THE COURT: All right. Thank you,
14 Mr. Oxford. You've been here twice for my
15 please speak up and answer yes or no. So we're
16 not going to plow that ground again.

17 (MARK JOHNSON, being duly sworn to
18 tell the whole truth, testified as follows:)

19 THE COURT: Please state and spell
20 your full name for the record, sir.

21 THE WITNESS: Mark Kevin Johnson.
22 M-A-R-K, K-E-V-I-N, J-O-H-N-S-O-N.

23 THE COURT: All right. Thank you,
24 sir. Mr. Oxford, your witness.

25 DIRECT EXAMINATION

1 BY MR. OXFORD:

2 Q. Hi, Mr. Johnson. Can you please
3 tell us who your current employer is?

4 A. Philips Healthcare.

5 Q. And how long have you worked at
6 Philips?

7 A. Eighteen years.

8 Q. What is your current position there?

9 A. Regional manager.

10 Q. Is that the same position you had
11 since around 2011 or so?

12 A. Yes. I've been a regional manager.
13 The title has stayed the same that period of
14 time. The actual direct reports have changed
15 from time to time as we change business models.

16 Q. And as regional manager, what are
17 your duties?

18 A. I supervise a team of field
19 salespeople that are represented in selling
20 Philips products.

21 Q. And Mr. Adickes was one of your
22 reports at one time?

23 A. Yes, sir.

24 Q. And during what time period did you
25 supervise Mr. Adickes?

1 A. 2011, 2012, and 2013.

2 Q. What was the day in 2011 that you
3 first took over supervising him?

4 A. I believe it was January 1st.
5 That's typically when they make a model change
6 that I would have picked up new people.

7 Q. How many people do you supervise?

8 A. Well, it varies from time to time.
9 I've managed as many as, I believe, 14 years
10 ago and now I'm currently managing nine. We've
11 gone through business model changes over the
12 course of the years, and we've had reduction of
13 force across the board at Philips. Not just my
14 team, but everywhere.

15 Q. Did you know Mr. Adickes before you
16 became his supervisor?

17 A. I knew who Barry was. I did not
18 know him well. I met him at one of our
19 distributor meetings. He was in a different
20 role with the company, but in the same
21 division. So I knew of him.

22 Q. So you had heard of him?

23 A. Yes, sir.

24 Q. And what had you heard about him?

25 MR. SMITH: Objection. Hearsay,

1 Your Honor.

2 THE COURT: Sustained.

3 THE WITNESS: Does that mean I'm
4 supposed to answer?

5 BY MR. OXFORD:

6 Q. No. Prior to you supervising
7 Mr. Adickes, what was your general opinion on
8 his work product?

9 MR. SMITH: Objection. No basis for
10 that question, Your Honor. He testified he did
11 not know him prior.

12 MS. PAYNE: He didn't testify to
13 that.

14 MR. SMITH: He said he met him one
15 time at a function.

16 THE COURT: He also said he knew of
17 him. I'm going to let him answer that
18 question.

19 THE WITNESS: Well, when I heard of
20 the model change and that I was picking up some
21 new team members, I reached out to former
22 managers and human resources to solicit
23 feedback of what was the person I'm going to be
24 managing now? Can you tell me more about them?
25 Barry had a reputation of being a good guy,

1 someone you would love to have a beer with. He
2 had some performance issues that he had been
3 working through. The feedback from human
4 resources and his prior manager were that he
5 was difficult to coach at times. They were
6 coaching him through a performance improvement
7 plan, a PIP, and that was the feedback that
8 they gave me.

9 BY MR. OXFORD:

10 Q. Did they give you a specific year
11 that they were referring to as far as
12 performance issues?

13 A. No, I didn't receive that.

14 Q. Does Philips and somebody in your
15 role, do you have a standard review procedure
16 that you will review people that are your
17 direct reports?

18 A. We have an annual review process
19 called the PPM, people performance management,
20 which is their annual review that you do as a
21 manager. You critique people, give them some
22 direction for the next year, develop a
23 development plan for the next year. That's the
24 formal process.

25 Q. So how did Barry come to work for

1 you and be under your supervision? How did
2 that process come about?

3 A. It was literally a change in the
4 business model. I was a regional manager
5 managing, you know, certain components of the
6 division's business. And for whatever reason
7 as we were responding to changes in healthcare,
8 they decided to realign that. And where I was
9 managing maybe half the country before with
10 fewer markets, now I was managing virtually the
11 same number of people, but more products, but
12 geographically located in the southeast.

13 Q. Did you get to put your team
14 together?

15 A. No. They were typically -- they're
16 assigned to you.

17 Q. And what position or what product
18 was Barry first assigned to your team? What
19 was his role at that time?

20 A. Well, when I was notified of the
21 change that was coming, I approached and I
22 solicited some feedback from the vice president
23 of sales and his former manager, Paul Stoddard,
24 and I got the feedback from human resources. I
25 came back to the vice president of sales and

1 suggested that, perhaps, Barry would be better
2 suited for another role on my team.

3 He was working as a specialist on
4 fire and EMS and working with one of our
5 largest customers that was very demanding, and
6 I just felt that, you know, based on what I
7 heard in canvassing and interviewing his former
8 manager and the vice president of sales, that a
9 change might do well for Barry. So I proposed
10 to the vice president of sales that Barry be
11 allowed to swap roles with one of his
12 counterparts that was working with the indirect
13 channel at that time and that they flip roles.

14 The vice president of sales heartily
15 endorsed that. She felt that that would be a
16 good move. It was structured to benefit both
17 employees. The indirect channel manager's job
18 for the most part isn't as challenging and
19 demanding as the fire and EMS job and we felt
20 that that would go both well for Barry and the
21 other employee. I was told that I needed to
22 approach both employees, propose the change,
23 and only if they both agreed could we enact
24 that change. They agreed, the change was made,
25 and that's how he landed his indirect channel

1 manager for me.

2 I think I heard him testify earlier,
3 I didn't remember this, that, you know, for the
4 first month or so there was a transition period
5 between he and the other employee as they
6 swapped out roles. The other employee lived in
7 the Charlotte area. So geographically, you
8 know, there was some compatibility there.

9 Q. Without getting into any specifics,
10 do you remember if anyone else on your team,
11 any of Barry's co-workers, I guess, had ever
12 complained about his work ethic, work product,
13 any of those types of things prior to the
14 accident?

15 A. Barry had a history of poor
16 follow-up with team members and just overall
17 lack of urgency. He was difficult to get ahold
18 of. If you ever called Barry, you could not
19 get him just by calling his cell phone. He
20 always called back and that was something that
21 was a little bit of a red flag for me. And
22 then I experienced it myself when he began to
23 work for me. I had, you know -- before his
24 accident and after his accident, I had several
25 complaints from employees and customers in his

1 follow-up or lack thereof.

2 Q. After his accident, did you notice
3 any changes in Barry's behavior, work product,
4 work ethic, any of those things from before the
5 accident to after accident?

6 A. No, sir.

7 Q. Any changes in communicating with
8 him?

9 A. No, sir. I would say no.

10 Q. So over the entire time that you
11 supervised Barry from January 1, 2011 up until
12 2014, would you say that his work ethic, work
13 product, his behavior, communication, all those
14 things that you supervised, was that steady
15 throughout that entire time?

16 A. I would say so. Looking back at his
17 performance reviews, he got middle of the road
18 performance reviews that entire time. Barry
19 was not a top performer. He was in the bottom
20 third of the ranking, if you will, typically,
21 but he was doing an adequate job from my
22 perspective.

23 Q. Let's move on to Mr. Adickes'
24 termination. What was your involvement when
25 Mr. Adickes was terminated?

1 A. I delivered the news. I did not
2 participate in who was involved in the
3 reduction of force. In fact, I was notified on
4 or about January 8th that I had to sign a
5 non-disclosure agreement that Philips was
6 rolling out a whole new business plan. So I
7 was informed that I would have a job and that
8 here were the changes and that roughly within a
9 week's time I would have to deliver a reduction
10 in force message to Barry.

11 These are things that I
12 unfortunately have grown accustomed to in the
13 healthcare industry. There's a lot of changes.
14 Almost every year we've had some type of
15 business model change where positions have been
16 eliminated.

17 So I did not participate in the
18 decision of who would be removed from their
19 position or what positions would be removed.

20 Q. Who does make that decision?

21 A. Well, in past reductions in force, a
22 manager -- frontline manager would participate
23 in that discussion. But the magnitude of this
24 particular RIF, is what we call it, reduction
25 in force, this came from very high levels. A

1 senior executive.

2 Q. Was it regional, national?

3 A. National decisions.

4 Q. So, in general, when you give one of
5 these termination calls that you've grown
6 accustomed to, unfortunately, having to make,
7 is there a standard procedure that you follow?

8 A. Oh, yes, definitely. I've been
9 through the training three or four times. We
10 are asked to follow a script. When we have the
11 call, we have a human resources manager on that
12 call with us and we are instructed to read from
13 the script, to notify the employee that this is
14 a business decision, that it's not about
15 performance, that the company has made a
16 business decision and I regret to inform you
17 that your position has been eliminated. That's
18 almost verbatim from the script.

19 Q. And I think you may have touched on
20 this before, but has there been similar
21 reductions in force in the years prior to 2014
22 since then?

23 A. Yeah. The year 2013, I let two
24 people go. 2012, I believe I let one go. The
25 end of this month, I have the misfortune of

1 informing an employee that I hired seven years
2 ago that their position is being eliminated.
3 There again, it's not for performance. It's
4 just as the company is retooling to take into
5 consideration the new world of healthcare, the
6 business models are changing.

7 Q. So you said in 2012 and 2013, those
8 were both times when Mr. Adickes worked for
9 Philips Healthcare; is that correct?

10 A. Yes, sir. He was not impacted by
11 those reductions in force, obviously.

12 Q. Now, specifically to the telephone
13 call made to Mr. Adickes, the termination phone
14 call, do you remember anything specific about
15 that call?

16 A. No, you know, it went pretty
17 smoothly. Barry received a pretty significant
18 severance check. That seems to make the calls
19 go a little bit better. I do remember Barry
20 asking something about, "Do I get a grace
21 period?" And I remember saying, "Barry, that's
22 not what this is about. This is about the
23 change in the business model. It's not about
24 performance." I specifically remember that.

25 On our script of do's and don'ts to

1 say, the first don't is do not discuss
2 performance because it's a business model --
3 business decision.

4 Q. And did you read from that script on
5 that particular call?

6 A. Yes, sir.

7 Q. Do you recall if you deviated from
8 that script at all?

9 A. I recall not deviating from it.

10 Q. As far as your team, has Barry's
11 position been replaced, refilled, anything like
12 that? Is somebody now doing Barry's job?

13 A. We did not hire a new head count for
14 that position. I had to spread his territory
15 out over existing employees. So we have not
16 had incremental head count which supports the
17 company's position of we believe we can handle
18 that with fewer people.

19 Q. Did Barry ever have any disciplinary
20 issues while -- other than performance issues,
21 while he was under your supervision?

22 A. I think two come to mind. One is
23 challenging him on his follow-up with customers
24 and co-workers, and I discovered that, you
25 know, he did have some problems coaching. He

1 was rather indignant that, hey, I have great
2 follow-up. Well, I've got customers calling me
3 saying to the contrary. And in our business,
4 you know, that's just not acceptable.

5 The other that I remember is he had
6 an issue with his American Express corporate
7 card. The card is only supposed to be used for
8 Philips' purposes, and he was using it for
9 personal uses and running up a pretty
10 significant bill. So we had to have a
11 discussion about that.

12 Q. Did you ever -- were you ever asked
13 to make any special accommodations for Barry
14 while he was under your supervision?

15 A. Well, it was discussed earlier today
16 when I first started to manage Barry, I
17 informed him that he needed to swap his SUV car
18 for the sedan. I think it was a Ford Fusion, a
19 car that his new position was slotted for
20 because they don't carry as much equipment.

21 And Barry, you know, really pushed
22 back on that. He didn't want to give up that
23 car despite the fact that most of his
24 co-workers didn't have that great of car. It's
25 kind of taking it back. Usually I don't get