

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: ; The Honorable Cynthia Dooley; The Honorable T. Scott Beck; and The Honorable Aisha Taylor

SCWCC File No.: 1714060

VANESSA ESTES,

Claimant,

v.

MB JONES OIL, CO. INC.,

Employer,

and

GUARANTEE INSURANCE COMPANY IN LIQUIDATION/SCPCIGA,

Carrier,

Defendants.

RECEIVED

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SC Court of Appeals

AFFIRMED

Hearing held in Columbia, South Carolina,
on February 12, 2024.

Per notice timely and properly served upon all Parties of Interest.

Appearances: Catherine D. Meehan of Steinberg Law Firm, LLC appeared on behalf of Claimant/Respondent.

Mark D. Cauthen of Cauthen Law Group, LLC, appeared on behalf of Defendants/Appellants.

Court Reporter: Sean Cary, (803) 252-3445

Filed: May 14, 2024

I. STATEMENT OF THE CASE

At the time of the accident, Claimant was employed as a sales associate/cashier with Sprint Foods, owned by the employer M.B. Jones Oil Company, Inc. Claimant was injured on June 17, 2017 when she tripped and fell backwards while replacing a propane tank, hitting her back and head on an upright pole. She also reported injuring both arms/ hands when she used them to try and break her fall. In addition to her back, head, and upper extremities, Claimant also alleged injuries to her neck, right shoulder, and torso. Defendants admitted injuries to Claimant's left and right upper extremities in addition to a sprain of her lower back.

Claimant contended she sustained compensable injuries to her head, neck, back, right arm, left arm, right hand, left hand, and right shoulder as a result of her work-related accident on June 17, 2017. Claimant contended she is permanently and totally disabled per S.C. Code Ann. § 42-9-10 based upon injuries to her bilateral upper extremities and her back, which she asserts prevent her from returning to any gainful employment. Claimant alleged she has a total loss of earning capacity and is therefore entitled to benefits for permanent and total disability under the South Carolina Workers Compensation Act. Claimant requested a lump sum payment of any award with Utica Mohawk allocation of that amount in the Order.

Claimant's contention of permanent total disability is supported by her functional capacity evaluation (FCE) results, which revealed she had permanent light duty restrictions. At the time of the hearing, she was 61 years old. Claimant's work history includes several positions as a cashier at convenience stores/gas stations. Claimant's pre-accident job required the ability to lift fifty (50) pounds, and all of the other cashier positions at convenience stores/gas stations Claimant has held in the past involved stocking shelves and carrying cases of sodas, water, and milk, which Claimant can no longer do. Claimant submitted a vocational evaluation of David Price, M.Ed., CRC in

support of her position. Claimant's testimony revealed she called each of the positions identified by Defendants' vocational evaluator, Glen Adams, MRC, CRC, CEES, CCM, and none of the positions were offered to her either because she was not qualified or the jobs were unavailable.

Claimant asserted her case has been full of delays caused by Defendants. Specifically, Claimant noted she reported back and head injuries to her Employer on the date of accident, and at the hospital the next day, she complained of neck, upper back, and lower back pain. She continued to complain of back pain and headaches to her authorized treating physicians; however, Defendants did not authorize care for the lumbar spine until January 3, 2019. Even then, authorized treating physician Dr. Jaiye Conner ordered an orthopedic referral, which Defendants did not authorize, so Claimant was forced to file for a hearing. Finally, a Consent Order was entered, and Defendants sent Claimant to Dr. Ty Carter for an independent medical evaluation (IME) on September 30, 2019. Dr. Carter stated Claimant was not at maximum medical improvement (MMI) and ordered physical therapy for the lumbar spine. Despite the order, Defendants did not authorize the physical therapy until November 2020, more than one year later.

Defendants asserted Claimant was unable to satisfy her burden of proof to establish loss of earning capacity, that she is capable of returning to work in her prior occupations of retail sales/cashier based on the work restrictions assigned by Dr. Carter and the FCE, and that she is not permanently and totally disabled under the Workers' Compensation Act. Defendants submitted a vocational evaluation performed by Glen Adams, MRC, CRC, CEES, CCM in support of these positions. Defendants contended Claimant is entitled to an award of permanent "partial" disability for the compensable injuries to her upper extremities and lower back per S.C. Code Ann. § 42-9-30. Defendants sought credit for overpayment of TTD benefits.

A hearing was held on September 14, 2022, in Aiken, South Carolina. Following service of the signed Decision and Order on August 24, 2023, the Defendants filed a WCC Form No. 30, Request for Commission Review, on September 11, 2023 asserting twelve (12) grounds for appeal.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

This claim was heard by Commissioner R. Michael Campbell, II on September 14, 2022 in Aiken, South Carolina. On August 24, 2023, Commissioner Campbell made the following Findings of Fact and Conclusions of Law and issued the following order:

FINDINGS OF FACT

Based upon the stipulations, the testimony of witnesses, and the APA submissions, the undersigned Commissioner makes the following Findings of Fact as required by S.C. Code. Ann. § 42-17-40, 1976:

1. The Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Vanessa Estes as Employee/Claimant and MB Jones Oil Co., Inc. as Employer and Guarantee Insurance Co. in Liquidation/Georgia Insurers Insolvency Pool as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to June 17, 2017 on which date she sustained an admitted injury by accident to her bilateral upper extremities and back arising out of and in the course and scope of her employment, and proper notice was given to the Employer.

3. That Claimant alleges additional injuries to her head, neck, right hand, left hand, and right shoulder as a result of her work-related accident as supported by the evidence in the record.

4. That the South Carolina Workers' Compensation Form No. 12A, First Report of Injury, completed by the Employer on June 19, 2017 indicates injuries to Claimant's back and head as a result of her work-related fall on June 17, 2017.

5. That Claimant received initial treatment at University Hospital Emergency Department on June 18, 2017. Claimant reported walking backward at work when she misstepped and fell directly onto her bottom, striking her back and head against an upright pole on the way to the ground. (Cl. APA #1, p. 1.) She reported persistent neck pain, upper and lower back pain, shoulder pain, and headache. (Cl. APA #1, p. 1.)

6. That on June 27, 2017, Claimant presented to authorized treating provider, Doctors Care, with complaints of continued neck, head, and back pain, as well as tingling in the right hand. (Cl. APA #2, p. 10.) Claimant underwent an x-ray of the thoracic spine. She was diagnosed with mid-back pain and trapezius muscle spasm and instructed to return for a follow-up. (Cl. APA #2, pp. 10-13.)

7. That on July 18, 2017, Claimant returned to Doctors Care with complaints of continued headache, tingling in the back of the head, and lower back pain. (Cl. APA #2, p. 20.) Claimant was diagnosed with a muscle contraction headache and a strain of the muscle and tendon of the back wall of the thorax and assigned light duty work restrictions. (Cl. APA #2, pp. 21, 23.)

8. That on August 1, 2017, Claimant presented to Aiken Regional Medical Centers with complaints of continued headaches. Dr. Kristen Paysinger ordered a CT scan of Claimant's head due to the consistent headaches since the work-related fall. (Cl. APA #3, p. 33.)

9. That on August 23, 2017, Claimant returned to Doctors Care with complaints of bilateral hand and wrist pain, joint pain, and muscle pain. (Cl. APA #2, p. 25.) Claimant was referred to orthopedics for evaluation. (Cl. APA #2, p. 28.)

10. That the Employer representative, Robin Cantwell, testified she was aware of and did not dispute Claimant's injuries to her back and head as documented by the hospital and Doctors Care medical records, but that she only authorized treatment at Nova Medical Center for the bilateral hands and wrists in August 2017. (Cantwell Dep. 19:1-7, 22:6-15, 23:3-5; Cl. Ex. H, pp. 310, 313, 314.)

11. That Dr. Howell ordered a physical therapy and an MRI and EMG/NCV of both wrists and hands; placed Claimant on restricted duty with no lifting or carrying more than ten (10) pounds for eight (8) hours a day; and referred Claimant to orthopedics based on the MRI and EMG/NCV findings. (Cl. APA #4, p. 41, 48, 64.)

12. That despite Doctors Care's referral to orthopedics on August 23, 2017 and Dr. Howell's continued referrals to orthopedics beginning October 6, 2017, the Carrier did not authorize orthopedic treatment of Claimant's bilateral wrists and hands until March 2018. (Cl. APA #6, p. 108; See Cl. APA #2, p. 28; Cl. APA #4, pp. 48, 56, 64, 68, 81, 84, 86.)

13. That Claimant began treating with Dr. Richard Pope for her bilateral arms and hands on March 22, 2018. (Cl. APA #6, p. 109.)

14. That Dr. Pope performed carpal tunnel release surgery on the left wrist on May 7, 2018 followed by carpal tunnel release surgery on the left wrist on September 17, 2018. Following the surgeries, Claimant continued to have right shoulder pain followed by her arm going limp in addition to triggering and locking of the bilateral middle and ring fingers. (Cl. APA #6.)

15. That Claimant testified she filed a formal grievance against Dr. Pope with the administrator of his practice because his office visit notes did not accurately reflect her complaints and she felt as though he was not listening to her complaints of continued symptoms after surgery. (Hr'g Tr. 83:22-88:25, 91:21-92:12, 116:22-25.)

16. That nurse case manager Linda Moody's report dated February 18, 2019 states: "Ms. Estes obtained and read copies of her medical notes from Dr. Pope's office. She said she found inconsistencies in the medical notes. For example, she said at one visit he noted that she was able to make a complete fist with her right hand. She stated that she was not able to form a fist at that visit." (Cl. Ex. G, p. 290.) Ms. Moody noted Claimant "politely stated her concerns about the areas she disagreed with in the medical record and her feeling that she was not being heard. Dr. Pope listened to Ms. Estes' complaints, but did not engage in any conversation with her. He simply stated, 'My notes are my notes and they are not going to change.'" (Cl. Ex. G, p. 290.) Ms. Moody noted she asked Dr. Pope if he would continue therapy if it were recommended by the physical therapist, and he left the room to call Maguire Therapy, and then returned and said his staff could not get through so he was discharging Claimant. (Cl. Ex. G, pp. 290-91.)

17. That on February 7, 2019, in his medical notes, authorized treating physician Dr. Richard Pope of August Orthopedic and Sports Medicine Specialists opined: "status post bilateral carpal tunnel release. I agree with the patient that we do not have a functional physician-patient relationship at this point. Her WC carrier will find another qualified hand surgeon to take over care. I will disengage in the treatment of Ms. Estes. I do believe that she has likely reached maximum medical improvement and should have an impairment eval. Patient can return to her regular work duty without restrictions." (Cl. APA #6, p. 137.)

18. That Claimant presented to Lana Hardeman at Occupational Therapy Plus, Inc. d/b/a Therapy Plus for an impairment evaluation of the right wrist on March 12, 2019. Claimant reported continued pain in her right hand and intermittent occurrences of a sharp pain in her right shoulder where her arm went limp. She reported triggering in the middle fingers on her bilateral hands. Evaluator Hardeman noted Claimant reported pain 7/10 in her right hand and difficulty with

dressing, housekeeping, toileting, cooking, bathing, laundry, shopping, writing, eating, using the telephone, and driving a car. (Cl. APA # 9, p.180.) Evaluator. Hardeman assigned a four percent (4%) impairment to the right upper extremity, and a 2% whole person impairment, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. APA # 9, p.180.)

19. That on April 8, 2019, on the impairment evaluation form, Dr. Pope concurred with the impairment ratings assigned by Evaluator Hardeman. (Def. APA #11, p. 412.)

20. That on March 30, 2022, in a medical records addendum, Dr. Pope opined: "I began treating Ms. Vanessa Estes on March 22, 2018 for bilateral wrist injuries she sustained as the result of a work-related fall on June 17, 2017. I diagnosed Ms. Estes with bilateral carpal tunnel syndrome and performed left carpal tunnel release surgery on May 7, 2018, followed by right carpal tunnel release surgery on September 17, 2018. On February 26, 2019, I referred Ms. Estes for an impairment rating evaluation. I assigned a 4% impairment rating to the right upper extremity based on the *Guides to the Evaluation of Permanent Impairment*, AMA, 5th Edition, Table 16-3. While the therapist performing the impairment rating evaluation only evaluated the right wrist, it is my opinion, based upon a reasonable degree of medical certainty, Ms. Estes also sustained a 4% impairment rating to the left upper extremity as a result of her work-related accident as she had the same diagnosis and surgical repair for both wrists. (Cl. APA #12, p. 277.)

21. That Claimant continued to report her head, neck, and back pain since the work accident to her treating physician at Nova Medical Center, Dr. Jerome Howell, and to her physical therapist, but Dr. Howell was only authorized to treat Claimant's bilateral arms and hands. (Hr'g Tr. 47:24-48:2, 55:14-19.) Dr. Jaiye Conner testified Dr. Howell was only authorized to treat Claimant's bilateral hands and wrists, so she would expect his note to focus solely on those body parts. (Conner Dep. 56:16-57:7.)

22. That Claimant sought treatment from her primary care physician, Dr. Jeremiah Wilson, for her back pain during the time from August 2017 until January 2019 when workers' compensation did not authorize treatment for her back. (Hr'g Tr. 45:19-21; 47:12-48:2.) Dr. Wilson made note of her back pain, prescribed pain medication, and gave Claimant a handicap placard. (Hr'g Tr. 46:8-17.)

23. That on January 3, 2019, the Carrier finally authorized treatment for Claimant's back with Dr. Jaiye Conner at Nova Medical Center, and Claimant presented to Dr. Conner that day with complaints of continued pain in her buttocks and lower back. (Def. APA #1, p. 1-3.) Dr. Conner noted Claimant had decreased range of motion in all planes and muscle spasm along the bilateral paraspinal muscles. Dr. Conner performed lumbar x-rays and ordered a lumbar MRI. She prescribed medications and placed Claimant on light duty restrictions with no bending, twisting or lifting more than twenty (20) pounds; limited walking, standing, or sitting for extended periods without stretching; and sit/stretch breaks of 1 per 1 hour (Def. APA #1, pp. 1-3.)

24. That on January 24, 2019 in a follow-up evaluation, Dr. Conner diagnosed Claimant with a sprain of ligaments of lumbar spine and ordered an orthopedic consult for Claimant's lumbar spine determine whether the disc bulges were a result of trauma or degenerative in nature. (Conner Dep. 18:12-19:8.) At that visit, Dr. Conner assigned work restrictions of "May not lift/carry objects more than 20 pounds for more than eight hours per day. Avoid bending, twisting or lifting more than 20 pounds. Limit walking, standing or sitting for extended [periods]." (Conner Dep. 67:1-17.)

25. That on February 11, 2019, in a narrative statement, Dr. Conner opined: "I treated Vanessa Estes pursuant to a workers' compensation claim with a date of accident of June 17, 2017. Ms. Estes' last office visit occurred on January 24, 2019. I believe, with reasonable degree of medical certainty, that Ms. Estes' lower back complaints are just as likely to be a result of a pre-

existing degenerative condition, as they are to be an acute condition stemming from the date of accident above. (Def. APA #1, p. 9.)

26. That Dr. Conner testified she received a letter from attorney Robert Mills, dated February 7, 2019, referencing a telephone conversation they had and enclosing a narrative statement regarding causation of Claimant's back injury. (Conner Dep. 60:7-61:8.) Dr. Conner testified she had a telephone conference with Robert Mills regarding Claimant's care in late January or February prior to writing the statement. (Conner Dep. 61:10-12.) Claimant's counsel noted for the record both the telephone communication and the letter were unauthorized communication with a treating provider as Claimant was represented in January and February 2019 and Claimant's counsel was unaware of the phone call and the letter and narrative statement until the date of Dr. Conner's deposition. (Conner Dep. 61:14-17.)

27. That on September 30, 2019, in an IME for Defendants, Dr. Ty W. Carter opined: "This is a 58 year old female who suffered a work related injury on 6/17/17. She was having some back pain prior to this incident that was documented from her family physician. She definitely has some muscle guarding and some tenderness of the superficial aspect of her back which would be much more consistent with muscle issues than anything deep such as degenerative disc disease or facet joint problems. Her MRI does not show any evidence of acute objective changes that would have occurred from the work related injury. She definitely has some degenerative changes of her back which were there prior to her work related injury. The patient could possibly have an exacerbation of her chronic underlying problems but I think most of her issues are muscle related and have nothing to do with the degenerative disc disease or arthritis. She has gone a significant period of time without treatment of her back and I do not think she has reached maximum medical improvement from her back in that she might require more physical therapy for dedicated lumbar

problems instead of doing a combination of physical therapy as she had done before. The patient is currently only taking Meloxicam which does seem to help some. I do not see any evidence that the patient would require any other major treatments such as epidural injections or surgery. I do think the patient should be able to do some employment especially after a round of physical therapy. She states that she has been out of work since May of 2018 and although she has work release statements from Dr. Pope secondary to her carpal tunnel surgeries, she states that she has not been back to work. Currently I do think she would be able to work but in a modified setting with light to medium duty. She could potentially benefit from a functional capacity evaluation to determine more specifically what she would be able to do but currently I would have her return to work light to medium duty with limited bending and lifting, lifting only 20 to 25 pounds with frequent position changes and limited overhead work. I am not giving an opinion of the carpal tunnel surgery, this is only related to her back. Short of physical therapy along with the continuation of Meloxicam, I would not offer any other major treatments to her back. Even with physical therapy and potentially some improvement, I do feel that the patient has chronic low back pain related to muscles and based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the patient is a DRE category 2 with a 5% impairment of whole person related to her lumbar spine based on muscle guarding and spasms and loss of motion." (Def. APA #12, pp. 416-17.)

28. That despite Claimant's numerous requests for authorization of physical therapy of the lumbar spine, the Carrier did not authorize the recommended physical therapy, but instead scheduled a return visit to Dr. Jaiye Andrews (nee Conner) on April 16, 2020 for completion of a WCC Form No. 14B and determination of work abilities before Claimant had had the physical therapy. (See Cl. Ex. K, pp. 422-28; Cl. Ex. L, pp. 429-35; Cl. APA #4, p. 99.) At that visit, Dr.

Andrews assigned work restrictions of no lifting/carrying objects more than 20 pounds for more than 8 hours per day; limit walking, standing, or sitting for extended periods without stretching; sit/stretch breaks of 1 per 2 hours. (Cl. APA #4, p. 96.)

29. That on May 22, 2020, on a Form 14B, Dr. Jaiye Conner Andrews opined to a reasonable degree of medical certainty that Claimant was at MMI and that she was not qualified to make a determination with regard to impairment, as she previously stated. (Def. APA #1, p. 13.)

30. That prior to authorization and completion of the physical therapy recommended by Dr. Carter, on September 2, 2020, in an FCE, Evaluator Justin Williams assigned an 8% impairment to the low back and an 8% impairment to the whole person based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. APA #10, p. 182.) In addition, Mr. Williams opined the results of the evaluation suggested Claimant gave a reliable, valid effort and demonstrated patterns of movement and physiological responses consistent with maximal effort. He also noted there was consistency between the test results and the referral diagnosis. (Cl. APA #10, p. 185.) Mr. Williams noted the FCE revealed Claimant had occasional lifting capabilities in the light physical demand category "as follows: floor to knuckle lift = 15lbs., Knuckle to Shoulder Lift = 10 lbs., Shoulder to Overhead Lift = 5 lbs., Two Hand Carry = 10 lbs." (Cl. APA #10, pp. 185-86.)

31. That on October 12, 2020, in an IME addendum, Dr. Carter opined: "In the independent medical evaluation report dated 9/30/19 for Vanessa Estes, I made the recommendation that the patient could potentially benefit from a functional capacity evaluation to more specifically determine any limitations. I have recently received a Functional Capacity Evaluation report from BenchMark Physical Therapy dated 9/2/20 in which their determination of impairment is 8% based on AMA Guides 5th Edition. Because an FCE actually tests a patient's

response through a series of physical activities, I am in agreement with the 8% impairment rating as stated in the report from BenchMark Physical Therapy. I also agree that the patient has reached maximum medical improvement from her work related injury of 6/17/17.” Notably, Dr. Carter had not seen Claimant since his IME on September 30, 2019, more than one year prior.

32. That on October 29, 2020, the adjuster finally authorized the physical therapy previously recommended by Dr. Carter on September 30, 2019. (Cl. Ex. N, pp. 438-40.)

33. That Claimant completed twelve (12) sessions of physical therapy at BenchMark Physical Therapy from November 4, 2020, to December 4, 2020. (Cl. APA #10.) On December 4, 2020, physical therapist, Mr. Brian Cook, discharged the Claimant, noting her current physical demand level was “sedentary,” indicating work-related limitations were lifting, carrying, pushing, pulling, prolonged standing or squatting (Cl. APA #10, p. 270-71.)

34. That David R. Price M.Ed., CRC performed a vocational evaluation of Claimant on July 14, 2021. Mr. Price opined Claimant could not return to her occupation of cashier or any occupation she has ever performed due to her physical limitations from the work accident. (Cl. Ex. P, p. 446.) He noted Claimant is functioning at a sheltered sedentary level, a category of work where she has no experience. (Cl. Ex. P, p. 446.) Mr. Price noted Claimant can no longer work at a consistent productive pace and her disabling pain flares render her unreliable as a day to day worker. (Cl. Ex. P, p. 446.) Mr. Price opined “these factors, combined with her status as an older worker, so restrict Claimant’s access to the labor market that jobs for which she is qualified and capable of performing will no longer be available to her in viable numbers, effectively rendering her unemployable.” (Cl. Ex. P, p. 446.) Mr. Price opined “with a reasonable degree of vocational certainty as a result of her work accident, Claimant is no longer capable of obtaining or retaining gainful employment[,] and as such[,] is completely disabled from a vocational perspective.” (Cl.

Ex. P, p. 446.) He noted at age sixty she is not a candidate for vocational rehabilitation. (Cl. Ex. P, p. 446.)

35. That on August 26, 2022, in a vocational assessment for Defendants, Vocational Consultant Glen K. Adams, MRC, CRC, CEES, CCM of Adams & Wilkinson opined: "Ms. Estes is capable of resuming full-time employment with no loss of earnings based on these findings. The opinions and conclusions of this report are provided to a reasonable degree of vocational probability." (Def. APA #14, p. 507.) Although Mr. Adams states Claimant can work certain jobs, he indicates in the body of his report negative factors in her profile including her: "age of 60, indicating a reduced capacity to adapt to new work situations and environments; reduced physical abilities based on Dr. Carter's work statement; and ongoing reported symptoms impacting the performance of her daily activities." (Def. APA #14, p. 506.)

36. That Claimant called all nine (9) of the positions identified in the labor market survey prepared by Mr. Adams. A majority of the positions were not available and/or the employers did not answer the phone. Still, Claimant is physically unable to do the job duties of several of these positions. For instance, the Lowe's head cashier position was filled, but also required minimum lifting of ten (10) pounds without assistance and lifting over ten (10) pounds with or without assistance. The Wendy's cashier position required maintaining inventory, a job duty Claimant has done in the past, which she knows she can no longer do as it requires lifting and overhead work. The Harveys Retail Stores cashier position involved stocking shelves and pushing a long line of grocery carts into a corral, which Claimant could not do. (Hr'g Tr. 77:19-78:11; Def. APA #14, p. 17) The Augusta University Health position required cleaning tables and spills, which Claimant testified she could not do as bending and crouching and/or mopping floors with a large mop would cause pain. (Hr'g Tr. 76:15-24; Def. APA #14, p. 15.) The Pan Tack, Inc. position was

located fifty (50) miles away from Claimant's home. As to some of the positions, Claimant would not meet the minimum experience preferred by the employer. For example, the Lowe's job required six months of experience using a computer and one year of identifying and selling products, neither of which Claimant has. (Hr'g Tr. 73:8-74:1.) Additionally, the Augusta University Health position required one year or more of experience clerical work, which Claimant does not have. (Hr'g Tr. 76:15-77:3; Def. APA #14, p. 15.)

37. That Claimant's pre-accident job as a retail sale associate with Sprint Foods required the ability to lift up to fifty (50) pounds; stocking shelves and coolers; climbing ladders; cleaning the parking lot and grounds surrounding the convenience store; sweeping and mopping floors; dusting shelves; and lifting and carrying out trash containers and placing them in an outside bin. (Cantwell Dep. 10:11-25, 11:1-14; Cl. Ex. H, p. 301-02.) While the Employer was able to accommodate the wrist restrictions from Dr. Pope, it was not able to accommodate Dr. Conner's restrictions for the back; therefore, Claimant was out of work. (Cantwell Dep. 32:5-25; Cl. Ex. H, p. 322.)

38. That on September 14, 2022, at the hearing before the undersigned Commissioner, Claimant testified regarding her work history, job duties, work-related accident, injured body parts, medical treatment, work restrictions, and the issues she continues to have and her ability to work.

39. That Claimant continues to have everyday pain in her lower back that ranges in severity from a 6 out of 10 to a 9 out of 10. The pain extends from right above her buttocks up in to her neck, and nine (9) times out of ten (10), the neck pain triggers right shoulder pain. Her pain is triggered by everyday tasks such as cleaning, bending, and/or sitting or standing for extended periods. (Hr'g Tr. pp. 60-61.) Claimant testified she has daily right wrist and arm pain that comes and goes based on her activity and makes it difficult for her to perform activities because she is

right-hand dominant. She also has daily left hand pain and tingling that comes and goes based on activity in addition to locking of the fingers on the left hand. (Hr'g Tr. pp. 63-64.) Claimant continues to have daily headaches. (Hr'g Tr. 65:8-11.) Claimant testified the symptoms she continues to experience affect her daily living, and she is unable to do fifty percent (50%) of the things she could do without difficulty prior to her work accident. (Hr'g Tr. 66:3-6; 66:13-14.)

40. That I find based on a preponderance of the evidence in the record and sworn testimony Claimant's back was at least aggravated by her work-related accident on June 17, 2017.

41. Furthermore, I give great weight to Claimant's testimony as to why she could not do the jobs identified by Defendants' expert, Glenn Adams, and thus give Mr. Adams' opinions little weight.

42. That a review of the Record as a whole provides that Claimant is unable to adequately compete for a job within her work-related restrictions.

43. Therefore, based on the impairment to multiple body parts, Claimant's age and work history, as well as Claimant's testimony and the opinions of David Price, I hereby find Claimant established by a preponderance of the evidence she has suffered destruction of her earning capacity as a result of her compensable injuries, and therefore, is deemed to be totally and permanently disabled.

44. That Claimant has been unable to work and has been receiving temporary compensation from Defendants at her applicable compensation rate from May 7, 2018 through July 29, 2018 and from August 21, 2018 through the present.

45. That Claimant is entitled to an award of total and permanent disability as a result of suffering a destruction of her earning capacity due to her combined compensable injuries to her back and bilateral arms. Claimant is entitled to receive 500 weeks of compensation at her

applicable compensation rate from Defendants, with Defendants being given a credit for weeks of temporary compensation paid to Claimant.

46. That Claimant received temporary compensation from May 7, 2018 through July 29, 2018 and from August 21, 2018 through the present. Claimant has received 212.2857 weeks of temporary compensation through the date of the Hearing. As of July 31, 2023, Claimant would have received 270 weeks of temporary compensation benefits. This leaves a balance of 230 weeks available on an award of total disability. The balance of this award as of July 31, 2023 would reduce to a commuted value of 211.8405 weeks, which at a compensation rate of \$262.29 per week, totals \$55,563.64. Claimant is entitled to receive her award of total disability payable in a lump sum commuted to present value. It is in the best interest of Claimant the award be paid in a lump sum. There is no prejudice shown to Defendants to pay the award in a lump sum. Furthermore, Claimant's lump sum award should be allocated in her best interest as follows:

a) Thirty-Three Thousand Two Hundred Nineteen Dollars and Ninety-One Cents (\$33,219.91) future disability benefits at the rate of Three Dollars and Seventy-Five Cents (\$118.97) per month for a period of 23.27 years (the Claimant's life expectancy pursuant to SC Code Ann. §19-1-150), commencing per the Order, pursuant to Sciarotta v. Bowen, 837 F. 2d 135 (3rd Cir. 1988), See also on remand 735 F. Supp. 148 (D.N.J. 1989); See also on remand 735 F. Supp. 148 (D.N.J. 1989); James v. Anne's Inc., 390 S.C.188, 701 S.E.2d 730 (2010); as well as the provisions of the South Carolina Workers' Compensation Act, as interpreted by the Courts of the State of South Carolina to include Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955).

For ERISA and social security disability purposes and any and all other disability policies, these settlement funds are to be apportioned for the entire life span of Vanessa Estes;

b) Eighteen Thousand Five Hundred Twenty-One Dollars and Twenty-One Cents (\$18,521.21) to the Claimant's attorneys as attorneys' fees; and

c) Three Thousand Eight Hundred Twenty-Two Dollars and Fifty-Two Cents (\$3,822.52) to reimburse Claimant and her attorney for costs and expenses incurred in the prosecution of this claim.

47. That because Claimant is deemed to be totally and permanently disabled, Claimant is entitled to medical treatment related to her injuries during her lifetime, without any regard to limitations in the Act or the maximum compensation limit.

CONCLUSIONS OF LAW

Based upon the Findings of Fact set forth above, the undersigned Commissioner makes the following Conclusions of Law as required by S.C. Code Ann. § 42-17-40:

1. Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961); Herndon v. Morgan Mills, Inc., 143 S.E.2d 376 (S.C. 1965). Claimant has met her burden of proving her claim by the preponderance of the evidence.

2. Under S.C. Code Ann. § 42-1-130, Claimant was an employee, and under S.C. Code Ann. § 42-1-140, the Defendant Employer was an employer covered under the Act at the time of Claimant's injuries.

3. Under S.C. Code Ann. § 42-1-160, Claimant sustained compensable injuries to her left arm, right arm, and back arising out of and in the course and scope of her employment with the Employer on June 17, 2017.

4. Under S.C. Code Ann. § 42-15-20, Claimant gave timely and proper notice of her injury to the Employer.

5. Under S.C. Code Ann. § 42-15-40, Claimant timely filed her claim within two (2) years of her admitted accident.

6. Under S.C. Code Ann. § 42-15-60, Claimant is entitled to all medical care, treatment, therapy, consultations, diagnostic studies, rehabilitations, injections, hospitalizations, surgeries, and medications related to her injuries, which tend to effect a cure, provide relief, and/or

tend to lessen Claimant's period of disability. Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999).

7. Under S.C. Code Ann. § 42-9-10, Claimant is entitled to receive compensation during her period of temporary total disability at her applicable compensation rate.

8. Under S.C. Code Ann. § 42-9-10, Claimant is totally and permanently disabled as a result of her combined injuries to her left arm, right arm, and back and resultant destruction of her earning capacity, and Claimant is therefore entitled to 500 weeks of compensation benefits. Total disability does not require complete helplessness. The generally accepted test of total disability is the inability to perform services other than those that are so limited in quality, dependability, and quantity that a reasonably stable market for them does not exist. Wynn v. Peoples Natural Gas Co. of S.C., 238, S.C. 1, 118 S.E. 2d 812 (1961); Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Svcs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1999). The presumption of total disability has not been rebutted.

9. Under S.C. Code Ann. § 42-15-60(C), Claimant is entitled to lifetime medical treatment for her injuries, without any regard to limitations in the Act or the maximum compensation limit.

10. Claimant's award of total and permanent disability shall be reduced to present value and paid in a lump sum, with allocation language. This is in the best interest of Claimant. The Defendants offered no evidence that it would be prejudicial to have the award paid in a lump sum with allocation language. Use of allocation language does not change the commuted lump value of the award based on the 500 week maximum compensation the Defendants must pay to Claimant.

11. Under § 42-9-301, the Commission has the authority to award lump sum payments and to fix, establish, or otherwise ascertain such payments along with allocation language as allowed under Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955); James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). Under Regulation 67-1605(E)(5), it is appropriate for the Carrier to receive a discount as calculated therein.

The Act must be given liberal construction in furtherance of the beneficial purpose for which it was designed. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). The allocation, appropriation, or distribution of an award is in accordance with the purpose of the Act which is to protect workers, to create and preserve rights of employees who are injured, to aid injured workers in providing for themselves, and to offer some degree of security regarding the necessities of life. The Act is to be given a liberal construction in furtherance of its purpose. Id. Without the allocation language as allowed under Utica-Mohawk Mills and James v. Anne's Inc., there would be prejudice to the Claimant, who potentially would lose certain other benefits, thereby producing a negative result to the injured worker, which would be contrary to the beneficial purposes of the Act. The award of a lump sum and the use of allocation language for the monies received pursuant to the Order does not create a new right nor does it increase or decrease the award to be received by the Claimant or the amount to be paid by the Defendants. These are funds which the Claimant is entitled to under the Act, and such lump sum and allocation merely assists the Claimant in achieving the primary purpose of the Act. Hooks v. Southern Bell Telephone & Telegraph Co., 291 S.C. 41, 351 S.E.2d 900 (Ct. App. 1986).

Furthermore, under § 42-3-180, the Commission is to resolve all questions under the Act, if not settled by agreement of the parties. There is no exception in § 42-3-180 which would

preclude the Commission from determining the propriety of a lump sum award with allocation language.

ORDER AND AWARD

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby:

ORDERED, ADJUDGED, AND DECREED Claimant, Vanessa Estes, sustained compensable injuries to her left arm, right arm, and back arising out of and in the course and scope of her employment with Employer on June 17, 2017; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant has received necessary and proper medical care and treatment from University Hospital, Doctors Care, Aiken Regional Medical Center, Nova Medical Center, American Health Imaging, Augusta Orthopedic & Sports Medicine Specialists, Maguire Therapy Services, Occupational Therapy Plus, Inc., One Call Care Physical Therapy, BenchMark Physical Therapy, and Dr. Ty Carter, related to Claimant's injuries, and therefore, all of this care, treatment, therapy, injections, consultations, diagnostic procedures, rehabilitation, medications, and other attendant care shall be the responsibility of Defendants, including reimbursement to Claimant of mileage and medications; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant is totally and permanently disabled as a result of a destruction of her earning capacity and therefore, Claimant is entitled to an award of her remaining 500 weeks of compensation at the compensation rate of \$262.29 from Defendants, with Defendants being given credit for temporary compensation previously paid to Claimant; and, it is further,

ORDERED, ADJUDGED, AND DECREED that Claimant shall receive a lump sum award of the remaining net total and permanent disability benefits with allocation language; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant is entitled to lifetime causally-related reasonable and necessary medical treatment pursuant to § 42-15-60(C) for her left arm, right arm, and back without regard to any limitation in the Act including the maximum compensation limit.

No hearing costs are assessed in this instance.

AND IT IS SO ORDERED.

III. ISSUES ON APPEAL

1. Whether the Hearing Commissioner erred in finding as a fact and/or concluding as a matter of law that the Claimant met her burden of proof to establish permanent and total disability based upon Claimant's alleged destruction of earning capacity, the error being such findings are against the greater weight of the evidence and/or clearly erroneous as a matter of law?

2. Whether the Hearing Commissioner erred in finding and concluding that the Claimant is unable to perform or compete for jobs within her work-related restrictions and erred in awarding permanent and total disability benefits, the error being that uncontroverted medical evidence, vocational and functional capacity testing all indicated Claimant could perform work in the light or light to medium physical demand categories and such work capacity was well within Claimant's past employment history?

3. Whether the Hearing Commissioner erred in relying on the vocational report and opinions of David Price that Claimant was functioning at a "sheltered sedentary level" and was allegedly unable to return to her occupation of cashier and no longer capable of obtaining or retaining gainful employment, the error being that such opinions are contrary to and unsupported by the medical evidence/opinions and functional capacity testing which indicates Claimant could work in the light or light to medium physical demand categories, therefore the opinions of David

Price are without adequate evidentiary basis and should be entitled to little or no weight?

4. Whether the Hearing Commissioner abused his discretion or otherwise erred in relying upon a physical therapist's note purportedly indicating Claimant's physical demand level as "sedentary," the error being that the physical therapist was not qualified to form or express an expert opinion as to such issue; the note, in fact, did not express any such opinion and additionally contained contrary information that Claimant "meets essential job duties," and was therefore not relevant or probative on the issue of alleged loss of earning capacity?

5. Whether the Hearing Commissioner abused his discretion or otherwise erred in placing "greater weight" on Claimant's testimony that she allegedly could not perform the jobs identified by Defendants' vocational expert, Glen Adams, the error being Claimant's unsubstantiated testimony was contrary to the medical opinions, vocational evidence and functional capacity testing, and Claimant's testimony on this issue should have been accorded little or no weight?

6. Whether the Hearing Commissioner abused his discretion or otherwise erred in assigning little weight to the opinion of Defendants' vocational expert, Glen Adams, the error being that Mr. Adams' evaluation, report, and opinions were based on and consistent with the medical evidence/opinions, functional capacity testing, information and history provided by the Claimant, as well as other evidence in the record, and his opinion that Claimant was capable of resuming full-time employment with no loss of earnings based on all findings was the only credible vocational evaluation/opinion submitted?

7. Whether the Hearing Commissioner erred in failing to grant Defendants' request to stop payment of TTD benefits, award credit for overpayment and award permanent partial disability for Claimant's admitted injuries, the error being this was required by the Workers'

Compensation Act and the preponderance of the evidence and there was no credible evidence supporting an award of permanent and total disability?

8. Whether the Hearing Commissioner erred in finding that the Claimant experienced triggering and locking of her bilateral middle and ring fingers without finding that these symptoms were unrelated, the error being that Dr. Pope's uncontroverted medical opinion was that Claimant's trigger finger symptoms were not related to her work injury and Claimant offered no medical evidence to the contrary?

9. Whether the Hearing Commissioner erred in awarding lifetime medical benefits for Claimant's injuries (assuming entitlement to same which is denied), without excluding responsibility for Claimant's trigger finger symptoms, the error being that the uncontroverted medical evidence indicates this problem is unrelated to Claimant's work injury and Claimant offered no medical evidence to the contrary?

10. Whether the Hearing Commissioner erred in making certain irrelevant and/or inaccurate Findings of Fact (including but not limited to findings, or portions of findings, 12, 15, 16, 26, 28, and 32), the error being these were not relevant or prohibitive of any issues or benefits to be determined in this matter.

11. Whether the Hearing Commissioner erred or committed an abuse of discretion in ordering a lump sum payment of the total disability award (assuming Claimant was entitled to same which is denied), the error being that Claimant failed to follow the procedure required by the Act to obtain a lump sum award and the evidence was insufficient to establish Claimant's entitlement to a lump sum?

12. Whether the Hearing Commissioner erred in miscalculating the amount of the lump sum award (assuming Claimant was entitled to same which is denied), the error being the

calculation fails to account for the effect of payment of ongoing temporary total disability benefits pending appeal and/or otherwise miscalculated the award?

IV. DECISION OF THE APPELLATE PANEL

In an application for review pursuant to S.C. Code Ann. § 42-17-50, the Appellate Panel shall review the Award, and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award by making its own Findings of Fact and its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the Request for Review in the instant case, including review of the entire record and upon consideration of the memoranda and arguments of the parties, the Appellate Panel has determined all of the Hearing Commissioner's Findings of Facts and Conclusions of Law are correct as stated and affirms the Hearing Commissioner's Order in full.

Accordingly, the Appellate Panel's Findings of Fact and Conclusions of Law are set forth below:

FINDINGS OF FACT

Based upon the stipulations, the testimony of witnesses, and the APA submissions, the undersigned Commissioner makes the following Findings of Fact as required by S.C. Code. Ann. § 42-17-40, 1976:

1. The Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Vanessa Estes as Employee/Claimant and MB Jones Oil Co., Inc. as Employer and Guarantee Insurance Co. in Liquidation/Georgia Insurers Insolvency Pool as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to June 17, 2017 on which date she sustained an admitted injury by accident to her bilateral upper extremities and back arising out of and in the course and scope of her employment, and proper notice was given to the Employer.

3. That Claimant alleges additional injuries to her head, neck, right hand, left hand, and right shoulder as a result of her work-related accident as supported by the evidence in the record.

4. That the South Carolina Workers' Compensation Form No. 12A, First Report of Injury, completed by the Employer on June 19, 2017 indicates injuries to Claimant's back and head as a result of her work-related fall on June 17, 2017.

5. That Claimant received initial treatment at University Hospital Emergency Department on June 18, 2017. Claimant reported walking backward at work when she misstepped and fell directly onto her bottom, striking her back and head against an upright pole on the way to the ground. (Cl. APA #1, p. 1.) She reported persistent neck pain, upper and lower back pain, shoulder pain, and headache. (Cl. APA #1, p. 1.)

6. That on June 27, 2017, Claimant presented to authorized treating provider, Doctors Care, with complaints of continued neck, head, and back pain, as well as tingling in the right hand. (Cl. APA #2, p. 10.) Claimant underwent an x-ray of the thoracic spine. She was diagnosed with mid-back pain and trapezius muscle spasm and instructed to return for a follow-up. (Cl. APA #2, pp. 10-13.)

7. That on July 18, 2017, Claimant returned to Doctors Care with complaints of continued headache, tingling in the back of the head, and lower back pain. (Cl. APA #2, p. 20.)

Claimant was diagnosed with a muscle contraction headache and a strain of the muscle and tendon of the back wall of the thorax and assigned light duty work restrictions. (Cl. APA #2, pp. 21, 23.)

8. That on August 1, 2017, Claimant presented to Aiken Regional Medical Centers with complaints of continued headaches. Dr. Kristen Paysinger ordered a CT scan of Claimant's head due to the consistent headaches since the work-related fall. (Cl. APA #3, p. 33.)

9. That on August 23, 2017, Claimant returned to Doctors Care with complaints of bilateral hand and wrist pain, joint pain, and muscle pain. (Cl. APA #2, p. 25.) Claimant was referred to orthopedics for evaluation. (Cl. APA #2, p. 28.)

10. That the Employer representative, Robin Cantwell, testified she was aware of and did not dispute Claimant's injuries to her back and head as documented by the hospital and Doctors Care medical records, but that she only authorized treatment at Nova Medical Center for the bilateral hands and wrists in August 2017. (Cantwell Dep. 19:1-7, 22:6-15, 23:3-5; Cl. Ex. H, pp. 310, 313, 314.)

11. That Dr. Howell ordered a physical therapy and an MRI and EMG/NCV of both wrists and hands; placed Claimant on restricted duty with no lifting or carrying more than ten (10) pounds for eight (8) hours a day; and referred Claimant to orthopedics based on the MRI and EMG/NCV findings. (Cl. APA #4, p. 41, 48, 64.)

12. That despite Doctors Care's referral to orthopedics on August 23, 2017 and Dr. Howell's continued referrals to orthopedics beginning October 6, 2017, the Carrier did not authorize orthopedic treatment of Claimant's bilateral wrists and hands until March 2018. (Cl. APA #6, p. 108; See Cl. APA #2, p. 28; Cl. APA #4, pp. 48, 56, 64, 68, 81, 84, 86.)

13. That Claimant began treating with Dr. Richard Pope for her bilateral arms and hands on March 22, 2018. (Cl. APA #6, p. 109.)

14. That Dr. Pope performed carpal tunnel release surgery on the left wrist on May 7, 2018 followed by carpal tunnel release surgery on the left wrist on September 17, 2018. Following the surgeries, Claimant continued to have right shoulder pain followed by her arm going limp in addition to triggering and locking of the bilateral middle and ring fingers. (Cl. APA #6.)

15. That Claimant testified she filed a formal grievance against Dr. Pope with the administrator of his practice because his office visit notes did not accurately reflect her complaints and she felt as though he was not listening to her complaints of continued symptoms after surgery. (Hr'g Tr. 83:22-88:25, 91:21-92:12, 116:22-25.)

16. That nurse case manager Linda Moody's report dated February 18, 2019 states: "Ms. Estes obtained and read copies of her medical notes from Dr. Pope's office. She said she found inconsistencies in the medical notes. For example, she said at one visit he noted that she was able to make a complete fist with her right hand. She stated that she was not able to form a fist at that visit." (Cl. Ex. G, p. 290.) Ms. Moody noted Claimant "politely stated her concerns about the areas she disagreed with in the medical record and her feeling that she was not being heard. Dr. Pope listened to Ms. Estes' complaints, but did not engage in any conversation with her. He simply stated, 'My notes are my notes and they are not going to change.'" (Cl. Ex. G, p. 290.) Ms. Moody noted she asked Dr. Pope if he would continue therapy if it were recommended by the physical therapist, and he left the room to call Maguire Therapy, and then returned and said his staff could not get through so he was discharging Claimant. (Cl. Ex. G, pp. 290-91.)

17. That on February 7, 2019, in his medical notes, authorized treating physician Dr. Richard Pope of August Orthopedic and Sports Medicine Specialists opined: "status post bilateral carpal tunnel release. I agree with the patient that we do not have a functional physician-patient relationship at this point. Her WC carrier will find another qualified hand surgeon to take over

care. I will disengage in the treatment of Ms. Estes. I do believe that she has likely reached maximum medical improvement and should have an impairment eval. Patient can return to her regular work duty without restrictions.” (Cl. APA #6, p. 137.)

18. That Claimant presented to Lana Hardeman at Occupational Therapy Plus, Inc. d/b/a Therapy Plus for an impairment evaluation of the right wrist on March 12, 2019. Claimant reported continued pain in her right hand and intermittent occurrences of a sharp pain in her right shoulder where her arm went limp. She reported triggering in the middle fingers on her bilateral hands. Evaluator Hardeman noted Claimant reported pain 7/10 in her right hand and difficulty with dressing, housekeeping, toileting, cooking, bathing, laundry, shopping, writing, eating, using the telephone, and driving a car. (Cl. APA # 9, p.180.) Evaluator. Hardeman assigned a four percent (4%) impairment to the right upper extremity, and a 2% whole person impairment, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. APA # 9, p.180.)

19. That on April 8, 2019, on the impairment evaluation form, Dr. Pope concurred with the impairment ratings assigned by Evaluator Hardeman. (Def. APA #11, p. 412.)

20. That on March 30, 2022, in a medical records addendum, Dr. Pope opined: “I began treating Ms. Vanessa Estes on March 22, 2018 for bilateral wrist injuries she sustained as the result of a work-related fall on June 17, 2017. I diagnosed Ms. Estes with bilateral carpal tunnel syndrome and performed left carpal tunnel release surgery on May 7, 2018, followed by right carpal tunnel release surgery on September 17, 2018. On February 26, 2019, I referred Ms. Estes for an impairment rating evaluation. I assigned a 4% impairment rating to the right upper extremity based on the *Guides to the Evaluation of Permanent Impairment*, AMA, 5th Edition, Table 16-3. While the therapist performing the impairment rating evaluation only evaluated the right wrist, it is my opinion, based upon a reasonable degree of medical certainty, Ms. Estes also sustained a 4%

impairment rating to the left upper extremity as a result of her work-related accident as she had the same diagnosis and surgical repair for both wrists. (Cl. APA #12, p. 277.)

21. That Claimant continued to report her head, neck, and back pain since the work accident to her treating physician at Nova Medical Center, Dr. Jerome Howell, and to her physical therapist, but Dr. Howell was only authorized to treat Claimant's bilateral arms and hands. (Hr'g Tr. 47:24-48:2, 55:14-19.) Dr. Jaiye Conner testified Dr. Howell was only authorized to treat Claimant's bilateral hands and wrists, so she would expect his note to focus solely on those body parts. (Conner Dep. 56:16-57:7.)

22. That Claimant sought treatment from her primary care physician, Dr. Jeremiah Wilson, for her back pain during the time from August 2017 until January 2019 when workers' compensation did not authorize treatment for her back. (Hr'g Tr. 45:19-21; 47:12-48:2.) Dr. Wilson made note of her back pain, prescribed pain medication, and gave Claimant a handicap placard. (Hr'g Tr. 46:8-17.)

23. That on January 3, 2019, the Carrier finally authorized treatment for Claimant's back with Dr. Jaiye Conner at Nova Medical Center, and Claimant presented to Dr. Conner that day with complaints of continued pain in her buttocks and lower back. (Def. APA #1, p. 1-3.) Dr. Conner noted Claimant had decreased range of motion in all planes and muscle spasm along the bilateral paraspinal muscles. Dr. Conner performed lumbar x-rays and ordered a lumbar MRI. She prescribed medications and placed Claimant on light duty restrictions with no bending, twisting or lifting more than twenty (20) pounds; limited walking, standing, or sitting for extended periods without stretching; and sit/stretch breaks of 1 per 1 hour (Def. APA #1, pp. 1-3.)

24. That on January 24, 2019 in a follow-up evaluation, Dr. Conner diagnosed Claimant with a sprain of ligaments of lumbar spine and ordered an orthopedic consult for Claimant's lumbar

spine determine whether the disc bulges were a result of trauma or degenerative in nature. (Conner Dep. 18:12-19:8.) At that visit, Dr. Conner assigned work restrictions of "May not lift/carry objects more than 20 pounds for more than eight hours per day. Avoid bending, twisting or lifting more than 20 pounds. Limit walking, standing or sitting for extended [periods]." (Conner Dep. 67:1-17.)

25. That on February 11, 2019, in a narrative statement, Dr. Conner opined: "I treated Vanessa Estes pursuant to a workers' compensation claim with a date of accident of June 17, 2017. Ms. Estes' last office visit occurred on January 24, 2019. I believe, with reasonable degree of medical certainty, that Ms. Estes' lower back complaints are just as likely to be a result of a pre-existing degenerative condition, as they are to be an acute condition stemming from the date of accident above. (Def. APA #1, p. 9.)

26. That Dr. Conner testified she received a letter from attorney Robert Mills, dated February 7, 2019, referencing a telephone conversation they had and enclosing a narrative statement regarding causation of Claimant's back injury. (Conner Dep. 60:7-61:8.) Dr. Conner testified she had a telephone conference with Robert Mills regarding Claimant's care in late January or February prior to writing the statement. (Conner Dep. 61:10-12.) Claimant's counsel noted for the record both the telephone communication and the letter were unauthorized communication with a treating provider as Claimant was represented in January and February 2019 and Claimant's counsel was unaware of the phone call and the letter and narrative statement until the date of Dr. Conner's deposition. (Conner Dep. 61:14-17.)

27. That on September 30, 2019, in an IME for Defendants, Dr. Ty W. Carter opined: "This is a 58 year old female who suffered a work related injury on 6/17/17. She was having some back pain prior to this incident that was documented from her family physician. She definitely has some muscle guarding and some tenderness of the superficial aspect of her back which would be

much more consistent with muscle issues than anything deep such as degenerative disc disease or facet joint problems. Her MRI does not show any evidence of acute objective changes that would have occurred from the work related injury. She definitely has some degenerative changes of her back which were there prior to her work related injury. The patient could possibly have an exacerbation of her chronic underlying problems but I think most of her issues are muscle related and have nothing to do with the degenerative disc disease or arthritis. She has gone a significant period of time without treatment of her back and I do not think she has reached maximum medical improvement from her back in that she might require more physical therapy for dedicated lumbar problems instead of doing a combination of physical therapy as she had done before. The patient is currently only taking Meloxicam which does seem to help some. I do not see any evidence that the patient would require any other major treatments such as epidural injections or surgery. I do think the patient should be able to do some employment especially after a round of physical therapy. She states that she has been out of work since May of 2018 and although she has work release statements from Dr. Pope secondary to her carpal tunnel surgeries, she states that she has not been back to work. Currently I do think she would be able to work but in a modified setting with light to medium duty. She could potentially benefit from a functional capacity evaluation to determine more specifically what she would be able to do but currently I would have her return to work light to medium duty with limited bending and lifting, lifting only 20 to 25 pounds with frequent position changes and limited overhead work. I am not giving an opinion of the carpal tunnel surgery, this is only related to her back. Short of physical therapy along with the continuation of Meloxicam, I would not offer any other major treatments to her back. Even with physical therapy and potentially some improvement, I do feel that the patient has chronic low back pain related to muscles and based on the AMA Guides to the Evaluation of Permanent Impairment,

Fifth Edition, the patient is a DRE category 2 with a 5% impairment of whole person related to her lumbar spine based on muscle guarding and spasms and loss of motion.” (Def. APA #12, pp. 416-17.)

28. That despite Claimant’s numerous requests for authorization of physical therapy of the lumbar spine, the Carrier did not authorize the recommended physical therapy, but instead scheduled a return visit to Dr. Jaiye Andrews (nee Conner) on April 16, 2020 for completion of a WCC Form No. 14B and determination of work abilities before Claimant had had the physical therapy. (See Cl. Ex. K, pp. 422-28; Cl. Ex. L, pp. 429-35; Cl. APA #4, p. 99.) At that visit, Dr. Andrews assigned work restrictions of no lifting/carrying objects more than 20 pounds for more than 8 hours per day; limit walking, standing, or sitting for extended periods without stretching; sit/stretch breaks of 1 per 2 hours. (Cl. APA #4, p. 96.)

29. That on May 22, 2020, on a Form 14B, Dr. Jaiye Conner Andrews opined to a reasonable degree of medical certainty that Claimant was at MMI and that she was not qualified to make a determination with regard to impairment, as she previously stated. (Def. APA #1, p. 13.)

30. That prior to authorization and completion of the physical therapy recommended by Dr. Carter, on September 2, 2020, in an FCE, Evaluator Justin Williams assigned an 8% impairment to the low back and an 8% impairment to the whole person based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. APA #10, p. 182.) In addition, Mr. Williams opined the results of the evaluation suggested Claimant gave a reliable, valid effort and demonstrated patterns of movement and physiological responses consistent with maximal effort. He also noted there was consistency between the test results and the referral diagnosis. (Cl. APA #10, p. 185.) Mr. Williams noted the FCE revealed Claimant had occasional lifting capabilities in the light physical demand category “as follows: floor to knuckle lift = 15lbs., Knuckle to Shoulder

Lift = 10 lbs., Shoulder to Overhead Lift = 5 lbs., Two Hand Carry = 10 lbs.” (Cl. APA #10, pp. 185-86.)

31. That on October 12, 2020, in an IME addendum, Dr. Carter opined: “In the independent medical evaluation report dated 9/30/19 for Vanessa Estes, I made the recommendation that the patient could potentially benefit from a functional capacity evaluation to more specifically determine any limitations. I have recently received a Functional Capacity Evaluation report from BenchMark Physical Therapy dated 9/2/20 in which their determination of impairment is 8% based on AMA Guides 5th Edition. Because an FCE actually tests a patient’s response through a series of physical activities, I am in agreement with the 8% impairment rating as stated in the report from BenchMark Physical Therapy. I also agree that the patient has reached maximum medical improvement from her work related injury of 6/17/17.” Notably, Dr. Carter had not seen Claimant since his IME on September 30, 2019, more than one year prior.

32. That on October 29, 2020, the adjuster finally authorized the physical therapy previously recommended by Dr. Carter on September 30, 2019. (Cl. Ex. N, pp. 438-40.)

33. That Claimant completed twelve (12) sessions of physical therapy at BenchMark Physical Therapy from November 4, 2020, to December 4, 2020. (Cl. APA #10.) On December 4, 2020, physical therapist, Mr. Brian Cook, discharged the Claimant, noting her current physical demand level was “sedentary,” indicating work-related limitations were lifting, carrying, pushing, pulling, prolonged standing or squatting (Cl. APA #10, p. 270-71.)

34. That David R. Price M.Ed., CRC performed a vocational evaluation of Claimant on July 14, 2021. Mr. Price opined Claimant could not return to her occupation of cashier or any occupation she has ever performed due to her physical limitations from the work accident. (Cl. Ex. P, p. 446.) He noted Claimant is functioning at a sheltered sedentary level, a category of work

where she has no experience. (Cl. Ex. P, p. 446.) Mr. Price noted Claimant can no longer work at a consistent productive pace and her disabling pain flares render her unreliable as a day to day worker. (Cl. Ex. P, p. 446.) Mr. Price opined “these factors, combined with her status as an older worker, so restrict Claimant’s access to the labor market that jobs for which she is qualified and capable of performing will no longer be available to her in viable numbers, effectively rendering her unemployable.” (Cl. Ex. P, p. 446.) Mr. Price opined “with a reasonable degree of vocational certainty as a result of her work accident, Claimant is no longer capable of obtaining or retaining gainful employment[,] and as such[,] is completely disabled from a vocational perspective.” (Cl. Ex. P, p. 446.) He noted at age sixty she is not a candidate for vocational rehabilitation. (Cl. Ex. P, p. 446.)

35. That on August 26, 2022, in a vocational assessment for Defendants, Vocational Consultant Glen K. Adams, MRC, CRC, CEES, CCM of Adams & Wilkinson opined: “Ms. Estes is capable of resuming full-time employment with no loss of earnings based on these findings. The opinions and conclusions of this report are provided to a reasonable degree of vocational probability.” (Def. APA #14, p. 507.) Although Mr. Adams states Claimant can work certain jobs, he indicates in the body of his report negative factors in her profile including her: “age of 60, indicating a reduced capacity to adapt to new work situations and environments; reduced physical abilities based on Dr. Carter's work statement; and ongoing reported symptoms impacting the performance of her daily activities.” (Def. APA #14, p. 506.)

36. That Claimant called all nine (9) of the positions identified in the labor market survey prepared by Mr. Adams. A majority of the positions were not available and/or the employers did not answer the phone. Still, Claimant is physically unable to do the job duties of several of these positions. For instance, the Lowe’s head cashier position was filled, but also

required minimum lifting of ten (10) pounds without assistance and lifting over ten (10) pounds with or without assistance. The Wendy's cashier position required maintaining inventory, a job duty Claimant has done in the past, which she knows she can no longer do as it requires lifting and overhead work. The Harveys Retail Stores cashier position involved stocking shelves and pushing a long line of grocery carts into a corral, which Claimant could not do. (Hr'g Tr. 77:19-78:11; Def. APA #14, p. 17) The Augusta University Health position required cleaning tables and spills, which Claimant testified she could not do as bending and crouching and/or mopping floors with a large mop would cause pain. (Hr'g Tr. 76:15-24; Def. APA #14, p. 15.) The Pan Tack, Inc. position was located fifty (50) miles away from Claimant's home. As to some of the positions, Claimant would not meet the minimum experience preferred by the employer. For example, the Lowe's job required six months of experience using a computer and one year of identifying and selling products, neither of which Claimant has. (Hr'g Tr. 73:8-74:1.) Additionally, the Augusta University Health position required one year or more of experience clerical work, which Claimant does not have. (Hr'g Tr. 76:15-77:3; Def. APA #14, p. 15.)

37. That Claimant's pre-accident job as a retail sale associate with Sprint Foods required the ability to lift up to fifty (50) pounds; stocking shelves and coolers; climbing ladders; cleaning the parking lot and grounds surrounding the convenience store; sweeping and mopping floors; dusting shelves; and lifting and carrying out trash containers and placing them in an outside bin. (Cantwell Dep. 10:11-25, 11:1-14; Cl. Ex. H, p. 301-02.) While the Employer was able to accommodate the wrist restrictions from Dr. Pope, it was not able to accommodate Dr. Conner's restrictions for the back; therefore, Claimant was out of work. (Cantwell Dep. 32:5-25; Cl. Ex. H, p. 322.)

38. That on September 14, 2022, at the hearing before the undersigned Commissioner, Claimant testified regarding her work history, job duties, work-related accident, injured body parts, medical treatment, work restrictions, and the issues she continues to have and her ability to work.

39. That Claimant continues to have everyday pain in her lower back that ranges in severity from a 6 out of 10 to a 9 out of 10. The pain extends from right above her buttocks up in to her neck, and nine (9) times out of ten (10), the neck pain triggers right shoulder pain. Her pain is triggered by everyday tasks such as cleaning, bending, and/or sitting or standing for extended periods. (Hr'g Tr. pp. 60-61.) Claimant testified she has daily right wrist and arm pain that comes and goes based on her activity and makes it difficult for her to perform activities because she is right-hand dominant. She also has daily left hand pain and tingling that comes and goes based on activity in addition to locking of the fingers on the left hand. (Hr'g Tr. pp. 63-64.) Claimant continues to have daily headaches. (Hr'g Tr. 65:8-11.) Claimant testified the symptoms she continues to experience affect her daily living, and she is unable to do fifty percent (50%) of the things she could do without difficulty prior to her work accident. (Hr'g Tr. 66:3-6; 66:13-14.)

40. That I find based on a preponderance of the evidence in the record and sworn testimony Claimant's back was at least aggravated by her work-related accident on June 17, 2017.

41. Furthermore, I give great weight to Claimant's testimony as to why she could not do the jobs identified by Defendants' expert, Glenn Adams, and thus give Mr. Adams' opinions little weight.

42. That a review of the Record as a whole provides that Claimant is unable to adequately compete for a job within her work-related restrictions.

43. Therefore, based on the impairment to multiple body parts, Claimant's age and work history, as well as Claimant's testimony and the opinions of David Price, I hereby find

Claimant established by a preponderance of the evidence she has suffered destruction of her earning capacity as a result of her compensable injuries, and therefore, is deemed to be totally and permanently disabled.

44. That Claimant has been unable to work and has been receiving temporary compensation from Defendants at her applicable compensation rate from May 7, 2018 through July 29, 2018 and from August 21, 2018 through the present.

45. That Claimant is entitled to an award of total and permanent disability as a result of suffering a destruction of her earning capacity due to her combined compensable injuries to her back and bilateral arms. Claimant is entitled to receive 500 weeks of compensation at her applicable compensation rate from Defendants, with Defendants being given a credit for weeks of temporary compensation paid to Claimant.

46. That Claimant received temporary compensation from May 7, 2018 through July 29, 2018 and from August 21, 2018 through the present. Claimant has received 212.2857 weeks of temporary compensation through the date of the Hearing. As of July 31, 2023, Claimant would have received 270 weeks of temporary compensation benefits. This leaves a balance of 230 weeks available on an award of total disability. The balance of this award as of July 31, 2023 would reduce to a commuted value of 211.8405 weeks, which at a compensation rate of \$262.29 per week, totals \$55,563.64. Claimant is entitled to receive her award of total disability payable in a lump sum commuted to present value. It is in the best interest of Claimant the award be paid in a lump sum. There is no prejudice shown to Defendants to pay the award in a lump sum. Furthermore, Claimant's lump sum award should be allocated in her best interest as follows:

a) Thirty-Three Thousand Two Hundred Nineteen Dollars and Ninety-One Cents (\$33,219.91) future disability benefits at the rate of Three Dollars and Seventy-Five Cents (\$118.97) per month for a period of 23.27 years (the Claimant's life expectancy pursuant to SC Code Ann. §19-1-150), commencing per the Order, pursuant to Sciarotta v. Bowen, 837 F. 2d 135 (3rd Cir. 1988), See

also on remand 735 F. Supp. 148 (D.N.J. 1989); See also on remand 735 F. Supp. 148 (D.N.J. 1989); James v. Anne's Inc., 390 S.C.188, 701 S.E.2d 730 (2010); as well as the provisions of the South Carolina Workers' Compensation Act, as interpreted by the Courts of the State of South Carolina to include Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955).

For ERISA and social security disability purposes and any and all other disability policies, these settlement funds are to be apportioned for the entire life span of Vanessa Estes;

b) Eighteen Thousand Five Hundred Twenty-One Dollars and Twenty-One Cents (\$18,521.21) to the Claimant's attorneys as attorneys' fees; and

c) Three Thousand Eight Hundred Twenty-Two Dollars and Fifty-Two Cents (\$3,822.52) to reimburse Claimant and her attorney for costs and expenses incurred in the prosecution of this claim.

47. That because Claimant is deemed to be totally and permanently disabled, Claimant is entitled to medical treatment related to her injuries during her lifetime, without any regard to limitations in the Act or the maximum compensation limit.

CONCLUSIONS OF LAW

Based upon the Findings of Fact set forth above, the undersigned Commissioner makes the following Conclusions of Law as required by S.C. Code Ann. § 42-17-40:

1. Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961); Herndon v. Morgan Mills, Inc., 143 S.E.2d 376 (S.C. 1965). Claimant has met her burden of proving her claim by the preponderance of the evidence.

2. Under S.C. Code Ann. § 42-1-130, Claimant was an employee, and under S.C. Code Ann. § 42-1-140, the Defendant Employer was an employer covered under the Act at the time of Claimant's injuries.

3. Under S.C. Code Ann. § 42-1-160, Claimant sustained compensable injuries to her left arm, right arm, and back arising out of and in the course and scope of her employment with the Employer on June 17, 2017.

4. Under S.C. Code Ann. § 42-15-20, Claimant gave timely and proper notice of her injury to the Employer.

5. Under S.C. Code Ann. § 42-15-40, Claimant timely filed her claim within two (2) years of her admitted accident.

6. Under S.C. Code Ann. § 42-15-60, Claimant is entitled to all medical care, treatment, therapy, consultations, diagnostic studies, rehabilitations, injections, hospitalizations, surgeries, and medications related to her injuries, which tend to effect a cure, provide relief, and/or tend to lessen Claimant's period of disability. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999).

7. Under S.C. Code Ann. § 42-9-10, Claimant is entitled to receive compensation during her period of temporary total disability at her applicable compensation rate.

8. Under S.C. Code Ann. § 42-9-10, Claimant is totally and permanently disabled as a result of her combined injuries to her left arm, right arm, and back and resultant destruction of her earning capacity, and Claimant is therefore entitled to 500 weeks of compensation benefits. Total disability does not require complete helplessness. The generally accepted test of total disability is the inability to perform services other than those that are so limited in quality, dependability, and quantity that a reasonably stable market for them does not exist. Wynn v. Peoples Natural Gas Co. of S.C., 238, S.C. 1, 118 S.E. 2d 812 (1961); Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); Colvin v. E.I. DuPont De Nemours Co., 227

S.C. 465, 88 S.E.2d 581 (1955); Stephenson v. Rice Svcs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1999). The presumption of total disability has not been rebutted.

9. Under S.C. Code Ann. § 42-15-60(C), Claimant is entitled to lifetime medical treatment for her injuries, without any regard to limitations in the Act or the maximum compensation limit.

10. Claimant's award of total and permanent disability shall be reduced to present value and paid in a lump sum, with allocation language. This is in the best interest of Claimant. The Defendants offered no evidence that it would be prejudicial to have the award paid in a lump sum with allocation language. Use of allocation language does not change the commuted lump value of the award based on the 500 week maximum compensation the Defendants must pay to Claimant.

11. Under § 42-9-301, the Commission has the authority to award lump sum payments and to fix, establish, or otherwise ascertain such payments along with allocation language as allowed under Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955); James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). Under Regulation 67-1605(E)(5), it is appropriate for the Carrier to receive a discount as calculated therein.

The Act must be given liberal construction in furtherance of the beneficial purpose for which it was designed. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). The allocation, appropriation, or distribution of an award is in accordance with the purpose of the Act which is to protect workers, to create and preserve rights of employees who are injured, to aid injured workers in providing for themselves, and to offer some degree of security regarding the necessities of life. The Act is to be given a liberal construction in furtherance of its purpose. Id. Without the allocation language as allowed under Utica-Mohawk Mills and James v. Anne's Inc., there would be prejudice to the Claimant, who potentially would lose certain other

benefits, thereby producing a negative result to the injured worker, which would be contrary to the beneficial purposes of the Act. The award of a lump sum and the use of allocation language for the monies received pursuant to the Order does not create a new right nor does it increase or decrease the award to be received by the Claimant or the amount to be paid by the Defendants. These are funds which the Claimant is entitled to under the Act, and such lump sum and allocation merely assists the Claimant in achieving the primary purpose of the Act. Hooks v. Southern Bell Telephone & Telegraph Co., 291 S.C. 41, 351 S.E.2d 900 (Ct. App. 1986).

Furthermore, under § 42-3-180, the Commission is to resolve all questions under the Act, if not settled by agreement of the parties. There is no exception in § 42-3-180 which would preclude the Commission from determining the propriety of a lump sum award with allocation language.

V. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby:

ORDERED, ADJUDGED, AND DECREED Claimant, Vanessa Estes, sustained compensable injuries to her left arm, right arm, and back arising out of and in the course and scope of her employment with Employer on June 17, 2017; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant has received necessary and proper medical care and treatment from University Hospital, Doctors Care, Aiken Regional Medical Center, Nova Medical Center, American Health Imaging, Augusta Orthopedic & Sports Medicine Specialists, Maguire Therapy Services, Occupational Therapy Plus, Inc., One Call Care Physical Therapy, BenchMark Physical Therapy, and Dr. Ty Carter, related to Claimant's injuries, and therefore, all of this care, treatment, therapy, injections, consultations, diagnostic procedures,

rehabilitation, medications, and other attendant care shall be the responsibility of Defendants, including reimbursement to Claimant of mileage and medications; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant is totally and permanently disabled as a result of a destruction of her earning capacity and therefore, Claimant is entitled to an award of her remaining 500 weeks of compensation at the compensation rate of \$262.29 from Defendants, with Defendants being given credit for temporary compensation previously paid to Claimant; and, it is further,

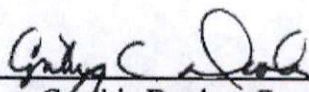
ORDERED, ADJUDGED, AND DECREED that Claimant shall receive a lump sum award of the remaining net total and permanent disability benefits with allocation language; and, it is further,

ORDERED, ADJUDGED, AND DECREED Claimant is entitled to lifetime causally-related reasonable and necessary medical treatment pursuant to § 42-15-60(C) for her left arm, right arm, and back without regard to any limitation in the Act including the maximum compensation limit.

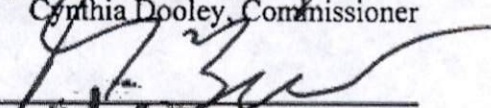
No hearing costs are assessed in this instance.

AND SO IT IS ORDERED.

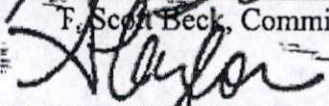
Columbia, SC



Cynthia Dooley, Commissioner



F. Scott Beck, Commissioner



Aisha Taylor, Commissioner

Order Served via email:

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| Mark D. Cauthen Cauthen Law Group mcauthen@cauthenlawgroup.com | Catherine D. Meehan The Steinberg Law Firm Cmeehan@steinberglawfirm.com |
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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 May 14, 2024