

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

WCC FILE NUMBER: 1108103

ANDREAS KMIECIK, Employee,  
Claimant/Respondent,

vs.

GIDDY UP TAXI, Employer,  
and COMMERCE AND INDUSTRY INSURANCE COAMPNY (AIG DOMESTIC  
CLAIMS)  
COMPANY, Carrier,  
Defendants/Appellants.

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Appellate Panel Decision and Order  
Affirm in Part and Reverse in Part  
Columbia, South Carolina  
October 14, 2013

Appellate Panel Decision and Order filed  
on March 19, 2014

Claimant/Appellant, Andreas Kmiecik (Employee), represented by The Steinberg Law Firm, L.L.P., David T. Pearlman, Esquire of Charleston, South Carolina

Defendants/Respondents, Giddy Up Taxi (Employer) and Commerce and Industry Insuracnce Company (Carrier), represented by Erin L. Hantske, Esquire of McAngus GoudeLock & Courie L.L.C. of Charleston, South Carolina.

This matter comes before the Appellate Panel of the South Carolina Workers' Compensation Commission on October 14, 2013 upon the Claimant/Appellant's (hereinafter "Claimant") filing of a WCC Form No. 30, Request for Review, appealing the Decision and Order of the Hearing Commissioner dated June 14, 2013. After careful review of the record on appeal and after considering the memorandums and arguments of the parties, the Appellate Panel affirms in part and reverses in part the Decision and Order of the Hearing Commissioner dated June 14, 2013.

### **Statement of the Case**

The Claimant, Andreas Kmiecik, is sixty-one (61) years old. He was employed by Giddy Up Tax, the Employer, as a taxi-cab driver for over six (6) years.

The Claimant suffered an admitted compensable injury arising out of and in the course and scope of his employment when he was involved in a work related motor vehicle accident on June 15, 2011. The Claimant suffered an admitted injury to his neck and back.

The Claimant was provided initial medical treatment at Main Street Medical where he was diagnosed with cervical spine radiculopathy and lumbar back pain. The Claimant was referred to Dr. Scott E. Strohmeyer, orthopedist, who became the authorized medical provider. Dr. Strohmeyer provided the Claimant with physical therapy, medications, and injections. Dr. Strohmeyer placed the Claimant at maximum medical improvement on October 31, 2011 with a 5% permanent partial impairment rating to his back as outlined on a WCC Form No. 14B. The WCC Form No. 14B states

the injury is to the "lumbar spine" and affects "the c-spine." The WCC Form No. 14B does not mention a left hip injury or that the left hip is affected as part of this claim.

The Claimant returned to Dr. Strohmeyer. On January 24, 2012, Dr. Strohmeyer stated "he returns back today, basically his left side is still bothering him." Dr. Strohmeyer stated at that time, "x-rays show that he may have AVN of his hip with some mild collapse" (emphasis added). Dr. Strohmeyer does not state in his office note of January 24, 2012 that the Claimant had AVN (avascular necrosis) of his left hip, does not state the Claimant needs left hip surgery, does not state the Claimant had impairment of left hip, does not state the Claimant should not work and most importantly, does not state the left hip condition was related to the motor vehicle accident. Dr. Strohmeyer recommended an MRI scan of the left hip.

Based on Dr. Strohmeyer's WCC Form No. 14B, the parties entered into a WCC Form No. 16(A) on March 22, 2012 for 10% partial disability of the back. The WCC Form No. 16(A) states the Claimant sustained an injury to his cervical and lumbar spine for which he was to receive 10% permanent partial disability to the back and additional medical treatment as set forth on the WCC Form No. 14B. The WCC Form No. 16(A) was not "approved" by the Commission, but was "received" by the Commission's Claims Department pursuant to regulation 67-802A(3)(c).

After the execution of the WCC Form No. 16(A), the Carrier authorized the Claimant to undergo an MRI of the left hip on May 23, 2012. The Claimant returned to Dr. Strohmeyer on June 1, 2012 to review the MRI. Dr. Strohmeyer stated in his office note of June 1, 2012 the Claimant will need a left hip replacement and stated for the first

time the Claimant's left hip was aggravated by the work accident. On August 17, 2012, Dr. Strohmeyer stated in his office note: "he returns back today. He has terrible back pain and hip pain that is definitely getting worse... I repeated some x-rays. He has severe collapse of the head. It is bone on bone in the hip joint. As compared to January, when his hip was very well maintained...the injury impacted the femoral head which expedited his symptoms..." At this time Dr. Strohmeyer took the Claimant out of work.

The Claimant filed a WCC Form No. 50, Request for Hearing, on September 27, 2012. In his WCC Form No. 50, the Claimant sought benefits under the Act based on an additional injury to his left hip, or in the alternative, based on a change of condition because of a worsening of his left hip condition. The Claimant argued that his hip condition should be established as a causally related new injury for which he is entitled to temporary compensation, medical treatment and surgery as recommended by Dr. Strohmeyer. Because Dr. Strohmeyer did not determine the left hip condition was work related until June 1, 2012, which was after the parties executed the WCC Form No. 16A, the Claimant argued the WCC Form No. 16A does not prevent or bar the filing of a new injury.<sup>1</sup> In the alternative, the Claimant argued that based on Dr. Strohmeyer's records, his left hip condition has clearly worsened after the date of maximum medical improvement and therefore constitutes a change of condition entitling him to additional compensation, medical treatment, and surgery as recommended by Dr. Strohmeyer. The Claimant argued that Dr. Strohmeyer's office notes clearly reflect a worsening left hip injury. On January 24, 2012, Dr. Strohmeyer stated the Claimant's x-ray showed a

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<sup>1</sup> The Claimant's WCC Form No. 50 seeking benefits for an injury to his left hip was timely filed within two (2) years of the date of accident pursuant to Section 42-15-40.

"mild collapse;" however, on August 17, 2012, Dr. Strohmeyer stated the Claimant's x-ray showed a "severe collapse."<sup>2</sup>

The Defendants/Respondents (hereinafter "Defendants") filed a WCC Form No. 51 denying the claim was entitled to additional benefits. The Defendants argued Dr. Strohmeyer's deposition taken on February 6, 2013 indicated that he diagnosed the Claimant with avascular necrosis and that the Claimant would need a left hip replacement based on an x-ray of the Claimant's left hip on January 24, 2012. However, the Claimant argued Dr. Strohmeyer's medical records on January 24, 2012 did not state either a definitive diagnosis of AVN or any indication that left hip surgery was recommended at that time.

A Hearing was held on February 26, 2013. The Hearing Commissioner issued an Order on June 14, 2013 making various findings of fact denying the Claimant benefits based on a change of condition. The Hearing Commissioner stated that the Claimant is barred from alleging a change of condition for his left hip because the Claimant had seen Dr. Strohmeyer prior to executing the WCC Form No. 16(A) and the WCC Form No. 16(A) did not list the left hip. Furthermore, the Hearing Commissioner did not address whether benefits for the Claimant's left hip should be awarded as a new injury.

A secondary issue raised at the Hearing was a determination of the Claimant's average weekly wage and applicable compensation rate. The Claimant argued he was paid commission plus tips as a taxi-cab driver, but the WCC Form No. 20 filed by the Defendants did not include tips. Therefore, the Claimant argued the average weekly

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<sup>2</sup> The Claimant's WCC Form No. 50 seeking in the alternative benefits for a change of condition was timely filed within one (1) year of the last date of payment of compensation pursuant to Section 42-17-90.

wage of \$342.40 and the compensation rate of \$228.28 set forth on the WCC Form No. 20 was inaccurate. The Claimant contended that based on the testimony of Brandon Lambrix, the President of Giddy Up Taxi, he had an average weekly wage of \$704.80 per week over twelve (12) months and a resulting compensation rate of \$469.87. The Hearing Commissioner found the Claimant was "without recourse" to challenge the average weekly wage and compensation rate set forth on the WCC Form No. 16(A).

The Claimant timely filed a WCC Form No. 30, Request for Commission Review, setting forth nineteen (19) grounds for review. The Claimant's grounds for review are as follows:

**FIRST:** The Hearing Commissioner erred in failing to make any findings of fact or conclusions of law regarding whether or not the Claimant sustained a causally related injury to his left hip; the error being the Claimant raised in his WCC Form No. 50, Request for Hearing, a claim for benefits to his left hip as a compensable injury.

**SECOND:** The Hearing Commissioner erred in failing to find and conclude as law the Claimant is entitled to benefits for a compensable injury to his left hip; the error being the only evidence in the record indicates the first time it was mentioned to the Claimant that his left hip condition was "maybe" related to his admitted injury was by Dr. Scott E. Strohmeyer, the authorized treating physician, on June 1, 2012.

**THIRD:** The Hearing Commissioner erred in failing to award benefits to the Claimant for a compensable left hip injury; the error being the Claimant timely filed for benefits when he was made aware he had a left hip injury related to his admitted accident.

**FOURTH:** The Hearing Commissioner erred in failing to award the Claimant benefits for a compensable hip injury; the error being Claimant's left hip condition deteriorated and required treatment and eventual disability from work after the Claimant had previously reached maximum medical improvement for his admitted neck and back injury.

**FIFTH:** The Hearing Commissioner erred in failing to award the Claimant benefits for a compensable left hip injury; the error being Claimant's left hip condition deteriorated and required treatment and eventual disability from work after the Claimant had previously reached maximum medical improvement for his admitted neck and back injury; and the Claimant is not barred for seeking benefits for a different injury (hip) that was not set forth on the WCC Form No. 16A (neck and back).

**SIXTH:** The Hearing Commissioner erred in failing to find as fact and conclude as a matter of law the Claimant sustained a change of condition for the worse to his left hip; the error being the only evidence in the record is that the Claimant's left hip condition worsened, required treatment, required diagnostic studies, and caused him to be taken out of work after the Claimant was previously determined to be at maximum medical improvement for his admitted back injury by Dr. Scott E. Strohmeyer on October 31, 2011.

**SEVENTH:** The Hearing Commissioner erred in failing to find as fact and conclude as a matter of law the Claimant sustained a change of condition for the worse to his left hip: the error being the Commissioner failed to follow the law set forth in the case Mungo v. Rental Uniform Service of Florence, 678 S.E. 2d 825 (Court Ap. 2010), which specifically states in part: "the appropriate date in which the single commissioner should have evaluated a change in workers' compensation Claimant's condition was the date the doctor found the Claimant had reached maximum medical improvement..."

**EIGHTH:** The Hearing Commissioner erred in failing to find as fact and conclude as a matter of law the Claimant sustained a change of condition for the worse to his left hip: the error being the Commissioner failed to follow the law set forth in the case Mungo v. Rental Uniform Service of Florence, 678 S.E. 2d 825 (Court Ap. 2010), which specifically states in part:

"A symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition, and such an occurrence is one of the reasons the Workers' Compensation Commission may review awards through change of condition hearings, and therefore, even if the mental condition

was not raised at the original hearing, it may be raised at the change of condition hearing."

**NINTH:** The Hearing Commissioner erred in making findings of fact number 14, 15, 16, and 19; the error being these findings of fact regarding Dr. Strohmeyer's opinion as to whether and when he diagnosed the Claimant with AVN (Avascular Necrosis) of the left hip is inconsistent with findings of fact number 13 and number 18, which showed Dr. Scott E. Strohmeyer did not reach his diagnosis until an MRI was approved by the Carrier and performed on May 30, 2012. Dr. Strohmeyer did not render a definitive diagnosis on January 24, 2012 as suggested by the Commissioner's findings.

**TENTH:** The Hearing Commissioner erred in making findings of fact number 12; the error being Dr. Scott E. Strohmeyer's medical records do not reveal a definitive diagnosis on January 24, 2012 and a definitive diagnosis was not made until June 1, 2012.

**ELEVENTH:** The Hearing Commissioner erred in making finding of fact number 23; the error being the Claimant was not advised his left hip pain was due to Avascular Necrosis until he had the MRI and was not advised this "maybe" related to his compensable injury until June 1, 2012.

**TWELTH:** The Hearing Commissioner erred in making finding of fact number 25; the error being the Claimant is not barred from raising a new injury or a change of condition by his filing a WCC Form No. 16(A). See Mungo v. Rental Uniform Service of Florence, 678 S.E. 2<sup>nd</sup> 825 (Court Ap. 2010)

**THIRTEENTH:** The Hearing Commissioner erred in making finding of fact number 25; the error being the Claimant was not aware of a compensable left hip injury prior to his filing a WCC Form No. 16(A) for his neck and back injury. See Mungo v. Rental Uniform Service of Florence, 678 S.E. 2<sup>nd</sup> 825 (Court Ap. 2010)

**FOURTEENTH:** The Hearing Commissioner erred in making finding of fact number 26; the error being the Claimant is not barred from raising a new injury or a change of condition by his filing a WCC Form No. 16(A). See Mungo v. Rental Uniform Service of Florence, 678 S.E. 2<sup>nd</sup> 825 (Court Ap. 2010)

**FIFTEENTH:** The Hearing Commissioner erred in making finding of fact number 26; the error being the Claimant was not aware of a compensable left hip injury prior to his filing a WCC Form No. 16(A) for his neck and back injury.

**SIXTEENTH:** The Hearing Commissioner erred in making finding of fact number 26: the error being the doctrine of *res judicata* does not apply to the facts of this case.

**SEVENTEETH:** The Hearing Commissioner erred in making finding of fact 32, 33, 34, and 35, the error being the Claimant's average weekly wage and applicable compensation rate has never previously been adjudicated, and therefore was not barred by the filing of WCC Form No 16A.

**EIGHTEENTH:** The Hearing Commissioner erred in making finding of fact number 36 and 37, the error being there was substantial evidence in the record as supported by the Claimant and the Employer's testimony that his average weekly wage should have included \$400-\$500 in tips per week.

**NINETEETH:** The Hearing Commissioner erred in failing to find as fact and conclude as matter of law and award the Claimant workers' compensation benefits to include temporary compensation and medical treatment/surgery as recommended by the authorized treating physician for either a newly discovered compensable injury to his left hip, or in the alternative a change of condition because of a worsening condition to the injury to his left hip.

In his brief in support of the WCC Form No. 30, the Claimant summarized the grounds for review as follows:

**FIRST:** Is the Claimant entitled to an award of benefits for a change of condition to his left hip? (Exceptions: Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Sixteenth, Nineteenth).

**SECOND:** Is the Claimant entitled to an award of benefits for a compensable injury to his left hip? (Exceptions: First, Second, Third, Fourth, Fifth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Nineteenth).

**THIRD:** Is the Claimant entitled to an adjustment in his average weekly wage and applicable compensation rate? (Exceptions: Seventeenth, Eighteenth).

The parties submitted briefs in support of their respective positions. Oral arguments were received on October 14, 2013. After careful review of the record on Appeal, including the briefs and arguments of the parties, the Appellate Panel makes the following findings of fact and conclusions of law affirming in part and reversing in part the Hearing Commissioner's Order:

### **FINDINGS OF FACT**

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Act.
2. The Claimant was involved in an admitted, work-related automobile accident on June 15, 2011. The Claimant sustained admitted injuries to his neck and back.
3. The Claimant received appropriate causally related medical treatment for injuries sustained in the June 15, 2011, accident by Dr. Scott E. Strohmeyer, Dr. David Brosman, and Main Street Medical Treatment.
4. Dr. Strohmeyer evaluated the Claimant on October 21, 2011 at which time he noted Claimant primarily complained of back and left buttock pain.
5. Dr. Strohmeyer evaluated the Claimant on October 28, 2011 and noted Claimant complained of being "uncomfortable" all of the time.
6. Dr. Strohmeyer completed a WCC Form No. 14B Physician's Statement on October 31, 2011, opining the Claimant reached maximum medical improvement on October 31, 2011 and suffered injuries to his spine (back and neck) as a result of the June 15, 2011, accident. There is no mention on the

WCC Form No. 14B that the Claimant sustained a related left hip injury or that the accident affected the Claimant's left hip.

7. Dr. Strohmeyer stated on the WCC Form No. 14B, Physician's Statement, that Claimant had suffered a 5% impairment as a result of injuries to his lumbar spine and cervical spine.
8. Dr. Strohmeyer opined on the WCC Form No. 14B, Physician's Statement, that the Claimant would need future medical care consisting of physical therapy, NSAIDS and injections as a result of his neck and back injuries suffered on June 15, 2011. There is no mention on the WCC Form No. 14B that the Claimant would need treatment for his left hip.
9. The Claimant underwent a lumbar epidural injection on November 7, 2011 at which time it was noted he complained of pain radiating to his left buttock and the posterior and medial aspect of the left thigh.
10. On January 24, 2012, the Claimant was reevaluated by Dr. Strohmeyer and his office note states "X-rays show that he may have AVN [avascular necrosis] of his hip with some mild collapse" (emphasis added). Dr. Strohmeyer did not state in his office note of January 24, 2012 that the Claimant had AVN and only recommended the Claimant obtain an MRI. There is no recommendation for left hip surgery.
11. On January 24, 2012, Dr. Strohmeyer noted, "I discussed it with him. I am going to go ahead and get an MRI scan. I will see him back with that and discuss options at that point." Dr. Strohmeyer did not state in his office note of

January 24, 2012 the Claimant had AVN and only recommended the Claimant obtain an MRI. There is no recommendation for surgery.

12. At no time prior to the parties entering the WCC Form No. 16(A) agreement did Dr. Strohmeyer or any doctor advise the Claimant that he had a deteriorating left hip injury related to the work related automobile accident which would result in left hip replacement surgery. Dr. Strohmeyer's office note of January 24, 2012 only states the Claimant has a mild collapse, does not state the left hip is related to the automobile collision, and does not recommend left hip replacement surgery.
13. The parties entered into a WCC Form No. 16A Settlement Agreement on April 3, 2012, which provided Claimant suffered and was compensated for 10% permanent partial disability to his cervical and lumbar spine (back).
14. On June 1, 2012, the Claimant was reevaluated by Dr. Strohmeyer for continued pain in his hip.
15. On August 17, 2012, the Claimant was reevaluated by Dr. Strohmeyer and Dr. Strohmeyer's office note stated "I repeated some x-rays. He has severe collapse of the head. It is bone on bone in the hip joint. As compared to January when his hip was very well maintained. I discussed it with him. He needs a hip replacement. The question is whether it is workers' compensation issue. I think we can paint the argument that the injury impacted the femoral head which expedited his symptoms. I will have him see Dr. Blocker for an evaluation and I will see him back PRN."

16. Dr. Strohmeyer testified by deposition on February 6, 2013. Dr. Strohmeyer testified at that time based on the x-ray he took on January 24, 2012, the Claimant's left hip had "collapsed" which is indicative of a left hip replacement. Dr. Strohmeyer further testified he recommended an MRI to "evaluate the anatomy of it. To look at the crescent sign. The MRI gives a 3D view of it actually shows you how much of the head is involved."
17. Dr. Strohmeyer testified by deposition of February 6, 2013. Dr. Strohmeyer testified at that time the Claimant complained of lower back, left buttock, and left thigh pain throughout his treatment of Claimant in 2011 and 2012.
18. Dr. Strohmeyer testified by deposition on February 6, 2013. Dr. Strohmeyer testified at that time that the findings he observed on Claimant's May 30, 2012 MRI scan were identical to findings revealed in Claimant's January 24, 2012 X-ray.
19. Dr. Strohmeyer testified by deposition on February 6, 2013, that a formal recommendation of a left hip replacement surgery was not made until June 1, 2012.
20. Dr. Strohmeyer testified by deposition on February 6, 2013, that it was his opinion to a reasonable degree of medical certainty that the Claimant sustained a change of condition for the worse of his left hip since he was placed at maximum medical improvement on October 31, 2011.
21. Dr. Strohmeyer testified by deposition on February 6, 2013, that the Claimant remained at maximum medical improvement for his neck and back, but was not at maximum medical improvement for his left hip.

22. Dr. Strohmeyer testified by deposition on February 6, 2013, that it was his opinion to a reasonable degree of medical certainty that the Claimant is unable to work because of his left hip injury which was aggravated by his accident.

23. The Claimant sustained a change of condition for the worse to his left hip after he initially reached maximum medical improvement on October 31, 2011. The Claimant's left hip injury continued to worsen after the parties entered into a WCC Form No. 16(A), establishing permanent disability to the Claimant's neck and back. Dr. Strohmeyer's office notes clearly reveal the Claimant's left hip condition worsened after he was placed at maximum medical improvement on October 31, 2011. Dr. Strohmeyer's office note of January 24, 2012 indicated the Claimant only may have AVN of the left hip with some mild collapse. Ongoing evaluations by Dr. Strohmeyer indicate the Claimant's pain from his hip worsened. On August 17, 2012 Dr. Strohmeyer's office note states: "x-rays revealed a severe collapse of the head" (emphasis added) and that the Claimant "needs" a left hip replacement. By August 17, 2012, Dr. Strohmeyer noted the Claimant was experiencing significant left hip pain. Dr. Strohmeyer stated "most of his complaints today are around the hip. He cannot tie his shoes and he cannot internally rotate his hip at all. Actually sitting in the chair he has leg length discrepancy now." The Claimant's worsening condition is reflected by the diagnostic changes shown on studies from a mild to severe collapse, his increased pain, limitations, and his resulting need for left hip replacement surgery.

24. The Claimant needs and is entitled to additional treatment and/or surgery for his deteriorating left hip condition. On August 17, 2012, Dr. Strohmeyer stated "the Claimant needs a hip replacement."
25. Dr. Strohmeyer opined on January 4, 2013 that Claimant was unable to work. The Claimant is entitled to temporary total benefits from January 4, 2013.
26. The Claimant entered into a Form 16A settlement agreement, approved by the Workers' Compensation Commission on April 3, 2012, which provided his Average Weekly Wage is \$342.40 with a corresponding compensation rate of \$228.28.
27. The Claimant alleges his average weekly wage and compensation rate as memorialized and ratified in his Form 16A settlement agreement is incorrect, and that his correct average weekly wage should be \$704.80 with a corresponding compensation rate of \$469.86 based upon commissions paid to him by Employer, in addition to tips he received from customers.
28. Brenan Lambrix, owner of Giddy Up Cab, provided testimony at the hearing and via his deposition regarding Claimant's potential compensation. However, Mr. Lambrix' testimony consists of broad observations and generalizations and provides no additional information regarding the calculation of Claimant's average weekly wage and compensation rates.
29. No evidence was presented at the hearing that was not available to Claimant prior to the execution of the Form 16A on April 4, 2012, relating to the accuracy of the average weekly wage and compensation rate calculations on the Form 16-A.

30. No information was presented in the APA submissions or via testimony that provides or addresses any inaccuracy in the calculation of Claimant's average weekly wage or compensation rate.
31. Even if Claimant's average weekly wage and compensation rate was improperly calculated by entering into a Form 16-A which was approved by the Commission, Claimant entered into a binding agreement regarding his average weekly wage and compensation rate. Pursuant to *Lloyd's v. AT&T Nassau Metals Corp*, 383 S.E.2d 257 (S.C. 1989), once a Commissioner approves an allegedly erroneous compensation rate, the Memorandum becomes enforceable as if it were an Order of the Commission.
32. Claimant was not without recourse to challenge his Average Weekly Wage and Compensation Rate as memorialized on the Form 16A, as he could have timely appealed the established compensation rate pursuant to remedies provided under S.C. Code 42-17-60.
33. Therefore, Claimant's appropriate avenue to dispute the average weekly wage and compensation rate on the Form 16-A would have been a timely appeal to the Full Commission. The time for such appeal has passed.
34. Claimant's average weekly wage of \$342.40 and compensation rate of \$228.28 have become the un-appealed law of this case and shall be Claimant's correct average weekly wage and compensation rate arising out of his June 15, 2011, work accident.
35. Assuming, arguendo, that Claimant's Average Weekly Wage and Compensation Rate could be adjusted at this time, I find no evidence

presented substantiates Claimant's calculation of his average weekly wage. Specifically, nothing was presented at the hearing that was not available to Claimant prior to execution of the Form 16A regarding the correctness of the calculations.

36. Therefore, even if the issue of Claimant's average weekly wage and compensation rate determination were correctly before the undersigned, I find there is insufficient evidence presented at the hearing or in the record to justify increasing Claimant's average weekly wage and compensation rate.

#### **Conclusions of Law**

**FIRST:** The burden of proof in a claim for Workers' Compensation benefits is the preponderance of the evidence. The Claimant must establish by the preponderance of the evidenced the basis that will entitle the Claimant for an award under the Workers' Compensation Act. The Claimant herein met his burden of proof in establishing his entitlement to benefits for his causally related left hip injury by a preponderance of the evidence.

**SECOND:** Under Section 42-1-130 and Section 42-1-140, the Claimant was a covered Employee and the employer was a covered Employer under the Act at the time of the compensable injury.

**THIRD:** Under Section 42-15-20, timely and proper notice of the injury by accident was provided.

**FOURTH:** Under Section 42-1-40, average weekly wage is defined. The Claimant's average weekly wage was confirmed in a WCC Form No. 16(A) to be \$342.40 with a

corresponding compensation rate of \$228.28. Therefore, the average weekly wage and compensation rate agreed upon by the parties in the WCC Form No. 16(A) approved on April 3, 2012 is an unappealed finding of the Workers' Compensation Commission and will be upheld pursuant to *Lloyd v. AT&T Nasau Metals Corp.* 299 S.C. 207, 383 S.E.2d 257 (1989); *Singleton v. Young Lumbar Company* 236 S.C. 454, 114 S.E.2d 837 (1960) and other applicable law.

**FIFTH:** Under Section 42-17-90, the Claimant timely filed an application to request the Commission to review the Hearing Commissioner's Order dated June 14, 2013 within one (1) year of the Claimant's last receipt of payment of compensation benefits.

**SIXTH:** Under Section 42-15-40, the Claimant timely filed for benefits for his left hip within two (2) years from the date of his accident.

**SEVENTH:** Under Section 42-1-160, the Claimant sustained an injury by accident when he was involved in a work related automobile collision on June 15, 2011 arising out of and in the course and scope of employment. Under Section 42-1-160, the Claimant sustained a compensable injury by accident to his neck, back, and left hip. While the parties entered into a WCC Form No. 16(A) agreeing to permanent partial disability of the neck and back, the WCC Form No. 16(A) does not bar or prevent the Claimant by *res judicata* or by the terms of the WCC Form No. 16(A) from seeking benefits under the Act for additional injuries and for additional benefits based on a change of condition which was not disabling before the execution of the WCC Form No. 16(A), but worsens and becomes disabling thereafter.

**EIGHTH:** Under Section 42-17-90, the Commission is authorized on application of a party in interest on the ground of a change of condition to review an award. The Claimant herein established by a preponderance of the evidence his left hip injury is casually related to his admitted automobile collision of June 15, 2011 and that his left hip injury has materially worsened thereby entitling him to benefits under the Act.

In *Mungo v. Rental Uniform Service of Florence* 678 S.E.2d 825 (Court Ap. 2010), the Court of Appeals held the appropriate date to evaluate a change in condition was from the date the Claimant reached maximum medical improvement. Furthermore, the Court of Appeals stated in part:

"A symptom which is present and causally connected, but found not to impact upon the Claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition, and such an occurrence is one of the reasons of the Workers' Compensation Commission may review awards through change of condition hearings, and therefore, even if the mental condition was not raised at the original hearing, it may be raised at the change of condition hearing." (id. 831)

**NINTH:** Under Section 42-1-160 and Section 42-9-10, the Claimant's compensable left hip injury causes an inability to work and therefore the Claimant is entitled to receipt of weekly temporary compensation at his compensation rate from January 14, 2013 thru the present and continuing until agreement of the parties or further Order from the Commission.

**TENTH:** Under Section 42-15-60, the Claimant is entitled to causally related medical treatment for his compensable injuries which tend to lessen his period of

disability to include related treatment and replacement surgery of the left hip as recommended by Dr. Scott E. Strohmeyer.

**Order and Award**

Based on the foregoing findings of fact and conclusions of law it is hereby:

ORDERED ADJUDGED AND DECREED, the Claimant, Andreas Kmiecik, has suffered a change of condition for the worse regarding this left hip related to his compensable accident of June 15, 2011 and therefore is entitled to benefits under the South Carolina Workers' Compensation Act; and it is hereby further,


ORDERED ADJUDGED AND DECREED, that the Hearing Commissioner's determination that the Claimant's average weekly wage is correctly stated at \$342.40 as provided on the WCC Form No. 16(A) with a corresponding compensation rate of \$228.28 applicable to the claim.


ORDERED ADJUDGED AND DECREED, the Claimant, Andreas Kmiecik, is entitled to receive temporary disability benefits from the Defendants at his compensation of \$228.28 per week beginning January 4, 2013 thru the present and continuing until agreement of the parties or further Order of the Commission; and it is hereby further,

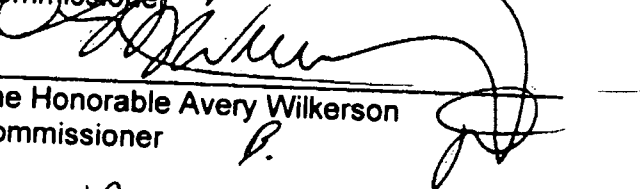
ORDERED ADJUDGED AND DECREED, that the Claimant, Andreas Kmiecik, is entitled to receive medical care and treatment for his left hip from the Defendants by Dr. Scott E. Strohmeyer to include hip replacement surgery as recommended by Dr. Scott E. Strohmeyer, all of which relates to his injury, his change of condition, and would tend

to lessen his period of disability including reimbursement, mileage, and related medications; and it is hereby further,

AND IT IS SO ORDERED!

  
The Honorable Melody James  
Commissioner

  
The Honorable Alesia Taylor, Panel Chair  
Commissioner

  
The Honorable Avery Wilkerson  
Commissioner

March 19 2014  
Columbia, South Carolina

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 March 19, 2014*

**RECEIVED**

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