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SC Court of Appeals

APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0919206

Judy Sanchez

EMPLOYEE,
CLAIMANT/RESPONDENT

VS.

Perry Ellis International

EMPLOYER,

AND

The Hartford

CARRIER,
DEFENDANTS/APPELLANTS,

Appellate Panel Review held in Columbia, South
Carolina, on September 17, 2013 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

December 29th, 2014

APPEARANCES: Claimant/Appellant represented by Steven M. Krause
Defendants/Respondents represented by George D. Gallagher

STATEMENT OF THE CASE

Judy Sanchez ("Claimant") sustained admittedly an compensable injury to her neck arising out of and in the course of her employment as an order filler at the Perry Ellis Distribution Center in Seneca, South Carolina on July 27, 2009. Specifically, Claimant injured her neck while lifting boxes of belts to fill an order. After failing conservative treatment, Claimant was ultimately referred to a neurosurgeon, Dr. Bucci, who diagnosed a herniated disc in the cervical spine at C5-C6. Claimant underwent single level fusion/decompression surgery at C5-C6. In addition, Dr. Bucci performed a carpal tunnel release on Claimant's right wrist in conjunction with her cervical spine surgery. Although Defendants never admitted compensability of Claimant's carpal tunnel syndrome, they nevertheless paid for surgical costs and treatment for the carpal tunnel release since it was rendered in conjunction with the compensable cervical spine surgery. Dr. Bucci ultimately released Claimant at maximum medical improvement as of November 8, 2011 and assigned Claimant impairment ratings of 10% to the spine and 10% to the right hand relative to her CTS.

Claimant continued to work with light duty accommodations for Perry Ellis up until her cervical spine surgery and carpal tunnel release. Thereafter, she received temporary total disability benefits for periods she was written completely out of work between May 11, 2011 and November 9, 2011. Thereafter, Claimant returned to work for Perry Ellis on or about November 10, 2011 with permanent work restrictions as outlined in a Functional Capacity Evaluation dated December 13, 2011, including lifting of up to 20 pounds occasionally and 10 pounds frequently for an eight-hour day.

This matter now comes before the Commission pursuant to Defendants' Form 21 request to enter a permanent partial disability award based on Dr. Bucci's impairment rating to the

cervical spine. Although Defendants paid for all medical treatment relative to the right carpal tunnel release, Defendants deny Claimant's entitlement to permanent partial disability compensation relative to the carpal tunnel syndrome. Defendants argue there is no medical evidence establishing that Claimant's carpal tunnel syndrome was related to her specific mechanism of injury- an acute lifting injury. Defendants further submit that payment of medical bills alone does not constitute an admission of liability. See McIntire v. Winn Dixie of Greenville, Inc., 275 S.C. 323, 270 S.E. 2d 440 (S.C. 1980) (holding that payment of medical bills cannot be used for admission of liability unless the circumstances surrounding the payment indicate an admission of liability rather than an act of benevolence).

A hearing in this matter was conducted before Commission Susan Barden on January 8, 2013. At the hearing, Claimant contended that she had not reached maximum medical improvement for all compensable injuries/conditions, and therefore a determination on the extent of her permanent disability is premature. Specifically, Claimant requested additional medical evaluation and treatment for ongoing pain, including a possible spinal cord stimulator. In addition, Claimant alleges she has developed numbness and tingling in her left arm and hand related to her cervical injury that requires further evaluation.

In the alternative, Claimant contends that if she has reached maximum medical improvement, then she is entitled to compensation for permanent and total disability based on either a greater than 50% loss of use of her spine per §42-9-30, or total disruption of her earning capacity per §42-9-10. Regarding her theory for total disability under §42-9-10, Claimant argues that even though she continues to work for Perry Ellis under light duty restrictions, such employment is merely "benevolent" or "sheltered" to the extent that she would be unable to obtain employment in the open labor market, within her residual functional capacity and for

which she is otherwise qualified, in the event she lost her employment with Perry Ellis. Claimant points to correspondence from the defense counsel to her attorney regarding Defendant's insistence that Claimant resign her employment as a condition of a full and final settlement to support the proposition that her employment is "sheltered." In that correspondence, defense counsel stated that Perry Ellis' is currently accommodating Claimant's light duty restrictions, but will not be able to do so on a permanent basis. Finally, Claimant alleges that her compensable spine injury has aggravated other pre-existing medical conditions, including depression/psychological overlay, blood pressure, and diabetes.

In reply, Defendants deny that Claimant's hypertension and alleged psychological condition are have been aggravated by her work-related accident. Defendants specifically point out that the alleged psychological issues have never been properly pled. Defendants further deny that Claimant suffered a compensable injury to her left arm as a result of the July 2009 accident, and/or that any conditions of Claimant's left arm/hand is otherwise a causally related consequence of her compensable injury, based primarily on the following: a) Claimant never complained of any left sided symptoms to her authorized providers before or after her fusion surgery; and b) Claimant herself testified her left hand/arm condition was *acute in onset* on or about May 12, 2012, nearly three years after her work accident and several months following her surgery.

Defendants also deny that Claimant has not sustained a greater than 50% loss of use of the spine under §42-9-30 entitling her to a presumption of permanent and total disability, since the impairment rating from the authorized treating physician is only 10% and Claimant is clearly capable of performing gainful work at light duty. In response to Claimant's argument regarding sheltered employment, Defendants submit defense counsel's statement that Perry Ellis would not

be able to accommodate Claimant's work restrictions on a permanent basis are not proof of an intent to cease accommodating claimant's restrictions. They were uttered in the context of settlement discussions and as an inducement to convince Claimant to consider a resignation of her employment as a condition for a full and final release of Defendants' liability for compensation and medical benefits. The purpose of insisting on Claimant's resignation as a condition of a full and final settlement is ostensibly to negate the risk of further injury through Claimant's continued employment with Perry Ellis after receiving premium consideration for a full and final release of all liability on the instant claim. Further, Claimant's continued employment with Perry Ellis is not merely benevolent or sheltered because she has continued to perform valuable services essential to Perry Ellis' business operations since November 2011 without loss of any pre-accident earning capacity, as well as a

By Order dated March 28, 2013, Commissioner Barden found, *inter alia*, the following: (a) that Claimant sustained compensable injury to her cervical spine and right hand (carpal tunnel release); (b) Claimant did not suffer a compensable injury to her left arm/hand either as a direct result of the compensable accident or as a causally related consequence of her neck injury; (c) Claimant failed to meet her burden of proving that either her pre-existing psychological and other physical conditions – diabetes and hypertension – were aggravated by her compensable neck injury; (d) Claimant is not permanently and totally disabled under §42-9-30 or §42-9-10 "sheltered employment" theory; (e) that Claimant had sustained a 22% permanent partial specific loss of use the spine per §42-9-30 and a 10% permanent partial specific loss of use her right hand; and (f) awarded Claimant ongoing palliative medical evaluation and treatment to maintain her maximum level of functioning under the direction of a provider to be designated by the Defendants.

Thereafter, Claimant timely appealed Commissioner Barden's Order to the Full Commission. Although Claimant's Form 30 alleges 18 exceptions, her grounds for appeal essentially boil down to the following: (1) the Commissioner erred in finding that Claimant's compensable injuries were confined to the cervical spine and right hand; (2) the medical evidence establishes that Claimant's ongoing left arm/hand symptoms stem from her cervical injury; and (3) the hearing Commissioner erred by not finding Claimant permanently and totally disabled under a "sheltered employment" theory based on a misinterpretation of Claimant's FCE results.

During the pendency of this Appeal, Claimant filed a Motion to Admit additional evidence into the record. The additional evidence Claimant sought to be admitted was a purported authorization from the carrier for a nerve conduction study to address ongoing issues with Claimant's disputed left arm/hand condition. Claimant contends that Defendants' authorization for this evaluation constitutes waiver of their denial and somehow "trumps" the hearing Commissioner's denial of compensability of this condition. Defendants initially filed a Return to Claimant's Motion, contending that the purported evidence was not proper for admission into the Record on Appeal in accordance with applicable WCC Regulations. Defendants later withdrew their objection and filed their own Motion to Admit additional evidence to complete the Record on Appeal, specifically, a narrative medical record from Claimant's authorized treating physician, Dr. Shallcross dated June 27, 2013, which they contend further supports Commissioner Barden's finding that Claimant's left arm condition is not related to her cervical spine injury. The parties then entered into a Consent Order dated September 11, 2013 to admit Dr. Shallcross's note into the Record on appeal for the Appellate Panel's consideration.

EVIDENCE OF THE CASE

Hearing Testimony

Claimant testified on her behalf. She testified that she is 52 years old and has a high school education. (Hr'g Tr. 15:20 – 16:1). Claimant has received mathematics training with a prior employer. (Hr'g Tr. 16:4-12). Claimant testified that she worked for Employer as a Finish Ready Merchandise Operator. (Hr'g Tr. 20:22-24). She stated that her job duties included getting the merchandise ready for shipping. (Hr'g Tr. 21:22-23).

Claimant testified she was injured on July 27, 2009. (Hr'g Tr. 23:18-24). On that day Claimant stated that she was working in the Order Filling Department. (Hr'g Tr. 24:1). Claimant testified that she was working in a small space that required a great deal of bending and stooping. (Hr'g Tr. 24:10-25). Claimant's injury was termed a "double crush" injury affecting the right side of Claimant's neck and her right arm (*See* Claimant's APA #5, p. 45; Defendants' APA #1, p. 2, 4-5, 11, and 13).

Claimant testified that she has pain in her neck starting at her shoulder and going up the right side of her neck to around her right ear. (Hr'g Tr. 38:15-20). Claimant had a fusion surgery with Dr. Bucci for her neck pain. (Hr'g Tr. 51:25 – 52:2). Claimant also stated that she has problems with her right arm. (Hr'g Tr. 43:9-10). She stated these problems include pain in her right hand and numbness in her fingers. (Hr'g Tr. 43:11-14). The pain will occasionally move to her right forearm and her index finger is numb. (Hr'g Tr. 43:15-25). Claimant underwent a carpal tunnel release on her right hand. (Hr'g Tr. 51:24 – 52:2). Claimant was released at maximum medical improvement by Dr. Bucci on October 20, 2011. (Defendants' APA #1). Claimant was released again at maximum medical improvement by Dr. Patel on November 9, 2011. (Defendants' APA #2).

Claimant stated that she suffered an acute onset of pain with her left side in May 2012. (Hr'g Tr. 47:8-10). However, Claimant testified that this onset of pain did not occur at work. (Cl. Depo. Tr. 32:25 – 33:3). In fact, Claimant indicated that she "...just woke up and was going to work." (Cl. Depo. Tr. 33:3-4). After waking up, Claimant stated "...[w]hen I woke up that morning, it was just hurting. I couldn't figure out what it was. And by that time, my hand was numb and tingling." (Cl. Depo. Tr. 33:4-6). She also stated that "I just woke up that morning at it was hurting." (Cl. Depo. Tr. 33:16-17). She reported her left side pain that day to her supervisor. (Hr'g Tr. 48:7-10). Claimant stated that her left side pain includes sharp pains in her left shoulder, pains in her left hand, and pain in the left side of her neck. (Hr'g Tr. 49:23 -- 50:17)...

Claimant testified Dr. Patel provided her with epidural steroid injections in between her shoulder blades. (Hr'g Tr. 52:22 – 53:3). Dr. Patel's records indicate that the injections were administered in the cervical spine for neck and thoracic pain. (Defendants' APA #2). Claimant testified that she does not take any prescription medications at the time of the hearing. (Hr'g Tr. 75:6-18). Claimant testified that she returned to work in November 2011. (Hr'g Tr. 27:22). Claimant stated that when she returned to work, she returned to the same job. (Hr'g Tr. 29:6). She admitted that Employer has made accommodations for her work restrictions. (Hr'g Tr. 31:2-5).

Nathan Lucas also testified at the hearing. Mr. Lucas testified that he is a human resources manager for Employer. (Hr'g Tr. 77:9-10). Mr. Lucas acknowledged that Claimant has work restrictions and that Employer accommodates those lifting restrictions. (Hr'g Tr. 78:3-16). Based on his understanding of Claimant's work, he testified that Claimant was doing 70% to 75% of her job based strictly on the doctor's restrictions. (Hr'g Tr. 79:7-22).

Medical Evidence

Claimant presented to Upstate Medical Associates on August 3, 2009 complaining of "...pain in neck and right shoulder pain from bending over @ work x 1 week." (Claimant's APA #12, p. 68). Claimant followed up on August 10, 2009 and complained of "...right shoulder soreness and neck soreness and stiffness from injury at work." (Claimant's APA #12, p. 73). Claimant followed up again on August 24, 2009 and complained of pain in her neck and upper back. (Claimant's APA #12, p. 80). She stated that she "...had to reach over her heads [sic] that strained her right shoulder and neck." Id.

On October 20, 2009, Claimant presented to Oaktree Medical Centre and Dr. Divina with complaints of "right side pain." (Claimant's APA #13, p. 85). Dr. Divina stated that Claimant's symptoms were "...localized to the neck on the right." (Claimant's APA #13, p. 86). Further, Claimant denied any numbness or tingling or radiation of pain to her fingertips. (Claimant's APA #13, p. 87).

Claimant underwent an MRI on January 25, 2010. During that MRI, Dr. Phelan noted that Claimant has "[n]eck pain with history of workman's compensation injury on 7/27/09, pain is located in the right side of the neck." (Claimant's APA #10, p. 57). On February 2, 2010, Claimant saw Dr. Divina and stated that "...the right side of her neck is still hurting some." (Claimant's APA #13, p. 92). Claimant followed up with Dr. Divina on April 26, 2010 and complained of an onset of tingling and numbness in her right index and middle fingers. (Claimant's APA #13, p. 94). On May 17, 2010, Claimant saw Dr. Baxley for "...numbness and tingling she has been experiencing in her right hand and fingers." (Claimant's APA #11, p. 58).

Dr. Kistler performed an EMG/NCV on October 11, 2011. (Defendants' APA #3, p. 30). This EMG/NCV revealed a "[n]ormal EMG/NCV study without evidence of cervical root,

plexus or peripheral nerve injury or denervation, peripheral neuropathy or median or ulnar nerve root entrapment... ” Id.

On October 20, 2011, Dr. Bucci noted “...she does not have any recurrent surgical pathology and the preoperative neurological changes have resolved. She does have residual neck and arm pain and she will be referred to Dr. Patel for any treatment suggestion in this regard.” (Defendants’ APA #1, p. 2). Dr. Bucci determined that Claimant reached MMI on October 20, 2011. (Defendants’ APA #1, p. 1). Further, Dr. Bucci stated that Claimant should be referred to pain management and sustained a 10% impairment to her spine and a 10% impairment to her hand. Id.

On November 9, 2011, Dr. Patel noted that Claimant was still have some ongoing pain in her neck and right shoulder but that she was essentially at MMI. (Defendants’ APA #2, p. 15). On November 23, 2011, Dr. Patel released Claimant at MMI as of November 9, 2011. (Defendants’ APA #2, p. 14). Dr. Patel also recommended an FCE be performed to determine any work restrictions. Id.

Claimant underwent an FCE on December 13, 2011. (Defendants’ APA #4). During this FCE, the evaluator noted that Claimant self-limited on 52% of the 21 tasks she was asked to complete. Id. If self-limiting exceeds 20%, then psychological and/or motivational factors are affecting the test results. Id. Further, he noted that the performance on the self-limiting tasks indicates a minimum rather than a maximum ability. Id. Therefore, the assigned 20-lb. limit through the FCE indicates a minimum amount for Claimant.

On January 31, 2012, Dr. Marsh conducted an IME of Claimant and issued a report. (Claimant’s APA #6). In that IME, Dr. Marsh notes that Claimant experiences pain in the right side of the neck with radiation to the right shoulder. (Claimant’s APA #6, p. 47). He makes no

mention of any left-sided pain. (Claimant's APA #6). Further, Dr. Marsh notes that Claimant had a satisfactory outcome post right carpal tunnel release. (Claimant's APA #6, p. 48). He also indicates that Claimant is at MMI and shows no objective documentation of residual carpal tunnel syndrome. (Claimant's APA #6, p. 48-49). Dr. Marsh indicated that Claimant should be assigned a 0% extremity impairment rating for her carpal tunnel syndrome. (Claimant's APA #6, p. 49).

Dr. Hodge saw Claimant on May 14, 2012 and noted that Claimant complained of right sided neck and shoulder pain. (Claimant's APA #7, p. 51). Claimant also saw Dr. Brabham on July 9, 2012. During that evaluation, Claimant noted that after her accident she was "...experiencing a considerable degree of pain in her neck, as well as right shoulder stiffness and pain." (Claimant's APA #14, p. 96). Dr. Brabham makes no mention of left sided pain. (Claimant's APA #14).

Additional Medical Evidence Admitted via Consent Order to Complete the Record on Appeal:

As noted earlier, the parties agreed to admit the medical record from Dr. Shallcross dated June 27, 2013 regarding his evaluation and opinion on diagnosis and causal relation of Claimant's alleged left arm/hand condition. Following the EMG and nerve conduction studies authorized by the Defendants, Dr. Shallcross stated in his record "[t]his is an abnormal electro diagnostic evaluation consistent with a moderate left carpal tunnel syndrome. There may well be a very early diabetic peripheral neuropathy (slowing of median motor nerve), however this is very mild and the changes at the wrist are felt to present a true carpal tunnel syndrome. ... There is no evidence of radiculopathy, plexopathy, or ulnar nerve entrapment."

STANDARD OF REVIEW

Pursuant to S.C. Code Ann. §42-17-50, the Appellate Panel of the Full Commission shall weigh the evidence as presented at the initial hearing before the single Commissioner and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the hearing Commissioner. Pack v. State Dept. of Transportation, 381 S.C. 526, 673 S.E. 2d 461 (Ct. App. 2009).

FINDINGS OF FACTS AND RULINGS OF LAW

After thorough review of the evidentiary record presented, consideration of appellate Briefs and able oral arguments presented by counsel for the parties, the undersigned Appellate Panel hereby makes the following Findings of Fact:

1. Claimant injured her neck in an admitted accident on July 27, 2009.
2. Claimant alleges that:
 - a. Her cervical condition has resulted in causally-related bilateral upper extremity radiculopathy;
 - b. She sustained causally related right arm carpal tunnel syndrome;
 - c. She requires evaluation/treatment for her left arm;
 - d. S.C. Code Ann. §42-9-35 applies in this case because of Claimant's pre-existing diabetes, anxiety/depression, hypertension, etc. (this argument was raised only during Claimant's testimony and not before in the pleadings or in the summary of Claimant's position at the hearing when the record was opened);
 - e. She is not at maximum medical improvement for either arm; and
 - f. Defendants should be required to provide treatment for both arms until she reaches maximum medical improvement.

3. Claimant's alleged aggravation of a pre-existing psychological condition is denied. The reasons for denial are:

- a. **Claimant did not plead psychological overlay on either her Form 50 or Form 58;**
- b. The treatment records do not support Claimant's contention that there was an aggravation—in fact, they show the opposite; and
- c. Claimant's testimony that she was already taking psychotropic drugs for her prior condition, but that another, new psychotropic medication was recently prescribed because of Claimant's work injuries is not supported by the medical records. In fact, all the various physicians (Drs. Bucci, Divina, Baxley, Patel, etc.) who documented Claimant's ongoing medications (such as levothyroxine/Synthroid for hypothyroidism, lisinopril for hypertension, Metformin for diabetes, simvastatin for diabetes, and glimepiride for diabetes) and other non-related conditions never list a psychotropic drug of any kind or mention an emotional problem. If Claimant simply forgot to tell Drs. Bucci, Patel, Baxley, and other physicians that she takes a psychotropic drug when they obtained a list of medications, it was incumbent upon her to present other evidence in order to corroborate her testimony that the additional medication was prescribed because of a work-related injury. Instead, Claimant brought this issue up for the first time at the hearing during her testimony. Further, although Claimant alleges an aggravation, she inconsistently told Dr. Brabham that she has "no prior mental health history"; therefore, Claimant would not have taken psychotropic medication prior to the injury in issue. Nonetheless, even Dr.

Brabham states that Claimant's level of depression on the Beck Inventory tested as "mild." Finally, medical evidence shows that Claimant's "sleep is good"—7 hours a night. (See Hr'g Tr. p. 64-67 for Claimant's testimony; Hr'g Tr. p. 8-12 for summary of Claimant's position when the record was opened and which contains no reference to the aggravation of any pre-existing condition including, but not limited to, psychological overlay; Claimant's APA #12, p. 68-71, 80-81, and 83-84 which specifically note no psychological problem or symptom; Defendants' APA #2, p. 27-28; Claimant's APA #11, p. 58-59, 64, and 66; Claimant's APA #13 (particularly p. 86-87); Claimant's APA #7, p. 51 where Claimant reported that she did not feel more sad than usual; Claimant's APA #14, p. 104-105; Defendants' APA #1, p. 11-12 documents all of Claimant's non-work-related conditions and medications; on the date of this record, Claimant's mental status is noted as "normal").

4. Claimant is 52 years of age. (Hr'g Tr. p. 15).
5. Claimant is left hand dominant. (Hr'g Tr. p. 58, 60, and 73-74; Defendants' APA #1, p. 11; Defendants' APA #4, p. 35).
6. Claimant is a high school graduate. She later took mathematics class through a previous employer. (Hr'g Tr. p. 15-16).
7. Claimant's prior employment included work:
 - a. At her family's gas station where she pumped gas, checked oil and air, stocked, and cashiered;
 - b. As an inspector at a sewing plant;
 - c. As an assembler at a power tool manufacturing plant; and

- d. As a brake tester for an automotive supplier. (Hr'g Tr. p. 17-20).
8. On the date of accident, Claimant's job at Employer's distribution center was in Finish Ready Merchandise (F.R.M). However, when this department was "low on work," Claimant was required to work in other departments. Claimant's employment duties required her to lift at least 40 lbs., push a 50-lb. buggy, reach overhead, and bend frequently. (Hr'g Tr. p. 20-21, 23-30, 32, 37, and 69-71).
 9. Claimant is an 8-year employee. This factor does weigh in Claimant's favor and was taken into consideration. However, employment tenure by itself is dispositive of nothing. (Hr'g Tr. p. 23).
 10. Claimant's employment is not sheltered or gratuitous. Claimant returned to work and signed a Form 17 on November 19, 2011. Since that time she has not missed work for her work-related injuries. She has received merit increases since returning to work. Nathan Lucas testified that Employer accommodates Claimant's work restrictions and that she is able to perform approximately 75% of her pre-injury job within the restrictions assigned by the doctors. (See Hr'g Tr. 78:3-16, 79:7-22).
 11. Claimant's injury was termed a "double crush" injury affecting the right side of Claimant's neck and her right arm (See Claimant's APA #5, p. 45; Defendants' APA #1, p. 2, 4-5, 11, and 13).
 12. Because of her injuries, Claimant underwent a cervical fusion surgery and right carpal tunnel release surgery. Claimant's cervical surgical incision, according to medical evidence, was to the "right neck." (Defendant's APA #1, p. 8-10; Claimant's APA #5, p. 45).

13. Claimant's right hand/arm radiculopathy claim is compensable. Claimant's pre- and post-surgical right shoulder (radicular) and hand complaints are corroborated by numerous medical records. Further, I note that, objectively, Claimant's pre-surgical MRI showed a right-sided disc herniation. (See Claimant's APA #5, p. 45; Defendants' APA #1, p.2; Defendants' APA #2, p. 15, 19, 23, 27-28, and 32; Dr. Patel Depo. Tr. p. 11; Claimant's APA #10, p. 57; Claimant's APA #12, p. 68; Claimant's APA #13, p. 85).
14. Claimant's right carpal tunnel syndrome is compensable. The greater weight of the evidence shows:
- a. Authorized treating physicians (Drs. Bucci and Baxley) refer to Claimant's condition as "double crush syndrome" whereby an impaired nerved at one location makes a person more susceptible to other nerve entrapments. In none of the records does Dr. Bucci state that the right carpal tunnel condition is unrelated to the injury at issue;
 - b. Although not dispositive of the issue, Defendants authorized treatment, including, but not limited to, CTS release surgery;
 - c. Dr. Bucci rated the right hand and Defendants later sent Claimant to an IME for another rating to the right hand/arm; and
 - d. The basis for Defendants' denial of Claimant's CTS is not premised upon recently discovered evidence showing Claimant has pre-existing/prior median nerve problems about which Defendants were unaware. If this were the case, the undersigned might take an entirely different view of the CTS compensability issue. Even if Defendants are not estopped from denying the CTS (they have provided treatment/ratings from the outset and Claimant has relied on their

conduct), the medical evidence supports a finding of compensability for Claimant's CTS.

15. Claimant's left arm and hand are not compensable causally related consequences of her work accident and cervical injury. This finding is based upon the evaluative/treatment records of every provider whose records were submitted into evidence. I also note:

a. Claimant admittedly had no pre-surgical complaints regarding her left arm/hand (See testimony of Claimant; medical evidence in its entirety—which does not document a single mention of the left side although Claimant's left upper extremity was specifically examined, e.g. Defendants' APA #2, p. 28).

b. As to post-surgical complaints, there is not a single post-surgical evaluative/treatment record from any of the various providers (at least 7 or more) involved in this case documents a left arm/hand complaint. This includes evaluative/treatment records of Drs. Bucci, Patel (as well as his deposition testimony), Hodge, Marsh, Kistler, and Baxley. These records set forth in detail both the location of Claimant's pain and the nature of her complains as only on the right side. Additionally, the FCE evaluator documented Claimant's complaints during the testing, none of which pertain to the left side. Finally, Claimant's vocational expert notes that *"[a]t the time of this evaluation, Ms. Sanchez continues to experience significant neck and right shoulder/right wrist/right hand pain symptoms and limitations as a result of her on-the-job injuries."* **There is no mention of left arm complaint** by Claimant's own expert. Claimant says she awakened on May 12, 2012 with left hand problems and reported it to Employer, but there was no further complaint voiced after this date—not even to Claimant's

own vocational expert who in detail chronicles all of Claimant's problems as of the date of the evaluation.

(See medical evidence in its entirety; Defendants' APA #4, containing the FCE; Claimant's APA #14, p. 97, 2nd paragraph; *see also* 6th paragraph which also makes no mention of the left upper extremity; p. 98, 1st paragraph, **citing Claimant's complaints during vocational testing**; p. 99, 1st paragraph; p. 107, where the vocational evaluator speaks to the limitations on the use of the right upper extremity, but makes no mention of the left; Hr'g Tr. p. 47-48 and 73); AND

c. Dr. Shallcross confirms in his June 2013 record that Claimant's left arm/hand symptoms are related to carpal tunnel syndrome and not the product of cervical radiculopathy.

16. The Appellate Panel considered the records for any left sided complaints. There is an ancillary reference in an examination by Stephen Small in August 2009, who states during his examination Claimant had "upper trapezius bilateral" tenderness. However, under subjective complaints, Claimant only complained of right sided problems, which is consistent with the right sided only complaints made to Claimant's vocational expert. Further, Claimant testified that she experienced no left side problems until 2011. Finally, the trapezius is not the left arm or hand and Claimant specifically mentioned the left hand/arm at the hearing. (Claimant's APA #12, p. 73).
17. Because the Panel is unable to locate even a single reference by any physician during all the clinical examinations relating to the left arm, we are somewhat puzzled as to why Dr. Bucci would sign off on a "check off" questionnaire relating to the left arm months after he had last seen Claimant, particularly when not one of his own treatment records

contains a left hand or arm complaint. I am not persuaded by the questionnaire (Dr. Bucci did not look at the MRI, per the communication submitted to the undersigned), and give greater weight to:

- a. Dr. Bucci's treatment records;
- b. The record of Dr. Marsh (whose report is impressive for its detail outlining Claimant's complaints, as well as for the fact that it is clearly not outcome-oriented), which is also **devoid of any complaint of left arm pain or numbness**; and
- c. The record of Dr. Hodge whose notes are also **devoid of any mention of left arm pain or numbness**.

Most important to the Panel is the fact that although Dr. Bucci signed a questionnaire linking "left hand pain and numbness." Claimant did not think enough of this alleged problem to even mention it to her vocational evaluator just three days later. (See Claimant's APA #5, p. 44; Cf. Claimant's APA #14 in its entirety).

18. It is important to note that Dr. Marsh saw Claimant for the one-time visit in January 2012 (during which examination Claimant made no complaint of her left arm). Claimant complained of right side problems only. In July 2012, Dr. Marsh was asked to sign a questionnaire regarding the compensability of left hand pain/numbness. He, understandably, declined to answer the question. (Claimant's APA #6).
19. At the one-time visit with Dr. Hodge, the report from this evaluation sets forth Claimant's complaints ("right sided neck and shoulder pain"), we well as the "location of pain," which again is "right, neck, shoulder." Dr. Hodge notes Claimant's diminished sensation in the right hand during the examination. There is no mention of a left-sided complaint.

and this report shows that Claimant's left upper extremity was specifically examined as Claimant is noted to have normal strength bilaterally in her upper extremities. Under Dr. Hodge's "plan," he yet again refers to Claimant's "right arm pain and neck pain." (Claimant's APA #7).

20. According to Dr. Bucci, Claimant's post-surgical EMG was normal, although he notes that Claimant does have some residual neck and arm pain. According to Dr. Bucci, Claimant's post-surgical MRI shows some "minor disc bulging without frank herniation at any level" and no recurrent surgical pathology. I give greater weight to his interpretation than I give to the radiologist's report. **Dr. Bucci notes that the radiologist's interpretation is "anatomically impossible."** (Defendants' APA #1, p. 2-5; Defendants' APA #3, p. 30).
21. Claimant's testimony that her injections by Dr. Patel were not to her cervical spine (but rather at the area where the bra hooks in the back) are refuted by the records of Dr. Patel. The two ESI injections administered by Dr. Patel were at the C7-T1 level. (Defendants' APA #2, p. 15-16, 21-22, and 25-26; testimony of Claimant).
22. Claimant reached maximum medical improvement on November 9, 2011. We base this finding on:
 - a. The written opinion of Dr. Bucci who notes that an FCE was not necessary to determine whether or not Claimant had reached MMI (i.e. that she already in fact had reached MMI); and
 - b. The note of Dr. Patel, the authorized pain management doctor, who also found Claimant at MMI.

(See Defendants' APA #1, p. 1; Dr. Patel Depo. Tr., p. 5, lines 10-24; Defendants' APA #2, p. 14-15; Claimant's APA #8, p. 54).

23. Claimant **takes over-the-counter medication only, and has been doing so for more than one year.** (See Hr'g Tr. p. 74-76; See also Dr. Patel Depo. Tr. p. 21, wherein he testifies that Claimant did not want to take narcotics and her pain "wasn't that significant").
24. The authorized treating physician assigned a 10% impairment rating to the spine. (Defendants' APA #1, p. 1).
25. The authorized treating physician assigned a 10% impairment rating to the right hand. Defendants' IME (Dr. Marsh) assigned a 0% impairment rating. (See Defendants' APA #1, p. 1; Claimant's APA #6, p. 49).
26. Claimant has a 15-lb. (per Claimant's APA #8, p. 54, dated 12/10/11) lifting restriction (based upon Claimant's FCE—Defendants' APA #2, p. 14, states awaiting the results). However, the findings of the FCE are not compelling or persuasive. Featuring prominently in the report is the statement that Claimant's "significant self-limiting and inconsistent behavior heavily influenced the test results." In fact, Claimant **self-limited in more than half of the 21 tasks**, when motivated persons, according to the report, self-limit on no more than 20% of test items). What bolsters the findings of the report is the fact that the evaluator specifies and documents the instances where he finds "low effort and inconsistent behavior," such as the fact that Claimant did not produce the expected bell-shaped curve during grip testing. In sum, the evaluator concludes that the FCE results indicate a minimum rather than maximum ability. After the date of the FCE, Dr.

- Patel assigned a 15-lb lifting restriction but no other restrictions, as had imposed earlier. (See Claimant's APA #8, p. 54; Defendants' APA #2, p. 17; Defendants' APA #4).
27. On paper, Claimant's summary lifting restriction is compelling evidence of significant disability. However, more weight is given to the notes of the FCE evaluator than to the restrictions imposed by Dr. Patel based upon the summary conclusions of the FCE.
28. Claimant's pre-existing conditions (diabetes, thyroid deficiency, emotional condition, and hypertension) have not been aggravated pursuant to S.C. Code Ann. § 42-9-35. Claimant testified that she was formerly insulin-dependent, but that she can now manage her diabetes with oral medication. Not one medical record states that any prior problem was aggravated. Not one record from any of the more than 7 providers contains any mention of an aggravated (or new) psychological problem or condition. The only evidence in the record of a psychological condition is in the vocational report of Dr. Brabham to whom Claimant was sent in anticipation of litigation, and to whom Claimant denied a prior mental health history. Nonetheless, the Beck Inventory test showed only "mild" depression. (Claimant's APA #14, including p. 96-97).
29. Claimant is able to drive. She drives herself to work, drove to her FCE, and drove to her vocational evaluation. (See Hr'g Tr. p. 42-43; Defendants' APA #4, p. 37; Claimant's APA #14, p. 97).
30. Claimant has no standing restrictions. (See the medical evidence in its entirety).
31. Claimant takes no prescription medications. (See testimony of Claimant in its entirety).
32. Claimant's APA #11, p. 65 contains a typographical error under assessment "chronic left c6 radiculopathy" as evidenced by the previous page (p. 64) under History, line 6, and by the remainder of Dr. Baxley's records (including, but not limited to, p. 66 which refers to

Claimant's chronic right C6 radiculopathy), in which there is no left arm complaint or finding.

33. Defendants will provide lifetime hardware and maintenance. (e.g. repair, replacement, and removal).

34. As to future medicals, I find that Claimant is entitled to pain management. I base this finding on:

a. The statement of Dr. Bucci, who recommended pain management when he released Claimant at MMI. (*See* Defendants' APA #1, p. 1-2).

b. The fact that Dr. Patel on p. 18 of his deposition recommends pain medications; and

c. The fact that Dr. Hodge recommends pain management on Claimant's APA #7, p. 52.

35. As to the provider for pain management, Claimant is to receive pain management from a different provider than Dr. Patel. This provider is to be selected by Defendants. I base this finding on the fact that Dr. Patel has released Claimant. (Dr. Patel Depo. Tr. p. 6).

36. As to the spinal cord stimulator, Dr. Hodge states that Claimant may benefit "possible" from a trial. This statement does not meet the requirements of S.C. Code Ann. § 42-15-60. Dr. Bucci did not recommend a stimulator or even a trial stimulator, and Dr. Patel relies on the surgeon, but is not ruling this modality out. I agree with Defendants' position that, at this point, the implantation of a spinal cord stimulator is, at best, a future medical. (*See* Dr. Patel Depo. Tr. p. 6-13, 16-17, and 21-23; Claimant's APA #7, p. 52).

37. As of the date of the hearing, Claimant has returned to work for Employer in her pre-accident position as an F.R.M. operator, but with accommodations. (Hr'g Tr. p. 27-36 and 74).
38. Claimant is awarded 22% permanent partial disability to the spine pursuant to S.C. Code Ann. § 42-9-30(21). I based this finding on the nature of the injury, the surgery involved (a fusion), the fact Claimant performs 75% of her former job, and an **invalid FCE**.
39. Claimant is awarded 10% permanent partial disability to the right hand pursuant to S.C. Code Ann. § 42-9-30(12).
40. Claimant's average weekly wage is \$447.79 with a corresponding compensation rate of \$298.54.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act, §42-1-10, S.C. Code of Laws, et. seq., that:

1. Pursuant to South Carolina Code Ann. §42-15-10 and §42-17-20, jurisdiction and venue are proper.
2. Pursuant to South Carolina Workers' Compensation Commission Rules and Regulations, Rule 67-210(B) and Rule 67-213(C), the parties were properly served with Notice of the Hearing.
3. Pursuant to South Carolina Code Ann. §42-9-30(21), Claimant is entitled to an award of permanent partial disability for her work-related injuries to her neck.
4. Pursuant to South Carolina Code Ann. §42-9-30(12), Claimant is entitled to an award of permanent partial disability for her work-related injuries to her right hand.

5. Pursuant to South Carolina Code Ann. §42-9-35, Claimant has not met her burden of proving an aggravation of any pre-existing condition.
6. Pursuant to South Carolina Code Ann. §42-15-60, Claimant is entitled to an award of future medical treatment in the form of pain management.
7. Pursuant to South Carolina Code Ann. §42-1-40, Claimant's average weekly wage is \$447.79 and her compensation rate is \$298.54.

ORDER

1. **IT IS HEREBY ORDERED** that Claimant has met her burden of proving that she sustained a compensable injury to her neck and right hand only.
2. **IT IS FURTHER ORDERED** that Claimant sustained a 22% permanent partial impairment to her spine and a 10% permanent partial disability to her right hand.
3. **IT IS FURTHER ORDERED** that Claimant is entitled to hardware pursuant to the Act.
4. **IT IS FURTHER ORDERED** that Claimant is entitled to future medical treatment in the form of pain management.
5. **IT IS FURTHER ORDERED** that Claimant is entitled to all allowable benefits under the Act.

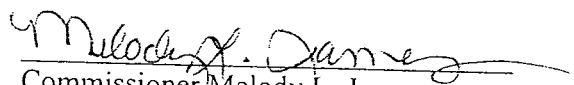
AND IT IS SO ORDERED.

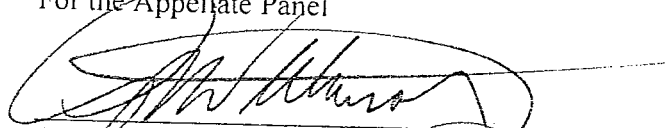
WE CONCUR:

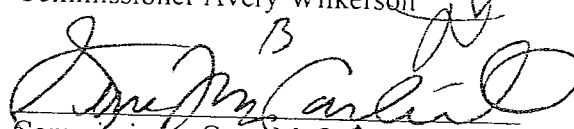
CERTIFICATE OF SERVICE

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 Kim Falls on December 29, 2014


 Commissioner Melody L. James
 For the Appellate Panel


 Commissioner Avery Wilkerson


 Commissioner Gene McCaskill