

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

RECEIVED

MAR 09 2016

SC Court of Appeals

Barry Adickes,

CLAIMANT,

vs.

Philips Healthcare,

Employer,

and

Fidelity and Guarantee Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1102937

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Appellate Panel Review held in Columbia, South Carolina on

December 14, 2015,

Appellate Panel Decision and Order filed on February 8, 2016

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

## STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

48. I find that the Claimant has suffered wage loss as the result of his 03/22/11 work-related accident. Based on a review of the evidence as a whole, the Claimant is clearly not as he was before this work-related accident.
49. I find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.83). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
51. As to future medical care and treatment, Claimant is entitled to future medical care and treatment which would tend to lessen his period of disability to his right shoulder. Dr. Barron's medical opinion found at Claimant's APAs, page 77a. Dr. Barron writes, "It is my further opinion that he will most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms. It is reasonable for Mr. Adickes to try to avoid surgery as long as possible. It is further my opinion that Mr. Adickes' condition was caused by his on the job automobile accident of March 22, 2011. These opinions are stated to a reasonable degree of medical certainty."
52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

The Single Commissioner further made the following Conclusions of Law:

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

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

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

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

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

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

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

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

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

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

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

#### FINDINGS OF FACT

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

3. It is the Defendants' position that this claim is not ripe for a determination of permanency. They contend that the Claimant is not at MMI as to the shoulders.
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44. When we consider all of those opinions and the evidence as a whole, the Claimant has suffered a cognitive deficiency as the result of his work-related accident on 03/22/11.
45. The impact of that deficiency is limited to his executive functioning. That being said, it is that executive functioning that is determinative of the Claimant's ability to hold employment similar to his employment for Philips Healthcare.
46. While the Claimant did continue to work for the Employer for 2.5 years after the work-related accident, he no longer works there and the cogent question is now can he find like employment at similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?
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49. We find that the Claimant has a post-accident average weekly wage of \$1,057.69.
50. The Claimant now has a residual earning capacity of \$1,057.69. The difference in the average weekly wage prior to the injury and after the injury is \$1,550.83 (\$2,608.52 - \$1,057.83). This computes to a compensation rate of \$1,033.94 (\$1,550.83 x .667). However, the maximum compensation rate for 2011 is \$704.92. Therefore, the Claimant is awarded \$704.92 a week for 340 weeks.
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52. The Claimant is entitled to future medical care and treatment to the right shoulder as noted above.
53. The Claimant is entitled to medical care and treatment to include prescription medications and follow-up visits with Dr. Mandell for his post-traumatic headaches.
54. The Claimant is also entitled to ongoing radiofrequency ablations for the neck with Dr. Park.

#### CONCLUSIONS OF LAW

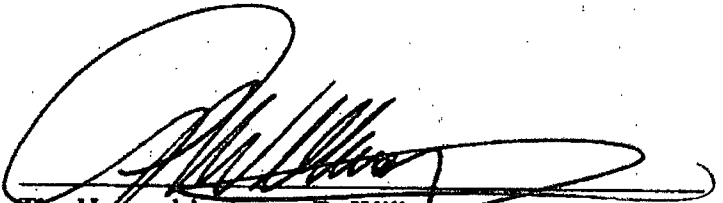
1. Pursuant to Section 42-1-160, claimant suffered a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-20, claimant has sustained a permanent loss of wage earning capacity. The claimant now has a residual earning capacity of \$1,057.69. The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

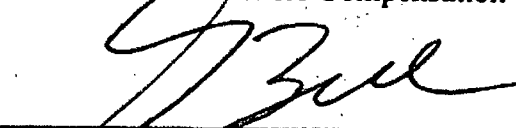
ORDER

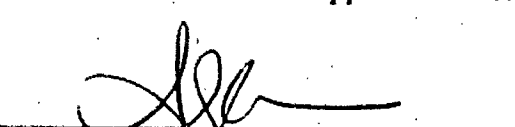
**IT IS THEREFORE ORDERED:** The Decision and Order of the single commissioner filed in the above entitled matter on August 17, 2015 is hereby affirmed by the Appellate Panel of the South Carolina Workers' Compensation Commission. We Order Defendants to make the following payments:

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

**AND IT IS SO ORDERED!**

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

  
The Honorable T. Scott Beck  
Commissioner for the Appellate Panel

  
The Honorable Aisha Taylor  
Commissioner for the Appellate Panel

**CERTIFICATE OF SERVICE**

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

**By Eugenia Hollmon on February 8, 2016**