

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

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

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APR 21 2016

SC Court of Appeals

Barry Adickes, Claimant,

Respondent,

v.

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

Appellants.

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INITIAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

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

## STATEMENT OF THE CASE

Respondent Barry Adickes (“Respondent”) initiated these proceedings by filing a Form 50, Request for Hearing, on September 23, 2014. (Form 50 dated September 13, 2014; Transcript of Jan. 21, 2015 hearing, p. 5, lines 17-19). In his Form 50, Respondent alleged a loss of earning capacity as a result of his work injury under S.C. Code Ann. § 42-9-20. (Form 50 dated September 13, 2014; Transcript of Jan. 21, 2015 hearing, p. 6, line 3-6). In the timely filed Form 51, Employer’s Answer, Philips Healthcare and Fidelity and Guarantee Insurance Company argued that a permanency determination was premature and denied that the Respondent was entitled to a wage loss award. (Form 51 dated October 15, 2014).

A Hearing was held before Commissioner Gene McCaskill on January 21, 2015, in Lancaster, South Carolina. (Transcript of Jan. 21, 2015 hearing before Commissioner McCaskill). The Respondent alleged that he has sustained cognitive impairment resulting from his work-related accident causing a loss of earning capacity. (Id. at p. 5 line 25 - p. 6, line 6). Respondent also sought ongoing medical care. (Id. at p. 6, lines 9-11).

Appellants argued that the Respondent had not yet reached maximum medical improvement, as to his bilateral shoulders and a permanency hearing was premature. (Id. at p. 7, lines 18-21). Appellants also argued Respondent had failed to show by a preponderance of the evidence that he sustained a causally related wage loss. (Id. at p. 6, line 21 – p. 7, line 1; p. 7, lines 10-15). Appellants further argued that the claim should be heard under the scheduled member statute, S.C. Code Ann. § 42-9-30. (Id. at lines 15-18).

After receiving testimony from the Respondent, Respondent's wife, and Employer Representative, and considering the documentary evidence presented pursuant to the Administrative Procedures Act, Commissioner McCaskill issued a Decision and Order dated August 27, 2015 (Order of the Single Commissioner dated August 27, 2015). By his Decision and Order, Commissioner McCaskill deemed the Respondent at MMI, found that he had sustained a permanent loss of wage earning capacity and awarded the Respondent "\$704.92 a week for three hundred forty (340) weeks commencing January 17, 2014, the date that the Claimant's wage loss began." (Id. at p. 18). Additionally, Commissioner McCaskill ordered Appellants to pay for Respondent's future medical care for his right shoulder, to include surgery as recommended by Dr. Barron, post-concussive medical care and treatment with Dr. Mandell and ongoing cervical radiofrequency ablations with Dr. Park. (Id.).

On September 3, 2015, Appellants filed a request for review by the Workers' Compensation Commission's Appellate Panel. (Form 30 dated September, 3, 2015). Appellants argued that Commissioner McCaskill erred in finding and concluding that the Respondent has reached MMI and had sustained wage loss as a result of his work accident. (Transcript of Appellate Panel Hearing dated December 14, 2015, p. 5, line 22 – p. 13, line

3). Further, Appellants argued that Commissioner McCaskill erred in concluding as a matter of law that the Respondent is entitled to three hundred forty (340) weeks of benefits commencing on January 17, 2014, against the plain language of S.C. Code Ann. § 42-9-20. (*Id.* p. 22, line 12 – p. 23, line 14).

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

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

#### **SUMMARY OF EVIDENCE**

Respondent Barry Adickes ("Respondent") earned a Bachelor's degree in Marketing from the University of South Carolina. (Transcript of Jan. 21, 2015 hearing, p. 9, lines 16-18). Prior to the work-related accident in March 2011, Respondent worked in his position for over twenty years, approximately five of those years directly for Philips Healthcare ("Philips"). (Transcript of Jan. 21, 2015 hearing, p. 10, line 23 – p. 11, line 1). On October 16, 2009, Respondent was placed on a Performance Improvement Plan ("PIP") as a result of low sales each quarter. (Def. Ex. D, pp. 17-20). The following month, Respondent was informed via email by his supervisor, Jim Hendrix, informing him that his numbers were still low in October and needed to improve. (*Id.* at p. 16).

Similarly, in May of 2010, Regional Manager Paul Stoddard informed Respondent that his performance was still an issue, as he had only achieved his quota once in the prior

6 months. (Transcript of Jan. 21, 2015 hearing, p. 54, lines 15-22; Def. Ex. D, p. 21). Respondent acknowledged that not meeting his quota meant not doing his job well. (Transcript of Jan. 21, 2015 hearing, p. 53, lines 20-24). In September of 2010, the VP of Sales and HR Manager discussed Respondent being on PIP and not being terminated because his sales were trending upwards, yet the HR Manager noted her opinion that it is “not the right job for him.” (Def. Ex. D, p. 24).

Respondent contends that he never had any issues performing his job pre-injury. (Transcript of Jan. 21, 2015 hearing, p. 29, lines 13-15). Respondent was of the opinion that the “PIPIPI (sic) was something that [he] --- that truly did not inhibit or influence [his] feelings of how [he] was doing [his] job.” (Id. at p. 50, lines 10-12). Respondent earned \$131,000.00 in 2010 at Philips. (Def. Ex. B, p.11).

Respondent was transferred into a new position in January 2011, placing him under the direct supervision of Mark Johnson. (Transcript of Jan. 21, 2015 hearing, p. 121, line 25 – p. 122, line 12). Mark Johnson is the Regional Manager at Philips, where he has been employed for 18 years. (Id. at p. 118, lines 2-9). Mr. Johnson became the Respondent’s direct supervisor on January 1, 2011, and remained his supervisor for three years. (Id. at p. 118, line 21 – p. 119, line 6). Before the Respondent came under his supervision, Mr. Johnson reached out to HR and other managers to solicit feedback about Respondent’s work performance. (Id. at p. 120, lines 19-24). Mr. Johnson learned that the Respondent was difficult to coach and had performance issues. (Id. at p. 121, lines 1-8). For this reason, Mr. Johnson recommended that the Respondent be placed on the Indirect Channel position, as opposed to the more challenging position in the EMS area, as it was more suited for his abilities. (Id. at p. 122, line 20 – p. 123, line 21). As a result, Mr. Johnson suggested that

the Respondent be assigned to a less complex sales position in January 2011. (Id. at p. 123, lines 17-21).

Philips has a standard review procedure, which Mr. Johnson performs annually on all of the employees under his supervision, called the People Performance Management (“PPM”). (Id. at p. 121, lines 18-21). In these reviews, the employees are critiqued and given direction and a development plan for the following year. (Transcript of Jan. 21, 2015 hearing, p. 121, lines 21-23). Prior to the work injury, Respondent earned a base salary of \$85,000.00, plus commission and bonuses. Respondent’s pre-injury average weekly wage was \$2,608.52. (Form 20 filed March 27, 2013).

The Respondent was involved in a single-car accident on March 22, 2011. (Transcript of January 21, 2015 hearing, p. 5, lines 24-25). An ambulance was called to the scene, but Respondent declined medical treatment. (Id. at p. 18, lines 13-16). His wife picked him up from the scene. (Id. at p. 19, lines 3-4). Respondent initially had pain in both shoulders, although worse on the right. (Id. at p. 20, lines 11-13). He remained out of work for less than two months, until May 1, 2011, when he returned to his normal job duties at Philips. (Id. at. 29, lines 16-21). In his work-related accident, Respondent suffered injuries to his head, neck, and bilateral shoulders. (Id. at p. 20, line 23).

#### Head/Neurological Treatment/Evaluations:

Respondent initially treated at Piedmont Medical Center on March 23, 2011. (Cl. APA 10, p. 186). A CT scan of his head was performed, which revealed no acute intracranial abnormality. (Id. at p. 189). On March 30, 2011, he treated with Dr. Nicholas Tuttle at Rock Hill Family Practice Associates. (Cl. APA 8, p. 156-159). Dr. Tuttle diagnosed a grade II-III concussion, post-concussive syndrome, headaches, left parietal

scalp contusion, left shoulder contusion, multiple abrasions of forearms and legs. (Id. at p. 158). Dr. Tuttle eventually referred him to Dr. Mandell for further neurological evaluation. (Id. at p. 155).

Respondent was first evaluated by Dr. Mandell on April 6, 2011 (Cl. APA 7, p. 129). Dr. Mandell noted that, over the last two weeks, Respondent had slowly improved, as he was no longer having nausea or vomiting, and his headaches waxed and waned in intensity. (Id.) Dr. Mandell indicated that he expected Respondent to have a full recovery and recommended he remain out of work for 4 weeks. (Id. at p. 131). An MRI scan of his brain was performed on July 11, 2011, which was normal. (Cl. APA 10, p. 195). On January 29, 2011, Dr. Mandell noted that Respondent continued to improve and he would not need to do anything further if his headaches continued to improve. (Cl. APA 7, p. 124-125).

Respondent returned to Dr. Mandell on May 8, 2012, and it was noted that his cognitive issues had resolved, but he continued with intermittent migraines. (Cl. APA 7, p. 120). At that time, Respondent reported only one bad headache since Christmas. (Id.) Mr. Mandell placed him at MMI. (Id. at p. 121). In September 2012 and January 2013, Respondent complained of forgetfulness and cognitive issues, which Dr. Mandell related to his medication, Zonisamide. (Id. at pp. 116-119). In April 2013, Dr. Mandell noted that his Zonisamide had been replaced by Nadolol, and Respondent had tolerated it quite well. (Id. at p. 106).

At his deposition in April of 2013, Respondent stated that his only cognitive issues were memory loss and difficulty putting words together. (Transcript of Jan. 21, 2015 hearing, p. 83, line 24 – p. 84, line 4). Respondent also testified at that time that his memory

loss had not impacted his ability to do his job; in fact, he had adequately performed his job at Philips since his return to work. (Id. at p. 84, lines 12-21). At his return visit to Dr. Mandell in October of 2013, Respondent reported doing a lot better, yet continuing to have headaches once a month. (Cl. APA 7, p. 104).

He was then evaluated by Dr. John Welshofer on October 31, 2012, for his post-concussive symptoms. (Cl. APA 6, p. 93). Dr. Welshofer assigned a PPD rating of 15% to his brain for post-concussive symptomatology and recommended that he continue under the care of Dr. Mandell. (Id. at p. 96).

At his February 4, 2014 visit with Dr. Mandell, Respondent continued to report intermittent migraines once or twice a month. (Cl. APA 7, p. 102). Additionally, it was noted that Respondent continued to have “minor issues with memory,” which he was “not sure if it is related to being 52 or if it is due to the work trauma, and he is willing to attribute it to age.” (Id.). He notes that Respondent is unsure of whether the memory issues are “different from any of his other friends.” (Id.). Overall, Dr. Mandell opined that Respondent was doing well and recommended a return visit in 6 months. (Id. at p. 103). Respondent was last evaluated by Dr. Mandell on August 29, 2014, wherein he reported difficulty with focus and concentration. (Id. at p. 98). Dr. Mandell indicated that he suspected that it was related to his brain injury, and he wanted to give him a trial of Adderall. (Id.). Respondent has not returned to Dr. Mandell.

Two months later, Respondent underwent a Neuropsychological Evaluation with Dr. Randy Waid on October 7, 2014, at the request of his counsel. (Cl. APA 3, pp. 1-9). Dr. Waid noted that it was Joel Leonard’s (Respondent’s vocational expert) recommendation that he undergo a neuropsychological evaluation. (Id.). With regard to

cognitive functioning, Respondent reported to Dr. Waid that it took him “longer to do paperwork and complete tasks,” and had difficulty with regard to “being able to formulate [his] thoughts and express them concisely.” (Cl. APA 1, p. 3).

Dr. Waid performed over 20 objective tests and found the Claimant to have average to above-average performance on nearly every exam. (Id. at pp. 4-11). Most notably, he found that the Claimant has a high average IQ, and performed within the 90<sup>th</sup> percentile on many occasions, particularly when reasoning, computation, and memory were involved. (Id.) Dr. Waid referred to the Respondent as “a resilient individual who is functioning reasonably well,” and that he is “functioning in the high average range of intellectual abilities.” (Id. at pp. 7-8). Dr. Waid noted that the Respondent complained of forgetfulness in day to day pursuits, and noted “yet, assessment of anterograde memory generally revealed intact immediate learning/memory as well as an efficient ability to retain and recall information once it is effectively encoded/learned. (Id.) Overall, Dr. Waid determined that the neuropsychological evaluation provided favorable results and that the Claimant’s brain behavior functioning is intact. (Id. at p. 8).

#### Right and Left Shoulder Treatment/Evaluations:

Respondent initially treated with his neighbor, Dr. Rentz, at his home in regard to his shoulder and upper extremity complaints. (Transcript of Jan. 21, 2015 hearing, p. 87, lines 11-14; Cl. APA 8, p. 156). He then treated with Dr. Tuttle at Rock Hill Family Practice complaining of pain and stiffness in his left shoulder and bruising in his left biceps area. (Cl. APA 8, p. 157).

Respondent returned to Dr. Rentz on August 25, 2011 for his right shoulder pain, and underwent an injection. (Cl. APA 9, p. 185). He then underwent a right shoulder X-

ray on October 5, 2011, which revealed a grade II/III acromion and no other abnormalities. (Id. at p. 183). Respondent underwent right shoulder arthroscopy, debridement of a grade IV SLAP tear and an anterior labrum, biceps tenotomy and open biceps tenodesis to the proximal humerus on October 21, 2011, 7 months after the accident. (Id. at p. 178). His post-op treatment with Dr. Rentz showed good recovery. (Id. at pp. 167-174). In fact, at his June 25, 2012 visit, Dr. Rentz noted that he was doing a lot better, his motion was essentially back to full. (Id. at p. 167). It was noted that Respondent was concerned about having some impingement in his shoulder, but that Dr. Rentz was of the opinion that it was just “some residual.” (Id. at p. 167).

At his counsel’s request, Respondent then underwent an IME with Dr. Jerry Barron, in relation to his right shoulder on December 12, 2012. (Cl. APA 5, pp. 75-77). He reported continued significant pain in his right shoulder and concerns of impingement. (Id. at p. 75). Dr. Barron noted that “unfortunately, he has not responded to surgical treatment on his right shoulder” and recommended that Respondent undergo a right shoulder MRI arthrogram. (Id. at p. 77).

At the request of the Appellants, Respondent returned to Dr. Rentz on September 14, 2014, and the office note indicates that he was seen for a “Rate and Release of his right shoulder.” (Cl. APA 9, p. 162). Respondent reported continued pain in his right shoulder with overhead activities and that his shoulder “wants to pop and catch.” (Id. at p. 164). Rather than providing a rating, Dr. Rentz recommended that Respondent undergo a right shoulder MRI scan due to his continued complaints. (Id.). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint

arthropathy and inferior osteophytosis and subacromial spur, and biceps tenodesis. (Id. at p. 160). Respondent never returned to his authorized treating physician, Dr. Rentz, following the scan. (Transcript of Jan. 21, 2015 hearing, p. 94, lines 9-11).

Dr. Jerry L. Barron, the IME physician, completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the left shoulder and that the Respondent will “most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms.” (Cl. APA 5, p. 77a). As of the date of the hearing, Respondent continues to have pain in his right shoulder, which feels like an impingement. (Transcript of Jan. 21, 2015 hearing, p. 23). He remains unable to raise his right arm above shoulder height without pain, and it is Respondent’s understanding that his right shoulder condition warrants surgery. (Id. at p. 39).

#### Cervical Treatment/Evaluations:

Respondent has treated with Drs. Welshofer and Park in relation to his cervical injury. (Transcript of Jan. 21, 2015 hearing, p. 21, lines 14-17). He first treated with Dr. John Welshofer on October 31, 2012, for his complaints of cervical pain. (Cl. APA 6, p. 93). Dr. Welshofer diagnosed chronic neck pain and recommended he undergo a cervical MRI scan. (Id. at p. 96). The cervical MRI scan was performed on March 28, 2013, revealing anterolisthesis at C4-5, small central disc protrusion without cord compression, facet arthropathy on the right side and the possibility of a non-healing fracture at C4. (Cl. APA 6, p. 86-87). Dr. Welshofer then recommended a whole body bone scan, which was performed on June 13, 2013, revealing advanced facet joint arthropathy at C4-5. (Cl. APA 6, p. 88). A cervical CT scan performed on the same date revealed significant degeneration

at C4-5, but no fracture. (Id. at p. 86-87). On June 19, 2013, Dr. Welshofer placed the Claimant at MMI for his cervical condition, assigned a PPD rating of 10% to his spine and referred him to Dr. Richard Park for injections. (Id. at p. 82).

Respondent began facet joint injection therapy with Dr. Park in July of 2013. (Cl. APA 4, p. 72). He initially underwent medial branch blocks and was pleased with the improvement, and then began undergoing radiofrequency ablations in January of 2014. (Id. at pp. 53, 57). Dr. Park opined that Respondent will need radiofrequency ablations every 6 to 24 months for pain relief. (Id. at p. 52).

During his position under Mark Johnson, Respondent had numerous disciplinary issues, one involving the improper use of his company credit card. (Transcript of Jan. 21, 2015 hearing, p. 130, lines 5-11). Mr. Johnson witnessed first-hand the Respondent's performance issues, as he was difficult to get a hold of, had poor follow-up with customer and coworkers and an overall lack of urgency. (Id. at p. 124, line 15 – p. 125, line 1). Respondent's work ethic, behavior and communication skills were the same before and after the accident, according to Mr. Johnson. (Id. at p. 125, lines 2-22).

According to Mr. Johnson, the Respondent did not mention any of the alleged symptoms related to his head injury, including headaches, lack of focus, or any other cognitive impairments. (Transcript of Jan. 21, 2015 hearing, p. 133, line 20 – p. 134, line 8). In the year of his accident, 2011, the Respondent almost met his quota, even though he was out of work for nearly 2 months. (Id. at p. 61, lines 15-24). Mr. Johnson sent an email to Respondent on March 9, 2012, stating that that his performance issues from 2010 were resurfacing, involving time management and focus issues. (Id. at p. 62, lines 4-25; Cl. APA 12, p. 199).

Following his injury, Respondent earned \$125,000.00 in 2012, \$115,000.00 in 2013 at Philips. (Def. Ex. B, p.10-11; Def. Ex. C, p. 12-14). Philips Healthcare underwent another corporate restructuring and the Respondent's position was eliminated in January of 2014. (Def. Ex. E, p. 25). Mr. Johnson called the Respondent on January 17, 2014, with HR personnel on the phone, and informed him that he was being let go as part of a Reduction in Force ("RIF"). (Transcript of Jan. 21, 2015 hearing, p. 126, lines 1-3). Mr. Johnson informed the Respondent that the RIF was commenced at a higher corporate level and that the Respondent's termination was not related to performance or any other motive. (Id. at p. 129, lines 19-24). Terminations resulting from RIF's are highly monitored by Philips, and the supervisors delivering the news are instructed to read from a script to ensure that there is no mention of performance, as the RIF's are purely business decisions. (Id. at p. 127, lines 8-18). Mr. Johnson did not make any comments about performance in the RIF termination discussion, as the RIF script strictly forbids use of that phrase. (Id. at pp. 127 lines 12-15, p. 128 line 25 – p. 129, line 3). In the termination discussion, Respondent requested a probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was solely the result of a restructuring and there are no probationary periods in this situation. (Id. at p. 128, lines 19-24). Respondent entered into a Settlement and General Release with Philips, wherein he was provided with a lump sum severance in the amount of \$90,139.00. (Def. Ex. F).

Respondent was aware of RIF's taking place each year, and his position was not affected in the 2012, 2013 RIF's. (Id. at p. 128, lines 7-11). Philips did not hire anyone to replace Respondent's position; rather, as suspected, the company was correct in

determining that the territory could be handled by fewer people. (Transcript of Jan. 21, 2015 hearing, p. 129 lines 10-18).

Respondent was deposed in September of 2014, wherein he was questioned about his termination discussion with Mark Johnson. (Id. at p. 63, line 19 – p. 65, line 23). Following his deposition, Respondent sent a text message to Mr. Johnson which read, “I was deposed again today by Philips ... I’m hoping a recording was made and can be found of that phone call. I don’t expect that you could recall exactly the dialogue. I cannot. But I remember my question of how I was selected and my follow-up question about the protocol of probationary period. With the reduction in force, RIF, I was perhaps, a natural selection for those making the call who did not know me...” (Id. at p. 64, line 18 – p. 65, line 7).

Respondent claims that he began looking for employment immediately after being released from Philips Healthcare, alleging that he applied for employment with D-E-X, ZOLL, McKesson and Valued Relations, Inc. (“VRI”). (Id. at pp. 35, line 12 – p. 36, line 4, p. 68, lines 16-24). In his resume, he portrayed himself as an “impactful” public speaker and communicator, extensively trained practitioner of consultative sales, and “expertly organized and focused. (Id. at pp. 69, line 18 – p. 70, line 25; Def. Ex. I, p. 76).

ZOLL does not have any application or resume on file for the Respondent, which was confirmed by two ZOLL HR personnel. (Def. Ex. I, p. 65). Similarly, Respondent offered no documentary or testimonial evidence in support of his alleged communications with D-E-X.

Respondent alleges that he applied for a director position at McKesson Corporation, which offered a similar salary to Philips. (Transcript of Jan. 21, 2015 hearing, p. 71, lines

7-12). Respondent underwent a phone interview with McKesson on March 4, 2014, the substance of which was documented in his McKesson file. (Def. Ex. J, p. 71). Respondent disclosed to McKesson that he was no longer employed by Philips because he had recently been “involved in a downsizing and his position was eliminated.” (Id. at p. 72). Respondent contends that he was turned down for the position at McKesson due to a drug test revealing medications associated with his work injury; specifically, he contends that a medical questionnaire during the application process brought to light that he was taking Nadolol, and that response persuaded McKesson not to hire him. (Transcript of Jan. 21, 2015 hearing, p. 75, line 11 – p. 76, line 7). McKesson’s Corporate Law Department advised that McKesson has no record of requesting or receiving results from any drug screening or testing. (Def. Ex. J, p. 69). Additionally, McKesson has no denial of employment letter on file for the Respondent. (Id.). Respondent did not tender any evidence or present witness testimony in support of his contention that he was not hired by McKesson due to his work injury. (Transcript of Jan. 21, 2015 hearing, p. 77, lines 15-24).

In his application for employment with VRI, Respondent was asked to indicate his “Desired Salary,” to which he responded “\$55K base.” (Def. Ex. F, p. 30). Respondent was offered a position with VRI in January 2014, the same month as his termination from Philips, but he did not accept the position until 5 months thereafter. (Transcript of Jan. 21, 2015 hearing, p. 36, lines 2-7, p. 74, lines 6-16). Respondent was offered his requested salary of \$55,000 annually with additional incentives and commissions for sales performance. (Cl. Ex. 6, pp. 217-218). Respondent did not complete any sales for VRI; thus he did not earn any additional compensation by way of commission or bonuses. (Transcript of Jan. 21, 2015 hearing, p. 37, lines 22-25, p. 100, lines 23-25). In January

2015, the Respondent was terminated from VRI. (Id. at p. 39). Respondent did not present any witness testimony or tender documentary evidence in support of his contention that he was terminated from VRI as a result of his work injury. (Id. at p. 83, lines 8-12).

At his attorney's behest, Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (Cl. APA 3, pp. 35-47). With regard to his employment with Philips, Respondent informed Mr. Leonard that he had "always met or exceeded his production goals" before the work injury. (Id. at p. 39).

Respondent reported residual problems concerning his concentration and focus; specifically, being unable to draft written correspondence in a proficient manner and inability to comprehend/retain written material. (Id. at p. 36). Additionally, he reported issues formulating his thoughts and that his pace of speech was much slower. (Id.). Mr. Leonard noted that the relative presence or absence of cognitive difficulties is of great importance with respect to his prospective employability. (Id. at p. 40).

Mr. Leonard determined that there were three potential Profiles that could represent Respondent's prospective employability, but that it is most accurately portrayed by "Profile B." (Cl. APA 3, pp. 45-46). Profile B is based on the conclusion that Respondent was terminated at least in part due to his post-accident performance issues. (Id. at p. 45). Profile B determined his current salary of \$55K to be a reasonable and proper representation of his earning capacity subsequent to the work accident, and that Respondent is capable of performing other occupations, but would not be expected to earn wages that significantly exceed the annual salary he was earning at VRI. (Id.).

At the end of his report, Mr. Leonard acknowledged the competing impressions with regard to Respondent's cognitive status and recommended that he undergo a

neuropsychological evaluation. (Id. at p. 47). He also indicated that he would be happy to review Respondent's personnel file. (Id.).

Mr. Leonard was subsequently provided with the additional documents (personnel file, emails from Mark Johnson, Dr. Waid's report, Dr. Mandell's deposition transcript) and was deposed on December 30, 2014 after his review of same. (Transcript of Joel Leonard deposition dated December 30, 2014 at Def. Ex. K).

When Mr. Leonard wrote his report, he relied solely on the information that Respondent had provided him with regard to his cognitive abilities. (Id. at p. 125, lines 10-15). He recommended Respondent undergo a neuropsychological evaluation because he would defer to Dr. Waid when it came to the analysis of Respondent's neuropsychological abilities. (Id. at p. 135, lines 6-8). Mr. Leonard testified that he had reviewed Dr. Waid's report with counsel for the Respondent prior to his deposition, and he found that there were "things that - - in looking at the report, that concerned me. I mean overall, I mean from a neuropsych perspective, it just seemed that he had a lot of intact functioning issues." (Id. at p. 18, line 11 – p. 19, line 14). Mr. Leonard agreed to the favorable results in each of the individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), yet testified that "Dr. Waid is clearly indicating that he has some degree of problem in terms of executive dysfunction and some issues with attention and executive difficulties." (Id. at p. 62, lines 13-16).

With regard to Respondent's employment, Mr. Leonard's understanding was that the Respondent was promoted immediately before the injury. (Id. at p. 115, lines 11-13). When informed that Respondent was actually demoted, Mr. Leonard acknowledged that his misunderstanding "could be an issue." (Id. at lines 6-11). Mr. Leonard further

acknowledged that the demotion could be an indication that Respondent is just a bad employee. (Id. at p. 152, line 24 – p. 153, line 1).

When presented with the PIP documentation and emails from supervisors regarding Respondent's poor work performance before the injury, Mr. Leonard testified that it was "reasonable" to conclude that the documentation supports performance issues before his injury. (Id. at p. 177, lines 4-9). Mr. Leonard acknowledged that he had no specific evidence indicating that Respondent was unable to secure a job due to his cognitive abilities or limitations. (Id. at p. 150, lines 6-8). Mr. Leonard also acknowledged that the only evidence supporting Respondent's post-accident wage earning ability is the base salary he received at VRI. (Id. at p. 151, lines 13-17). Mr. Leonard admitted that he "does not know for sure" whether the Respondent had actually missed any days of employment due to his headaches. (Id. at. 174, lines 9-11).

Mr. Leonard was asked whether, after reviewing the additional documentation, there is a likelihood that the Respondent would fall into Profile A, to which he replied "[t]here is a possibility of it; certainly." (Id. at p. 153, lines 10-13). "Profile A" concludes that Respondent's capacity to access the open labor market and earn a wage commensurate with past employment would not be impacted by the March 2011 accident. (Cl. APA 3, p. 45). Under "Profile A," any demise in his residual earning capacity, subsequent to his release by Philips, would be attributed to events and circumstances germane to the open labor market in general. (Id.).

### **STANDARD OF REVIEW**

Judicial review of a Workers' Compensation Appellate Panel's Decision is governed by the substantial evidence rule of the Administrative Procedures Act. Lark v.

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

For purposes of judicial review of the Appellate Panel of the Workers' Compensation Commission, "substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Appellate Panel reached in order to justify its action. Pratt v. Morris Roofing, Inc. 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health and Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).

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

## ARGUMENTS AND CITATION OF AUTHORITY

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

#### a. Permanency Benefits Are Premature Before a Finding MMI.

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

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

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

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

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

Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician’s opinion there is no further medical care or treatment

which will tend to lessen the degree of impairment. O'Banner v. Westinghouse Elect. Co., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). This Court explained this concept in Scruggs v. Tuscora Yarns, Inc., concluding that a finding of MMI was proper by the Single Commissioner because the evidence supported that additional medication or treatment prescribed for the Claimant was intended to help alleviate the Claimant's remaining symptoms, but *would not improve the Claimant's condition*. 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987)(emphasis added). This Court further evaluated which types of medical treatment do not impact the finding of MMI, and has held that "additional medical treatment may improve [a Claimant's] overall quality of life and ability to cope" which would not impact a finding of MMI. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997).

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

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

AMA Guidelines, 6th Ed, p. 26.

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

recommendation precludes a finding of MMI, the courts have certainly alluded to the fact that a line is drawn at surgical procedures.

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

Similarly, in Hall v. United Rentals, the court analyzed the role that a surgical recommendation played in a determination of MMI. 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006). Hall sustained a back injury, and his authorized treating physician placed him at MMI and recommended future medical care to include pain medication and epidural spinal injections. (Id. at 76). The physician opined that Hall had exhausted all of his treatment options and was not a candidate for surgery. (Id.). After his release, Hall obtained a second opinion, and that physician recommended he undergo surgery. Hall underwent the back

surgery successfully and his post-op appointments revealed that his pain was lessened significantly for nine months or more. (Id. at 77). Hall sought payment of his surgery by the carrier, who had declined additional treatment in light of his previous release at MMI. (Id.). The Court explained that it had been presented with conflicting expert evidence, but the evidence as a whole supported the conclusion that Hall had not reached MMI prior to the recommended surgery. (Id. at 90). It reasoned that Hall's significant pain relief from surgery with the second physician was sufficient evidence to find that Hall had not reached MMI at the time his authorized treating physician had made the designation. (Id. at 89).

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

Respondent first treated with Dr. Rentz within days of his accident. (Transcript of January 21, 2015 hearing, p. 87, lines 11-14; Cl. APA 8, p. 156). Dr. Rentz performed a right shoulder arthroscopy, debridement of a grade IV SLAP tear and an anterior labrum, biceps tenotomy and open biceps tenodesis to the proximal humerus on October 21, 2011, 7 months after the accident. (Cl. APA 9, p. 178). He continued post-op treatment with Dr. Rentz and, at his June 25, 2012 visit, Dr. Rentz noted that Respondent was concerned about having some impingement in his shoulder. (Cl. APA 9, p. 167 - 174).

Respondent then underwent an IME with Dr. Jerry L. Barron, on December 12, 2012. (Cl. APA 5, pp. 75-77). At this evaluation, Respondent reported continued significant pain in his right shoulder and concerns of impingement and Dr. Barron noted

that “unfortunately, he has not responded to surgical treatment on his right shoulder” and recommended a **right shoulder MRI arthrogram**. (Cl. APA 5, p. 77).

Respondent returned to Dr. Rentz on September 14, 2014, and the office note specifically indicated that he was seen for a “Rate and Release of his right shoulder.” (Cl. APA 9, p. 162). At this visit, Respondent reported continued pain in his right shoulder with overhead activities and that his shoulder “**wants to pop and catch**.” (Cl. APA 9, p. 164). Dr. Rentz **recommended that Respondent undergo a right shoulder MRI** scan due to his continued complaints, indicating that a rating was premature. (*Id.*). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint arthropathy, inferior osteophytosis and subacromial spur, and biceps tenodesis. (Cl. APA 9, p. 160).

Dr. Barron, the IME physician, completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the L shoulder and that the Respondent will “**most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms**.” (Cl. APA 5, p. 77a).

Respondent reported to Joel Leonard in August of 2014 that he was unable to perform upper extremity tasks with his right arm that require a full range of motion, so he relies of his left arm for tasks that require him to reach overhead and out from his body in a forceful manner. (Cl. APA 3, p. 36). Further, as of the date of the hearing in 2015, Respondent reported continued pain in his right shoulder, which “feels like an impingement.” (Transcript of Jan. 21, 2015 hearing, p. 23, lines 12-14). He reported an

inability to raise his right arm above shoulder height without pain, and that it is his understanding that his right shoulder condition warrants surgery. (Id. at p. 39, lines 14-17).

The Commission found that the language contained within Dr. Barron's questionnaire response to be determinative of MMI, as "assigning 'permanent impairment' to the shoulders attests to Dr. Barron's opinion that the shoulders are not going to get any better than they are now. In other words, they are in a condition of 'impairment' – plain meaning of the word – impairment." (Appellate Panel Decision and Order filed February 8, 2016, p. 3). Appellants contend that the questionnaire response itself provides the most compelling evidence to contradict a finding of MMI, indicating that the Respondent will likely need future surgery. Dr. Barron never unequivocally stated that the Respondent was at MMI; rather he assigned a PPD rating and, at the same time, contradicted this determination by indicating that the Respondent will likely require surgical intervention in the future.

As detailed above, the evidence contained in Respondent's medical reports related to his right shoulder show no indication that he is being released from care, has reached a plateau in his medical condition or that he is at MMI. Appellants contend that the Commission erred in relying solely on an arbitrary permanent impairment rating assigned by an IME physician, while ignoring the substantial medical evidence indicating that medical treatment in the form of an invasive surgery is warranted to further improve Respondent's condition. The surgical recommendation, coupled with the MRI results, Dr. Rentz's reports and the Respondents current complaints establish that the Respondent still has significant medical treatment ahead in relation to his right shoulder in order to improve

his condition. Thus, the substantial evidence supports that Respondent is not at MMI and, therefore, a determination of permanency is premature.

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

The Commission found that Respondent is “clearly not as he was before this work-related accident.” (Appellate Panel Decision and Order filed February 8, 2016, p. 7). The Commission found that the Respondent did continue to work for Philips for 2.5 years after his work injury, and noted that the “cogent question is whether he can find like employment at a similar wage: and, if not, is the inability to find such employment the result of his diminished executive function?” (*Id.* at p. 6). In response to this question, the Commission found it reasonable to conclude that if the Respondent could find employment at a wage comparable to what he earned for the Employer, he would; thus, the Commission found that Respondent suffered wage loss as the result of his work injury. (*Id.*). It deferred to the vocational report prepared by Mr. Joel Leonard, noting there was no competing vocational opinion, and found that Respondent has a “post-accident average weekly wages of \$1,057.69. (*Id.* at pp. 6-7). As such, the Commission ordered the Appellants to pay \$740.92 per week for three hundred forty weeks, commencing January 17, 2014, the date his wage loss began. (*Id.* at p. 15).

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

(emphasis added). Further, SC Code Ann. § 42-1-120 defines “disability” as “**incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.**” (emphasis added).

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

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

The most compelling evidence of Respondent’s ability to earn wages following his work injury is his actual history of having done so. Similar to the facts in the Floyd case, Respondent’s ability to return to work earning pre-injury wages or higher indicates that he did not suffer a loss of earning capacity related to his work injury. Floyd v. City of Charleston, 287 S.C. 474, 339 S.E.2d 166 (Ct. App. 1986). In Floyd, a firefighter sustained a work-related neck injury, continued to work for a period of time, was subsequently admitted to the hospital for a few weeks, then resumed work at the fire department performing all of his usual tasks. (Id. at 476-477). Floyd passed the Air Force physical entrance exam and entered the reserves in April 1981, completing basic training. (Id. at 477). In January 1982, he opened his own part-time washer-dryer repair service. (Id.). During this time, Floyd remained employed by the fire department. (Id.). In April 1982, he returned to a physician that had previously treated him, and was diagnosed with degenerative disc disease with spur formation. (Id.). Floyd then brought a claim against the Fire Department for loss of earnings, as he was no longer able to perform his part-time job. (Id.). The Floyd Court held that the Claimant was unable to sustain his burden of

showing that he could neither hold any other employment nor locate a second job. (Id. at 479). Specifically, the court found that the fact that he was able to physically continue working for the fire department, his physician advised him that he could return to work without any restrictions and he was well enough to pass the Air Force physical exam indicated that he did not suffer a loss of earning capacity arising from the injury. (Id. at 480).

Here, prior to the work injury, Respondent earned a base salary of \$85,000.00, plus commission and bonuses. (Form 20 filed March 27, 2013). Respondent's pre-injury average weekly wage was \$2,608.52. (Id.). Respondent was out of work for less than two months, then he continued working for Philips for 2.5 years in his pre-injury position, earning the same base salary of \$85,000.00. (Def. Ex. C, p. 12-14). Following the work injury, Respondent earned \$118,000.00 in 2011 (the year of his work injury), \$125,000.00 in 2012 and \$115,000.00 in 2013. (Id.).

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

Philips Healthcare underwent a nationwide corporate restructuring nearly 3 years after Respondent's work injury. Respondent's job was eliminated as part of this Reduction in Force ("RIF"), having nothing to do with his work injury. Mr. Johnson called the Respondent on January 17, 2014, with HR personnel on the phone, and informed him that he was being let go as part of the RIF. (Transcript of Jan. 21, 2015 hearing, p. 126, line 1 – p. 127, line 18). Mr. Johnson was very clear in specifying that the termination was purely a business decision and not related to his performance or any other motive. (Id. at p. 128, line 25 – p. 129, line 9). In this termination discussion, Respondent requested a

probationary period similar to his previous performance related disciplinary actions; however, Mr. Johnson reiterated that the downsizing was solely the result of a restructuring and there are no probationary periods in this situation. (Id. at p. 128, lines 19-24).

In fact, in his phone interview with potential employer, McKesson, Respondent disclosed that he was no longer employed by Philips because he had recently been “involved in a downsizing and his position was eliminated.” (Def. Ex. J, p. 72). Philips has not hired anyone to replace Respondent, which supports that Philips was correct in determining that the territory could be handled by fewer people. (Id.). The substantial evidence in the record indicates that Respondent’s termination had no connection to his work injury.

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

The Commission erroneously found that there is no evidence in the record that the Respondent would choose to self-limit as to his earning potential. (Appellate Decision and Order, p. 6). The substantial evidence in the record indicates otherwise, as Respondent specifically requested the salary he earned at VRI. (Def. APA F, p. 30). On his application for VRI, next to “Desired Salary,” the Respondent specifically indicated “\$55K base.” (Id.).

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

The Supreme Court has held that, “whenever [a Respondent] depends in part upon a showing that he has been unable to get work because of his physical condition, it naturally follows that ... [the Respondent] must prove that he has made reasonable efforts to secure employment.” Coleman v. The Quality Concrete Products, Inc., 245 S.C. 625, 631, 142

S.E.2d 43 (1965). Similarly, a Respondent must demonstrate that he has made “reasonable effort to obtain employment, [and] failed [to do so] because of an injury produced handicap.” Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1965).

Respondent alleges that he attempted to obtain employment with many different employers, beginning his employment search within an hour after learning of the reduction in force. (Transcript of January 21, 2015 hearing, p. 135, lines 14-23). Respondent admitted that he was offered a position with VRI in January 2014, the month of his termination from Philips, yet he did not accept the position until May 2014. (Transcript of Jan. 21, 2015 hearing, p. 74, lines 6-16, p. 36, lines 2-7). Thus, Respondent’s four month period of unemployment is a result of his personal choosing to delay employment, having nothing to do with his work-injury.

Moreover, Respondent was only able to produce the names of four companies to which he allegedly applied: McKesson, Zoll, D-E-X and Valued Relations, Inc. (“VRI”). (Id. at p. 68 lines 20-24). There is no documentary or testimonial evidence that Respondent applied to either ZOLL or D-E-X. (Def. Ex. I, p. 65). Additionally, although Respondent alleges that he was turned down for the position at McKesson due to a drug test revealing medications associated with his work injury, McKesson has no record of requesting or receiving results from any drug screening or testing. (Def. Ex. J, p. 69; Transcript of Jan. 21, 2015 hearing, p. 75, line 11 – p. 76, line 7). The substantial evidence in the record supports that Respondent’s work injury played no part in his 4 month period of unemployment, or his inability to obtain employment with D-E-X, McKesson or Zoll.

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

The Commission found that the Respondent has suffered a cognitive deficiency as a result of his work-related accident. (Appellate Panel Decision and Order filed February 8, 2016, p. 6). It further found that the impact of his cognitive deficiency is limited to his executive functioning, and it is executive functioning that is determinative of Respondent's ability to hold employment similar to his employment for Philips Healthcare. (Id.). Appellants contend that the substantial evidence in the record supports that Respondent suffers from no cognitive deficits resulting from his work injury.

Respondent had performance issues following his work injury and, contrary to his testimony, he had the same issues before his work injury. (Transcript of Jan. 21, 2015 hearing, p. 29, lines 10-15). Specifically, on October 16, 2009, Respondent was placed on a Performance Improvement Plan ("PIP") as a result of low sales each quarter. (Def. Ex. D, pp. 17-20). The following month, Respondent was informed by his supervisor that his numbers were still low, then in May of 2010 the Regional Manager informed Respondent that his performance was still an issue. (Transcript of Jan. 21, 2015 hearing, p. 52, line 23 – p. 53, line 4; Def. Ex. D, pp. 16, 21). Further, shortly before the work injury, in September of 2010, the VP of Sales and HR Manager discussed Respondent being on PIP and not being terminated because his sales were trending upwards, and the HR Manager voiced her opinion that it is "not the right job for [Respondent]." (Def. Ex. D, p. 24). Respondent acknowledged that not meeting his quota meant not doing his job well, yet he is of the opinion that the "PIP's did not inhibit or influence his feelings about how he was doing his job." (Transcript of Jan. 21, 2015 hearing, p. 50, lines 9-12, p. 53, lines 20-24). Due to the performance issues, Mr. Johnson recommended that the Respondent be placed in a less

complicated position in the beginning of 2011, months before his work injury. (Transcript of Jan. 21, 2015 hearing, p. 122, line 20 – p. 123, line 21).

Following Respondent's work injury, his performance issues continued. Mr. Johnson sent an email to Respondent on March 9, 2012, stating that that his performance issues from 2010 were resurfacing, involving time management and focus problems. (Transcript of Jan. 21, 2015 hearing, p. 62, lines 4-25; Cl. APA 12, p. 199). Additionally, aside from performance concerns, Respondent had disciplinary issues, one involving the improper use of his company credit card. (Transcript of Jan. 21, 2015 hearing, p. 130, lines 5-11). Respondent used his corporate credit card for personal uses and ran up a significant bill. (*Id.*). Mr. Johnson witnessed first-hand the Respondent's performance issues, as he was difficult to get a hold of, had poor follow-up with customer and coworkers and an overall lack of urgency. (Transcript of Jan. 21, 2015 hearing, p. 124, line 15 – p. 125, line 1). Respondent's work ethic, behavior and communication skills were the same before and after the accident, according to Mr. Johnson. (Transcript of Jan. 21, 2015 hearing, p. 125, lines 2-22). As such, Respondent's poor performance before and after the work injury is indicative of a longstanding problem with work ethic.

Further evidence of Respondent's lack of cognitive deficits is his resume prepared following his termination from Philips, wherein Respondent portrayed himself as an impactful public speaker who was "expertly organized and focused." (Def. Ex. I, p. 76). Respondent also characterized himself as an extensively trained practitioner of consultative sales, and "expertly organized and focused." (*Id.*).

Moreover, the Respondent's neuropsychological expert, Dr. Waid, found him to be neuropsychologically intact. With regard to cognitive functioning, Respondent reported to

Dr. Waid that it took him “longer to do paperwork and complete tasks,” and had difficulty with regard to “being able to formulate [his] thoughts and express them concisely.” (Cl. APA 1, p. 3). Dr. Waid performed over 20 objective tests and found Respondent to have average to above-average performance on nearly every exam. (Cl. APA 1, pp. 4-11). His detailed 9-page report thoroughly tested and examined all of Respondent’s potential cognitive deficits, which determined that Respondent was functioning in the high average range of intellectual abilities, with no loss of memory, no evidence of issues with language or reasoning abilities and an ability to meet the demands of higher reasoning/problem solving. (Cl. APA 1). Most notably, he found that the Claimant has a high average IQ, and performed within the 90<sup>th</sup> percentile on many occasions, particularly when reasoning, computation, and memory were involved. (*Id.*) Dr. Waid referred to the Respondent as “a resilient individual who is functioning reasonably well,” and that he is “functioning in the high average range of intellectual abilities.” (Cl. APA 1, pp. 7-8).

Notably, Dr. Waid noted two inconsistencies between the Respondent’s reports and the objective findings. First, Dr. Waid noted that the Respondent complained of forgetfulness in day to day pursuits, yet he found the Respondent’s memory to be intact and efficient. (*Id.* at p. 8). Additionally, Dr. Waid noted that the Claimant complained of being short-fused as a result of the accident, but his evaluation did not reveal any evidence of disruptive depression, sleep disturbance, anxiety or emotional compromises. (*Id.* at p. 7-8). Overall, Dr. Waid concluded that Respondent made a good recovery from his head and other injuries sustained, as the neuropsychological evaluation provided favorable results. (*Id.* at p. 8).

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

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

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

Respondent underwent a vocational evaluation with Joel Leonard on August 25, 2014. (Cl. APA 3). With regard to his alleged cognitive deficits, Respondent reported residual problems concerning his concentration and focus; specifically, being unable to draft written correspondence in a proficient manner and inability to comprehend/retain written material. (Id. at p. 36). Additionally, he reported issues formulating his thoughts and that his pace of speech was much slower. (Id.). Respondent informed Mr. Leonard that he had "always met or exceeded his production goals" at Philips before the work injury. (Id. at p. 39).

Mr. Leonard concluded that there were three potential Profiles that could represent Respondent's prospective employability, but that it is most accurately portrayed by "Profile B." (Cl. APA 3, pp. 45-46). "Profile B" is based on the conclusion that Respondent was terminated at least in part due to his post-accident performance issues. (Id. at p. 45). "Profile B" determined his current salary of \$55,000.00 to be a reasonable and proper

representation of his earning capacity subsequent to the work accident, and that Respondent is capable of performing other occupations, but would not be expected to earn wages that significantly exceed the annual salary he was earning at VRI. (Id.).

Mr. Leonard noted that the relative presence or absence of cognitive difficulties is of great importance with respect to his prospective employability. (Id. at p. 40). At the end of his report, Mr. Leonard acknowledged the competing impressions with regard to Respondent's cognitive status and recommended that he undergo a neuropsychological evaluation. (Id. at p. 47). He also recommended that Respondent's personnel file be sent to him, once obtained. (Id.).

Mr. Leonard was subsequently provided with the requested personnel file and neuropsychological report and deposed to determine whether additional information had modified his conclusions regarding Respondent's prospective earning capacity. (Def. Ex. K). At his deposition, Mr. Leonard acknowledged that he had **no specific evidence indicating that Respondent was unable to secure a job due to his cognitive abilities** or limitations, and that the only evidence supporting Respondent's post-accident wage earning ability is the base salary he received at VRI. (Id. at p. 150, lines 6-8, p. 151, lines 13-17). Further, Mr. Leonard admitted that he relied solely on the information that Respondent had provided him with regard to his cognitive abilities, and he "does not know for sure" whether the Respondent had actually missed any days of employment due to his headaches. (Id. at p. 125, lines 10-15, p. 174, lines 9-11).

As reflected in the vocational report, Respondent informed Mr. Leonard that he had no performance issues prior to his work injury; however, Mr. Leonard was subsequently presented with Respondent's Philips employment file. When informed that Respondent

was actually demoted immediately before his injury, as opposed to promoted, Mr. Leonard acknowledged that his misunderstanding “**could be an issue.**” (Id. at lines 6-13). Mr. Leonard further agreed that the Respondent’s pre-injury demotion **could be an indication that Respondent is just a bad employee.** (Id. at p. 152, line 24 – p. 153, line 1). When presented with the PIP documentation and emails from supervisors regarding Respondent’s poor work performance before the injury, Mr. Leonard acknowledged that it is “**reasonable**” to conclude that the documentation supports performance issues before **his injury**, contrary to the information relayed to him by Respondent. (Id. at p. 177, lines 4-9).

Further, Mr. Leonard was presented with the deposition testimony of Mark Johnson, detailing the Reduction in Force termination. Mr. Leonard was asked whether, after reviewing the testimony from his supervisor and his personnel records, there is a **likelihood that the Respondent would fall into Profile A, to which he replied “[t]here is a possibility of it; certainly.**” (Id. at p. 153, lines 10-13). “Profile A” concludes that Respondent’s capacity to access the open labor market and earn a wage commensurate with past employment would not be impacted by the March 2011 accident. (Cl. APA 3, p. 45). Under “Profile A,” any demise in his residual earning capacity, subsequent to his release by Philips, would be attributed to events and circumstances germane to the open labor market in general. (Id.).

Although Mr. Leonard indicated in his vocational report that he would defer to Dr. Waid when it came to the analysis of Respondent’s neuropsychological abilities, Mr. Leonard went out of his way to argue around Dr. Waid’s actual findings. When Mr. Leonard wrote his report, he relied solely on the information that Respondent had provided

to him with regard to his cognitive abilities; thus, he recommended Respondent undergo a neuropsychological evaluation. (Id. at p. 125, lines 10-15, p. 135, lines 6-8). Mr. Leonard testified that he had reviewed Dr. Waid's report with counsel for the Respondent prior to his deposition, and he found that there were "things that - - in looking at the report, that concerned me. I mean overall, I mean from a neuropsych perspective, it just seemed that he had a lot of intact functioning issues." (Id. at p. 18, line 11 – p. 19, line 14). Mr. Leonard testified that he would defer to Dr. Waid and agreed to Respondent's favorable results in each of the individual tests (memory, IQ, reasoning abilities, functioning abilities, etc.), yet testified that "Dr. Waid is clearly indicating that he has some degree of problem in terms of executive dysfunction and some issues with attention and executive difficulties." (Id. at p. 62, lines 13-16).

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

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

The Commission erred in concluding that Respondent is entitled to wage loss benefits commencing January 17, 2014, the date that the Respondent's wage loss began, and continuing for 340 weeks thereafter. (Appellate Panel Decision and Order filed February 8, 2016, p. 15).

The statute providing for permanent partial disability benefits due to loss of wage earning capacity is SC Code Ann. § 42-9-20, which states that when an employee's capacity to work resulting from the injury is partial, he is entitled to compensation equal to 66 2/3 percent of the difference between his average weekly wages before the accident and his average weekly wages which he is able to earn thereafter ... **"In no case shall the period covered by such compensation be greater than 340 weeks from the date of accident."** (emphasis added).

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

In South Carolina, the "plain meaning" of a statute governs and, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341

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

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

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

S.C. Code Ann. § 42-9-20 unambiguously prohibits a Claimant from receiving permanent partial disability benefits beyond 340 weeks from the date of the accident. Here,

however, the Commission has awarded the Claimant permanent partial disability benefits commencing nearly 3 years from his date of accident and continuing for a period of 340 weeks; thus, the Claimant is being permitted to receive permanent partial disability benefits up through 487 weeks from his date of accident.

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

Appellants contend that S.C. Code Ann. § 42-9-20 is plain and unambiguous on its face and should be interpreted in accordance with its plain meaning. Explicitly, it states that a Respondent cannot receive wage loss benefits beyond 340 weeks from the date of accident; thus, the Order of 340 weeks of wage loss benefits commencing nearly 3 years after the date of accident is against the rules of construction.

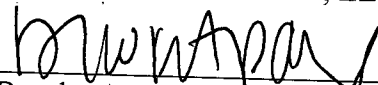
### **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission Order, and find that Respondent is not at MMI and this case is not ripe for a permanency determination. Alternatively, if this Court finds Respondent to be at MMI for all work injuries, Appellants request that this Court reverse the Commission's Order and find Respondent not entitled to wage loss benefits. Should this Court find Respondent entitled to wage loss benefits, Appellants respectfully request that this Court modify or

correct the Commission's Order to reflect the just and accurate amount due under S.C.  
Code Ann. § 42-9-20.

Respectfully submitted:

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